

Marriage as Blindspot: What Children with LGBT Parents Need Now  
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Lesbian and gay parents figured prominently in the most visible gay rights issue of our time—access to marriage. Although only about 16-18% of same-sex couples are raising children, of the plaintiff couples in the cases decided by the Supreme Court in 2015, about 68% were parents. Opponents argued, largely without recent success, that gay and lesbian couples should not be allowed to marry because their children don't turn out as well as children of married biological parents, and because same-sex marriage hurts the prospects of all children. Supporters argued that same-sex couples had to be allowed to marry for the benefits that marriage would confer on their children. The disproportionate number of parent plaintiffs in the litigation showed that supporters expected this argument to be quite persuasive.

With marriage equality now a legal mandate, advocates for LGBT families will need to turn their attention to supporting the needs of all children with lesbian, gay, bisexual and transgender parents. Because arguments about children became intertwined with marriage, this will sometimes prove difficult. In this paper, I explain how we arrived at this moment and make suggestions for moving forward.

Support for a wide diversity of family forms and relationships was a tenet of the LGBT rights movement for four decades. This included advocacy for unmarried same-sex couples adopting children together; for access to assisted reproductive technology regardless of marital status or sexual orientation; and for the ability of lesbian and gay parents who come out after a heterosexual marriage ends to continue raising their children, often with new, same-sex partners.

Inherent in such advocacy was opposition to the claim that there was anything intrinsically superior about marriage as a family form for adult relationships or for raising children. But during this same period, conservatives began blaming the decline of life-long heterosexual marriage, and especially the increase in nonmarital childrearing, for a vast array of social problems, including poverty, violence, homelessness, illiteracy, and crime. They posited marriage as the solution to those problems. They targeted women raising children outside of marriage, a group that is disproportionately women of color, for the greatest disapproval.

Initially, opposition to same-sex marriage was part of the conservative canon. But over time, some conservatives revised their position to encompass support for same-sex marriage precisely because it was *marriage*. To capture or solidify this support, LGBT advocates made decisions both about the rhetoric they would employ and the legal positions they would assert. Often, explicitly or implicitly, both the rhetoric and the legal positions acquiesced in a preference for childrearing by married parents—as long as same-sex couples could marry.

In the first part of this paper, I argue that the focus on marriage as a way to improve the lives of children raised by LGBT parents disrespected other family structures and especially disregarded the circumstances of LGBT parents of color and those with limited economic resources. Attributing greater social welfare to married families is tantamount to blaming Black and Latina women and their unmarried male partners for social problems. This serves as a wedge

within LGBT activism itself, whereby LGBT parents of color, who overwhelmingly live in neighborhoods with those unmarried heterosexual parents of color, are bound to feel alienated from rhetorical arguments antithetical to the communities in which they are embedded. In addition, LGBT people of color are substantially more likely to be raising children than their White counterparts, and they are significantly more likely to be living in or close to poverty. The wellbeing of children within those families is therefore indelibly bound up with issues of racial and economic justice, which marriage equality will not bring.

Most children living with same-sex couples were born in prior heterosexual relationships, and LGBT parents of color are disproportionately raising those children. The parents among the marriage equality plaintiffs, however, were disproportionately White and well-off, and disproportionately raising either adopted children or children conceived through donor insemination. The narratives about children told in the context of same-sex marriage advocacy, therefore, overlooked the family circumstances of the majority, and the most disadvantaged, children being raised by gay and lesbian parents. Future advocacy should put the needs of these children at the forefront.

My second set of criticisms center on the conflation of the legal definition of parentage with marriage. The law must accurately identify a child's parents, as numerous critical consequences flow from parentage. Some involve economic well-being, including the obligation of a parent to support a child; the ability of the child to inherit; the availability to the child of state support through child social security payments if a parent becomes disabled or dies; and the ability to recover in tort for a parent's wrongful death. Others involve the parent's right to care for a child; control the child's upbringing; and make decisions on behalf of the child. For the past three decades, advocates for gay and lesbian parents and their children have been developing legal theories for accurately defining who is a parent in such families.

Conflation of marriage and parentage constituted a detour from those three decades of progress in two distinct ways. Arguments for marriage equality, and court opinions overturning marriage bans, emphasized the importance to the children of having two parents. But the benefits to children of having two parents flow from legal recognition of the two adults as parents. For more than 40 years, government policy and constitutional law have demanded that the legal benefits of parentage for children not depend upon their parents' marriage. Until recently the LGBT movement has fervently advocated for the ability to adopt irrespective of marriage and for parentage rules grounded in the parent-child relationship, not in the relationship between the two adults. Marriage equality advocacy changed course by demonstrating a willingness to accept distinctions based on marriage as long as same-sex couples can marry.

At the same time that advocates for lesbian and gay families became more accepting of marriage as necessary to establish parentage, they portrayed marriage as sufficient to establish parentage. In doing so, they made a sweeping and unqualified promise they will be unable to keep. The argument that same-sex couples should be allowed to marry so that their children will have two parents misled those who heard such arguments, including the couples themselves. This rhetoric presupposed that the child born to a married same-sex couple would be considered the child of both spouses. While that will be true in some states under some circumstances, it will often, perhaps usually, not be true.

Marriage in every state creates the presumption that the birth mother's husband is the child's other parent, but the applicability of the presumption to a female spouse will turn on the resolution of numerous questions. These include whether the presumption ever attaches to a spouse who cannot be the child's biological parent; whether the applicability of the presumption varies based on method of conception or the presence of an identified man whose sperm contributed to the child's conception; whether, even if the presumption attaches, it can be rebutted by factors that will be routinely present when the spouses are both women; and whether there are statutes governing assisted conception and what they say. Furthermore, because the marital presumption attaches to the spouse of a woman who gives birth, it has no bearing on parentage for male same-sex couples. It also has no bearing for the large number of stepfamilies in which same-sex couples are raising a child born in a previous heterosexual context.

The focus on marriage led many gay rights advocates to take their eyes off twin goals that are critical to the wellbeing of children being raised by lesbians and gay men: ensuring that no child faces either deprivation or discrimination due to the form of his or her family, and accurately determining who counts as legal parents. Now that marriage equality is the law, those are the goals to which advocates for lesbian and gay families should return.