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,[1] of the plaintiff couples in the cases decided by the Supreme Court in 2015, about 68% were parents.[2] 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 chapter, 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.[3]

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*.[4] 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 chapter, 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.

Prologue 1996: Parenting by Same-Sex Couples before Marriage was on the Table

The early years of planned lesbian and gay families generated a strategy to achieve recognition of both of a child's parents as a matter entirely distinct from recognition of the parents' relationship to each other. Advocates urged courts to allow second-parent adoptions, an adoption analogous to a step-parent adoption but without the requirement that the couple be married. When one partner was the biological or adoptive parent of a child, second-parent adoption allowed the other partner to adopt the child without terminating the first parent's parental rights. Similarly, advocates urged courts to allow an unmarried couple to adopt a child jointly.

To achieve this result, advocates asked the state courts to interpret adoption statutes using the principle of the best interests of the children. A court did not need to address the parents' relationship to each other at all; it was determining only whether the child would have one legal parent or two. The Vermont Supreme Court expressed it as follows:

> We are not called upon to approve or disapprove of the relationships between the appellants. Whether we do or not, the fact remains that Deborah has acted as a

> parent of BLVB and ELVB from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore with the public policy of this state…..[5]

Before the first full trial on marriage equality in 1996, trial courts in numerous states, and appellate courts in five states and the District of Columbia, approved such adoptions. Today they are available in most, but not all, states.[6]

Parenting by Same-Sex Couples once Marriage Equality Litigation Began

The relationship between childrearing and same-sex marriage became firmly linked beginning with the 1996 trial mandated by *Baehr v Lewin,* the Hawaii Supreme Court ruling requiring the state to provide a compelling reason for its same-sex marriage ban.[7] From that moment through the present, opponents of same-sex marriage have always justified their position by asserting the well-being of children, but the articulation of why the well-being of children depended upon keeping gay and lesbian couples from marriage evolved over time. Marriage equality supporters met head on each distinctly different child welfare-based allegation. It is in this point/counterpoint over the wellbeing of children that the advocacy linking marriage and parentage solidified.

Opponents of same-sex marriage have always argued that the optimal setting for raising children is that provided by married biological parents. Over time, however, they shifted their articulation of why that claim required same-sex couples to be excluded from marriage. In the Hawaii litigation, opponents asserted that children faced increased likelihood of harmful consequences if raised by gay or lesbian parents. At the forefront of those arguments stood the children of same-sex couples, whose numbers would presumably increase if those couples could

marry. By this reasoning, the marriage exclusion was justified to limit the number of children who would suffer such bad outcomes.

It was simple enough for marriage equality supporters to respond to arguments that focused on the relative harm to children of being raised by gay or lesbian parents; no such harm existed, nor has any emerged from three decades of research. Every major mental health and child welfare organization has articulated unequivocal support for childrearing by same-sex couples.[8] Dr. Michael Lamb, a world renowned child development expert, offered the following summary of the research:

> Children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by different-sex parents, including "biological" parents. Numerous studies of youths raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by different-sex parents, including "biological" parents. Furthermore, the research makes clear that the same factors, as elaborated below, affect the adjustment of youths, whatever the sexual orientation of their parents.
>
> It is beyond scientific dispute that the factors that account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and socio-emotional resources. These factors affect adjustment in both traditional and nontraditional families.

> The parents' sex or sexual orientation does not affect the capacity to be good parents or their children's healthy development. There also is no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well-being.[9]

Notice that the above articulation disassociated child outcome entirely from family form. It contained no claim that marriage is a better family structure within which to raise children or that the children raised by gay men and lesbians were harmed by their parents' exclusion from marriage. To the contrary, the children were not harmed by anything in their upbringing, presumably including the absence of marriage.

Opponents of marriage equality next asserted that the marriage exclusion was justified because the children of same-sex couples are planned and wanted, and the purpose of marriage is to provide structure for the children who result from "accidental procreation." By this way of thinking, the children of same-sex couples did not need their parents to be married, and the state could limit marriage to those relationships that needed the incentive of marriage to promote stability.[10] Same-sex marriage supporters responded to this (patently ludicrous) reasoning by noting that making marriage available to an additional group of people would not in any way decrease the incentive for heterosexuals to marry.

Defenders of the marriage exclusion then further refined their claim on behalf of the children of heterosexuals by lauding marriage, and by decrying no-fault divorce and increased rates of nonmarital birth and cohabitation for making marriage more optional and less tied to the bearing and rearing of children. Marriage equality opponents argued that same-sex marriage would be one more step in changing marriage by disassociating it from procreation.

They reasoned as follows: Because the sexual relationship of a same-sex couple does not result in procreation, same-sex marriage makes a statement that marriage is about the well-being of adults rather than the well-being of the children who come from heterosexual sexual intercourse. In addition, when same-sex married couples do raise children, they send the message that children do not need both a mother and a father. Taken together, they argued, this revised picture of marriage, unmoored from a structure whose alleged purpose is to provide stable, two-parent, dual-gendered homes for the natural consequences of heterosexuality, would contribute to the decline in marriage by heterosexuals. More children of heterosexuals would thereby suffer the effects of being raised by never-married or divorced mothers, without the allegedly indispensable presence of fathers.

Marriage equality supporters responded to this reasoning by combining aspects of their responses to the previous two rationales. The well-accepted consensus research demonstrated that the presence of a male and a female parental role model was not necessary for child well-being. And given that the decline in marriage was admittedly the work of heterosexuals, an argument for continuing to exclude same-sex couples in order to stem that decline was as illogical as the "accidental procreation" rationale. Furthermore, the availability of marriage to infertile and elderly couples, as well as Supreme Court reasoning on the benefits of marriage even when consummation is impossible because one spouse is incarcerated,[11] provided excellent rebuttal to the claim that procreation was the sole purpose of marriage.

But marriage equality advocates did not counter the part of opponents' argument that posited marriage as the preferred family structure for children. Instead they praised marriage as "majestic," "unique," and "hallowed."[12] They articulated, sometimes quoting earlier court rulings, that "the structure of society itself largely depends upon the institution of marriage,"[13]

and that "excluding same-sex couples from civil marriage . . . prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which the children will be reared, educated, and socialized."[14]

Marriage is Better: The 2015 Version

By the time marriage equality reached the US Supreme Court, supporters were arguing that children of same-sex couples were harmed because their parents could not marry. Sometimes they listed the injury to children in terms of legal consequences, such as economic support and the right to make decisions. Later in this chapter, I explain that these legal consequences flow from a legally recognized parent-child relationship for which marriage is neither necessary nor, in many instances, sufficient.

Advocates also argued that marriage would provide economic benefit to the household and for that reason children were harmed by its absence, but the economic benefit argument is not always true. Two individuals earning close to the same annual income will pay more in income taxes if they marry than if they remain unmarried. This "marriage penalty" might or might not be offset by economic benefits, such as access to the other spouse's low cost, employer-provided health insurance. For poor couples, marriage may reduce eligibility for means-tested public assistance with no corresponding economic benefit. The couples most likely to see financial benefits from marriage are those who have a single earner and a stay-at-home spouse.[15]

Although legal and economic consequences vary by individual family circumstance, marriage equality advocates could claim that all the children of same-sex couples suffered a dignitary harm because their parents were unable to marry. The least problematic of the harm-to-children arguments was the one that focused on exclusion from marriage as legally sanctioned

discrimination that sent a message of the inferiority of same-sex relationships. Banning same-sex couples from marriage *is* a statement that heterosexual relationships, and therefore heterosexuals, are morally and socially superior. Like a vote against banning sexual orientation discrimination in the workplace, it sends the message that the government approves of discrimination.

It is a different matter to assert the superiority of marriage as a family form in which to raise children and to claim harm to children of same-sex couples because they are required, against the wishes of their parents, to live in unmarried family units. When marriage equality advocate Mary Bonauto criticized the ban on same-sex marriage because it "means that you are increasing the number of children who are raised outside of marriage,"[16] she was going after support from those who judge it bad to raise children outside marriage.

In his majority opinion in *United States v. Windsor,* Justice Anthony Kennedy wrote that the section of the Defense of Marriage Act (DOMA) denying federal recognition of valid same-sex marriages made it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[17] "Concord with other families"—all other families—sounds like a desirable condition for building schools and neighborhoods where people feel that they share a common interest in the well-being of their community. That is not what Kennedy is referring to in this statement. Rather it is "concord" with other families in which married parents are raising children.

In the same paragraph, Justice Kennedy said denial of marriage recognition "humiliates tens of thousands of children now being raised by same-sex couples."[18] *Humiliates* is a powerful verb. In *Windsor* it referred to children whose parents were married under state law but considered unmarried for federal law purposes. After *Windsor,* lower federal court judges used

these parts of Kennedy's reasoning to strike down state same-sex marriage bans themselves, often further elaborating upon the stigmatizing effect of having unmarried parents.[19]

Briefs filed by advocates in the cases that made up *Obergefell v. Hodges*, the 2015 Supreme Court cases seeking marriage equality, consistently argued that "marriage brings 'social legitimization' and stability to families;"[20] that there is harm to children from their parents' inability to provide the "stable family structure" of marriage;[21] and that marriage is necessary to spare children "the stigma of being in a family without the social recognition that exists through marriage."[22]

Notice the odd inconsistency of arguing that thirty years of research on children shows no harm from being raised by gay or lesbian parents—who were not married—while also arguing those same children *are* harmed by having unmarried parents. Researchers and advocates necessarily devoted much time and energy to proving and arguing that children are not disadvantaged by having gay or lesbian parents. It was a change of direction to construct the argument that the children *are* harmed because their parents cannot marry. That advocates who had previously championed family diversity were willing to do this is a testament to the rhetorical power of embracing the marital norm.

Yet a minority of children—46%—live with their married heterosexual parents in a first marriage.[23] Another 9% live with their married heterosexual parents but one or both of the parents have been married before. A full 45% of all children do not live with their married parents: 34% live with a parent who is single or cohabiting with an unmarried partner; 6% live with a parent and a stepparent; 5% live with someone other than a parent, such as a grandparent. This includes the majority of children with a lesbian or gay parent, as most of those children were born in prior heterosexual relationships and will not be living with their married parents

even if their gay or lesbian custodial parent subsequently marries a same-sex partner. The majority of African-American children, 55%, live with a single parent, as do 31% of Hispanic children, compared with about 20% of White children and 13% of Asian-American children.[24]

The higher incidence of nonmarital childrearing by African-American and Latina women is not just a statistical fact. Conservatives view it as a largely negative fact, causally responsible for numerous social problems. Rather than address racism, education deficits, lack of well-paying jobs, over criminalization, income inequality and other structural problems, they lay blame at the feet of unmarried mothers, especially women of color, as well as their unmarried male partners, for what they call a lack of "personal responsibility." The primary solution they propose is marriage.

Law professor Melissa Murray has analyzed the "racial undertones" of marriage equality advocacy in the name of ending the "illegitimacy" of the children of same-sex couples.[25] The paradigmatic, and stigmatized, single mother is young, poor, African-American, and receiving public assistance. The public face of LGBT rights is affluent, White, and often male. Marriage equality advocacy on behalf of the children of White, economically comfortable, same-sex couples creates a distance between marriage-seeking gay and lesbian parents and those *others,* who are permitted to marry but choose a different family form.

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

indicated "the need for anti-poverty organizations and LGBT organizations to include considerations of poor LGBT people in their work."[26]

In this chapter, I identify marriage equality advocacy in the name of children of same-sex couples as a choice that obscured the real picture of families in which same-sex couples are raising children. The parent-plaintiff couples in the marriage equality litigation were not representative of the vast majority of same-sex couples raising children. Test case litigation usually relies on plaintiffs chosen for characteristics that will make them appealing, and for stories that will garner support for the remedy they seek. The marriage equality litigation was no different, and by all measures the plaintiffs accomplished those goals. But looking ahead at what policies are necessary for the well-being of children being raised by same-sex couples must begin with correcting the inaccurate picture those parent-plaintiffs presented.

Eleven of the sixteen families who made up the marriage equality plaintiffs in the US Supreme Court—about 68%—were parents. As I indicated at the beginning of this chapter, the vast majority of same-sex couples are not raising children. Married same-sex couples are more likely to be raising children than are unmarried couples, 27% compared with 15%, but even the 27% figure is significantly below the percentage of plaintiffs who became the public face of the fight for marriage equality.[27] Advocates expected the children these parents were raising to paint a compelling picture of why the marriage bans should be struck down. They selected families that were demographically unrepresentative, however, thereby obscuring the importance of racial and economic justice for the well-being of the children being raised by same-sex couples.

The parent-plaintiffs were not representative of the racial demographics of same-sex couples raising children. Of the 22 individuals in the 11 parent-plaintiff couples, 5 (23%) were people of color—one African-American couple and three biracial couples, two White and

Latina/o and one White and Filipino. Yet nationally, 34% of individuals in same-sex couples raising children are people of color.[28] 41% of African-American individuals in same-sex couples are raising children. The figure for Latinos/as is 30%. Only 16% of White individuals in same-sex couples are raising children.[29] Among same-sex couples raising children, the African-American childrearing rate is 2.4 times that of Whites. Among different-sex couples, African-Americans are only 1.3 times more likely than Whites to be raising children.[30] African-Americans comprise 14% of same-sex couples raising children, a figure that greatly exceeds the 8% of different-sex couples raising children who are African-American. In other words, African-American same-sex couples are disproportionately raising children when compared with both White same-sex couples and African-American different-sex couples.

Furthermore, African-American parents in same-sex couples live not in enclaves of gay-friendly communities with statistically higher numbers of lesbian and gay individuals and couples, but in the parts of the country, and the urban neighborhoods, where there are higher proportions of African-Americans.[31] Their neighbors and relatives are among the targets of the hostility directed at unmarried parents. The fight to raise children within marriage neither comes from this group nor speaks to its needs.

Children living with same-sex couples are much more likely to be poor (24%) than their counterparts living with different-sex couples (14%), and race plays a substantial role in identifying who those poor children are. 12% of the children of White same-sex couples are poor. For African-American children, the statistics are dire; data from numerous sources between 2006 and 2012 reveal a poverty rate of 52% for those raised by male same-sex couples and 38% for those raised by female same-sex couples.[32] These are largely the biological children of one member of the couple.

In fact, most same-sex couples with children are raising children born to one partner while in an earlier different-sex marriage or relationship, but only one of the eleven plaintiff couples fit this profile. Such children usually have two parents prior to the same-sex couple relationship, putting them in the large category of children who do not live with their married parents. If the same-sex couple marries, the child will still not be living with his or her married parents; the child, like millions of other children, will be living with a parent and a step-parent.

In addition to being disproportionately White, the parent-plaintiffs were disproportionately male and disproportionately adoptive parents. Of the eleven couples with children, six (55%) were female and five (45%) were male. Yet 77% of the same-sex couples raising children are female. Even among same-sex married couples raising children, 71% are female couples.[33] The five male couples all adopted their children, as did one of the female couples. The remaining four female couples used donor insemination to conceive.

Although same-sex couples are more likely to adopt children than different-sex couples, only 4% of all same-sex couples, and 8% of married same-sex couples, have an adopted or foster child. Even among same-sex couples raising children, only 22% have an adopted or foster child; 28% of married same-sex couples with children have an adopted or foster child.[34] Roughly double that percentage of the parent-plaintiffs in the marriage equality litigation, 55%, was raising adopted children.

Same-sex couples raising adopted children differ substantially from those raising biological children. A large overrepresentation of adoptive parents therefore creates a dramatically distorted picture. White same-sex couples are almost twice as likely (18% compared with 9.6%) as couples with at least one person of color to be raising an adopted child.[35] Individuals in same-sex couples with adopted children are twice as likely as those raising

biological or stepchildren (62% to 31%) to have college degrees or higher. This contrasts with the disparity among different-sex couples raising adopted children, which is relatively small. Same-sex couples with adopted children have 200% the median household income of same-sex couples with biological or stepchildren ($124,440 vs. $62,000). Again, this is very different from different-sex couples, whose households with adopted children have median incomes only slightly above that of households with biological or stepchildren. According to 2013 Census data, the median household income of married, male, same-sex couples with adopted children dwarfs that of all other same-sex couple households.[36]

Data from the 2013 American Community Survey permits for the first time a comparison between married and unmarried same-sex couples.[37] Family researchers have long noted that marriage is more common, and more lasting, among those who are more affluent and who wait to marry and have children until they complete higher education. The Census data suggests this may turn out to be also true for same-sex marriages. In the 2013 data, one-third of all the children living with same-sex couples, approximately 71,000, were being raised by married same-sex couples. Their poverty rate was low, 9%, compared with the 32% poverty rate for children of unmarried same-sex couples. Married same-sex couples with children also had higher median household income and a higher percentage of home ownership than their unmarried counterparts. At this rate, marriage might exacerbate inequality within the population of children being raised by same-sex couples.

In a 2013 presentation, Williams Institute demographer Gary Gates described “two paths to parenting,” one for disproportionately White same-sex couples raising adopted children in high income households in gay supportive regions of the country; and the other for disproportionately racial minority same-sex couples raising biological children in low income

households in regions of the country more hostile to LGBT families. Marriage equality advocacy choose to forefront families from the former group.

Marriage equality mandated by the Supreme Court will not make the most hostile regions of the country more welcoming, nor will it remedy racism or economic inequality. It is the children in the families of the latter group, therefore, whose needs LGBT policy and legal advocates should forefront going forward.

The Misguided Focus on Marriage Equality as the way to Recognize a Child's Two Parents

In the first part of this chapter, I addressed the urgency of meeting the needs of all children being raised by LGBT parents, including those born from earlier heterosexual relationships. Starting with this part, I turn to the doctrine necessary to appropriately confer the legal status of parentage on adults who are raising children but who are not their married biological mother and father. The children that same-sex couples add to their families, often through adoption or through assisted conception, fall into this category. The lens of marriage equality has led advocates astray, and now is the time to return to a path independent of the marital status of adults raising a child.

Adoption Should not be Limited to Married Couples

April DeBoer and Jayne Rowse wanted both to be the legal parents of their children.[38] Between them, the two women had adopted three children from the state child welfare system. But Michigan did not allow them to adopt jointly, so April was the legal parent of two and Jayne was the legal parent of the third. Faced with this roadblock to what they knew was best for their

children, the couple filed a federal law suit challenging the constitutionality of denying their children the benefit of having two parents through second-parent adoption.

Pointing out that if they were married the state would permit them to complete step-parent adoptions, the trial court judge assigned to the case urged them to challenge the state law prohibiting same-sex marriage.[39] According to the judge, that ban was the reason they could not adopt. Although the couple all along desired second-parent adoptions, not marriage, they amended their lawsuit. The team of attorneys representing the couple subsequently abandoned the argument that prohibiting second-parent adoption unconstitutionally infringed upon the rights of both the women and their children.

In 2012, the ACLU LGBT Rights Project filed a constitutional challenge to North Carolina's refusal to allow second-parent adoption.[40] All the plaintiffs were same-sex couples. After the *DeBoer* trial judge turned that case into one focused on same-sex marriage, the ACLU lawyers amended their complaint to challenge North Carolina's ban on same-sex marriage. After the 4th Circuit struck down Virginia's same-sex marriage ban and, in October 2014, the US Supreme Court denied review,[41] the District Court judge signed a consent order declaring North Carolina's marriage ban unconstitutional. The same order, with the consent of the ACLU, dismissed the challenges to the state's second-parent adoption ban as moot; the couples could now marry and complete step-parent adoptions.

Much is lost when the goal of achieving second-parent adoption disappears into marriage equality. Same-sex couples lose the right to *choose* marriage.[42] Leaders in the marriage equality movement have insisted their efforts do not contain the message that same-sex couples *must* marry. They have spoken instead in the register of choice.[43] But April and Jayne lost their right to *choose* marriage the moment it became the sole way they could both be parents of their

children, as did the North Carolina plaintiffs. At the moment, couples in several states, including Wisconsin, Nevada, and Arizona, also lack this choice and must marry before they can both be the legal parents of the children they are raising.

The other possibility that is lost is the ability to recognize the creative family structures in which children can thrive. Second-parent adoption has never been a same-sex couple-only solution. For example, the first second-parent adoption in Maryland was one in which a woman adopted a child who had previously been adopted by her twin sister. The two sisters lived in the same home and were raising the child together.[44] A lesbian or gay man who knows parenthood will not come in the usual planned or unplanned way must consider his or her alternatives. Those alternatives go substantially beyond the exclusive, sexually-linked parents who populate marriage equality litigation.

For example, in 2013, a New York trial court judge approved a second-parent adoption by the close gay-male friend of a woman who had adopted a child in Ethiopia.[45] The two friends, K.L. and L.L., had known each other for years when they decided to become parents by inseminating L.L. with K.L.'s sperm. After two years of trying with no success, they turned to adoption. They selected Ethiopia and travelled there together to meet the child identified for them. Because they were not married, Ethiopia permitted only one to adopt, and L.L. returned to Ethiopia and completed the adoption there. When she returned to New York, she and K.L. petitioned for a second-parent adoption.

The trial judge noted that had their insemination succeeded they would have both been the parents of their biological child.[46] The judge then went on to find that K.L. and L.L. met the definition of "intimate partners" in the statute identifying when two unmarried people could

adopt together. Although K.L. and L.L. did not live together, by that time they had fully co-parented for two years. The judge found the adoption to be in the best interest of the child.

The distinct circumstances within which lesbians and gay men become parents can also lend themselves to a family structure in which more than two adults function as a child's parents. Although lesbian couples often choose an unknown sperm donor, or a known donor who will have limited involvement with the resulting child, some couples choose to fully parent with the child's genetic father (and perhaps his partner). When it is the child best interests to recognize more than two parents, adoption should be available to solidify this result. The first lesbian couple "second-parent" adoption in the country, granted in Alaska in 1985, was actually a third-parent adoption, as the parental rights of neither biological parent were terminated.[47] Lawyers representing lesbian and gay families around the country report an increasing number of states in which judges have been willing to grant an adoption to a third parent, usually after a period of successful co-parenting has taken place. Confining adoption to married couples forecloses this possibility.

It also forecloses the possibility of adoption when a couple starts raising a child while married but separates and divorces before an adoption takes place. This may happen when the couple becomes foster parents and the child does not become available for adoption for a substantial period of time. Or it may happen when one spouse is the biological parent but the couple delays a second-parent adoption and then separates. If the parents are in conflict, an adoption might not at that point be in the child's best interests. But if they are co-parenting successfully, and both welcome the prospect of establishing joint legal parentage, prohibiting such a result leaves the child without the benefits that flow from recognition of her parents.

Law professor Angela Mae Kupenda wrote over 15 years ago about the importance of allowing two unmarried African-Americans to pool financial and emotional resources to become adoptive parents of African-American children.[48] She was not, of course, suggesting that this mechanism should be available only to African-Americans. Rather, she focused on certain distinctive characteristics of African-American communities that, she argued, gave this tool an especially significant means for providing for the welfare of children.

Assisted Reproduction Laws Should not be Limited to Married Couples

The path to parentage through assisted reproduction should similarly not turn on the marital status of the parents. When a lesbian couple plans for, welcomes, and raises a child together, the child and all those around her may believe she has two mothers. In some marriage equality states, however, including Massachusetts and New York, the child has two mothers only if those mothers were married when the child was born. Those states are among about 20 that enacted a model statute written in the 1970s naming a husband the father of his wife's child if he agreed to the conception of the child with donor semen. Massachusetts and New York courts have applied their statutes to a female spouse. If the couple isn't married, however, the child has only one mother unless and until there is a second parent adoption.[49] In 2010, the New York Court of Appeals reaffirmed the rule it established almost 20 years earlier that when such a couple separates the one legal parent may entirely obliterate the other parent from the child's life.[50]

Marriage equality may precipitate statutory reform integrating same-sex couples. Advocates for gay and lesbian families should not accept a rewrite of donor insemination statutes that simply makes them applicable to married lesbian couples. Five states and the District of Columbia now have insemination statutes based on 21st century model laws that extend

parentage on a gender-neutral and marital status-neutral basis to any person who consents to a woman's insemination when both persons intend that they will both be parents.[51] Those statutes should be the models going forward. Advocates working in states considering surrogacy statutes should also ensure that surrogacy not be restricted to intended parents who are married couples.

The Misleading Focus on Marriage as the Gateway to Parentage For a Nonbiological Mother

Many states have no statutes on assisted conception, in which case all questions of legal parentage are decided using statutes and court rulings that define parentage more generally. Married men in all states become legal fathers because a statute or common law rule extends to them a presumption of parentage based on marriage. Advocates for same-sex marriage have acted as though this presumption will extend to the wife of a woman who bears a child, but I'm not so sure this will turn out to be true. One state appeals court has already found its marital presumption inapplicable to a woman, ruling instead that the marital presumption was a statute of presumed *biological* paternity. The court wrote that it could not apply to a female spouse because, "for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child."[52] Another state's trial court made a similar ruling that a woman's female spouse was not her child's other parent because the statute used the terms "husband" and "father," and a female could be neither.[53]

If a state interprets its own constitution to protect gay men and lesbians from discrimination, there may be a better outcome. A case from Iowa is illustrative. The Iowa Supreme Court ruled that the state's ban on same-sex marriage violated the state constitution.[54]After that ruling, Melissa and Heather Gartner married.[55] Heather got pregnant

through donor insemination and when the child was born the state refused to put Melissa's name on the birth certificate. The state argued that Melissa needed to adopt the child, and then the state would issue a new birth certificate naming both parents. Melissa argued that the marital presumption of parentage applied to her. The state argued that it did not because she was not a biological parent. The statute read that "if the mother was married…the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction."

The Iowa Supreme Court concluded that those words meant what they said, that "only a male can be a husband or father. Only a female can be a wife or mother." Therefore, Melissa was not a parent under that statute. Because the court had previously held the marriage ban unconstitutional, however, it said this statute, excluding a married woman's female spouse from the presumption of parentage, was also unconstitutional.

Here is the problem. In states that have allowed same-sex couples to marry without a constitutionally based mandate from the state courts, and in states that do not have good constitutional law for sexual orientation-based classifications, there is reason for grave concern that courts will find that marriage does not create a parentage presumption for a female spouse who is not biologically related to the child. With the Supreme Court imposing marriage on hostile states, we cannot expect those states to go any farther than constitutionally required. There is reason to believe that many courts in those states will find the marital presumption inapplicable to a clearly nonbiological parent.[56] Without supportive state constitutional doctrine, that will be the final word.

Iowa had (and still has) no statute governing assisted reproduction. Melissa and Heather Gartner's child was born using unknown donor insemination. Iowa also had (and still has) no

statutory definitions of "parent." Rather than explore the possibility of law reform with Iowa family law practitioners and scholars, Lambda Legal approached the Gartners' problem as one dependent upon a more robust recognition of their marriage. They were successful, but only because sexual orientation receives heightened scrutiny under the Iowa Constitution. Their success provides no benefit to those couples who do not marry.

No marital presumption will ever apply to a same-sex male couple. This is because no marital presumption applies for heterosexuals to the wife of a man who becomes the biological father of a child born to another woman. Rather, the woman is the child's mother, and, if she is married, it is *her* husband who gets the marital presumption. The same rule will apply to a married gay male couple that uses one spouse's sperm to conceive a child. For the most part, without a surrogacy statute in place, the woman bearing the child is the child's mother, and, if she has a husband, he is the presumed father.

Conception through Sex will Bring Additional Legal Challenges

Marriage will also be a problematic path to parentage when one of the lesbian spouses conceives not through insemination but through sexual intercourse. Consider the facts of one 2014 case from California:[57]

After a number of years together, a married lesbian couple, Julia and Victoria, decided they wanted a child, and they agreed that Victoria would ask a co-worker, Sam, if he would be willing to be a sperm donor. The three discussed the arrangement and all agreed that Sam would donate semen so that Julia and Victoria could raise a child together, and that he would have no parental rights or responsibilities. They downloaded a sperm donor agreement from the internet, made a few changes, and signed it

Over a two month period, Sam gave the couple semen samples and Julia inseminated Victoria at home. Unbeknownst to Julia, Victoria and Sam had begun a sexual relationship a few months before the first insemination. As soon as Victoria became pregnant, her sexual relationship with Sam ended.

Julia participated in all prenatal activities and was present when Baby Marta was born. Both women are named as parents on the birth certificate, and Marta's last name is the hyphenated last names of her mothers. The two mothers shared in child care and financial support. Sam paid no support, had no relationship with the child, and, in fact, had a girlfriend he didn't want to upset and a son with that girlfriend.

When Marta was eight months old, Julia and Victoria split up, but they continued to share custody and Julia paid child support to Victoria. Marta called both women "Mommy." Several months later, Victoria and Sam resumed their sexual relationship. Sam moved in with Victoria, and Victoria told Julia that although she originally intended to raise Marta with her, she now intended to raise her with Sam.

Julia filed for partial custody alleging that Marta was conceived during the marriage by donor insemination. Victoria's response revealed to Julia for the first time that during the relevant period Victoria was also having sexual intercourse with Sam. She opposed Julia's custody request, and she and Sam joined in a petition to declare him the father of the child.

The court had to identify Marta's legal parents. The trial court chose Julia over Sam. On appeal, the majority upheld Julia's parentage but also sent the case back to the trial judge to determine if all three should be considered parents under a new California statute—unique in the country—explicitly allowing such a finding.[58] One appellate judge dissented, reasoning that Marta had a biological mother and father who wanted to raise her together and that, therefore,

only they should be her legal parents. The approach of that judge is most likely representative of judges across the country in states with laws less favorable than California's to lesbian couples raising children.

It would be a mistake to consider the facts of this case anomalous. An increasing number of cases have reached the courts in which the child raised by a lesbian couple was conceived through sexual intercourse. Sometimes that is not an issue in the case but simply part of the factual background. Sometimes, as in the case above, it matters greatly.

According to Williams Institute demographer Gary Gates, the 2008–2012 General Social Survey shows that 13.8% of women who identify as lesbian have had sex with a man in the last five years; 4.3% have had sex with a man in the last year. [59] Using Gates's most recent demographic analysis, there are approximately 756,000 lesbians ages 18-44 in the United States, translating into 32,508 lesbians ages 18-44 who slept with a man in the last twelve months. Using Gates's analysis of bisexuals, there are approximately 1,557,500 bisexual women ages 18-44, 92.9% of whom say they have had sex with a man in the last five years, and 91.4% of whom—over 1.4 million—say they have had sex with a man in the last year.

In the 2012 American Community Survey, 3.5% of women in same-sex couples reported giving birth to a child in the previous year. The 2013 American Community Survey counts approximately 351,900 female same-sex couples, which translates to an estimate of over 12,000 children born to lesbian couples in a year. While some number of those births are certainly the result of assisted conception, the General Social Survey data suggests that many of those children were conceived—intentionally or unintentionally, with or without a same-sex partner's consent—through sex with a man.

The Way Ahead

Some same-sex marriage advocates have on marriage blinders when it comes to parentage. If there are bumps ahead in what marriage brings to the families of same-sex couples, they expect to get marriage to do more work rather than seek results for a wider range of families. The experience with the *Gartner* case in Iowa may be a precursor of what is to come.

I cringe when I think about the resources that advocates for gay and lesbian families will expend trying to make the marital presumption work across the country. But the fact that one spouse is not the child's biological parent – something that will continue to distinguish same-sex marriage from the vast majority of different-sex marriages, means this process will have somewhat of a square peg/round hole quality to it. There will be successes, but these will likely derive from case law involving nonbiological husbands.

Advocates for gay and lesbian parents should work for parentage laws that apply regardless of marital status. They need to remove their marriage blinders and look around at the paths to parentage that have proven capable of protecting a more diverse set of gay and lesbian families. Some have required statutory changes forged through work with a wide range of stakeholders, and successes have not been limited to traditionally gay-friendly states. As a result of a statute enacted in Nevada in 2013, for example, a gay male couple, married or unmarried, may become parents through surrogacy. And when a woman conceives through donor insemination, with the consent of her female or male partner, married or unmarried, they both are parents of the resulting child.[60]

One of the architects of marriage equality, Mary Bonauto, stands as an excellent example for future advocacy. In addition to pursuing marriage equality, including representing same-sex couples seeking marriage in the United States Supreme Court, she served on the Family Law

Advisory Commission in Maine that drafted a comprehensive proposal for a Maine Parentage Act.[61] If enacted, the law will facilitate determination of a child's parentage for lesbian and gay parents in a variety of family arrangements not dependent upon marriage.

The evolution of parentage law in California is a case study for protecting children of same-sex couples through existing statutes and without any reference to marriage. In 2005, the California Supreme Court in *Elisa B. v. Superior Court* extended to the female partner of a woman who bore twins the statutory presumption of parentage that attaches to a man who receives a child into his home and openly holds the child out as his natural child.[62] The path to that victory was not paved by married heterosexuals, but by diverse family structures.

In *In re Nicholas H.*, the name of a woman's unmarried male partner was placed on the birth certificate even though the couple knew he was not the biological father.[63] He raised the child for many years. The issue of his legal status arose when the child's mother could no longer care for the child. The appeals court ruled that the "holding out" presumption was rebutted by his lack of biological paternity, but the California Supreme Court reversed, reasoning that it was discretionary, not mandatory, to rebut the presumption based on lack of biology.

In a subsequent case, *In re Karen C.*, a mother who bore a child in a hospital misidentified herself as Letitia C.[64] Karen's birth mother wanted Letitia to raise the child, and by using Letitia's name Karen had a birth certificate that named Letitia as her mother. Letitia raised Karen as her own child and told Karen she was adopted. Ten years later, when the issue of Karen's legal parentage arose, a California appeals court cited *Nicholas H.*, and the principle of gender-neutral statutory interpretation, for the proposition that a woman could not lose her status as a presumptive parent based solely on a lack of biological tie.

A year after *Karen C.*, a California appeals court refused to rebut the holding out parentage presumption of Monica, the adult half-sister of Salvador, whom Monica had helped care for since birth.[65] Their (common) mother died when Salvador was three, and Monica raised him as her son alongside her other children. Monica said that

> [Salvador] thinks of me as his mother and I think of him as my son. Our family knows of the actual relationship between Salvador and me and I have been truthful in official matters such as school registration, but to the rest of the world, Salvador is my son.[66]

The court applied the holding out presumption and ruled it would be inappropriate to rebut Monica's parentage because doing so would "sever this deeply rooted mother/child bond."

Twenty-five years ago, before *Nicholas*, *Karen*, and *Salvador*, advocates for a nonbiological mother in California thought the holding out presumption could not apply to her. They thought that to hold the child out as her "natural" child she would have to think the child was her biological child. But less than 15 years later, with no intervening statutory changes, the very same holding out presumption guaranteed protection for the parent/child relationships formed by both lesbian and gay male couples and their children.[67]

It's worth remembering what made that result possible. It was not the married heterosexuals with whom marriage equality advocates always compare same-sex couples, but an unmarried man and woman, an unmarried woman wanting her child to be raised by an unmarried woman friend, and an unmarried woman who raised her half-brother as her son.

Seeking broad statutory reform or favorable court rulings will take substantial effort. But so will trying to gain parentage through the marital presumption. It isn't a question of the amount

of work there is to do; it's about whether that work will focus on protecting only married same-sex couples or the broader range of LGBT family arrangements.

Two principles emerge from this chapter:

1. The well-being of a disproportionately large segment of the children being raised by LGBT parents depends upon remedying racial and economic inequality as much as it depends upon ending the discrimination their parents face as gay, lesbian, bisexual and transgender adults. Marriage will not bring them justice.
2. Children with LGBT parents thrive in a variety of nonmarital family forms. They require rules that do not revolve around marriage to give them the legal parents they need.

These are the principles that should guide future advocacy on behalf of children raised by LGBT parents.

Notes

[1] Jonathan Vespa, Jamie M. Lewis, and Rose M. Kreider, America's Families and Living Arrangements: 2012, Population Characteristics, US Census Bureau, August 2013 [hereinafter Census Report 2012] (16.4%, comprising 10.5% of male couples and 21.6% of female couples); Gary J. Gates. LGB Families and Relationships: Analysis of the 2013 National Health Interview Survey, Williams Institute, October 2014 [hereinafter Gates, 2013 NHIS] (18% of married same-sex couples and 19% of unmarried same-sex couples).

[2] *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (one of two plaintiff couples); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (three out of four plaintiff

couples); Tanco v. Haslam, (M.D. Tenn. 2014) (two out of three plaintiff couples); DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich.) (one out of one plaintiff couples), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-574).

[3] *See, e.g.*, Barbara Dafoe Whitehead, "Dan Quayle was Right," *Atlantic Monthly* (April 1993); Charles Murray, "The Coming White Underclass," *Wall Street Journal*, October 29, 1993.

[4] The paradigmatic about-face was that of David Blankenhorn, who wrote a book opposing same-sex marriage in 2007 and testified in favor of California's ban on same-sex marriage in 2010 but then publicly switched his position. David Blankenhorn, "How My View on Gay Marriage Changed," *New York Times*, June 23, 2012.

[5] In re Adoption of BLVB and ELVB, 628 A. 2d 1271, 1276 (Vt. 1993).

[6] The most update list of states allowing second parent adoption can be found on the website of the National Center for Lesbian Rights. Legal Recognition of LGBT Families, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf, accessed April, 2015.

[7] 852 P.2d 44 (Haw. 1993) (finding the ban to be a classification based on sex, a suspect classification under the state constitution, and requiring the state to show that the ban was necessary to achieving a compelling state interest).

[8] The statements of numerous organizations have been assembled by the Human Rights Campaign as "Professional Organizations on LGBT Parenting," and can be found at http://www.hrc.org/resources/entry/professional-organizations-on-lgbt-parenting, accessed April, 2015.

[9] Declaration of Michael Lamb, PhD., *Sevcik v. Sandoval*, Case No. 2:12-CV-00578-RJC-PAL, United States District Court District of Nevada, filed Sept. 12, 2012.

[10] As professor Courtney Joslin summarized,"Rather than arguing that marriage can be limited to heterosexual couples because heterosexual couples make better parents, the claim is essentially that marriage can be limited to heterosexual couples because, without the inducement of marriage, heterosexual couples are more likely to be unstable and unhealthy parents." Courtney G. Joslin, "Searching for Harm; Same-Sex Marriage and the Well-Being of Children," 46 *Harvard Civil Rights-Civil Liberties Law Review* 81, 90 (2011).

[11] Turner v. Safely, 482 U.S. 78 (1987).

[12] Respondents' Supplemental Brief, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999) online at http://www.lambdalegal.org/in-court/legal-docs/in-re-marriage_ca_20070831_respondents-consolidated-supplemental-reply-brief, accessed April, 2015 [hereinafter NCLR marriage brief]. This brief was prepared by lawyers for the National Center for Lesbian Rights and Lambda Legal in the challenge to California's ban on same-sex marriage; Brief *Amicus Curiae* of Bay Area Lawyers for Individual Freedom et al, in *Obergefell v. Henry*, the US Supreme Court same-sex marriage case, online at http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Bay_Area_Lawyers_for_Individual_Freedom.pdf, accessed April, 2015 [hereinafter BALIF brief]. This brief was submitted on behalf of several LGBT bar associations from around the country.

[13] NCLR marriage brief, p. __.

[14] BALIF brief, p. 15.

[15] Kyle Pomerlau, "Understanding the Marriage Penalty and Marriage Bonus," Tax Foundation Fiscal Fact, 2015, available at

http://taxfoundation.org/sites/taxfoundation.org/files/docs/TaxFoundation_FF464_0.pdf, accessed April, 2015.

[16] Nina Totenberg, Legal Battle Over Gay Marriage Hits the Supreme Court Tuesday," April 27, 2015, available at http://www.npr.org/blogs/itsallpolitics/2015/04/27/402456198/legal-battle-over-gay-marriage-hits-the-supreme-court-tuesday, accessed April, 2015.

[17] 133 S. Ct. 2675, 2694 (2013).

[18] 133 S. Ct. at 2694.

[19] *See, e.g.*, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Campaign for Southern Equality v. Bryant, 2014 US Dist LEXIS 165913; *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir 2014).

[20] Briefs of Petitioners, *DeBoer v. Snyder*, p. 37, filed in US Supreme Court, available at http://www.supremecourt.gov/ObergefellHodges/PartyBriefs/14-571_Brief_Of_DeBoer.pdf, accessed April, 2015.

[21] *See, e.g.*, Brief *Amicus Curiae,* Garden State Equality,p. 29, in *Obergefell v. Henry*, the US Supreme Court same-sex marriage case available at http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Garden_State_Equality.pdf, accessed April, 2015.

[22] BALIF Brief at 15.

[23] The data in this paragraph is from the Pew Research Center analysis of census data. Gretchen Livingston, Less than Half of US Kids today lives in a 'traditional' family, Pew Research Center, December 22, 2014, available online at http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/, accessed April, 2015.

[24] Census Report 2012, Figure 8, p. 27.

[25] Melissa Murray, "What's So New about the New Illegitimacy?" 20 *American University Journal of Gender, Social Policy & Law* 387 (2011).

[26] M.V. Lee Badgett, Laura E. Durso, & Alyssa Schneebaum, New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community, Williams Institute, June 2013, p.24 [hereinafter Poverty Report 2013].

[27] Gary J. Gates, Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey, p. 5, Williams Institute, March 2015 [hereinafter Gates 2013 ACS].

[28] Gates 2013 ACS, p. 7.

[29] Angeliki Kastanis and Bianca D.M. Wilson, Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-sex Couples, Williams Institute, p. 2.

[30] Gary J. Gates, Family Formation and raising children among same-sex couples, National Council of Family Relations, Family Focus, Winter 2011, p. F3 [hereinafter Gates, Family Formation].

[31] Angeliki Kastanis and Gary J. Gates, LGBT African-Americans and African-American Same-sex Couples, Williams Institute, p. 3

[32] Poverty Report 2013, p. 16.

[33] Gates 2013 ACS, p.6

[34] Gates 2013 ACS, pp. 7–8.

[35] Gates, Family Formation, p. F3

[36] Gates, Power Point presentation, UCLA, April 2015.

[37] Gates, 2013 ACS.

[38] The extensive facts of the case are contained in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (dissenting opinion).

[39] Christine Ferretti, "Judge Tells Couple to Consider Challenging State's Gay Marriage Ban," *Detroit* News, August 29, 2012.

[40] Fisher-Borne v. Smith, Case No. 1:12CV589, United States District Court for the Middle District of North Carolina. This case arose after the North Carolina Supreme Court, in 2010, ruled that a second-parent adoption granted five years earlier was void because the court lacked subject matter jurisdiction to enter such an order. Boseman v. Jarrell, 704 S.E.2d 904 (N.C. 2010). That decision simultaneously invalidated every second-parent adoption ever granted in North Carolina.

[41] Bostic v. Schaefer, 760 F.3d 3352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

[42] And of course different sex couples as well. In the New York litigation approving second-parent adoption in that state, Lambda Legal represented both a lesbian couple and an unmarried different-sex couple who did not wish to marry. *In re Jacob*, 86 N.Y.2d 651 (NY 1995).

[43] For example, Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique," 21 *New York University Review of Law & Social Change* 567 (1994).

[44] Information about this adoption is found in a June 9, 2000 letter from Assistant Attorney General Kathryn M. Rowe to Maryland General Assembly Delegate Sharon Grosfeld. The letter can be found at http://www.oag.state.md.us/Opinions/2010/Grosfeld.pdf, accessed April, 2015.

[45] In re Matter of Adoption of G., 42 Misc. 3d 812 (N.Y. Surr. Ct. 2013).

[46] Under federal and state law, when an unmarried woman gives birth and the biological father of the child is present, the couple is offered the opportunity to sign a voluntary acknowledgement of paternity that has the force of a court judgment declaring the man the legal father of the child.

[47] In re A.O.L., discussed in Nancy D. Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families," 78 *Georgetown Law Journal* 459, 522 (1990).

[48] Angela Mae Kupenda, "Two Parents Are Better Than None: Whether Two Single African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other –Should Be Allowed to Jointly Adopt and Co-Parent African American Children," *35 University of Louisville Journal of Family Law* 703 (1996–1997).

[49] I discuss this issue in depth in Nancy D. Polikoff, "The New 'Illegitimacy": Winning Backware in the Protection of Children of Lesbian Couples," 20 *American University Journal of Gender, Social Policy & Law* (2012).

[50] Debra H. v. Janice R., 930 N.E.2d 184 (NY 2010).

[51] I describe the enactment of one such law in Nancy D. Polikoff, "A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century," 5 *Stanford Journal of Civil Rights and Civil Liberties* 201 (2009).

[52] Shineovich v. Kem, 214 P.3d 29 (Ore. App. 2009).

[53] Opinion and Order, Conover v. Conover, 21-C-13-046273 (Circuit Ct for Washington Cty, Maryland), currently on appeal to the Maryland Court of Special Appeals

[54] Varnum v. Brien, 762 N.W.2d 862 (2009).

[55] Gartner v. Iowa Department of Public Health, 830 N.W.2d 335 (Iowa 2013).

[56] There are a handful of cases determining parentage when the egg of one partner in lesbian couple is fertilized *in vitro* with donor semen and the embryo is implanted in the other woman. For example, *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013). Because one woman has a parentage claim based on giving birth to the child and the other based on genetic parentage, courts have found that both women are parents under existing statutes. It is unlikely that many lesbian couples will choose this expensive and medically invasive method of conception.

[57] These facts are based on the reported opinion and the briefs in S.M. v. E.C., 2014 Cal. App. Unpub. LEXIS 4574 (2014). The case refers to all the individuals by initials. To minimize confusion, I have selected names for them.

[58] Cal. Fam. Code §7612 (c).

[59] The General Social Survey data is from an analysis Gates conveyed to me by email. The estimate of total US population ages 18–44 is from *Age and Sex Composition: 2010*, United States Census Bureau, May 2011, found at http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf, accessed April, 2015. Estimates of percentages of the population who are lesbians and bisexual women are from Gary J. Gates, LGBT Demographics: Comparisons Across Population-Based Surveys, October 2014, found at http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf , accessed April, 2015. A 1999 study of 6,935 self-identified lesbians found that 5.7% reported one or more male sexual contacts in the preceding year. Alison L. Diamant et al., "Lesbians' Sexual History with Men; Implications for Taking a Sexual History," 159 *Archives of Internal Medicine* 2730, 2732 (Dec. 13/27, 1999). Women who were not white, were younger than fifty, had not graduated from college, and had annual income of less than $20,000, were more likely to be in this category.

[60] Statutes and cases achieving these results are listed in a publication of the National Center for Lesbian Rights. Legal Recognition of LGBT Families, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf, accessed April, 2015.

[61] A bill proposing enactment of the Act was introduced on in the 127th Maine Legislature as S.P. 358 on March 19, 2015. The text of the bill is available here: http://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0358&item=1&snum=127, accessed April, 2015.

[62] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

[63] In re Nicholas H., 46 P.3d 932 (Ca. 2002).

[64] The facts of this case are contained in *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

[65] 4 Cal. Rptr. 3d 705 (Ct. App. 2003).

[66] 4 Cal. Rptr. 3d at 707.

[67] I describe this evolution in detail in Nancy D. Polikoff, "From Third Parties to Parent: The Case of Lesbian Couples and Their Children," 77 *Law & Contemporary Problems* 195 (2014).