IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2006

NO. 44

FRANK CONAWAY, et al.,

Appellants,

vs.

GITANJALI DEANE & LISA POLYAK, et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY

(M. BROOKE MURDOCK, JUDGE)

Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES, GITANJALI DEANE & LISA POLYAK, et al.

American Academy of Matrimonial Lawyers
American Academy of Matrimonial Lawyers, Maryland Chapter

Cheryl Lynn Hepfer, President
American Academy of Matrimonial Lawyers
150 N. Michigan Avenue
Suite 2040
Chicago, IL 60601
312-263-6477

Susan Carol Elgin, Secretary
Maryland Chapter
American Academy of Matrimonial Lawyers
1122 Kenilworth Drive - Suite 113
Towson, MD 21204
410-828-6100

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INTEREST OF AMICI CURIAE

The American Academy of Matrimonial Lawyers (the "AAML") is a national organization of 1,600 attorneys recognized as experts in the field of family law. The AAML was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. There are thirty (30) members of the AAML who comprise the Maryland Chapter. The members of the AAML, including those of the Maryland Chapter, deal with married couples every day as they struggle with the management of their clients' rights before and during marriage (e.g., pre-nuptial agreements, adoption), dissolution of their clients' marriages, custody of children, disposition of property, and apportionment of financial support. AAML members also represent same-sex couples in their desire to create marriage-like arrangements in order to acknowledge their commitment to one another and to provide security for their children. AAML members also assist same-sex couples in the chaotic area of dissolution of their relationships.

The AAML believes that Maryland, and all other states, should recognize that the American family has undergone major changes in structure and type during the last generation, and that state law should conform to this reality. At its 2004 annual meeting in Chicago, the AAML approved, by overwhelming margins, two resolutions in support of the legalization of marriage between same-sex couples. The resolutions stated:

> BE IT RESOLVED that the American Academy of Matrimonial Lawyers supports the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all the legal rights and obligations of spouses and children of spouses.
>
> and
>
> BE IT RESOLVED that the American Academy of Matrimonial Lawyers encourages the United States Congress and the legislatures of all states to achieve the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all of the legal rights and obligations of spouses and children of spouses.

The members of the AAML are devoted to the protection of children and their families. AAML members are guided in their professional conduct by the AAML's Bounds of Advocacy,[1] a detailed aspirational guide to the moral and ethical problems that frequently confront family law attorneys, yet are not adequately addressed by existing rules of professional conduct. The goal of protecting children is paramount in the Bounds of Advocacy. Zealous advocacy of a parent which would harm a child is prohibited. Rule 5.2 states *"An attorney should advise the client of the potential effect of the client's conduct on a child custody dispute."* The Comment to this Rule continues to describe the attorney's role in advising his/her parent-client against conduct that could adversely affect a

[1] The Bounds of Advocacy can be found at the AAML website – www.aaml.org. The Bounds are aspirational and are not mandatory. Each AAML member agrees to be guided by the Bounds as part of induction into the Academy.

child. If a parent-client insists on proceeding with a spurious custody claim or in using custody as a bargaining chip, the lawyer should withdraw.

Section 6 of the Bounds of Advocacy deals entirely with the lawyer's role in protecting children. Section 6 begins, *"One of the most troubling issues in family law is determining a lawyer's obligations to children. The lawyer must competently represent the interests of the client, but not at the expense of the children."* (Emphasis added.) Section 6.1 states, *"An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children."* Section 6.2 states, *"An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness."*

In addition to the importance of protecting children when representing parents, AAML members protect children every day in family disputes by the direct representation of children. This representation presents its own set of issues and complications, and the AAML has established a unique set of standards to deal with them entitled, "Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings."[2] After this Court's ruling in *Fox v. Wills*, 30 Md. 620 (2006), which effectively removed immunity for attorneys appointed as guardians ad litem for children, AAML members spent countless hours seeking the appropriate legislative and rule

[2] These standards are at the AAML website www.aaml.org.

remedies to allow this representation to continue.

The interest of the AAML (both the National organization and the Maryland Chapter) in this case is the protection of children. This Brief presents the perspective of the leading matrimonial lawyers, in Maryland and across the country, who deal, on a daily – even hourly – basis, with the complex human struggles of their clients as they work through intimate familial and social relationships within (and without) the confines of the legal system. From this perspective, we herein address the issue of the harms that same-sex couples, and particularly their children, face due to the inability of same-sex couples to marry.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the Statement of the Case and Statement of the Facts as set forth in the brief of the Appellees.

QUESTION PRESENTED

I. DOES MARYLAND'S STATUTORY PROHIBITION AGAINST SAME-SEX MARRIAGE, CODIFIED AT FAMILY LAW §2-201, DISCRIMINATE AGAINST SAME-SEX COUPLES AND THEIR CHILDREN IN HARMFUL WAYS?

SUMMARY OF ARGUMENT

MARYLAND'S STATUTORY PROHIBITION AGAINST SAME-SEX MARRIAGE, CODIFIED AT FAMILY LAW §2-201, DISCRIMINATES AGAINST SAME-SEX COUPLES AND THEIR CHILDREN IN HARMFUL WAYS.

Maryland courts have always made children a priority. In a recent family law case, *Ricketts v. Ricketts*, 393 Md. 479 (2006), this Court addressed the issue

of whether parties could file for divorce and custody determinations when the parties continued to reside in the same home. In ruling that an action for custody may be filed even when both parties are residing together, and instructing trial courts to retain jurisdiction and determine custody, this Court stated:

> This result and this approach are consistent with the primacy of the interests of the child and the courts' paramount concern to secure the welfare and promote the child's best interests. *Id.* at 501.

In *Evans v. Wilson*, 328 Md. 614 (2004), this Court held that the best interests of the child prevailed when a trial court was deciding whether or not to order paternity testing. In *Evans*, the paternity of a child born into a marriage was challenged by a man claiming he was the father. This Court held that when a father challenges paternity of a child born into a marriage, that paternity test is not automatic or mandatory. Rather, it is for the trial court to decide if ordering a paternity test is in the best interest of the child. In balancing the husband's and wife's privacy rights, the putative father's rights and the child's best interest, the child won.

As discussed in this Brief, excluding same-sex couples from the right to marry harms the children of those families in a myriad of tangible and intangible ways. Maryland courts have provided some protections for these children (see e.g., *North v. North*, 102 Md. App. 1 (1994); *Boswell v. Boswell*, 352 Md. 204 (1998); *S.F. v. M.D.*, 132 Md. App. 99 (2000); *Gestl v. Frederick*, 133 Md. App. 216 (2000)), but these protections are limited. The only way this Court can

effectively remove the harms experienced by children of same-sex parents in Maryland is to allow their same-sex parents to marry. The trial court's decision to allow same-sex marriage has broad societal implications. The issue of same-sex marriage is a controversial one for many, including the courts. However, American courts in general, and specifically this Court, face difficult decisions each day.[3]

The AAML urges this Court to uphold the trial court's decision for the future betterment of families headed by same-sex couples and, in particular, the children of those families. There is nothing controversial about the Court's traditional role of protecting children from unintended legal disadvantages. Consideration of the impaired legal status of children of same-sex couples must play a significant role in the decision of this important case.

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[3] Just two years ago, members of this Court took note of this responsibility in a concurring opinion in *Frase v. Barnhart*:

> It is always easiest to decline to address controversial issues. It is, perhaps, the safest thing to do, even for courts. But the avoiding of such issues is best left to the political processes of the other branches of government. It is our branch of government, the judiciary, under the express or implied doctrine of the separation of powers, to which the toughest and most difficult decisions are delegated. It is our primary role to ensure that the fundamental constitutional rights, which are reserved to the people, are protected.

Frase v. Barnhart, 379 Md. 100, 132 (2004) (Cathell, J., concurring).

ARGUMENT

I. DIRECT HARMS TO CHILDREN.

A. Thousands of children are raised by same-sex couples in Maryland.

The inability of same-sex parents to marry puts literally thousands of children in Maryland in legal limbo. There are thousands of children in Maryland who are being raised by same-sex couples. According to the 2000 U.S. Census, there were 11,243 same-sex unmarried partner households living together in the State of Maryland, of whom 5,230 were male and 6,013 were female. Married-Couple and Unmarried-Partner Households: 2000, U.S. Census Bureau, February 2003, www.census.gov/prod/2003pubs/censr-5.nat. Of the male same-sex partner households, 23.3% (1,219 persons) lived with their own children and 24% (1,255 persons) lived with their own and/or unrelated children. Of the female households, 31.7% (1,906 persons) lived with their own children and 33.3% (2,002 persons) lived with their own and/or unrelated children. Thus, nearly 25% of male same-sex households and 33.3% of female same-sex households include children. These statistics likely under-report the number of households of same sex couples raising children in Maryland because (1) the numbers represent the number of parents rather than the number of children; (2) people may under-report their same-sex orientation; (3) the statistics are limited to households and (4) the statistics are now at least six years out of date. Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, A Preliminary Analysis of 2000 United States

Census Data, a Human Rights Campaign Report, August 22, 2001, by David M. Smith and Gary J. Gates, Ph.D.; (page 1, "Undercount"); www.hrc.org.[4]

Each child of the thousands of children raised in households headed by same-sex couples in Maryland needs and deserves the same legal protections and other salutary effects as a child of married parents. Previously, in same-sex households that included children, those children commonly were the result of a prior heterosexual relationship. Now, with societal changes and growing acceptance of same-sex relationships, more same-sex couples are making an affirmative decision to co-parent. They are bringing children into their relationships through birth and adoption with the intention of parenting the children together. Inherent in this decision is the intention for both parents to assume the responsibilities and rights of parenting the children, regardless of whether the family remains intact. It is difficult to ensure that the children enjoy the legal benefits of two parents unless the parents are able to marry. Yet, the State has excluded their parents from marriage. In doing so, the State has worked significant harm on them, as well as their parents, as detailed below.

B. Creation of the legal parent/child relationship is automatic for children born to married couples, but not for children born to same-sex couples.

Children born within a marriage enjoy favored treatment with respect to the establishment of legal relationships with both of their parents. A

[4] Baltimore City is 15th among the top 25 counties in the United States by percentage of same-sex couple households. *Id.*

child born to a married couple automatically has two legal parents and is the legitimate child of both parents. Md. Ests. and Trusts Code Ann. §1-206 (2006). *Goodman v. State*, 236 Md. 257, 258 (1964); *Bridges v. Nicely*, 304 Md. 1 (1985); Md. Fam. L. Code Ann. §5-1027 (2006); *Id.* at §5-306.

A child born to a same-sex couple faces a different and much more precarious situation. Because the same-sex couple cannot marry, they cannot both enjoy automatic parental status with respect to their child.[5] The only way they can both obtain certain legal status as parents is through the time-consuming, expensive and, many times, complicated process of what is commonly referred to as a second-parent adoption. Maryland adoption law neither explicitly includes nor excludes same-sex parents from being potential adoptive parents. Any adult may petition a court to decree an adoption. *Id.* at §5-309(a). Although there are no appellate rulings on the subject, a widely reported Baltimore City trial court decision granted a second-parent adoption to a lesbian couple based on its finding that doing so was unquestionably in the best interests of the couple's children. *In re Petition of D.L.G. & M.A.H.*, No. 95-179001/CAD, 2 MFLM Supp. 21 (Cir. Ct.

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[5] Even a child born to an unmarried heterosexual couple has an easier time establishing legal relationships with both parents than a child born to a same-sex couple. The birth mother is the child's legal mother. The father needs only to be listed on the birth certificate to gain parental status as the presumed legal father. In contrast, the lesbian or gay partner of a biological birth parent cannot simply list his or her name on the birth certificate as the other parent without court order. There are rare instances where a hospital or doctor will list both males or females on the birth certificate, however, this in and of itself does not establish a legal relationship of the non adoptive or non biological birth parent as it would with an opposite sex couple.

Baltimore City, June 27, 1996); Gregory Care, Student Author, *Something Old, Something New, Something Borrowed, Something Long Overdue: The Evolution of a "Sexually Orientation-blind" Legal System in Maryland and the Recognition of Same-Sex Marriage*, 35 U. Balt. L. Rev. 73, 82 (2005).

Second-parent adoption, however, has considerable practical limitations as a remedy. While the availability of adoption aids those children whose parents are both cognizant and determined enough to seek adoption and can afford the process, it is far more cumbersome – as well as uncertain – than automatic parentage arising from marriage.

Without dispute, the establishment of parental status to children born within their relationship is more difficult for same-sex parents than for married parents.[6] Where there is no second-parent adoption, their children suffer directly from the uncertainty of the legal status of the person they have been raised by and known to them as mom or dad. Even where there is a second-parent adoption,

[6] Even with respect to children who are not born within their relationship, the establishment of parental status is more difficult for same-sex parents than for married parents. First, the second-parent adoption process for same-sex couples is more cumbersome than the stepparent adoption process for married couples. Second, unlike married couples, same-sex couples are not always permitted to adopt a child jointly. Depending on the jurisdiction and the particular judge reviewing the petition of adoption, it may or may not be granted, thus creating unnecessary uncertainty regarding whether or not the adoption will be granted. Some judges have held that since Maryland does not explicitly provide for second-parent adoptions, they do not have authority to grant them. Because of this, almost all second-parent adoptions are filed and held in the Circuit Court for Baltimore City, where the adoptions are almost guaranteed to be granted, assuming all other supporting documentation is in order.

their children suffer indirectly by being in a family that must spend time[7] and money (oftentimes, considerable sums) to achieve the legal status which comes automatically to married couples and opposite-sex unmarried couples and their children. The only way to eliminate these harms is to allow same-sex parents to marry so children who are born within their marriage are automatically legitimate.

C. Determination of child custody, visitation, and support is less cumbersome for married parents whose relationships dissolve than for same-sex parents whose relationships dissolve.

While Maryland courts have been astute in their recognition of the importance of gay and lesbian parents in the lives of their children after relationships dissolve,[8] there can be no true equality in the treatment of children of gay and lesbian parents without the ability of their parents to marry.

When married couples divorce, their rights and obligations regarding their children are governed by the well-developed system of custody, visitation, and child support statutes and case law in Maryland. Maryland Circuit Courts have jurisdiction over matters including adoption, annulment, divorce, custody, visitation and child support. Md. Fam. L. Code Ann. §1-201. This jurisdiction

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[7] Indeed, during the significant time that it takes to establish a legal parent-child relationship by adoption between a child and his or her second-parent, a child is directly exposed to considerable risk of harm given the possibility that his or her first parent will die or become incapacitated and thereby potentially leave him or her with no legal ties to his or her second-parent. Also in this waiting period, the non-legally related parent cannot make medial decisions that could prove harmful in a medical emergency.

[8] Maryland appellate cases have established that courts are to be blind as to sexual-orientation of a parent in visitation cases, just as they are to be gender blind. Any restrictions on visitation must be evaluated under the best interests of the child standard. *North v. North*, 102 Md. App. 1 (1994), *Boswell v. Boswell*, 352 Md. 204, 721 (1998).

over marriage does not extend to same-sex couples for the resolution of their disputes. The parents' status as married individuals gives them immediate access to the courts to remedy any custodial disputes. If married parents divorce, a family court determines the amount of time the children spend with each parent and what parental decision making responsibilities each parent has. *Taylor v. Taylor*, 360 Md. 172 (1986); *Ross v. Hoffman,* 280 Md. 172 (1977); Md. Fam. L. Code Ann. §1-201. Maryland case law has determined that both parents owe the children a duty of support during their minority. *Thrower v. State,* 358 Md. 146 (2000); *Carroll County Dept. of Soc. Servs. v. Edelmann*, 320 Md. 150 (1990); *Rand v. Rand*, 40 Md. App. 550 (1978); *Id.* at §10-203; *Id.* at §5-203. Such is not always the case for children of same-sex parents.

If a same-sex couple whose relationship has ended (including via the death of one parent) has not formalized their parental relationships with a child through a second-parent adoption, they must satisfy legal requirements to adjudicate their respective rights and obligations vis-à-vis their children beyond those that married parents must satisfy. In the absence of statutory authority to the contrary, Maryland courts have exercised their equitable powers to provide for such dual parentage not only via second-parent adoption but also, where there is no adoption, via the *de facto* parenting doctrine. Nevertheless, the case law establishing the *de facto* parenting doctrine reveals the greater legal obstacles that same-sex parents whose relationships have ended face in establishing dual

parentage of children born within their relationship, in light of their inability to marry.

Maryland courts have recognized the non-biological but intended co-parent of a child born to a lesbian couple as a *de facto* parent for purposes of determining child visitation rights. *S.F. v. M.D.*, 132 Md. App. 99, 110-111 (2000). While this represents a significant protection of the parent-child relationship, the fact remains that a non-biological, but intended, co-parent of a child born to a lesbian couple would not be required to demonstrate that she is a *de facto* parent – an appropriately burdensome requirement – if she were married to the biological co-parent. Moreover, it is unclear whether the *de facto* parenting doctrine applies for purposes of determining child custody rights. This is critical because, under Maryland law, a third party (i.e., a non-parent) is ineligible for child custody unless he/she can prove the legal parent's unfitness or exceptional circumstances. Furthermore, Maryland courts have not clarified whether a *de facto* parent is liable for child support. If same-sex parents were able to marry, where there is no adoption of a child born within their relationship, each would clearly be entitled to both custody of and visitation with the child, and the child would clearly have the benefit of child support from both, all without any need to demonstrate *de facto* parenthood.

Where there is no second-parent adoption of a child born within a relationship, Maryland appellate courts have made the family law system available to families headed by same-sex couples only on a <u>limited basis</u> to those who prove

de facto parenthood and, so far, only where visitation is concerned. Just like in the creation of parental relationships, when same-sex couples must go through the additional legal step of second-parent adoption to establish the legal parent-child relationship, same-sex couples seeking access to the court system and the body of family law concerning custody, visitation, and child support determinations must go through the extra step of proving (or defending) *de facto* parent status first. Even then they may not have access to the body of family law concerning custody and child support. Establishing *de facto* status does not guarantee visitation, yet alone give rise to custody and child support issues.

Therefore, the "usual" stress of parental dissolution is compounded for children of same-sex parents when their parents decide to dissolve the relationship. The extra step of proof of *de facto* status will add time to the resolution of the parental dispute. If the non-legal parent cannot afford counsel, they will have little chance of success and that child may be deprived of a parent he/she has known. At a minimum, the financial and emotional expense of a legal battle harms children.

D. Children of same-sex parents are subject to psychological harm because of the inability of their parents to marry.

Maryland's statutory ban on same-sex marriage has the effect of stigmatizing children of same-sex couples, who cannot help but wonder why their parents are not allowed to marry. Theirs is a situation somewhat analogous to children the law formerly labeled as illegitimate. Regardless of whether their

parents form families that are indistinguishable in their habits from what their community regards as typical, children of same-sex couples do not enjoy equal treatment with respect to dual parentage, custody, visitation, child support, and countless other considerations due to societal disapproval of their parents' sexual orientation.[9] Given the venerated place that the institution of marriage has in our society[10], the fact that their parents are "outlaws" in marriage is especially stigmatizing. As noted by the Supreme Judicial Court of Massachusetts in recognizing same-sex marriage:

> marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

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[9] According to a national survey conducted in 2000, 74 percent of lesbians, gay men and bisexuals reported having been subjected to verbal abuse because of their sexual orientation and 32 percent reported being the target of physical violence. (Henry J. Kaiser Family Foundation, Inside-Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's View on Issues and Policies Related to Sexual Orientation (2001) pp. 3-4 [www.kff.org/kaiserpolls].

[10] "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the point of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965).

Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003). There is simply no good answer to a child's question of why his or her parents cannot marry.

The American Psychological Association's website references studies conducted on the adverse impact many of the above mentioned factors have on children. The resulting exclusion from peer activities, lack of adequate parental support, loss of daily or regular contact with a caretaker and societal issues which cause stress to families all have been documented to be severely detrimental to the development, education, health and well-being of children. While these studies do not specifically refer to children in families headed by same-sex couples, they are nonetheless informative with respect to the harms suffered by children who risk losing a caretaker they have known as a parent. See www.apa.org.

If a same-sex couple breaks up, where there is no second-parent adoption of children, the harm continues to be compounded. The children are in jeopardy of losing one of the people they know as their parent. They may suffer the trauma of losing contact altogether with a caretaker they have known as a parent for many years. Regardless, they may have to live through a contested legal proceeding over who their parents are, to the financial and psychological detriment of the family. If they lose one parent, they automatically lose the financial benefits to which they would be entitled if the caretaker were recognized as their parent, including inheritance rights. In addition, if they lose one parent,

there is one less person to pay child support or to contribute financially to the family household. They experience the disorder – sometimes chaos – of a family torn apart, without all of the remedies that are available to children of married parents. In short, their experience is more harmful than that of children of married parents contesting custody, visitation, or child support determinations in that their parents' access to the legal system and legal status are more uncertain, indeed, in many ways, uncharted.

In sum, difficulty in establishing legal parental status, limited access to the courts and the legal system and the disfavored status of their parents that is institutionalized in the law are harmful to children of same-sex parents. Same-sex parents cannot obtain a marriage license to legitimize their commitment to one another and to legitimize the children born within their relationship. In order to do the latter, same-sex parents must spend time and money to adopt their children. If their relationship breaks up, where there is no adoption of their children, their access to the court system is complicated by the need for the non-biological or non legal parent to prove *de facto* parent status (as well as potential limitations on the *de facto* parenthood doctrine). Significantly, these disparities pose a grave risk of psychological and related harm to their children.

E. Due to the inability of their parents to marry, children of same-sex parents are treated unequally with regard to protections involving trusts, estates, inheritance and the disposition of property upon death.

There is a presumption that a child born or conceived during a marriage is the legitimate child of both spouses. Md. Ests. and Trusts Code Ann. §1-206. This presumption is equally applicable to a child conceived by donor insemination during a marriage. Children of same-sex couples may be conceived by donor insemination as well, but there is no presumption of legitimacy, because their parents cannot marry.[11]

Because same-sex couples cannot marry, their children cannot benefit by any of the intestacy laws that protect spouses and children with respect to the disposition of property. For children of married parents, if one (or both) of their parents die and there is no will, children born within that marriage automatically inherit from both parents in addition to being assured that the surviving parent will be recognized as their legal parent. *Comptroller of Treas. v. Phillips,* 384 Md. 583 (2005); *Sollers v. Mercantile-Safe Deposit & Trust Co.,* 262 Md. 606 (1971); Md. Ests. and Trusts Code Ann. §1-205 through §1-210. This is not the case for children of same-sex parents. The only way to assure children can inherit from a non-legal parent is the creation of a will. Again, same-sex couples must take extra legal steps to legitimize their children, because they cannot marry. If there is no will, the children have no right to receive the property of the non-legal parent.

[11] Estates and Trusts §1-208 provides that a child born out of wedlock is legitimate if the father has openly and notoriously recognized the child to be his. There is no similar law to allow a same-sex parent to make an open and notorious declaration.

F. Children of same-sex parents experience harmful discrimination in the administration of health care and health insurance.

Same-sex partners are not included among the list of those prioritized by law to make health care decisions for one another. Md. Health Gen. Code Ann. §5-605. Moreover, a same-sex parent who has not adopted a non-biological child cannot make health care decisions for that child and can be precluded from involvement in those decisions. Even a *de facto* parent for custody, visitation, or child support purposes upon dissolution of a relationship may not qualify for involvement in medical decision-making. Furthermore, under *Id.* at §20-104, medical personnel can give information concerning the treatment of a minor to a parent, guardian or custodian of the minor or the spouse of the parent of the minor. Because a same-sex partner is not considered a spouse, he or she cannot obtain critical health information about a non-adoptive, non-biological child.

In addition, minor children of a married couple are always eligible dependent insureds on the health insurance of both parents. *Lacy v. Arvin*, 140 Md. App. 412 (2001); Md. Ins. Code Ann. §15-401; *Id.* at §15-405; Md. Fam. L. Code Ann. §1-102; *Id.* at §12-102.1; *Id.* at §12-204; *Id.* at §12-202. Non-adoptive, non-biological minor children of same-sex parents do not enjoy this same right. An employer who offers group health insurance to its employees is not required to extend those benefits to include the employee's same-sex partner, nor the couple's

children, if the child is not biologically related to the employee or the employee has not formally adopted the child.

G. Other harms.

Under Md. Cts. and Jud. Procs. Code Ann. §3-904, a spouse has a cause of action for the death of the other spouse. If no husband or wife survives, a person related to the deceased by blood or marriage may bring an action. Same-sex partners do not have this right in Maryland and, therefore, cannot rely on this remedy to support their children in the case of the accidental death of a parent. Also, in a personal injury action, the damages for loss of consortium, which are available to married couples, are not available to the families of same-sex couples. *Id.* at §11-108.

Additional discriminatory practices exist in education. A child can attend the public school where the child is domiciled with a parent, guardian, or relative providing informal kinship care. If a same-sex couple separate and the child remains living with the non-legal parent, that child's continuing enrollment in public school is in jeopardy. Md. Educ. Code Ann. §7-101. In addition in higher education, there are several instances where married parents have the ability to get savings or loan deferments for their children's college expenses, but those benefits are not available to the children in same-sex families. *Id.* at §§15-106.4, 18-601.

Certain State Worker's Compensation benefits are not available for same-sex partners and non-adopted children even though those persons are

"wholly dependent" on the deceased worker. Md. Lab. and Empl. Code Ann. §9-681; *Weatherly v. Great Coastal*, 164 Md. App. 354 (2005).

In numerous other State programs and laws, children of same-sex parents are discriminated against if there is not a legal adoption. For example, if a firefighter or police officer (who is not the legal parent of a child in a same-sex couple) is killed in the line of duty, that child is ineligible for the death benefits resulting from the partner's death. Md. Pub. Safety Code Ann. §1-202, §7-203. Under Md. St. Personnel and Pens. §10-404, death benefits for a state employee go to a surviving spouse, dependent child or dependent parent of a state employee killed in the performance of his/her duties. A surviving same-sex partner and a child not adopted by the deceased employee are ineligible for those death benefits.

The statutes cited in Section 1B through G of this Brief are just an example of the many areas where Maryland law discriminates against the children of same-sex families. Included in the Appendix to this Brief is a report, "Marriage Inequality in the State of Maryland," compiled by Equality Maryland (Apx. 1-51). It sets forth 425 instances in which there are legal disparities between married couples and their families and same-sex couples and their families. The discrimination in the law permeates the lives of children in same-sex couples. Consequences of these laws can have a profound effect on a child even at the most mundane level. How do you explain to a child old enough to complete a school or

medical form why there is no place for the second-parent to be recognized on the form?[12]

H. Governmental benefits – Federal and State.

In their Brief at pages 9-10, Appellants are critical of Appellee's position because, as the State asserts, even if same-sex marriage was valid, it would still not entitle same-sex couples and their children to the 1,138 federal benefits governed by federal, rather than state, law. However, many of these federal benefits have a state component and the inability of the same-sex couple to marry deprives them of that state benefit.

An example of an area that has benefits with federal and state components is taxation. Married couples enjoy many financial benefits under the federal and state tax laws. There are the tax savings available to married couples in the area of income tax as well as gift and estate taxes by joint filing status, unlimited marital deductions for transfers of wealth between spouses and transfers incident to divorce as well as other benefits. While recognition of same-sex marriage in Maryland will not change the federal tax laws, it would extend state tax law benefits to same-sex families. Money saved on taxes directly impacts the

[12] "The legal status of parent or stepparent confers authority that is recognized by society's institutions and by the child. Every medical form or school forms asks for the names of the mother and father. There is no line for the name of the loving second-parent who sits in the emergency room but cannot authorize medical treatment for that child in an emergency, or who cannot sign school permission forms." Testimony of Steve Varnum, Public Policy Director, Children's Alliance of New Hampshire, September 12, 2005. Available at: www.childrennh.org.

well-being of children.

II. INDIRECT HARMS TO CHILDREN ON ACCOUNT OF DIRECT HARMS TO PARENTS.

Under current Maryland law, hundreds of rights and remedies are available to married couples but largely unavailable to same-sex couples.[13] As set forth in this Section, the harms which result from the unavailability of these rights and remedies to same-sex couples impact not only the adults, but their children as well.

A. Recognition of commitment.

Heterosexual couples can marry and can thereby enjoy legal recognition of their commitment to one another. This Court has held that the State has a strong interest in protecting the integrity of the marital family unit and in promoting family harmony. *Evans v. Wilson*, 382 Md. 614 (2004). The concept that the preservation of the marital relationship is more important than the judicial search for the truth is the basis for the confidential marital communications privilege codified at Md. Cts. and Jud. Procs. Code Ann. §§9-105, 9-106. *Gutridge v. State,* 236 Md. 514 (1964). The same ability to obtain legal recognition of their committed relationship should be available to same-sex couples. The uniquely strong bond and commitment between adults in a family that marriage signifies greatly enhances household stability and thereby

[13] See "Marriage Inequality in the State of Maryland" included in the Appendix, Apx. 1-51.

significantly promotes security for children in the household. The recognition of that marriage bond and commitment would benefit greatly the children of married same-sex couples.

B. Remedy for breach of commitment.

Maryland continues to have fault grounds for divorce – adultery, cruelty of treatment, and desertion (Md. Fam. L. Code Ann. §7-102, *Id.* at §7-103). [14] When a heterosexual couple marries, and one party commits an injury to the marriage, there is legal recourse for the injured party. The wronged party in a marriage has the redress to end the relationship expeditiously and to enhance potentially their rights to financial support and property disposition as a consequence. Same-sex couples have no similar system of rules or orderly means of legal redress when they end their relationships. Same-sex couples can only resort to contract actions and remedies that are not as effective in dealing with the issues involved in family dissolutions. This adversely impacts the children in families headed by same-sex couples and exposes them to greater tension and anxiety.

For instance, when a spouse in a marriage is left behind by the other, that spouse can go to court and file for divorce and avail himself/herself of all the services that now exist in the Maryland family courts with respect to the

[14] While there is a "no-fault" ground for divorce, it requires a two year separation, unless both parties agree that the separation was voluntary, but that still necessitates a one year separation period.

dissolution of a marriage (mediation, counseling, investigation resources, etc.). They can sue for divorce (limited or absolute) and receive prompt relief through *pendente lite* hearings for support, use and possession and other relief. This is not so for the wronged partner in a same-sex relationship. Worse, if the wronged partner is the economically dependent partner, he/she has no remedy to "end the relationship" or obtain court services because he/she cannot afford the legal representation necessary to obtain the alternative legal remedies on which same-sex couples must rely. The economically dependent partner cannot get alimony or any type of support. This has a potentially adverse impact on children in these stressed relationships, when the parents have disputes that cannot be resolved.

Maryland has long had a commitment to strengthening families with a special emphasis on the fact that children are our most valuable resource. The protection of children through the orderly and structured resolution of disputes between their parents is a laudable goal. Only by permitting same-sex parents to marry would their children be afforded such protections.

C. Duty to support.

While Maryland does not impose upon either spouse the duty to support the other for necessities, Maryland does impose a duty of support in the context of divorce for a married heterosexual couple, Md. Fam. L. Code Ann. §11-101, et seq. The Maryland alimony statute sets forth factors to be considered in determining whether an economically dependent spouse is entitled to monetary support from the economically dominant spouse. However, there is no provision

in Maryland common law or statute that gives an economically dependent person a right to support in any same-sex relationship, regardless of the merits of the claim or the term of the relationship. There is no basis for denying same-sex partners the opportunity to seek such economic help if confronted with the dissolution of their relationship.

One could argue that the entitlement to alimony impacts adults only. The reality, however, is that an award of alimony potentially supplements child support for a custodial parent and provides a certain standard of living for the children. For many same-sex couples with children, a standard of living may not be able to be sustained for the child if the only available avenue for support is child support, if indeed child support is obtainable.

D. Ownership and distribution of real property and personal property.

Married couples have the ability to title real property as tenants by the entireties, which provides certain protections. Md. Real Prop. Code Ann. §4-108. This protection is not simply for the adults in the household, but can protect the children as well. The tenants by entireties titling necessitates agreement between both owners before a property can be sold. One disgruntled party in a tenants by the entireties ownership cannot force the sale of the home and that protects the children living in that home. The same is not true for the children of same-sex couples. Because same-sex parents can only hold title as joint tenants or tenants in common (but not as tenants by the entireties), one party has the freedom

to sell his/her share without the consent of the other party, which can lead to a chaotic living arrangement for the family.

In addition, the primary residence of a married couple going through a divorce can be declared to be a "family home" (Md. Fam. L. Code Ann. §8-206) and can be awarded to a custodial parent for up to a three year use and possession period. The purpose of this statute is STRICTLY for the benefit of a minor child. *Strawhorn v. Strawhorn*, 52 Md. App. 614 (1982); *Bledsoe v. Bledsoe*, 294 Md. 283 (1982). Unfortunately, it is a benefit available only to the children of married couples. The children of same-sex couples going through a dissolution of a relationship are not similarly entitled to have a "family home" declared and thereby they do not have their primary residence secured for them. Effective October 1, 2006, Maryland trial courts in a divorce action are able to transfer ownership of jointly owned real property, used as the principal residence of the parties, from one party to the other. Md. Fam. L. Code Ann. §8-205(a)(2)(iii). The testimony supporting this law in the General Assembly relied heavily on the need for children to remain in the home as the reason for its passage. For children who live with same-sex parents, this is another equitable remedy that is unavailable to them, and courts are not similarly able to assure that these children can remain in their home upon their parents' breakup. The only remedy is a partition action and sale of the jointly held real property.

The concept that use and possession of property insulates the children of divorce from having their home sold during their parents' divorce also

applies to the personal property and automobiles. For many families, the household furnishings and automobile are the most important "property" to the parent responsible for the custodial care of the children. Maryland courts can grant use and possession of family use personal property to a parent if it is in the best interests of the child. Md. Fam. L. Code Ann. §8-208. As with real property, the right to use and possession of personal property is a remedy available in divorce. Because same-sex couples cannot marry, the custodial parent has no recourse to preserve the family use personal property for the children when the relationship ends.

Even if same-sex parents decide to separate amicably and divide their property without litigation, they suffer financial penalties that married parents do not. Under Maryland law, married individuals can transfer real property to one another (whether incident to divorce or not) without having to pay transfer or recordation tax, Md. Tax-Prop. Code Ann §12-108; *Id.* at §13-404, and they can transfer vehicles without transfer tax *Id.* at §13-810(c)(1)(i). In contrast, if same-sex couples decide to transfer real property from one party to the other, they are subject to transfer tax and recordation costs. In addition, they must pay a transfer tax, go through inspection, retitle and retag, in order to transfer vehicles to one another. These inequities impose significant financial burdens on the separating adults and resulting financial harm and emotional stress to their children.

A husband and wife have certain protections in the titling of property with regard to creditors. Real property titled tenants by the entireties cannot be sold by the creditor to satisfy the debt of only one party. Md. Real Prop. Code Ann. §4-108; *Cruickshank-Wallace v. County Banking & Title Co.*, 165 Md. App. 300 (2005). Similarly, creditors of one party may not attach bank and investment accounts held at financial institutions jointly by husband and wife. Md. Cts. and Jud. Procs. Code Ann. §11-603. Same-sex couples do not have these protections and can do nothing by contract or any other legal method to protect jointly held assets.

E. Documented extra legal harms.

A comprehensive examination of the legal, financial and psychological/emotional disadvantages or harms inflicted on the children of same-sex couples is explored in Professor Michael Wald's 2001 article, "Same-Sex Couple Marriage: A Family Policy Perspective."[15] This article addresses the reality that at least 1,500,000 same-sex couples reside in the United States and that many have children. These children are dramatically and adversely impacted by the ways in which our legislators choose to define marriage.

III. THE PURPORTED CHILD-ORIENTED REASONS FOR LIMITING MARRIAGE TO OPPOSITE-SEX COUPLES ARE IRRATIONAL AND CONTRARY TO THE INTERESTS OF CHILDREN.

[15] Michael S. Wald, "Same-Sex Couple Marriage: A Family Policy Perspective," 9 Va. J. Soc. Policy & L. 291 (2001), included in the Appendix to this Brief (Apx. 52-80).

In recent months, the highest courts of New York and Washington upheld statutes limiting marriage to opposite-sex couples, with analyses that linked marriage and child-rearing. *Hernandez v. Robles*, __ N.E. __, 2006 LW 1835429, 2006 N.Y. slip. op. 05239 (N.Y. July 6, 2006); *Andersen and Christian v. King*, 183 P.3d. 963 (Wash. 2006). Both decisions find their rational basis for limiting marriage in the child-rearing functions of marriage.

If marriage by statute exists so as to create a family environment and support for children,[16] there is simply no rational basis for limiting marriage to opposite-sex couples. Children of same-sex parents should be entitled to the same family environment and support as those of opposite-sex couples. There exists no reason to provide less legal protection to children of same-sex parents because of the sexual orientation of their parents. This unequal and inferior treatment by the marriage statutes is the essence of a denial of equal protection, and it harms the most vulnerable members of our society - children.

The plain fact is that all of these children deserve the emotional and financial support of married parents, and limiting marriage to opposite-sex couples harms those children whose parents are ineligible to marry. As Chief Judge Kaye noted in her dissent in *Hernandez*: "The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it...The State's interest in a stable

[16] Indeed, the New York high court concedes that marriage provides many valuable economic and social benefits for same-sex couples and their children.

society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses." *Hernandez v. Robles*, _ N.E.2d. _, 2006 WL 1835429, slip. op., 2006 N.Y. 05239 at 29.

Amici agree that promoting by statute a family unit in which parents are married is a legitimate government interest and that children are thus better protected than if their parents are not married. However, allowing marriage by same-sex couples in no way detracts from this statutory encouragement of child-rearing within marriage. Expanding the tent to include children of same-sex couples does not remove any shelter or protection for children of opposite-sex couples; it only enhances such protection for children of same-sex couples.[17]

If a prime justification for marriage is to provide a stable home for children, then marriage should be available equally to same-sex couples. If the availability of marriage is to turn on the interests of children, then marriage must be accorded to same-sex couples because children are certainly prevalent in same-sex households. If a justification for marriage is to protect children and to provide them the support, both emotional and financial, of two parents, then marriage must

[17] An as-yet unpublished but comprehensive analysis of the existing social science research (involving 20-30 studies) reaches conclusions consistent with those of all the professional groups that have reviewed the body of literature, e.g., Am. Psychological Ass'n, Resolution on Sexual Orientation, Parents and Children (2004), http://www.apa.org/pi/lgbc/policy/parents.html (concluding that "[o]verall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents."), etc. See Michael S. Wald, "Adults' Sexual Orientation and State Determinations Regarding Placement of Children," Draft article for Family Law Quarterly (November, 2006) at pages 23-43, included in the Appendix (Apx. 81-168).

be accorded to same-sex couples. From a child's perspective, it is impossible to justify prohibiting marriage between his or her intended parents. It is the profound belief of the Amici that Maryland should not continue to adhere to a narrow view of such a complex issue and, most importantly, should truly consider the interests of the children directly affected by it.

CONCLUSION

Only by extending the right to marry to same-sex couples can Maryland afford the full range of legal rights and benefits to their children. As a result of the statute challenged in this case, the children of same-sex couples continue to be harmed and discriminated against in the application of countless other Maryland laws. In most instances, it is impossible for same-sex couples to obtain equal rights for their children due to their unmarried status. Even when alternatives such as adoptions and health care directives are available to them, the process is seldom automatic. They are required to expend time and money simply to secure equal treatment. For all the reasons set forth in this Brief, the Court should find Md. Fam. L. Code Ann. §2-201 unconstitutional and thereby bolster this Court's tradition of protecting and providing for all of Maryland's children.

DISCLAIMER

This brief represents the views of the American Academy of Matrimonial Lawyers and the Maryland Chapter of the American Academy of Matrimonial Lawyers. This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should

be drawn that any judge who is a Fellow of the American Academy of Matrimonial Lawyers participated in the preparation of this brief or reviewed it before its submission. The Maryland Chapter of the American Academy of Matrimonial Lawyers does not represent any party in this matter other than itself, is receiving no compensation for acting as amicus, and has done so pro bono publico.

This Brief has been written by the following members of the Same-Sex Marriage Committee of the American Academy of Matrimonial Lawyers.

Susan Carol Elgin
Kaufman, Ries & Elgin, P.A.
1122 Kenilworth Drive
Suite 113
Towson, MD 21204

Diana E. Richmond
Sideman & Bancroft, LLP
One Embarcadero Center
8th Floor
San Francisco, CA 94111

Suzanne Harris
Harris-Ginsberg
6500 Wilshire Boulevard
Suite 1870
Los Angeles, CA 90048

Phyllis G. Bossin
Phyllis G. Bossin Co., L.P.A.
36 East 4th Street
Suite 1210
Cincinnati, OH 45202

Cheryl Lynn Hepfer, President
American Academy of
Matrimonial Lawyers
150 N. Michigan Avenue
Suite 2040
Chicago, IL 60601

Susan Carol Elgin, Secretary
Maryland Chapter
American Academy of
Matrimonial Lawyers
1122 Kenilworth Drive - Suite 113
Towson, Maryland 21204

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2006, a copy of the foregoing *Amicus Curiae* Brief was mailed by first class mail, postage prepaid, to:

J. Joseph Curran, Jr., Attorney General of Maryland
Margaret Ann Nolan, Assistant Attorney General
Steven M. Sullivan, Assistant Attorney General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202

Robert A. Zarnoch, Assistant Attorney General
Kathryn M. Rowe, Assistant Attorney General
Office of the Attorney General
104 Legislative Services Building
90 State Circle
Annapolis, MD 21401

Attorneys for Appellants

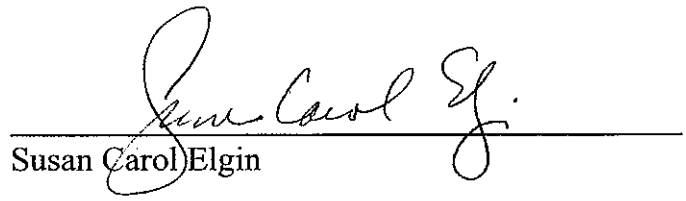
Andrew H. Baida
Caroline D. Ciraolo
Cooperating Attorneys for ACLU Foundation
and ACLU Foundation of Maryland
Rosenberg | Martin | Funk | Greenberg, LLP
25 S. Charles Street, Suite 2115
Baltimore, MD 21202

Kenneth Y. Choe
James D. Esseks
American Civil Liberties Union Foundation
Lesbian and Gay Rights Project
125 Broad Street
New York, NY 10004

David R. Rocah
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211

Arthur B. Spitzer
American Civil Liberties Union Foundation
of the National Capital Area
1400 20th Street, NW, #119
Washington, DC 20036

Attorneys for Appellees



Susan Carol Elgin

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APPENDIX

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A Report By Equali

Maryland's Lesbian, Gay, B Transgender

Advocacy

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Maryland

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MARRIAGE INEQUALITY IN THE STATE OF MARYLAND

A Report By Equality Maryland
Maryland's Lesbian, Gay, Bisexual And Transgender
Advocacy Organization

EQUALITY MARYLAND
8121 Georgia Avenue, Suite 501
Silver Spring, MD 20910
(301) 587-7500
info@EqualityMaryland.org
www.EqualityMaryland.org

Equality Maryland is a member of Equality Federation,
a national coalition of statewide
Lesbian, Gay, Bisexual, and Transgender advocacy organizations
working to secure full civil rights in every U.S. state and territory.

DEDICATION

This report is dedicated to the many

gay men, lesbians, bisexuals, and transgender individuals and their families

who live their lives every day with dignity and the belief in change.

METHOD OF RESEARCH

Researchers reviewed the Maryland Code for provisions that discriminated against same-sex couples based on marital status or the definition of family. Their review found more than 425 provisions that disparately treat or unambiguously discriminate against same-sex couples, who are unable to marry or classify their partner as a member of their immediate family under current Maryland law. Researchers conducted searches for various words or word stems ("spouse," "husband," "wife," "mart!," "relative," etc.), selected to generate the text of Maryland statutes involving marital or family status in several electronic databases containing the Maryland Code. We reviewed the collection of statutes and eliminated those laws that included one or more of our search terms but that were not relevant to our inquiry. As a result, the collection of laws herein reflect those state statutes that provide some sort of social and financial protections, benefits, rights or obligations based solely on marital status or familial relationship.

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TABLE OF CONTENTS

I. INTRODUCTION

From time to time, America comes to a crossroads. With confusion and controversy, it's hard to spot that moment. We need cool heads, warm hearts, and America's core principles to cleanse away the distractions... We are now at such a crossroads over same-sex couples' freedom to marry. It is time to say forthrightly that the government's exclusion of our gay and lesbian brothers and sisters from civil marriage officially degrades them and their families....

— U.S. Representative John Lewis, a Democratic lawmaker from Georgia, who worked closely with Dr. Martin Luther King and was one of the original speakers at the 1963 March on Washington.

Civil marriage for same-sex couples is a matter of equal protection and equal rights under the law. No domestic partnership, civil union or private agreement can duplicate the legal status and salutary benefit of marriage. Same-sex couples seeking the ability to marry legally seek to achieve the stability, equity and peace of mind that so many other families take for granted. For example, heterosexual couples take for granted the right to visit a spouse in the hospital; make medical decisions for a spouse; take family and medical leave to care for a sick spouse; file joint tax returns; and inherit property and receive Social Security benefits in the event of a spouse's death. In Maryland, a marriage license from the Clerk of the County Court unlocks to door to over 400 state-level and more than a thousand federal rights and responsibilities that enable a couple to care for each other and their family properly. The legal movement for marriage equality is the quest for this license and all that it brings with it.

Before one can really make sense of the issue of marriage for same-sex couples, its important to distinguish the state created institution of marriage and religious marriage performed in churches and other places of worship. Civil marriage is, in essence, a state-recognized contract among two people and the state of Maryland. There is no religious requirement for obtaining a marriage license and, in fact, approximately 40% of marriage licenses obtained by couples in Maryland are signed by judges or clerks of the court -- not clergy.

Moreover, this legal contract has no bearing on the decision of religious denominations to bless, or not bless, the relationships of same-sex couples. Many people incorrectly believe that places of worship will be forced to marry same-sex couples if civil marriage becomes a legal option. This is simply not true. Churches and clergy have determined and always will determine for themselves whether to perform or recognize a marriage based on the tenants of their faith.

This report attempts to provide a comprehensive list of protections, rights, obligations and benefits that are denied to same-sex couples and their families in Maryland. Our research found more than 425 Maryland state statutes that utilize marital status or familial relationship as a basis for granting a right, privilege or restriction and as a result disparately impact same-sex couples, who are unable to marry legally. The consequences of being excluded from these protections disadvantage same-sex couples and their families in virtually every aspect of daily life, from purchasing car insurance to providing legal and economic security for their families in the event of illness or death.

Part II of this report provides a brief background on the interplay between state and Federal laws where marriage is concerned. Part III highlights selected statutes that most severely disadvantage same-sex couples living in Maryland and illustrates the real world effect these laws have on the lives of Maryland citizens. Lastly, Part IV provides a compilation of the hundreds of state statutes that utilize marital status or familial relationship as a basis for granting a right, privilege or restriction and as a result disparately impact same-sex couples, who are unable to marry legally.

II. INTERPLAY BETWEEN FEDERAL AND STATE LAWS

Marriage in the United States is a bright line that determines an individual's access to many social and financial protections, benefits, rights and obligations under both federal and state law. Such social and financial benefits are provided for under the civil laws of the United States and have no relationship to the practice of religion. The U.S. Government Accountability Office (GAO) has identified 1,138 statutory provisions in which marital status is a factor for determining or receiving such benefits, rights or privileges under federal law.[A]

Historically, the federal government has based its recognition of marriage on state laws. A couple married under state law is automatically qualified to receive all of the benefits provided, not only under state law, but under federal law as well. However, in September 1996 the Defense of Marriage Act (DOMA) was enacted. The passage of the federal DOMA statute was a reaction to the fledgling movement for marriage equality for same-sex couples and a number of favorable court rulings, most notably in Hawaii and Alaska. DOMA defines "marriage" as "a legal union between one man and one woman as husband and wife" and defines "spouse" as referring "only to a person of the opposite sex who is a husband or a wife." DOMA requires that its definitions apply "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative agencies of the United States." 1 U.S.C. § 7. As a result, the federal government grants no protections or benefits to same-sex couples who are permitted to be legally married under state law. Moreover, DOMA explicitly purports to permit each state to recognize or deny any marriage or "marriage-like relationship" between persons of the same sex which has been recognized in another state. Therefore, while couples in Massachusetts (the only state that, as of publication, grants marriage licenses to same-sex couples) may currently avail themselves of the rights and privileges associated with marriage under Massachusetts state law, the Federal government refuses to recognize their marriages under Federal law.

A. See GAO Report attached at Appendix A. As of December 31, 2003, the GAO had identified a total of 1,138 federal statutory provisions in which marital status is a factor in determining or receiving benefits, rights, and privileges defined, limited, or dependent upon the legal definition of marriage and family. Updated in 2004, the GAO survey was initially conducted in 1997 and identified 1,049 statutory provisions in the Unites States Code in which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor. *To view the original GAO Report visit the GAO website at www.gao.gov/archive/1997/og97016.pdf.*

III. SELECTED STATUTES AND THE EFFECT OF MARRIAGE INEQUALITY ON MARYLANDERS

Under current Maryland law, same-sex couples are prohibited from entering into civil marriages. A 1973 Maryland law declares that "only marriage between a man and woman is valid in th[e] State." MD Code, Family Law § 2-201. Our research found more than 425 Maryland statutes that rely on the definition of "marriage" or a legally recognized family relationship to determine who is to receive certain benefits, protections, assumptions of law or rights and obligations accessible to married couples and their immediate family under the Maryland Code.

A marriage license provides protections that are crucial for families, including:

- Ability to extend health insurance benefits to a spouse
- Right to hospital visitation with and to make medical decisions for an incapacitated spouse
- Added protection for children
- Ability to inherit property without incurring tax penalties
- Ability to name your spouse as primary beneficiary of life insurance without him/her incurring tax penalties
- Right to make burial decisions
- Right to sue for wrongful death
- Right to file joint income taxes
- Mutual responsibility for debts
- Access to family courts for dissolution of relationships.

Every day the vast majority of Maryland residents and Americans in general, take many of these protections for granted.

Maryland law typically includes the following individuals in its definitions of "immediate family:" 1) a spouse; 2) a child; 3) a sibling; 4) a parent; 5) a grandparent; 6) a grandchild; or 7) any adopted relative. Still, many Maryland families are not included within this definition and as a result they are excluded from some of the most basic protections provided under state law. A same-sex couple raising two children -- no matter how long they have been together -- are virtual strangers in the eyes of the state. Their children have two parents with no legalized relationship to one another, and, consequently, they face numerous challenges in ensuring that their family and children are recognized and protected under state law.

The following collection of Maryland statutes illustrate some of the most vital protections provided to married couples and their families under state law -- vital protections that are unavailable to similarly situated same-sex couples and their families because same-sex couples are prevented from marrying their chosen life partner. This inequality of access to legal protections affects same-sex couples and their families in the gay, lesbian, transgender, and bisexual community every day in very concrete ways.

Like many, Russell ("Rusty") came to live and work in Maryland as an adult, leaving his parents and extended family thousands of miles away. Two years after he and his partner, Bryan, moved to Baltimore, Rusty was diagnosed with a heart condition that required hospitalization. Upon admittance, Rusty asked that Bryan be included in discussions regarding his condition, treatment and prognosis. Rusty informed the staff of the hospital that, as his partner, Bryan knew him better than any other person, his full medical history, his religious beliefs and his wishes should his condition take a turn for the worst. Yet the medical facility where Rusty was treated refused to honor his request, informing him that "partners are not family." As Rusty was being prepped for treatment that could possibly cause him to go into cardiac arrest, he was told that the one person he trusted the most could not participate in the decision making process or advocate on his behalf should something go wrong.

Had the couple been married, no challenge would have been raised by the medical facility and Bryan's right to participate in the decisions made about Rusty's treatment would have been protected by law.

ACCESS TO HEALTH CARE (HEALTH, LIFE, DISABILITY INSURANCE)

HEALTH CARE ADVOCATE

A spouse is automatically entitled to act as a surrogate regarding health care decisions necessary for an incapacitated spouse. MD Code, Health-General § 5-605.

A partner in a same-sex relationship does not automatically have this right. Same-sex couples must execute a legal document called a Health Care Power of Attorney (i.e., Medical

Authorization or Advance Medical Directive) in favor of their partner in order to grant them the authority to make medical decisions on the other's behalf in the event of incapacity. In the event of an emergency, same-sex couples are often faced with a horrifying reality when hospitals refuse to honor such documents or refuse to impart vital information to the patient's same-sex partner until such documents can be produced. Once married, a spouse is presumed to be the logical decision maker in the event of the other's incapacity, yet hospitals never require married couples to present a marriage certificate to prove their relationship to each other.

Bill had to live through his worst nightmare when his partner Robert became critically ill while the couple was traveling. Robert was admitted to a shock trauma facility in Baltimore. Bill waited for information and access to Robert for hours but was never called up from the waiting area. His requests for information were repeatedly ignored by hospital staff as he was told that 'partners' were not allowed in the shock trauma unit. Bill and Robert had executed medical powers of attorney and Bill asked to speak to a hospital supervisor so that he might explain his situation, but no supervisor ever responded. Hours later, Robert's sister arrived and was immediately taken to Robert's side. She demanded that Bill be brought to Robert, but by the time the two were finally reunited, Robert had been placed on life support in contradiction of his final wishes and had lapsed into a coma from which he never recovered.

If Bill and Robert had been married, Robert would not have undergone unwanted life extending procedures and he would not have died alone. Moreover, had they been heterosexual and married, Bill would not have been required to present a marriage certificate to hospital officials to prove his relationship to Robert.

INSURANCE COVERAGE AND BENEFITS

Spouses are entitled to receive the following benefits:

- A spouse is permitted to secure life or health insurance on the other spouse. MD Code, Insurance § 12-202.
- Health insurance providers are required to permit open enrollment of an involuntarily terminated spouse who has lost individual coverage. MD Code, Insurance § 15-411.
- A group life insurance policy is required to cover a spouse and dependent children. MD Code, Insurance § 17-209.

Same-sex couples are not afforded these same benefits and protections. A company offering group health or life insurance to its employees is not required to extend those benefits to include its employee's same-sex partner, nor the couple's children, if the children are not biologically related to the employee or the employee has not formally adopted the child.

Takia and Jo have been in a committed relationship for over 4 years and have two children, an eleven year old daughter and a six year old son born to Takia. Takia works part-time as an administrative assistant while her partner Jo is a Baltimore City bus driver employed by the Maryland Transit Authority. Neither Takia or her children have health insurance. As an employee of Maryland, Jo cannot enroll Takia or the children in the state sponsored plan and Takia's part-time job does not offer health insurance benefits. Takia and Jo's son has asthma and the couple is constantly struggling to ensure their son's proper medical care and treatment.

If married, this family would be covered under Maryland's group health insurance plan and Jo's family would have the health and financial protection offered to other Maryland State employees and their families.

RIGHT TO ADVOCATE ON BEHALF OF SPOUSE

LEGAL ADVOCACY

A spouse may serve as the legal representative of a victim of a violent crime who dies or is disabled. MD Code, Criminal Procedure § 11-103.

A partner in a same-sex relationship does not have this right.

WRONGFUL DEATH CLAIMS

A husband or wife may bring an action for the death of their spouse. If no husband or wife exists, a person related to the deceased by blood or marriage may bring an action on behalf of the decedent. MD Code, Courts and Judicial Proceedings § 3-904.

A same-sex partner does not have standing to bring a wrongful death action on behalf of their deceased partner.

INVESTIGATIONS

A spouse has the right to initiate an investigation against the police for brutality. MD Code, Public Safety § 3-104(c).

A partner in a same-sex relationship does not have this right.

INHERITANCE AND RELATED ISSUES

LAWS PROTECTING INHERITANCE RIGHTS OF SURVIVING SPOUSES.

Where a decedent spouse dies without leaving a will, the surviving spouse automatically:

- Inherits the estate, subject to the rights of the decedent's children or, if no children, the decedent's parents. MD Code, Estates and Interests § 3-102.
- Is entitled to a family allowance of $5,000, which is exempt from and has priority over all claims against the estate. MD Code, Estates and Interests § 3-201.
- Has the right to elect to take a one-third share of the net estate if there is a surviving child, or a one-half share of the net estate if there is no surviving child. MD Code, Estates and Interests § 3-203.

Intestate statutes are not applicable to the surviving same-sex partner. Heterosexual married spouses automatically inherit from the estate of a deceased spouse, while the estate of the deceased partner in a same-sex relationship reverts to his parents, if alive, or siblings.

John and his partner, Jim, had been together for 13 years when Jim died suddenly in 2003 at the age of 33. The home John and Jim shared in Hagerstown was in Jim's name and although Jim had executed a will naming John the sole beneficiary of his estate, the will was found to be technically defective. As a result, Jim's estate defaulted to the laws of intestate succession allowing Jim's family of origin to inherit the home that he and John had shared and in which Jim had wanted him to remain.

Had Jim and John been married, John would have inherited his partners' residence, even without a valid will executed by Jim.

INHERITANCE TAX

A spouse is exempt from inheritance tax on benefits plans or real property passed on by the decedent. MD Code, Tax General § 7-203.

A same-sex partner does not qualify for this exemption.

Donna and Patty were partners for six years when Donna was diagnosed with ovarian cancer. When Donna died at the age of 49, Patty was refused bereavement leave by the State because Donna was not her spouse. Donna's will left Patty the house they had shared; however, because same-sex partners are not entitled to the same exemptions from inheritance taxes for bequests of property to a spouse, the State assessed $19,000 of inheritance tax against the value of the property left to Patty. To pay the tax, Patty was forced to refinance the mortgage in order to continue to live in the home she had shared with Donna for over six years.

If Donna and Patty had been married, Patty would have been entitled by law to bereavement leave and exempt from inheritance tax assessed on the property left to her by Donna.

SURVIVING SPOUSE'S RIGHT TO REMAINS AND DECISION ON FUNERAL ARRANGEMENTS

A surviving spouse automatically has the right to:

- Arrange for the final disposition of the body of the decedent, including cremation, in the absence of written instructions. MD Code, Health-General § 5-509.
- Consent to the postmortem examination of the decedent. MD Code, Health-General § 5-501.
- Make an anatomical gift or donation of all or part of the decedent's body unless the person has knowledge that contrary directions have been given by the decedent. MD Code, Estates and Interests § 4-503; Health-General § 19-301.

Same-sex partners possess none of these rights under state law. A same-sex couple must execute legal documents granting their partner primary authority to determine the disposition of their body and to make funeral arrangements in the event of one or the other's death. Without a validly executed document, neither is presumed to have the authority under Maryland law to make funeral arrangements for the other.[8]

8. Current Maryland law is unclear regarding the ability of an individual to appoint an agent to arrange for final disposition of the body. Accordingly, while same-sex couples in Maryland are currently encouraged to draft legal documents granting their same-sex partner primary authority over the disposition of their remains, the enforceability of such documents has not been ruled upon.

Deanne and Kristina were a couple for over ten years when Kristina died unexpectedly from a heart condition. Deanne and Kristina had not executed legal documents granting one another primary authority to determine the disposition of each other's body should either of them pass away. Consequently, after Kristina's sudden death, her immediate family seized control over the funeral arrangements and the disposition of Kristina's body and refused to allow Deanne to participate in the plans for Kristina's funeral. Over the course of their ten years together, Kristina had been the breadwinner of the family and although both contributed to household finances in proportion to their respective incomes, including payments on the mortgage, the house they shared was in Kristina's name. As a result, the house passed through the laws of intestate succession to Kristina's parents who later evicted Deanne from the home she had shared with her partner for a decade.

Had Deanne and Kristina been permitted to marry, Deanne would not have suffered the indignity of having her decisions with respect to Kristina's funeral usurped by Kristina's other family members. If the couple had been married Deanne would not have lost her home but would have inherited the property under the laws of intestate succession.

RIGHT TO RECOVER

A surviving spouse may sue on behalf of the deceased spouse for:

- Debts or rights accrued to the deceased spouse. MD Code, Family § 4-202.
- Damages against an individual convicted of willfully distributing a controlled dangerous substance that caused the death of a spouse. MD Code, Courts and Judicial Proceedings § 3-1603.

Same-sex partners are not entitled to these protections.

INSURANCE COVERAGE FOR SURVIVING SPOUSE

Spouses are entitled to the following insurance benefits:

- Health insurance providers are required to continue coverage for surviving spouses. MD Code, Insurance § 15-407.
- Proceeds of a life insurance policy are exempt from the claims of creditors. MD Code, Insurance § 16-111.

Same-sex couples are not entitled to these benefits. In the case of health insurance coverage, continuing insurance coverage provides an added level of security and long-term protection for a heterosexual couple and their family. Likewise, with regard to the requirement that employer sponsored group policies be extended to include spouses and children. A similarly situated same-sex couple can rely on no such safety nets regarding insurance coverage for their partners or children.

LAWS PROTECTING CHILDREN

BIRTH OF CHILDREN

A child born or conceived naturally or through artificial insemination during a marriage is presumed to be:

- The legitimate child of both spouses. MD Code, Estates and Interests § 1-206.
- An heir should his or her parents die intestate. MD Code, Estates and Interests § 1-206.

Take the following hypothetical couples. If Robin and Kim decide to have a child together and Robin gives birth to the baby through artificial insemination, Kim will have no legal relationship to the child unless Kim is able to petition the court successfully for a second-parent adoption. On the other hand, Tom, married to Sally, is presumed to be a parent of any child born within the bonds of his marriage, even if the child was conceived through donor insemination with the sperm of an unknown donor. Tom has no biological relationship to the child, yet under Maryland law, he is still presumed the child's natural parent. Similarly, a child born to Sally during the course of her marriage to Tom is automatically an heir to Tom's estate and is automatically eligible to receive Social Security benefits from Tom as his child. If Kim were to die prior to adopting Robin's biological child, or without leaving a will naming the child as a beneficiary of her estate, the child born to Kim and Robin would not inherit from Kim.

Jenn and Jennifer had a civil union ceremony in Vermont in September of 2000, after which they returned to Maryland and began planning to have a family. Jenn became pregnant with their first child via donor insemination and gave birth to a baby girl. At the hospital, Jennifer's request to add her name to the baby's birth certificate as the legal second parent was denied. The couple was required to initiate a second-parent adoption process because they were not legally married in Maryland, nor was their out-of-state civil union recognized. The adoption process cost the couple over $3000 dollars in legal fees and involved a lengthy home study conducted by the department of social services in

order to adopt a child planned for and conceived within the bonds of their relationship.

Had Jenn and Jennifer been permitted to marry, the law would have provided immediate recognition of parentage for their child born within the bonds of their marriage regardless of how the child was conceived.

OBLIGATION TO PROVIDE FINANCIAL SUPPORT

Each parent has an equal duty to provide for a child's support, care, nurturing, and general welfare. MD Code, Family § 5-203.

There is no such statutory obligation placed on a same-sex couple. Same-sex partners have no statutory legal duty to support each other's birth or adopted children without a second-parent adoption. In the case of married couples, a legal duty of care and support is automatically created, without the court's involvement, to any children born during the marriage.

ADOPTION

Courts often waive certain requirements, such as adoption counseling, written consent, medical histories, and accounting reports, for adoption of a child by the spouse or relative of the natural parent. MD Code, Family Law § 5-321.[C]

A same-sex partner is not entitled to waiver of adoption requirements under the above statute.

CHILD SUPPORT

In a divorce proceeding, the judge may order the non-custodial parent to pay child support to the custodial parent including placing the child on the non-custodial parent's health insurance plan. MD Code, Family § 12-101.

A same-sex partner, who has not legally adopted the birth or adopted children of their partner, is under no statutory legal obligation to provide child support in the event the couple separate.[D]

FAMILY HOME

The court may exercise its power to ensure that children can continue to live in the environment and community that are familiar to them in the event that their parents divorce. The court may provide for the continued occupancy of the family home and the possession and use of personal property (e.g., family car) by the custodial parent. MD Code § 8-206.

The child of a same-sex couple may not receive such protection where the non-custodial parent solely owns the primary family residence.

LAWS PROTECTING THE MARITAL RELATIONSHIP

DUTY OF SUPPORT

A spouse has a duty to support his or her spouse. MD Code, Family § 10- 201.

This obligation does not apply to same-sex couples.

TRANSFER OF PROPERTY

Newly married couples may freely transfer joint ownership in property to their spouse without having to pay transfer or recordation tax. MD Code, Tax, Property §§ 12-108; 13-403.

Same-sex couples are required to pay recordation and transfer tax on real or personal property when they transfer an ownership interest in such property to their partner. Even though this may be the home that they share, the two individuals are treated as strangers undergoing a financial transaction rather than family.

Linda and Harriet had lived together for a number of years when they decided to add Linda's name to the deed of the home they shared. The couple was required to pay $325 to have the home appraised and $5,870 in transfer and recordation taxes in order to transfer joint ownership of the property to Linda.

If the couple had been married, there would have been no costs associated with the transfer.

C. MD Code, Family Law 5-321 repealed effective Jan. 1, 2006.

D. Under Maryland case law, the de facto parent doctrine has been successfully argued to secure visitation and/or custody rights for a non-biological/non-adoptive parent, however, the extension of the de facto parent doctrine to secure the right to child support from a non-biological/non-adoptive parent has not yet been addressed by the Maryland courts.

JUDICIAL PROCEEDING

In a judicial proceeding, spouses are granted the following rights:

- Married individuals may not be compelled to testify against their spouse and are not considered competent to disclose confidential communications that occurred between the spouses during the marriage. MD Code, Courts and Judicial Proceedings § 9-105.
- A spouse cannot be compelled to testify against a defendant spouse as an adverse witness unless the charge involves child abuse or assault in any degree in which the spouse is a victim. MD Code, Courts and Judicial Proceedings § 9-106.

This judicial privilege is intended to protect the intimate bond between married couples. Partners in a same-sex relationship, however, may not rely on the judicial privilege and if involved in a civil or criminal proceeding, they could be compelled to disclose confidential communications or give testimony adverse to the other.

JUDGMENTS AGAINST SPOUSE

A non-debtor spouse receives the following creditor protection:

- A garnishment against property held jointly by husband and wife in a bank, trust company, credit union, savings bank, or savings and loan association or any of their affiliates or subsidiaries is not valid unless both owners of the property are judgment debtors. MD Code, Courts and Judicial Proceedings § 11-603.
- The non-debtor spouse may sell or transfer real or personal property owned with the debtor-spouse that is the subject of a judgment against the debtor-spouse. MD Code, Family Law § 4-206.
- A creditor may not attach the joint property of the debtor spouse based solely on the marriage. MD Code, Family Law § 4-206.

These protections against creditors do not extend to same-sex couples who own property jointly.

SOCIAL SERVICES FOR SPOUSES AND FAMILIES

The Secretary of Health establishes programs for lower income families that assist spouses and children in difficult emotional and financial times.

- Services are provided to help families cope with catastrophe, poverty, homelessness, illness, death, desertion, or abandonment. MD Code, Family § 4-402(a)-(b).
- Services consist of counseling, health care referrals, and instruction in household management and budgeting. MD Code, Family § 4-402(a) and (b).
- Services are automatically granted to eligible spouses regardless of whether they are currently living together. MD Code, Family § 4-401(1).

Same-sex couples are not entitled to these benefits because the Maryland Code defines family as a spouse and the individual's children. MD Code, Family § 15-201(c).

LAW PROTECTING SPOUSES IN THE EVENT OF DIVORCE

MARITAL PROPERTY

In a divorce proceeding, a judge may:

- Determine what property constitutes marital property to be considered when making an award to one spouse or the other. MD Code, Family § 8-203.
- Award use and possession of the family home and use of personal property for the benefit of the children of a marriage regardless of how the property is titled. MD Code, Family Law § 8-208.

Married couples may avail themselves of court procedures available to determine the division of property pursuant to well-established rules of family law. A same-sex couple seeking the court's assistance upon separation is subject to established contract law in the determination of how to divide their joint property. Contract law does not take into consideration the intimate relationship between the parties.

ALIMONY

In an action for annulment or limited or absolute divorce, a judge may award alimony to either party for:

- A fixed or indefinite period of time. MD Code, Family Law § 11-106.
- Reasonable expenses including attorney's fees. MD Code, Family Law § 11-110.

These rehabilitative awards are not available to same-sex couples.

INSURANCE COVERAGE

Insurance providers are required to continue coverage for divorced spouses and dependent children for limited time period. MD Code, Insurance § 15-408.

A same-sex partner covered under domestic partnership benefits is not entitled to continuing coverage if the couple separates.

RETIREMENT & PENSION PLANS

In the event of divorce, one spouse may be awarded an ownership interest in the pension, retirement, profit sharing, or deferred compensation plans that accumulated while the couple was married. MD Code, Family Law § 8-205.

A same-sex couple has no legal right to any monies accumulated in the retirement or pension plan of their partner, regardless of the length of the relationship. If divorced after 25 years of marriage, a spouse would have the right to receive one-half of that portion of the other spouse's retirement benefits accumulated during the course of their marriage. If separated after 25 years, neither same-sex partner would have a right to a portion of the other's retirement benefits.

DIVORCE AFTER WILL EXECUTED.

When a person divorces the decedent (before death):

- That person is no longer a surviving spouse for probate or intestate purposes. MD Code, Estates and Interests § 1-202.
- All provisions in the will relating to the spouse are revoked unless otherwise provided by a will or decree. MD Code, Estates and Interests § 4-105.
- The divorce decree severs joint tenancies with rights of survivorship and automatically converts such interests to tenancies in common. MD Code, Estates & Trusts, § 1-102.

These automatic provisions do not apply to same-sex couples. Intestacy laws anticipate changes in family structure for estate planning purposes in the case of divorce, so that if a married couple divorce after executing wills in each other's favor or buying property together with rights of survivorship, the statutes direct the probate court to convert automatically joint ownership of property to individual ownership to reflect the divorce. Same-sex couples are not protected by this provision. A same-sex couple who own joint property and execute wills in favor of one another must incur the legal expense of amending their wills and modifying the deed to any jointly held property, in the event they choose to separate.

IV. REVIEW OF MARRIAGE INEQUALITY IN THE MARYLAND CODE

The previous section highlights those sections of the Maryland Code that most egregiously discriminate against same-sex couples by denying them access to the legal institution of marriage. The following list represents a comprehensive review of the remaining Maryland Code titles and highlights those sections that also have a discriminatory or disparate impact either because they use marital status as a factor or rely on the definitions of marriage, family, relative, etc., to bestow a protection, benefit, or right under the law. In the Maryland Code, a same-sex partner is not recognized as either a "spouse," "relative," or an "immediate family member" and therefore cannot benefit from these statutory protections.

CODE SECTIONS REFERRING TO "MARRIAGE," "SPOUSE," OR "RELATIVE"

AGRICULTURE

2-603 Loan process. Describes the eligibility of spouses to file jointly for disaster aid. Spouses may be granted joint and several eligibility for the Farmer Disaster Loan Program. *A same-sex couple is not eligible to file jointly for disaster aid.*

BUSINESS OCCUPATIONS & PROFESSIONS

10-605.1 **Legal restrictions to protect relatives.** Lawyers prohibited from soliciting personal injury or wrongful death clients who are relatives to the injured party until thirty days have passed since the accident or disaster. *Same-sex partners are not considered relatives.*

10-605.2 **Legal restrictions to protect related individuals.** Prohibitions on lawyer communications and advertisements to potential personal injury and wrongful death clients related to the injured party. *Same-sex partners are not considered related.*

17-319 **Real Estate license after death.** Upon a real estate broker's death, family members may carry on the business for six months and may also qualify for the license itself. *Same-sex partners are not considered family members.*

17-404 **Claims against guaranty fund.** A spouse of a licensee may not make a claim against the guaranty fund. *This protection to the fund does not apply to same-sex couples.*

17-410 **Payments by guaranty fund.** Claimant must prove that he/she is not the spouse of the licensee. *This fund protection does not extend to same-sex couples.*

17-511 **Real estate business limitations.** Not more than 50% of the interest in a real estate business may be held by associate brokers or salespersons, unless these individuals are a spouse, parent, child, sibling, stepparent, stepchild, or stepsibling. *This exception is not applicable to same-sex partners.*

BUSINESS REGULATIONS

5-603 **Restrictions on business interests.** A trustee of a cemetery may not use any trust funds to either purchase an interest in any contract or agreement to which his spouse is a party; or make any loan or direct or indirect investment to his spouse or to any entity or business owned or under the control of his spouse. *Same-sex partners are not considered spouses.*

7-303 **Application for collection agency license.** A collection agency license may be denied if the applicant's spouse has had a license revoked or is responsible for the revocation of a license. *Same-sex partners are not considered spouses.*

8-405 **Claims restrictions.** A claim against the Home Improvement Guaranty Fund based on the act or omission of a particular contractor may not be made by a spouse or immediate relative of the contractor, or by an immediate relative of an employee, officer, or partner of the contractor. *Same-sex partners are not considered spouses or immediate relatives.*

11-301 **"Beneficial ownership" defined.** A relative who is living in the home may be considered a beneficial owner. *A same-sex partner is not considered a relative.*

17-308 **Remainder of license term upon death.** If a general business licensee dies, the surviving spouse or personal representative may do business under the license for the rest of the term of the license. *A same-sex partner, not named personal representative, is not protected under this statute.*

19-207 **Organizational insignia limitations.** Spousal rights to wear the insignia of fraternal and patriotic organizations. *Same-sex partners are not considered spouses.*

COMMERCIAL LAW

9-102, 9-602 **Secured transaction disposition calculations.** States that, for the purposes of secured transactions, the surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a person related to the secured party, which includes a spouse and any other relative by blood or marriage, if the transferee in the disposition is a person related to the secured party. *Same-sex partners are not considered spouses or relatives.*

9-615 **Disposition calculations.** States that, for the purpose of secured transactions, the surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a person related to the secured part, which includes a spouse and any other relative by blood or marriage, if the transferee in the disposition is a person related to the secured party. *Same-sex partners are not considered spouses or relatives.*

9-626 **Disposition calculations.** States that in an action arising from a transaction in which the amount of a deficiency or surplus is in issue, if a deficiency or surplus is calculated under 9-615, the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than a person related to the secured party, which includes a spouse or any other relative by blood or marriage, would have brought. *Same-sex partners are not considered spouses or relatives.*

12-705 **Definition of discrimination.** Refusal to extend credit to someone based on marital status or to refuse to consider the circumstances of the marriage, such as joint income, alimony or child support is discrimination. *Same-sex couples are not afforded protection under this statute and may be discriminated against based on a creditor's refusal to consider the couples' joint income.*

15-302 **Prerequisites.** For the purposes of debt collection, a married person may assign wages if his or her spouse executes and acknowledges the assignment. *This privilege and protection is not afforded to a same-sex couple.*

16-601 **Hospital's lien.** This provision authorizes a hospital's lien on 50% of the recovery a patient or his/her heirs collects for an injury claim when the patient is injured in an accident not covered by the Maryland Workers' Compensation Act. *A same sex partner has no standing to bring an action for the injury of his/her partner, thus hospitals do not have similar recourse to recover outstanding debt from same-sex couples.*

19-4A-01 **Transfer of dealer's business, requirements.** This provision defines "family member" for the purposes of the subsection. *A same-sex partner is not included in the definition of "family member."*

CORRECTIONAL SERVICES

3-305 **Leave for inmates.** Inmates may be granted leave to make a family visit. *A same-sex partner is not considered family.*

3-804 **Same-disposition of earnings.** Inmates employed in a work-release plan must surrender earnings except any amount that he or she is legally obligated to pay to support his or her dependents. *A same-sex partner or a child who has not been legally adopted by the inmate is not eligible to receive support payments under the family law statutes.*

3-807 **Work-release program privileges.** Under the extended work-release program, an inmate who is sentenced for desertion or nonsupport of a spouse, child, or destitute parent may be granted the privilege of leaving actual confinement. *Same-sex partners are not considered spouses.*

3-808 **Compassionate leave.** Inmates may be granted leave to visit a member of his or her immediate family who is seriously ill or to attend the funeral of a member of his or her immediate family. *A same-sex partner is not considered immediate family under this provision.*

3-811 **Family leave.** The Commissioner may grant an inmate leave to visit an immediate family member. *A same-sex partner is not considered immediate family under of this statute.*

3-909 **Disposition of body.** The body of an executed inmate will be returned to a relative, at the relative's cost. *A same-sex partner is not a relative under the statute.*

9-601 **Pregnant inmates.** The division of correction may order the father or relative to take custody of the child born to an inmate. *A same-sex partner is not considered a relative nor presumed to be the child's parent and would not get custody of a child born to an imprisoned partner.*

9-604 **Payment of burial and funeral expenses of indigent inmates.** An indigent inmate who dies in the custody of the state will be eligible for this benefit if the family is known or registered with the Department of Human Resources. *A same-sex partner is not considered family and may not register on behalf of his indigent partner.*

11-711 **Dorchester.** An inmate may be granted compassionate leave to visit a seriously ill member of the inmate's immediate family or attend the funeral of an immediate family member. *A same-sex partner is not included as a member of an inmate's immediate family.*

11-716 **Kent County.** An inmate may be granted compassionate leave to visit a seriously ill member of the inmate's immediate family or attend the funeral of an immediate family member. *A same-sex partner is not included as a member of an inmate's immediate family.*

11-724 **Wicomico County.** An inmate may be granted compassionate leave to visit a seriously ill member of the inmate's immediate family or attend the funeral of an immediate family member. *A same-sex partner is not included as a member of an inmate's immediate family.*

CORPORATIONS & ASSOCIATIONS

3-601 **Extraordinary actions.** An associate is defined as a relative or spouse of a director or officer of the corporation. *A same-sex partner is considered neither a relative nor a spouse of a director or officer of the corporation.*

5-6B-08 **First right of purchase.** Transfers to a spouse or child are exempt from the locality's right of first refusal. *A same-sex partner does not receive this exemption.*

5-622 **Electric Cooperatives/Board of Directors.** If a husband and wife hold joint membership in a cooperative, then one or the other, but not both may be elected directors. *This protection for a board of directors does not extend to same-sex couples.*

COURTS & JUDICIAL PROCEEDINGS

1-705 **Judge's salary restrictions.** Supplementation of a judge's salary is prohibited, including any payment from a political subdivision to the surviving spouse of the judge. *Same-sex partners are not considered spouses.*

2-309 **County Sheriff's surviving spouse pension.** The Calvert County Commission may provide a pension to be paid to the surviving spouse of a county sheriff. *Same-sex partners are not considered spouses.*

3-502 **Maintenance of action, woman.** A husband may maintain an action of slander against any person for words spoken falsely and maliciously about his wife for her character or reputation for chastity before or during the marriage. *A same-sex partner may not maintain a similar suit.*

3-902 **Wrongful death action.** Primary beneficiaries include spouses, parents of a child, and children of the decedent. *A same-sex partner is not included as a primary beneficiary and, therefore, could not sue for the wrongful death of his or her partner.*

3-904 **Wrongful death action benefits.** A wrongful death action shall be for the benefit of the wife, husband, parent, and child of the deceased person. If none of these persons exist, an action shall be for the benefit of any person related to the deceased person by blood or marriage who was substantially dependent upon the deceased person. *Same-sex partners are not considered husbands or wives, nor related by marriage.*

3-1603 **Standing to Bring Suit.** A civil action for damages for the death of an individual caused by the individual's use of a controlled, dangerous substance may be brought by a parent, legal guardian, child, spouse, or sibling of the individual. *Same-sex partners do not have standing to bring suit on each others behalf.*

5-901 **Right to sue in consideration of marriage.** The Statute of Frauds bestows the right to sue on an agreement made in consideration of the marriage, if written evidence of it exists and is signed by the allegedly breaching party. *Same- sex partners may not maintain a similar action.*

7-406 **Copies of records for former Armed Forces member.** A clerk of the court, under certain circumstances, is prohibited from charging an armed services member, spouse, or child for copies of the marriage license. *Same-sex couples cannot avail themselves of this exemption.*

8-202 **Juror forms requesting spousal information.** Juror qualification form asks about the occupation of the potential juror's spouse. *Same-sex partners are not considered spouses, hence are overlooked under this procedural safeguard.*

9-105 **Confidential marital communications; spouse's testimony.** Confidential communications between spouses are privileged information. *Same-sex couples are not afforded this privilege and can be forced to disclose confidential communications.*

9-106 **Criminal defendant; spouse's testimony.** The spouse of a person charged with a crime may not be compelled to testify as an adverse witness unless charges involve child abuse or assault in any degree in which the spouse is a victim. *This marital privileges is not available to a same-sex couples, therefore, one partner can be compelled to testify against the other.*

11-108 **Personal injury action.** Includes marital care in the category of non-economic damages. Non-economic damages include loss of consortium. *Loss of consortium is only included as damages for married couples; same-sex couples cannot recover for loss of consortium.*

11-603 **Joint property.** Creditors may not attach property held jointly by both spouses unless both spouses are debtors. *Property owned jointly by a same-sex couple can be attached by a creditor of only one partner.*

CRIMINAL LAW

3-103 **Exceptions.** A family member will not be charged with assisting another to commit or attempt suicide unless the family member knowingly administers a procedure or administers or dispenses a medication to cause death. *A same-sex partner is not considered a "family member" under this provision.*

3-318 **Sexual crimes - Spousal defense.** A person may not be prosecuted for rape or certain sexual offenses against his/her spouse unless the spouses have lived apart for a specified period of time or force has been used by the person in committing the crime and the act is without consent of the spouse. *The spousal defense does not apply to same-sex couples.*

3-502 **Kidnapping.** Kidnapping does not include the act of a parent carrying a minor of that parent in or outside of the State. *A parent who has not adopted a partner's biological or adopted child is not included within the scope of this exception.*

7-110 **Theft / Defenses and presumptions.** It is a defense to the crime of theft that the property involved was that of the defendant's spouse unless at the time of the alleged theft they were living in separate residences. *This defense does not extend to same-sex couples.*

8-801 **Exploitation of vulnerable adult prohibited.** The section cannot be construed to impose criminal liabil-

ity on a person who at the request of the vulnerable adult's family made a good faith effort to assist the vulnerable adult in the management of or transfer of the vulnerable adult's property. *A same-sex partner is not considered family under the statute, therefore, this defense is unavailable where such a request was made by the same-sex partner of a vulnerable adult.*

10-117 **Furnishing for or allowing underage consumption.** A person will not be prosecuted for furnishing alcohol to a minor if the parties are members of the same immediate family and the alcohol is furnished and consumed in a private residence. *This defense is not available to a same-sex partner who has not adopted his/her partner's biological or adopted children.*

CRIMINAL PROCEDURE

3-123 **Notification to victim.** A family member or guardian can act as a victim's representative and has the right to receive notice from state agencies involved in the prosecution or confinement of a person accused of committing a violent crime. *A same-sex partner is not included in the definition of "family member" and cannot presume to act as his/her partner's representative.*

4-202 **Transfer of criminal cases to juvenile court.** Victim's representative may act on behalf of victims concerning the transfer of defendants. *A same-sex partner may not serve as a victim's representative as a partner is not included within the definition of "family member" for the purposes of this provision.*

6-106 **Right of victim or victim's representative.** A victim's representative has a right to receive notification of hearings and trial. *A same-sex partner may not automatically assume the role of victim's representative and may be denied the right to receive notification of hearings and trial involving his or her partner.*

7-105 **Victim's and representative's rights of notice and attendance.** Describes rights concerning victim representative, who may be a spouse or family member. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision, therefore a same-sex partner may not receive notice of proceedings involving his/her partner.*

11-102 **Victim's right to attend proceedings.** Describes rights concerning victim representative, who may be a spouse or family member. *Such rights do not extend to same-sex partners who are excluded from the definition of "spouse" and "family" under this title.*

11-103 **Application for leave to appeal denial of victim's rights.** A spouse, surviving spouse, child, sibling, parent, or legal guardian may file- an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider various rights secured to the victim. *A same-sex partner does not have standing to advocate or bring such an appeal on behalf of his/her partner that was the victim of a violent crime.*

11-104 **Victim notification.** Requires law enforcement officers, district court commissioner, juvenile intake officer, and prosecuting attorney to supply pamphlet concerning the victim's rights, court procedures and services to the victim or victim's representative, who may be a spouse or family member. *A same-sex partner is not included within the definition of "family member" and may therefore be excluded for purposes of this provision.*

11-113 **Notification of accused HIV testing.** A victim or victim's representative, who may be a spouse or family member, may request testing and receive notification of the HIV status of a criminal defendant upon a finding of probable cause of conviction. *A same-sex partner may not serve as a victim's representative as a partner is not included within the definition of "family member" for the purposes of this provision.*

11-114 **Disclosure of test results.** Permits victim's representative, who may be a spouse or family member, to disclose HIV test results to another person to protect the health and safety or seek compensation for the victim. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and therefore cannot act on behalf of his/her victim partner.*

11-117 **Regulations.** Instructs the Dept. of Health and Mental Hygiene to adopt regulations to provide counseling on HIV disease and testing to victim or

victim's representative, who may be a spouse or family member. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and therefore may be excluded from mandatory counseling requirement.*

11-204 **Competence examination notification.** Requires Dept. of Health and Mental Hygiene to provide notice to victim or designated victim's representative, who may be a spouse or family member, upon receipt of a court order to examine a defendant to determine whether the defendant was competent. *A same-sex partner is excluded from the definition of "family member" and therefore may not file the required notification request designating him/her as the victim's representative.*

11-302 **Presence of victim or representative at trial.** Describes the right a representative of a deceased victim to be present at defendant's trial. The representative may be designated by the next-of-kin. *A same-sex partner's rights are not protected under this provision, unless designated as the representative by his/her partner's other family members. A same-sex partner is not included within the definition of "next-of-kin" and therefore may not automatically serve as a victim's representative.*

11-403 **Right of victim or victim's representative to address court during sentencing or disposition hearing.** Provides for the right of the victim's representative, who may be a spouse or other family member, to address the court. *A same-sex partner is excluded from the definition of "family member" for the purposes of this provision and may not serve as a victim's representative entitled to address the court.*

11-404 **Right of victim's representative to address jury in death penalty proceeding.** Provides for the right of the victim's representative, who may be a spouse or other family member, to address the jury in a death penalty case. *A same-sex partner is excluded from the definition of "family member" for the purposes of this provision and may not serve as a victim's representative entitled to address the jury.*

11-504 **Proceedings at Patuxent Institution, Notice and Comment.** Prior to granting parole, work release or leave of absence to an inmate, the Board is required to provide notice and an opportunity to comment to the victim or victim's representative. *A same-sex partner is not included within the definition of "family member" and may not serve as a victim's representative.*

11-505 **Department of Public Safety and Correctional Services - Notice and comment.** Requires the Department to provide notice to the victim or victim's representative regarding a convicted inmate's parole hearing or parole violation. *A same-sex partner is not included within the definition of "family member" and may not serve as a victim's representative.*

11-506 **Victim's rights after finding of not criminally responsible.** Requires the Department of Health and Mental Hygiene to notify the victim or victim's representative in certain circumstances, such as, when it receives a court order to examine a defendant or when it receives an order committing a defendant to the Department is found. *A same-sex partner is not included within the definition of "family member" and may not serve as a victim's representative.*

11-507 **Notification of probation violation.** Provides that the Department of Juvenile Justice notify the victim or victim's representative of alleged probation violation or whenever a warrant or subpoena is issued for a person who was convicted of a violent crime or delinquent act. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and hence is not entitled to receive notice.*

11-602 **Persons who may act on behalf of victim.** To secure restitution for a crime against a burial site, a person related by blood or marriage to a person buried may act on behalf of the victim of the crime. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and hence cannot seek restitution on behalf of his/her partner's defiled burial site.*

11-624 **Escrow account.** Requires the attorney general to hold monies for restitution payable to the victim or

victim's representative in an interest bearing escrow account and requires the attorney general to publish a legal notice in the newspaper advising the victim or victim's representative that such funds are available to satisfy money judgments. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and hence is not entitled to receive such notice.*

11-625 **Payments from escrow account.** Permits the Attorney General to pay the defendant from the escrow account money that a court has ordered be used to secure legal counsel and after notice to the victim or victim's representative necessary funds to covers expenses such as production. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision and may not serve as a victim's representative.*

11-801; 11-808 **Eligibility for award.** A victim's spouse and dependents, which shall include spouses and children or a person who is principally supported by the victim, under certain circumstances are all eligible for awards under the Criminal Injuries Compensation Board. *A same-sex partner is not eligible for such an award based on a partner's injury.*

11-811 **Amount of award. In addition to monetary awards from the Criminal Injuries** Compensation Board, a parent, child, or spouse of a victim is eligible to receive psychiatric, psychological, or mental health counseling. *A same-sex partner is not eligible to receive such additional assistance.*

11-1001 **Definitions.** Defines a victim's representative, to include a spouse, child, sibling, or parent of a victim of a crime. *A same-sex partner is not included within categories of those that may serve as a victim's representative for the purposes of this section.*

11-1002 **Guidelines for treatment of victim of crime, victim's representative, or witness.** Entitles a victim's representative, which includes a spouse, child, sibling, or parent of a victim of a crime, to receive certain notices, services, and treatment during the investigation and prosecution of a crime. *A same-sex partner is not included within the definition of "family member" for the purposes of this provision, and hence is not entitled to be kept informed regarding the status of an investigation or prosecution of a crime.*

11-1003 **Guidelines for treatment of victim of delinquent act, victim's representative, or witness.** Entitles a victim's representative to certain notices, services, and treatment during the investigation and prosecution of a juvenile crime. *A same-sex partner may not serve as a victim's representative and therefore is not entitled to receive such services.*

12-103 **Conditions excluding property from forfeiture.** Property held by husband and wife as tenants by the entirety is protected from forfeiture in certain circumstances involving drug related crimes. *As same-sex couples cannot hold property as tenants by the entirety, their jointly-held property may be subject to forfeiture.*

EDUCATION

3-5B-02 **Individuals married to administrators or teachers on board.** A spouse may not serve on the Frederick County Board of Education, if the other spouse is an administrator or teacher in the district. Conversely, a spouse may not be hired as an administrator or teacher in the district, if the other spouse serves on the Board, unless the board member first resigns. *Same-sex couples are not included within the scope of this provision.*

4-122.1 **Education of children in an informal kinship care relationship.** An informal kinship care relationship occurs when a relative provides for the care and custody of the child due to a serious family hardship. A child in such care is entitled to receive an appropriate education in the jurisdiction in which his or her caregiver resides. *A same-sex partner who has not adopted their partner's children is not considered a relative of the children and cannot provide kinship care to the children.*

7-101 **Education admission.** A child shall attend a public school in the county where the child is domiciled with the child's parent, guardian, or relative providing informal kinship care. *A same-sex partner who has not adopted their partner's children is not considered a parent, guardian or relative of the children and cannot provide kinship care to the children.*

15-106.4 **Exemption from paying nonresident tuition.** Spouses and dependent children of armed forces members are exempt from paying non-resident tuition at a public institution of higher education. *A same-sex partner and children in the family who have not been adopted by the armed forces member are not eligible for this benefit.*

18-601 **Scholarships.** Establishes a scholarship program for children of certain veterans and children and surviving spouses of public safety employees. *A same-sex partner and non-adopted children of the veteran or public safety employee are not eligible for this scholarship.*

18-10009 **Higher education loan deferments.** Deferment from repayment of higher education loans is authorized for up to three years during which the borrower is unable to secure employment by reason of care required by a spouse who is disabled; if both spouses have loans, then both spouses' payments are combined in order to satisfy the minimum total annual payment. *Same-sex partners are not considered spouses and are thus not applicable for this deferment.*

ELECTION LAW

9-304 **Absentee voting.** Provides that an individual qualifies for absentee voting if the death or serious illness of the voter's immediate family prevents them from going to the polling station. *The serious illness or death of a same-sex partner does not qualify for this protection.*

13-230 **Loans.** Provides that under certain circumstances, a loan by a candidate's spouse to a campaign finance entity of the candidate need not comply with certain formalities and reporting requirements. *This option is not available to the same-sex partner of a candidate who wishes to make a similar loan.*

13-231 **Personal-funds.** Contributions or loans to a campaign from the personal funds of the candidate's spouse are not subject to the contribution limits; expenditures from personal funds by the candidate's spouse for personal expenses of the candidate, such as filing fees, telecommunication services, travel, and food are not contributions. *Expenditures made by the same-sex partner of a candidate for the same purposes are not addressed and may be subject to reporting requirements.*

13-408 **Payment of publication expenses.** Publication expenses may be paid from the personal funds of the spouse of the incumbent, under certain circumstances. *Payments by a same-sex partner are not addressed.*

14-101 **Definitions.** Defines "contributions", which does not include a bona fide gift by a spouse. *A contribution made by a same-sex partner constitutes a contribution.*

ENVIRONMENT

6-801, 6-818 **Lead and dust testing restrictions.** Prohibits any person performing lead-contaminated dust testing or conducting an inspection from being a related party to the owner, which includes any person related to an owner by blood or marriage. *Same-sex partners are not considered related.*

ESTATES & TRUSTS

1-101 **Heir.** An "heir" is a person entitled to property of an intestate decedent pursuant to Maryland law. *A same-sex partner is not considered an heir who may inherit from a decedent who dies intestate (without a will).*

1-202 **Surviving spouse.** A surviving spouse is a person who has not received an absolute divorce from the decedent or whose marriage has not been annulled; a person who participates in a marriage ceremony with a third person, after a degree or judgment of divorce or annulment has been obtained by the decedent is not a surviving spouse. *The same-sex partner of the decedent may not be classified as a surviving spouse.*

1-206 **Legitimate child.** There is a presumption that a child born or conceived during a marriage is the legitimate child of both spouses, including a child conceived by artificial insemination if done with the consent of the woman's husband (such consent is presumed). *This presumption is unavailable to same-sex couples who conceive a child in an identical fashion via artificial insemination. Hence, the child of a same-sex couple is not protected in the event his/her*

non-biological parent dies prior to the issuance of an adoption decree and will not inherit from the non-biological parent.

1-208 **Illegitimate child.** Provides for the recognition of a child born out of wedlock, if the father has openly and notoriously recognized the child to be his. *A same-sex partner may not make a similar open and notorious declaration that would be recognized under Maryland law.*

1-209 **Definitions.** Defines "issue" to means every living lineal descendant of the decedent except a living lineal descendant of the living lineal descendant. Legitimate, adopted, and illegitimate children are considered lineal descendants. *A same-sex partner who has not adopted their non-biological child will exclude the child as a lineal descendant in the event of his or her death.*

2-108 **Judicial compensation.** The surviving spouse of every elected judge of the Court of Baltimore City shall be paid one half of the pension to which his/her spouse was entitled at the time of his or her death, provided certain requirements are met. *The same-sex partner of an elected judge is not entitled to a similar pension benefit.*

3-102 **Spousal share.** The surviving spouse inherits intestate in varying amounts depending on whether there are any issue (children, grandchildren, great-grandchildren, or parents) also surviving. If there are none, the surviving spouse gets the entire estate. *A surviving same-sex partner cannot inherit intestate.*

3-104 **Distribution when there is no surviving issue.** In the event of intestate succession, if there is no surviving spouse and no surviving blood relative entitled to inherit under this section, the estate shall be divided into as many equal shares as there are stepchildren of the decedent – stepchild means the child of any spouse of the decedent if such spouse was not divorced from the decedent. *The non-biological, non-adopted child of a same-sex partner is not similarly protected under this section.*

3-201 **Family allowance.** A surviving spouse is eligible for a family allowance and statutory share of the decedent spouse's estate. *A surviving same-sex partner is not eligible to receive a family allowance and will not collect from their decedent partner's estate unless specifically named as a beneficiary.*

3-203 **Election by spouse.** In the case of testate succession, the surviving spouse may elect to take a one-third share of the net estate if there is also surviving issue, or a one-half share of the net estate if there is no surviving issue. The surviving spouse who makes this election may not take more than a one-half share of the net estate. *A same-sex partner does not have the right to a spousal election.*

3-204 **Spousal election not transferable.** The right of election of a surviving spouse cannot be transferred. *A same-sex partner does not have the right to a spousal election.*

3-205 **Waiver of rights in decedent's estate.** The right of election of a surviving spouse may be waive before or after marriage by a written contract, agreement or waiver signed by the party waiving the right. *Same-sex couples are not entitled to the spousal election.*

3-208 **Effect of election on a will.** If the surviving spouse takes the elective share, all property or other benefits which would have passed to the surviving spouse under the will shall be treated as if the surviving spouse had died before the execution of the will, and he or she may not receive property under the will. *Surviving same-sex partners do not have the option of taking an elective share if they are not provided for adequately in a partner's will.*

4-105 **Procedures to revoke a will.** A will or any part of it may be revoked by the subsequent marriage of the testator followed by the birth, adoption, or legitimization of a child by him, or by an absolute divorce or annulment of a testator and his spouse or the annulment of the marriage. *Provisions in a will regarding a former same-sex partner will not be automatically revoked unless the testator amends his or her will.*

4-401 **Death of legatee.** A legatee, other than a spouse, who fails to survive the testator by 30 full days is

considered to have predeceased the testator. *A bequest to a same-sex partner who did not survive the testator for more than 30 days will fail, unlike a bequest to a spouse.*

4-501 **Definitions.** A spouse is "next of kin." *A same-sex partner is not considered next of kin for inheritance or health care purposes.*

4-503 **Making a gift.** In the event that a decedent has not made a gift of all or part of his/her body, and no directions to the contrary have been given, a surviving spouse has first priority in deciding whether or not to donate all or part of the decedent's body. *Without express written consent, same-sex partners do not have priority, nor do they have the right to donate a partner's organs upon the partner's death.*

4-508 **Rights of next of kin and donee.** After an anatomical gift has been made, the remains of the body shall be transferred to the next of kin or other authorized person. *A same-sex partner is not included within the definition of "next of kin."*

4-509 **When organ or tissue may be provided for transplant.** The Chief Medical Examiner, the Deputy Chief Medical Examiner, or an assistant medical examiner may provide an organ or tissue for transplant upon the request of the federally designated organ procurement organization or tissue bank if, inter alia, a reasonable, unsuccessful search has been made by the treating physician and the hospital where the patient is located to contact the next of kin, which includes a spouse, or no objection by the next of kin is known by the medical examiner. *Same-sex partners are not considered next of kin, therefore, if no other family member of the decedent is present, a medical examiner may provide an organ or tissue for transplant over the objections of the decedent's same-sex partner.*

4-510
4-509.1 **Corneal tissue donation.** In any case where there is a need for corneal tissue for a transplant or research, the Chief Medical Examiner, the Deputy Chief Medical Examiner, or an assistant medical examiner shall provide the cornea for transplant upon the request of the Medical Eye Bank, if no objection by the next of kin is known by the medical examiner. *Same-sex partners are not considered next of kin, therefore, if no other family member of the decedent is present, a medical examiner may provide corneal tissue over the objections of the decedent's same-sex partner.*

5-104 **Order of right of letters.** A personal representative is appointed by the court in order of priority, with the first priority given to the personal representative named in a will, the surviving spouse and children of an intestate decedent or the surviving spouse of a testate decedent, residuary beneficiaries, and other relatives who apply for administration. *Unlike a surviving spouse, a same-sex partner is not granted priority to serve as the personal representative if not named as such in the deceased partner's will.*

5-105 **Restrictions on right to letters.** Letters of right will not be granted to a person who is not a citizen of the United States, unless the person is a permanent resident who is the spouse, ancestor, descendent or sibling of the decedent. *A foreign born same-sex partner resident in the U.S. may not serve as the personal representative of a deceased partner's estate.*

5-601 **Eligibility.** An estate may be treated as a "small estate" if the surviving spouse is the sole legatee or heir of the decedent and the property has a value of $50,000 or less. For non-spouse beneficiaries, the estate shall be treated as a small estate if it has a value of $30,000 or less. *A deceased partner's estate valued at $50,000 or less is not eligible for treatment as a "small estate," where the partner is the sole beneficiary.*

5-702 **Election for modified administration.** An election for modified administration of an estate may be filed by a personal representative of an estate within three months from the date of appointment if, among other things, all trustees of each trust that is a residuary legatee are limited to the decedent's personal representative, surviving spouse, and children. *The estate of a decedent who leaves property, real or personal, to a same-sex partner will not qualify for this streamlined probate process unless the surviving partner is named as the personal representative in the deceased partner's will.*

6-401; 9-103 **Personal Representative/Special Administrator.** Bequests to non-spouses are more vulnerable to abatement than bequests to spouses: The shares of legatees abate without preference or priority as between real and personal property in the following order: (1) property not disposed of by the will; (2) residuary legatees; (3) general legacy other than (4), (5) or (6) of this subsection; (4) general legacy to dependents of testator; (5) general legacy to creditor of testator in satisfaction of a just debt; (6) general legacy to surviving spouse of testator; (7) specific and demonstrative legacies. *As same-sex partners are not considered spouses, their bequests are not protected and are some of the first bequests subject to abatement.*

11-106 **Tax elections.** Authorizes a fiduciary of an estate to exercise discretion to maximize the allowable estate tax marital deduction. *Bequests made to a same-sex partners do not qualify for the estate marital tax deduction.*

13-207 **Minors/Persons entitled to appointment as guardian.** Provides guidance regarding who may serve as a guardian for a minor or disabled person with a preference provided for his/her spouse and parents. *A same-sex partner is not granted priority and would be required to petition a court for a determination that he/she was the most appropriate person to serve as guardian.*

13-301 **Definitions.** Defines the member of a minor's family as the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption. *A same-sex partner is not considered a family member unless he or she legally adopts the child of his/her partner.*

13-307 **Transferring property to minors and their custodians.** If no custodian has been nominated under the Maryland Uniform Transfers to Minors Act, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family, or to a trust company unless the property exceeds $10,000 in value. *Same-sex partners are not considered spouses or family members and therefore are not eligible to be designated as a custodian.*

13-318 **Refusal of nomination; designation of successor; resignation; lapse of custodian; removal.** Provides that certain individuals may petition a court for removal of a custodian. *The section does not include a same-sex partner or parent who has not legally adopted the minor.*

13-503 **Powers exercisable directly by minors.** A minor who holds title to property as a tenant by the entirety with a spouse who has reached the age of majority is authorized to join with the spouse in any deed or financing statement in the same manner and effect as an adult. *Same-sex couples cannot hold property as tenants by the entirety.*

13-707 **Eligibility and priority.** Provides guidance regarding those individuals eligible to serve as guardian of a disabled person, including the disabled person's spouse, parents, an agency, the disabled person's children, or other adult persons in order of priority. *A same-sex partner receives no priority status and would be required to petition a court for a determination that he/she was the most appropriate person to serve as guardian.*

13-709 **Emergency protective services.** For medical procedures that involve a substantial risk of the life of a disabled person, a court must grant specific authorization for a guardian to give consent or approval for those procedures. However, a court may authorize such decisions without further specific authorizations if the guardian is also the disabled person's spouse, adult child, parent, adult brother or sister or adult grandchild. *Decisions made by a same-sex partner are not granted such deference.*

14-104 **Certain persons ineligible.** Provides that a judge, a clerk of the court or register of wills, may not serve as a trustee of any inter vivos or testamentary trust created by an instrument and executed in Maryland by the grantor or any trustee, administered in the State or governed by the laws of the State, unless that official is the surviving spouse of the grantor of the trust, or is related to the grantor within the third degree. *A inter vivos trust created by a same-sex partner is not similarly protected under this provision.*

14-107 **Termination without court order.** Under this provision, a trust may not be terminated if the

trust would be eligible for the marital deduction from the United States estate tax or for United States gift tax purposes under the IRS Code, unless all the beneficiaries agree that all of the trust shall be distributed to the spouse of the creator of the trust. *Same-sex partners are not considered spouses and therefore cannot qualify for the marital deduction.*

14-109 **Trustee's powers; restrictions.** Provides certain exceptions for a trustee spouse to ensure that marital deductions are not adversely impacted by the exercise of trust powers. *Same-sex partners are not eligible to receive marital deductions.*

14-401 **Definitions.** Defines a member of the beneficiary's family to include a beneficiary's spouse. *A same-sex partner is not included in the definition of a beneficiary's family.*

14-403 **Creation; trustee's responsibilities.** Permits an adult member of the beneficiary's family to petition the court to designate a successor trustee if the present trustee of a discretionary trust is unable or unwilling to serve and no successor trustee will serve. *A same-sex partner is not included in the definition of a beneficiary's family and does not have priority to act on behalf of his/her partner who is designated a beneficiary.*

14-405 **Trustee obligations and compensation.** Permits a member of the beneficiary's family to request an accounting of trust property and transactions from the trustee of a discretionary trust. *Same-sex partners are not considered family members.*

15-116 **Contracts of insurance on life of a grantor.** Prescribes the duties of loyalty and fair dealing on trustees regarding the acquisition, retention, and ownership of a contract of insurance on the life of the grantor of the trust, and on the lives of the grantor and the grantor's spouse, children, or grandchildren. *A same-sex partner is not considered a spouse, therefore the trustee's duties of loyalty and fair dealing do not extend to him or her.*

15-502.1 **Unitrust.** A trustee may not convert a trust into a unitrust if the conversion would result in the disallowance of an estate tax or gift tax marital deduction that would be otherwise allowed, in whole or in part, if the trustee did not have the power to convert. *Same-sex couples are not eligible for marital deductions, hence, trusts created for the benefit of same-sex partners are not similarly protected under this provision.*

15-502.2 **Adjustment between principal and income.** A trustee may not make an adjustment that diminishes the income interest in trust that requires all of the income to be paid at least annually to a spouse and for which an estate or gift tax marital deduction would be allowed in whole or in part. *A same-sex partner receiving income from a trust is not eligible for estate or marital tax deductions and hence is not similarly protected under this provision.*

15-503 **Determination and distribution of net income.** A fiduciary shall distribute the remaining net income in the manner described in this subtitle to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust, but excluding a beneficiary other than a surviving spouse who receives a pecuniary amount that is not in trust. *Income to a same-sex partner is not similarly protected in this manner.*

15-516 **Deferred compensation, annuities, and similar payments.** Permits a trustee to increase a payment allocation to income to obtain an estate tax marital deduction. *Same-sex partners are not entitled to the marital deduction.*

15-520 **Property not productive of income.** If a marital deduction is allowed for all or part of trust assets which consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, the spouse may require the trustee to make such property productive of income and convert the property within a reasonable time. *Same-sex partners are not entitled to the marital deduction and therefore may not avail themselves of such a strategy without significant tax consequences.*

16-101 **Definitions.** Defines "heirs" to include the surviving spouse and those persons entitled to the property of the decedent under the statutes of intestate succession. *A same-sex partner is not considered a spouse and hence excluded from the definition of "heirs."*

FAMILY LAW

1-201 **Equity court; jurisdiction.** The family court has jurisdiction over matters including adoption, alimony, annulment of marriage, divorce, custody/guardianship of a child, visitation of a child and support of a child. *Jurisdiction of the family court in regard to matters relating to marriage does not extend to same-sex couples.*

1-203 **Alimony, annulment, divorce; court's authority.** The court has the power to issue an injunction to protect any party to the action from physical harm or harassment. *Alimony, annulment and divorce are not remedies available to same-sex couples seeking redress through the court system upon the dissolution of a relationship.*

2-201 **Marriages which are valid.** Only a marriage between a man and a woman is valid. *This provision prohibits the legal recognition of relationships between same-sex couples.*

2-401 **License Requirement.** Individuals may not marry without a license. Violators will be guilty of a misdemeanor. *Marriage licenses may not be issued to same-sex couples.*

2-403 **License; forms used.** Marriage license applications refer to intended husband and intended wife. *Marriage licenses may not be issued to same-sex couples.*

2-404.1 **Premarital preparation course.** Couples completing a marriage preparation course receive a marriage license discount. *Same-sex couples may not apply for marriage licenses.*

2-405 **Issuance of license.** The clerk for the county in which a marriage ceremony is to be performed issues a marriage license and will be guilty of a misdemeanor for issuing a marriage license in violation of the statutory requirements. *A clerk for a county will be guilty of a misdemeanor for issuing a marriage license to a same-sex couple.*

2-503 **Secretary of Health and Mental Hygiene; records sent.** Copies of marriages, divorces, and annulments are filed with the Secretary of Health and Mental Hygiene. *Records relating to the relationships of same-sex couples are not maintained by the State of Maryland.*

3-102 **Action for breach of promise to marry.** Unless the individual is pregnant, an individual has no cause of action for breach of promise to marry. *This cause of action is not available to same-sex couples.*

3-104 **Void and unenforceable contracts.** Provides an exception for an individual who is a holder in due course of a negotiable instrument for payment or settlement of a claim for breach of promise to marry or alienation of affections to enforce the instrument even though such contracts are prohibited under this title. *Such contracts are void and unenforceable, however, the cause of action was never available to same-sex couples.*

4-201 **Domicile of spouse.** A spouse may be domiciled in a location different than that of his or her spouse. *Same-sex partners are not included in the definition of spouse.*

4-202 **Surviving spouse; right to recover.** A surviving spouse has standing to bring a personal action to recover damages or debt owned to a deceased spouse. *A surviving same-sex partner does not have standing to bring suit for damages or debts owed to his/her deceased partner.*

4-203 **Property rights; married women.** A married woman may hold, use and dispose of property as if she were unmarried. *Such specific protections, rights, and responsibilities related to marriage do not extend to same-sex partners.*

4-204 **Rights of married women.** A married woman has the right to deal as if unmarried. Such specific protections related to marriage do not extend to same-sex partners. *Same-sex partners must always deal as if they are unmarried.*

4-205 **Rights of husband and third parties.** Permits a husband or third party to sue his wife or a married woman, respectively, as if unmarried to recover on a contract, lease, tort or in equity. *Such specific protections related to marriage do not extend to same-sex partners.*

4-206 **Spousal transfers; effect on others.** Provides, inter alia, that whenever an interest in property is transferred from husband to wife and has been or is then transferred from the wife to a subsequent third party, the fact of the previous transfer from husband to wife will not preserve for the creditor any greater right, lien, or cause of action against the property interest than if the husband had directly transferred the property to the third person. *Jointly owned property by same-sex couples is not similarly protected from creditors.*

4-301 **Commitments of spouse; No liability.** Spouses are not liable for each other's debts prior to the marriage. A spouse is not liable for torts or contracts made separately by their spouse or without the spouse's participation. A wife's property acquired before or after marriage is not subject to seizure for the payment of her husband's debts. *Such specific protections related to marriage do not extend to same-sex partners.*

4-401 **Policy of General Assembly.** Declares the General Assembly's policy and responsibility to promote family stability, to preserve family unity and provide services, such as family counseling and other supportive services that prevent family dissolution and breakdown which require protective services or out-of-home placement. *The Maryland General Assembly's declaration does not extend to same-sex couples who are excluded from the definition of "family" and are therefore not eligible for such state sponsored services.*

4-402 **Creation of program.** Requires the establishment of services for low income families with children and families receiving public assistance. Services include counseling to resolve marital conflict or familial conflict, and to teach parenting skills or household management skills. *Such services are not available to same-sex partners as a couple or "family" under this provision.*

4-501 **Definitions.** Defines persons eligible for relief, in the form of a protective order, under domestic violence provisions which include a current or former spouse, a person related by blood or marriage, a cohabitant, a vulnerable adult or an individual who has a child in common with the respondent. *A same-sex partner not cohabitating with the respondent will not be eligible for relief unless they meet other criteria under this statute.*

4-504.1 **Interim protective orders.** Permits the state to award temporary use and possession of the family home to the person eligible for relief in an abuse situation. *A court may not grant an order awarding temporary use and possession to a non-spouse unless their name appears on the lease or deed, or unless the individual has lived with the respondent for a period of 90 days within one year of filing the petition for relief.*

4-506 **Protective orders.** The court may not grant an order to vacate and award temporary use and possession of the home to a non-spouse eligible for relief unless the name of the person eligible for relief appears on the lease or deed to the home or the person eligible for relief has resided in the home with the respondent for a period of at least 90 days within one year before the filing of the petition. *Such limitations do not affect married couples.*

4-513 **Victim of domestic violence defined.** Defines a victim of domestic violence as an individual who has received deliberate, severe, and demonstrable physical injury, or is in fear of imminent deliberate, severe, and demonstrable physical injury from a current or former spouse, or a current or former cohabitant. *A same-sex partner must meet the definition of an individual other than a spouse.*

4-601 **Definition of displaced "homemaker."** Defines a displaced homemaker as an individual who is dependent on the income of a family member and has lost that income as the result of separation, divorce, or the death or disability of that family member. *A same-sex partner is not considered family, therefore, a partner that chooses to stay at home in a same-sex relationship is not similarly protected from financial hardship under this provision.*

4-602 **Displaced homemaker services.** States the General Assembly's intent to provide displaced homemakers with counseling, training, employment placement assistance, services, and health care. *A displaced same-sex partner is not eligible for these services.*

4-606 **General operations.** To assist displaced homemakers in becoming gainfully employed, the center shall provide them with counseling, training, skills, services, and education. *Same-sex partners who have separated from their partners or whose partners have died or become disabled are not eligible for such services.*

4-607 **Services provided.** The center shall provide a job counseling program for displaced homemakers that is designed specifically for individuals who are reentering the job market after being absent from the job market for a number of years; job training programs for jobs that are available in the public and private sectors; an employment placement program; and service programs, including health services and counseling. *A displaced same-sex partner is not covered by the definition of "displaced homemaker" and is therefore ineligible for such programs.*

4-609 **Responsibilities of personnel.** The staff of the center shall work with local government agencies and private employers to develop job training programs and work with federal, state, and local government agencies in the area of the center to assist displaced homemakers in securing permanent employment. *A displaced same-sex partner is not covered by the definition of "displaced homemaker" and is therefore ineligible for such programs.*

5-202 **Child of invalid marriage.** When granting a divorce or annulment, the court in the decree shall declare each child of the marriage to be a legitimate child of the parties to the marriage. *A court will not declare a child born to or adopted by only one member of a same-sex couple to be the legitimate child of both parties if the relationship ends.*

5-203 **Authority of parents; natural guardianship.** Parents are jointly and severally responsible for a child's support, care, nurture, welfare, and education. Each parent has the same powers and duties in relation to the child. *Unless granted a second-parent adoption, only one parent in a same-sex couple will have a legal obligation to support the children of that relationship.*

5-205 **Parent's right to child's services.** A parent has rights to services and earnings of a minor child if that parent has custody or the other parent is deceased or has abandoned the child. *A same-sex parent who has not formally adopted his/her partner's child does not have a right to the services and earnings of a minor child in their family.*

5-206 **Wrongful injury; suit by parent.** One parent, to the exclusion of the other, may sue for wrongful injury or seduction of a child if the parent has been awarded custody or the other parent has died or abandoned the child. *A same-sex parent who has not formally adopted does not have standing to bring a wrongful injury suit on behalf of his/her child.*

5-308 ****Legal effect of adoption.** An adoptee is entitled to all the rights and privileges of and is subject to all of the obligations of a child born to the petitioner in wedlock. *A same-sex couple is not entitled to the legal presumption that children born to the relationship are the legal responsibility of both parents.*

5-310 ****Criteria for natural father.** A man will be considered the natural father of a child if he was married to the individual's natural mother at the time of conception or was married to the individual's natural mother at the time of the individual's birth. *A same-sex partner is not legally presumed to be the natural parent of a child conceived or born to his/her partner during their relationship.*

5-312; 5-313 ****Consent unnecessary; independent adoption & guardianship.** Under certain circumstances a court may grant an adoption to a stepparent, relative, or other individual who has exercised physical care, or custody, control of the child without the consent of the child's natural parent. *A non-adoptive same-sex parent does not have standing to seek custody.*

** Family Law, Title 5, Subtitle 3 – Adoption and Guardianship with the Right to Consent to Adoption has been substantially amended. The current code sections highlighted above from Subtitle 3 are effective until January 1, 2006.

5-315 **Joint petition by married individuals.** If a petitioner for adoption is married, the petitioner's spouse must join in the petition unless the petitioner's spouse is a natural parent of the individual to be adopted and has consented to the adoption or is separated from the petitioner under circumstances that give the petitioner grounds for divorce or annulment. *A same-sex partner will not qualify as either a stepparent or relative eligible to adopt the child unless they meet the care, custody, and control requirements. As a same-sex partner is not required to join in a petition for adoption of a child by a partner, he or she may have no legal relationship to the child.*

5-321 **Adoption by relative or spouse.** Permits the independent adoption by a spouse of the natural parent of the adoptee without the requirement of advice of counsel, adoption counseling, written consent, the assessment of attorney's fees and costs, an accounting report, or a medical history of the natural parents. *Same-sex partners seeking adoptions generally do not benefit from the waiver of such requirements.*

5-322 **Notice requirement.** When a court determines that a child is in need of assistance, it shall make efforts to locate and notify the child's natural parents or immediate family members. *A non-adoptive, non-biological same-sex partner is not considered a legal parent or a family member and is not entitled to notice by the court.*

5-323 **Counsel.** The court will appoint counsel for a natural parent who has a disability that renders him or her incapable of consenting and effectively participating in a termination of parental rights hearing. *A non-adoptive, non-biological same-sex partner is not considered a legal parent and is therefore not eligible for the appointment of counsel by a court.*

5-329.1 **Availability of child's health records.** Access to medical or dental records of an adopted minor may not be denied to the minor's parent because the parent is an adoptive parent. *A same-sex parent who has not formally adopted has no access to the mental or dental records of their child.*

5-4C-01 **Definitions.** Defines a natural father to include a man who was married to the adoptee's natural mother at the time of conception or was married to the adoptee's natural mother at the time of the adoptee's birth, or who acknowledges himself, orally or in writing, to be the father of the adoptee. *A same-sex parent may not similarly acknowledge parentage during a relationship or by declaration, orally or in writing.*

5-501 **Definitions.** Defines "Kinship care" as continuous 24-hour care and supportive services provided for a minor child placed by a child placement agency in the home of a relative related by blood or marriage within the fifth degree of consanguinity or affinity under the civil law rule. *A non-adoptive, non-biological same-sex partner is not considered family, and therefore is not eligible to receive placement of a child separated from his/her biological/adoptive parent.*

5-507 **Child placement agency; license requirement.** Provides an exception to the license requirement for the placement of a child with an individual related to the child by blood or marriage. *Such an exception does not exist if the child is placed with a same-sex partner not related to the child by blood and unable to establish a relationship via marriage.*

5-534 **Kinship care program.** In selecting a placement that is in the best interests of a child in need of out-of-home placement, the local department shall, as a first priority, attempt to place the child with a kinship parent. *A same-sex partner will not qualify as a kinship parent for purposes of priority placement.*

5-571 **General Assembly's findings; objective.** The purpose of the subtitle is not to limit a parent in getting the help of responsible relatives or friends in giving child care for a child, but is to aid each parent and protect each child from the risk present if the child is cared for by an individual other than a relative or friend. *A non-adoptive, non-biological same-sex partner is not considered a legal parent or a family member.*

5-609 **Compact inapplicable.** The interstate compact shall not apply to the sending or bringing of a child into a receiving state by the child's parent, step-par-

ent, grandparent, adult brother or sister, adult uncle or aunt, or guardian and leaving the child with any such relative or non-agency guardian in the receiving state. *Such an exception will not apply to the bringing of a child into the receiving state by a same-sex parent who has not formally adopted his/her non-biological child.*

5-701 **Definitions.** Defines a "Family member" to mean a relative related to a child by blood, adoption, or marriage. *A non-adoptive, non-biological same-sex partner is not considered a legal parent or a family member.*

5-1002 **Legislative objective.** The state has a duty to improve the deprived social and economic status of children born out of wedlock and to secure for them, as nearly as possible, the same rights to support, care, and education as children born in wedlock. *A child born to a same-sex couple is legally classified as being born out of wedlock even though born to parents who plan for and conceived the child within the bonds of a committed relationship.*

5-1027 **Same burden of proof; presumptions; testimony.** Establishes a rebuttable presumption that a child is the legitimate child of the man to whom the child's mother was married at the time of conception. *This legal presumption is not afforded to same-sex couples who are not permitted to marry under state law.*

5-1032 **Order declaring paternity; child support.** Upon order of the court, a father's financial obligation to support a child shall end when the child becomes an adult, marries, or becomes self-supporting. *A same-sex parent does not have an obligation to support a child born in the course of his/her relationship absent a formal adoption proceeding.*

6-101 **Definitions.** Defines "single parent services" which include: counseling for one or both parents, making parents aware of the need for prenatal care, helping in decisions about adoption, helping parents prepare for employment and hiring, and examining any aspect of maternal health, child health, and family planning. *A same-sex couple may not receive the same parenting services provided to married heterosexual couples.*

7-102 **Grant of limited divorce.** A limited divorce will be granted for reasons including cruelty of treatment, excessively vicious conduct, desertion, and voluntary separation. *Limited divorces are not available to same-sex couples. If same-sex partners separate, a partner who is financially dependent on the other partner has no recourse in court to obtain temporary support.*

7-103 **Grant of absolute divorce.** Spouses may obtain an absolute divorce for adultery, voluntary separation, conviction of a felony or misdemeanor, two-year separation, insanity, cruelty of treatment or excessively vicious conduct. *Same-sex couples do not have the protection of divorce laws when ending a relationship.*

7-103.1 **Orders of protection.** The existence of a protective order is inadmissible in an action for divorce. *Legal protections applicable to divorce cases are not available to same-sex couples.*

7-103.2 **Divorce; child support, custody, or visitation issues.** Prior to a decree of divorce, the court may require all parties to participate in an educational seminar that is designed to educate parents about the effects of divorce, and to minimize the disruption of a divorce on the lives of children. *Same-sex couples ending their relationships do not have access to such services designed to help parties cope with the disruption to their lives.*

7-104 **Attempt or rejection of reconciliation.** Offers or refusals of reconciliation are not a defense to, a bar to, or a ground for divorce. *Same-sex couples are not entitled to the protections of divorce laws when ending a relationship.*

7-105 **Changed to former name.** In granting a decree of absolute divorce, the court may change the name of a party to either the name given the party at birth or any other former name the party wishes to use. *A same-sex partner who has formally adopted his/her partner's name must petition the court for another name change if they seek to use a former name after the dissolution of a relationship.*

7-107 **Award of expenses.** In a divorce action, a judge may award reasonable and necessary expenses

including suit money, counsel fees, and costs. *Same-sex couples may not utilize the laws applicable to divorce for the dissolution of their relationship, therefore an award of expenses is unavailable.*

8-101 **Enforceability of agreements.** A husband and wife may make a valid and enforceable deed, settlement, or agreement that relates to alimony, support, property rights, or personal rights. *Same-sex couples may create such agreements, however these agreements will be interpreted according to contract law, not family law.*

8-102 **Divorce not prohibited by agreement.** A deed or agreement between spouses is not a bar to an action for absolute or limited divorce, regardless of whether the deed or agreement was executed. *Divorce is not available to same-sex couples.*

8-103 **Alteration of agreement by court.** In a divorce proceeding, the court may modify any agreement between spouses regarding children. It may also modify agreements regarding spousal support and alimony unless the agreements specifically states otherwise. *Legal protections regarding children, spousal support, and alimony are not available to same-sex couples.*

8-104 **Verification of testimony; separation agreement.** In a suit for absolute divorce on the grounds of voluntary separation, a separation agreement is full corroboration of the plaintiff's testimony that the separation was voluntary, if the agreement states that the spouses agreed to separate and the agreement was executed under oath before the application for divorce was filed. *A court cannot look to divorce laws in order to enforce a same-sex couple's separation agreement.*

8-105 **Enforcement authority of court; alteration.** The court may enforce by power of contempt the provisions of a deed, agreement, or settlement that are merged into a divorce decree. The court may also modify any provision of a deed, agreement, or settlement. *The court cannot look to divorce laws in order to enforce a same-sex couple's property settlement.*

8-201 **Definitions.** Defines "marital property" as any property acquired by one or both parties during the marriage and any real property held by the parties as tenants by the entirety, excluding property obtained before the marriage, acquired by inheritance or gift, excluded by agreement, or directly traceable to any of the forgoing; defines "family home" as the property used as the principal residence of the parties when they lived together: "family use personal property" as tangible property acquired during the marriage used primarily for family purposes. *Same-sex couples cannot marry and, thus, their common residence is not included in the definition of a family home, nor is their shared property within the definition of marital property or family use personal property.*

8-202 **Determination of property ownership.** When the court grants a divorce or annulment it may resolve any dispute between the parties with respect to the ownership of real or personal property. *Same-sex couples cannot obtain a divorce or annulment and, thus, property disputes may not be resolved by a court under this provision.*

8-203 **Determination of marital property.** If there is a dispute between the parties, the court will determine what property is marital property. *Property jointly acquired by a same-sex couple is not marital property.*

8-204 **Valuation of marital property.** The court determines the value of all marital property except retirement benefits that are distributed on an "if, as, and when" basis. *Property jointly acquired by a same-sex couple is not marital property.*

8-205 **Granting of monetary award.** The court may transfer certain personal property, or grant a monetary award, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded. *Property jointly acquired by a same-sex couple is not marital property and, thus, transfers of personal property or monetary awards are not available under this provision to partners ending their relationship.*

8-206 **State policy regarding family home.** The court shall exercise its powers to enable any child of the family to continue to live in the environment and community that are familiar to the child. It shall

also provide for the continued occupancy of the family home and possession and use of family use personal property by a party with custody of a child who has a need to live in the that home. *A child of a same-sex couple may not receive the protection of the family home provision if the parent who individually owns the primary residence is not able to adopt.*

8-207 **Decision as to family home.** In a proceeding for an annulment or divorce, the court may determine which property is the family home and family use personal property. *A same-sex couple's residence or property is not a family home or family use personal property subject to this provision.*

8-208 **Award of family home.** When a court grants an annulment or divorce, the court may decide that one of the parties shall have the sole possession and use of the family home or family use property or divide the possession and use of that property between the parties, regardless of how it is titled, owned, or leased. *A same-sex couple's residence or property is not a family home or family use personal property subject to the protections of this provision.*

8-209 **Family home; order; court's authority.** In a temporary or final order or decree, each provision that concerns the family home or family use personal property is subject, as the circumstances may require, to the terms and conditions that the court sets, the time limits that the court sets and modification or dissolution by the court. *A same-sex couple's residence or property is not a family home or family use personal property subject to the protections of this provision.*

8-210 **Family home; expiration of family order.** A provision that concerns the family home or family use personal property shall terminate within three years or when the party with possession or use of the property remarries. *A same-sex couple's residence or property is not a family home or family use personal property subject to the protections of this provision.*

8-211 **Family home; order not admissible.** An order or decree regarding the disposition of a family home may not be considered as evidence of constructive desertion. *A same-sex couple's residence or property is not a family home or family use personal property subject to the protections of this provision.*

8-212 **Court's authority after foreign divorce.** If an annulment or a divorce has been granted by a court in a foreign jurisdiction, a Maryland court may exercise the powers under this subtitle if one of the parties was domiciled in Maryland when the foreign proceeding was commenced and the court in the other jurisdiction lacked or did not exercise personal jurisdiction over the party domiciled in Maryland or jurisdiction over the property at issue. *Same-sex couples cannot marry and, thus, a court will not exercise jurisdiction to dissolve a same-sex relationship as a family matter.*

8-213 **Enforcement of orders; appeal.** An order, award or decree issued under this subtitle is enforceable under the Maryland Rules. Any decree of annulment or divorce in which the court reserves any power under this subtitle is final and subject to appeal in all other respects. *Same-sex couples cannot marry; thus, awards or decrees under this subtitle are not available.*

8-214 **Award of expenses.** A spouse may be awarded reasonable and necessary expenses including suit money, counsel fees, and costs. *Same-sex couples cannot obtain a divorce or annulment thus awards under this provision are not available.*

9-101 **Rejection of custody; abuse likely.** In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether the abuse or neglect is likely to occur if custody or visitation rights are granted to the party. *In such proceeding the non-adoptive same-sex parent is at a significant disadvantage and will not receive equal preference regarding issues of custody and visitation.*

9-101.1 **Evidence of abuse considered.** In a custody or visitation proceeding, the court shall consider several factors including evidence of abuse by a party against the party's spouse. *A same-sex partner is not considered a spouse for these purposes.*

9-102 **Application for visitation by grandparents.** A court may consider a petition for reasonable visitation of a grandchild by a grandparent and grant visitation rights if it is in the best interest of the child. *No such provision exists for the parents of a non-adoptive same-sex parent.*

9-103 **Change of custody; child's application.** A child who is 16 years old or older and who is subject to a custody order or decree may file a petition to change custody. *A same-sex partner who has not adopted the biological child of his or her partner will have no legal relationship to the child, making it more difficult to obtain a custody award.*

9-104 **Availability of records; non-custodial parent.** Unless otherwise ordered by a court, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child. *Only a legal or adoptive parent will have access to medical records, regardless of which partner has physical custody of a child.*

9-105 **Visitation or custody; denial or interference; court actions and remedies.** In any custody or visitation proceeding, if the court determines that a party to a custody or visitation order has unjustifiably denied or interfered with visitation granted by a custody or visitation order, the court may order that the visitation be rescheduled, modify the custody or visitation order and assess costs or counsel fees against the party who has unjustifiably denied or interfered with visitation rights. *A non-adoptive same-sex parent in has no right to custody or visitation of a child should the couple separate.*

9-106 **Notice of intent to relocate.** In any custody or visitation proceeding, the court may include as a condition of a custody or visitation order a requirement that either party provide advance written notice of at least 45 days to the court, the other party, or both, of the intent to relocate the permanent residence of the party or the child either within or outside of the State. *A non-adoptive same-sex parent has no right to receive notice of relocation of his/her child.*

9-301 **Definitions.** "Relative" includes a parent, grandparent, brother, sister, aunt, and uncle. *A non-adoptive same-sex parent is not included in the definition of a relative.*

9-302 **Custody and visitation; jurisdiction.** An equity court has jurisdiction over a child removed from the state if the parents are (i) separated or divorced and Maryland was the parents' marital domicile or the domicile in which the marriage contract was last performed and (ii) one of the parents resided and continues to reside in the state. *This provision may not grant a court jurisdiction over a child of a same-sex couple as the couple had no marital domicile.*

9-303 **Legal custodian; effect of conflict.** In most circumstances, a Maryland custody order prevails over a custody order of another state. *A non-adoptive same-sex parent does not have standing to seek a Maryland custody order.*

9-304; 9-305 **Acts barred in and outside of Maryland.** A relative who knows that another person is the lawful custodian is prohibited from certain acts including abducting, taking, or carrying away the child from the lawful custodian. The non-adoptive same-sex parent of a child may not be treated as a lawful custodian by other relatives.

9-306 **Clear and present danger; petition.** An individual who violates §§ 9-304 or 305 may file a petition stating that the child was removed because of a clear and present danger to the child. *A non-adoptive same-sex parent is not a relative of the child and, thus, is not covered under §§ 9-304 and 305, nor can he/she seek relief under the provisions in the event of danger to the child.*

9-307 **Penalties for violations.** A person who removes a child from his or her lawful custodian in violation of §§ 9-304 and 305 is guilty of a misdemeanor. *A non-adoptive same-sex parent is not a relative of the child and is therefore not covered under §§ 9-304 and 305.*

10-103 **Use of any civil or criminal remedy to enforce spousal support.** The State's Attorney, the Child Support Enforcement Administration of the

Department of Human Resources, or a local support enforcement office is not limited in its authority to use any civil or criminal remedy to enforce a spousal support order. *Spousal support is not available for a partner in a same-sex couple.*

10-121 **Withholding notice.** A court may impose an earnings withholding notice pursuant to a spousal support order. *Spousal support is not available for a partner in a same-sex couple.*

10-134 **Withholding termination.** Withholding will terminate when support payments are brought up to date. *Spousal support is not available for a partner in a same-sex couple.*

10-201 **Failure to support spouse; punishment.** A spouse may not willfully fail to provide support for the other spouse without just cause. *Spousal support is not available for a partner in a same-sex couple.*

10-20 **Spousal support orders.** A court may order a spouse to pay spousal support. *Spousal support is not available for a partner in a same-sex couple.*

10-207 **Inmate earnings and spousal support.** A court may order the Commissioner of Corrections to deduct an amount of an inmate's earnings in order to pay the inmate's spousal support order. *Spousal support is not available for a partner in a same-sex couple.*

10-301 **Definitions.** Defines "duty of support" as an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse. *Spousal support is not available for a partner in a same-sex couple.*

10-309 **Enforcement and modification of support order by tribunal having continuing jurisdiction.** A tribunal of this State may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state. *Spousal support is not available for a partner in a same-sex couple.*

10-313 **Proceedings under this subtitle regarding support orders.** This title applies to modification of an order for child support or spousal support. *A non-adoptive same-sex parent does not have an obligation to pay child support. Spousal support is also not available for a partner in a same-sex couple.*

10-328 **Rules of evidence and procedure regarding support orders.** Spousal privilege against the disclosure of communications between husband and wife does not apply to proceedings for support under this subtitle. *Spousal privilege does not apply to same-sex couples.*

10-332 **Complaint to establish support order.** A court can issue a spousal or child support order for an individual or support enforcement agency from another state. *A non-adoptive same-sex parent does not have child support obligations. Spousal support is not available for a partner in a same-sex couple.*

10-338 **Contest of support order.** The obligor of a spousal or child support order may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in Maryland. *A non-adoptive same-sex parent is not subject to child support or spousal support obligations.*

11-101 **Alimony award.** Alimony may be awarded upon the filing of a complaint for alimony by either party as part of a decree that grants an annulment, limited divorce or absolute divorce. *Alimony is not available to a partner in a same-sex couple.*

11-102 **Award of alimony pendente lite.** In most cases, a court may award alimony pendente lite to either spouse. *Alimony is not available to a partner in a same-sex couple.*

11-103 **Ground for divorce not bar.** The existence of a ground for divorce against the party seeking alimony is not an automatic bar to the court awarding alimony to that party. *Alimony is not available to a partner in a same-sex couple.*

11-104 **Alimony award against nonresident.** The court may award alimony against a nonresident when the bill of complaint requests it, the defendant owns property in the state, and the court lacks or is unable to exercise personal jurisdiction over the nonresident spouse. *Alimony is not available to a partner in a same-sex couple.*

11-105 **Alimony award after foreign decree.** Under certain circumstances, a court may award alimony to either party when an annulment or divorce has been granted in another jurisdiction. *Alimony is not available to a partner in a same-sex couple.*

11-106 **Amount and duration of alimony.** A court considers many factors in awarding alimony, including the length of the marriage and circumstances that contributed to the estrangement of the parties. *Alimony is not available to a partner in a same-sex couple.*

11-107 **Extension or modification of alimony.** A court can extend the length of alimony if ending it would lead to a harsh and inequitable result. *Alimony is not available to a partner in a same-sex couple.*

11-108 **When alimony terminates.** Unless the parties agree otherwise, alimony terminates on the death of either party, on the marriage of the recipient, or if the court determines that termination is necessary to avoid a harsh and inequitable result. *Alimony is not available to a partner in a same-sex couple.*

11-110 **Reasonable expenses.** A court can order a party to pay reasonable expenses, including suit money, counsel fees, and costs, to a party for prosecuting or defending an action for alimony. *Alimony is not available to a partner in a same-sex couple.*

11-111 **Health insurance expenses allocated.** A court can allocate between the parties any additional costs of providing hospital, medical or surgical benefits under a group contract or require continuation or reinstatement of such benefits. *Divorce law protections authorizing a court to allocate health insurance expenses are not available to same-sex couples.*

11-112 **Authority of court in cases of insanity.** A court can order one spouse to pay alimony, a lump sum, or give bond to the State conditioned on the payment for the care and support of the insane party for the rest of his or her life and the insane party's reasonable funeral expenses. *Divorce law protections authorizing a court to order alimony or other payments in the case of insanity are not available to same-sex couples.*

12-101 **Award of child support and payment of mother's medical expenses.** A court can award child support, both pendente lite and for a fixed period. A court also can order a party to pay a portion or all of the mother's medical and hospital expenses for pregnancy, confinement, and recovery and medical support for the child, including neonatal expenses. *Divorce law protections authorizing a court to allocate child support and other expenses are not available to same-sex couples.*

12-102 **Inclusion of child on health insurance coverage.** A court can order a parent to include a child in their health insurance coverage as part of any support order. *Divorce law protections authorizing a court to order health insurance coverage are not available to same-sex couples.*

12-103 **Award of costs and counsel fees.** A court can order a party to pay costs and counsel fees in any application, recovery, or enforcement of any custody, support, or visitation proceeding. *Divorce law protections authorizing a court to determine custody, support, or visitation are not available to same-sex couples.*

FINANCIAL INSTITUTIONS

6-302 Credit union membership via spouse. Permits the spouse of an individual who is eligible for membership in a credit union to become a member. Same-sex partners are not considered spouses.

8-307 **Savings and Loan Associations' Directors' spouses and gifts.** With regards to Savings and Loan Associations, the spouse of the Division Director or any Division staff is prohibited from receiving gifts from or becoming indebted to any association or related entity that is subject to the jurisdiction of the Division Director. *Same-sex partners are not considered spouses, therefore, the statute is not applicable to same-sex couples.*

11-301 **Extension of credit.** Exempts the granting of a loan or credit between relatives from the licensing requirements for the provision of installment loans. *Same-sex partners are not considered relatives and therefore may be in violation of the statute if one partner habitually grants installment loans to the other.*

11-405 **Sales Finance applications.** Allows the Commissioner of Financial Regulation in the Department of Labor, Licensing, and Regulation to deny the application for a license to deal as a sales finance company if the spouse of the applicant has, inter alia, had a license revoked. *Same-sex partners are not considered spouses, therefore, the status of one partner under the Department of Labor regulations will not adversely affect the other.*

11-502 **Mortgage loans.** Exempts from the licensing requirement for mortgage lenders, a person making a mortgage loan to a borrower who is that person's spouse or a child's spouse. *Same-sex partners are not considered spouses, therefore, the parent of one partner may not enter into a mortgage agreement solely with his child's same-sex partner.*

HEALTH GENERAL

4-211 **New certificates of birth.** A new birth certificate is automatically made, without court order, upon proof that the previously unwed parents of a child born in Maryland have now married. *Same-sex couples are not eligible to be married, and cannot obtain a new birth certificate for their child, without a second-parent adoption.*

4-215 **Burial permit.** The Department of Health and Mental Hygiene may not deny inspection of a burial permit record to the spouse of the deceased whose human remains have been disinterred or reinterred. *A same-sex partner is not entitled to review the permit.*

4-217 **Copies of certificates.** When issuing a death certificate to a surviving spouse, notice must be given of eligibility of continued health insurance benefits. *Continued health insurance benefits are not guaranteed for same-sex surviving partners.*

5-501 **Consent for postmortem examinations.** Provides a list of those persons, in order of priority, entitled to make postmortem decisions for the deceased, including a parent, spouse, etc. *Same-sex partners are not included on this list of those authorized by law to grant consent for postmortem examinations.*

5-508 **Definitions.** "Practitioner" is defined as a person who is licensed by the State as a funeral director, including a surviving spouse licensee to practice mortuary science. *A same-sex partner is not eligible to operate under a surviving spouse license.*

5-509 **Disposition of body other than by will.** Provides a list of those persons, in order of priority, who may decide how to dispose of a decedent's body in the absence of a will. *Same-sex partners are not included among the list of those authorized by law to make decisions regarding the final disposition of a partner's body.*

5-602 **Health Care Agent restrictions.** Prohibits a spouse of an owner, operator, or employee of a health care facility from which the declarant of an advance directive is receiving health care from serving as a health care agent. *Same-sex partners are not considered spouses, hence they are not covered under this provision.*

5-605 **Surrogate decision making.** Provides a list of those persons, in order of priority, who may make health care decisions in the absence of a health care agent appointment. *Same-sex partners are not included among the list of those authorized by law to make health care decisions for one another. As a result they must execute health care agent appointments, such as Advance Directives or Medical Powers of Attorney in order to secure their ability to make medical decisions for each other.*

7-404 **Evaluations.** Requires the "family unit" be evaluated for a determination of eligibility for state supported services. *Same-sex couples are not considered a family unit.*

7-1003 **Shared room privileges for spouses.** Provides that spouses who are both residents of a licensed residential facility for developmental disabilities shall be given the opportunity to share a room if it is feasible to do so and not medically contraindicated. Also, that each married individual in a licensed residential facility for developmental disabilities shall have privacy during a visit by the spouse. *Same-sex partners are not considered spouses and are therefore not eligible to receive these preferences.*

10-616 **Certificates.** Prohibits a physician or psychologist from signing an involuntary hospital admission for mental disorders if the practitioner is related to the individual by blood or marriage. *A same-sex partner does not receive similar protection under this provision.*

10-807 **Transfers between facilities.** Permits the director to transfer an individual between public and private facilities subsequent to notifying the individual's next-of-kin and prohibits the transporting of the individual/patient unless he/she is accompanied by a spouse, parent, or adult sibling or child. *A same-sex partner is not entitled to a notice of transfer nor eligible to accompany his/her same-sex partner who is a patient.*

13-104 **Restrictions for voting members of the State Advisory Council on Hereditary and Congenital Disorders.** Prohibits a voting member of the State Advisory Council on Hereditary and Congenital Disorders appointed by the Governor from being a spouse of a health professional or a spouse of an individual involved in the administration or ownership of any health care institution or health insurance organization. *Same-sex partners are not considered spouses and therefore are not subject to this provision.*

15-122 **Responsibility of spouse under program.** A spouse is responsible for paying the health care costs of the Maryland Medical Assistance Program to the extent of his or her ability. *A same-sex partner does not have a responsibility to cover the costs of his/her partner's healthcare expenses.*

15-201 **Definitions – Maryland AIDS Insurance Assistance Program.** Defines "family" to include a resident spouse and children under the age of 18 years, or the parents of child under the age of 18 years participating in the program. *Same-sex partners are not covered by the definition of "family" in this subtitle.*

16-101 **Definitions.** Defines a "responsible relative" of a recipient of services to mean a spouse, parent, or child. *A same-sex partner is not included within this definition.*

16-203 **Liability for payments.** Prohibits the imposition of liability for health care services on a spouse or child if they have been abandoned by the recipient of services and prohibits the imposition of liability on a responsible relative, if that relative has been the victim of sexual/physical abuse. *A same-sex partner is not liable for payment of his/her partner's health care services.*

16-204 **No limitation on time for misrepresented assets by spouse.** States that if a responsible relative, which includes the spouse of a recipient of services, who is liable for the cost of care of the recipient of services has misrepresented assets or submitted fraudulent information and, by doing so, has avoided any part of the claim for the cost of care, there is no limitation on the time in which the claim may be brought against the estate. *Same-sex partners are not considered spouses and cannot be held liable for the healthcare liability of his/her partner.*

16-404 **Liability of responsible relatives.** The liability of responsible relatives, which includes the spouse of a recipient of services, for the cost of care of a mentally retarded individual in a residential, state facility ceases when the cost of care of the mentally retarded individual has been charged for a period or periods that total 16 years. *A same-sex partner is not included within the definition of "responsible relative" and cannot assume liability for the healthcare costs of his/her partner.*

19-310 **Organ or tissue donation.** Provides a list in order of priority of those individuals that may serve as a decedent's representative regarding discussions of organ and tissue donation, including a spouse, an adult child, a parent, an adult sibling, a guardian, or a friend or other relative accompanied by an affidavit asserting their relationship to the decedent. *A same-sex partner possessing an advance medical directive providing them with authority over the disposition of his/her partner's body would qualify under the last category above, however, without this additional legal instrument, a same-sex partner may not serve as his/her decedent partner's representative.*

19-344 **Admissions.** Where feasible, spouses who are in the hospital together should be able to share a room

together. *Same-sex couples are not entitled to this preference when both are hospitalized.*

19-370 **Definitions.** Classifies those persons that may petition the Patient Care Advisory Committee on behalf of the patient and are responsible for making decision with medical consequences for patient, including the patient, a physician, a family member, or an individual with a power of attorney to make decision with medical consequence for a patient. *A same-sex partner possessing a medical power of attorney to act on behalf of his/her partner may petition the Committee, however, without this additional legal instrument, a same-sex partner may not act on behalf of his/her partner with regard to medical decisions.*

20-102 **Minors; treatment for health-related problems.** A minor has the same capacity as an adult to consent to medical treatment if the minor is married, is the parent of a child, or if the minor's health would be jeopardized by the delay in obtaining consent from another. *A minor in a same-sex partnership will not be deemed to have the same capacity as an adult.*

20-104 **Access to medical information.** Physicians or other medical staff may give a parent, the guardian or custodian of a minor, or the spouse of the parent information concerning the treatment of a minor without the minor's consent or over the minor's express objections. *A same-sex partner is not considered a spouse and therefore is not entitled to receive information concerning the treatment of his/her partner's minor child.*

20-105 **Definitions.** For the purposes of informal kinship care, a "relative" is defined as an adult related to the child by blood or marriage within the fifth degree of consanguinity; such a relative may consent to health care on behalf of the minor. *Same-sex partners do not qualify as a relative for purposes of informal kinship care.*

HEALTH OCCUPATIONS

1-301; 1-302 **Health care referrals and business interest.** Governs the structure of compensation arrangement that may be provided to a health care practitioner and an immediate family member and defines "immediate family members" to include, a spouse, child, a child's spouse, a spouse's parents, a sibling, or the sibling's spouse. *Same-sex partners are not considered spouses, hence, this statute is inapplicable to same-sex partners of health care practitioners, their parents and siblings.*

1-301; 1-303 **Health care referrals and business interest.** Requires a health care practitioner making a lawful referral to disclose the existence of the beneficial interest of a spouse in the health care entity to which the referral is being made. *Same-sex partners who are not considered spouses are not required to comply with this disclosure requirement.*

7-101; 7-308 **Continuation of mortician or funeral director license.** Requires the Maryland State Board of Morticians to issue a Surviving Spouse License to an applicant if the applicant is the surviving spouse of a licensed mortician or funeral director whose license was in good standing at the time of death and whose spouse was operating and wholly or partially owned the mortuary science business at the time of death. *Same-sex partners are not considered spouses and cannot receive such a license in the event of their partner's death.*

7-308.1 **Continued operation of a mortuary science business.** Permits the personal representative of the estate of a licensed mortician or funeral director, who wishes to continue operation of the mortuary science business to obtain an executor's license that is valid for six months. Upon expiration of the executor's license, the personal representative must be independently licensed or the holder of a surviving spouse license or corporation license. *A same-sex partner serving as the personal representative of his/her deceased partner's estate may not continue to operate the mortuary science business under a surviving spouse's license.*

7-405 **Regulation of pre-needs contracts.** Permits the holder of a surviving spouse's license to provide services or merchandise under a pre-needs contract. *Same-sex partners are not eligible for a surviving spouse's license.*

7-407 **Surviving spouse health insurance benefits.** Requires funeral directors to provide the surviving

spouse of the deceased, or the authorized representative, a notice which advises that certain individuals may be entitled to continuation of group health insurance benefits. *Surviving same-sex partners are not entitled to a continuation of benefits under applicable law, therefore funeral directors are not required to provide such notice to the surviving same-sex partner.*

7-410 **Disposition of body.** Provides for priority of those persons able to make decisions as to the final disposition of decedent's body. *Without prior written authority, same-sex partners have no priority to make decisions as to disposition of their deceased partner's body.*

INSURANCE

10-120 **Temporary license.** Permits the Commissioner to issue a temporary license to act as an insurance producer to the qualified surviving spouse or personal representative of a deceased or mentally or physically disabled insurance producer. *Surviving same-sex partners would not be eligible for such a temporary license under the provisions relevant to a qualified spouse.*

12-202 **Application or consent required for life or health insurance contracts.** A spouse may put into effect an insurance policy on the other spouse. *A same-sex partner may not similarly take out an insurance policy on the other partner without that partner's written consent.*

13-115 **Insurance of husband and wife.** A creditor may not require that both husband and wife be insured, unless expressly authorized. Similar protections are not provided to same-sex couples. *As a result they may face greater difficulty obtaining credit.*

14-115 **Restrictions for the Board of Directors of Nonprofit Health Services.** Prohibits a member of the board of directors of a nonprofit health services plan from being another member's spouse, child's spouse, spouse's parent, or sibling's spouse. *Same-sex partners are not considered spouses.*

15-201 **Form of policy.** Requires health insurance policy issued in the state to cover the policy holder's spouse, dependent children, any other individual dependent on the policy holder or any other individual related and resident in the household of the policy holder. *Same-sex partners are not considered spouses, nor are they considered related to the policy holder. Moreover, same-sex partners are rarely permitted to make a showing of economic dependence.*

15-215 **Optional Indemnity Provision.** Permits insurance policies to contain certain indemnity provisions that provide for payment to the insured's estate or beneficiary under 18 years of age; otherwise such funds shall be paid to any relative by blood or marriage to the insured. *Same-sex partners are unable to marry and therefore are not eligible to receive indemnity payments under such a contingency provision.*

15-407 **Continuation of group coverage after death.** Requires a group contract insurance provider to provide continuation of coverage for a qualified secondary beneficiary, which includes the spouse of the insured, after the death of the insured. *Same-sex partners are not covered under this provision.*

15-408 **Continuation of group coverage after divorce.** Requires a group contract insurance provider to provide continuation coverage for a qualified secondary beneficiary, which includes the spouse of the insured, after the divorce of the insured and the beneficiary spouse. *Same-sex partners are not covered under this provision.*

15-409 **Continuation coverage for involuntarily terminated employees.** Requires a group contract insurance provider to provide continuation coverage for the spouse of the insured, if the group contract previously provided coverage for the insured's spouse before the insured was involuntarily terminated. *Same-sex partners are not covered.*

15-411 **Open enrollment of involuntarily terminated spouse losing coverage.** Requires continuous open enrollment under group health insurance contracts for employee's spouse or children who lose coverage under another policy due to involuntary termination. *Same-sex partners do not have the right to be covered by their partner's health insurance benefits.*

15-414 **Conversion rights of covered spouse ceasing to be dependent.** A group contract must provide the same conversion rights to a dependent spouses that cease to be qualified members of the family due to divorce or death of the insured employee. *Same-sex partners do not have the right to be covered by their partner's health insurance and therefore are not entitled to similar conversion rights under this provision.*

15-810 **Benefits for in vitro fertilization (IVF).** Prohibits excluding benefits for all outpatient expenses arising out of IVF procedures. *Such benefits are defined in terms of families, which do not include same-sex couples, same-sex couples attempting to have children together may be required to pay the full cost of IVF procedures.*

15-1206 **Group spousal coverage.** Provides that policy carriers requiring participation minimums for small employers may not consider as eligible employees who have group spousal coverage under another public or private plan. *Coverage of same-sex partners is not covered under the above provision.*

15-1208 **Late enrollee coverage.** Excludes a late enrollee in a health services plan from coverage for pre-existing conditions if a court has ordered coverage to be provided for a spouse or a request for enrollment is made within 30 days after the eligible employee's marriage. *Same-sex partners are not covered.*

15-208.1 **Special enrollment in health benefits - small employers.** Requires all small employer health benefit plans to provide a special enrollment period during which an individual who becomes a dependent of the eligible employee through marriage, an eligible employee who acquires a new dependent through marriage, or the spouse of an eligible employee at the birth or adoption of a child may be enrolled under the health benefit plan. *Same-sex couples who are unable to marry are not entitled to a similar benefit.*

15-1406.1 **Special enrollment in health benefits.** Requires a group health benefit plan to provide a special enrollment period during which an individual who becomes a dependent of the eligible employee through marriage, an eligible employee who acquires a new dependent through marriage, or the spouse of an eligible employee at the birth or adoption of a child may be enrolled under the group health benefit plan. *Same-sex couples who are unable to marry are not entitled to a similar benefit.*

16-110 **Payment of proceeds without letters of administration.** Allows an insurer to pay the life insurance proceeds of a resident of the state who dies intestate, with an estate valued at less than one thousand dollars, to the decedent's surviving spouse without the grant of letters of administration under certain circumstances. *Such streamlined procedures are not available to same-sex partners.*

16-111 **Proceeds exempt from creditors.** Proceeds of an insurance policy for the benefit of a spouse or dependent child are exempt from claims of creditors. *Proceeds for the benefit of same-sex partners are not exempt, and may be attached by creditors.*

16-305 **Cash surrender value after premium in default.** Sets the cash surrender value of family life insurance policies that defines a primary insured and provides termed insurance on the life of the spouse of the primary insured that expires before the spouse's age of 71. *The definition of families does not include same-sex couples.*

17-209 **Insurance on spouse or child of employee or member.** Group life insurance policies are required to cover the spouse and children of the employee. *Same-sex couples are not entitled to similar coverage.*

19-505 **Personal Injury Protection Coverage.** Requires issuers of motor vehicle liability insurance to provide other types of insurance coverage for family members. *Same-sex couples are not included within the definition of family members and thus may not have access to joint insurance coverage.*

20-519 **Continuation of coverage of family members on exclusion of policyholder.** Cancellation of coverage for a Maryland Automobile Insurance Fund policy holder does not change the coverage of the policy holder's spouse. *A same sex partner is not provided similar protection.*

20-601 **Uninsured driver's claims.** Prohibits an uninsured driver's spouse who lives in the uninsured driver's household from submitting a claim against the Maryland Automobile Insurance Fund. *Same-sex partners are not considered spouses.*

LABOR & EMPLOYMENT

3-403 **Extent of subtitle.** Excludes from the requirement to pay minimum wage, the spouse, child or immediate family member of an employer. *Same-sex partners are not included in the definition of spouse or immediate family.*

8-808.1 **Deduction or withholding of benefits.** Defines when spousal support or alimony may be withheld or deducted from unemployment insurance benefits. *Same-sex partners are not eligible for spousal support.*

8-215 **Family relationship.** Excludes an employed spouse from eligibility for the receipt of unemployment insurance benefits. *Same-sex partners may be treated like any other employee and are eligible to receive unemployment insurance should they cease working for the partner-employer.*

8-220 **Students.** Unemployment insurance benefits will not cover employment performed by the spouse of a student that is part of a program established by an educational institution to provide financial assistance to the student. *Same-sex partners are not considered spouses, therefore may be ineligible for such financial assistance employment program.*

8-808.1 **Alimony and spousal support withholdings.** Alimony and spousal support can only be withheld from unemployment insurance to the extent of federal law. *Same-sex partners are not eligible for alimony or spousal support.*

9-509 **Exclusivity of employer liability.** Where an employee covered by worker compensation is deliberately injured or killed in the course of employment, a surviving spouse may bring a claim against the employer for any deliberate act. *A same-sex partner does not have standing to bring a suit against an employer for a deliberate act against his/her employee partner.*

9-632; 9-640; 9-646 **Survival of compensation.** Creates a survival right to compensation for surviving spouses and dependent children for unpaid disability insurance upon the death of the covered employee. *A same-sex partner is ineligible to collect such benefits.*

9-680 **Compensation prohibited.** Prevents a surviving spouse of a covered employee whose death was caused by an accidental personal injury or an occupational disease from receiving worker's compensation benefits if the surviving spouse deserts the covered employee within a year of the occurrence of the accident or disablement. *A same-sex partner is not entitled to a survival right of compensation in any event.*

9-681 **Wholly dependent individuals.** A surviving spouse who was wholly dependent upon a covered employee at the time of the employee's death can continue to receive death benefits from the employer or insurer. *A surviving same-sex partner may not collect such continuing death benefit as a same-sex partner is not considered a spouse or a dependent of the deceased under any circumstances.*

9-682 **Continuation of death benefits after remarriage.** Requires an employer to continue payment of ongoing death benefits to a partially dependent surviving spouse who remarries and does not have dependent children and who has not received more than $45,000 before his/her remarriage. *A surviving same-sex partner may not collect such continuing death benefit as a same-sex partner is not considered a spouse or a dependent of the deceased under any circumstances.*

NATURAL RESOURCES

3-103.1 **Employees.** Spouses and family members of the Maryland Environmental Service (MES) are eligible for health care and retirement benefits. *Same-sex partners of MES employees are not eligible for these benefits.*

4-604 **Angling licenses generally.** An owner or tenant of land bordering on non-tidal water, his/her spouse, children or the spouse of any child who resides on the land with the owner or tenant when fishing in non-tidal water adjoining the land are exempt from the license requirements. *A same-sex partner resid-*

ing with the owner/tenant is not exempt from the license requirements.

4-701 **Tidal fish license.** The Department may authorize the permanent transfer of a tidal fishing license to a licensee's spouse, spouse's sibling, child or child's spouse, stepchild, grandchild, sibling, sibling's spouse or grandparent. *This provision does not permit a permanent transfer to a same-sex partner.*

4-745 **Chesapeake bay sport fishing license.** A person may fish for finfish in the Chesapeake Bay or its tidal tributaries without a Chesapeake Bay sport fishing license if the person is fishing from private real property as an owner or family member of an owner. *A same-sex partner is not considered a family member under this provision.*

4-807 **License to engage in business of picking, canning or packing crabs.** The family trade exception exempts persons engaged in a family trade from operating and sales licensing requirements. *A same-sex partner is not included within the definition of family under this provision.*

4-811 **Restrictions on use of crab pots by landowners in certain counties.** Persons selling crabmeat for local family trade are exempt from license requirements. Family trade means the selling of picked crabmeat directly to the consumer by the picker, with the meat being picked entirely from crabs harvested by the picker or family of the picker. *A same-sex partner is not considered family under this provision.*

8-716 **Safe – Fees; excise tax.** A person is not required to pay an excise tax if the transfer is between members of the immediate family. *A same-sex partner is not an immediate family member, and therefore is required to pay the excise tax.*

10-301 **General requirements.** Hunting license exemptions exist for the resident owner of the farmland, his/her spouse, children and the children's spouse. *The exemption does not apply to same-sex partners.*

10-410 **Restrictions on hunting wildlife generally.** Steel jaw leg-hold trap restrictions do not apply to those set on farmland by the owner of the farmland or by his or her immediate family who reside on the farmland. *Same-sex partners are not included within the definition of immediate family and are therefore excluded from this exemption.*

PUBLIC SAFETY

1-202 **Death benefits.** A spouse or family member of a law enforcement officer, correctional officer, or firefighter who dies in the line of duty is eligible to receive a $50,000 death benefit, up to a $10,000 funeral benefit, and is presented with a state flag. *The same-sex partner of a law enforcement officer who dies in the line of duty is not entitled to collect these benefits.*

3-104 **Investigation or interrogation of law enforcement officer.** A spouse is eligible to initiate an investigation against a police officer for brutality against his/her spouse. *A same-sex partner does not have standing to initiate such an investigation on behalf of his/her partner.*

5-136 **Straw purchases.** Spouses are eligible for a simplified process for a gift transfer of a firearm. *Same-sex couples are not eligible to take advantage of this simplified process.*

7-203 **Death benefits for volunteer fire/rescue squad.** Provides for the payment of death benefits, in order of priority, to the surviving spouse, dependent child, parents, or siblings of a volunteer fire and rescue worker who dies in the line of duty. *Same sex partners are not entitled to receive death benefits under the above provision for a partner who dies in the line of duty.*

7-209 **Cecil County.** Provides for the cessation of surviving spouse benefits if the spouse of a deceased fire or rescue squad member remarries. *A surviving same-sex partner is not entitled to death benefits.*

13-811 **Excuse.** Members of the Maryland National Guard may be excused from assemblies or annual inspections for the serious illness of a family member. *A same-sex partner is not included within the definition of "family member."*

14-201 **Definitions.** Defines "family member" to include individuals related by blood or marriage. *The definition does not include same-sex partners.*

14-212 **Eviction or distress.** Prohibits the eviction, from certain kinds of rental property, of the spouse, children or other dependents of a person in emergency management service or a person suffering serious injury during a statutorily-defined state of emergency. *A same-sex partner is not protected against eviction during this period.*

14-602 **Interstate emergency management and civil defense compact.** Requires the State to provide compensation and death benefits on the same terms and conditions to members or representatives of deceased members of the state's emergency management and civil defense forces injured or killed responding to an emergency in another state pursuant to the compact. *A same-sex partner is not eligible to receive survivor benefits.*

14-702 Emergency management assistance compact. Requires the State to provide compensation and death benefits on the same terms and conditions to injured members of the emergency forces of the state and representatives of deceased members of such forces where such members sustained injuries or were killed rendering aid in another state pursuant to the compact. A same-sex partner is not eligible to receive survivor benefits.

PUBLIC UTILITIES COMPANIES

2-301 "Relative" defined. A relative is a person related by blood or marriage. Definition does not include a same-sex partner.

2-303 **Relationship with public service company.** No commissioner, general counsel, officer, or employee of the public service commission or their spouse, parent, sibling or child may have an official relation or connection to or financial interest in a public service company. *This restriction does not extend to the same-sex partners of public service commission personnel.*

2-307; 2-308 **Accepting gifts.** No commissioner, general counsel, officer, or employee of the public service commission or their spouse, parent, sibling or child may accept gifts from a public service company, its agents, officers, or employees. *This restriction does not extend to the same-sex partners of public service commission personnel.*

4-503 **Rate discrimination.** Public utilities are generally prohibited from rate discrimination. They may offer more favorable rates to their employees and their immediate family members, as well as pensioners, as part of employee benefits packages. *Same-sex partners are not included within the definition of immediate family, therefore there may be limitations on the value such reduced rates provide to a same sex employee benefit package compared to that of a married employee.*

REAL PROPERTY

4-108 **Abolition of straw deeds.** Provides for the elimination of straw deeds for the grant of any interest in property, including property held by husband and wife in tenancy by the entirety. *Same-sex couples may not hold property in tenancy by the entirety which provides added protections for property held jointly by a married couple.*

4-204 **Acknowledgment of husband and wife.** Sets forth the prescribed form for acknowledgment to be used by a husband and wife for the grant of property held as tenants by the entirety. *Same-sex couples are not eligible to hold property in this form of joint tenancy.*

7-301 **Foreclosure protections.** Provides certain protections for residences in foreclosure, consisting of not more than four single family dwelling units, one of which is occupied by the owner or the owner's spouse or former spouse. *A same-sex partner is not considered a spouse.*

8-326 **Levy on possession of spouse.** In a lease in either the husband or wife's name, all goods on a leased premises belonging to either husband or wife are subject to levy under distress. *In a lease naming only one partner in a same-sex couple, the other partner's goods may not be eligible for levy under distress.*

11-138 **Rental facility, local government purchase.** Provides local governments with the right of first refusal on certain rental facilities, with the exception of transfers made to a spouse, child, or co-tenant or transfers made pursuant to legal action. *Transfers made to a same-sex partner will not supplant the local government's right of first refusal.*

14-121 **Access to burial sites.** Defines a "person in interest" as one who is related by blood or marriage to the person interred at a burial site. *This definition does not include a same-sex partner.*

STATE FINANCE & PROCUREMENT

13-221 **Information required from state contractors.** Requires state contractors provide financial disclosures including the ownership interests held by a spouse, child, or any other relative living in the home. *A state contractor is not required to disclose the ownership interests of his/her same-sex partners under the above provision because the partner is not considered a "relative."*

14-301 **Definitions.** Defines a person's net worth for purposes of the provision to include assets held jointly with a spouse. *A same-sex partner is not included within the definition of spouse, therefore the statute could be read to exclude jointly held assets with another individual, not a spouse.*

STATE GOVERNMENT

2-107 **Restrictions on relative employment.** A member of the General Assembly may not employ for legislative business, the member's own relative or the relative of another member from the same legislative district. *Same-sex partners are excluded from the definition of relative under this provision.*

9-123 **Ineligibility to buy State lottery tickets and shares.** Prohibits the spouse of an employee of the State Lottery Agency from purchasing lottery tickets or receiving prizes. *The provision does not apply to a same-sex partner of an employee.*

9-913 **State veterans' cemeteries.** The Maryland Veterans Commission is authorized to maintain cemeteries in the state for veterans and their immediate families. *A same-sex partner is not considered immediate family and may be prohibited from being interred with his/her partner.*

10-611 **Definitions.** A surviving spouse qualifies as a "person in interest" eligible to request a correction to a death certificate. *A same-sex partner does not qualify as a "person in interest" and cannot request a correction to a partner's death certificate.*

15-102 **Definitions.** Defines categories of persons affected by public ethics laws, including "qualifying relative," "member of household," "immediate family," etc. *Same-sex partner is not included in the above categories of persons tangentially affected by public ethics laws.*

15-505 **Gifts.** Exempts an official or employee of the state government from the general prohibition on solicitation or acceptance of gifts if the gift is from an individual related to the official or employee by blood or marriage. *Such an exemption does not extend to gifts received by a same-sex partner.*

15-512 **Suspending the disqualification of a member of the General Assembly.** Prohibits the suspension of a disqualification of a member of the General Assembly (i.e., disqualifying them from participating in any legislative action because of a conflict of interest) if the conflict is direct and personal to the member or a member of the legislators immediate family. *Same-sex partners are excluded from the definition of immediate family.*

15-513 **Relationship with nonlegislative agencies.** Requires a legislator to disclose financial interests held by the member or the member's immediate family to the Joint Ethics Committee of the name of any business enterprise subject to regulation by a State agency. *Same-sex partners excluded from the definition of "immediate family."*

15-607 **Contents of financial disclosure statements.** Exempts a member of the General Assembly from filing a financial disclosure statement regarding any gift received by the member's spouse. *Same-sex partners are not considered spouses.*

15-608 **Interest attributable to individuals filing financial statements.** Provides that an interest held by a spouse or child of the individual may be attributable if directly or indirectly controlled by the individual during the applicable time period. *Interests held by same-sex partners is not attributable for purposes of financial disclosure statements.*

15-704 **Regulating lobbying activities.** Requires a regulated lobbyist to file reports detailing expenditures

made on behalf of members or the member's immediate family. *The same-sex partner of a member is excluded from the definition of immediate family and hence not covered under the above provision.*

15-705 **Regulating lobbying activities.** Requires a regulated lobbyist to file a report disclosing the name of the member of the immediate family of a State official of the Executive Branch who has benefited during the reporting period from gifts of meals or beverages from the regulated lobbyist, whether or not in connection with lobbying activities. *Same-sex partners are excluded from the definition of "immediate family."*

15-710 **Regulating lobbying activities-gifts.** Exempts a regulated lobbyist from disclosing any gift made to the regulated lobbyist's immediate family if the gift is purely personal and private in nature and not related to the regulated lobbyists' lobbying activities. *Same-sex partners are excluded from the definition of "immediate family."*[1]

15-849 **Disclosing contributions.** A candidate for office in Howard County is required to disclose certain financial contributions made by a family member to the treasurer of the candidate, the political committee, or a slate of candidates, if made during the 48 month period prior to the application for candidacy being filed or during the pendency of the application. *Disclosure provisions do not extend to contributions made by same-sex partners who are not included within the definition of "family member."*

19-111 **Acknowledgments – members of the armed services.** Permits any instruments executed by a member of the armed services or the person's spouse or dependents to be acknowledged and validated wherever they are located before a commissioned officer. *Such a benefit does not extend to same-sex partners who may not avail themselves of a military witness to acknowledge an instrument.*

STATE PERSONNEL & PENSIONS

2-302 **Discrimination, harassment prohibited.** Prohibits the government from discriminating in employment on the basis of marital status. *Same-sex couples do not receive similar protection under this statute.*

2-307 **Use of political or personal influence.** State employees may not directly supervise their spouses, parent, child or sibling. *This provision excludes same-sex partners.*

2-507 **Enrollment and participation.** Provides that the surviving spouse and/or minor child of a state employee may, subject to certain conditions, enroll in the state employee health insurance program. *A same-sex partner of a deceased state employee does not qualify to enroll in the state sponsored health insurance program.*

2-508 **Enrollment and participation by retirees.** Provides that under certain conditions, the surviving spouse or dependent child of a deceased retiree, who was eligible to participate in the state health insurance benefits, may enroll and participate themselves in the health insurance benefits options established under the program. *Same-sex partners are not considered spouses and are not eligible to receive such health insurance benefits.*

2-509 **Enrollment of optional retirement employees.** Provides that the surviving spouse or dependent child of a deceased state employee who was eligible to enroll in the health insurance program, may, subject to certain conditions, enroll and participate themselves in the health insurance benefit options established under the program. *A surviving same-sex partner is not eligible to enroll and participate in the health insurance program of his/her deceased partner.*

2-511 **Enrollment of Environmental Service State Employees.** Allows a surviving spouse of an employee or former employee of the Maryland Environmental Service and Northeast Maryland Disposal Authority to enroll and participate in the State Employee and Retiree Heath and Welfare Benefits Program. *Same-sex partners are not considered spouses and are therefore not eligible to participate in a deceased partner's benefits program.*

2-514 **Special open enrollment.** Requires the state to maintain a special open enrollment period in the health insurance program for state employees after the death of their non-state employee spouse. *Such*

special open enrollment periods are not available to a state-employed surviving same-sex partner.

7-207 **Government service credits.** Permits the spouse or surviving spouse of a military veteran to receive an additional ten point credit on selection tests given for skilled service and professional service positions. *A surviving same-sex partner of a military veteran is not eligible to receive such credit.*

9-501 **Entitlement to sick leave.** Non-temporary state employees are entitled to paid sick leave for the medical appointment, illness, disability, or death of an immediate family member. *Same-sex partners are not included in the definition of immediate family, therefore, a partner in a same-sex couple is not entitled to sick leave for the illness, disability or death of their same-sex partner.*

9-601 **Definitions.** Defines "Immediate family" to include spouses. *Same-sex partners are not included in the definition of "immediate family."*

9-604 **Employee to Employee leave donation.** Employees with unused leave may donate their leave to a fellow employee who has exhausted all of his/her leave because of a catastrophic illness or injury of an immediate family member. *A same-sex partner is excluded from the definition of an employee's immediate family and therefore may not take advantage of donated leave to care for their ill or injured partner.*

9-1203 **Sick Leave Incentive Program; eligibility.** Provides for year-end payment of unused sick leave time over 240 hours, with usage exceptions provided for, inter alia, the death of an immediate family member or leave taken in accordance with the Family Medical Leave Act. *Same-sex partners are not included within the definition of "immediate family," therefore they not entitled to take sick leave for the death of a partner.*

10-404 **Death benefits for survivors of state employees.** Provides for the payment of a death benefit to a surviving spouse, dependent child or dependent parent of a state employee killed in the performance of his/her duties. *A surviving same-sex partner of a state employee killed in the performance of his/her duties will not collect under the above provision.*

21-401 **Election of reduced allowance.** Permits a member of the Law Enforcement Pensions System, State Police Retirement System or Judges Retirement System to elect a reduced allowance to be paid instead of the basic allowance provided for, if the member is not married at the time of retirement. *As applied, this statute may disparately impact married participants, in that the reduced allowance option is always available to a same-sex partner who is not permitted to marry under the law.*

21-503 **Retirement counseling.** Requires the administrators of the state retirement system to offer retirement counseling to member/retirees and their immediate family members. *A same-sex partner is not considered an immediate family member of the retiree.*

21-602 **Election of eligible rollover distribution.** Provides that eligible rollover distribution payable to a surviving spouse may only be paid directly into an individual retirement account or annuity. *A surviving same-sex partner is not covered under this provision.*

22-305; 22-308 **Purchase of service credit.** Provides that the surviving spouse of a member of the Teachers' Retirement System may pay the final adjustment for service credit purchased by a deceased spouse. *A surviving same-sex partner is not permitted to make final payment on service credits for a deceased partner.*

22-405 **Governor and surviving spouse.** The surviving spouse of a Governor or former Governor of Maryland is entitled to receive half of the Governor's pension. *A similarly situated same-sex partner would not be entitled to receive one-half of the retirement allowance.*

24-401.1; 26-401.1 **Deferred retirement option program.** A surviving spouse will automatically receive funds set aside by a member of the State Police Retirement System or Law Enforcement Officers' Pension System Deferred Retirement Option Program if the member dies prior to retirement. *A surviving same-sex partner would not automatically receive such funds if not specifically designated as a beneficiary prior to the member's death.*

24-403; 26-402 **Survivor benefits.** The surviving spouse of a retiree in the State Police Retirement System or Law Enforcement Officers' Pension System who has retired with a service retirement or disability retirement allowance is entitled to half of the retiree's allowance. *A surviving same-sex partner is not eligible to receive such an allowance.*

24-404 **Supplemental survivor benefits.** If eligible, the State will continue to pay for the insurance benefits of a surviving spouse and dependent child for a retiree in the State Police Retirement System. *A similarly situated same-sex partner is not eligible for continuing state sponsored insurance benefits upon the death of his/her retired partner.*

27-103 **Construction of title.** The provisions of the Judges' Retirement System may not be construed to impair or reduce the benefits that the spouse of a member, former member, or retiree would receive under general public law. *A same-sex partner is not included within the definition of spouse and therefore is ineligible to receive benefits applicable to spouses under the Judges' Retirement System.*

27-403; 27-404 **Rights of surviving spouse or minor child.** Requires the Judges' Retirement System to pay to a surviving spouse 50% of the retirement allowance that would be payable to the former member. *A surviving same-sex partner is not eligible to receive such an allowance.*

27-407 **Limitations on supplements.** Under certain conditions, the surviving spouse of a member or former member of the Judges' Retirement System may be eligible to receive a supplement to the member's retirement allowance. *A surviving same-sex partner is not eligible to receive a supplement to his/her surviving partner's retirement allowance.*

29-203 **Special death benefit – Law Enforcement Officers' Pension System.** If an individual dies under certain conditions while employed as a member of the Law Enforcement Officer's Pension system, the member's spouse is entitled to receive an allowance of 50% of the ordinary disability retirement allowance provided by statute. *A surviving same-sex partner of a law enforcement officer is not eligible to receive half of the deceased partner's ordinary disability retirement allowance as provided under this section.*

29-204 **Special death benefit; State Police Retirement System.** Provides that the State Police Retirement System shall pay an allowance of 50% of the member's average final compensation to the surviving spouse or dependent child/parent of a member who died while employed. *Surviving same-sex partners are not eligible to receive this death benefit allowance.*

29-205; 29-206 **Election of allowances by surviving spouse; Pension Systems.** Permits the surviving spouses under certain other state retirement systems to elect a lump sum death benefit or a 50% allowance payable over the remainder of their life. *A surviving same-sex partner cannot elect the death benefit allowance.*

29-410 thru -427 **Adjustments.** Provides that, among others, surviving spouse participating in the various state retirement systems who receive benefit allowances through the programs are entitled to annual cost of living adjustments. *Surviving same-sex partners are not eligible to receive such allowances.*

TAX GENERAL

7-203 **Events exempt.** Describes the instances in which inheritance tax will not be applied, including on annuities or other payments made under a public or private pension plan, receipt of property that passes from the decedent to a family member or other payments not taxable for federal estate tax purposes. *Inheritance tax exemptions applicable to family members will not apply to same-sex partners who are excluded from the definitions of family, relative, spouse, etc. under Maryland law.*

7-209 **Value of interest.** Describes how property which is held as tenants by the entirety is valued. *Same-sex couples are not eligible to hold property as tenants by the entirety.*

10-209 **Federal Adjusted Gross Income subtraction.** A subtraction from the Federal adjusted gross income to the lesser of certain retirement benefits to deter-

mine Maryland adjusted gross income is allowed if a Maryland resident's spouse is totally disabled. *A same-sex partner may not make such an adjustment for his/her disabled partner.*

10-217 **Standard deduction values for Maryland income tax.** Sets out the amount of the standard deduction to compute Maryland taxable income for an individual described as a surviving spouse and for spouses filing a joint return. *A surviving same-sex partner is not eligible for the surviving spouse standard deduction, nor are same-sex couples permitted to file jointly.*

10-709 **Tax return claims.** Allows an eligible low income tax payer's spouse filing a joint tax return to claim a credit against the state income tax for a taxable year. *Low income same-sex couples are not permitted a similar income credit.*

10-718 **Tax return claims.** Allows an individual to claim a credit against the State income tax in an amount equal to 100% of the eligible long term care premiums paid by the individual during the taxable year for long term care insurance covering the individual's spouse. *A same-sex partner may not claim a similar income tax credit for long term care insurance covering his/her partner.*

10-807 **Joint Maryland income tax returns.** Requires that a husband and wife who file a joint federal income tax return also file a joint Maryland income tax return except in certain circumstances. *Same-sex couples may not file joint income tax returns.*

10-808 **Filing a deceased spouse's tax return.** Requires an individual's surviving spouse to file their decedent spouses' tax return if they die and there is no other named personal representative. *A same-sex partner is not similarly obligated to file his/her deceased partner's final tax return if no other is named as personal representative of the estate.*

13-905 **Refunds to the estate for joint filing.** Requires the Comptroller to pay a claim of refund to the estate of a decedent if the decedent's tax return was filed jointly by the surviving spouse. *Same-sex couples are not considered spouses and may not file jointly.*

TAX PROPERTY

7-207 **Blind individual or spouse's home.** Exempts the dwelling house of a surviving spouse of a blind individual from property tax if the house had been formerly exempt. *Same-sex partners are not considered spouses therefore a surviving partner is ineligible to receive a similar property tax exemption.*

7-208 **Disabled veteran or spouse's home.** Provides a tax exemption on the dwelling house of a surviving spouse of a disabled veteran and authorizes refunds of property tax not exempted as well as interest for such tax assessed. *The surviving same-sex partner of a disabled veteran is not entitled to a similar property tax exemption.*

8-226 **Rezoned real property.** Defines "homeowner" to include spouses and former spouses who have been permitted under a court order or separation agreement to reside in a dwelling in which they have interest. *A same-sex partner is not considered a spouse, therefore, without an explicitly defined interest, a same-sex partner will not be deemed to have an interest in the real property of his/her partner.*

9-101 **Homeowners eligible under repealed statutes.** Applies specifically to repealed tax credit statutes and permits a surviving spouse of a homeowner, who has not remarried, to claim a previously available property tax credit for elderly or disabled homeowners. *Same-sex partners are not considered spouses, therefore, a surviving partner cannot claim this previously available property tax credit.*

9-104 **Homeowner tax credits.** Defines homeowners to include spouses and former spouses who have been permitted under a court order or separation agreement to reside in a dwelling and allows the surviving spouse of a homeowner, who has not remarried to continue to claim a property tax credit for a deceased disabled veterans. *A same-sex partner is not included within the definition of spouse and therefore, without a defined tenancy, will not be deemed to have an interest in the real property of his/her partner and cannot claim a property tax credit previously applicable to a deceased partner.*

9-210 **Surviving spouses of law enforcement officers and rescue workers.** Permits the Mayor and City Council of Baltimore City or the governing body of a county or municipal corporation to grant a property tax credit on a dwelling owned by the surviving spouse of a fallen law enforcement officer or rescue worker. *The surviving same-sex partners of a fallen law enforcement officer or rescue worker is not eligible to receive a similar property tax credit.*

12-108 **Exemptions.** Recordation tax is not levied on property transferred between blood relatives or spouses. *Same-sex couples are required to pay recordation tax on property transferred between them.*

13-207 **Additional Exemptions.** Provides an exemption from transfer tax for property transferred between relatives or to a spouse or former spouse. *Same-sex couples are required to pay transfer tax on property legally transferred between them.*

13-403 **Spousal transfers.** Transfers of property between spouses or former spouses in accordance with a property settlement or divorce decree are not subject to county transfer taxes. *Same-sex couples are required to pay county transfer taxes for property transferred to each other even if pursuant to a property settlement agreement.*

TRANSPORTATION

8-309 **Sale of unnecessary land.** Requires the state government to dispose of unneeded land acquired for transportation purposes and defines former owners to include a decedent's surviving spouses and children. *A same-sex partner would not be considered a former owner based solely on the real property interest held by his/her deceased partner.*

13-503.1 **Transfers between spouses, parent and child.** Where the title or interest of an owner in a vehicle is transferred to a spouse, parent or child, either may continue to use the same license plate. *A same-sex partner seeking to transfer joint interest in his/her vehicle to a partner will not be permitted to keep the same license plate.*

13-619 **Special Registration number for surviving spouses.** Allows a surviving spouse of a member organization considered eligible by the Motor Vehicle Administration to apply for a special registration number (license plate). *Same-sex partners are not considered spouses and are not eligible for a special registration number honoring a deceased partner.*

13-810 **Exclusions (Excise Tax).** The transfer of title or interest in a vehicle to individuals related by blood or marriage is exempt from excise tax. *The transfers of interest in a vehicle made between same-sex couples is not exempt from excise tax.*

13-903 **Exclusions (Registration Fees).** Provides an exemption from registration fees where a vehicle is owned and personally used by the surviving spouse of a deceased veteran who is at least 65 years old. *A surviving same-sex partner is not eligible for such an exemption.*

23-106 **Used vehicle transfer; inspection certificate.** Provides an exemption from inspection requirements for used vehicles when the transfer of title is to a spouse, parent or child. *Transfer of title on a used vehicle to a same-sex partner is not subject to the above exemption.*

ARTICLE 2B

ALCOHOLIC BEVERAGES

8-217 **Prince George's County.** In Prince George's County, it is unlawful for any person under the age of 18 years, between 10 p.m. and 6 a.m., to be on the premises of the holder of any Class B or Class D alcohol license, unless the person is in the immediate company of his spouse. *A same-sex partner is not considered a spouse, therefore, an under-aged person in the company of his/her partner in a bar will not be subject to the same exemption.*

9-212 **Garrett County.** In Garrett County, a surviving spouse that holds the alcoholic beverage license originally issued to a deceased spouse is exempt for any issuing fees on the license. *A same-sex partner is not entitled to assume the license of his/her deceased partner therefore is ineligible for the same exemption.*

10-506 **Death of license holder.** Upon application after the death of a married (alcoholic beverage) licensee, a

new license shall be issued to the surviving spouse. *A surviving same-sex partner is not eligible to be issued a new alcoholic beverage license after the death of a partner that previously held such a license.*

11-502 **Anne Arundel County (Days/Hours of Sale).** In Anne Arundel County, no person under the age of 18 is allowed on the premises of any bowling alley with a Class B or Class D alcohol license between 2 am and 6 a.m., unless the person is accompanied by a spouse. *A same-sex partner is not considered a spouse, therefore, an under-aged person in the company of his/her partner in a bowling alley during the specified hours will not be subject to the same exemption.*

ARTICLE 25
COUNTY COMMISSIONERS

3 **Charles County Pension Plans.** Specifically requires pension plans for Charles County employees to contain disability provisions and death benefits for spouses and/or minor children. *A same-sex partner is not included within the definition of spouse and therefore is ineligible for any benefits flowing from provisions related specifically to spouses.*

3 (pp) (1) **Calvert County Pension Plans for the Sheriff's Department.** Requires any pension plan established by the Board of Commissioners for the Calvert County Sheriff's Department to include death benefits for spouses and children. *A same-sex partner is not included within the definition of spouse and therefore is ineligible for any benefits flowing from provisions related specifically to spouses.*

51 **Garret County – Relationship to the County Treasurer.** The Deputy Treasurer of Garret County may not be related to the County Treasurer by blood or marriage. *This provision is not applicable to same-sex partners.*

ARTICLE 28
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

2-115 **Regulation of conduct of commissioners.** No commissioner on the Maryland-National Capital Park and Planning Commission may knowingly participate in a decision affecting the financial interest of a person related to the commissioner or the commissioner's spouse. *This provision is not applicable to same-sex partners.*

5-105.1 **Relocation of people after condemnation.** Whenever the Maryland-National Capital Park and Planning Commission acquires real property that results in the displacement of a person from his place of business or farm, eligible persons are entitled to a payment equal to the average annual net earnings of the business or farm operation being displaced: annual net earnings includes any compensation paid by the business or farm operation to the owner's spouse. *Compensation paid to a same-sex partner may not be included in a calculation of annual net earnings.*

ARTICLE 41
GOVERNOR — EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS

6 thru 6-7A-03 **Department of Human Resources.** Under the Community Attendant Services and Supports Program of the Department of Human Resources, the consumer's spouse is barred from receiving medical assistance payment for providing services. *Same-sex partners are not considered spouses.*

ARTICLE 66B
LAND USE

5.03 **Regulations (Subdivision Control).** Regulations governing the subdivision of land require that an appropriate easement be provided to any burial site and that such easement shall be subject to the subdivision plat for entry to and exit from the burial site by persons related by blood or marriage or persons in interest. *A surviving same-sex partner is not included in the definition of a person related by blood or marriage.*

ARTICLE 70B
DEPARTMENT OF AGING

1 **Definitions.** "Congregate Housing Services" means services provided in an apartment building that promote independent living and include congregate meals, housekeeping, and personal services for an individual at least 62 years old who has temporary or periodic difficulty with one or more essential

activities of daily living and the spouse of the person previously described who is at least 55 years old and who has difficulties with life activities as well. *A same-sex partner is not included within the definition of spouse and therefore may be ineligible to accompany his/her partner into an assisted living facility.*

26 **Definitions.** For the purposes of the Senior Citizens Activity Centers Capital Improvement Grants Program, projects that receive grants shall be for "elderly citizens" which means people 60 years or older or spouses of people 60 years or older. *A same-sex partner is not considered a spouse.*

ARTICLE 88A
DEPARTMENT OF HUMAN RESOURCES

77 **Claims against the estate after the death of a recipient of public assistance.** Upon the death of any recipient of public assistance the total amount of assistance received by the individual shall be allowed as a claim against the estate to be divided by the state and local subdivision, however, no such claim shall be enforced against any real estate still occupied by the recipient's surviving spouse or dependents. *A same-sex partner is not considered a spouse and therefore a claim may be made against the estate of his/her deceased partner who was the recipient of public assistance even while the partner continues to occupy the property.*

85 **Definitions (Community Home Care Services).** Defines "elderly persons" as those persons who have attained the age of 65 years and their spouses, regardless of age. *A same-sex partner is not included in the definition of spouse and may be ineligible to receive services under the community home care program.*

ARTICLE 96
VETERANS

48 **Special credits and merits to spouses of veterans.** Special credits and merits may be extended to the spouses of veterans for the purposes of appointments, made on a merit-based system, to positions within municipal or county government. *Same-sex partners are not considered spouses and are therefore ineligible to receive such special credits and merits based on the military service of his/her partner.*

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COMMENTARY: Same-Sex Couple Marriage: A Family Policy Perspective

NAME: Michael S. Wald *

BIO:

* Professor of Law, Stanford Law School. This article is based in part on an earlier publication, Michael S. Wald, Same-sex Couples: Marriage, Families, and Children: An Analysis of Proposition 22 (Stanford Institute for Research on Women and Gender Dec. 1999), a report that analyzed a California ballot initiative defining marriage as limited to a man and a woman. In preparing that report, I received substantial assistance from Stanford law students Lynne Echenberg, Michael Evans, Susan Hightower, Katherine Keating, Severa Keith, and Elizabeth Lester. I also want to thank Professor David Chambers for his helpful comments on earlier drafts of this article.

SUMMARY:
... There are now at least 1,500,000 same-sex couples living in the United States, and many of these couples have children. ... Further, I analyze the available evidence regarding the likely impacts of recognition of same-sex couple marriages on families, children, and the institution of marriage. ... Upon death or dissolution, a number of laws automatically protect the economic interests of the surviving spouse or provide support for a divorced spouse who has given up a career to raise children, put a spouse through school, or otherwise made economic sacrifices to advance his or her partner's career. ... It is with respect to the adoption of children by step-parents and to the rights of the non-gestational partner when a child is conceived through artificial insemination that same-sex couples are treated very differently from married couples. ... For these children, the only pertinent issues are whether their parents will be married or cohabiting and whether it will be easier or harder for the partner who is not the biological parent to adopt the child. ... For some of the children who lived with a gay parent following their parents' divorce, coping with the parent's new sexual identity added to the difficulties most children experience from divorce itself. ...

TEXT:

[*291] INTRODUCTION

Over the past thirty years, there has been a substantial change in the public's views regarding lesbian and gay individuals. n1 A majority of Americans believe that private sexual conduct should not be the subject of state regulation and that gays should be protected from discrimination. n2 Moreover, it appears that public attitudes are moving from [*292] tolerance of gays as a group to acceptance of individual gay men and women. Recently, gay men and lesbians have been elected to Congress, to state and local legislative bodies, and have been appointed to high public office.

While there is increasing acceptance of gays as individuals, there is still substantial reluctance to treat gay families and parents as equal to heterosexual couples and parents. Although one state legislature, under court pressure, has provided gay partners the opportunity to enter civil unions that are the functional equivalent of marriage, n3 the majority of states have explicitly denied gay couples the right to marry. n4 In 1996, Congress passed the Defense of Marriage Act,

n5 which defines marriage under federal law as the union of a man and woman. Polls show that the majority of Americans oppose recognition of same-sex couple marriage. n6

There are now at least 1,500,000 same-sex couples living in the United States, n7 and many of these couples have children. n8 Like most Americans, many of these couples would like to be able to marry. For most people, the opportunity to commit, publicly and legally, to share one's life with another person is one of the central aspects of the [*293] human experience. n9 Moreover, marriage functions as an exceptionally important institution in American society as well. n10 Our laws and policies reflect the judgment that society as a whole benefits when people make a deep commitment to share their lives through marriage and, if they choose, to raise children together. Moreover, while many view marriage primarily as a personal commitment and choice, it also confers legal status, and encompasses a number of rights and obligations. Therefore, the denial of marital status has real legal consequences for both adults and children in gay and lesbian families. Because of its central importance to individuals, the Supreme Court has recognized the right to marry as one of the fundamental elements of individual liberty. n11

[*294] In this article, I discuss whether the opportunity to marry should be denied to same-sex couples wishing to marry and live together in a shared emotional, economic, and sexual union. In answering this question, I intend to explore whether, as partners and as parents, same-sex couples fulfill the policies underlying marriage law. This perspective is often lacking in the current debate, which generally focuses on the rights of gay couples to marry. I begin from the premise that same-sex sexual relations are as morally worthy as opposite-sex sexual relations. I do not address the underlying issue here, as it has been fully discussed elsewhere. n12 Many religious leaders accept this view. n13 In fact, the only type of marriage available to gay couples at this time is religious marriage; religious officials regularly perform marriage ceremonies for gay couples.

I begin by proposing a framework for evaluating the family policy issues raised by same-sex couple marriage. Next, I describe how the state currently regulates marriage and the policies behind this regulation. In the next section, I review the legal privileges the state provides to married couples and the obligations imposed on these couples, and I examine the reasons why the law is structured this way. I [*295] then focus on how societal interests in the institution of marriage might be affected if same-sex couples could marry. Further, I analyze the available evidence regarding the likely impacts of recognition of same-sex couple marriages on families, children, and the institution of marriage.

I conclude that the evidence clearly shows that in terms of family policy objectives, the state has as strong an interest in supporting marriage by same-sex couples as it does in supporting opposite-sex couple marriage. Yet two-thirds of Americans and all state legislatures disagree with this conclusion. Why? I believe that the reasons relate to the continued controversy over the morality of same-sex sexual relations and to the inability of many people to accept that same-sex relationships are equivalent to opposite-sex relationships. In the final section I speculate about how to lessen public resistance to same-sex marriage.

I. A FRAMEWORK FOR ANALYSIS

A. Defining the Issues

Thinking about same-sex couple marriage from a family law perspective requires addressing the following questions:

1. Why does the state regulate who can get married? That is, why does the state provide benefits and obligations to some units and not to others?

2. What does it mean to be legally married? What are the legal benefits and obligations that are affected by the fact that one is married, rather than single or living with another person in a "non-marital" relationship? Why are these benefits attached to marriage?

[*296] 3. How would same-sex couples that wish to marry fit within the purposes of marriage laws and policies? What might be the benefits and costs of enabling same-sex couples to marry for the adults in such relationships; for children living with them; and for other families and children?

Opponents of same-sex couple marriage offer a number of reasons why allowing or recognizing same-sex couple marriages would not advance society's general interest in marriage and family. n14 For some, the opposition is based on their view that homosexuality is immoral and therefore should not be legitimized in any way. But many of those opposed to same-sex couple marriage assert more functional claims. The major contentions are:

1. The purpose of marriage is procreation; since same-sex couples cannot procreate they should not be able to marry. n15

[*297] 2. It is harmful to children, or less optimal for them, to be raised by same-sex parents. n16

3. Homosexual individuals are not capable of the strong emotional feelings for their partners necessary to make marriage work. n17

4. Centuries of tradition teach us that limiting marriage to opposite-sex partners is a critical aspect of social organization. Allowing same-sex couples to marry will undermine the institution of marriage as a whole. n18

5. Allowing same-sex couples to marry will force society to allow people who wish to enter polygamous unions or unions with close relatives to marry. n19

These claims obviously raise a number of factual issues, and I will examine the evidence relevant to assessing the factual premises. Since there are a number of value judgments underlying the factual premises, I first propose a value framework for approaching the evidence.

B. Value Framework

In this article, I examine marriage from a functional perspective; this perspective seeks to show how recognizing an institution called marriage and attaching [*298] certain rights and obligations to that institution furthers societal interests. In addition to identifying the societal goals that marriage is meant to serve, a functional approach requires examining the empirical evidence regarding the likely effects of state recognition of same-sex couple marriages. For example, opponents and proponents of same-sex couple marriage disagree on whether recognizing same-sex marriages would strengthen or weaken the institution of marriage and whether such recognition would harm or benefit children. I review the evidence on these issues below.

I believe that the research strongly supports recognizing same-sex couple marriage. Not surprisingly, however, the evidence on some issues is limited or incomplete. Since gay couples have not been permitted to marry, it is impossible to determine precisely whether such marriages would materially differ from opposite-sex couple marriages. This lack of data is a significant problem. In their book, *The Case for Marriage*, sociologist Linda Waite and journalist Maggie Gallagher provide evidence that getting married changes people's behavior in ways beneficial to both the individuals and society. n20 Waite and Gallagher argue that the behavior of married couples is significantly different from that of unmarried couples living together (cohabitors). n21 If [*299] they are correct, and I believe that they are, then it is likely that all current research understates the benefits that would be derived by allowing same-sex couples to marry, not just cohabit.

Due to the limitations in available data, it is necessary to draw inferences from various types of research studies that have looked at same-sex couples. In drawing inferences, policy-makers must decide which position to prefer when the evidence is unclear or incomplete: Is it better to err on the side of including or excluding same-sex couples from the benefits and obligations of marriage? Policymakers also must decide what constitutes a fair standard for distinguishing the treatment of same- and opposite-sex couples.

Given the fundamental importance of marriage in our society, I believe that the burden of proof should be on those who would deny recognition to same-sex couple marriages. There is a strong preference in our law for marriage. Under the law of all states, virtually anyone over 18 years of age may get married to a person of the opposite sex. This is true even though many of the couples will not have children, or will turn out to be bad parents and many of their marriages will end in divorce. Principles of equality require that we do not impose a higher standard for judging the desirability of same-sex marriage than we do for opposite-sex marriage. Our government is founded on the principle that it is morally wrong to treat people unequally absent strong justification. Legally, the burden of proof is on those who want to treat people unequally; the burden is especially high with respect to those rights deemed fundamental, like the right to marry. n22

[*300] II. WHY THE STATE PROVIDES FOR AND REGULATES MARRIAGE

Although the state places few restrictions on who may marry, marriage is more than just a personal act signifying a commitment between two individuals to share life together. It is a socially regulated institution, carrying with it a number of legally prescribed benefits and obligations. The special legal status accorded marriage reflects the judgment that society as a whole has strong interests in supporting the institution of marriage. n23 Legislatures, courts, and commentators who have written about marriage as a legal and social institution have articulated four particular interests the state has in supporting marriage. n24 First, marriage law is intended to encourage [*301] people to enter into long-term, stable units if they have children. n25 Children need stable environments and generally benefit from having two adults available to care for them. Therefore, the law provides benefits to couples that marry, and divorce law is designed to discourage easy termination of these units.

Second, marriage law is designed to facilitate and support the decision of two people to share their economic lives. n26 Backing this commitment by law is desirable for society, as well as for the individuals. For example, rewarding economic interdependence is related to the goal of facilitating child-rearing since two adults can often arrange their work live in ways that maximize involvement in their children's lives more easily than a single caregiver can. Even when a married couple does not have children, society and individuals reap benefits. Enabling people to make economic decisions in concert with someone else greatly broadens the options of both partners. For example, marital partners may agree to support each other through school. With broader options, people can make greater contributions to the entire community as well as enhance their own economic well-being. The contributions marital partners, and often their extended family, make to each other also lessens the state's burden to provide economic support to individuals, especially with respect to the care provided to a spouse who is seriously ill. In short, marriages provide a critical form of social insurance. For these reasons, the law provides economic protections and privileges to people who are married and protections for each of the partners in the case of divorce.

[*302] Third, through marriage people enhance their emotional well-being. n27 In marriage, people give and receive the types of intimacy that enhance human emotional health. The intimacy, love, and commitment that married individuals hopefully enjoy generally are thought to be uniquely valuable to them. n28 In addition, marriage provides a context through which individuals develop a stable sense of self and identity, n29 both of which can be critical to an individual's emotional health.

Finally, many scholars believe that the institution of marriage plays a critical role in the functioning of an open, democratic society. Both conservative and liberal commentators have pointed out the importance of this function. n30 In marriage people learn to define themselves as caring rather than egoistic beings and as connected to, rather than alienated from, the concerns and well-being of others. As a result, they are more likely to contribute to society. As family law scholar Bruce Hafen has written:

> The commitments of close kinship and marriage represent the last modern vestiges of status as a source of duty. Much of what family members-especially marital partners-"owe" one another cannot be enforced in a court of law; yet the sense of family duty has an uncanny power to produce obedience to the unenforceable...A sense of voluntary duty is the lifeblood of a free society...The family in a democratic society not only provides [*303] emotional companionship, but is also a principal source of moral and civic duty... n31

For all of these reasons, our laws are based on the presumption that it is best to make marriage available to as many people as possible. n32

III. THE LEGAL CONSEQUENCES OF MARRIAGE

Because it is believed that society as a whole has a substantial interest in marriage, both state and federal laws confer unique legal rights and obligations that can significantly enhance the lives of married couples and their children. There are three basic categories of legal regulation of marriages, each with rules designed to further one or more of the state's interests in supporting marriage: (1) furthering the affective or emotional bonds associated with marriage; (2) facilitating economic sharing; and (3) supporting parents [*304] in the raising of children. n33 Because I cannot discuss each of the vast number of benefits and obligations that are tied to marriage, n34 I will describe only the most important.

A. Regulations That Recognize Emotional Attachments and Needs

In marriage, more than in any other relationship except parenthood, individuals invest unselfishly in the well-being of another. Spouses make investments through physical labor, emotional support, and material contributions. While the material investments often receive the most legal attention, the emotional investments may be the most critical. It is not surprising, therefore, that many laws are designed to reflect and facilitate the emotional commitments spouses make to each other.

Three types of laws are especially important in facilitating emotional commitments between married individuals. First, most states provide that if one spouse becomes incompetent to make decisions with respect to her or his medical care, the other spouse is given the power to make such decisions. n35 These laws are based on the assumption that a spouse possesses the most knowledge about his or her partner's wishes and needs, and that the couple's formal commitment to marriage has signaled their willingness and desire to have the healthy spouse make critical decisions for his or her incapacitated partner. n36 [*305] Unmarried individuals may give their partner some of these rights by signing a durable power of attorney, but many unmarried couples do not take advantage of this option. n37 As a result, the person closest to a very ill individual has been often excluded from participating in critical decisions. n38

Second, under federal law, most individuals have a right to take family care and medical leave from work in order to care for a spouse. n39 Partners in a same-sex relationship do not have a right to such leave, which may make it impossible for them to provide care and result in the ill partner receiving less or poorer care. n40 If there are children in the family, their well-being may be affected by the restrictions on the adults' rights.

Third, under immigration law, the spouse of an American citizen has a preference for admission to the United States. n41 Thus, being able to marry may be critical to maintaining a relationship.

B. Regulations To Encourage and Reflect Economic Sharing

While emotional commitment may be what people most hope for in a marriage, economic sharing and investment also are extremely beneficial to the partners and to society as a whole. There are a number of laws designed to encourage marital partners to act in tandem in financial matters and to protect each of the partners if they make economic sacrifices for the benefit of the couple. These rules have implications during the relationship, if the partners separate, or if a spouse dies.

[*306] To begin with, a number of states treat the income and assets acquired during marriage as the joint property of the spouses. n42 This is true regardless of which partner "earns" the money. Under these laws, it is assumed that the earnings of each partner are made possible by the sharing of tasks within the marriage. In contrast, if couples are cohabiting, in most states, all property is separate property, unless the partners establish a different structure through contract. n43

In a similar vein, the marital partners in a marriage also have obligations of mutual support during the relationship. n44 Economic sharing is greatly facilitated by the fact that marital partners automatically qualify as dependents for purposes of medical and other forms of insurance. n45 This benefit is especially important if one of the partners provides full-time care for children. It also allows each partner greater flexibility in finding jobs or making other career decisions. Moreover, if one of the partners in a marriage is wrongfully injured and unable to continue to make economic contributions, the other partner is entitled to sue for damages to the partnership. Again, this right is not enjoyed by cohabitors. n46 Thus, an individual in a long-term relationship with a same-sex partner who has given up a career to enhance the other's career or to promote the family's well-being in other ways is left without redress if his or her partner is injured or killed.

The marital unit also assumes economic burdens, again reflecting the sharing principle. In many states, both [*307] partners are responsible for the debts incurred by either partner; this is not true in cohabitation. n47 In addition, the entire family income counts in establishing eligibility for means-tested government programs, such as student loans, Medicaid, or In-Home Support for the Elderly. n48

The legal treatment of spouses often is even more critical if the marriage ends in divorce or death. Upon death or dissolution, a number of laws automatically protect the economic interests of the surviving spouse or provide support for a divorced spouse who has given up a career to raise children, put a spouse through school, or otherwise made economic sacrifices to advance his or her partner's career. n49 Most states provide that the surviving spouse inherits all or most of the couple's assets if the other spouse dies without a will (a common occurrence) and greatly restricts the ability of one spouse from disinheriting the other completely. n50 Same-sex partners do not automatically have these protections. n51 With respect to divorce, the fact that married couples must get a divorce to end the relationship is important to the married individuals' and the states' interest in promoting stability. Both the rules and the process of divorce are

intended to discourage couples from breaking up too easily and to protect the economically weaker spouse, if divorce occurs. If the spouses divorce, their property generally is divided equally between them; this does not happen when cohabitors end a long-term relationship. n52 Either spouse may also be awarded spousal support, based on need and other equitable considerations. Cohabitors are not entitled to support as a matter of law.

[*308] Taken together, the rules bearing on the economic relationships of married couples offer significant advantages to those couples. Existing marriage laws enable couples to organize their lives in ways that maximize their joint economic worth, assuring them some degree of protection if things go badly. At the same time, these rules require that each spouse fulfill the moral obligations that arise from long-term relationships.

C. Regulations With Respect to Parenting

It is with respect to rights related to parenthood that the law provides the most important protections to both parents and children. The law tries to enhance the well-being of children by encouraging and facilitating, but not requiring, the rearing of children in stable environments by two adults legally related to the child and to each other. Even if the parents divorce, the law favors maintaining the child's legal and physical relationship with both parents, and both parents remain obligated to provide economic support to the child.

In contrast, when same-sex partners are raising children, the law makes it difficult for a partner who is not the biological parent of the child to establish a legal relationship with the child. To understand this difficulty, it is necessary to review the common contexts in which same-sex partners rear children. The most common context involves children born to one of the partners in the course of a prior heterosexual relationship, usually a marriage. In such situations, the new homosexual partner is the equivalent of a step-parent in a marital unit. The second situation is where same-sex partners are living together and decide that one of them will become the biological parent of a child through some form of reproductive technology, and that, after the child's birth, they will serve as co-parents. Of course, married couples may also have children in this manner. Finally, as is the case with married couples, same-sex couples may seek to adopt a child to whom neither adult is biologically related.

It is with respect to the adoption of children by step-parents and to the rights of the non-gestational partner when a [*309] child is conceived through artificial insemination that same-sex couples are treated very differently from married couples. For married couples, the legal rules greatly facilitate establishment of legal parenthood by the partner not biologically related to the child. In contrast, the non-biological parent in a same-sex couple faces formidable obstacles in establishing a legal parent-child relationship.

For example, in marriages where one of the adults is a step-parent, state laws and practice generally give the step-parent a virtually automatic right to adopt the child, provided that the non-custodial biological parent is dead, has abandoned the child, or does not object to the adoption. n53 In short, the step-parent is automatically considered suitable to adopt the child. This judgment is reflected in the fact that the adoption paperwork and other legal requirements are minimal. These rules are designed both to provide children with two legal parents whenever possible, and to enable the step-parent to establish a legal relationship with the child.

In contrast, the same-sex partner of a person who has a child from a previous relationship is not eligible for a step-parent adoption. Instead, the couple must try to get a court to grant what is commonly called a "second-parent adoption." Many states do not permit such adoptions and even in those that do, the process is much more difficult than in a step-parent adoption. n54 Usually, there is an extensive social work assessment of the "suitability" of the prospective adoption. Moreover, the adoption process can be lengthy and costly, emotionally as well as financially. Finally, even if these hurdles are overcome, in many states, judges will simply not authorize such adoptions. n55

Same-sex couples face similar barriers if the couple wishes to have a child through donor insemination. n56 In the [*310] case of married couples, a husband generally is automatically made the legal parent of a child born to his wife through artificial insemination, provided that he consents to the insemination and that it is carried out under the supervision of a licensed physician. n57 If a lesbian couple decides to have a child by this means, the non-gestational partner is not automatically treated as the child's second legal parent. To achieve that status, she must apply for a "second parent" adoption with its attendant difficulties. n58

There are major adverse consequences for the child, and adults, if the non-biological partner cannot establish a legal relationship with the child. Without a legal relationship, the child is not entitled to financial support from the non-biological partner, to any inheritance if the person dies without a will, or to numerous other economic protections. The non-biological partner may have no right to seek custody or visitation if the couple splits up, n59 no right to consent to

medical treatment of the child, and none of the various other legal rights of parenthood. The emotional quality of the relationship for both the child and the adults may be significantly altered by this legal scheme.

Thus, marriage brings major legal benefits to the couple and their children. However, people do not marry for legal benefits; they marry for love and commitment. And, according to Waite and Gallagher, the benefits of marriage greatly exceed the legal benefits which result from such a union. These authors find that marriage increases the [*311] chances that individuals will be healthy, happy, better off financially, safer, and happier with their sex lives. In light of these personal and legal benefits it must be asked why persons who love and want to marry a person of the same sex should be deprived of these opportunities. Opponents of same-sex marriage do not deny that gay individuals would benefit from marriage. Rather, they argue that recognizing such marriages would have harmful consequences to society. I turn now to an examination of the evidence relevant to assessing these claims.

IV. SAME-SEX COUPLE MARRIAGES AND FAMILY POLICY

A. Promoting and Strengthening Family Units Committed to Long-term Mutual Support

I look first at the goal of promoting and strengthening family units committed to long-term mutual support. Would recognizing same-sex couple marriages further this goal or detract from it? Opponents of recognition claim that the nature of the relations between partners in same-sex couple marriages would be so dissimilar to partner relations in opposite-sex couple marriages, that standard family policy should not be applied to same-sex relationships. n60 They further assert that same-sex marriages are likely to be highly unstable, thereby defeating the goal of advancing social stability. n61 However, since same-sex couples have not been allowed to marry, opponents of same-sex couple marriage cannot present data that directly proves these claims. Those who argue for allowing such marriages face the same problem of "proving" what such marriages would be like.

[*312] While direct evidence on this issue is not currently available, there is data that is relevant in addressing these claims. The best evidence comes from studies of same-sex partnerships, even though the couples who would choose to marry are only a subset of these partnerships. The findings of these studies do not support the argument that marriages of same-sex couples would differ from opposite-sex marriages in ways relevant to public policy. From the relevant evidence, it seems clear that large numbers of lesbians and gay men live with long-term partners and that, with regard to mutual care and support, these relationships function similarly to those of opposite-sex couples. n62

1. Number of Same-sex Couples

It is clear that gay, like heterosexual, individuals want to form partnerships. The U.S. Census Bureau estimates that in 1998 there were approximately 1,674,000 same-sex partnerships in the United States; 865,000 were male couples and 809,000 were female relationships. n63 A large number of the same-sex couples are raising children. In the 1998 [*313] Census, 166,000 same-sex couples reported that they had children 15 or younger living with them (the Census does not ask about 16 and 17 year olds). n64

Census estimates indicate that there were approximately 4,236,000 non-married opposite-sex couples n65 and 54,317,000 married couples n66 living together in the United States in 1998. Thus, self-reported same-sex couples constituted about three percent of all couples living together, whether married or cohabiting, in the United States. The most comprehensive national study on sexuality concludes that approximately 2-3 percent of the adult population is exclusively homosexual in identity. n67 Thus, the percentage of adult homosexuals living with partners appears to be the same as the percentage of heterosexual adults living with partners: approximately 60 percent. n68

2. Stability and Commitment of Relationships

There are a number of reasons to believe that same-sex couples who chose to marry will be at least as committed to their relationship as are opposite-sex married couples. Surveys of gay and lesbian communities consistently find that 70 percent or more of respondents prefer being in long-term monogamous relationships to other relationships and [*314] many would like to have a life partner and be able to marry. n69 Moreover, among gays and lesbians who identify themselves as living with partners, the vast majority (close to 90 percent) of the respondents, regardless of gender, indicate that they have made a long-term commitment to the relationship. In fact, many of these couples view themselves as "married." Between 30 and 50 percent (with a higher percentage among women) indicate that they have gone through commitment ceremonies, sometimes presided over by religious officials, or have exchanged rings. Many couples have registered as domestic partners, where that option was available, and are viewed by family and friends as married. In all of the surveys, a significant portion of the respondents indicated that they had been in the relationship for more than ten years.

[*315] Research studies that have assessed the nature and quality of same-sex relationships through self-reports of people in these relationships support these survey responses. n70 Most of these studies include heterosexual couples for comparison. Due to the relatively small number of subjects in these studies, and the possibilities of sample bias, the findings from these studies cannot be generalized to the entire population of same-sex couples. Again, however, the findings support the conclusion that the great majority of same-sex couples share the kind of intimacy and economic sharing found in heterosexual relationships. Thus, the same-sex couples display behavior marriage laws seek to encourage.

Despite these similarities, same-sex partnerships often vary from opposite-sex partnerships. This finding is not surprising, considering that research on families reports great variation in the structure and functioning of heterosexual marriages with respect to gender roles, childrearing practices, and even with respect to sexual relations. These differences are often related to a family's socio-economic situation, race, ethnicity and religion; cultural norms shape behavior. n71 The nature of marriage relationships also has changed significantly over time, so there are generational differences in the way men and women relate to each other and in the structure of their marriages. Moreover, men and women often view marriage differently, so it would be expected that a marriage consisting of two men or two women would differ in various ways from a marriage of a man and woman. However, with regard to caring and supporting each other, the central concerns of marriage law, it seems clear that same-sex couples function similarly to opposite-sex couples.

[*316] Unfortunately, no studies have followed a randomly selected group of same-sex couples over a period of time in order to assess the stability of the relationships. Several studies do provide relevant information, although they rely on non-random samples. The largest study, conducted in the late 1970s by two sociologists at the University of Washington, included same-sex couples, married couples and heterosexual cohabiting couples. n72 Most of the cohabiting couples had been living together less than four years; this was true of both the gay and heterosexual couples. The average length of the marriages, in contrast, was nearly ten years. n73

The researchers conducted two sets of interviews, 18 months apart. At the follow-up interviews, 80 percent of the lesbian couples, 84 percent of the gay male couples, and 83 percent of the opposite-sex cohabiting couples were still together. Ninety-five percent of the married couples were still together. n74 The higher percentage for married couples is not surprising; they had chosen to marry, they likely were receiving the social and economic supports designed to encourage stability in marriage, and they already had been married for a lengthy period (most divorces occur early in marriage). In another, more recent longitudinal study, which tracked a smaller sample of only same-sex couples (66 male and 51 female couples) for a five-year follow-up period, 86 percent of the male couples and 84 percent of the female couples remained together over the five-year period. n75

These findings, along with the information from various surveys, are especially illuminating in light of the fact that our society has not, until now, made the possibility of marriage and family an option that gay men and lesbians could see as part of their future. The official message to [*317] these individuals has been that marital-type commitments were not expected, nor recognized or protected. Yet, despite the barriers and the stresses created by legal and cultural norms, it is clear that large numbers of gay men and lesbian women have entered into stable, long-term partnerships.

Some opponents of same-sex couple marriage have argued that, at least with respect to gay men, homosexuality is incompatible with commitment and, therefore, with marriage. n76 Most research and surveys do find that gay men are less likely than heterosexual men to express commitment to monogamy. n77 These findings do not support the conclusion that we should bar male couples from marrying. First, while sexual fidelity may be an important contributor to marital stability, its impact depends upon the weight the partners assign to it. In the studies of male couples, the respondents report very high levels of caring and commitment, even in those relationships that were not totally monogamous. n78

[*318] In addition, if marriage were an option, those couples choosing to marry may well place more emphasis on sexual fidelity. Moreover, marriage itself will likely influence the couple's behavior. Scholars who study sexual behavior emphasize the critical role that culture plays in shaping individual sexual behavior. n79 As the authors of the most comprehensive and respected survey of sexual practices in the U.S. recently wrote:

> (S)ociocultural processes play a fundamental role in determining what we perceive to be "sexual" and how we construct and interpret our sexual fantasies and thoughts. Thus, although biological factors may indeed affect sexual behavior, they play at most a small role in determining what those specific behaviors will be... (T)hrough a process of acculturation lasting from birth to death, individuals acquire a pattern of

sexual conduct that is appropriate to their culture (including those patterns that are thought to deviate from the norms of their culture). n80

These researchers conclude that people generally adapt their sexual behavior to conform to cultural norms. Our society has outlawed homosexual sexual activity. Under these circumstances, it is not surprising that gay behavioral patterns, at least among men, differed from heterosexual norms. n81 But, if marriage were an option, there is likely, from adolescence onward, to be a convergence of the norms of heterosexual and gay relationships, with respect to dating, sexual relations, and marriage. n82

[*319] Moreover, recognition of these relationships should contribute to their stability. n83 The partners will be more likely to receive the type of social support that is given by parents, grandparents, friends, and neighbors to married couples. Each partner's sense of self and the relationship may be altered in positive ways. Finally, entering into a legally-sanctioned marriage will make terminating the relationship more difficult, as a legal divorce will be required; and support obligations upon divorce will be instituted that reflect the nature of the commitment between the partners.

Opponents of recognition correctly assert that there is limited evidence to support the conclusion that allowing same-sex couples to marry will strengthen their relationships. Again, it is necessary to ask by what standard should the evidence be judged. The nature of current marriages varies greatly and the law does not attempt to restrict marriage to only those couples that are not likely to divorce or to those who make a legal or emotional commitment to monogamy or to mutual support. Divorce rates are generally high and many heterosexual couples with a high statistical probability of divorcing, such as those between 18 and 21 years of age, or those of different religions, are permitted to marry. n84 There is no justification for applying a different standard to same-sex couples who wish to marry.

B. Parenting

Perhaps the area of greatest concern to those who do not view homosexuality as morally wrong but who are skeptical of same-sex marriage centers on issues related to children: Isn't it harmful to children, they ask, to be raised by a gay parent or by a same-sex couple? Or, at a minimum, isn't it better for children to be raised by two opposite-sex married parents? Shouldn't marriage be restricted to this "optimal" family structure?

[*320] Unquestionably, the manner in which the next generation will be raised should be a central concern of the state. As discussed below, however, the evidence indicates that children raised in households headed by a gay parent do as well as those raised in heterosexual households. Even more important from the perspective of children's psychological and emotional development, the relevant question is not whether one form of family is better for children, however "better" is defined. There currently are hundreds of thousands of children living with parents in same-sex partnerships or with a single gay mother or father who may later find a partner. They will continue living with their parent(s) regardless of whether the state allows their parents to marry. Nobody is suggesting that they be should be taken from their parent(s) and placed elsewhere; such a policy would not only be undesirable and contrary to current state laws, it would be unconstitutional. n85

For these children, the only pertinent issues are whether their parents will be married or cohabiting and whether it will be easier or harder for the partner who is not the biological parent to adopt the child. As discussed previously, n86 children of gay parents would benefit if their parents were able to marry and if their non-biological parent could adopt them. This would maximize stability and protect [*321] their economic interests. They would be able to see their family as more similar to families with heterosexual parents, leading to the conclusion that gay families are "normal." Their parents' well-being would likely be improved, enhancing their child-rearing capacity. By not allowing gay parents to marry, children are made to suffer.

Perhaps those opposing marriage believe that if the state allows same-sex couples to marry, more gay and lesbian couples will have children, and those children will be living in a family that is less "desirable" than a heterosexual, married family. Again, as discussed below, the evidence does not support the claim that children raised by same-sex parents exhibit more developmental problems than those raised in heterosexual families. Even if there were some differences favoring those reared in heterosexual households, would this result mean that it is better for children not to be born at all than to be born to a same-sex couple? Would society be better off if these children were not born at all? Such a position would be totally contrary to family law policy. It has never been public policy that only those families that will provide children the most "optimal" home should have children. There would be no support for such a policy, for many good reasons. n87 American society has made the decision that it is best to try to help all parents raise their children successfully, not to limit who may have children or to penalize children because they were born to the "wrong" parents.

The fact that all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples underscores the undesirability of such a policy. n88 Over the past twenty years, there have been [*322] a number of studies of children being raised by gay parents. n89 These studies have analyzed many aspects of the children's development, including the following: the presence or absence of significant academic, emotional or social problems; their level of self-esteem; their relationships with peers; their relationships with their parents; and whether they were "happy." In particular, researchers have focused [*323] on the gender identification and sexual orientation of children in these families, since these issues are of theoretical interest to specialists in child development, and because one of the concerns of opponents to gay parenthood is that the children will become homosexual. n90

While the number of children in these studies is small, n91 the findings are all consistent. Upon reviewing these studies, the American Psychological Association, in 1995, concluded that the research indicates that children raised by gay parent(s) are not "disadvantaged in any significant respect relative to the children of heterosexual parents." n92 Most significantly, for the purposes of family policy, none of the studies support the claims that children raised by lesbian parents will have serious emotional, intellectual, or social development problems because of their parents' sexual orientation. The vast majority of children functioned well [*324] academically and did not engage in self-destructive behaviors or in behavior harmful to the community. n93 The studies also find that children raised by lesbian parents get along as well with their parents and peers as do children raised in heterosexual families. n94 The research finds no differences between these groups of children in terms of self-esteem or in characteristics such as leadership ability, self-reliance, interpersonal flexibility, and self-confidence. n95 In these regards, as well as in general psychological and emotional well-being, they did not differ from their heterosexual counterparts. n96 In the one study that followed children raised from birth into adulthood by one or two gay parents, the young adults did not differ from the young adults raised in heterosexual families with respect to employment, ability to find and relate to partners, or in their general sense of well-being. n97

All this is not to say that being raised by a gay parent or parents is not different in some respects or without difficulties. The children raised by gay parents were aware that many people stigmatize homosexuality. Many children reported being embarrassed to tell their friends about their parent's sexual orientation or living arrangement. Many children reported being teased about their parents. For some of the children who lived with a gay parent following their parents' divorce, coping with the parent's new sexual identity added to the difficulties most children experience from divorce itself.

Despite the fact that these children's lives were not problem-free, the children's mental health did not differ from that of other children. In essence, these children had learned to cope with the fact that society considered their family [*325] different, just as children living in other minority families (such as families of a minority religious faith or interracial families), learn to cope with community stigma based on their family's difference. n98

Some commentators have argued that one reason for discouraging gays and lesbians from becoming parents is that their children may be more likely to engage in homosexual behavior. n99 Again, the relevance of this accusation to marriage public policy is not clear. Denying people the right to marry does not mean they will not have children despite that fact that the desire for children is strong in many families. Importantly, these commentators also fail to provide good reasons for why it would be negative for a child with homosexual parents to choose same-sex relationships. n100

On a factual level it is clear, of course, that some children raised by both heterosexual and gay parents enter into same-sex relationships and some self-identify as gay. However, it is not clear whether being raised by a gay parent influences sexual orientation. The evidence is preliminary and inconclusive. As noted, the most comprehensive [*326] national study of sexual behavior found that approximately 8 percent of people report that they have had a same-sex relationship or encounter at some point in their life and that approximately 2.5 percent of adult men and 1.3 percent of adult women self-identify as gay. n101 Most of these people were raised in heterosexual households. n102 Another study that followed children into adulthood found that children raised by lesbian parents were not more likely to self-identify as gay or lesbian in adulthood than were children raised by heterosexual couples. n103 Yet other studies have concluded that the children living with gay parents were more likely to have a same-sex sexual encounter or relationship during their adolescence than were children from heterosexual families. n104 However, because the samples in these studies were so small and since the great majority of the children in both settings reported only heterosexual relationships, the differences in the percentages reporting same-sex relationships were not statistically significant.

It would not be entirely surprising if family composition influenced sexual behavior. Both the presence of a parental role model, and the fact that the children living with a gay parent would generally assume that homosexual behavior is not bad, should make these children more open to considering a same-sex relationship. This is likely even though

studies regularly find that gay parents try to provide their children with multiple role models of both sexes and to stay closely involved with extended family supportive of the child.

Even if we assume that a small percentage of children might consider a same-sex relationship because they are living with a gay parent, what is the relevance of this [*327] information for public policy? Under any set of assumptions, recognizing the validity of same-sex marriages should increase the well-being of children, especially those who recognize their homosexuality early in life. When children receive parental support with respect to their sexual orientation, there is no reason to believe that the children will be harmed as a result of choosing same-sex relationships.

More importantly, it is clear that most children who will seek same-sex relationships will be living in heterosexual households. The more that society normalizes and accepts same-sex relations, the better off these children will be. Many heterosexual parents reject their homosexual children, which can lead to severe mental health problems for the children, including attempted or actual suicide. n105 It seems likely that fewer heterosexual parents will reject their gay children if society at large recognizes and accepts the human dignity of gays. Gay and lesbian youth also will benefit by being able to look forward to the opportunity of marriage. Thus, from a child welfare perspective, there is no reason to focus on the sexual orientation of children raised by gay parents.

The evidence supports the conclusion that in their capacity as parents and as partners, gay and lesbian couples function similarly to heterosexual couples and that their children do not differ in important ways from children raised in heterosexual households. Gays and lesbians are highly committed parents, who, in the cases of children conceived by artificial insemination, who were adopted, went to great lengths to have the child. These children all are wanted, so it is not surprising that they are developing normally.

[*328] In summary, some critics of same-sex couple marriage assert that research on the effects of gay parenting on children is incomplete or methodologically flawed. They claim that homosexual parenting should not be endorsed until there is more research. n106 It is true that the research is limited and has methodological limitations. n107 The sample sizes are small in these studies, the families may not be representative, and there has been almost no longitudinal research on the issue. However, as a practical matter, there may never be sufficient research to convince the skeptics. In short, it simply is not possible to obtain large, representative samples of same-sex couple families with children. n108 Even if such samples could be found, it would be many years until there could be adequate longitudinal data. It takes years to design good longitudinal research, and the subjects must then be followed for years. Moreover, large sums of money would be necessary to conduct such research. Studies are likely to be outdated as rapidly as they are published, since the impact of a parent's sexual orientation on a child is certainly mediated by societal attitudes towards sexual orientation. Finally, there is also no reason to believe that more research would provide data significantly different from that already available with respect to the issue of same-sex marriage. In light of the clear benefits recognizing same-sex marriage would give to the hundreds of thousands of children living with gay parents, it is bad policy to deny marriage until it is "proven" that children are not harmed by living with gay [*329] parents. Instead, the burden must fall on those opposing same-sex marriage.

C. Potential Societal Costs of Recognizing Same-Sex Couple Marriage

I turn now to a set of objections of a quite different nature. It is often asserted that granting same-sex couples the right to marry would pose a great threat to marriage as an institution, and even to the fabric of society itself. n109 While the arguments supporting these claims are varied, they can be divided into three categories.

1. Marriages and Procreation

There are claims that gay marriages would be contrary to the basic purposes of marriage. The two major claims in this regard are:

1. The basic purpose of marriage is to channel procreation into stable units and since same-sex couples cannot procreate, they should not be able to marry.

2. Only sexual relations designed to lead to procreation are morally acceptable, so marriage should be limited to those who engage in morally acceptable sexual activities.

Because these beliefs generally are associated with the teachings of some religions, some proponents hold them strongly and sincerely. These arguments make no sense outside the context of these religious beliefs. First, same-sex [*330] couples do have children and their children have the same needs as other children to grow up in a stable setting.

Second, the law provides many options to couples wishing to have a child through means other than sexual intercourse. Third, marriage policy reflects the view that it is desirable for people to marry even if they cannot or do not wish to have children. Many couples who marry do not intend to have children, either because they are beyond the age at which the woman can bear a child, because one or both of the partners is infertile, or because the couple prefers to remain childless. Finally, couples have a constitutional right to engage in sexual relations without the objective of procreation and states may not forbid the use of contraceptive devices. n110

Law pertaining to marriage and procreation, as well as with respect to divorce, reflects values that differ from those of some religions. Our commitment to separation of church and state, our recognition of the diversity of viewpoints on these issues (including those within and among religions), and our commitment to respecting individual choice on these highly personal matters has led policy-makers to focus on secular goals when regulating families. Recognizing same-sex couple marriages furthers these secular goals.

2. Social Stability

The second category of claims focus on concerns that marriage by same-sex couples will undermine social stability and cohesion in society and, ultimately, the institution of marriage itself. The most frequently made argument is that centuries of tradition limiting marriage to opposite-sex couples reflects the wisdom that this form of marriage is a critical aspect of social organization.

Proponents of this view fail to be precise about the exact harms they foresee and/or fail to provide supporting evidence. Often, the claim is made as part of a general argument that homosexuality itself is immoral and a threat to [*331] society. Since same-sex couple marriage has rarely, if ever, been recognized in any legal system in the world, n111 there is no empirical evidence of societies that have suffered as a result of same-sex marriages. Despite the lack of evidence, some commentators cite generally to social theory or to claims about the reasons that previous societies have gone into "decline" to justify their position.

Because claims based on tradition do not rest on empirical evidence of the likely consequences that would result from change, they cannot be empirically refuted until the change is made. Yet, when subject to critical analysis, predictions about the potential negative impacts are unsupported by theory, logic, or historical evidence. Concerns that marriage was changing in ways that foretold societal doom have been existed for centuries, and these predictions have been particularly numerous when changes to the rules regulating the structure of marriage or who could marry were being contemplated. For example, historically, marriage meant that the wife was subsumed in the husband; her property became his and he had the right to control all family decisions. n112 In the 1800s, both England and the United States began enacting laws designed to make marriage into a partnership of legally equal spouses. n113 As these changes were being considered, it was not unusual for opponents to predict catastrophe. When England was considering allowing wives to own property, *The Times* of London wrote that doing so would "abolish families in the old sense" and "break up society into men and women" creating "discomfort, ill-feeling, and distrust where hitherto harmony and concord prevailed." n114 Similarly, when New York State was considering the same change, a legislator argued that his colleagues must remember

> [*332] the complexity and fragility of marriage as a social institution... If any single thing should remain untouched by the hand of the reformer, it was the sacred institution of marriage...(which) was about to be destroyed in one thoughtless blow that might produce change in all phases of domestic life. n115

Similar arguments were made in opposition to interracial marriage. n116 In fact, it was only last year that the state of Alabama repealed its law banning such marriages. n117

As these quotes thoroughly illustrate, there is a long history of strong resistance to any change. This opposition is not surprising given that marriage is so central to our own sense of self. Change can be quite threatening, even more so when the change is related to sexual identity. It is natural, and easy, for opponents of change to argue that society should stick to "tradition." Since significant changes usually cannot be tried as an experiment, proponents of the change cannot prove that it will not cause the predicted harms. n118 Yet, claims about the likely effects of previous major changes to the institution of marriage have frequently turned out to be inaccurate, even when the change really did alter the nature of marriage, as was the case with the passage of "Married [*333] Women Acts." The evidence reviewed earlier indicates that the arguments of harm to society if same-sex couples are able to marry will prove equally false.

It also is relevant that many other countries have rejected the "tradition" based arguments against same-sex couple marriage. In recent years a number of countries, including Denmark, Holland, Iceland, Norway, and Sweden have given formal status to same-sex unions. n119 France and Brazil have recently joined the list. Australia treats the long-term partners of homosexuals as spouses for purposes of its immigration policy. Canada, Israel, Namibia, South Africa and Spain also recognize such unions for a variety of purposes. Although these laws have been in effect for only a short period of time, I have found no reports of negative consequences in these countries. The institution of marriage appears to be as strong as it was before the change in law. In addition, many American same-sex couples live as if they were traditionally "married." Some states have granted various forms of legal and social approval short of legally recognizing these unions as marriages, and the presence of these couples has not had any reported destabilizing effect on marriage or on other social institutions. n120 Given that same-sex couple marriages will never amount to more than a very small proportion of the total number of American marriages, arguments that legalizing same-sex marriages will destabilize the institution of marriage or society itself seem very weak.

In fact, in terms of creating instability, earlier changes, especially those that enhanced gender equality, or allowed for divorce, did alter fundamentally the nature and meaning of marriage. These changes had real potential for destabilization. In contrast, authorizing marriage by same-sex [*334] couples would bring more people into the institution of marriage, not change its fundamental elements. If the reasons for encouraging marriage over cohabitation for opposite-sex couples are valid, why should the same arguments not apply?

3. Parade of Horrors

The final category of claims against recognizing same-sex marriages consists basically of what might be called a "parade of horrors." The most common is that recognizing same-sex marriages will force legislatures to allow other types of units to marry, including polygamous couplings and incestuous relations. n121 These claims are baseless from both a legal and a policy perspective.

As a matter of law, a legislative decision to authorize same-sex couple marriage would not create a legal obligation to abandon any other limits on the form of marriage. The issue as to whether each particular limitation on marriage is valid is based on whether the limitation has independent justification. Same-sex couples are fundamentally unlike polygamous units and sexual unions of biologically related individuals in ways that would be clear to legislators or judges.

Rules limiting marriage to couples reflect the concern that a person married to several people will not be able to adequately assume the economic obligations of marriage (including those that arise in the case of divorce). Polygamous units also may not be able to develop the kinds of intimacy and emotional growth that are seen as important elements of marriage. n122 Thus, it is [*335] extraordinarily unlikely that a legislature would authorize polygamous marriages or that a court would require it to do so. Furthermore, the claim that recognition of gay marriage would also require recognition of incestuous marriage is especially absurd. Allowing marriages between parents and children would entail numerous potential harms to children and families. Assertions that acceptance of same-sex couple marriage will require recognition of other currently disfavored relationships seems designed to play on fear rather than to promote reasoned discussion.

In sum, none of the empirical claims of those opposing same-sex couple marriage withstand scrutiny when judged by normal standards of proof. Given the potential benefits of recognition of gay marriage, not to mention the equality issues, opponents should be required to provide some convincing evidence to support their claims that recognition would have major negative consequences.

V. THE "NON-MARRIAGE" ALTERNATIVES

A. Maintaining the Current State of the Law

In deciding whether to recognize same-sex couple marriage, policy-makers need to consider that the number of same-sex couples will continue to increase in the coming years. Inevitably, courts and government agencies will be confronted with questions regarding the legal status of same-sex relationships, including the rights of the partners if the relationship ends and the rights or status of the couple and their children with respect to a variety of government programs and benefits. n123

[*336] Absent legislative action clarifying the status of these couples, same-sex couples living in marriage-like units may be treated as "cohabitors" under state laws and afforded any rights given cohabitors by statute or through court decisions. n124 In addition, in many states a number of legal rights are available to same-sex couples if they explicitly contract for them, although there are states that do not recognize such contracts for gay or heterosexual couples.

n125 But even taking these possibilities into account, treating same-sex couples as cohabitors does not adequately protect their interests and those of their children.

Like opposite-sex couples, same-sex couples would like to be able to enter into a relationship in which their rights and obligations are defined by law, and not dependent on court decisions or contracting. If denied the legal rights that come with marriage, the couple needs to draft contracts dealing with significant parts of their relationship, such as how they hold property, what will happen to their assets if one of them dies, and if there will be any support obligations if the relationship ends. Contracting is not an adequate substitute for statutorily prescribed rights and obligations. Many people will not think to contract or will feel that contracting about financial issues is not the way to organize a relationship based on love. Moreover, contracting is costly, both financially and emotionally. Enforcing contracts may require long court procedures, the outcome of which may be uncertain. In addition, there are significant rights and obligations associated with marriage that cannot be obtained or altered by contract, such as access to various government programs and legal protections, such as the right to sue for wrongful death.

[*337] From the perspective of the legal system, a judicial case-by-case determination of legal rights is a less desirable way of organizing intimate relationships than is marriage. As the California Supreme Court recently stated, in a case limiting the rights of cohabitors:

> The state has a strong interest in the marriage relationship... Our emphasis on the state's interest in promoting marriage is not based on anachronistic notions of morality. The policy of favoring marriage is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in an organized society ... [Case-by-case establishment of rights] would require a court to inquire into the relationship of the partners to determine whether the "emotional attachment of the family relationship" existed between the parties, and whether the relationship was "stable and significant"... Application of these factors would not allow for consistent application of rights from case to case. n126

B. Domestic Partnerships or Civil Unions

As an alternative method to the status quo, many people, including a number of political figures, have taken the position that same-sex couples should be given the legal benefits associated with marriage through adoption of domestic partnership laws or civil unions. Supporters of this approach claim that a comprehensive domestic partnership law, including a registration system, could provide most of the privileges and obligations of marriage, without offending those who strongly oppose extending the term "marriage" to same-sex couples. n127

[*338] If states continue to adhere to their policy of denying same-sex couples the right to marry, I would support passage of a comprehensive domestic partnership or civil union law for same-sex couples. A civil union law would clarify same-sex couples' legal rights and would help protect their children and partners. Nevertheless, I believe that a domestic partnership law is still a less desirable alternative than marriage. Presumably, the legal benefits and obligations associated with marriage are the ones that legislatures believe are the most appropriate in light of the state's interests in marital units and as a way of protecting the interests of the partners and children. If, as I have argued, same-sex couple marriages n128 would be functionally equivalent to opposite-sex couple marriages, there is no reasoned basis for different treatment. Therefore, unless the civil union provisions exactly mirrored the provisions governing opposite-sex marriages, the legal situation of same-sex couples would be inadequate. n129

Most importantly, if a state passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units unworthy of the term "marriage." Aside from the offensiveness of the message, it might be viewed as a statement that these are less important family relationships. As Waite and Gallagher argue, society's attitudes may be critical if couples are to remain committed to each other for life. n130 From a strategic and political perspective, the civil union approach may make great sense. In terms of family policy, it does not.

[*339] VI. WHERE TO GO FROM HERE: THE FUTURE OF SAME-SEX COUPLE MARRIAGE

I believe that the evidence clearly indicates that it would be beneficial to children and families if same-sex couples were able to marry. There is no substantial evidence to the contrary. Why then is there continued resistance? For some opponents, resistance is based on a deep-rooted view that homosexuality is immoral. These people simply oppose any acceptance of gays by society. Still, many other people, less hostile to gays in general, see marriage as different. Marriage has great symbolic as well as practical meaning. Peoples' attitudes towards same-sex couple marriage are inevita-

bly influenced not only by their religious beliefs but also by their deepest emotional responses to homosexuality and their images of gay couples. Many people have a vision of gay relationships as being fundamentally different, and less valuable, than heterosexual relationships. As a result, it may be difficult to get people to make an objective assessment of the data and its relevance to family policy.

A lack of reasoned debate may not be surprising in the political realm where ideology or political considerations may lead legislators to ignore evidence. Unfortunately, ideology also influences the views of those who purport to approach the issue in a scholarly fashion. One example is the treatment of same-sex couple marriage by at least one of the two authors of *The Case for Marriage*, a book I have cited often in my analysis. As I have noted several times above, these authors argue that marriage has enormous benefits for the individuals, their children, and society as a whole. More importantly, they argue that people are changed, often dramatically, by marrying. After marrying, individuals change their attitudes and behaviors and receive the social, cultural, and economic support of others because they are married. Nevertheless, Gallagher opposes same-sex couple marriage (Waite tends to favor it). I need to quote at length their discussion of this issue, since it is so revealing:

> [*340] The state of social-science research, as it now stands, sheds little light on the question: Would gay couples (and their children) reap the same benefits from marriage that men and women who marry do? As social scientists, the most we can conclude is, Maybe, maybe not. The answer depends in part on how much gender matters. A family consisting of two mothers would undoubtedly be better off financially than the average single-mother family. But would one of the two women reap the breadwinner's bonus married men get? Or would they both be "married mothers" cutting back on earnings to care for children? Would two bachelors who "married" settle down to an orderly life together, reaping the health advantages men get from marriage? Or would they barhop in tandem? Again, we suspect, but do not know, that adults in such same-sex couples would reap some, but not all, of the benefits of the marriage. The benefits afforded same-sex couples by marriage would also depend on the extent to which family, friends, and other social institutions supported these unions.
>
> As for children, the intergenerational effects of deciding that gender is irrelevant to the public project of marriage are, frankly, unknown and unknowable--to us or anyone else as social scientists, unless and until some jurisdiction permits gay marriage and we start following the development of children of same-sex couples to see how they do. We, as a society, have to decide whether to take the leap of faith required to legalize gay marriage, but we need to make that decision based on other discourses--on religious and moral views about social justice and sexual morality-- but not on the basis of scientific [*341] knowledge about the consequences for individuals of these unions. n131

This treatment of the issue is disturbing in a number of respects. First, while it certainly is true that the case for same-sex couple marriage cannot be proven through social science research, the authors show little knowledge of the research on gay families and parents. While research is limited, it does shed light on a number of the issues the authors raise. For example, studies show that in lesbian couples both "mothers" tend to put time into caring for their children; the "second" parent in the lesbian couples were more involved in child care than were fathers in opposite-sex couples. n132 Such extra time might cost them some of the "marriage bonus" on earnings, but the children get the "time with parent bonus," a fact disregarded by Waite and Gallagher. Similarly, there is research describing the nature of gay male relationships showing that they resemble married couples, not bachelors sharing a home. n133

Moreover, the authors apply entirely different standards in assessing the case for same-sex couple marriage than they do for opposite-sex couples. For example, they express concern that same-sex couples would reap "some but not all of the benefits of marriage." Few opposite-sex couple marriages reap all the various benefits associated with marriage, yet we do not limit marriage to couples that are likely to reap the earnings bonus or who will have improved health. Certainly Waite and Gallagher do not suggest such a policy. Why a different standard? n134 Since Waite and Gallagher presume that even high risk (in terms of conflict and divorce) opposite-sex couples marriages will generally [*342] benefit society, why do they not make the same presumption for same-sex couples?

In addition, in suggesting that gender may be the critical determinative, the authors ignore their own evidence about why marriage may lead to better health, better sex, and greater happiness. Waite and Gallagher argue throughout their book that marriage is different because each member of the couple has made a strong mental and emotional commitment to the joint enterprise and to live together in sickness and in health, for better and for worse. They write that:

> Marriage partners together create a shared sense of social reality and meaning--their own little separate world, populated by only the two of them... Ordinary, good-enough marriages provide the partners with a sense that what they do matters, that someone cares for, esteems, needs, loves, and values them as a person... Marriage and family provide the sense... that one has a purpose in life and a reason for continued existence, that life is worth the effort because... other people (are) depending on you, counting on you, caring about you... Marriage give(s) people a sense that their life has meaning and purpose. n135

There simply is no reason to believe that same-gender couples that marry will make any less of a commitment. Truly, all of the evidence is to the contrary.

An especially troubling aspect of their brief discussion is their adoption of negative stereotypes about gay couples. Why do they ask if gay men will chose to settle down to orderly lives or choose to "barhop in tandem?" What is the evidence that these couples were barhopping to begin with? Perhaps the authors believe that all men, [*343] regardless of sexual orientation, are predisposed to barhopping.

What accounts for this striking variance between the authors' treatment of same-sex marriage and their use of data in the rest of the book? In light of their conclusion that the issue must be decided based on religious and moral attitudes about social justice, it appears that the problem is not the lack of data, but the religious and moral lens through which Gallagher chooses to look at that data.

To make sure my view on this issue is clear, let me reiterate that my problem is not with Gallagher's religious beliefs, although I may hold very different moral views. What I object to is the double standard applied by Gallagher (and perhaps Waite) to data analysis based on these beliefs, and their caricatures of gay relationships.

I am concerned when social scientists lose their objectivity because social science provides a backdrop for the moral debate that, like Waite and Gallagher, I think is essential before legislatures will be willing to recognize same-sex couple marriage. I do not think legislative change will come in the near future, as legislative change usually lags behind social change. Few politicians are likely to be willing to take the lead on an issue like this, n136 although the degree of openness to same-sex couple marriage expressed by both now Vice-President Richard Cheney and Senator Joseph Lieberman during the recent vice-presidential debate, and the actions of the Governor of Vermont and the majority of the Vermont legislature, were impressive and important.

Before there will be legislative change there must be a change in public attitudes. The public must come to understand that while families of different cultures, [*344] ethnicities, income levels, and gender composition do vary in a variety of ways, same-sex couple families do not differ in ways critical to marriage policy. A number of factors can contribute to change. It would, of course, be helpful if respected family scholars addressed the issues and evidence in a serious and open-minded way. Much more important, however, is the increased visibility of gay couples. As more people meet and get to know gay couples, I believe that they will abandon the stereotypes of gay couples. The more contact heterosexuals have with gay couples, the more they will recognize that these relations are the moral and functional equivalent of their own. Change will also come as more and more members of the clergy express acceptance of gay relations, perform commitment ceremonies, and, where possible, officiate over civil unions. Finally, media portrayals are extremely important; in modern society, we form opinions of people we do not know through the media.

In fact, despite strong opposition, these changes are occurring already. We will all be better off when our states follow the lead of other countries, and recognize the case for same-sex couple marriage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawCohabitationDomestic PartnersGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageValiditySame-Sex Marriages

FOOTNOTES:

n1 In accordance with a number of other authors, I use the terms "lesbian" and "gay" to refer to women and men, respectively, whose affectionate attractions are directed primarily to persons of the same gender. At times, for brevity, I use the term "gay" to refer to both men and women.

n2 See Craig Christensen, If Not Marriage? On Securing Gay and Lesbian Family Values By a "Simulacrum of Marriage," 66 Fordham L. Rev. 1699, 1723 n. 144 (1998); Nancy Levit, A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory, 61 Ohio St. L. J. 867, 884-85 n. 81 (2000). As Levit points out, however, there still is substantial discrimination and violence against gays, and the courts have upheld a great deal of unequal treatment. Despite changing attitudes, a substantial number of people still view same-sex sexual activity as morally wrong or undesirable.

n3 In 2000, the Vermont legislature passed a "civil union" statute, 1999 Vt. Acts & Resolves 847, which was enacted on April 26, 2000. The legislature acted pursuant to the decision of the Vermont Supreme Court in Baker v. State, 744 A.2d 864 (1999) (holding that the state's prohibition of same-sex marriage violated the Vermont Constitution).

n4 At least thirty states have enacted laws limiting marriage to a man and a woman. For a review of various states' laws affecting gays and lesbians, see generally Dominick Vetri, Almost Everything You Always Wanted To Know About Lesbians and Gay Men, Their Families, and the Law, 26 S.U. L. Rev. 1 (1998).

n5 Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999)).

n6 See Christensen, supra note 2, at 1723 n. 143.

n7 U.S. Census Bureau, Current Population Reports, 71-73 tbl.8, v. tbl.C (March 1998 (update)).

n8 At least 10% of these couples, nearly 200,000 same-sex couples, have children living with them. U.S. Census Bureau, United States Census of Population: Social and Economic Characteristics, 71 tbl.8 (1998).

n9 More than 90% of Americans rate having a happy marriage as a very important goal, generally the most important goal in life. See Linda Waite & Maggie Gallagher, The Case for Marriage 3 (Doubleday 2000).

n10 This is a central theme of much political discourse, and I recognize that many take issue with this assertion. See Martha Albertson Fineman, Why Marriage? 9 Va. J. Soc. Pol'y & L. 239, 268-71 (2001) (this issue). There is substantial debate within the gay community about the desirability of pressing for the opportunity to marry. 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. 1535-49 (1993); Michael Warner, The Trouble With Normal 81-147 (Harvard Univ. Press 1999). Most of these critics are not opposed to what people generally think of as marriage: a commitment between two people to share their lives and love. Rather, these critics are concerned with the way law structures marriage and the fact that certain rights tied to marriage are not available to other family units or individuals. I will not enter into this debate in this paper. While I agree with some of the concerns expressed by these critics, I do not believe ending marriage is the way to deal with these problems. Moreover, it does not make sense to single out gay couples for exclusion from the benefits of marriage.

n11 The fundamental right to marry was recognized by the United States Supreme Court in Loving v. Virginia, 388 U.S. 1, 12 (1966) (finding laws prohibiting marriage between blacks and whites unconstitutional).

The status of marriage as a fundamental right has been reaffirmed by other cases. See Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (finding laws prohibiting those delinquent in child support payments from marrying unconstitutional); Turner v. Safley, 482 U.S. 78, 95 (1987) (finding regulations prohibiting prisoners from marrying unconstitutional).

n12 See Carlos Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Geo. L.J. 1871-943 (1996); Stephen Macedo, Homosexuality and the Conservative Mind, 84 Geo. L.J. 261-300 (1995); John Culhane, Uprooting The Arguments Against Same-Sex Marriage, 20 Cardozo L. Rev. 1120-211 (1999). In recommending the recognition of same-sex couple marriage, citizen commissions in the states of Hawaii and Colorado have also recognized the morality of same-sex sexual relations. The Colorado Commission was chaired by Reverend William J. Winterrowd. See State of Colorado, The Governor's Commission on the Rights and Responsibilities of Same-Sex Relations: Report, Findings, and Recommendations (July 1, 1998); State of Hawaii, Report of the Commission on Sexual Orientation and the Law (Dec. 8, 1995). Like Ball and Macedo, I believe that the assertions regarding the immorality of homosexuality ultimately rest either on biblical interpretations or on tautological arguments regarding marriage and procreation.

n13 For views of religious leaders from a number of faiths, see generally Susan Olyan and Martha Nussbaum, Sexual Orientation and Human Rights in American Legal Discourse (Oxford Univ. Press 1998).

n14 There has been an extensive amount of writing on the issue of same-sex couple marriage over the past ten years. I draw my conclusions about various positions from a number of sources. For an extensive bibliography on same-sex couple marriage, see generally Christensen, supra note 2; Culhane, supra note 12. Nearly all the arguments against same-sex couple marriage can be found in the Congressional debates over the passage of the Defense of Marriage Act. See Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary 104th Cong. 533 (1996). Among the sources I have relied on for arguments against the recognition of same-sex couple marriage are Ball, supra note 12; John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049 (1994); Robert H. Knight, How Domestic Partnerships and "Gay Marriage" Threaten the Family, *in* Same-sex Marriage: The Moral and Legal Debate 108-21 (Robert M. Baird & Stuart Rosenhan eds., Prometheus Books 1997); Robert M. Byrd, Senate Debate on the Defense of Marriage Act, *in* Same-Sex Marriage: Pro and Con 232-36 (Andrew Sullivan ed., Vintage Books 1997).

n15 This argument is stated in functional terms. However, many opponents of same-sex couple marriage believe that the only morally acceptable sexual relations are those where the purpose is procreation. According to these people, since sexual relations between same-sex partners cannot lead to procreation, such relations are immoral and should not be recognized as a basis for marriage. See Finnis, supra note 14, at 1063-70.

n16 See Knight, supra note 14, at 118-19.

n17 See Byrd, supra note 14, at 232.

n18 See Byrd, supra note 14, at 232-34.

n19 See Ball, supra note 12, at 1878-79.

n20 See generally Waite & Gallagher, supra note 9. The central argument of the book is that getting married, in and of itself, changes most people's behavior because they have to act in ways that further the interest of

their partner as well as themselves. Moreover, people's behavior changes as a result of community expectations regarding how married people should behave. The authors present both data and vignettes to support their case. I find their data convincing on the issue of behavior change. The data are consistent with my own experiences and other literature reviews. I refer to this book throughout this article. While I agree with their basic conclusions about the effects of marriage, I want to emphasize that I believe that the authors overstate the significance of their data on many issues. I also think that many of their policy recommendations are not well thought out and do not flow from their data. Most of my disagreements are not relevant for the issues addressed in this article.

n21 See id. at 36-46 (arguing that because cohabitors are generally less committed to each other than are married couples, cohabitors are "less likely than spouses to view their sexual union as permanently exclusive" and are "less willing to support or be financially responsible for their partners").

n22 The United States Supreme Court has ruled that the fact that a person has financial obligations to a former spouse and children or the fact that a person is in prison are not adequate reasons to deny a person the right to marry. See Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safly, 482 U.S. 78 (1987).

n23 While I agree the state has strong interests in marriage, not all commentators agree that marriage should be privileged. See Fineman, supra note 10, at 221. I agree with many of the concerns identified by Fineman; however I do not believe that ending all benefits associated with marriage is the way to achieve the goals she identifies. In any case, as Fineman indicated during the conference at which our papers were given, her goals will not be achieved by denying gays the right to marry.

n24 For a discussion of the functions of marriage, see David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 453-85 (1996) (discussing "three central categories of regulation" dealing with marriage: laws recognizing emotional bonds between people; laws relating to parenting; and laws regulating financial arrangements between married partners); Milton C. Regan Jr., Family Law and the Pursuit of Intimacy 4-5 (New York Univ. Press 1993) (discussing the function of marriage in promoting a "coherent sense of identity that is necessary for the capacity to make intimate commitments"). The functions of marriage law have varied over the centuries. See E.J. Graff, What is Marriage For? at x (1999) (in introduction) (explaining that "marriage and family have been in violent flux throughout history, the rules constantly shifting to fit each culture and class, each era and economy"). There have been substantial changes in the laws relating to marriage, and its alternatives, over past 40 years. Many commentators believe that a number of these changes have undermined goals or even reflect lack of societal interest in marriage as an institution. It is beyond the scope of this article to consider these changes. For a variety of reasons I do not believe recent legal changes, such as no-fault divorce, reflect less societal interest in marriage. Most reforms have been efforts to make marriage more equitable for both spouses. The fact that some reforms may have been misconceived does not alter my point.

n25 See Chambers, supra note 24, at 461-70.

n26 See id. at 470-85.

n27 See id. at 454-61; Regan, supra note 24.

n28 See Waite & Gallagher, supra note 9, at 75 (explaining that in marriage the "shared sense of social reality" between a couple provides a valuable "foundation for emotional health").

n29 See Milton C. Regan Jr., Law, Marriage and Intimate Commitment, 9 Va. J. Soc. Pol'y & L. 116, 122-23 (2001) (this issue).

n30 See Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 476-84 (1983); Robin West, Universalism, Liberal Theory, and the Problem of Gay Marriage, 25 Fla. St. U. L. Rev. 705, 719-30 (1998).

n31 Hafen, supra note 30, at 476-77. Hafen's claim about the importance of marriage in promoting a sense of civic duty is difficult to prove and may be wrong, but there is evidence that society may benefit in other ways when people marry. Waite and Gallagher review a large body of empirical research that tends to support the premise that individuals and society as a whole benefit through marriage. They present research indicating that married couples have increased happiness, health, economic well being, physical safety, and even more satisfying sexual lives than do single persons or cohabiting couples. See generally Waite & Gallagher, supra note 9. Society benefits when its citizens are healthier, more productive and safer.

n32 In fact, states now place almost no restrictions on who can marry; there are also few procedural requirements. Generally, any man or woman over a certain age may marry, as long as they are not already married or closely related to each other. To marry they must obtain a marriage license and go through a ceremony presided over by a duly authorized official. No further action is needed, and unless one of them takes an action to dissolve the marriage, or dies, they will remain husband and wife. All states view marriage as a personal choice, belonging to the couple, even though it is recognized that many couples will not adequately perform the intended functions of marriage. For an overview of state marriage requirements, see Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 2.3, 34-44 (West 2d ed. 1988); Ira Mark Ellman et al., Family Law: Cases, Texts, Problems 56-60 (Lexis 3d ed. 1998).

n33 This discussion draws heavily on Chambers, supra note 24, at 453. In addition to the legal rules discussed in the text, there are a number of rules that regulate how outsiders, businesses and government, deal with the marital unit. Since the rights and obligations associated with marriage vary from state to state, in this paper I describe the most common patterns.

n34 At the federal level alone, there are at least 1049 federal programs available only to married couples or individuals. See U.S. General Accounting Office, Defense of Marriage Act, GAO/OGC-97-16 (1997). While marriage remains critical under state laws as well, in some states a number of benefits and obligations have been extended to non-marital couples through state legislation or judicial rulings.

n35 See Chambers, supra note 24, at 454-55.

n36 See id. at 456.

n37 See id. at 457.

n38 See id. at 457-58.

n39 See id. at 458-59. The passage of the federal Family and Medical Leave Act of 1993, 29 U.S.C. § § 2611-2654, 2612 (a)(1)(C) (1994), has been followed by the passage of similar statutes by many states.

n40 See id. at 459.

n41 See id. at 458.

n42 See id. at 476.

n43 See id. at 480. A few states, however, do not require an actual contract to be formed, but will enforce "implied contracts" inferred from the conduct of the parties during their relationship.

n44 See Clark, supra note 32, at § 6.1.

n45 See Chambers, supra note 24, at 474.

n46 See id. at 484. See also John G. Culhane, "A Clanging Silence": Same-Sex Couples and Tort Law, 89 Ky. L. J. 911-96 (2000) (arguing for granting same-sex partners the standing to recover damages to the partnership in tort).

n47 See Chambers, supra note 24, at 485.

n48 See id. at 473-74.

n49 See id. at 478-79.

n50 See id. at 479.

n51 See id. at 480.

n52 Many states require an equal division. Other states grant courts the discretion to divide property unequally, but there often is a strong presumption for equal division. See id. at 477-78.

n53 See id. at 464.

n54 See id. at 466.

n55 See id.

n56 Same-sex couples also face barriers in adopting children, since many states favor married couples when placing children for adoption. Some states also forbid adoption by gay couples or individuals or make placement with gay individuals a "last resort." The discussion in the text focuses on issues mainly relevant to lesbian couples. Gay men face even greater hurdles, since they must find a surrogate mother if they wish to have a child biologically related to one of the men. This process generally is more expensive than artificial insemination and raises many more legal problems. See id. at 468.

n57 See id. at 467.

n58 See id. at 466-67.

n59 For a discussion of custody and visitation issues relevant to the dissolution of a same-sex couple with children, see Ellman, supra note 32, at 634-38, 731-32, 1119-35.

n60 This was the position of Senator Robert Byrd during the Senate Debate on the Defense of Marriage Act on Oct. 9, 1996. He argued that it is "patently absurd" to afford same-sex couples marital status because same-sex couples are incapable of having children and because many same-sex relationships do not result in traditional "families." See Byrd, supra note 14 at 232-36.

n61 Knight, supra note 14, at 115-17 (discussing studies finding that "monogamy is not the norm for the average homosexual").

n62 It is only very recently that same-sex couples could safely reveal their status publicly. Studies conducted even twenty years ago probably would not capture important aspects of today's families. The changes in societal attitudes have enabled researchers to conduct studies with larger and more representative samples than in the past. There is now a sufficient body of evidence to draw reasonable conclusions about family relations of same-sex couples. The studies show that same-sex couples function similarly to opposite-sex couples. It seems likely that couples who choose to marry are even more committed to a permanent relationship. Thus, these studies likely understate the degree to which same-sex couple marriages would be similar to opposite-sex couple marriages.

n63 Unlike marriages, which require licenses, there is no official recording system for cohabiting couples. To estimate the number of same-sex couples, I rely on self-reports to the U.S. Census Bureau. These numbers likely are underestimates since gay couples may be reluctant to reveal either their sexual orientation or their living status, even to the U.S. Census Bureau. The best available data are from the 1998 Current Population Reports (CPR), information gathered by U.S. Census Bureau annually from a representative sample of the population. The numbers reported here are from U.S. Census Bureau, Current Population Reports, 71-73 tbl.8, v. tbl.C (March 1998 (update)).

n64 U.S. Census Bureau, United States Census of Population: Social and Economic Characteristics, 71 tbl.8 (1998).

n65 Id.

n66 Id. at v. tbl.C.

n67 Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 311-13 tbl.8.3B (1994).

n68 There was a dramatic increase in the number of people reporting that they lived with a same-sex partner between 1990 and 1998. The 1990 decennial census identified 145,000 same-sex partnerships; thus, there was an eleven-fold increase by 1998 (opposite-sex non-married couples increased by 33%). It is not possible to tell how much of the increase reflects a greater willingness of same-sex couples to identify themselves and how much is increase in the actual number of couples; both factors are undoubtedly operating. It is also possible that because the Current Population Reports relies on interviews, not questionnaires, same-sex couples responded more frequently.

n69 See Janet Lever, The 1994 Advocate Survey of Sexuality and Relationships: The Men, Advocate, Aug. 23, 1994, at 24 (citing that 59% of gay men interviewed would, and 26% said they might, want to legally marry another man if they could. Of those interviewed, 71% said they prefer long-term relationships to other arrangements.) [hereinafter Lever, The Men]. In addition to this study, there have been three other major magazine surveys of the nature of gay and lesbian communities. While the respondents in these surveys may not have been representative of the entire population of same-sex couples, they do provide insight into the nature of same-sex couple relationships. See Janet Lever, Lesbian Sex Survey, Advocate, Aug. 22, 1995, at 28 [hereinafter Lever, Lesbian Sex Survey]; A. Demian, Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Survey, 1 J. of Gay and Lesbian Soc. Services 101, 104 (1994) (reporting that of those gay and lesbian couples surveyed, 92% of the women and 96% of the men were committed to be together "for life or 'a long time.'" Also, 60% of women and 39% of men had "symbolized their commitment with a relationship ritual."); Larry D. Hatfield, New Poll: How U.S. Views Gays, S.F. Examiner, June 6, 1989, at A-19. In addition, in the late 1970s, two sociologists from the University of Washington conducted a large study examining the relationships of American couples. See generally Philip Blumstein & Pepper Schwartz, American Couples: Money, Work, Sex (1983). A major study of sexual behavior in the United States conducted by researchers at the University of Chicago in 1996 provides additional information from a large, national sample about the number of same-sex couples and the characteristics of their relationships. This study includes heterosexual couples, so comparisons are available. See Laumann et al., supra note 67, at 283-320.

n70 For a review of this research, see Lawrence A. Kurdek, Lesbian, Gay, and Bisexual Identities over the Lifespan: Psychological Perspectives 243-64 (A.R. D'Augelli & C.J. Patterson eds., 1995).

n71 See Laumann et al., supra note 67, at 3-8, 78, 88-89.

n72 See Blumstein & Schwartz, supra note 69, at 594 tbl.3.

n73 Id.

n74 Id. at 308 (calculated from data in Fig.53).

n75 See Lawrence A. Kurdek, Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples, 60 J. Marriage & Fam. 553, 565 (1998).

n76 See Hadley Arkes, The Closet Straight: When Andrew Sullivan Pleads for Gay Marriage, Has He Thought About What Marriage Is?, Nat'l Rev., July 5, 1993, at 43, 43-44.

n77 See Blumstein & Schwartz, supra note 69, at 271-72. Their 1970's survey found that only 36% of gay men considered monogamy to be important while 71% of lesbian couples, and of heterosexual couples, 75% of husbands and 84% of wives, believed monogamy to be important. But see Laumann et al., supra note 67, at 316 (suggesting that the difference in monogamy rates in gay and lesbian relationships may not be as variable as was once thought). In discussing the fidelity issue, opponents of same-sex couple marriage do not address the fact that these statistics apply only to males. In fact, almost all of the claims that same-sex couple marriages would not be functional seem to focus on issues related to male couples. I have often wondered if opponents would accept marriage by two women. Professor Sylvia Law has incisively analyzed the gendered nature of the opposition to same-sex couple marriage, see generally Sylvia Law, Homosexuality and the Social Meaning of Gender, 2 Wisc. L. Rev. 187 (1988).

n78 See Doug Sadownick, Open Door, Genre, April 1994, at 33, 35 (reporting that studies over the previous decade have shown that gay men are able to maintain long-term relationships even when those relationships are not monogamous).

n79 This argument is made by Waite & Gallagher, supra note 9.

n80 Laumann, supra note 67, at 5-6.

n81 The fact that the differences are considerably smaller in lesbian couples may indicate that, at least with respect to sexual behavior, gender is a very powerful influence on behavior.

n82 This prospect is a source of concern to some people within the gay community. See Warner, supra note 10, at 88-89, 116.

n83 See Waite & Gallagher, supra note 9, at 37.

n84 See Andrew Cherlin, Marriage, Divorce, Remarriage 21 (Harvard Univ. Press 1992); Evelyn Lehrer & Carmel Chiswick, Religion as a Determinant of Marital Stability, 30 Demography 385, 386-87, 398 (1993).

n85 The right to parent is constitutionally protected. The state can only interfere with the right to parent if there is a risk of harm to the child and if the interference is in the child's best interests. See Prince v. Massachusetts, 321 U.S. 158, 166-70 (1944) (holding that the state has the authority to limit "parental freedom and authority in things affecting the child's welfare," but also noting that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

n86 See supra notes 53-59 and accompanying text. Some opponents of same-sex couple marriage appear to be concerned that recognition of such marriages would negatively impact children because recognition would

undermine policies that disadvantage gay couples with respect to adoption of children and in child custody disputes. I agree that recognition would affect policies in these areas.

n87 Any policy that sought to restrict childbearing based on parental characteristics that are predictive of less "optimal" outcomes would have to confront the fact that two of the strongest predictors of children's well-being are parental income and race. Our society makes it very difficult for low-income parents and members of racial minorities to raise children, just as it makes it hard for gay parents.

n88 For reviews of the literature on gay and lesbian parenthood, see Cheryl A. Parks, Lesbian Parenthood: A Review of the Literature, 68 Am. J. Orthopsychiatry 376-89 (1998); Charlotte Patterson, Children of Lesbian and Gay Parents, 19 Advances in Clinical Child Psychol. 235-82 (1997).

n89 These studies generally involve two different groups of children. The majority of the studies, especially those done in the 1970s and 1980s, involve children living with a gay parent following that parent's divorce from the child's other biological parent. Almost all of the children had lived for a period of time with both biological parents, which meant they also had lived with both a father and mother. When studied, some of the children were living with a single gay parent, while other children were living with one biological parent and that parent's new same-sex partner; virtually all of the parents were female. Most of these children were over ten years old at the time of the research. One study, done in England, includes a follow-up of the children fourteen years later, when the children ranged from 17 to 35 years of age (average 24 years). See Fiona L. Tasker & Susan Golombok, Growing up in a Lesbian Family: Effects on Child Development (The Guilford Press 1997). In essence, these studies are the equivalent of the numerous studies of children following a divorce, except that the children in these studies were living with a gay parent. The research usually included, for comparison purposes, a group of children living with a heterosexual parent following divorce.

The second group of studies looks at children born through artificial insemination and raised by lesbian couples and heterosexual couples. These studies, all done in the 1990's, are methodologically sophisticated and provide highly relevant evidence on the development of the children. For the best primary studies, see A. Brewaeys et al., Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families, 12 Hum. Reprod. 1349-59 (1997); Raymond Chan et al., Psychosocial Adjustment Among Children Conceived Via Donor Insemination By Lesbian and Heterosexual Mothers, 69 Child Dev. 443-57 (1998); David Flaks et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Developmental Psychol. 105-14 (1995); Susan Golombok et al., Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 J. Child Psychol. & Psychiatry 551-72 (1983); Richard Green et al., Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children, 15 Archives Sexual Behav. 167-84 (1986).

n90 See Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. Ill. L. Rev. 833, 852-54 (1997) (citing studies that found that a "significantly disproportionate percentage of children raised by homosexual parents develop homosexual interests themselves").

n91 Many of these studies, particularly the earlier studies, have methodological limitations, especially with respect to their small sample sizes and recruitment methods. Usually, some parents volunteered to participate in the study and recommended another possible participant to the researchers; this process of self-selection limits a study's generalizability. In addition, almost all of the children in the divorce studies had lived with parents of both sexes for a period of time. Thus, these studies cannot tell us about the effect of living from birth with parents of the same-sex. The types of methodological problems faced by the researchers are typical of research related to divorce.

n92 American Psychological Association, Lesbian and Gay Parenting: A Resource for Psychologists (visited Sept. 9, 2001) <http://www.apa.org/pi/parenthtml#II>. The trial judge in the litigation challenging Hawaii's ban on same-sex couple marriage reached the same conclusion. The state tried to justify its policy by claiming that the policy was needed to protect children. After hearing from a number of experts on child development, the court concluded that there was no respectable evidence that being raised by a gay or lesbian parent harmed children. See Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

n93 See Brewaeys et al., supra note 89, at 1355; Chan et al., supra note 89, at 449; Flaks, supra note 89 at 109-12; Golombok et al., supra note 89, at 565-71; Patterson, supra note 88, at 245-46.

n94 Id.

n95 Id.

n96 Id.

n97 See Tasker & Golombok, supra note 89, at 128-30, 138, 143-44.

n98 Children certainly recognize that their parents are stigmatized by parts of society. It is questionable whether this should be relevant in developing social policy. Claims that the children would be harmed by social stigma were used in the past to justify laws against interracial marriages. More recently, a trial judge in Georgia based his transfer of custody from one parent to the other on the fact that the custodial parent had remarried to a person of a different race and the judge was concerned that the child would suffer from community stigma towards an interracial marriage. The United States Supreme Court held that this action was unconstitutional. See Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

n99 One of the most persistent critics is law professor Lynn Wardle. See Wardle, supra note 90, at 852-54, 857, 862. Wardle provides no empirical evidence in support of his claims that homosexual parenting is harmful to children. At its core, his argument boils down to the claim that we should not allow same-sex couples to parent children because these children are more likely to be gay and because extramarital sexual behavior of parents is generally harmful to children. Because homosexuals cannot legally marry, their sexual behavior is by default "extramarital."

n100 See id.

n101 Laumann, supra note 67, at 300.

n102 At the time of the study, few of the participants were raised in gay households.

n103 Tasker & Golombok, supra note 89, at 132.

n104 For a discussion of this issue, see generally Judith Stacey & Timothy Biblarz, (How) Does the Sexual Orientation of Parents Matter? 66 Am. Sociological Rev. 159 (2001).

n105 See Anthony D'Augelli et al., Lesbian, Gay, and Bisexual Youth and Their Families: Disclosure of Sexual Orientation and Its Consequences, 68 Am. J. Orthopyschiatry 361, 368-69 (1998). See also Wardle, supra note 90, at 854 (focusing on the suicide rates of homosexuals as a central reason why it is "bad" for children to be gay. Wardle ignores the fact that banning same-sex couple marriage does not alter the fact that many youth are gay and that parental and societal acceptance is critical for their well-being.).

n106 See Wardle, supra note 90, at 852.

n107 For a good discussion of why the research on this issue is limited, see Carlos Ball & Janice Farrell Pea, Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents, 3 U. Ill. L. Rev. 253, 272-76 (1998).

n108 Most research on families and children relies on small samples. There are a few data sets that include child development information on relatively large numbers of children and parents. But even these data sets typically are limited to several thousand families. While this is a large number of subjects for social science studies looking closely at child development, the samples are not large enough to include more than a small number of children being raised by gay parents since families headed by gay parents are such a small percentage of all families.

n109 Proponents of this view include respected social scientists, like James Q. Wilson, as well as those arguing from religious ideology, such as Robert H. Knight of The Family Research Council. See James Q. Wilson, Against Homosexual Marriage, *in* Same-Sex Marriage: Pro and Con, 161 (Andrew Sullivan ed., Vintage Books 1997); Robert H. Knight, supra note 14, at 108. Surprisingly, Wilson provides no more evidence for his assertions than does Knight, who is strictly an ideologue.

n110 See Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

n111 For a discussion of the historical treatment of same-sex couple relationships, see William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 15-50 (The Free Press 1996).

n112 See Graff, supra note 24, at 27-30.

n113 Id. at 30-31.

n114 Id. at 31.

n115 Id.

n116 See id. at 148-60.

n117 The Alabama law had not been enforced since such laws were declared unconstitutional, less than forty years ago, by the United States Supreme Court in Loving v. Virginia, 388 U.S. 1, 12 (1967). The Alabama law was repealed by an Initiative; forty percent of the electorate voted against repeal.

n118 I am not arguing that tradition is never a sufficient reason for retaining the status quo. The fact that a given practice has been followed for a long period of time or by many different societies is an indication that it probably has social utility. However, tradition alone is not a sufficient basis for justifying social practices, especially practices of discrimination. See generally Harry Krause, Marriage for the New Millennium: Heterosexual, Same-sex Or Not at All?, 34 Fam. L. Q. 271, 285-88 (2000).

n119 The European developments are extensively discussed in Yuval Merlin, Equality for Same-Sex Couples--A Comparative Study of the Legal Recognition of Gay Partnerships in Europe and the United States (2000) (unpublished dissertation, NYU School of Law) (on file with author).

n120 Many cities and some states have enacted various forms of domestic partnership laws aimed at giving same-sex couples some legal rights. See Vetri supra note 4, at 62-78.

n121 Other more extreme claims are that same-sex couples' marriages will produce health risks and that clergy will be required to perform marriages of which they disapprove. For all of the reasons discussed by Waite and Gallagher, allowing same-sex couple marriage should improve an individual's health. See Waite & Gallagher, supra note 9, at 47-64. Furthermore, no state has a law requiring clergy to perform any marriage ceremony they do not want to perform.

n122 These are not necessary conclusions. If a functional analysis leads to the conclusion that polygamous units would serve the purpose that are ascribed to marriage, then a legislature should rethink recognition. I do not think that such unions do or can perform the functions that couple marriage does. But see Krause, supra note 118, at 288-90 (arguing that the concern that allowing same-sex couple marriage may lead to the recognition of polygamous marriages "may not be that farfetched").

n123 For example, courts have been asked to determine whether the surviving member of a same-sex partnership qualified to stay in a rent-controlled apartment following his partner's death. See Braschi v. Stahl Associates Co. 543 N.E. 2d 49 (N.Y. 1989).

n124 In some states sexual relations between the partners are still treated as a felony. Obviously, I think such laws are extraordinarily bad policy. The first step in these states is the acceptance of homosexual sexual relations.

n125 See Vetri, supra note 4.

n126 Elden v. Sheldon, 46 Cal. 3d 267, 274-76 (1988).

n127 See generally Levit, supra note 2 (arguing that granting same-sex couples the "formal equality" of marital status may not best serve their interests since marriage is based on "heterosexual norms"). For a review of various domestic partnership laws enacted by cities and states across the country, see Vetri supra note 4, at 62-78.

n128 I am referring to the unions of those same-sex couples who would want to marry.

n129 However, I am not arguing that all of the existing benefits and obligations attached to marriage are appropriate. My point is that however the appropriate marital scheme is defined, it would apply equally to same-sex couple unions.

n130 Waite & Gallagher, supra note 9, at 16.

n131 Id. at 200-01.

n132 See Charlotte Patterson, Families of the Lesbian Baby Boom: Parents' Division of Labor and Children's Adjustment 31 Developmental Psych. 115, 121 (1995).

n133 See Kurdek supra note 75, at 564.

n134 Moreover, not all of the marriage bonuses are equally important to society. For example, do we really favor marriage because it makes people richer?

n135 Waite & Gallagher, supra note 9, at 75.

n136 Many are in fact active opponents based on their personal beliefs. See e.g., Same-Sex Marriage: Pro and Con 213-39 (Andrew Sullivan ed., Vintage Books 1997) (reporting the positions of Representatives Hyde and Inglis and Senators Byrd and Gramm on the Defense of Marriage Act).

DRAFT NOT FOR CITATION

Adults' Sexual Orientation and State Determinations Regarding Placement of Children

Michael S. Wald

Professor of Law

Stanford Law School

July 2006

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Adults' Sexual Orientation and State Determinations Regarding Placement of Children

Michael S. Wald *

I. INTRODUCTION

Should the fact that a parent or prospective parent is gay be deemed relevant when the state places children in adoptive and foster care homes, resolves child custody disputes, and establishes policy with respect to access to assisted reproductive technologies (ART)?[1] In this article, I examine this question from a child welfare and family law policy perspective.[2] Opponents of placing[3] children with lesbians or gay men claim that being raised by a gay parent may be harmful to children's social or emotional development, or at least less advantageous than being raised by a heterosexual parent or parents. I therefore focus on the issue of whether consideration of sexual orientation is likely to promote the positive development and well-being of children.[4] Some commentators oppose placing

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* Jackson Eli Reynolds, Professor of Law, Stanford Law School.. Many people provided helpful research and comments on earlier versions of this article. I am especially grateful to Stacey Rosenkrantz Aronson who helped me assess the research studies that are reviewed here, to David Chambers and Robert Levy for their detailed readings of several drafts, and to Joan Hollinger for her comments on the drafts and our many conversations. I also benefited substantially from the suggestions of Carlos Ball, Richard Banks, George Fisher, Marsha Garrison, Theresa Glennon, Sara McLanahan, Steven Nock, Nancy Polikoff, Jonathan Rauch, Kim Richman, Jane Schacter, Elizabeth Scott, Judith Stacey, Ross Thompson, Lois Weithorn, and Tobias Wolff. Alex J. Han and Caitlin Weisberg provided excellent research assistance.

[1] ART is the use of non-coital technologies to conceive a child and initiate pregnancy. The most common methods are donor insemination, in vitro fertilization, and surrogacy. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994).

[2] Many commentators approach these issues from an adults' rights perspective, focusing on issues of equal treatment of gay individuals. *See, e.g.*, SUSAN OLYAN & MARTHA NUSSBAUM, SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN LEGAL DISCOURSE (1998). With respect to ART, it also is argued that access should be a matter of reproductive rights or freedom and should not be regulated, except to control practices that are clearly harmful to the prospective child or to society. *See, e.g.*, John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology,* 55 CASE W. RES. L. REV. 323 (2004). For reasons discussed *infra*, see notes and accompanying text, I agree that adults' interests are relevant, especially those regarding access to ART. However, since I am focusing here on policy from a children's perspective, I analyze all the issues primarily in terms of children's well-being and rights.

[3] With respect to ART, there is no child, so the issue is better conceptualized as an allocation of the opportunity to have a child, rather than as a child placement. For ease, I use the term placement for all these decisions.

[4] I focus on the claims that an adult's homosexuality should be treated as a potentially negative factor because this is

children with lesbians or gay men because they believe that homosexuality is immoral,[5] a position I reject. Others have addressed the morality issues and whether a belief that same-sex relations are immoral should, standing alone, be a sufficient basis for restricting gay peoples' access to parenting; I do not review these positions here.[6]

Our society does not assess the competence of individuals to become biological parents; no one needs permission to have a child. Nor does the state deny interfere with parental custody of children unless parental care falls below the minimum standards established under child abuse and neglect laws.[7] No state has policies preventing a gay adult from bearing a child or allowing children to be

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the way most people frame the issue. Most people would think it strange to ask whether an adult's heterosexuality should be considered a negative factor, although it might well be in some instances, for example with respect to placements of gay youth. In fact, the research indicates that many lesbian parents are exceptionally competent, which is consistent with my own observations. For a very insightful discussion of how policy makers and judges inappropriately make assumption about what is normal and place extra burdens on those thought to be "different" see MARTHA L. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 51 (1990). Discrimination based on race and religion has been common in family law. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 & cmt. d (2002) [hereinafter ALI].

[5] For example, in 2002 Raymond Moore, the former Chief Justice of the Alabama Supreme Court, wrote, "homosexual behavior is a ground for divorce[,] . . . a crime against nature, an inherent evil, and an act so heinous that it defies one's ability to describe. That is enough under the law to allow a court to consider such activity harmful to a child." *Ex Parte* H.H., 830 So. 2d 21, 37 (Ala. 2002) (Moore, J., concurring). Many legislators also believe that the likelihood that a parent will promote a child's moral development should be a factor in placement decisions. For those legislators who believe that homosexuality is immoral, an adult's sexual orientation would obviously be relevant. The most prominent academics, social commentators, and advocacy groups that oppose placement of children with lesbians and gay men, such as Brigham Young law professor Lynn Wardle, syndicated columnist Maggie Gallagher, and the Family Research Council, a major advocacy group on family issues, also believe that homosexuality is immoral or a sickness. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) [hereinafter Wardle, *Homosexual Parenting*]; Lynn D. Wardle, *Adoption by Adults Involved in Homosexual Lifestyles*, *in* ADOPTION FACTBOOK III 289 (Connaught Marshner & William L. Pierce eds., 1999) [hereinafter Wardle, *Adoption*]; Maggie Gallagher, *Fixing Sexual Orientation*, TOWNHALL.COM, May 10, 2001, http://www.townhall.com/opinion/columns/maggiegallagher/2001/05/10/166382.html; FAMILY RESEARCH COUNCIL, THE BIBLE, THE CHURCH, AND HOMOSEXUALITY (2005); FAMILY RESEARCH COUNCIL, GETTING IT STRAIGHT (2005). However, they frequently present their arguments in terms of child well-being. *See* note 71 *infra* and accompanying text.

[6] *See, e.g.*, OLYAN & NUSSBAUM, *supra* note 2; THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES (Timothy P. Jackson ed., 2005); Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1996); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart Rosenbaum eds., 1997).

[7] *See* Michael S. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 75

removed from gay parents solely because the parent is gay;[8] such policies would receive little public support and likely would be unconstitutional.[9]

The situation changes when the state is involved in placing children. Several states have laws or regulations that limit adoption or foster placement to heterosexual individuals or to married couples (which effectively precludes placement of children with same-sex couples, who are barred from marrying in these states); even in the absence of statutory bars, child welfare workers may be reluctant to place children with gay adults.[10] In contested custody disputes, the fact that a parent is gay may be considered as a negative factor, based on state legislation, rules adopted by state appellate courts, or the views of individual trial judges.[11]No state currently denies lesbians or gay men access to ART. The absence of government restrictions leaves control to individual doctors or to clinics, which become de facto doorkeepers of access.[12] Some doctors and clinics refuse to

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STAN. L. REV. 985 (1975).

[8] There is no exact count of how many American children are being raised by same-sex couples today. The 2000 U.S. Census counted about 594,000 households headed by a member of a same-sex couple; there were children living in 27 percent of such households. Thus, at least 166,000 children are being raised by gay and lesbian couples. U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003); GARY GATES & JASON OST, THE GAY AND LESBIAN ATLAS 45 (2004). This is a minimum estimate. The Census did not count the number of children in each home, children over age 16, or children living with single gay parents.

These children may be from the parent's previous marriage or other heterosexual relationship, born to the parent through assisted reproduction or adopted. In most of these families only the biological parent has a legal relationship with the child; in some same-sex couple households, the non-biological parent has adopted the biological parent's child, or the child was adopted by both parents, so that both partners are the child's legal parents.

[9] Under most state laws and the U.S. Constitution, intervention under child abuse laws requires some showing of harm or potential harm to the child. *See* Prince v. Massachusetts, 321 U.S. 158 (1944); *In re* Jeanette S., 94 Cal. App. 3d. 52 (Ct. App. 1979). As discussed below, see notes ___-___ and accompanying text *infra*, being raised by a gay parent is not, in and of itself, harmful to children. The evidence is all to the contrary.

[10] *See* discussion at note ___ and accompanying text *infra*; EVAN B. DONALDSON, ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES? 11-12(2006).

[11] *See* discussion at note ___ and accompanying text *infra*. In addition, concern with gay men and lesbians as parents is offered as a major reason for not allowing same-sex couple marriage and civil unions. *See, e.g.*, Wardle, *Homosexual Parenting*, *supra* note 5, at 833.

[12] Many women perform insemination at home, with sperm acquired from known donors or donors contacted via the Internet or sperm banks. In five states, however, only doctors may inseminate women. *See* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 148, 163 n.142 (2000).

provide services to lesbians.[13] A number of other countries do bar lesbians and gay men from access to state facilities providing eggs or sperm, including several countries with "pro-gay" policies in other family-related areas.[14] Some commentators have proposed similar restrictions in the U.S.[15]

In assessing these policies, I begin by examining the value issues that should be addressed in establishing policy regarding placement of children. I pay special attention to the common assertion that the state should place children only in the "optimal" or "ideal" family setting, which is then defined as a heterosexual, married couple household. I also review interests besides those of children that ought to be weighed in establishing policy, specifically the interests of biological parents in raising their children, the interests of most adults in having children, and the general societal interest in equal treatment. I then look at the social science research assessing the family-related factors that contribute to the academic, social, and emotional well-being of children, especially the research on the development of children living with gay parents, in order to assess the potential relevance of a parent's sexual orientation on children's development. I then examine the implications of this research with respect to the various placement decisions.

I conclude that it is almost always detrimental to children if decision-makers consider an adult's sexual orientation when making placement decisions. With respect to foster care and adoption placements, there should not be laws barring or disfavoring placement of children with gay adults; doing so would harm children and adults alike. At most, the fact that a prospective parent is gay might be considered, as one of a number of factors, in assessing the best alternative in the small

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[13] *See* Benitez v. N. Coast Women's Care Med. Group, Inc., 106 Cal. App. 4th 978 (Ct. App. 2003) (challenging doctors refusal to provide insemination to lesbians); DeLair, *supra* note 12, at 151 & n.36; Elizabeth Weil, *Breeder Reaction*, Mother Jones 33 (July-august 2006).

[14] The numerous restrictions adopted by countries throughout the world are detailed in LESLIE ANN MINOT, CONCEIVING PARENTHOOD: PARENTING AND THE RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE AND THEIR CHILDREN, at ch. VI (2000); *see also* Robertson, *supra* note 2, at 325.

[15] *See, e.g.*, Helen Alvaré, *The Case For Regulating Collaborative Reproduction: A Children's Rights Perspective* 40 HARV. J. ON LEGIS. 1 (2003); David Blankenhorn, President, Inst. for Am. Values, Presentation to the Danish Institute for Human Rights: The Rights of Children and the Redefinition of Parenthood (June 2, 2005), www.americanvalues.org/html/danish_institute.htm. At least one legislator has introduced legislation that would ban access. *See* Brooke Adams, *Controversial Surrogacy Law Fix Proposed*, SALT LAKE TRIB., July 17, 2003, at

number of situations when there are several qualified couples or individuals seeking to adopt or foster a child. With respect to custody disputes, the fact that a parent is gay should not be treated as relevant by decision-makers.[16] Regarding assisted reproductive technologies, same-sex couples and gay individuals should have access on the same terms that a state permits for heterosexual couples and individuals.

These recommendations would require substantial changes in the laws and/or practices of many states (and other countries). I recognize that many legislators, judges, and members of the general public will view some of my proposals skeptically, at best. Given the historic view that homosexuality is abnormal (and morally problematic), the majority of legislators and members of the public may well assume that living with a gay parent is likely to be detrimental to children. In all decision-making involving children, there is a great risk that adults will focus on their own values, not on children's interests. I hope that the analyses and data presented here at least help readers think about the issues that need to be confronted in establishing policy in these areas if the interests of children truly are the goal.

II. THE RELEVANCE OF SEXUAL ORIENTATION: A FRAMEWORK FOR ANALYSIS

A. The Policy Options

In making placement decisions, legislatures, courts, and child welfare agencies must develop standards for determining where to place a child, if there is more than one placement option available. These standards establish the criteria that individual judges and child welfare workers should apply in making such decisions. At present, when the state is involved in placing children for adoption/foster care or allocating custody, all states make the child's well-being the primary focus of the decision, usually by stating that the decision should be based on the "best interests of the

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[16] As discussed *infra, see* note ___ and accompanying text, I propose that the parent's sexual orientation might be relevant when an adolescent objects to living with a parent.

child."[17] I agree with that value judgment.

As noted by many commentators,[18] the term best interests does not tell decision-makers what outcomes constitute a child's interests or what factors found in alternative caretakers or home environments are likely to produce these outcomes. In the past, many legislatures and courts adopted presumptions that certain people should be favored or disfavored, often focusing on the proposed parent's gender or race.[19] Today, family law policy generally is based on the premise that a presumption in favor or against particular categories of people is not in the interests of children.[20] While many state statutes direct decision-makers to consider some general factors in making these assessments, such as the capacity of the potential caretaker to provide love, affection, and guidance,[21] these statutes generally do not define best interests or focus on particular characteristics of the parent.[22] Current laws reflect the judgment that it is best for children if decision-makers assess each alternative placement in light of the specific child's needs.[23]

Critics of placing children with gay individuals contend that an adult's sexual orientation, unlike any other parental characteristic, should be singled out and specifically treated as a negative factor. Some advocate a total bar on placing adoptive or foster children with gay parents and a ban on access to ART; for example, the Catholic Church has said that allowing adoption by gay adults would be

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[17] NAT'L INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY LAW, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES § 3.1 (Robert J. Levy ed., 1998) [hereinafter Levy].

[18] Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

[19] For example, many states used to have custody laws favoring placement with mothers, especially of young children and favoring placement with parents of the same race as the child. *See* Levy, *supra* note 17, § 3.2 (discussing maternal preference); *Id.* § 3.5 (discussing race matching)

[20] *See id.* §§ 3.2, 3.5; ALI, *supra* note 4, § 2.12. Over the past twenty years, family law policies have moved from a focus on parental characteristics to a focus on behavior. As discussed *infra*, *see* notes and accompanying text, there may also be presumptions for preserving current caretaking arrangements and for involving both parents in the child's life through joint custody.

[21] *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23 (West 2002); Unif. Marriage & Divorce Act (UMDA), § 402, 9A U.L.A. 561 (1997).

[22] Levy, *supra* note 17, § 3.1.

[23] ALI, *supra* note 4, § 2.02 cmts. b & c.

"doing violence to these children."[24] Others propose a presumption against placement of children with gay couples or individuals with respect to all placement decisions.[25] In contrast, many commentators and professional organizations, including the American Law Institute, recommend that an adult's sexual orientation should be irrelevant in making these decisions.[26]

Policy-makers must determine which approach is likely to best serve the interests of most children for whom the state must decide on placement. In a system that focuses on the best interests of each child, a total bar on placements with gay adults would be justified only if placement with gay individuals would always, or almost always, be harmful to children, or a worse alternative than any other option. A presumption against placement with a gay adult would be justified only if there was strong reason to believe that children will usually do better if placed with a heterosexual adult, regardless of any other characteristics of the two adults, such as their education, income, mental health, or parenting history.[27] Another third alternative would be for decision-makers to utilize a preference for heterosexual families *other things being equal*.[28] Such a preference would reflect the

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[24] CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS § 7 (2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

[25] Wardle, *Homosexual Parenting*, *supra* note 5, at 893-99.

[26] *See, e.g.*, ALI, *supra* note 4, at 12 (introduction) & § 2.12 cmt. e ("[N]ondiscrimination provisions [including sexual orientation] conform to the emerging law, which recognizes that the prohibited factors usually reflect prejudice rather than a rational assessment of the child's welfare. Because much bias is unintentional and subtle, however, it cannot be expected that nondiscrimination provisions will be entirely effective in ending over-reliance on stereotypes. . . . Some courts assume that the open homosexuality of a parent is detrimental to the child's interest. This treatment reflects a moral judgment, not a scientific one, and, even as a moral matter, is subject to considerable societal debate. Attempting to avoid over-generalizations on both sides of the debate . . . [ALI advocates that] sexual orientation should not be a consideration and that homosexual conduct, like heterosexual, extramarital conduct, should be disregarded unless shown to be harmful to an individual child."); Levy, *supra* note 17, § 3.8; sources cited in note ___ *infra*.

[27] Presumptions reflect a legislative or judicial judgment that some situations tend to benefit children and some tend to harm them. The role of the presumption is to create a base line value judgment and add predictability and consistency to the process of adjudication. *See* Katherine Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Process* 36 FAM. L.Q. 11 (2002). They are justified only if there is good reason to believe that applying the presumption will improve the overall quality of decisions.

[28] Unlike a presumption, which carries heavy weight and places the burden of proof on the party seeking to overcome the presumption, a preference comes into to play only as a tie-breaker and does not alter the burden of proof.

decision that sexual orientation is relevant and that it should receive some extra weight when there is little to choose between alternative placements. Finally, determining that a factor should be excluded from consideration must rest on the judgment that the factor is irrelevant to the child's development or that allowing decision-makers to consider the factor is likely to lead to worse decisions overall. These judgments must be made with respect to each of the four placement categories—adoption, foster placement, custody, and access to ART; different considerations may be applicable for each category. I will use this framework in assessing the policy options.

B. Optimality or Best Interests

Currently, most states direct courts and agencies charged with making child placement decisions to choose the placement, *among the available homes or other placements*, which best meets the overall needs of the specific child. The goal is to ensure that all children will receive at least adequate care in that placement. A fundamental premise is that children almost always are best off when raised by families, rather than in group homes.[29] Many opponents of gay parents frame the issue differently. They propose that when the state places children through adoption or foster care, or provides access to ART, it should place them only in optimal homes.[30] They then assert that being raised by married, heterosexual biological parents is the optimal environment for children; therefore children should not be placed in same-sex couple families. This position has been adopted by many politicians, including President Bush, who opposes adoption by gay couples because "[s]tudies have shown that the ideal is where a child is raised in a married family with a man and a woman."[31]

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[29] This is the premise of federal and state laws. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101 (codified as amended at 42 U.S.C. §§ 670-76); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101 (codified as amended at 42 U.S.C. § 671). There are, however, some children who require placement in a group home or residential treatment facility.

[30] *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 186-91 (2004); William Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2003); Blankenhorn, *supra* note 15; Wardle, *Homosexual Parenting*, *supra* note 5, at 841. The optimality standard is not proposed with respect to child custody disputes, since almost all commentators agree that children generally should be placed with the parent who will best meet the child's needs and that neither home is necessarily optimal.

[31] Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

As I will discuss later,[32] the claim that children raised with two heterosexual parents do better with respect to their academic, social, emotional, or behavioral development than children raised by two same-sex parents is not supported by the evidence. Numerous studies find few differences in children's development that are attributable to the sexual orientation of their caretakers. Moreover, irrespective of the research on family structure, framing placement decisions in terms of optimality is neither conceptually coherent nor sensible from a policy perspective. Application of the proposed optimality standard would be harmful to the interests of the child. It should be rejected.

(1) Placement Decisions Rarely Involve Choosing Between Heterosexual and Same-Sex Couples

A policy based on the premise that children be placed only with married, heterosexual families ignores the fact that placement decisions almost never involve choosing between a married, heterosexual couple and a same-sex couple. With respect to children needing state-facilitated adoption or foster care, the choice generally is placement with a gay couple, or a single heterosexual or gay individual, or not providing a child with a parent at all; there are far more children needing homes than available homes.[33] Excluding gay couples or individuals from becoming foster or adoptive parents means that some children will have to live in institutional settings or in non-permanent homes. The only situation in which a decision-maker must choose between married heterosexual and same-sex couples families with respect to an adoption or foster placement is when there are both married heterosexual couples and same-sex couples seeking to adopt (or foster) a child—a relatively rare situation.

The irrelevance of the optimality framework is even more pronounced in custody disputes between two biological parents. In these disputes, the question generally is which parent should have primary care of the child and what type of relationship the child should have with the non-custodial parent. In most situations, both parents will be a single parent. The assertion that children do better with two parents (heterosexual or gay) again is beside the point.[34]

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[32] *See* notes ___-___ and accompanying text *infra*.

[33] *See* note ___ and accompanying text *infra*.

[34] Some custody disputes involve requests for modification of a previous custody arrangement. In these situations,

Access to ART presents a somewhat different situation. Restricting access to certain family structures might be feasible.[35] Still, the optimality standard has little to recommend it with respect to ART. No child exists when people seek to conceive a child using ART. The issue is not whether to provide a small pool of semen or eggs to one type of potential caretaker(s) versus another; the supply of semen and eggs exceeds demand.[36] The policy issue is whether people should be denied access to ART based solely on their sexual orientation or their marital status. It is argued that access to ART should be restricted to heterosexual married couples because the state has an obligation, with respected to assisted, but not with "non-assisted" reproduction, to ensure that children are brought into the world only if they will enter an optimal household. [37] In essence, the claim is that it is better for children not to be born than to be born into an environment deemed less than optimal. This claim seems patently wrong from both a children's and societal perspective.[38]

From a children's perspective, would an unborn child prefer not to come into existence unless guaranteed an optimal set of parents and environment? Obviously, we cannot ask the unborn this question. How do we speak for a child who cannot speak for herself? David Chambers has examined this question in another context, child custody disputes.[39] He explored the question how should a court determine a child's best interests when the child is too young to speak for herself? He

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one of the parents often has remarried, so the contest may be between a gay parent and a heterosexual couple. But even in these cases, the two parent option includes a stepparent, not the arrangement generally proposed as "optimal," that is a home with two biological parents.

[35] A state could pass laws restricting access to state funded or supported clinics and can restrict who provides services. Still, there are various ways an individual seeking ART could manage to find a sperm donor or someone willing to be a surrogate. The web is widely used for these purposes.

[36]This may not be true with respect to surrogacy. However, at least some women who are willing to be surrogates prefer doing so if the child will live with gay men. *See* Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1.

[37] *See* Alvaré, *supra* note 15, at 61-62; Alvare, *supra* note 30, at 156-63. Issues of reproductive freedom clearly arise with respect to trying to restrict sexual relations, which is seen as justifying the distinction.

[38] I discuss the issue from a child's perspective here. I address societal interests at notes ___-___ and accompanying text *infra*.

[39] David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce,* 83 MICH. L. REV. 477 (1984).

proposed that the decision-maker try to look at the question in terms of what the child would, once having reached adulthood, have realistically wanted to have happened.[40] I believe that using this test, the vast majority of children born to gay parents would not wish that they had not been born; it certainly is not the view of children who live with gay parents or adults who were raised by gay parents.[41]

People do not seek optimality in life. Rather, most people are "satisfiers", not optimizers.[42] They are content with a satisfactory set of outcomes—with satisfactory being defined in a highly individualistic manner. Consistent with this view, the federal government has determined that quality of life shall not be considered with respect to decisions regarding withholding of special medical treatment from newborns born with major impairments.[43] It is possible that an adult who has experienced a life filled with great pain, physical or emotional, might say they wished they had not been born. But there is no basis for concluding that most children would think it better not to be born unless they were provided optimal homes.

A far more persuasive standard is that children would prefer to exist so long as they have a reasonable chance of experiencing a life in which they are wanted by their parent(s), have access to basic goods, and the opportunity to seek happiness. A reasonable existence test is consistent with the way ethicists have assessed the question who should have children. For example, John Stuart Mill proposed "The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility-to bestow a life which may be either a curse or a blessing-unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being."[44] Some philosophers

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[40] *Id.* at 488-89.

[41] *See* ABIGAIL GARNER, FAMILIES LIKE MINE (2004).

[42] *See, e.g.*, HERBERT SIMON, MODELS OF MAN: SOCIAL AND RATIONAL (1957); Michael Byron, *Satisficing and Optimality*, 109 ETHICS 67 (1998).

[43] With respect to newborns, federal regulations forbid withholding life-saving treatment based on "subjective opinions about the future 'quality of life.'" 45 C.F.R. § 1340.20 (2005).

[44] J.S. MILL, ON LIBERTY, at ch. V (David Bromwich & George Kateb eds., Yale University Press, 2003) (1869).

recently have argued that even this is too high a standard; for example, Derek Parfit argues that from the perspective of the unborn any existence is better than not to exist at all.[45] But, even taking Mill's test as appropriate, it is clear, as I shall show below,[46] that children born to gay couples, or individuals, will have as much, or more, opportunity to lead a desirable existence as children born to heterosexual couples or individuals.

A variation on the optimality claim is the argument that children are entitled to a "normal" existence and therefore should not be placed with gay parents. For example, one state legislator recently argued, "Children should have a male and female parent to grow up and have a normal life. I'd hate to think I grew up with a dad and a dad instead of a mom and a dad."[47] This legislator is suffering from a failure of imagination and an inability to put himself, as a decision-maker, in anybody's shoes but his own. Given the way he was raised, and who he is, he undoubtedly cannot imagine having grown up with a dad and a dad. But, if he listened to those who did grow up with a dad and a dad or a mom and a mom, he would discover that while having two moms or dads can be challenging, these children were more than happy to have grown up in their families.[48] Moreover, the normality test would apply to many other couples who might seek access to ART (or to be adoptive parents): prospective parents who belong to religious or cultural minorities, interracial couples, or parents with disabilities. Not surprisingly, critics of gay parents are not suggesting such couples should not be allowed to adopt children or have access to ART. Courts have rejected resting placement decisions on such factors.[49] Defining optimality in terms of "normality" of family characteristics

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[45] DEREK PARFIT, REASONS AND PERSONS 359 (1984); Philip. G. Peters., Jr., *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 488 (1989).

[46] *See* notes ___-___ and accompanying text *infra*.

[47] ACLU LESBIAN & GAY RIGHTS PROJECT, TOO HIGH A PRICE 106 (2003) (quoting Mississippi state representative Tom Cameron).

[48] *See* GARNER, *supra* note 41; JANE DRUCKER, FAMILIES OF VALUE: GAY AND LESBIAN PARENTS AND THEIR CHILDREN SPEAK OUT (1998).

[49] *See* Smith v. Smith, 367 P.2d 230 (Ariz. 1961)(religious minority); Palmore v. Sidoti, 466 U.S. 429 (1984) (interracial couple); *In re* Marriage of Carney, 598 P.2d 36 (Cal. 1979) (disabled parent). Some private agencies do seem to use such criteria, often related to religion. *See Christian adoption agency snubs Catholics*, CNN, July 15, 2005, http://www.cnn.com/2005/US/07/15/adoption.church.ap/ (Protestant agency declaring Catholics unacceptable as adoptive parents).

would take policy in a highly undesirable direction.

(2) The Proposed Concept of Optimality Is Not Meaningful

The claim that there is such a thing as an optimal home for rearing children, and that it always is a two parent, heterosexual, married family, also is flawed from a scientific perspective. No one family type constitutes an optimal environment as a general rule, let alone with respect to a specific child. As a number of leading researchers on families have concluded "social science research does not—and cannot—support the (contention) that the presence of two biological or opposite-sex parents comprises an "optimal" child rearing environment. There is broad consensus among child development specialists that child outcomes are affected by a large number of factors; these factors include . . . the overall quality of parenting as reflected in parental love, warmth, involvement and consistency; parental socioeconomic resources; quality of neighborhood and schools; (and) influences of peers and siblings . . . ."[50] The importance of any given factor may be influenced by the child's abilities, temperament, attitudes, and psychological resources.[51]

The problem with the claim that a particular family structure is optimal and that placements should be restricted to such families is illustrated by the following example:

> Jennifer and Linda are registered domestic partners, living together for eight years. Jennifer is a fourth grade teacher, who has worked with children needing special education; Linda a chef. They live in a small house in a neighborhood with many families, including a number of lesbian couples with children, and good schools. They have several brothers and sisters living nearby with their own families, whom they see often. They are seeking to adopt a child or have a child through ART. If they are successful, Linda will leave her job to be at home full-time, although she might do some catering, especially during the summer when Jennifer is out of school.

How should their sexuality be taken into account in establishing policies regarding placement or

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[50] Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., Baehr v. Miike, No. 91-CIV-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *available at* http://www.qrd.org/qrd/usa/legal/hawaii/baehr/1997/brief.doctors.of.sociology-06.02.97.

[51] *Id.*

allocation decisions? For example, compare Jennifer and Linda's home with that of a heterosexual couple each of who has only a high school education and a much lower income than Jennifer and Linda. Is the heterosexual household optimal because there is a male and female or because they are married? There is simply no reason to conclude that a child will do better in the home of a married couple with less income or education than in the home of Jennifer and Linda. In the United States, family income is associated with school performance, test scores on standardized tests, years of schooling completed, and incidence of child maltreatment, among other outcomes.[52] In part, this is accounted for by the high incidence of single-parent families among low income families. But children of two-parent, low income families also do less well than children from wealthier families, including single parents, in terms of all school related variables, including grade point, graduation, and college entrance exam test scores.[53] The same is true with respect to parental education; even controlling for family structure, children living with more educated parents do better in school and have fewer behavioral problems.[54] Child development research also indicates that a parent's style of interacting with a child can have a substantial influence on the child's social and emotional development.[55]

The list of other factors that might be relevant to assessing the relative benefits provided by any particular home is long. What if each of the heterosexual partners plans to continue working, leaving the daily care of the child to a neighbor? What if the heterosexual couple were members of a religious minority that was looked down upon in the community in which they lived? What if one or the other family lived among a close extended family relationship? Beyond parental

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[52] *See* Greg J. Duncan & Katherine A. Magnuson, *Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?*, FUTURE CHILDREN, Spring 2005, at 35, 40-42; Jeanne Brooks-Gunn and Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, FUTURE CHILDREN, Spring 2005, at 139, 145; Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review, in* THE FUTURE OF THE FAMILY (Daniel Moynihan et al. eds., 2004); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT (1994).

[53] *See* Duncan & Magnuson, *supra* note 52, at 40; McLanahan & Sandefur, *supra* note 52, at 88-91.

[54] *See* Henry Ricciuti, *Single Parenthood and School Readiness in White, Black, and Hispanic 6- and 7-Year-Olds*, 13 J. FAM. PSYCHOL. 450, 458 (1999).

[55] *See* Diana Baumrind, *The Influence of Parenting Style on Adolescent Competence and Substance Use*, 11 J. ADOLESCENCE 59 (1991).

characteristics, a child's future often is determined in part by geography. Outcomes for children vary significantly by state and neighborhood. This is especially true with respect to school achievement. At least thirty percent of the variation in students' academic achievement is related to the state in which they live.[56] Should children be placed for adoption only with families in higher performing states or neighborhoods?

I am not arguing that family structure, or the fact that parents are married, does not influence children's development or against the assertion that it should be considered in making placement decisions. However, based on the evidence regarding the factors that influence children's development, a number of other factors also are relevant. There is no clear rank ordering of factors such that a given factor always should be the determinative element in placement policy or decisions. No single factor or family form makes a home optimal.

(3) Optimal Placements for All Children is an Unattainable Goal

Aside from the difficulties in defining optimality, the state simply cannot ensure that children live in, or are placed, in optimal settings. When children require adoptive or foster placement or judges are making custody determinations, the state does well when it is able to provide children with adequate homes; in some cases, the best possibility is the least detrimental alternative, as the noted child development experts Anna Freud, Joseph Goldstein, and Albert Solnit pointed out many years ago.[57] Family law policy is based on the premise that the role of the state is to protect children from harm and, when making placements, to choose the best available alternative. Failure to recognize this is likely to produce policies harmful to children. For example, one prominent person in the adoption field has argued that, rather than place children with gay adults, the state "should change the incentives and supports to eliminate the shortage of appropriate families (that is two parent

[56] JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 22 (2003); THE EDUC. TRUST, PRIMARY PROGRESS, SECONDARY CHALLENGE: A STATE-BY-STATE LOOK AT STUDENT ACHIEVEMENT PATTERNS 20-24 (2006).

[57] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, at ch. 4 (1974).

heterosexual families)."[58] This position would mean that thousands of children would be left without families until the state figured out how to achieve his goal, a goal that is likely unobtainable (and, as shown below, is not desirable).

The optimality standard has a superficial appeal. However, it is not a meaningful concept. In fact, commentators arguing for optimality as a basis for rejecting placement with gay adults do not actually support a general optimality test; they are totally willing to place children with single individuals when a married couple is not available, even though they start with the premise that two parents are optimal. The fact that the optimality standard is being proposed only with respect to sexual orientation, not family structure, parental education or income, or any other factor that arguably makes a home less optimal, calls into question the reasoning of those who oppose placement of children with gay adults. Their claims appear to be based their belief that homosexuality is immoral, not on the developmental needs of children.

C. The Interests of Adults and the Goal of Equal Treatment

Ultimately, the choice of placement policies involves value judgments. I support the value judgment that furthering the interests of children should be a primary goal of all placement decisions. But the interests of children should not be the exclusive focus in examining policy options. The interests of adults deserve consideration. The opportunities to have, and care for, children are critical aspects of happiness for most adults.[59] The loss of custody of a child may be the most devastating event a parent can experience, other than the death of a child. Thus, policies that regularly disadvantage gay parents in custody disputes or gay adults seeking to adopt a child or have a child through ART ought to be clearly supportable as necessary to protect children to justify the harm to these adults.[60]

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[58] William L. Pierce, *Adoption Principles*, NAT'L REV. ONLINE, May 10, 2002, http://www.discovery.org/scripts/viewDB/index.php?command=view&prgram=Misc&id=1159. Pierce was the influential founder of the National Council for Adoptions. Pierce does not make the same claim with respect to placement with single parents, again raising the likelihood that his position is based on his belief that homosexuality is immoral.

[59] *See* Amy Harmon, *First Comes the Baby Carriage*, N.Y. TIMES, Oct. 13, 2005, at E1; Dawn Yun, *And Adoption Makes Three*, S.F. CHRON., Oct. 21, 2005, at F1.

[60] It is morally good for society to create more opportunities and possibilities for individual self-realization.

Policy-makers also should consider the implications of potential policies with respect to the fundamental American commitment to equal treatment. When the state tries to restrict access to fundamental opportunities, it should have clearly supportable reasons for categorically denying some groups this opportunity. As noted by Jonathan Rauch, "American's commitment to equality under the law . . . is the country's essential social contract. It is the glue that binds a diverse population into a nation."[61] Our laws reflect special concern with treatment differences based on an individual's choice of identity.[62] Opponents of placement with lesbians and gay men do not suggest that access to parenthood categorically be denied to any other groups of adults, despite the fact that these other characteristics **are** predictive of less desirable outcomes.[63] Singling out sexual orientation as the only disqualifying factor violates the norm of equal treatment. Denying lesbians and gay men this opportunity is especially troubling since no state precludes anyone from having a child if she or he can conceive through heterosexual intercourse; single individuals, teenagers, adults with limited ability to support the child all are given the right to have children; restricting the right to have children raises major constitutional issues.[64] The interests of children in the quality of the home do not vary by the manner of conception.

Policies embodying the goal of equal treatment also are the best way of promoting the well being of children in general. It is in the interests of all children that parenthood be open to all adults in society. Adults who are parents are likely to support public policies beneficial to children, including the expenditure of resources on schools, health care, and other goods children need. It is not desirable to have a significant portion of the population feel that the interests of children are

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[61] JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 97 (2004).

[62] Lawrence v. Texas, 539 U.S. 558, 592 (2003) ("[A]dults may choose to enter upon [a same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.")

[63] Some commentators do suggest that ART and adoption be restricted to married people. *See* Alvaré, *supra* note 15, at 62-63; Duncan, *supra* note 30, at 38-39.

someone else's problem. In addition, at least two to three percent of all children are likely to self-identify as gay; some will do so when they are still legally children, others after reaching adulthood.[65] A legislature needs to think about the implications of its policies on the interests of these children, during their childhood and/or in adulthood.

The desirability of considering interests beyond the immediate interests of children is reflected in many aspects of family law policy, including those related to child placement. For example, the Supreme Court has held that race cannot be taken into account in custody determinations, even if relevant to a child's interests.[66] In particular, a policy that might provide a small advantage to children in terms of well-being might be rejected if that policy has a large detrimental impact on other important values. Legislative attention to interests of adults and the goal of equal treatment is especially important with respect to placement policies, since the definition of best interests is so indeterminate and the process of predicting what will influence a child's development is so fraught with error, which makes the determination of children's interests uncertain, even speculative.

As it turns out, difficult balancing of competing values is not necessary with respect to most placement decisions, since, as I will discuss, the evidence indicates that children's development is not negatively influenced by their parent's sexual orientation. There are, however, some infrequent situations, where the interests of gay adults and those of children might differ to a degree. I examine how these interests should be balanced when I discuss each type of decision, since the balance may be different in each context. I first look at the research.

III. PARENTS' SEXUAL ORIENTATION AND CHILDREN'S DEVELOPMENT

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[64] Eisenstadt v. Baird, 405 U.S. 438 (1972); Robertson, *supra* note 2, at 36-37.

[65] *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 297, 305 (1994).

[66] Palmore v. Sidoti, 466 U.S. 429 (1984). The interests of adults also are weighed against the interests of children with respect to custody challenges by non-parents, parental visitation when children object, child support, and issues related to children's education. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). I do not necessarily agree with the balance established in all of these areas, but I do support the need for balancing, with the child's interests given greater weight.

A. The Claims

Adults have many attributes--height, weight, political affiliation--that we would not think of as relevant in placement decisions.[67] In assessing whether consideration of a parent's or couples' sexual orientation is relevant to placement decisions, policy-makers should want evidence on the relationship, if any, between a parent's sexual orientation and those aspects of a child's development that are deemed relevant to their definition of best interest. Absent such evidence, there is no basis for taking sexual orientation into account.

Proponents of considering sexual orientation[68] generally make three claims regarding how a parent's sexual orientation might affect her or his child's well being. The most commonly expressed concern is that the absence of two parents of opposite sex affects children's development in undesirable

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[67] As discussed previously, *see* notes ___-___ and accompanying text *supra*, there are other parental characteristics, including gender, income, race, and education that are treated as irrelevant or not singled out for special attention, although they may well have an impact of children's development. It is reasonable to ask why sexual orientation is singled out for concern. The debate seems largely driven by those who oppose homosexuality from a values or religious perspective. *See* note 5 *supra*. In fact, if the issue were race or religion a debate about whether it is bad for children to be raised by members of a certain race or religion would be seen as illegitimate and empirical research would be deemed irrelevant. I believe that a strong argument can be made that the sexual orientation should be treated in the same manner. Perhaps it will be in the future, as same sex relationships become more and more accepted. Since many legislators and courts do think that sexual orientation could be a legitimate consideration if an adult's sexual orientation affects children, I treat the empirical questions as a valid subject for analysis.

[68] There is a large literature focusing on the policy issues regarding gay adults as parents. Most of this literature focuses on the question of same-sex marriage. As noted by Lynn Wardle, the vast majority of the articles written by academics take the position that an adult's sexual orientation should not be considered as a negative factor. *See* Wardle, *Homosexual Parenting*, *supra* note 5, at 835-40. The same is true with respect to the placement issues I address in this article; very few academic commentators argue that children should not be placed with gay adults. Wardle is by far the most prolific of the writers opposed to placement with gay parents. His work frequently is cited by politicians and judges opposed to such placements. There also are a number of advocates and advocacy groups that have published reports and papers arguing against placement. Among the best known and most widely cited are journalist Maggie Gallagher, David Blankenhorn, founder of the Institute for American Values, and the Family Research Council. I focus on the writings of these commentators because they are the most active writers on the issues. As noted, *see* note 5 *supra*, most of these commentators believe that homosexuality is immoral, based on their religious convictions. They often invoke social science research in support of their positions, especially research regarding divorce and unwed parenthood and the role of fathers in children's lives. There is a vast academic literature on these subjects. However, few researchers on these subjects are hostile to lesbians and gay men as parents. Many have taken public positions indicating that they do not believe that their research warrants taking sexual orientation into account with respect to placement decisions. *See, e.g.*, Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., *supra* note 50; DAVID POPENOE, LIFE WITHOUT FATHER 147 (1996).

ways, especially with respect to the child's developing an adequate sense of "gender identity."[69] The absence of a father is viewed as especially problematic by some commentators, who believe that children are more likely to develop behavioral problems without a male in the household.[70] A second claim is that gay parents have a style of parenting which causes children to develop in less desirable ways or that sexual orientation is related to lifestyles that may negatively affect children; in particular, some commentators assert that gay couples are likely to have less stable relationships and therefore their children are more likely to experience instability.[71] Based on these claims, it is argued that living with a gay parent is harmful in and of itself and therefore children should not be placed in homes headed by gay parents[72]or that public policy should disfavor placement of children in non-married, non-heterosexual households and should limit the opportunity of gay individuals to acquire children though ART.[73]

In this part, I examine the social science evidence relevant to these claims. I begin by examining research studies that have looked at the development of children being raised by gay parents. This research provides the only direct evidence on whether children's development appears to be affected by their parent's sexual orientation. I then look at research regarding heterosexual families that opponents of placing children with gay parents believe demonstrates that the need for opposite sex parents.

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[69] *See, e.g.*, POPENOE, *supra* note 68, at 77.

[70] *See, e.g.*, DAVID BLANKENHORN, FATHERLESS FAMILIES: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25 (1995).

[71] Wardle, *Homosexual Parenting*, *supra* note 5, at 852-67.

[72] Just recently, following the requirements of the Vatican, Catholic social service agencies in the U.S. have stopped placing children for adoption with gay couples. *See* Katie Zezima, *National Briefing New England: Massachusetts: Bishops on Gays' Adoptions,* N.Y. TIMES, Mar. 1, 2006, at A17 (describing four Catholic bishops in Massachusetts requesting exemption from rules requiring the church to assist adoptions for gay couples); Katie Zezima, *National Briefing New England: Massachusetts: Charity Board Members Quit over Adoption Plan*, N.Y. TIMES, Mar. 2, 2006, at A19 (reporting that several board members resigned from Catholic Charities in opposition to the bishops' announcement that it would not place children in same-sex families since this "undermines [Catholic Charities'] priority to place children in homes and seeking an exemption shows a "profound disrespect" for same-sex couples). *See also* Wardle, *Homosexual Parenting*, *supra* note 5, at 893 (advocating a presumption against placing children with a gay parent or parents).

I look at the research in terms of its relevance to the policy decisions. Placement decisions arise in two different contexts, which I will call the competitive and non-competitive contexts. With respect to many children needing adoptive or foster care homes, placement with a gay couple or individual is the only family placement available.[74] If gay adults are barred from becoming adoptive parents, some children will be denied the opportunity to have a family. To justify such a policy requires evidence that being raised by a gay parent *harms* children--that children raised by a gay parent are likely to experience serious or significant developmental problems, for example mental health problems, poor school performance, or poor peer relationships, and that the risk is greater than for children raised in heterosexual households?[75] If children will develop adequately, there is no basis for never placing them with gay parents. The same considerations apply with respect to access to ART, since denying gay individuals access would result in some (potential) children not having the opportunity to be born.

In contrast, in those adoption or foster care placements when there is more than one family available to take the child, the placement will be made to one of two or more potential caretakers, who are "competing" to adopt the child. Each setting may be perfectly adequate; the decision-maker has to determine which would be "better." The same is true with respect to custody disputes; the placement almost always will be with one of the parents who are competing for custody. Therefore, I examine whether the evidence indicates that being raised by heterosexual parents is, in general, more advantageous to children, for example are such children likely to be "happier" or better adjusted socially, even if they are not harmed (however defined) by living with gay parents. Evidence that heterosexual households offer a *comparative advantage* might justify choosing an adoptive placement with a heterosexual parent(s), assuming other aspects of the prospective households that might affect children's development, for example income and education, were reasonably equal

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[73] *See* Wardle, *Homosexual Parenting*, *supra* note 5, at 893.

[74] *See* note ___ and accompanying text *infra*.

[75] In terms of harm, the appropriate question probably should be would the child be better off adopted or left in foster care or an abusive family?

(which often will not be the case.)[76] The comparative advantage framework also applies to custody disputes, when a court must choose between the parents. Do children do better when custody is given to the heterosexual parent?

B. Research Assessing Children Living With Gay Parents

There is a substantial body of research examining children living with gay parents and the characteristics of gay parents and same-sex couple households. However, as discussed below,[77] many studies did not have a comparison group of children living with heterosexual parents and the parents, all of whom were lesbians, were all volunteers. While such studies tell us something about the specific children that were studied, it is not possible to draw any general conclusions from these studies with respect to harm or comparative advantage because the samples were not random and there were no comparison groups.

There are 20-30 studies that I consider sufficiently sound methodologically to be probative on the policy questions.[78] Most of these assessed the development of children being raised by lesbian

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[76] There are other factors relevant to comparative advantage. In the custody context, the nature of each parent's relationship with the child is critical. Any alleged disadvantages associated with living with a gay parent to whom the child was strongly bonded would need to be weighed against the harm of separating the child from this parent.

[77] *See* note ___ and accompanying text *infra*.

[78] I have read all of these studies and discussed them with a number of child development researchers. Any review will reflect, to some degree, the weight a reviewer place on the various studies. However, I think that there can be little debate about the actual findings themselves—the issue is what to make of the finding given their methodological limits. I discuss that issue below. *See* Section ___ *infra*. My conclusions regarding the findings are consistent with all of the professional groups that have reviewed the body of literature. *E.g.*, AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), http://www.apa.org/pi/lgbc/policy/parents.html (concluding that "[o]verall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents"); *see also* William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE CHILD. 97, 100-02 (2005); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 224 (2005); Norman Anderssen, Christine Amlie, & Erling Andre Ytteroy, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCHOL. 335 (2002). Other reviewers might reach somewhat different conclusions with respect to the utility of any particular study.

I draw my conclusions primarily from the following studies: Jennifer Wainwright & Charlotte Patterson, *Delinquency, Victimization, and Substance Use Among adolescents With Female Same-Sex Parents*, J. FAMILY PSYCHOL (2006); Nanette Gartrell et al., *The National Lesbian Family Study: 4. Interviews with the 10-Year-Old Children*, 75 AM. J. ORTHOPSYCHOL. 518 (2005); H.M.W. Bos et al., *Minority Stress, Experience of Parenthood*

parents and included a comparison group of children being raised by heterosexual parents There also are some high-quality studies of children living with lesbian parents that did not include comparison groups but that did use well-standardized tests to assess the children's development, especially with respect to aspects of development (e.g. gender identity) that have been the focus of concern by those opposed to placement with gay adults. These studies allow assessments of how the children's development compared with national norms. In general, these studies best inform the harm, not the comparative advantage, issues. If a study finds no evidence that children are experiencing significant problems, the absence of harm by itself answers the policy question.[79]

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and Child Adjustment in Lesbian Families, 22 J. REPROD. & INFANT PSYCHOL. 291 (2004); Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 1407 (2004); Beth Perry et. al., *Children's Play Narratives: What They Tell Us About Lesbian-Mother Families, 74* AM. J. ORTHOPSYCHIATRY 467 (2004); Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886 (2004); Susan Golombok et al., *Children with Lesbian Parents: A Community Study,* 39 DEVELOPMENTAL PSYCHOL. 20 (2003) [hereinafter Golombok et al., *Children with Lesbian Parents*]; Katrien Vanfraussen et al., *Family Functioning in Lesbian Families Created by Donor Insemination*, 73 AM. J. ORTHOPSYCHIATRY 78 (2003); Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve,* 73 CHILD DEV. 952 (2002) [hereinafter Golombok et al., *Families with Children Conceived by Donor Insemination*]; Tamar D. Gershon et al., *Stigmatization, Self-Esteem, and Coping Among the Adolescent Children of Lesbian Mothers*, 24 J. ADOLESCENT HEALTH 437 (1999); Anne Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families,* 12 HUMAN REPROD. 1349 (1997); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal,* 24 J.CHILD PSYCHOL. & PSYCHIATRY 551 (1998) [hereinafter Golombok et al., *Children in Lesbian and Single-Parent Households*]; Raymond Chan et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers,* 69 CHILD DEV. 443 (1997); Susan Golombok et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY 783 (1997) [hereinafter Golombok et al., *Children Raised in Fatherless Families from Infancy*]; FIONA TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY (1997); Sotirios Sarantakos, *Children in Three Contexts: Family, Education, and Social Development* 21 CHILD. AUSTL. 23 (1996); David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Heterosexual Parents and Their Children,* 31 DEVELOPMENTAL PSYCHOL. 105 (1995); Charlotte Patterson, *Families of the Lesbian Baby Boom: Parents' Division of Labor and Children's Adjustment*, 31 DEVELOPMENTAL PSYCHOL. 115 (1995); Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203 (1995); Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 24 CHILD PSYCHIATRY & HUMAN DEV. 24 (1993); Frederick W. Bozett, *Children of Gay Fathers, in* GAY AND LESBIAN PARENTS 39-57 (Bozett ed., 1987); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children,* 15 ARCHIVES SEXUAL BEHAV. 167 (1986); Beverly Hoeffer, *Children's Acquisition of Sex Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981).

[79] Since a number of studies relied on volunteers, the absence of findings of harm could reflect the non-random sample. Most of the parents were highly educated and relatively well-off economically, which also likely influenced

The majority of studies, especially those done in the 1970's and 80's, involved children living with a lesbian parent following that parent's divorce or separation from the child's father. Almost all of the children had lived for a period of time with both biological parents. When studied, some of the children were living with a single lesbian mother; the majority was living with their mother and her new same-sex partner. There are also six more recent studies that looked at children conceived by donor insemination and raised from birth by a lesbian mother.[80] In the majority of these households the biological mother had a partner and they treated the child as their joint child; in a few instances, the non-biological parent had adopted the child. Four of these studies included a comparison group of children born through donor insemination to heterosexual couples; the others used assessment instruments with national norms. All families were recruited to participate in the study.

There are also four recent studies based on data from two large data sets, one in the U.S. and one in England, which had tracked thousands of families over a period of years.[81] The data had been gathered originally by researchers interested in general child development, not on the impact of parent's sexual orientation. Two groups of researchers, interested in the relevance of sexual orientation, examined these data sets and identified the children living with gay parents. They then compared these children's development with that of the other children in the sample, who were living with heterosexual parents.

The body of research, taken as a whole, provides evidence on a number of outcomes including: the gender identification and sexual orientation of children in these families; cognitive abilities and school performance; children's general emotional well-being; self-esteem; peer relations; parent-child relations; and general happiness. The studies that included adolescents looked at behavioral

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outcomes for children.

[80] These samples are described in Bos et al., *supra* note 78; Brewaeys et al., *supra* note 78; Chan et al., *supra* note 78; Flaks et al., *supra* note 78; Gartrell et al., *supra* note 78; Golombok et al., *Families with children conceived by donor insemination*, *supra* note 78. Some of these samples have been followed for a number of years and there are additional reports on the children's development over time.

[81] *See* Wainright et al., *supra* note 78; Golombok et al., *Children with Lesbian Parents*, *supra* note 78.

problems such as drug use and delinquency. The only study that followed a group of children into adulthood also looked at employment and general well being in adulthood.

In reviewing the findings from these studies, I organize the review along the lines suggested by my framing of the policy issues. First, is there evidence that children are actually harmed by living with a lesbian parent? Second, are there any areas of development for which children may do better or worse, on-average, in households with a heterosexual or homosexual parent(s)?

1. Major Developmental Issues-Evidence of harm

(a) Cognitive Abilities and School Performance

The children in these studies were, on average, doing extremely well in terms of cognitive development and school performance.[82] Generally, their IQ scores were above average and the children were, on average, doing well academically. This was true of children living with a gay parent following divorce and those born through donor insemination. While the children's high IQ and school performance undoubtedly reflected, in part, the fact that most of the lesbian parents had high education, which is predictive of children's school performance, the children performed as well as would be expected given their parents' education and income and as well as classmates living with heterosexual parents of comparable education and income.[83]

(b) Serious Behavioral Problems

A number of studies tried to determine whether children in lesbian households were experiencing any serious behavior problems, such as misbehavior in school, aggressiveness towards peers or delinquency. The researchers employed two different approaches. Some measured behavior by asking parents and teachers to complete standardized questionnaires that have been widely used by

[82] There is one exception to this general finding. A study of elementary school children in one Australian school found that teachers reported that the children living with gay parents did somewhat less well in some aspects of school performance; however, the teachers appeared to disapprove of gay parents. *See* Sarantakos, *supra* note 78.

[83] It is possible that children living with lower income gay parents might differ from those with lower income heterosexual parents if hostility towards gay parents and stigmatization of their children is greater in areas where lower income gay parents live.

other researchers studying child development.[84] Other studies relied primarily on clinical interviews with parents and/or children.[85] The majority of the studies had comparison groups.

Overall, the children living with a lesbian parent seemed comparable to the children living with heterosexual parents with respect to serious emotional or behavioral problems. In the studies that utilized standardized tests of children's behavior, the great majority of children living with lesbian parents scored within the normal range on both parent and teacher ratings. The few children who did have serious problems were in households that had experienced divorce; the proportions of children with problems were the same in households headed by lesbian and heterosexual divorced parents. Children of divorced parents typically have somewhat more problems, on average, than children from non-divorced families.[86] Only a very small number of studies have included teenage children, so there is not much evidence with respect to problem behaviors, such as delinquency, early pregnancy, drug use, or dropping out of school, which generally manifest themselves in adolescence. Several recent studies that focused on teens did not find problem levels any higher than the general population of children in comparable heterosexual families.[87] The one study that followed children raised from birth into adulthood by a lesbian parent(s) found that these young adults did not differ from the young adults raised in heterosexual families, with respect to employment, ability to find and relate to partners, or in their general sense of wellbeing.[88]

(c) Gender Identification and Sexual Orientation

A consistently expressed concern is that children living with gay parents will have problems with

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[84] The most common instrument was the widely used Child Behavior Check List developed by Thomas Achenbach. *See* THOMAS ACHENBACH & C. EDELBROCK, MANUAL FOR THE CHILD BEHAVIOR CHECKLIST AND REVISED CHILD BEHAVIOR PROFILE (1983).

[85] Such interviews often produce less reliable data than standardized instruments.

[86] *See* Paul Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well Being of the Next Generation*, 15 FUTURE CHILD. 75, 76-78 (2005)

[87] *See* Wainright and Patterson, *supra* note 78; Wainright et al., *supra* note 78; Tasker and Golombok, *supra* note 78; Golombok et. al, *Children Raised in Fatherless Families from Infancy*, *supra* note 78; MacCallum & Golombok, *supra* note 78; Gershon et. al, *supra* note 78..

[88] Tasker & Golombok, *supra* note 78.

their own sexual development. Two separate issues have been raised. First, it is hypothesized that these children will have difficulty with respect to their gender identity, that is their concept of themselves as a male or female. Second, some commentators contend that children of gay parents are more likely to engage in same-sex sexual activity or become gay than are children raised by heterosexual parents

(i) Gender Identification. Some child development specialists believe that children with a poor sense of gender identity experience emotional problems because they are confused about their identity or unhappy with being a female or male; other child development specialists believe that a child's sense of gender identity is unrelated to their emotional wellbeing. Regardless, the many studies that looked at gender identification of children with gay parents found that the vast majority of children were happy with their own gender; the few children in these studies who reported a desire to be the opposite sex came equally from the gay and heterosexual households.[89]

Aside from gender identification, critics of gay parents sometimes express concern that their children will not adopt appropriate male or female roles--they will not act in ways deemed "appropriate" for their gender with respect to preferred toys, games, activities, friendships As many commentators have pointed out "appropriate gender roles" is a totally value-laden concept.[90] In any case research has not shown this to be an issue. Research consistently finds that children living with gay parents generally do not differ from those in heterosexual households in terms of those behaviors that are seen as gender linked. [91]

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[89] In a personal communication, developmental psychologist Ross Thompson, who has done extensive research on gender and on the role of fathers, points out that with respect to gender roles, as well as other areas of development children have multiple social sources on which to draw from outside (as well as within) the family for identifying the behavioral characteristics associated with their sex: peers, the media, schools are among the extra-familial contexts in which children learn about gender. Thus, the over-socialization of gender roles makes it very doubtful that it will be a disadvantage for children to grow-up with gay or lesbian parents. This is one of the reasons, to use a different example, that heroic parental efforts to raise children with a nonsexist orientation are often frustrated by the fact that their offspring are being influenced to adopt conventional roles by these outside influences.

[90] *See* Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference,* 31 CAP. U. L. REV. 691 (2003).

[91] Tasker & Golombok,*supra* note 78. Some commentators contend that there are, in fact, small differences and that these favor children raised by lesbians. For example, there are indications that daughters of lesbians mothers engage in less "sex stereotypical behavior." Timothy Biblarz & Judith Stacey, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 159, 168 (2001).

(ii) Sexual Orientation. The potential impact of living with a gay parent on the child's sexual behavior or identity is a major focus of some commentators, who believe that that being gay is an undesirable outcome.[92] Of course, many people, including myself, reject the premise that this is an undesirable outcome. But even if becoming gay were considered a negative outcome, the research indicates that the vast majority of children raised by gay parents will identify as heterosexual in adulthood, although there may be a somewhat greater likelihood that they will consider or experience a same-sex relationship at some point in their lives.

It is difficult to determine through research whether a parent's sexual orientation influences a child's sexual orientation or behavior. First, there are no precise figures on the proportion of the population that ever engages in same-sex relations or the percentage that self-identifies as gay. There are reasonable approximations, but these remain approximations.[93] Thus, it is not clear what numbers should be used in comparing outcomes for children raised by gay parents. Second, very few studies have looked at sexual behavior and orientation of adolescents or adults raised by gay parents. The total number of children in these studies is under 100; the number raised exclusively by gay parents is even smaller, since many of these children had lived with a heterosexual parent at some point.

Thus, any conclusions are somewhat speculative. The one study that followed children into adulthood found that children raised by lesbian parents were not more likely to self-identify as gay in adulthood.[94] There is some indication, in a few studies, that the adolescent children living with gay parents in the study sample were more likely to have a same-sex sexual encounter or relationship during adolescence than were children living with heterosexual parents in the study sample. Because the samples in these studies were very small and over eighty percent of the adolescents or young adults in both settings reported only heterosexual relationships, the differences in the percentages reporting same-sex relationships were not statistically significant. Two

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[92] Wardle, *Adoption*, *supra* note 5, at 291.

[93] The most comprehensive national study of sexual behavior found that 4.3% of females and 9.1% of males report that they have had a homosexual relationship or encounter at some point in their life and that approximately 2.8% of adult men and 1.4% of adult women self-identify as homosexual. LAUMANN ET AL., *supra* note 65, at 295-96, 305.

societal stigma, gay adolescents would benefit from living with gay parents.

Moreover, under any set of policies, the vast majority of gay adolescents will be born to heterosexual parents. If society reduces the stigma associated with homosexuality, and thereby helps more heterosexual parents accept their gay children, the overall increase in children's well-being would likely be substantial. From the perspective of children as a whole, a cost-benefit analysis seems strongly to favor eliminating distinctions based on sexual orientation.

(d.) The Negative Impact of Community Attitudes.

Among the most frequently expressed concerns by judges and legislators is that children living with gay parents will suffer emotional harm as a result of community stigma. Whether the potential exposure to stigma is a legitimate consideration in placement policies is a subject of debate; the U.S. Supreme Court has ruled that courts cannot consider the impact on children of community stigma based on a parent's race in making custody determinations.[104] I look at the issue from a value perspective later.[105] Here I review what is known about the impact of stigma.

Studies regularly find that by the time they are school-aged children are aware that homosexuality is stigmatized by many people and that having two moms or two dads is quite unusual. Several studies found that some children are stigmatized by other children, by some parents of their classmates, and, in one report from Australia, by some teachers.[106] Some children report being embarrassed to tell their friends about their parent's sexual orientation or living arrangement.[107] In some instances, it affects their social relations, for example, they may avoid some children or not ask certain friends to their house. In addition, some children living with a gay parent following that parent's divorce report

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[104] Palmore v. Sidoti, 466 U.S. 429 (1984).

[105] *See* note ___ and accompanying text *infra*.

[106] Sarantakos, *supra* note 78.

[107] The experiences of youth in households of gay parents are insightfully described in GARNER, *supra* note 41. *See also* Ann O'Connell, *Voices from the Heart: The Developmental Impact of Mother's Lesbianism on Her Adolescent Children,* 63 SMITH C. STUD. SOC. WORK 281 (1993); S.J. Pennington, *Children of Lesbian Mothers, in* GAY AND LESBIAN PARENTS, *supra* note 78, at 58-74; Gershon et al., *supra* note 78; Javaid, *supra* note 78; Karen G. Lewis, *Children of Lesbians: Their Point of View,* 25 SOC. WORK 198 (1980).

that coping with the parent's new sexual identity added to the difficulties most children experience from divorce itself.[108]

While the presence of stigma is clear, the research does not find that it has a significant harmful impact on the children's mental health. No study has found evidence of higher rates of emotional problems among children living with gay parents. On average, the social development of the subject children in all the studies was well within normal range. Interviews of adults who lived with gay parents during childhood indicate that, while having gay parent or parents presents varied challenges, and could lead to painful experiences, these adults did not report major developmental problems or long-term disadvantages. Concerns about the negative impact of community attitudes do not find support from the research.

2. *Comparative Well-being.*

Even if children raised by gay parents develop adequately, in terms of academics, social relations, and mental health, are they likely to be better-off if they live with heterosexual parents? The evidence on this question is much more limited than the evidence regarding harm. To make assessments of comparative advantage, it is necessary to compare children living with heterosexual and homosexual parents who are comparable with respect to education, income, family structure and other factors that have been shown to influence children's development. Only a small number of studies, fewer than ten, meet this criterion.[109]

None of these studies found significant differences in children's development related to their parent's sexual orientation.[110] In every critical aspect of well-being, the children in these studies who

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[108] Garner, *supra* note 43, at ch. 3.

[109] These studies looked at a number of aspects related to children's general development, including self-esteem, social competence, peer relations, and general emotional health. Some of the studies also measured the perceived quality of family relations from the child's and parents' perspectives. Data were gathered using interviews with children, parents, and teachers, as well as through standardized instruments designed to assess children's well-being.

[110] As discussed below, see note and accompanying text, the sample sizes in many of these studies may have been too small to allow for detection any differences between the two groups. In another vein, Biblarz and Stacey, *supra* note 92, criticize the focus of researchers on finding no differences. They believe that at least some differences

were being raised by lesbian parents appeared to be doing as well as the children being raised by heterosexual parents. The children were not more likely to show poor mental health (anxiety, depression); this was the finding from direct tests of children and from reports by parents and teachers. They got along as well with their parents and peers as children living with heterosexual parents. The research found no evidence of differences between these groups of children in self-esteem or in measures of social competence and healthy development, such as leadership ability, self-reliance, interpersonal flexibility, and self-confidence. Thus, the research to date has not found evidence indicating a comparative advantage based on the sexual orientation of the parents.

C. Methodological Issues and Their Relevance

I turn now to an issue that has assumed great prominence in the debates over policy. Several prominent opponents of allowing lesbians and gays to become parents have argued that the body of research on children living with gay parents is so flawed that it is of no relevance to policy-makers.[111] The essence of these critiques is the research, taken as a whole, does not prove that

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should be expected based on various psychological theories of child development. They argue that the appropriate question is the policy relevance of any differences. They also argue that some of the differences favor children living with gay parents. I agree with their critique, but the policy world asks for research looking for no differences.

[111]*See, e.g.*, ROBERT LERNER & ALTHEA K. NAGAI, MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (2001), *available at* http://marriagelaw.cua.edu/publications/nobasis.pdf; Wardle, *Homosexual Parenting*, *supra* note 5, at 841-52. As discussed below, there are many flaws in these analyses. Yet these analyses have been seized upon by ideological opponents of gay parenting and marriage as justifying policies limiting placement with gay adults. *See, e.g.*, MAGGIE GALLAGHER & JOSHUA K. BAKER, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, DO MOTHERS AND FATHERS MATTER?: THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL-BEING (2004), *available at* http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf. Ironically, some of the most ardent opponents of gay parenting, and the strongest advocates for ignoring the research looking at children in these homes, have offered totally unsupportable reasons for denying gays the right to adopt. For example, Wardle suggests that if gays are allowed to adopt "heterosexual couples ...may be discouraged by the increased competition from gay and lesbian couples and decline to enter the 'adoption market." Wardle, *Adoption*, *supra* note 5, at 291. He offers no evidence in support of a seemingly indefensible prediction. Moreover, these opponents have been willing to rest their case on research that has been totally discredited as fraudulent, in particular the work of Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757, 770-74 (1996). Paul Cameron, the author of this study, has been widely discredited for misrepresenting and misconstruing sociological research on homosexuality and its effects. The American Psychological Association expelled Cameron, and the American Sociological Association cited him for willfully misrepresenting research. *See* Stacey & Biblarz, *supra* note 91, at 161. A federal district court determined that Cameron's conclusions, and specifically his conclusion that homosexuals abuse children at a greater rate than heterosexuals, constituted a total distortion of the data. Baker v. Wade, 106 F.R.D. 526, 536 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

there are no differences in children's development related to their parent's sexual orientation. In technical terms, it is argued that the research has not established the "null hypothesis", that it has not established that there are no differences between children in the two types of households.[112] Critics point out that while no study has found differences, the sample size in most studies were too small to detect differences and that future research may show differences, especially relatively small, subtle differences.[113]

A second critique is that because almost all studies the sample populations were not selected randomly, they may not be representative of the entire gay and lesbian population (the samples included a disproportionate number of highly-educated, economically well off lesbian individuals and couples). Moreover, no studies examine the development of children living with gay fathers, although there are studies describing parenting styles of gay fathers.[114] Therefore, the findings cannot be generalized to all lesbian parents and not at all to gay men as parents.[115] In addition, in a few studies, the comparison samples differed in important respects from the study population, including income or family composition, making comparisons unreliable.

These are legitimate concerns. Nonetheless, the research is relevant to policy development. These studies, even with their limitations, provide no support for the claim that being raised by gay parents is harmful to children, with respect to the aspects of child development that always

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[112] Affidavit of Steven Lowell Nock, Halpern v. Toronto, 60 O.R.3d 321 (Ontario Div. Ct. 2003) (No. 684/00, 39/2001); LERNER & NAGAI, *supra* note 111. These same issues would apply, of course, if differences had been found.

[113] Affidavit of Stephen Lowell Nock at ¶¶ 116-19, *Halpern*, 60 O.R.3d 321 (No. 684/00, 39/2001); LERNER & NAGAI, *supra* note 111, at 98-106. Individual studies ranged from fewer than 10 children to a maximum of subjects. The children were of a fairly wide age range, which limits comparisons across studies. Altogether the studies involved about 600 children and a similar number of parents.

[114] There are some clinical reports and descriptions but these are not systematic.

[115] Many studies, especially the earlier ones, utilized clinical interviews or used psychological tests that have not been standardized on large samples. Studies that use more standardized tests allow for greater confidence in generalizing from the findings. Almost all of the research looked at the children's development at a single point in time, often during early childhood or at a point in time shortly after they began living exclusively with a gay parent. Many of the aspects that were being studied, such as problem behaviors or sexual orientation, do not develop until children are older. In addition, problems might develop the longer the child lives with the parent.

have been considered relevant for public policy-mental health, social relations, and academic performance. There is not a single study that finds children raised by gay parents are at greater risk than any other children of doing poorly academically, engaging in behaviors harmful to themselves or to others, or experiencing mental health problems. Altogether, these studies included hundreds of children, with very few children showing any significant problems, no more than the comparison children.[116] Moreover, the small number of studies drawn from random populations, which looked at a range of factors indicative of psychological health, including mental health scores, self-esteem, peer relationships, and parent-child attachment, found no differences in well-being.[117]

While the samples in individual studies often were small, they were large enough to detect differences related to family factors other than parents' sexual orientation. For example, while no study found differences related to parent's sexual orientation, most of the studies found that children in single parent families (gay or heterosexual) did less well than children in two parent families (gay or heterosexual).[118] Differences also were found based on family income, parental education, high levels of family conflict, and parental behavior towards the child.[119] These findings are consistent with the evidence from a large body of child development research examining the influence of these factors on children's development and indicate that the research designs could uncover differences.

While this body of research does not prove that there will be no differences in children's development based on the sexual orientation of their parents, it provides no support for taking sexual orientation into account in placement decisions. If there is a case to be made for consideration of sexual orientation, it does not come from the research directly looking at children raised by gay

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[116] The children experiencing problems were in families that had divorced.

[117] Wainright et al., *supra* note 78; TASKER & GOLOMBOK, *supra* note 78.

[118] See, e.g. MacCallum and Golombok, *supra* note 78.

[119] See, e.g. Golombok et. al., *Children with Lesbian Parents, supra* note 78; Perry et al., *supra* note 78; Wainright et al., *supra* note 78; Chan et al., *supra* note 78.

parents.

D. Evidence Offered By Opponents of Gay Parents

Recognizing that direct evidence from studies of children with gay parents does not warrant on sexual orientation, opponents of placing children with gay adults contend that other social science research justifies rejecting or limiting placement of children with gay adults. The main contention is that children need both a mother and father to develop adequately. Some commentators also assert that gay adults are likely to behave in ways that may be harmful to children.

(1) The Need for Fathers and Mothers

The central contention is that a two-biological-parent family, especially a married two-biological-parent family, is the optimal setting for children. In particular, it is asserted that the presence of a male in two parent families, not just the presence of two married adults, is critical to children's positive development.[120] In support of these claims, the numerous studies comparing the development of children in two-parent versus single parent families are referenced. In general, this research finds that children raised by both biological parents evidence fewer developmental problems than children raised by never married or divorced single parents. While the majority of children in both types of households do not experience major developmental problems, and the differences in developmental outcomes between children in one parent and two parent households are not that large, it appears that, on average, being raised by always married parents who get along with each other is more advantageous for children than being raised by a single heterosexual mother or by a divorced parent.[121] Children in single parent homes are more likely to engage in delinquent

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[120] Wardle, *Homosexual Parenting*, *supra* note 5, at 857-64; GALLAGHER & BAKER, *supra* note 112; BLANKENHORN, *supra* note 70, at 222-31.

[121] There is a very large body of research examining the effects of family structure and divorce on children's development. There is no consensus among researchers about either the effects of family structure on the causes for the effects that many studies find. Many of the issues are discussed in the recent volume of *The Future of Children* on *Marriage and Child Wellbeing*, which contains a particularly good summary by Paul Amato, who has written extensively about divorce and family structure. Amato, *supra* note 86. Amato concludes that "the estimated effects of parental divorce on children's development are modest rather than strong." Amato, *supra* note 86, at 88, 86 tb. 1. *See also* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 7 (2002). This conclusion, which is consistent with the great majority of the research, belies the often hysterical claims of some commentators that divorce and single parenthood are destroying the lives of large numbers pf children and the cause of major social problems. Moreover, as discussed below, most experts attribute these differences to factors

behavior or become pregnant as teens than children in two biological parent households, and children raised by both biological parents also do better, on average, in school.

However, while research indicates that there are advantages to being raised by two always married biological parents as compared with a single parent, the research does not demonstrate that the gender of the two parents matters. Researchers propose at least five different reasons why children in married households might do better than children in single parent households. First, the presence of two parents, rather than one, might make a difference. Second, the fact that the parents are married may have an influence. Third, the development of children in single parent households may be affected by the fact that many of these children experienced parental divorce. Fourth, the fact that single parent families have low income and that many of the children were born to poor single mothers may influence the children's development. Finally, the fact that the children in married households live with opposite sex parents might account for some of the differences. This last possibility is, of course, the critical question for assessing the relevance of sexual orientation.

Researchers have examined each of these explanations. All of the evidence supports the first four. There is no evidence supporting the claim that having opposite sex parents makes a difference; as discussed, the body of research looking at children with gay parents goes the opposite way. Most researchers who study the impact of family structure attribute the differences in children's outcomes primarily to the fact that there are two parents rather than one. They find that children do better in two parent families due to several factors: (1) the advantages generated by the fact that two parent families have higher income; (2) the fact that two parents provide more monitoring and supervision of children's activities and behavior; and (3) the greater consistency of parenting in homes with two caretakers, since single-parents often become overburdened and less able to provide consistent care and nurture.[122] None of these advantages turn on the sex of the two adults. It is the number of adults that count. In addition, research regularly shows that some children in divorced families experience

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other than the gender of the parents.

[122] *Id.*; *see also* McLanahan & Sandefur, *supra* note 52; Sigle-Rushton & McLanahan, *supra* note 52, at 126-39.

behavioral problems that seem to be related to the fact of divorce in and of itself and by the effects of being exposed to parental conflict preceding and/or following the divorce.[123] Third, the fact that many single parents have low income makes a difference.[124] Finally, there is some evidence that children living with their biological heterosexual married parents do better than children living with two unmarried biological heterosexual parents.[125] The hypothesis is that cohabiting couples make less of an investment in their relationship, which could affect the children; a small amount of evidence supports this hypothesis. This research is much more limited; there no consensus as to whether there are systematic differences based on marriage itself.

While this body of research provides evidence that living with two biological parents may be preferable living with a single parent and that divorce can be harmful to children's development, none of the family structure studies provide any support for the claim that the gender of the two parents makes a difference. Moreover, as Paul Amato concludes that "the estimated effects of parental divorce on children's development are modest rather than strong."[126] Both the modesty of the impact and the very high likelihood that they are not associated with having opposite sex parents strongly undercuts the argument that children will be disadvantaged if placed with gay adults. Reliance on this literature to justify policies against placement of children with gay adults is inappropriate and misleading.

Opponents of placing children with gay adults also refer to two other bodies of theory and research to support the assertion that gender matters and therefore sexual orientation should be relevant to placement decisions. First, classic psychoanalytic theory emphasized the importance of same-sex

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[123] *See* Amato, *supra* note 86, at 84.

[124] *See* McLanahan & Sandefur, *supra* note 52; Duncan & Magnuson, *supra* note 52.

[125] *See, e.g.*, JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY (Alan Booth & Ann C. Crouter eds., 2002); Rachel Dunifon & Lori Kowaleski-Jones, *Who's in the House? Race Differences in Cohabitation, Single Parenthood, and Child Development*, 73 CHILD DEV. 1249 (2002); Wendy Manning & Kathleen Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J.MARRIAGE &FAMILY 876 (2003). This may reflect the fact that cohabiting couples generally have lower income. Differences also are reported depending on the race of the family.

[126] Amato, *supra* note 86, at 77.

role models; some psychiatrists and psychologists continue to hold this view.[127] These theories sometimes are based on the assumption that there are appropriate gender roles to which females and males should conform.[128] It also is theorized that mother-father interactions may provide children with models of adult relationships.[129] Second, some studies that find that fathers and mothers engage in different patterns of interaction and guidance with their children. For example, fathers engage in different styles of play and may use different means of enforcing discipline. It is argued that these differences are critical to children's socialization, especially to that of boys.[130]

While males and females may provide children with role-modeling with respect to some aspects of gender roles, no research shows that being exposed to this role differentiation is critical to any aspects of children's development. To the contrary, as noted by psychologist Michael Lamb, editor of the major anthology on fatherhood, "very little about the gender of the parent seems to be distinctly important. The characteristics of the father as a parent rather than the characteristics of the father as a man appear to be most significant, although it is impossible to demonstrate that the father's masculine characteristics are of no significance."[131]

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[127] Much of classic theory was based on the idea that boys needed active fathers or they would turn out effeminate, the result of overly protective mothering. Such boys would become homosexual. Girls would become delinquent because they lacked a father to help them work through Oedipal desires. *See* Elizabeth Pleck, *Two Dimensions of Fatherhood*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 40-41 (M. Lamb ed., 4th ed. 2004).

[128] Wardle adopts the view that "father love and mother love are different kinds of love," Wardle, *Homosexual Parenting*, *supra* note 5, at 858, and that men and women have distinct, gender based roles—fathers as providers and mothers as stay at home nurturers, Lynn D. Wardle, *Introduction, Relationships Between Family and Government* 31 CAL. W. INT'L L.J. 1, 21 (2000) ("Fathers must selflessly return to their role as providers and protectors of their families, and mothers must return lovingly to nurture their children.").

[129] *See* Ross Parke et al., *Fathering and Children's Peer Relationships*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, *supra* note 128, at 307-08; *cf.* Michael Lamb, *The Development and Significance of Father-Child Relationships in Two-Parent Families*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, *supra* note 127, at 287.

[130] *See* POPENOE, *supra* note 68, at chs. V & VI (1996); Wardle, *supra* note 128, at 21. Fathers provide children "with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to the identity, character, and competence of children." Wardle, *supra* note ___, at ___.

[131] Michael Lamb, *The Role of the Father an Introduction*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, *supra* note 127, at 7. His views are shared by other leading researchers. For example, Kyle Pruett, one of the main contemporary advocates of involved fathering, recently wrote "I also now realize that most of the enduring skills (of children) are probably, in the end, not dependent on gender." KYLE PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD 18 (2000). *See also* Parke et al., *supra* note 130, at 330.

This conclusion may be surprising in light of all of the political attention that is paid to the importance of both family structure and the role of fathers. It is not necessary, however, to conclude that fathers are unimportant in order to reject the claim that the law should disfavor gay adults in placement decisions.[132] Many "fathers are critical" proponents appear to be concerned with the situation of males in low-income, mother only families, who often experience very bad outcomes. It may be that for children in high poverty neighborhoods, the presence of a father is a protective factor for young males, lessening the chances that they will engage in undesirable behaviors. Thus, the stress on the importance of fathers is not surprising; increasing father involvement with their children may be strategically valuable in combating the impacts of poverty and single motherhood. But regardless of whether it would benefit some children if their fathers were more involved, there is no carry-over to policies regarding placement I address in this article.[133] There is no evidence that children do better with a father and mother than with two mothers or two fathers.[134]To the extent that the claims about the need for fathers purport to be passed on research, this research is far less relevant than the research studying children living with gay parents.

2. Parental Behaviors

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[132] There is a vast academic literature on fatherhood. In contrast to social critics like Wardle and Gallagher, I have not found any academic researchers on these subjects who are hostile to lesbians and gay men as parents. Many prominent researchers have taken public positions indicating that they do not believe that their research warrants taking sexual orientation into account with respect to placement decisions. *See, e.g.*, Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., *supra* note 50; POPENOE, *supra* note 68, at 147; sources cited in note 132 *supra*.

[133] Some opponents of placement of children with gay adults seem to be concerned that acceptance of gay parenting will be seen as a conveying the message that fathers are not important, thereby undercutting their efforts to push for more father responsibility. But however valuable it may be strategically, it is wrong from a scientific, and moral, perspective to penalize children and gay adults for a problem unrelated to them. As I discuss below, preventing gay adults from becoming parents often is harmful to children. It is both bad policy and values to treat these children as pawns in other struggles.

[134] In fact, many studies find that while father involvement can be valuable to children, fathers are far less involved with their children than are mothers. *See* Brent A. McBride & Mary M. Lutz, *Intervention Changing the Nature and Extent of Father Involvement*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, *supra* note 127, at 447. Several studies find that in lesbian families, both parents spend considerable time with the children, each spending more time than would an average father. Thus, children may benefit by being placed in a lesbian household. *See* Patterson, *supra* note 78.

Some critics also contend that children should not be placed with gay adults because such homes are likely to be harmful to children. Specifically, it has been claimed that: (a) gay men and lesbians are likely to engage in infidelity, promiscuity or other irresponsible sexual behavior; (b) gay adults have higher mortality rates and therefore are more likely to leave children parentless, and (c) that gay couples are likely to break up at higher rates than heterosexual couples.[135]

To support the claims regarding fidelity, commitment, and sexual behavior, opponents of placement with gay adults cite surveys of gay men that reported that many of these men had sexual relations with multiple partners and that gay males with partners are less likely than heterosexual men to believe that monogamy is a critical aspect of a committed relationship.[136] But, as law Professor Eugene Volokh has shown, these surveys, many of which are 30-40 years old, were of highly unrepresentative samples of men, generally recruited by methods that "were focused not on homosexual men generally, but only on a sample that would predictably have many more sexual partners than the average gay man."[137] In contrast the largest national study of sexual behavior, with a representative sample of gay men and lesbians, found only small differences in the behaviors of gay males and comparably situated heterosexual males; there were virtually no differences for women.[138] Moreover, these studies did not include gay men with children and none of the respondents had the opportunity to marry. There is substantial evidence that marriage and the presence of children significantly alters the behavior of heterosexual men.[139]

With respect to the claim of a greater likelihood of relationship instability, again there is no evidence

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[135] Wardle, *Adoption*, *supra* note 5, at 291. Wardle's writings reflect the flawed notion that there is such a thing as homosexual parenting or homosexual lifestyle." People whose love and sexual interests are to others of the same-sex have many different lifestyles and gay, like heterosexual, parents have many different parenting styles.

[136] Wardle, *Homosexual Parenting*, *supra* note 5, at 582 n.84.

[137] RAUCH, *supra* note 61, at 141-45.

[138] LAUMANN ET AL., *supra* note 65, at 313-317. See also RAUCH, *supra* note 61, at 143-45.

[139] *See* LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 21 (1999). These authors contend that marriage significantly changes the marital partners' behavior, increasing their commitment to each other. This, along with the social support given married couples by relatives, friends, and society in general, enhances the stability of the relationship.

that same-sex couples choosing to have children though ART or seeking to adopt children are at greater risk of breaking up than heterosexual couples choosing to have children by these means. This is not to say that the issue of stability is irrelevant. The evidence indicates that, in the absence of the option of marriage or civil unions, same-sex couple relationships (at least those without children) may be somewhat less stable than the relationships of married heterosexuals.[140] But these are not relationships with children or that have the advantages of marriage. Whether the situation will change as marriage and civil unions becomes more widely available is unknown. However, agencies placing children already seek to assess the likelihood that a prospective adoptive couples' relationship will remain stable; they do so regardless of the couple's sexual orientation.

The claim regarding risk of higher mortality due to AIDS is groundless with respect to those individuals seeking to become parents. Most gay parents are lesbians, who have the lowest risk of AIDS of all population groups. There is no reason to believe that gay men with children are at higher risk of life-threatening disease than similarly situated heterosexual men. In sum, the assertion that children are at greater risk of being harmed if placed with gay adults does not withstand scrutiny. The claims are based on studies that do not meet even the most minimal research standards and on logically flawed arguments.[141]

IV. APPLYING THE RESEARCH IN ESTABLISHING POLICY: BURDEN OF PROOF

Neither the evidence from studies of children with gay parents nor widely-accepted theory provides

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[140] *See* sources cited in Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 316 (2001).

[141] For example, Wardle suggests that if gays are allowed to adopt "heterosexual couples ...may be discouraged by the increased competition from gay and lesbian couples and decline to enter the 'adoption market.'" Wardle, *Adoption*, *supra* note 5, at 291. He offers no evidence in support of a seemingly indefensible prediction. As I discuss below, I do not believe that the policy issues can be or should be resolved solely on the basis of social science research. However, since reference to social science research plays such an important part in policy debates, it is important for policymakers to be aware of the quality of the research. While asserting that the research looking at children with gay parents should be ignored because of methodological limitations, commentators like Wardle, Gallagher, and the Family Research Council generally base their claims on studies that, I believe, are either irrelevant to the policy issues or that have been discredited and are totally inadequate methodologically.

a basis for policy-makers to conclude that an adult's sexual orientation will make any significant difference in terms of children's well-being that should generally influence policies regarding placement decisions. Yet, advocates like Wardle call for rejecting lesbians and gay men as parents until the "evidence is clear beyond reasonable dispute that adult homosexual relationships do not pose risk" of harms to children.[142] In essence, it is being asserted that those who support placement of children with gay individuals or couples should bear the burden of proving, through social science, that a parent's sexual orientation has no negative impact on children's development. This argument is ill-conceived. It does not make sense in terms of meeting the needs of children and it contradicts basic principles regarding who should bear the burden of proof on issues like these.

Most importantly, policies requiring or encouraging decision-makers to focus on sexual orientation in making placements generally will lead to worse outcomes for children.[143] For example, such policies would reduce the pool of potential adoptive and foster parents, thereby lessening the chances that children will be adopted and lead to placements that are less desirable for some children. It also would significantly increase the likelihood of inappropriate decisions in custody disputes.

A presumption against placement with gay adults also ignores the great weight of the existing evidence and professional opinion. The great majority of child development professionals and researchers assert that any differences in child outcomes raised in similar two parent families, differing only in gender composition, are likely to be small and irrelevant for policy purposes. According to the American Psychiatric Association "optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults."[144] Similarly, The Committee on Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics recently wrote "Research has shown that the adjustment,

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[142] Wardle, *Adoption*, *supra* note 5, at 291.

[143] *See* discussion at notes ___-___ and accompanying text *infra*.

[144] AM. PSYCHIATRIC ASS'N, SAME-SEX COUPLES: POSITION STATEMENT (2002), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf.

development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."[145] Moreover, virtually every organization of professionals working with children and families has adopted the position that same-sex households should be treated equivalent to heterosexual households with respect to placement policies.[146] The positions of such organizations are not incontestable and not all members will subscribe to every position. However, these are the best available reflections of professional and scientific consensus.[147] The burden should be on those who seek to reject this level of consensus.

In addition, singling out sexual orientation as a strongly negative (or positive) factor is inconsistent with the lessons from social science research on children's development. Children's development is influenced by a complex mix of factors. No single parental characteristic or behavior, other than a history of very bad parenting, has significant predictive power with respect to children's development. This is why, in most areas of family law, decision-makers are directed to determine a child's "best interests" on a case-by-case basis, without resorting to presumptions related to parental characteristics.[148]

Moreover, the research situation is not going to change in any significant way in the near future--or perhaps ever. It is especially difficult to obtain data on large numbers of children living with gay

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[145] AM. PSYCHOLOGICAL ASS'N, SEXUAL ORIENTATION, PARENTS, & CHILDREN: POLICY STATEMENT (2004), *available at* http://www.apa.org/pi/lgbc/policy.parents.html.

[146] The American Psychological Association, the American Psychoanalytic Association, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry all have adopted this view. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf; AM. ACAD. OF PEDIATRICS, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES: POSITION STATEMENT (2002), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf; AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, POLICY STATEMENT: GAY, LESBIAN, AND BISEXUAL PARENTS (1999), *available at* http://www.aacap.org/publications/policy/ps46.htm.

[147] *See* Sarah Ramsey, *Social Science Knowledge in Family Law Cases: Judicial Gatekeeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 72-79 (2004); *cf.* Margaret F. Brinig, *Promoting Children's Interests Through a Responsible Research Agenda* 14 U. FLA. J.L. & PUB. POL'Y 137 (2002).

[148] *See* Levy, *supra* note 17, §§ 28:1-28:4.

parents. These data could only be obtained from general surveys of large samples of randomly selected families.[149] While there are several such data sets, the number of gay families in these data sets is invariably small, since the number of gay families in the general population is small. For example, one recent study looked at data from the "ADD Health" National Survey, one of the largest data sets focused on children's developmental, [finish sentence]. Even in this very large research sample of 12,105 adolescents, only 44 adolescents lived in a household that appeared to be headed by a gay parent, only 18 for certain.[150] Thus, most research will come from studies that recruit families and thereby encounter the problems associated with using non-random samples. In addition, for both logistical and financial reasons, there will be very few long-term longitudinal family studies and few, if any, studies will include large numbers of randomly selected gay parents.

These methodological problems are not unique to research related to assessing the relevance of sexual orientation: they are common in virtually all research related to controversial family law policies, such as the desirability of trans-racial adoptions, fathers as parents, the desirability of joint custody, the conditions under which a custodial parent should be allowed to relocate to a home distant from a non-custodial parent, or the impact of grandparent visitation.[151] In each of these contexts, it is very difficult to get a substantial amount of data on the development of large numbers of randomly selected children and compare their development with comparable children who subject to a different arrangement. The body of research on gay parenting is at least as developed and reliable as other research relied on by legislatures in making policy regarding placement of children, such as those just mentioned.

While future research will add to our knowledge, social science evidence will not provide definitive answers to the policy questions. When it comes to children's policy, social science rarely,

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[149] It is from such large scale studies that evidence about the impact of variables like income and family structure have been obtained.

[150] *See* Wainright et al., *supra* note 78, at 1888-90.

[151] *See* Brinig, *supra* note 147, at 141-43.

if ever, establishes that something is "clear beyond reasonable dispute."[152] For example, there are now thousands of studies examining the impact of family structure (single parent versus two parents) on children's development, a variable that is commonplace and easily obtained in data sets with very large numbers of subjects. Yet, debates still rage about the impact of family structure on children.[153] So many factors effect children's well-being, it is extremely difficult to develop and conduct studies that prove the impact of any particular factor. Thus, any presumptions disfavoring gay adults are likely to remain permanent if they can only be changed by indisputable social science.

Finally, in the absence of any data indicating harm to children,[154] it is unfair from a values perspective to place the burden on the group that is being denied an opportunity, especially an opportunity as important to adults as access to children or parenthood.

Thus, in adopting policies with respect to each of the placement decisions, policy-makers should presume that, in general, children will do as well being raised by gay parents as with heterosexual parents. There may, however, be some situations where an adult's sexual orientation should be relevant. I examine the implications of the research with respect to designing policies in each of the placement arenas in the remainder of the article.

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[152] In fact, Wardle's proposal that the absence of harm from living with a gay parent be shown beyond reasonable dispute displays a fundamental misunderstanding of social science methods. Social science cannot prove that something will not happen. Even if every research study finds no harm, it remains possible that future studies might find situations that could be thought of as harm. What constitutes proof beyond reasonable dispute? Given the difficulties in conducting studies, people who believe that homosexuality is harmful will always find problems with the research. The burden should be on those claiming the likelihood of harm, since they only need a small number of studies finding harm to meet this burden. Other opponents of gay parents argue that the burden should be on those supporting change. *See* LERNER & NAGAI, *supra* note 111, at 16-21. But this would only make sense if there were good reasons to believe that preserving the status would benefit children. As I discuss throughout this article, there are many reasons why preserving the status quo is bad for children.

[153] *See* Amato, *supra* note 86, at 76-78.

[154] With respect to harm, only one issue emerges from the studies—the painful impact of the behavior of some children and adults towards children and youth living with gay parents. Still, as noted, the social development of the subject children was well within normal range and did not differ from the development of other children. In essence, it appears that these children had learned to deal with the fact that society considered their family different, just as children living in other minority families, for example religious minorities or interracial families, learn to cope with community stigma based on their family's difference.

IV ADOPTION AND FOSTER CARE

A. Adoption

1. Current Policies

All states regulate the adoption process. At present, five states have legislation or regulations limiting adoption by gay adults.[155] In 1977, Florida enacted legislation prohibiting adoption by gay couples or individuals.[156] More recently, Mississippi enacted legislation that bars adoption by gay couples, but not gay individuals.[157] Utah and Virginia bar adoption by any unmarried couples, effectively precluding gay couples, but not gay individuals.[158] Legislation to ban adoption by gay adults has been introduced, but not passed, in at least seven other states.[159] In contrast, at least 10 states either provide for adoption by gay couples and individuals or bar discrimination based on sexual orientation.[160]

In states where there is no legislation, courts and public and private adoption agencies have discretion to consider or ignore sexual orientation as one of the factors to weigh in making or approving an adoptive placement. Practices vary by state and agency; in a recent nationwide survey of private adoption agencies, one-third of the responding agencies indicated that they would not place a child with a gay person.[161] There is little research indicating how the relevance

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[155] Florida, Mississippi, Utah, Virginia. While the Alabama statute does not contain a bar, the legislature adopted a resolution in 2002, stating that its "intent is to prohibit child adoption by homosexual couples." ALA. CODE § 26-10A-6 (2002) (referencing Act 98-439, HJR35). The status of gay adults is unclear in Nebraska and Oklahoma. Many states have been modifying their laws regarding adoption by gay individuals and couples in recent years. New Hampshire had a statute barring adoption by homosexuals that was repealed in 1999. N.H. REV. STAT. ANN. § 170-B:4 (amended 1999). The ability of gay adults to adopt also is affected by court opinions and administrative regulations. For a review of these laws see National Gay and Lesbian Task force, Adoption Laws in the U.S. (Jan. 2006), http://thetaskforce.org; Duncan, *supra* note 30, at 32-36.

[156] Florida law prohibits adoptions by individuals otherwise qualified if those individuals are sexually active "homosexuals," although the state does not prohibit lesbians or gay men from being foster parents. 1977 Fla. Laws, ch. 77-140, § 1, FLA. STAT. ANN § 63.042(3) (West 2002).

[157] MISS. CODE ANN. § 93-17-3 (2002).

[158] UTAH CODE ANN. § 78-30-1 (2002), VIR. CODE ANN. § 63.2-1225 (West 2006).

[159] Leslie Cooper and Paul Cates, TOO HIGH A PRICE 6 (ACLU LESBIAN & GAY RIGHTS PROJECT 2d ed. 2006).

[160] *See* Maryland Family Policy Impact Seminar, Impact of Gay Adoption Laws on Permanency for Foster Youth, http://www.hhp.umd.edu/FMST/_docsContribute/GayAdoptionResearchBrief_000.pdf.

[161] *See* David Brodzinsky et al., *Adoption Agency Perspectives on Lesbian and Gay Prospective Parents: A National*

of adult's sexual orientation is assessed by caseworkers in the remaining agencies. Most reports indicate that the children placed with gay individuals and couples often have special needs and are considered hard to place children, indicating that many workers consider placement with gay adults as less desirable than other placements.[162]

2. Proposed Approach

(a). Total Bans

In terms of children's interests, legislative bans on placing children with gay individuals are irrational and harmful to children, as are agency policies that refuse placements with gay persons. Currently, there are over 100,000 children in the U.S. awaiting adoptive homes; almost all entered care through the child welfare system.[163] This number has remained stable for many years. There are not now, and will not be in the future, anywhere near enough individuals or families, heterosexual or gay, wanting to adopt these children.[164] Many hard to place children are

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Study, 5 Adoption Quarterly 5 (2002); *See also* EVAN B. DONALDSON INSTITUTE, ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES (2002).

[162] *See* EVAN B. DONALDSON INSTITUTE, EXPANDING RESOURCES FOR CHILDREN, *supra* note 10, at 4, 11-12. There are some agencies generally considered gay-friendly to which gay couples, especially men, look for children.

[163] *See* Administration for Children & Families, U.S. Dep't of Health & Human Services, The AFCARS Report: Preliminary FY2003 Estimates as of April 2005, http://www.acf.hhs.gov/programs/cb//stats_research/afcars/tar/report10.htm.

[164] In most states, there are two different processes by which children are adopted—independent adoptions and agency adoptions. Most adoptions involve the voluntary decision of the biological parent(s) to give up their right to custody of the child and to allow another person or persons to become the legal parents of the child through adoption. Generally, these are very young children, often newborns. There usually are more people wanting to adopt than there are children available, especially if the child is under one year of age. Most birth parents who voluntarily place a child utilize what is called the private or independent adoption process. Frequently, the parent, using a lawyer or doctor as an intermediary, selects a person or couple to be the adoptive parents and relinquishes custody to them. Alternatively, the parent may relinquish the child to a private non-profit adoption agency, authorizing that agency to place the child for adoption. The state role in both these types of placements generally is quite limited. All states require that a state agency evaluate the suitability of the proposed home and the adoption must ultimately receive approval by a court; however, the choice of the parent or the private agency rarely is rejected. Except in the states limiting placement with gay couples or individuals, the birth parent or the private agency decides on the relevance of the prospective adoptive parent's sexual orientation.

In contrast to voluntary placements, some children are placed for adoption after their parents' rights to custody have been involuntarily terminated by a court because the parents are ruled unfit to care for the child. These usually are children who have been removed from their parents by a juvenile court because of inadequate parental care or maltreatment. Most such children are initially placed in a foster home, while efforts to help the parent(s) regain custody are implemented. If these efforts are unsuccessful, federal and state laws require that the state look to have the child adopted and the child welfare agency will chose the prospective adoptive parents. Often the agency chooses the

adopted by gay individuals or couples.[165] Obviously, a bar on adoption by gay individuals or couples will mean that even fewer of these children will be adopted. They will either remain in a foster family home or be placed in a group residential setting.

The vast majority of children without parents unquestionably would be better off being adopted. Child development specialists all agree that adoption is the best means of promoting the well-being of most children who do not have parents willing or able to care for them.[166] Adoption provides children with the most committed caretakers, the greatest stability, the most emotional security, and the most legal protection. A preference for adoption is recognized in federal law and is the public policy of every state, including the states with bans.[167] All of the leading professional child health and welfare organizations oppose the exclusion of gay men and lesbians as potential adoptive parents.[168] Some opponents of adoption by gay parents assert that

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child's foster family. In other cases, relatives are sought out. Finally, an adoptive family may be selected from a pool of applicants evaluated by the agency. If there are no families already available, the agency will seek out potential adoptive homes through a variety of means. With respect to children who have been abused or neglected, there are fewer homes available than there are children needing adoptive placement. Many of these children are older and may have a variety of "special needs." Most such children are adopted by their foster parents, if they are adopted at all. Large numbers are never adopted. *See* note 164 *supra*.

[165] These may be only children available to them. *See* note 163 *supra*.

[166] See, John Triseliotis and Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing , in THE PSYCHOLOGY OF ADOPTION 107(*David M. Brodzinsky and Marshall D. Schechter eds. 1990).

[167] *See* The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272; The Adoption and Safe Families Act of 1997, P.L. 105-89. In Florida, adoption is "the primary permanency option" Fla Stat. ch. 39.001(1)(h);39.621 (2).

[168] *See* AMERICAN ACADEMY OF PEDIATRICS, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES: POSITION STATEMENT (2002), *available at* http://www.aclu.org/getequal/ffm/section1/1c7apa.pdf ; AMERICAN PSYCHOLOGICAL ASSOCIATION, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf; AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, POLICY STATEMENT: GAY, LESBIAN, AND BISEXUAL PARENTS (1999), *available at* http://www.aacap.org/publications/policy/ps46.htm; AMERICAN PSYCHOANALYTIC ASSOCIATION, POSITION STATEMENT ON GAY AND LESBIAN PARENTING (2002), *available at* http://www.apsa.org/ctf/cgli/parenting.htm; NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, NACAC POSITION STATEMENTS: GAY AND LESBIAN ADOPTIONS AND FOSTER CARE (2002), *available at* http://www.aclu.org/getequal/ffm/section1/1c11nacac.pdf; AMERICAN ACADEMY OF FAMILY PHYSICIANS, CHILDREN'S HEALTH (2003), *available at* http://www.aafp.org/x16320.xml. In 2002, approximately 60 of AAP's more than 60,000 members formed the American College of Pediatricians (ACP) in 2002 to oppose adoption by gay adults. Bill Fancher & Jody Brown, Am. Family Ass'n, *Pro-Life Pediatric Group Stands Contrary to Established AAP*, AGAPE PRESS, July 29, 2003, http://headlines.agapepress.org/archive/7/afa/292003e.asp. American College of Pediatricians, *Homosexual Parenting: Is It Time for Change?* (2004),

"the interest of the child served by adoption laws is an 'interest' in having an ideal family."[169] This is clearly wrong. The interest is in having a family, one that is better than the alternatives of foster care or institution. There is not a shred of evidence, or a single reason to believe, that most children would be better-off left in foster family or group homes than adopted by a gay couple or individual, which is essentially the judgment reflected in a total bar.[170]

The irrationality of a total ban is reflected in other policies in the four states with bans. The Florida statute was passed in 1977 following an anti-gay crusade led by singer Anita Bryant, who argued that homosexuality was immoral.[171] This policy has been challenged in court a number of times; it was recently upheld by the 11th Circuit Court of Appeals in the case of *Lofton v. State of Florida*.[172] Over the years, as Florida has defended its law in court challenges, it no longer focuses on morality. Its current justification is that the state should place children for adoption only in optimal families, which the AG claimed is a two parent heterosexual household.[173] As discussed previously, the optimality claim is indefensible—there is no justification for denying children a perfectly good permanent family, because the family is not optimal. Moreover, Florida allows adoption by single individuals and cohabiting couples. While any of these individuals or couples may be totally suitable, they would not be considered optimal under the standard proposed by the AG. In addition, other Florida laws and practices

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http://www.acpeds.org/?CONTEXT=art&cat=10005&art=50&BISKIT=2684987796 (last visited Oct. 20, 2005).

[169] *See* Duncan, *supra* note 30, at 37.

[170] While there are circumstances where long-term foster care or legal guardianship is preferable for a given child, this choice should be made because it is best for the child, not out of the necessity caused by limiting the applicant pool. The irrationality and inconsistencies of the arguments against adoption are reflected the writings of William Duncan. Duncan states that the purpose of adoption law is "fashion adoption in imitation of procreation," id at 31; no state makes this the goal of adoption. Duncan rejects the idea that a child's best interests are met if he or she is ensured the "best" emotional, physical, and economic context. Like others, he makes no effort to address the question whether children are better-off left in foster care or a residential institution if an "ideal" family is not available. Yet, Duncan accepts that adoption by single individuals is all right, even though such settings are not ideal. He asserts that such placements are acceptable because single individuals may get married; there is no evidence showing any likelihood that this happens often.

[171] *See Adoption Ruling a Slap at Gays,* MIAMI HERALD, Sept. 2, 2001, at [Page].

[172] Lofton v. Sec'y Dep't Child. & Family Servs., 358 F.3d 804 (11th Cir. 2004), *rehearing en banc denied*, 337 F.3d 1275 (11th Cir. 2004), *cert. denied,* 543 U.S. 1081 (2005).

[173] Brief of Appellees at 16, 30, *Lofton*, 358 F.3d 804, 2002 WL 32868748; Appellants' Reply Brief at 4, 9, *Lofton*, 358 F.3d 804, 2003 WL 24131214.

recognize that gay individuals and families provide perfectly suitable homes. Florida allows gay individuals to become foster parents and legal guardians of foster children. Many of these gay foster parents raise children from birth until they become adults.[174] Obviously, the Florida legislature and state placement agencies believe that these homes are suitable and preferable to institutions. Ironically, the plaintiffs in the Lofton case were a gay couple who had been selected as foster parents of the year in Florida.[175] If a child is to be raised by a gay family, it is irrational not to allow the child to be adopted, which provides children with more legal protections and greater stability.

The Florida Attorney General's Office also proposed that the legislation could reflect the goal of keeping open the possibility of adoption by a heterosexual couple at some point in the child's life, a position that the Lofton court majority found sufficient to uphold the law.[176] Regardless of whether this claim is sufficient to pass muster under a rational basis review of the statute's constitutionality,[177] it is indefensible policy from a child welfare perspective. Delay in placing a child for adoption decreases the ultimate likelihood of adoption. This was recognized by Congress when it passed the federal Multi-Ethnic Placement Act (MEPA) in 1994,[178] an act that addressed adoption policies akin to those barring adoption by gays. In the case of MEPA, the issue was trans-racial adoption. It was the practice, if not the policy, in many states, to try to place children, especially African-American children, with families of the same race or ethnicity as the child. Many people argued that this was the optimal placement in the case of minority

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[174] Steven Lofton is a registered pediatric nurse who raised three Florida foster children from infancy. *Lofton*, 358 F.3d at 807.

[175] *Fighting for Their Families*, S. FLA. SUN-SENTINEL (Broward Metro Edition), Aug. 12, 2001, at G1.

[176] Lofton at

[177] For a discussion of the legal issues, see Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children,* 40 TULSA L. REV. 421, 428-41 (2005).

[178] The Multi-Ethnic Placement Act of 1994, as amended, P.L. 103-382 [42 USC 622] prohibits the delay or denial of any adoption or placement in foster care due to the race, color, or national origin of the child or of the foster or adoptive parents and requires States to provide for diligent recruitment of potential foster and adoptive families who reflect the ethnic and racial diversity of children for whom homes are needed. The 1996 amendment, Section 1808 of P.L. 104-188, Removal of Barriers to Interethnic Adoption, affirms the prohibition against delaying or denying the placement of a child for adoption or foster care on the basis of race, color or national origin of the foster or adoptive parents or of the child involved [42 USC 1996b].

children. Yet, because there were many more African-American children needing adoptive homes than there were available African-American families looking to adopt, large numbers of African-American children remained in foster care for lengthy periods of time; most were never adopted.

There was, and remains, substantial debate regarding the desirability of racial matching.[179] But, even those who favored a preference for same race placements recognized that it was bad for children to delay adoption placement in the hope that a same race family would materialize. For many children, delay means denial of adoption. Delay often is accompanied by decreases in a child's emotional health, making adoption less likely. Moreover, there is little reason to believe that for hard to place children adoptive families will materialize. Therefore, MEPA bars states from delaying placements in order to find a more a so-called more "suitable" home-in this case a same race home. As MEPA recognizes, denying a child a good adoptive home on the possibility that a "better" home will become available at some point cuts against every element of good adoption practice.

Mississippi bars gay couples, but not gay individuals, from adopting. Utah and Virginia ban adoption by unmarried couples, regardless of sexual orientation, but not by gay or heterosexual individuals. Why bar gay or unmarried couples but allow adoption by single individuals? It cannot be because these legislatures thought that children do best with single parents. Mississippi law prefers heterosexual married couples over heterosexual individuals as candidates for adoption. A total bar prevents adoption by couples in long-term, highly stable relationships and assumes that children are worse off with two parents who are not married than they are with a single parent. The policy would only make sense if it was always better for children to remain in foster care or a residential placement, or with a single parent, than in two parent homes with unmarried parents. This is extraordinarily unlikely, given the advantages to children associated with having two parents in the household. It appears that these legislatures did not want to give

[179] *See* R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through*

any recognition to same-sex relationships, perhaps out of concern that such recognition might be used as a justification for same-sex marriage in any litigation of this issue.[180]

In addition to harming children needing adoptive homes, singling out sexual orientation as the only basis for a total ban stigmatizes gay families, potentially adding to the burdens children in these families already experience. A total ban also means that birth parents loose the right to select an adoptive home they prefer, if they wish to choose a gay couple or individual. A total ban on adoption by gay families should be rejected. Lesbian and gay individuals should be considered as suitable adoptive parents.

(b) Consideration of Sexual Orientation When Alternative Placements Are Available

Where there is more than one family seeking to adopt a child, it is necessary to ask whether sexual orientation should be viewed as a factor in choosing among families and, if so, how. There are four possible general policies. Policy-makers could direct that adoption agencies always select placement with a heterosexual couple or individual over a same-sex couple or individual, regardless of any of the other characteristics of the two families or individuals. Alternatively, they could choose a presumption for heterosexual couples or individuals, making

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Discriminatory State Action, 107 YALE L.J. 875 (1998).

[180] The fact that gay couples could adopt was viewed by courts in Vermont and Massachusetts as evidence that the legislature believed that such couples were competent parents and denial of the opportunity to marry violated their right to equal treatment. For a discussion of some of the legislative reasoning in Mississippi and Utah, see Kari E. Hong, *Parens Patri(archy): Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 40-60 (2003).

In fact, the child-focused arguments against same-sex couple marriage also are illogical. Opponents often assert that children do better in heterosexual families and therefore marriage should be restricted to such couples. Regardless of whether this is true, and I do not believe it is, the policy issue is not about the potential benefits of living with both a mother and father versus two same-sex parents. The children who will be affected by same-sex marriage already live with two same-sex adults. The issue is whether it is better for those children if these adults, both of whom function as parents, are able to marry, rather than be required to cohabit. The hundreds of thousands of children who are currently living with parents in a same-sex partnership, or who are living with a single gay mother or father who may later find a partner, will continue living with their parent(s) regardless of whether the state allows their parents to marry. Nobody is suggesting that they be should be taken from their parent(s) and placed elsewhere; such a policy would not only be undesirable and contrary to existing state laws, it would be unconstitutional. These children clearly would benefit if their parents were able to marry. This would maximize stability and protect their economic interests. They would be able to see their family as more normal. Their parent's wellbeing will be improved, which will contribute to their capacity for child rearing. By not allowing their parents to marry, or by undoing existing marriages, the

this the placement of choice unless there are factors that suggest placement with the same-sex couple or individual is clearly preferable. Third, agencies could be instructed to consider sexual orientation as just one of the factors relevant in trying to choose the "best" placement for the specific child. Finally, agencies could be directed not to consider sexual orientation in assessing the alternative placements.

Would a policy that heterosexual families or individuals should always be selected when available, or that there should be a presumption for heterosexuality, lead to the best outcomes for children? While the answer may seem obvious to many people, think again about Jennifer and Linda, the hypothetical couple described previously.[181] A legislative rule requiring placement with a heterosexual couple if one is available or a strong presumption for placement with heterosexual parents can be defended only if the sexual orientation of the prospective parent(s) is likely, in general, to be the most critical factor in predicting the home that will be best for the child. As discussed previously, this premise is not supported by the evidence.[182] Therefore, neither a bar, nor a presumption, against placement with gay adults is justified, even when a heterosexual family is available. Instead, agencies should treat each child individually, focusing on the needs the specific child and the suitability of specific caregivers in meeting those needs.[183]

The most difficult issue, I believe, is whether there should be a preference for heterosexual families when reasonably comparable heterosexual and gay couples or individuals are available to adopt a child. The fact that they are adopted poses challenges for many children, especially during adolescence and early adulthood, although most adopted children appear to lead

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children are made to suffer. *See* Wald, *supra* note 140.

[181] *See* note ___ and accompanying text *supra*.

[182] *See* note ___ and accompanying text *supra*.

[183] This is the position taken by the Child Welfare League of America, the preeminent professional organization dealing with children in the child welfare system. According to the League "Applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing life style, or sexual orientation. Applicant should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child...." CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARD OF EXCELLENCE FOR

successful lives and benefit from adoption. Therefore, a legislature might choose policies that minimize any potential obstacles to a successful adoption, including the challenges a child will face living in a "non-normal" family.[184]As previously discussed,[185] children with gay parents will face challenges that they would not face if raised in a heterosexual household. Some of these children, perhaps most, ultimately may see these challenges as having had a beneficial impact. But this will certainly not be true for all children. While it could be argued that facing such challenges has potential benefits, it strikes me that most adults looking back at their childhoods would opt for minimizing painful experiences, as would most children if asked.

Nonetheless, there are major problems with creating a preference for normality, even when there are reasonably comparable families in all respects except sexual orientation.[186] In fact, there is a strong case for discouraging agencies from considering sexual orientation at all. In considering the appropriate policy, policy-makers should assess how a given policy is likely to be implemented. If the ultimate decision-makers are likely to use a particular factor inappropriately, this should be taken into consideration in establishing policy. Many agencies already focus on sexual orientation inappropriately; any policy preference for heterosexual families would exacerbate the situation.

Adoption placements involve highly discretionary decisions by workers in public and private adoption agencies. Under current practices, most agencies instruct their staff to try to match the child with the family they consider most suitable for each child. A staff member will review the characteristics of the pool of families that have applied to the agency for a child. The worker will look first at any preferences a family has with respect to the type of child it wishes to adopt. The

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ADOPTION SERVICES §§ 4.7, 5.1 (rev. ed. 2000).

[184] Historically, agencies emphasized matching the characteristics of the child and adoptive parents as closely as possible to avoid the "stigma" of adoption. They sought to place children with adoptive families that resembled the child's biological families as closely as possible, families in which parents and child were physically, ethnically, racially, and intellectually alike. *See* BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION, at chs. 2-3 (2002).

[185] *See* notes ___-___ and accompanying text *supra*.

[186] It may be that having a pool of families comparable in all respect except for sexual orientation is a rare event.

agency then will assess the adults' capacity to meet any special needs the child might have, for example, their ability to raise a child with a disability, a child of a different race or ethnicity than theirs, or their willingness to have contact with the birth mother, if an open adoption seems appropriate.

At their best, placement decisions reflect sound clinical judgments by experienced, well-trained adoption specialists, using their clinical experience. A sound decision should involve weighing multiple factors, including family structure, marital status of couples, education levels, income, presence of other children in the family, evidence of childrearing skills, availability of an extended family support network, as well as sexual orientation. The ability of the family to meet the needs of the specific child should be the focus. Unfortunately, the decision-making process is far from ideal in most circumstances. There is little science to the selection process. Caseworkers, many of whom have limited training, are likely to make these decisions based on their own value judgments, plus any agency policies. There is little reason to expect that these decisions will be free of bias. Many workers are likely to bring the general biases found in society and give too much weight to sexual orientation and not enough weight to other factors. As noted, one recent survey found that a third of all agencies nationally have policies against placements with gay families; in other agencies this will be the practice of many workers.[187]

The historical record with respect to agency decision-making is not encouraging.[188] Beginning in the early 1900's, adoption agencies purported to use psychological knowledge to place children in the best available adoptive families. For much of the last century, agencies assumed that the best families were those that were most normal. However, the factors considered normal often were questionable with respect to their influence on children's development. For example, agencies placed major emphasis on matching children with parents of the same religion and

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[187] *See* note ___ *supra*. This is especially true with respect to adoption agencies affiliated with religious organizations.

[188] The following description of adoption agency practices is drawn from MELOSH, *supra* note 184; there are many other books and articles also describing these practices. *See* Hong, *supra* note 180, at 3 n. 7, 4 nn.8-9.

intelligence level. They also looked for families where the adults performed according to proper gender roles--men in the labor force in masculine jobs, women at home. These factors were used as rules of thumb and given far more weight than factors likely to be predictive of successful child development. While agency practices have become more sophisticated over time, worker competence and attitudes are still highly variable. It remains highly likely that allowing caseworkers to consider sexual orientation on a case by case basis will lead to unwarranted rejections of gay families or too long delays in the placement of children with gay adults while the worker searches for a "comparable" heterosexual placement.

In addition, choosing a normality standard is problematic. What factors should be considered as non-normal? Should agencies disfavor placement with adults who belong to religious or cultural minorities or who are of a different race than the child? Encouraging workers to consider value laden criteria is likely to lead to bad decisions.

Allowing consideration of sexual orientation on a case by case basis raises another problem. A major reason why the sexual orientation of the family matters might be considered relevant is because of the stigma that the children will experience because their family is different. It is difficult for gay parents to protect their children from stigma, although they certainly can mitigate the impact of community prejudice, just as other parents from stigmatized minorities--racial, ethnic, or religious--help their children deal with prejudice. Should policy-makers allow community bias to influence policy?[189]

This issue was considered by the U.S. Supreme Court in the case of *Palmore v. Sidoti*,[190] involving a custody dispute following a divorce. At the time of the divorce, the mother, a Caucasian, was granted primary physical custody of the child. Several years later, the mother

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[189] At this point, many policymakers have the same biases. The same is true of the general public; about half of all people oppose adoption by lesbians and gay men. *See* Wyatt Buchan, *Poll Finds U.S. Warming to Gay Marriage*, S.F. CHRON., Mar. 23, 2006, at A5.

[190] 466 U.S. 429 (1984).

married an African-American man. The father filed for a change of custody. The trial judge in rural Florida transferred custody to the father. The judge based his decision on the need to protect the child from the social stigma that would presumably accompany an interracial marriage in this rural area.[191] The Supreme Court reversed, holding that a court cannot ratify such local prejudices, even if this requires disregarding one aspect of the child's best interests. The Supreme Court agreed that it "would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated."[192] The Justices accepted that, all else being equal, it might be better for the child to live in an environment free of these pressures and stresses. Nonetheless, the Court held that "the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother....The Constitution cannot control such prejudices but neither can it tolerate them."[193]

Due to the legal differences between adoption and custody,[194] and the level of constitutional concern with distinctions based on race versus sexual orientation,[195] the *Palmore* holding might not be applied by the Supreme Court to a legislative preference for heterosexual couples in adoption proceedings. Nonetheless, the value premises underlying the holding are relevant to any situations where government policy supports community biases. The chance of stigma is not limited to situations with a gay parent. Depending where they live, children could face stigma, teasing, and feelings of defensiveness based on their families' religion, race, or cultural

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[191] The Florida trial court stated that: "[D]espite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." *Id.* at 431

[192] *Palmore*, 466 U.S. at 433.

[193] *Id.*

[194] The rights of an existing parent are accorded substantial protection while an applicant to adopt a child has no special standing. *See* Lofton v. Sec'y Dep't Child. & Family Servs., 358 F.3d 804, 809-11, 815 (11th Cir. 2004), *rehearing en banc denied*, 337 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

[195] Unlike race, sexual orientation is not a suspect classification requiring heightened scrutiny. *Cf.* Drummond v. Fulton County Dep't Family & Children's Servs. 563 F.2d 1200 (5th Cir. 1977) (race may be considered as one factor but not only factor in determining whether foster parts may adopt).

practices. It is highly undesirable to allow community biases against any groups influence public policies towards those groups. This concern is furthered by the need to protect the important interest of gay adults in having the opportunity to adopt and the undesirability of any polices that contribute to societal beliefs that gay parents are less desirable. Thus, there is a strong case for barring consideration of sexual orientation at all.

Despite these concerns, I would opt for a system that allows decision-makers to assess, on a case by case basis, the difficulties or advantages a particular child is likely to face in living with a gay family as one of the factors in determining the best placement. Even if the difficulties are related to the fact of stigma, as a general rule children should not be made to bear the costs of remedying biases that are deemed undesirable by policy-makers. They are voiceless and easily made victims of adults' agendas. They have no ability to avoid the costs. This is especially true of children needing adoptive placements; other children generally have at least their parents as advocates and protectors of their interests.

Moreover, workers are likely to take sexual orientation into consideration, even if a legislature specifies that they should not do so.[196] Legislatures should recognize this and enact rules or guidelines designed to limit inappropriate uses of discretion. Most importantly, in states where foster parents are the preferred adoptive home if their foster child becomes adoptable, gay foster parents should be given the same preference as other foster parents. Situations like that of Stephen Lofton in Florida should not be allowed. Foster children generally benefit when adopted by their foster parents, thereby providing stability and continuity in their lives. In addition, non-discrimination laws, like those found in a number of states, should be adopted.[197]

Another approach would be for a legislature to adopt a statutory framework indicating the factors

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[196] There is evidence that worker attitudes toward racial matching continue to influence placement decisions of African-American children despite the mandates of MEPA. *See* U.S. Dept Health and Human Services, Protection from Racial Discrimination in Adoption and Foster Care, Summary of Selected OCR Compliance Activities at http://www.hhs.gov/ocr/mepa/complianceact.html.

[197] *See* note ___ *supra*.

that agencies and courts should consider. This would force legislatures to confront the complexity of the decision, the values involved, and the potential for irrational decision-making by agencies. It might be specified that if potential stigma or the search for normalcy is to be a basis for rejection of an applicant, it should be applied uniformly to stigma from all sources, including religion, not singling out sexual orientation. Agencies could be required to specify the factors they considered in choosing the prospective adoptive home. When a gay applicant(s) is passed over, the agency could be required to document the reasons, including the bases for concluding that stigma is relevant in the particular case.

There is little reason to believe, however, that legislatures will confront these issues in a reasoned fashion. In many states, legislators concerned with public attitudes, especially those of a highly organized constituency opposed to lesbians and gay men as parents, may draft guidelines that do more harm than good. As a practical matter, it will be very hard to monitor whether agencies in fact weigh the relevance of sexual orientation appropriately or end up giving it too much weight. It is generally very difficult to show that an agency used inappropriate factors in a given case. To establish worker bias, a pattern would need to be shown. This is quite difficult, as the attempts to enforce MEPA have demonstrated.[198] Therefore, it may be best to let the current low visibility process remain as it is. Gay adults already are permitted able to adopt, both privately and through agencies, in most states. Public acceptance of gay parents is likely to keep increasing; the shift has been substantial in just the past few years.[199]While the laws in Florida, Mississippi, Utah and Virginia should be repealed, the current process might be satisfactory elsewhere.

Finally, state laws should be changed or clarified to permit joint adoption by both partners and to authorize second parent adoptions when the child is the biological or adopted child of one of the

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[198] See note 196 *supra*; Cindi Andrews, *Report finds rights were violated in interracial adoption case*, The Cincinnati Enquirer, Sunday, October 26, 2003.

[199] *See* Buchan, *supra* note 189.

partners, so that the child can have the benefits associated with having two legal parents.[200]

B. Foster Care Placements

1. Current Law and Practice

Each year, approximately 100,000 children and youth are removed from their parents' homes and placed in foster homes in the U.S. because their parents are unable to adequately care for them.[201] Child welfare agencies and courts must choose the family in which the child will be placed. Foster placements are not intended to be permanent. The goal is to reunify the child and parent when possible. However, if reunification does not become possible because the biological parents continue to be unable to provide adequate parenting, legal proceedings to terminate parental rights and place the child for adoption often are pursued. In many such situations, the foster parents seek to become the adoptive family.

At present, only Utah precludes placement of children with a gay foster parent.[202] Arkansas enacted a ban in 1999, but the ban has been declared unconstitutional as was a similar policy in Missouri.[203] Legislation proposing bans has been rejected in several other states in recent years. It is unknown how child welfare workers generally assess the relevance of an adult's sexual orientation when making placements. While there are no data available, various reports indicate that agencies in many states regularly place children with gay foster parents. Some of these

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[200] As of mid-2004, at least six states and the District of Columbia permitted same-sex couples to apply jointly for adoption, meaning that both members of the couple could be simultaneously granted parental status. In a number of other states, courts in either the whole state or in some jurisdictions allow "second-parent" adoptions, under which one gay or lesbian partner can petition to become the second parent of the first partner's biological or previously adopted child. (For instance, a gay man could first adopt as a single parent, and then his partner could apply to become the child's other legal parent.) In many states, however, same-sex couples are not eligible for either joint or second-parent adoption, which means that any children they might be raising are legally related to only one custodial parent. *See* Cooper & Cates, *supra* note 159, at 8, 9; Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255 (1998).

[201] About ten percent are placed in group homes or other residential facilities, not foster family homes.

[202] UTAH CODE ANN. § 78-30-1 (2005).

[203] Howard v. Dep't of Human Servs. & Child Welfare Agency Review Bd., ___ S.W.3d ___, 2006 WL 1779467 (Ark. 2006), *affirming* Howard v. Child Welfare Agency Review Bd., No. 1999-CV-9881, 2004 WL 3154530 (Cir. Ct. Ark. Dec. 29, 2004); www.aclu.org/lgbt/parenting/12199res20050503.html www.semissourian.com/story/1155954.html

placements involve gay youth. Others are undoubtedly hard to place children.

2. Proposed Approach

While, in general, the considerations that apply to adoption policy are the same with respect to foster placements, children needing foster homes differ from those needing adoptive homes. First, their age range is greater and quite different. Only four percent are infants; over forty percent are teens.[204] Older children have different needs, and more to say about where they will be placed. Many foster children have serious emotional problems and are significantly behind in school--the consequences of the poor parental care that lead to the placement and/or to poor placement practices. Many of the infants have been exposed to drugs in utero or live with a mother who has substantial problems related to drug or alcohol use. All of these children require high quality care from their foster parents, care that is too often hard to find.

Virtually every child welfare agency in the country faces a shortage of qualified foster parents. As a result, children often must live in one or more temporary foster homes or residential institutions until a more permanent foster home can be found; multiple placements are often traumatic for children needing stability of care. Thus, the situation with respect to foster care is much like that facing the hard to place children needing adoptive homes, most of who are already in foster homes. Any diminution of the applicant pool lessens the chances that all children will find good homes. As the Arkansas court concluded, banning foster placement with gay adults is irrational--it means that some children will be left in abusive parental homes or placed in institutions because of the lack of foster homes. Legislative bans seemed motivated by a desire to avoid putting gay adults in a situation where they would be the preferred adoptive parents if a foster child becomes free for adoption, as well as some public officials desire to express disapproval of homosexuality.[205] Such policies are not pro-child.

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[204] *The AFCARS Report: Preliminary FY 2003 Estimates as of April 2005 (10)* (U.S. Department of Health and Human Services, 2005a).

[205] *See* Hong, *supra* note 180, at 41.

The case for allowing agencies to consider an adult's sexual orientation as one of a number of factors is stronger with respect to foster placement than it is in the typical case of adoption, however. As noted, children tend to enter foster care at older ages; many are teens. They face very difficult adjustments. Asking these youth to adjust to a home where the caretakers are of a different sexual orientation may be unwise in some situations. The youth may bring biases that will undermine the chances of a successful placement. Getting foster youth to develop the emotional commitment and sense of trust needed for successful placements is challenging under the best of circumstances. It is likely to be impossible if the youth is resistant. Adjusting to a home headed by a gay adult may be more of a challenge than some foster youth can handle, even if they are not hostile. These youth must adjust to new schools, peers, and family dynamics. Facilitating continuity of experiences can ease these adjustments. In contrast, some youth may prefer placement with gay adults; for example, for gay youth placement in a gay household may provide a level of support greatly missing in their biological family. Also, gay adults may be more tolerant of foster children whose attitudes or behaviors pose problems for other foster parents.

Thus, agencies should explore the attributes of alternative placements with older foster youth, at least those over 10. By this age, many children have well-thought through views about placements, especially if they have been in foster placement before. Foster youth should be consulted for all placements, not just those where the potential foster parents are gay, and allowed to visit the prospective home. With training, social workers can have sensitive conversations with the youth. If the potential foster parent's sexual orientation is a concern for the youth, the nature of the concern should be explored. Ultimately, youth should not be placed in homes in which they do not want to live. These considerations are less significant with younger children. The little available evidence indicates that many abused or neglected children begin to thrive after placement with a gay parent. Therefore, the sexual orientation of prospective foster parents should be irrelevant when placing younger children.

IV. CUSTODY DISPUTES

In several respects, child custody disputes raise the most difficult issues regarding the appropriate consideration of sexual orientation by decision-makers. There are countervailing considerations. On the one hand, there is no basis for believing that a parent's sexual orientation is a critical, or even relevant, factor in assessing the needs of the child in most situations. In fact, there is good reason to believe that if courts are allowed to consider sexual orientation many judges will place inappropriate weight on sexual orientation and deprive a child of the opportunity to live with the parent with whom the child has the closest and best relationship. In addition, allowing courts to consider sexual orientation may generate more custody disputes and parental conflict, thereby harming many more children than would conceivably be benefited by considering sexual orientation. However, a parent's sexual orientation may have great relevance to some children's well-being. Devising policies that prevent the inappropriate focus on sexual orientation in the great majority of cases, while meeting the child's needs in the very small number of cases where consideration may be appropriate, is challenging.

A. Current Rules Related to Custody Determinations In General

Parents may contest three issues related to custody of their children. First, at the time of the break-up, they may disagree as to how physical custody of the child(ren) shall be divided between them; if so, a court will need to decide where the child should live.[206] Second, if one parent is awarded primary physical custody of the child, there may be a dispute the amount of time the child should spend with the other parent and under what conditions; this is called visitation or access. Finally, at some point after the break-up, there may be a dispute about whether physical custody of a child who has been living with one of the parents should be transferred to the other parent; a court may be asked to modify the custodial arrangement. In addition to disputes between parents, non-parents, such as grandparents, sometimes challenge the parent's right to custody; these are commonly called third-party disputes.

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[206] Courts also determine legal custody—how decision-making authority regarding the child should be allocated

With respect to initial custody determinations, all states instruct courts to select the custodial arrangement that furthers the child's "best interests." In some states, this is the only standard. These statutes provide little guidance with respect to what best interest means.[207] Over the past twenty years, many states have modified the "pure" best interest test by adopting a statutory presumption favoring joint physical custody; under this test it is presumed that the child should spend substantial periods of time living with each parent.[208] This presumption reflects the judgment that a substantial relationship with both parent's generally is best for children, absent substantial parental conflict. In these states, a parent wanting some other form of custody must prove that joint custody is not in the child's best interest.[209] The importance of continuity of relationships also is reflected in the rules regarding visitation and modification. All states provide that it is generally in a child's interest to have regular contact with a non-custodial parent. A custodial parent who wishes to significantly restrict visitation by the other parent typically must demonstrate that the child would be harmed by the proposed visitation.[210]

In order to preserve continuity of care and to discourage continued litigation over children, most state statutes provide that modification shall occur only if there is a significant change of circumstances adversely affecting the child's well being. It is presumed that children are best off staying with their current caretaker; the parent moving for modification generally bears a heavy

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between the parents.

[207] Some statutes specify factors for a court to consider but they do not specify the weight courts should give to specific factors. *See* Levy, *supra* note 17, § 3.1.

[208] *Id.* § 4.3.

[209] Very recently, the American Law Institute proposed a presumption that physical custody be allocated in a manner that roughly approximates the proportion of time each parent spent caring for the child when the marriage was intact. The draft identifies six values that advance children's interests: (1) parental planning and agreement about the child's custodial arrangements; (2) continuity of existing parent-child attachments; (3) meaningful contact between the child and each parent; (4) caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so; (5) security from exposure to physical and emotional harm; and (6) expeditious, predictable decision-making and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control. A secondary objective is fairness between parents. *See* ALI, *supra* note 4, § 2.08.

[210] Levy, *supra* note 17, § 12.5. Some states have abandoned the term visitation, replacing it with the concept of allocation of time, to reflect the judgment that both parents remain as custodians and caregivers. This approach is also

burden of proof.[211] When a non-parent challenges a parent for custody, all states place a heavy burden on the challenger. Generally, a person seeking to replace the parent must show that the parent is "unfit" or that parental custody would be harmful to the child; this is true even in situations when the non-parent has cared for the child.[212] It is not enough to claim that the living with the non-parent would be in the child's best interests.

B. Current Approaches to the Relevance of Sexual Orientation in Custody Decisions

At present, no state has legislation specifically addressing the relevance of a parent's sexual orientation in custody disputes, although some states' statutes direct courts not to consider parental conduct that does not affect the well-being of the child.[213] The courts in many states have established policies through case law, however. A few state courts have adopted rules that specifically disfavor gay parents both with respect to custody and visitation.[214] The Virginia Supreme Court has stated that it is always harmful for a child to live with a gay parent, based on its belief that homosexual conduct is immoral, as well as illegal in that state.[215] Other courts have created a presumption that placement with a gay parent is harmful to the child; the gay parent bears the burden of overcoming this presumption.[216] Overcoming such a presumption is extremely difficult, especially when courts

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taken by the ALI. *See* ALI, *supra* note 4, § 2.08(1)(a) & cmt. a.

[211] *Id.* § 2.08.

[212] *Id.*

[213] *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-124(2) (West 1999); ALI, *supra* note 4, § 2.12(1)(d) & cmt. e.

[214] For an extensive discussion of the statutes and case law, see Note, *Assessing the Best Interests of the Child: Missouri Declares that a Homosexual Parent Is Not Ipso Facto Unfit for Custody*, 64 MO. L. REV. 949 (1999) [hereinafter Note, *Assessing the Best Interests*].

[215] Roe v. Roe, 324 S.E.2d 691 (Va. 1985); *see also* Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999); Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998). These courts based their decisions on the fact that homosexual behavior was criminal in their state. All of these decisions preceded the 2003 U.S. Supreme Court decision in Lawrence v. Texas, declaring such laws unconstitutional. It is not clear how these courts would treat open same-sex relationships today.

[216] *See* J.P. v. P.W., 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (stating that Missouri courts presume detrimental impact to a child from a parent's homosexual conduct); Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (holding that it is not necessary in Arkansas to prove that illicit sexual conduct by custodial parent is harmful to the children because it is presumed child might be exposed to ridicule and teasing by other children); Constant A. v. Paul C.A., 496 A.2d 1, 10 (Pa. Super. Ct. 1985) (finding that "there are sufficient social, moral and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving

rest the decision on value judgments. Even in states where there is no presumption, several recent court decisions make clear that homosexuality remains a negative consideration.[217] Gay parents may be granted more restricted visitation than other parents and trial courts have modified custody based solely on the fact that the custodial parent entered into a same-sex relationship, without any showing of significant detriment to the child from the relationship.[218]

The majority of state courts have moved away from presumptions or assumptions that a parent's homosexuality is likely to negatively impact the child. Most courts now apply what is commonly called the *nexus* test: a parent's sexual orientation will be deemed relevant only if there is evidence that the parent's sexual orientation is having, or is likely to have, a negative impact on the child.[219] However, even under the nexus test court opinions in several states continue to treat open same-sex relationships as suspect and to assume that a parent's active involvement in a same-sex relationship will adversely affect the child, without requiring a showing of actual harm.[220] For example, courts have ruled that the likelihood of harm can be inferred if a gay parent openly engages in affectionate conduct with a partner, including hand-holding or kissing,[221]or from the fact that the gay parent shared a bed with his partner.[222] Courts also have imposed restrictions on visitation, such as

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detriment to the children"); *see also In re* J.B.F. v. J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (reinstating trial court's order changing custody to father based, in part, on presumed harm resulting from mother's decision to change her relationship with her lover from a discreet affair in the guise of roommates to an openly homosexual home environment and had presented it to the daughter as the social and moral equivalent of a heterosexual marriage. With evidence that the child believed "girls can marry girls," the court held that the trial court did not abuse its discretion by transferring the girl to her father's custody).

[217] *See, e.g.*, Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (court stated that when a homosexual parent openly resides with his or her partner, primary custody with the homosexual parent would rarely be in the best interests of the child); *Pulliam*, 501 S.E.2d at 905 (upholding the trial court's conclusion that homosexual father was exposing the children to unfit and improper influences that would likely create emotional difficulties despite the fact that evidence only showed that the father was gay).

[218] *See, e.g.*, *In re J.B.F. v. J.M.F.*, 730 So. 2d at 1196.

[219] *See* cases discussed in Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,* 71 IND. L.J. 623, 635 n.67 (1996); Note, *Assessing the Best Interests*, *supra* note 214.

[220] *See* discussion and cases in Shapiro, *supra* note 219, at 641-46.

[221] Tucker v. Tucker, 910 P.2d 1209, 1218 (Utah 1996); M.J.P. v. J.G.P., 640 P.2d 966, 967 (Okla. 1982); Pulliam v. Smith, 501 S.E.2d 898, 901-02, 904 (N.C. 1998).

[222] This is sometimes justified because the partners were not married, ignoring the fact that same-sex couples cannot marry.

forbidding the gay parent's partner from being present during visitation and forbidding gay parents from discussing issues related to homosexuality with their children.[223] Courts have changed custody from a mother to a father because her child attended the mother's commitment ceremony.[224] These opinions are based on perceived negative societal attitudes towards same-sex relationships, concerns that the children will be harmed because the parent will be stigmatized, or concerns that the child will be attracted to homosexuality.[225]

Indeed, some judges treat sexual orientation as more important than any other aspect of the child's home environment. For example, in 1997 Missouri decision, an appellate court transferred custody from a mother to a father because the mother was in an open same-sex relationship. In dissent, one judge noted:

> The mother was not perfect, but (she) provides the child with his own room in a well kept house, enrolls him in a pre-school, has a steady nursing job, cares about the child, and, despite sleeping with and occasionally hugging a woman, has stated under oath she would discourage her son from emulating her sexual preference. The father has limited education, an income of $6500 and lives in basically a one room cabin containing a toilet surrounded by a curtain; the child sleeps in a fold-up cot by a woodstove and plays in an area littered with Busch beer cans, collected by the father's "slow" sister, who was ordered by the trial court not to care for the boy while alone. The 75 year old paternal grandmother helps care for the little boy. To say it is in the best interests of this little boy to put him in the sole custody of the father, who was pictured leering at a girly magazine, solely on the basis of the mother's sexual preference, would be and is a mistake.[226]

It has long been recognized that making custody decisions under a general best interest standard is problematic.[227] The best interest standard provides judges with substantial leeway to base decisions

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[223] S.E.G. v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987); In re J.S. & C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974); DiStefano v. DiStefano, 401 N.Y.S.2d 636 (App. Div. 1978); In re Jane B., 380 N.Y.S.2d 848 (App. Div. 1976); Woodruff v. Woodruff, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979); Roberts v. Roberts, 489 N.E.2d 1067 (Ohio Ct. App. 1985).

[224] Hertzler v. Hertzler, 908 P.2d 946, 951 (Wyo. 1995)

[225] *But see* Hassenstab v. Hassenstab, 570 N.W.2d. 368 (Neb. Ct. App. 1997); Fox v. Fox, 904 P.2d 66, 69 (Okla. 1995); Stroman v. Williams, 353 S.E.2d 704, 706 (S.C. Ct. App. 1987).

[226] G.A. v. D.A., 745 S.W.2d 726, 729-30 (Mo. Ct. App. 1987).

[227] Mnookin, *supra* note 18, at 229.

on their own values about what is good for a child; these can be highly biased or idiosyncratic.[228]When trial judges apply personal values, appellate remedies are limited. Many trial court decisions are not appealed, since appeals are costly both economically and emotionally, time-consuming, and generally futile, since appellate courts give great deference to trial court judgments.[229] In addition, the positions taken by trial court judges may influence the assessments of evaluators who provide recommendations to trial courts. Thus, court-established policies that place inappropriate emphasis on a parent's sexual orientation can have a significant negative impact on many children.

C. Proposed Approach

1. Factors Relevant To Designing Custody Rules

Designing a child-oriented set of rules regarding custody requires consideration of several factors that differ from those relevant to ART or adoption. First, unlike adoption or ART, custody disputes almost always arise in a context in which the child has an existing relationship with both parents.[230] The nature of the relationship with each parent is likely to be the most predictive factor in assessing the arrangements that will best promote the child's future well-being.[231] It is critical to keep this relationship at the center of all determinations. In addition, as most legislatures have concluded, it generally is best for children to continue as full a relationship with both parents as is feasible, unless

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[228] *See* Levy, *supra* note 17, § 3:8. For an very interesting discussion of trial court practices, *see* Kimberly Richman, *Judging Knowledge: The Courts and Arbiter and Purveyor of Social Science Knowledge and Expertise in Gay and Lesbian Parents' Custody and Adoption Cases*, 35 STUD. L. POL. & SOC'Y 3 (2005). Richman gives many examples of judges relying on their own views about homosexuality and its likely impact on children and ignoring any and all evidence that contradicted their views. Some judges also invited organizations that oppose homosexuality based on their religious beliefs, such as the Family Research Council, to submit materials to the court. *See also* Pleasant v. Pleasant, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993) (trial judge characterized mother as a "defiant and hostile admitted lesbian" in ordering only supervised visitation.)

[229] In a 1989 survey, almost a third of the surveyed judges indicated that a parent's homosexuality alone warranted a finding of unfitness. Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Survey,* 23 SUFFOLK U. L. REV. 711, 736 (1989).

[230] This also is true in adoption cases when a foster parent seeks to adopt a child. *See* note ___ and accompanying text *supra*.

[231] The importance of continuity was first pointed out by GOLDSTEIN, ET. AL., *supra* note 57, at 31-52 and has been well-recognized since. *See* Levy, *supra* note 17, § 5.2. In addition, a child may be more strongly attached to one of the parent's due to the nature of the caretaking arrangements or the behavior of the parents.

the parents are engaged in on-going conflict that place the children in painful loyalty binds or expose them to continuing conflict.[232] Third, because of the desirability of continuity and the need to minimize conflict, modification of physical custody arrangements should be discouraged.[233] These premises are accepted by virtually all researchers and clinicians.[234]

These factors caution strongly against allowing consideration of sexual orientation in custody disputes. In a system where judges have substantial discretion, it is especially critical to adopt rules designed to minimize the possibility that trial judges will act on the basis of their personal biases. To do otherwise invites bad results for children. When judges focus on the morality or presumed harmfulness of homosexuality, they are likely to ignore the factors that are of real importance to the child's well-being. A judge's view regarding the morality of homosexuality is totally inappropriate as a basis for decision, as inappropriate as, for example, a judge's views about a parent's religion or political beliefs.[235] Unfortunately, few family court judges come to the bench with any training in child development; many evaluation specialists used by courts or the parents also have minimal qualifications. Individual biases or misconceptions about the likely impact of a parent's sexual orientation may play a large role in their decision-making.

Custody rules also should be designed to minimize the incentive for parents to enter into custody disputes. They certainly should not include elements that encourage conflict. Deep conflict may be especially prevalent in custody disputes involving a gay parent, since non-gay parents may react very negatively when their previous partners inform them about their sexual orientation. Just the fact

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[232] *See* ALI, *supra* note 4, § 2.02 & accompanying notes.

[233] *See* ALI, *supra* note 4, § 2.15; Levy, *supra* note 17, § 20.1. Motions for modification may be more common when parent's sexual orientation at issue than in other custody cases. The gay parent's sexuality may not have been revealed initially or the parent's entering into a same-sex relationship may trigger the motion, especially if moving parent has remarried.

[234] ALI, *supra* note 4, § 2.15 & cmts. a-c; Levy, *supra* note 17, §§ 5:1-5:3. Both the ALI Standards and the Levy Deskbook were the products of interdisciplinary workgroups that consisted of many of the leading family court judges, child development specialists, and family law professors in the country.

[235] This is clearly the case in the increasing number of states that recognize same-sex relationships, but also should be rejected in states where legislative and public views remain less accepting of homosexuality. *See* Levy, *supra* note 17, § 3.8.

that parents are contesting custody can be extremely traumatic for children, who often get caught in the middle of parental battles.[236] Many children experience loyalty conflicts and a sense of guilt about "siding" with one or the other parent. Parents regularly seek to influence the child's attitude towards the other parent and may compete for the child's attention or affection. Custody disputes generally are drawn out, placing the children under great strain for a substantial period of time. In addition, resolution of these disputes often requires assessments by evaluators, who are asked by courts to provide information on how the child might be affected by living with each parent. If sexual orientation is a factor, the evaluators will be asked to determine whether the parent's sexuality is having an adverse impact on the child. These assessments frequently include interviews with the children, again a potentially traumatic event for the child.[237] A meaningful assessment process often requires a number of interviews with the children. The children may be pressured by parents about what to say in these sessions. Even the most well meaning and sensitively put questions by evaluators can be threatening to children, who are being asked to judge their parents. Ideally, divorcing parents would agree on custody arrangements, including the sharing of custodial time, since avoiding conflicts generally is most beneficial to the children.

The rules established by legislatures and courts with respect to factors that may be considered by the court will influence parents behavior prior to the divorce, during the divorce, and after an arrangement has been established.[238] If courts are allowed to consider sexual orientation, and especially if a parent's sexual orientation is given substantial weight, heterosexual parents will be more likely to challenge custody in situations where they might otherwise work out an agreement. For example, if heterosexual parents believe that sexual orientation will trump other aspects of care-giving, challenges will occur even in situations where the gay parent was the primary caretaker of

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[236] For general descriptions of the custody process, see Levy, *supra* note 17, §§ 1:1-1:5; ALI, *supra* note 4, § 2.02(h). For discussions of problems associated with high conflict divorces see JANET JOHNSON & LINDA CAMPBELL, IMPASSES OF DIVORCE, at chs. 6-7 (1988); MARLA BETH ISSACS ET AL., THE DIFFICULT DIVORCE (1986).

[237] Levy, *supra* note 17, § 25.1; JOHNSON & CAMPBELL, *supra* note 237, at ch. 8.

[238] As first pointed out by Mnookin and Kornhauser, the underlying rules greatly influence parental bargaining behavior. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

the child or has an especially close relationship with the child. Similarly, heterosexual parents may try to restrict visitation or to move for modifications of custody in situations where they would not prevail absent claims based on sexual orientation. Of special concern, such rules may encourage non-gay parents to try to influence the child's view of the gay parent, creating loyalty conflicts for the child and risking great psychological harm[239] Polices allowing consideration of sexual orientation also may discourage highly-qualified gay parents from asking for custody initially.

Thus, the case for not allowing any consideration of sexual orientation is very strong. There is a countervailing consideration, however. A parent's sexual orientation may play a significant role in the life of a child caught in a contested divorce, in ways that do not affect adopted children or those born through ART. Because the child starts with a relationship with each parent, anything that significantly alters that relationship can have a large effect on the child. In virtually all situations, the divorce itself is painful for the child and requires significant adjustments. When the divorce is accompanied by, perhaps associated with, a parent's becoming openly gay children react in a variety of ways. For many, especially younger children, the parent's sexual orientation is irrelevant. But other children may reject the parent, feel betrayed, or be frightened by the change.[240] Thus, there may be a clear and strong current relationship between the parent's sexual orientation and the child's

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[239] The problem of parent's trying to influence children is common to all divorces, not just those involving gay parents. *See* Levy, *supra* note 17, §§ 6:5-6:6.

[240] *See* Rebecca Van Voorhis & Linda McClain, *Accepting a Lesbian Mother*, FAMILIES SOC'Y: J. CONTEMP. HUM. SERVS., Nov.-Dec. 1997, at 642. Van Vorhis and McClain present a model of children's reactions to their parent's shift from a heterosexual orientation to a homosexual orientation. A number of studies report on children's experiences upon learning that a parent is gay. *See, e.g.*, Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, *supra* note 78; MARTHA KIRKPATRICK, CLINICAL IMPLICATIONS OF LESBIAN MOTHER STUDIES 208 (1987); Ann O'Connell, *Voices From The Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH . STUD. SOC. WORK 281, 283 (1993); LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 198-99 (1994). Some cases report such impacts. *See, e.g.*, Knotts v. Knotts, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998) (finding no abuse of discretion in awarding custody to father when evidence showed oldest child was "diagnosed with major depression and taking prozac, when symptoms were caused at least in part by her mother's relationship with another woman"); Johnson v. Schlotman, 502 N.W.2d 831, 833-34 (N.D. 1993) (finding no clear error in trial court's decision not to change primary physical custody from father to lesbian mother when the children disliked mother's partner and began having sleeping problems and experienced depression after learning of their mother's homosexuality notwithstanding the mother's allegations that children's problems stemmed from father's bigotry with regard to homosexual) As discussed below, attributing children's behavioral problems to the parent's sexual orientation is difficult and may involve speculation by evaluators based on their own views regarding homosexuality.

best interests with respect to placement in some situations, not because the parent's sexual orientation influences their parenting but because of the child's reaction to the orientation.

2. No Presumptions

How should these competing considerations be weighted and reflected in legislative or judicial policies?

To begin with, there clearly is no empirical basis for a presumption against placing children with a gay parent or for limiting visitation by a gay parent.[241] To justify such a presumption regarding sexual orientation, it would be necessary to conclude that following divorce children growing-up in households headed by their gay parents generally will be less well-off than those growing-up in households headed by their non-gay parents. As discussed fully previously,[242] this conclusion is not justified. In the absence of any evidence that children on average do better when placed with a heterosexual parent, a presumption is not rational. Even more significantly, such a presumption is likely to lead to worse outcomes for children. Most legislatures, following the advice of child welfare specialists, have identified a number of factors that should be considered by courts because they are important to children's well-being. These include the nature of the current parent-child relationship, parental violence towards the children or spouse, and the likelihood that the parent will facilitate contact with the non-custodial parent.[243] It would make sense to adopt a presumption against placement with a gay parent only if there were good reason to believe that a parent's sexual orientation is likely to have enough negative influence on a child's development that it should outweigh these other considerations. This certainly is not the case.[244] Moreover, a presumption is likely to encourage heterosexual parents to contest custody, try to restrict visitation, or move for

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[241] *Cf.* Wardle, *Homosexual Parenting*, *supra* note 5, at 893 (contending that there should be a "rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interest of a child").

[242] *See* note ___ and accompanying text *supra*. Even Wardle concedes that children raised by gay parents generally feel loved, wanted, and are well cared for. Wardle, *Homosexual Parenting*, *supra* note 5, at 856-57.

[243] *See* Levy, *supra* note 17, §§ 3:1-3:9.

[244] It also might be argued, as Florida did in the adoption context, that there should be a presumption for the heterosexual parent because if that parent remarries, there will be a two parent, heterosexual household. But this is a different argument, requiring different reasons and evidence, than the contention that decision-makers should favor married, heterosexual households consisting of the child's biological parents.

modification of custody even when the other parent has previously played the primary caretaking role, or when the heterosexual parent would almost certainly not prevail due to limits in their caretaking abilities. A presumption or preference against placement with a gay parent should be rejected.

3. The Nexus Test

While some courts continue to treat sexual orientation, in and of itself, as a negative factor, most courts are moving in the opposite direction, towards the "nexus" test. This has the clear advantage that it directs trial court judges to focus on the alleged impact of the parent's sexual orientation on the child, and not to base decisions on their views of homosexuality. Still, there are significant problems with this test. First, as noted above, if evidence regarding a parent's sexual orientation is deemed relevant in custody disputes, some judges and evaluators will continue to make it the major factor in their determination, ignoring the nexus requirement.[245] In addition, in states with a nexus test, some judges continue to speculate about the potential negative impacts of living with a gay parent, especially the possible effects of community attitudes.[246] Since the empirical research refutes the claim that children are worse-off with gay parent, research cannot serve as the source of a court's predictions regarding the possible impact of sexual orientation. Allowing judges to speculate about potential harm is unwise.[247]

The nexus test certainly constitutes an improvement over the prior situation, which allowed trial judges to speculate about possible harm or rule solely on the basis of their value judgments. Nonetheless, even if trial courts are instructed to considering only allegations of current harm, not

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[245] *See* T.C.H. v. K.M.H. 784 S.W.2d 281, 284 (Mo. Ct. App. 1989); Pulliam v. Smith 501 S.E.2d 898, 901-02, 904 (N.C. 1998); *Cf. In re* Marriage of R.S. & S.S., 677 N.E.2d 1297, 1301-03 (Ill. App. Ct. 1996) (kissing harmless when evidence showed children well adjusted, well groomed, and doing well in school); Pleasant v. Pleasant, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (finding no evidence that seeing two consenting adults hug and kiss in a friendly manner is harmful to the child); Shapiro, *supra* note 219.

[246] *See generally* Shapiro, *supra* note 219, at 642-45. In some cases, courts have ordered gay parents not to engage in same-sex sexual relations even in the absence of the children. *Id.*

[247] This has been recognized recently by a number of appellate courts. *See, e.g., In Re Marriage R.S. & S.S.*, 667 N.E.2d 1297.

the possibility of future harm, the nexus test is undesirable. The basic problem is that it lends itself to making the parent's sexual orientation, rather than the general nature of the parent-child relationship, the focus of the proceedings. By singling out sexual orientation, and no other factor, it implies that a parent's sexual orientation is of special concern. It makes it too easy for judges to conclude that any behavior problems a child may be exhibiting result from the gay parent's sexual orientation. It may lead trial judges to ignore the normal presumptions and considerations applied in custody disputes. It can encourage heterosexual parents to disparage gay parent's sexuality with the child. The nexus test should be abandoned.

4. Proposed Approach.

Rather than a special test for disputes involving gay parents, courts should apply the same standards as are applied in all other cases.[248] With respect to initial custody, the most prevalent standard directs courts to focus on the nature of the parent-child relationship, with the goal of maximizing the involvement of both parents in the child's life, unless this is clearly contrary to the child's well-being. Where parents dispute physical custody, courts are directed to give primary custody based on the child's relationship with each parent, the past caretaking arrangements, and the ability of each parent to meet the physical and emotional needs of the child in determining who should have primary physical custody.[249]These factors also should be central in disputes involving gay parents. In general, the fact that one of the parent's is gay should be irrelevant in making these determinations. As a panel of the leading national experts on child custody recently concluded, "a parent's competence to provide a child all the food, clothing, shelter, and physical, educational, and emotional nurturance a child needs cannot possibly be measured by the parent's sexual practices or gender preferences; how the parent deals with the child is all that matters."[250]

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[248] In fact, disputes that arise because of sexual orientation resemble in many respects disputes that arise when divorced parents have strong and different religious beliefs. For a discussion of these conflicts, see ALI, *supra* note 4, at 299-307.

[249] With respect to parental ability to meet the child's needs, the main factor commonly considered by courts is evidence that a parent is mentally ill or emotionally unstable and that the parent's mental health is affecting the child.

[250] Levy, *supra* note 17, § 3:8-3:9. The American Law Institute also reached this conclusion. *See* ALI, *supra* note 4, at 2.12 & cmt. e.

Under current laws, if one parent is granted primary physical custody, courts should maximize the time the child spends with the "non-custodial" parent, consistent with the child's needs, and restrict that parent's conduct only when clearly necessary to protect the child.[251] In fact, courts generally have been very reluctant to limit or deny visitation, except for proven serious risk to the child and have hesitated to impose conditions on visitation.[252] Yet, as noted, some courts have ignored these general rules in cases involving gay parents and placed restrictions on visitation with gay parents that would not be considered in other situations, such as ordering that the gay parent not expose the child to the parent's partner.[253] In contrast, courts have been reluctant to order a parent not to expose the child to particular religious views, even when these conflict with the views of the primary custodian.[254] While it is generally important to try to protect children from parental conflict, conflict based on the fact that one of the parents is gay should not be treated differently than conflict arising out of religious or other differences.[255]

This is not to say that a gay parent's sexual behavior, rather than sexual orientation, is never relevant to decisions regarding visitation. Inappropriate sexual behavior, by gay or heterosexual parents, should be considered when the behavior impacts the child. For example, in one case a court based its decision on the fact that a gay parent allowed the children to observe the parent having sexual

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[251] Levy, *supra* note 17, § 12.2; ALI, *supra* note 4, § 2:02 & cmt. f.

[252] Levy, *supra* note 17, § 12:5.

[253] *See generally* Note, *Bottoms III: Visitation Restrictions and Sexual Orientation,* 5 WM. & MARY BILL RTS. J. 643 (1997). In some cases, courts have ordered gay parents not to engage in same-sex sexual relations even in the absence of the children.

[254] *See* ALI, *supra* note 4, § 2:12 cmt. d.

[255] Both the Interdisciplinary Colloquium (Levy) and the ALI adopt the position that courts should not restrict parental behavior during visitation that is not illegal or clearly harmful to the child. These groups would err on the side of deferring to the non-custodial parent, even if the child is uncomfortable during the visit. *See* Levy, *supra* note 17, § 12.5; ALI, *supra* note 4, § 2.12. I am not necessarily in agreement with these recommendations, which, I believe, do not take adequate account of the child's interests. It is beyond the scope of this article to develop specific criteria. For purposes here, the critical point I wish to make is that disputes arising out of differences related to sexual orientation should not be treated differently than disputes arising from other factors, such as religion, that may be dividing the parents.

relations with her partner.[256] Inappropriate exposure of children to sexual activity is a factor courts should consider, whether the sex is with a same-sex or opposite sex partner. But it is the particular behaviors, not the fact that the parent is gay, that are relevant, a fact that courts often ignore using the nexus test.

Finally, no special rules should be applied with respect to requests for modification of custody. Modification should be discouraged.[257] In cases involving gay parents, motions for modification frequently are brought when the gay parent becomes open about her or his sexual orientation or establishes a relationship with a same-sex partner. As with many custody disputes, the dispute is triggered by the anger of one parent towards the other and may have little to do with the children. But the non-custodial parent will claim that the children are experiencing problems. It is critical that trial courts be directed to focus on the child's past and current development and how the child is likely to do in each setting, not on the custodial parent's sexual orientation, since the sexual orientation will undoubtedly come up as an explanation for why a child is not doing well.

The most difficult policy question is what voice should be given to those children who react very negatively to living with a gay parent. Unquestionably, some children find it stressful to live with a gay parent due to the impact of community stigma or their difficulty in accepting the parent's sexual orientation. Some children will voice their objection to living with a gay parent. Other children may not want to make a choice, but may indicate significant concerns about the parent's homosexuality.[258]

A number of states have legislation requiring courts to consider the child's preference, at least with

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[256] Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992).

[257] I believe that the test proposed in the Uniform Marriage and Divorce Act provides the best standard: Modification should be granted only if there is substantial evidence that "the child's present environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages" to the child. UMDA § 409, 9A U.L.A. 439 (1987).

[258] For a review of the studies that report on children's reactions to learning that a parent is gay, see Kirsten Lea Doolittle, *Don't Ask, You Might Not Want To Know: Custody Preferences of Children of Gay and Lesbian Parents* 73 S. CAL. L. REV. 677 (2000).

respect to adolescents. According to a recent review,[259] four states give older children a right to choose their custodian, unless the parent is determined to be unfit; twenty-nine other states direct the courts to consider a child's preference but custodial arrangements and visitation may be ordered over a child's objection. There is substantial division among child welfare experts regarding the weight to be given children's views. Some commentators believe that children have a right to be heard and that older children should have a right to decide. Others assert that allowing children, even older children, to decide is ultimately not in the interests of children.[260]

I believe that the views of children, especially older children, are relevant and that a child should not be forced to live with a parent when this is very painful or difficult for the child.[261] However, it would be inappropriate for there to be a special rule in cases involving a gay parent. There is little distinguishing such cases from other custody disputes where a child does not want to live with a parent.[262] Although cases involving gay parents raise some unique considerations, there are many parallels to cases involving disputes between parents with substantial religious differences. Yet, courts are very reluctant to listen to the voice of children who do not like one parent's religious beliefs. Therefore, judges should consider the wishes of the child that are based on the parent's sexual orientation only if the state allows judges to consider children's wishes in general. Judges must recognize that it is the child's views, not the parent's sexual orientation, which becomes the relevant factor. Hopefully, judges will do all they can to discourage each parent from trying to turn a child against the other parent.[263] This may be of special concern in cases involving a gay parent, since, as discussed previously, one spouse

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[259] *See* Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Going, Where We Should Go*, 83 IOWA L. REV. 437, 440 (1998)

[260] Family law scholars have reached very different views on this issue. *Compare* MARY ANN MASON, THE CUSTODY WARS (1999), *and* Elizabeth S. Scott et al., *Children's Preferences in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988), *with* Levy, *supra* note 17, §§ 6.3-6.8.

[261] Beyond the issue of children's rights, older children may run away from homes they strongly dislike or behave in such a way as to force the custodial parent to accede to their wishes.

[262] *See* note ___ *supra*.

[263] For very useful suggestions on how judges can minimize the impact of conflict, see Levy, *supra* note 17, *passim*; *see also* Janet R. Johnson, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child* 38 FAM. L.Q. 757 (2005)

coming out as gay often provokes strong hostility from the other spouse.[264]

What about disputes in which the child has not expressed a preference but the heterosexual parent claims that the child is experiencing emotional problems related to the sexual orientation of the other parent? For example, in one case the court concluded that the children experienced bed wetting, difficulty sleeping, and nightmares after their father took them to gay religious services and social events and discussed in detail his homosexuality with them.[265] In such situations, there needs to be a very careful evaluation of the child's well-being and the causes of any disturbances. All of the research indicates that gay parents engage in essentially the same parenting behaviors as heterosexual parents. Taking children to gay religious services is not different than taking children to any other religious services. It would seem highly desirable that the parent discuss her or his homosexuality with the child, just as parents discuss their religious beliefs, political beliefs, and other aspects of their identity.

Thus, a court should want to know why the children were experiencing these problems. In the above cited situation, the child might have been depressed or very upset because she was rejected by friends who were biased against gay adults. Or perhaps the child had strong views about homosexuality derived from her absorption of societal attitudes. Another possibility is that the child was under intense pressure from the other parent to turn against the gay parent.

The issue of how to treat the impact of stigma is challenging in the case of younger children. Courts certainly should not be able to speculate about the potential for stigma. A number of courts, including those in conservative states, recently have rejected the possibility of stigma as a reason for denying gay parents custody.[266] Allowing consideration of the potential impact of stigma plays into

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[264] The particular problems faced in adopting sound rules in cases involving gay parents are discussed in Doolittle, *supra* note 259.

[265] Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998).

[266] See Van Driel v. Van Driel 525 N.W. 2nd 37 (S.D. 1994).

judicial, as well as community, biases.[267]

But there may be cases where stigma is occurring and impacting the child. As discussed previously, the U. S. Supreme Court has ruled that this cannot be a basis for deciding custody if the stigma is related to the race of the parents. The importance of this principle can be seen by contemplating another situation. In Pater v. Pater,[268] the Ohio Supreme Court considered a custody fight between parents of differing religions. The court accepted the assumption that the mother, a Jehovah's Witness, would prevent the child from participating in various extracurricular activities and from socializing with non-Witnesses. The father argued that this would harm the child because it might subject the child to ostracism and because it would interfere with proper socialization of the child. Suppose the evidence showed that the children felt stigmatized, were experiencing difficulties at school, and hated engaging in Witness activities.[269] Should this be a basis for granting the father custody? I believe the answer is no. It might be claimed that cases involving race or religion are different, since the Constitution forbids state discrimination on the basis of race or religion, but not on the basis of sexual orientation. But the wrongness of racial or religious prejudice does not turn on the fact that such discrimination is forbidden by the Constitution. We should not allow courts to base decisions on community prejudices as a matter of policy, regardless of whether the Constitution requires this outcome. Despite the pain some children may experience, it is in children's and society's best interest that children learn that such prejudices are wrong and should be opposed, not given state sanction. Moreover, any other policy is likely to encourage heterosexual parents[270] to contest initial custody, visitation, or move for modification and to try

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[267] Mnookin, *supra* note 18, at 257. ("[T]he judge would require information about how each parent had behaved in the past, how this behavior had affected the child, and the child's present condition. Then the judge would need to predict the future behavior and circumstances of each parent if the child were to remain with that parent and to gauge the effects of this behavior and these circumstances on the child.")

[268] *See* Pater v. Pater, 588 N.E.2d 794 (Ohio 1992).

[269] This situation could arise in many other contexts. Suppose two parents are divorcing; one parent is Christian, the other Jewish. And the couple lives in an area where there are few Jews and that many people in the community believe Jews are immoral.

[270] The same considerations apply, even more strongly, to custody challenges by non-parents. The law in all states places a heavy burden on non-parties seeking custody. Yet, some courts have seemed to require less in cases involving a gay parent. *See* Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995). In order to discourage disputes, the

to influence the child's view of the gay parent. It also opens the door for judicial manipulation of criteria based on their views of homosexuality.

A rule that leaves some children in parental homes in which they are unhappy obviously is not desirable. On balance, however, a rule barring consideration of sexual orientation, other than in cases involving adolescents who express a preference to be with the heterosexual parent, will benefit most children.[271]

In the end, legislatures and courts need to focus on the fact that in virtually all situations children respond to the quality of love and parenting they receive from their parents, not to their parents' sexual orientation. Parents should not have to hide their identity in order to get or keep custody or to spend time with a child following divorce.

VI. ACCESS TO REPRODUCTIVE TECHNOLOGIES

A. Current Policies

Until recently, most gay parents became parents as part of a heterosexual relationship, generally a marital relationship that ended in divorce. A smaller number entered a sexual relationship solely to have a child. In recent years, this situation has begun to change. At present, many gay individuals and couples are having children through various types of assisted reproductive technologies,

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standard should be one of substantial detriment. *See* ALI § 2.18 & cmt. b. Similarly, with respect to visitation, in most states, visitation usually can be denied or restricted only if it will be detrimental to or will endanger the child. *See, e.g.*, MO. REV. STAT. § 452.400 (Supp. 1998); 750 ILL. COMP. STAT. ANN. 50/607(c) (West Supp. 1999) ("[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health."); KAN. STAT. ANN. § 60-1616(a) (1997 & Supp. 1998) (entitling a parent not granted custody to reasonable visitation rights unless the court finds that visitation would seriously endanger the child's physical, mental, moral, or emotional health); *In re* Marriage of McKay, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996) (stating that Minnesota utilizes an "endangerment standard" in determining visitation restrictions).

[271] This is position adopted by ALI. *See* ALI, *supra* note 4, § 2.12(d) & cmt. e. The comments, however, provide no discussion of the rational for adopting this position. As a practical matter, if a child is evidencing significant behavioral problems, some type of evaluation generally will be appropriate, in order to determine whether the custodial arrangement is harmful to the child. The fact that the child is living with a gay parent will undoubtedly become known. Evaluators and judges can be instructed not to focus on sexual orientation, but it seems highly likely that at least some of them will assume a relationship between the child's situation and the parent's sexual orientation regardless of the legal rules.

especially donor insemination (DI), in vitro fertilization (IVF), or surrogacy.[272]

As noted previously,[273] U.S. legislatures have done little to regulate ART. However, while no legislation prevents lesbians or gay men from using ART, some aspects of existing law and practice make it more difficult for gay individuals or couples to create families in this manner.[274] The absence of laws requiring physicians to provide insemination on a non-discriminatory basis means that some lesbians have trouble accessing services; this can be a major barrier in the five states that criminalize donor insemination unless it is performed by a licensed physician. Limits on the right of the non-biological mother or father to adopt a child born through donor insemination or surrogacy also are a major barrier to the full use of ART by gay couples In many states, the consenting husband of a woman who gives birth via ART is deemed the father of the child; the sperm donor is specifically denied any legal rights. This protection is available only to married couples, however, so the non-biological mother in a same-sex couple does not have parental rights and, in many states, the sperm donor retains the right to claim parentage. Finally, in some states, surrogacy contracts are enforceable only if the intended parents are a married couple, which means that gay men cannot enter into an enforceable surrogacy contract.

Conception through ART raises difficult issues wholly unrelated to the sexual orientation of the potential parent. These include legal and ethical questions about the sale or transfer of human genetic material or embryos, the rights of children to know and have a relationship with their genetic parents, and the rights of donors of genetic material (or of their bodies in the case of surrogacy) to a

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[272] DI is far more common than IVF or surrogacy. While both lesbians and gay men can have children using donor insemination, the process is far easier for women, since they only need to have access to donated sperm, while a male must find a woman willing to carry the child. It appears that most lesbians who conceive through DI utilize the services of a sperm bank and physician assistance in order to ensure donor screening and anonymity, although some women achieve insemination without medical help or sperm banks, using sperm donated by a person known to the woman or found through the Internet. *See* Jennifer Egan, *Wanted: A Few Good Sperm,* N.Y. TIMES, Mar. 19, 2006, §6 (magazine), at 44. Some of these women are single; others are in a committed relationship where both partners wish to be considered the child's parent. Most gay males use surrogacy. Virtually all are in domestic partnerships. Recently, some potential surrogates have indicated a preference for entering into surrogate arrangements involving gay male couples. *See* Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005 at A1.

[273] *See* notes ___-___ and accompanying text *supra/infra*.

relationship with children born through the use of these material.[275] These are serious concerns. There may be reasons to regulate some aspects ART based on one or more of them. However, these factors are the same regardless of the sexual orientation of the applicant; therefore I do not address them here. With respect to sexual orientation, policy-makers face a single basic question: should gay individuals or couples be treated differently from heterosexual individuals or couples regarding access to ART?

B. Proposed Approach

Some commentators suggest that the U.S. should restrict ART to married couples, which would exclude gay couples in virtually all states.[276] Others would limit access to heterosexuals, even if gay couples are able to marry.[277] These approaches should be rejected. As a society, we now accept that there are many reasons that government should not attempt to regulate who may have children through coital conception, aside from the facts that it would be unconstitutional and impractical.[278] These reasons apply equally to the regulation of conception through ART. It is a mistake to think of ART in allocation or placement terms. It is better thought of as an aspect of reproductive freedom.

The central premise of those who would limit access to ART to heterosexual married couples is the optimality rationale, a position which, as previously discussed, does not make sense from a children's perspective.[279] I therefore examine here whether there are other societal interests that would justify policies limiting access to married, heterosexual couples. It is argued that limiting access to married couples would reduce the number of potential legal or ethical problems associated with ART.[280] In addition, a few commentators, who are opposed to ART in principle because they

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[274] For a description of the various legal impediments, see DeLair, *supra* note 12, at 162-73.

[275] *See, e.g.*, Alvaré, *supra* note 15, at 11-13; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 83 (2000).

[276] *See* Alvaré, *supra* note 15, at 62; MINOT, *supra* note 14, at 130.

[277] *See* Blankenhorn, *supra* note 15; DAVID BLANKENHORN, FATHERLESS AMERICA 233 (1995).

[278] *See* Michael Sandmire & Michael Wald, *Licensing Parents -- A Response*, 24 FAM. L.Q. 53 (1990).

[279] *See* notes ___-___ and accompanying text *supra*.

[280] Alvaré, *supra* note 15, at 47-51, 62.

believe that birth through artificial means is generally morally problematic, would support ART only for married, infertile couples, on the premise that these couples have the greatest "right" to have children. Allowing married couples to conceive a child fulfills these commentators' view of the natural meaning of marriage, the union of a man and a woman to produce a child.[281]

These contentions are not persuasive. In addition to the benefits to children of being born, the benefits to the adults and to society as a whole strongly support allowing gay couples and individuals to conceive a child via ART.[282] There are no costs to society if these children are born; they will contribute to society, not threaten the public welfare. Providing, or at least not barring, access to ART to all adults that are reasonably capable of raising children, benefits society. Parenthood increases the adult's stake in social institutions and helps insure the future of a society's existence. The case against restricting access is even more compelling when the interests of the potential parents are considered. Parenthood brings great pleasure to most parents. As long as the children will live in households that are perfectly adequate, it seems highly likely that facilitating this desire furthers the overall well-being in society and produces the greatest amount of happiness. Providing gay adults with access also furthers our society's goal of equal treatment. Our society would never consider restricting heterosexual couples from having access to ART on the grounds that their home would be sub-optimal. The equal treatment principle is violated when policy-makers chose to restrict the opportunities of gay adults while granting those opportunities to heterosexual families with characteristics that are associated with poorer outcomes for children. In fact, most children are brought into the world into "sub-optimal" homes. Children born to gay couples through ART are likely to have better opportunities and developmental outcomes, on average, than many, if not most, children born to heterosexual adults without assisted reproduction.[283]

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[281] Alvaré, *supra* note 30, at 156-63.

[282] For these reasons, I would not limit ART to married couples, regardless of the couple's sexuality. I believe that children live perfectly good lives with single parents and that this should be the standard for access to ART.

[283] In fact, because ART is expensive, the parent's are likely to be of reasonably high income. These children will have the same access as children of parents of similar economic status to high quality schools, neighborhoods, and opportunities for intellectual and cultural development, as well as the advantages of highly committed parents.

Moreover regulation of access is difficult and costly. Insemination can be done at home with sperm from a known donor. Many women now acquire sperm over the Internet, from known and unknown donors.[284] Those who can afford it will travel to states or countries that grant access, creating more inequality of opportunity. There is no good reason to push people to use means that are more complicated or less desirable from their perspective. Yet, given the enormous desire to have a child, this is certainly likely to occur if access to sperm banks is restricted.

Some commentators argue that gay adults should be denied access to ART because recognition of same-sex couples through facilitating parenthood would send a message that the "traditional" family is not that important, thereby contributing to the perceived decline of the traditional family.[285] As I have written elsewhere, it would benefit children and society, as well as gay couples, if states provided for same-sex couple marriage.[286] Regardless, it seems highly dubious as an empirical matter that recognition of same-sex relationships will cause heterosexual couples to devalue marriage.[287] Moreover, it is wrong to penalize potential children and gay adults because some heterosexuals will act in ways that are perceived of by some as undesirable.

In a society that values procreative liberty and diversity, there is no moral case for preventing gay individuals or couples from having children through ART in the absence of compelling evidence that these children are likely to have inadequate lives. Perhaps if sperm and eggs were a scarce resource, a case could be made for allocating them to certain types of families preferred by a society. In the absence of scarcity, there is no reason to adopt such limitations. Rather than trying to restrict ART to married couples, legislatures should be removing barriers facing lesbians and gay men in accessing and fully utilizing ART. This would include providing for second-parent adoption, combating provider discrimination, and applying the same rules to same-sex couple unions as apply to married couples with respect to the right of non-biological mother, or father, to become the legal

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[284] Lesbians also could choose to have a child through intercourse.

[285] Blanckenhorn *supra* note 15.

[286] Wald *supra* note 140.

[287] RAUCH, *supra* note 61, at 166-69.

parent of the a child born via ART.[288]

IX. CONCLUSION

I believe that a truly child-focused look at the issues examined in this article leads to the clear conclusion that an adult's sexual orientation generally is irrelevant with respect to adoption, foster care, and child custody decisions and policies regarding access to ART. Children need homes where they are wanted and receive love and steady care, qualities that are not related to adult's sexual orientation. Consideration of sexual orientation in placement decisions is likely to be harmful to children, as well as to gay adults and society in general. All of the evidence supports this conclusion.

It is too often the case with respect to family law policies that the interests of children get lost in debates that really are about adult's visions of the good society. While the majority of Americans now believe that as individuals lesbians and gay men should not be discriminated against based on their sexual orientation, a large portion of the public remain suspicious of lesbians and gay men as parents.[289] This is not surprising given that homosexuality has begun to be more commonly accepted as "normal" only very recently. Many vocal opponents of gay parents believe that homosexuality is immoral. But other people, less hostile to homosexuality in general, still see parenthood as different. This may reflect cultural norms that lead most heterosexuals to think of gay relationships as being fundamentally different, and less valuable, than heterosexual relationships.

I have tried to present information and analyses that will help policy-makers make an objective assessment of the data and its relevance to family policy. But ultimately, policy rest on values, not data. Social science can inform, but not resolve, policy debates. Policy-makers are more likely to look at public attitudes than social science. As public attitudes towards lesbians and gay men have

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[288] *See* Robertson, *supra* note 2.

[289] *See* notes ___-___ *supra*.

become more positive, so have the policies of courts and legislatures.[290] Hopefully, this trend will continue. Both children and gay adults will be the beneficiaries.

[290] *See* Nathanial Persily et al., *Gay Marriage, Public Opinion, and the Courts* (Univ. of Pa. Law Sch., Public Law Working Paper No. 06-17).