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## **Suffer the Little Children: Justifying Same-Sex Marriage From the Perspective of a Child of the Union**

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# SUFFER THE LITTLE CHILDREN: JUSTIFYING SAME-SEX MARRIAGE FROM THE PERSPECTIVE OF A CHILD OF THE UNION

*Lewis A. Silverman\**

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## I. INTRODUCTION

Ever since the state of Hawaii<sup>1</sup> and now Vermont<sup>2</sup> raised the possibility

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\* Director of Family Law Clinic and Assistant Professor of Clinical Law, Touro College, Jacob D. Fuchsberg Law Center. I want to thank all the students who worked on this project, especially Kelly Caputo, Esq., Paula Lopez, Esq., research assistant Craig DeMeo, the entire Spring 1999 roster of "Sexual Orientation and Law" for much of the initial research and one of the most stimulating teaching experiences I have enjoyed, Taya Williams, Jacob Meyer, CPA, Janis Noto, Esq., Peter Maiorino and Pasquale Sicuranza.

<sup>1</sup> Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *remanded sub nom.* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (Haw. 1999). Although the initial decision found an equal protection violation under the Hawaii Constitution, a subsequent amendment allowing the Legislature to reserve marriage for opposite-sex couples rendered the case moot and the Hawaii Supreme Court dismissed it on that ground, carefully declining to vacate its initial ruling.

<sup>2</sup> Baker v. Vermont, 744 A.2d 864 (Vt. 1999). For a more detailed discussion of this case, see *infra* Part V. For the legislative responses of both Hawaii and Vermont to these judicial decisions, see *infra* Part VI.

The appellant's (proponent's) brief to the Vermont Supreme Court is published as Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et*

that two adults of the same gender could become married to each other, much has been written regarding same-sex marriage<sup>3</sup> and the justifications for it.<sup>4</sup> These justifications are usually based upon the expectations and legal rights of the two potential adult partners. Yet marriage, whether between a man and a woman or two adults of the same gender, frequently involves more than just two adults. Marriage frequently involves children who receive benefits therefrom.<sup>5</sup> What is different about a child of a marriage is that a child essentially has no choice as to the marital status of the parents; that is a decision made by the adults and not the child. In all the discussion about same-sex marriage and the rights of adults, as well as the benefits they can derive therefrom, there is precious little written about the rights of a child who may be the product of a same-sex relationship.<sup>6</sup> The preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship. The purpose of this paper is to analyze the rights of a child whose parents may be unable to marry because of the restrictions on same-sex marriage and the resultant loss of benefits to the child that would have been enjoyed if the option of marriage were available to the parents.<sup>7</sup>

Part II of this article will discuss the right of the government to regulate the establishment of family and of the right to marry. Part III will discuss how a child may be legally the product of a same-sex union, and the right of the child to enjoy the benefits of a particular family. Part IV will discuss in detail the rights and benefits of a child whose parents are married to each other. Part V will offer a detailed analysis and discussion of the recent decision in *Baker v. Vermont*<sup>8</sup>, which offers intriguing possibilities for the future of legalized same-sex relationships. Part VI

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al. in *Baker et al. v. State of Vermont*, 5 MICH. J. GENDER & L. 409 (1999). The reply brief is published as Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont*, 6 MICH. J. GENDER & L. 1 (1999).

<sup>3</sup> Same-sex marriage can involve more than homosexual couples. Two adults, including relatives, may seek to marry for a variety of reasons involving care, nurturing, and financial support and benefits. Nevertheless, the primary focus of the debate regarding the legalization of same-sex marriage involves gay male and lesbian couples, and this paper will highlight these specific couples in its analysis.

<sup>4</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997); Richard D. Mohr, *Symposium on Sexual Orientation, The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995); Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995).

<sup>5</sup> Children living with their same-sex parents may not be able to receive benefits from both of their parents as easily as other children might because of the state refusal to allow the same-sex couple to marry. See Strasser, *supra* note 4, at 949.

<sup>6</sup> Rights and benefits of the child are sometimes mentioned in passing.

<sup>7</sup> The distinction should be made between children of parents who are legally permitted to marry but choose not to do so, and children whose parents are not legally permitted to marry. This article deals only with the latter category.

<sup>8</sup> 744 A.2d 864 (Vt. 1999).

will discuss the benefits of domestic partnership and civil union legislation and private agreements and how they fail to offer children adequate substitution for a valid marriage between the parents.

## II. REGULATING FAMILY AND MARRIAGE

### A. *Defining and Regulating Family*

The family, historically, has been highly valued and viewed as a great benefit to a stable and productive society. Safeguarding the family and its values shapes policy and politics.<sup>9</sup>

Although we consider the family sacrosanct, the fact is that governments at different levels regulate not only the activities of the family, but the very composition of the family unit itself. The definition of family is used as a government function in granting or denying benefits to a certain group of people.<sup>10</sup> There are, however, two different classes of definition of "families," and it is the difference in these families for definitional purposes that raises serious questions about restrictions on same-sex marriage as viewed from a child of the union.<sup>11</sup>

Many of the noted cases involving the definition of family come from zoning laws where local governments attempt to regulate the number of individuals living within a certain space for health, safety and aesthetic reasons.<sup>12</sup> What is unique about these cases generally is that the parties are not married to each other and there is no tie of blood or marriage bringing the people together. Government therefore must look at the function of these people and determine whether they are, in fact, a family unit,<sup>13</sup> the functional equivalent of a family,<sup>14</sup> or within some other level or relationship which the government will allow to live together in one dwell-

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<sup>9</sup> See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 390-91 (1993). A perfect example is the debate regarding, and enactment of, the Defense of Marriage Act in 1996. See Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. III 1997)).

<sup>10</sup> See *Hann v. Hous. Auth. of Easton*, 709 F. Supp. 605 (E.D. Pa. 1989).

<sup>11</sup> "Not responsible for their birth, these children [of a lesbian family] are often punished by the legal system for society's failure to recognize the legitimacy of the relationship between their parents. Such discrimination seems to contravene the standards set forth in the Equal Protection Clause." Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1077 (1995).

<sup>12</sup> See, e.g., *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974).

<sup>13</sup> See, e.g., *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981), where the ordinance required non-blood-related individuals to establish a "domestic bond." The Supreme Judicial Court of Maine ruled that this group home for the mentally retarded did not include a central authority figure and failed to meet the statutory definition of family.

<sup>14</sup> See, e.g., *Borough of Glassboro v. Vallorosi*, 568 A.2d 888 (N.J. 1990), where the New Jersey Supreme Court held that a group of 10 college students sharing a large, single-family house qualified as the "functional equivalency [sic]" of a family and satisfied the ordinance, even though the intent of the residents to remain part of this group was inherently temporary.

ing.<sup>15</sup>

The second area where the government may define family is in granting benefits. Housing rights,<sup>16</sup> tax laws,<sup>17</sup> even vacancy decontrol of rental units,<sup>18</sup> are areas in which government has extended or denied benefits to certain groups of individuals based on the definition of family.<sup>19</sup>

The above examples, as stated, all contain instances where the adults are neither married to each other nor related by blood, marriage or consanguinity.<sup>20</sup> Courts have been generous in allowing governments to enhance or restrict the definition of family because courts have held that this type of definition is in fact not creating a new family, but simply defining, for a particular purpose, the equivalent of a family.<sup>21</sup> Of course, this assumes that family is defined by the presence of the adult(s), but in today's ever-changing society perhaps we should reconsider that the family may, just as easily, be defined around the child.<sup>22</sup>

Where government may not tread so easily, however, is when government seeks to restrict relations among individuals who are actually related by blood or marriage. In *Moore v. City of East Cleveland*,<sup>23</sup> the Supreme Court held that a gov-

<sup>15</sup> These cases are frequently used in family law courses to assist students to understand that the term "family" is not fixed in definition or structure, but is amorphous in its content and concept. Zoning ordinances are frequently adopted to assign certain quality of life standards to a particular community or neighborhood, but each definition of who may reside in a particular locale becomes, by its nature, exclusive as well, keeping out individuals because of their excessive number, use of the premises, etc.

<sup>16</sup> See, e.g., *Hann v. Hous. Auth. of Easton*, 709 F. Supp. 605, 609 n.6 (E.D. Pa. 1989).

<sup>17</sup> See *infra* Part IV.A.

<sup>18</sup> See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989), where the court held that an objective examination of the relationship of the parties was necessary to determine if they met the definition of family as contained in a local regulation (actually enacted by the State of New York, but applying in this instance to New York City).

<sup>19</sup> Even here, however, certain rights and benefits which we normally associate with families are restricted to those units in which the parents are married. The relationship between kinship and marriage was questioned by Bruce C. Hafen in *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). Professor Hafen argued that a distinction must remain between marriage and kinship, on the one hand, and the evolving concepts of individual tradition and self-interest. But he failed to accept the fact that children have always existed as a result of non-marital unions, will continue to exist, and legal discrimination against the parents because of marital status is, in effect, legal discrimination against the child.

<sup>20</sup> "The instant a court is willing to say that 'family' does not mean 'married,' the path is open to gays and lesbians to have their relationships recognized too." Thomas S. Hixson, *Public and Private Recognition of the Families of Lesbians and Gay Men*, 5 AM. U. J. GENDER & L. 501, 502 (1997). The legal recognition of gay families depends on the separation of legal benefits from marital status. See *id.* at 504.

<sup>21</sup> Of course, in defining "equivalency" governments may have more leeway to avoid constitutional limitations than if the government is attempting to redefine an actual "family."

<sup>22</sup> See, e.g., Jesse Green, *Orbiting the Son*, N.Y. TIMES, Aug. 8, 1999, § 6 (Magazine), at 66. The family here includes the (gay) father, his adopted son, various "aunts" and "uncles," and many other "shadow families." "In traditional families we easily see how the pre-existing structure incorporates the child, but in a family as unusual, as manufactured as this one, the opposite process is also evident. The child creates a structure to suit him." *Id.* The author calls these new social structures "radial," centering on the child.

<sup>23</sup> 431 U.S. 494 (1977).

ernment may not tear at the very basis of family itself. In that case, the government tried to redefine a family by drawing classes among people with the same blood relations to each other, and this was held impermissible.<sup>24</sup> In discussing the attempt to regulate an extended family the Court stated:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. . . .

. . . [T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.<sup>25</sup>

In other circumstances the government is also equally restrictive of regulation involving blood or marital relationships. A government will not normally interfere with the way parents raise their children so long as the parents are providing minimally adequate care to the children<sup>26</sup> and are accepting society's fundamental premise that all children must have basic standards of care; however, the level beyond that is the right of the parent and not of the government.

In *Meyer v. Nebraska*,<sup>27</sup> the Supreme Court established the importance of family in our society. In striking down a law which prohibited instruction in foreign languages before the eighth grade, the Court found a liberty interest in the "right of the individual to . . . marry, establish a home and bring up children . . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."<sup>28</sup>

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<sup>24</sup> The Court held: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04.

<sup>25</sup> *Id.* at 504-06.

<sup>26</sup> See, e.g., N.Y. SOC. SERV. LAW § 371(4-a) (McKinney 2000), which states: "Neglected child" means a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired . . . as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter [or] education . . . .

<sup>27</sup> 262 U.S. 390 (1923).

<sup>28</sup> *Id.* at 399-400.

Just a few years later, the Court struck down an Oregon law which restricted education to secular schools. In *Pierce v. Society of Sisters*,<sup>29</sup> the Court pronounced:

Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>30</sup>

The next major decision by the Supreme Court to discuss the importance of family resulted in a rare victory for the state. Still, in *Prince v. Massachusetts*,<sup>31</sup> the Court emphasized the role of the family, deciding that this was one of those rare instances where the state's interest in protecting a child's welfare outweighed the parent's right to decide the child's well-being. "It is cardinal with us 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. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."<sup>32</sup>

Perhaps the most overwhelming affirmation of family integrity can be found in *Wisconsin v. Yoder*,<sup>33</sup> where the Court affirmed the right of the Amish to control their own level of education over the state's compulsory education laws. Attempting to distinguish *Prince v. Massachusetts* on the record (no inference of harm to the physical or mental health of the child or to the public safety, peace, order or welfare), the Court held that the Amish right to raise their children to be

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<sup>29</sup> 268 U.S. 510 (1925).

<sup>30</sup> *Id.* at 535 (citations omitted).

<sup>31</sup> 321 U.S. 158 (1944).

<sup>32</sup> *Id.* at 166 (citations omitted). Curiously, this case did not deal with a parent but an aunt-guardian, and was, ostensibly, a child labor case. It also involved religious freedom and Jehovah's Witnesses, a group which has been as unsuccessful in the Supreme Court as homosexuals. The Court went on to state: "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." *Id.* (citations omitted).

<sup>33</sup> 406 U.S. 205 (1972).

Amish – that is, to continue their special way of life and to train their children vocationally, rather than through formal compulsory education – outweighed the state's requirement of formal high school education until age sixteen.<sup>34</sup>

The Supreme Court has been more than salutary about the importance of family to both the individual and society.<sup>35</sup> The Court has said that “[t]he intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility.”<sup>36</sup> Individual interests in matters concerning family life are as compelling and “among the basic civil rights of man.”<sup>37</sup> Parental interests in maintaining relationships with their children are fundamental liberty interests for due process purposes,<sup>38</sup> and parental decision-making on behalf of children is protected from unwarranted state interference.<sup>39</sup>

The Court also has recognized the right of companionship, although only of the parents’ right to companionship of their children.<sup>40</sup> The Court has not yet found a similar right on behalf of children to companionship of their parents, whether blood, legal or de facto.<sup>41</sup>

What is the basis for this difference? It stems in part from our notion and our complete acceptance as a society that people who are related by blood or consanguinity are a family.<sup>42</sup> Where we stretch in other circumstances to properly and fully define the term,<sup>43</sup> there is a perceived reticence to do so where these alternate families do not meet our portrait of the stereotype: husband, wife, children.<sup>44</sup> The

<sup>34</sup> See *id.* Interestingly, Justice Douglas, in a dissent, raised the concern that no one had sought the input of two of the children who were the subjects of the proceeding and it might not be appropriate to assume that a child’s wishes were the same as the parent. “While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. . . . It is the student’s judgment, not the parents’ that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.” *Id.* at 244-45 (Douglas, J., dissenting in part).

<sup>35</sup> See Lydia A. Nayo, *On Sexual Minority Adoption from the Perspective of the Unadopted Child*, 35 U. LOUISVILLE J. FAM. L. 25, 87 (1996-97).

<sup>36</sup> *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

<sup>37</sup> *Skinner v. Oklahoma*, 315 U.S. 535, 541 (1942).

<sup>38</sup> See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>39</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>40</sup> See *Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. 645.

<sup>41</sup> See *infra* Part III.B, especially text accompanying note 128.

<sup>42</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>43</sup> It is difficult to define “family” because traditional notions in our society tend to dictate that a married man and woman and their children constitute a “family.” However, see Leo Sullivan, Comment, *Same Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275, 282 (1973), where the author notes that there is no “typical” American family. Many families now consist of non-traditional arrangements, including single-parent families formed due to divorce and single motherhood, stepfamilies, grandparent-grandchild units, senior citizen group homes, pseudo-parent-child and homosexual family units.

<sup>44</sup> I like to call this the “Donna Reed” or “Father Knows Best” type of family, glorified by 1950s



marriage-centered nuclear family has traditionally served as the bastion for securing American family values, but we must reconsider whether legitimate values of families headed by same-sex couples can be protected by means other than marriage.<sup>45</sup> While attempts are made to include others into a broader definition of family or family unit, no attempt has been made to exclude those whom society recognizes as the basic core family unit.

This is because we recognize family as a result of blood relationships<sup>46</sup> rather than function.<sup>47</sup> Two individuals may perform all tasks and equal, in every sense of the word, all the functions of a parent and child. Yet if they are not related by blood (or at least adoption) they will not be considered a parent and child in the eyes of the law.<sup>48</sup> The role of law should be to respect the caregiver's commitment, hard work, and knowledge and understanding of the child by according him or her maximum autonomy, authority and assistance, not to create impediments to the family relationship.<sup>49</sup>

### B. *Regulating Marriage*

The same policies regarding governmental regulation of families are, to a lesser extent, similarly applicable to marriage. Marriage is normally regulated by the state government.<sup>50</sup> While the state may certainly prescribe the requirements for

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sitcoms. Inevitably there was a husband who was employed, a wife who was a homemaker, and two or three children. The television shows were fictional, and the "family" they glorified was probably more of an ideal than a reality.

<sup>45</sup> See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 *FORDHAM L. REV.* 1699, 1712 (1998). Professor Christensen goes on to analyze the evolution of the nuclear family, finding that it did not evolve in a form recognizable to us today until well after the end of the Middle Ages and did not become the dominant family model until nineteenth century America. See *id.* at 1713-16.

<sup>46</sup> See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 *GONZ. L. REV.* 91, 97 (1990-91). Some Americans make a distinction between "family" and "relatives" by focusing on emotional ties for the former and blood for the latter. See *id.*

<sup>47</sup> Paula Ettelbrick argues for broader family definition and the right to family benefits that are not contingent on marriage or blood. See Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 *J.L. & POL'Y* 107, 113 (1996). She argues "for more inclusive social and legal policies that would bestow respect and benefits upon all who assume the responsibility for and function of family—whether they are married or not." *Id.* at 114. If we treat the sexual orientation of those involved as a matter of little or no consequence, we emphasize an approach to family definition of function over form, which has other precedents in family law analysis. See Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 *CARDOZO L. REV.* 1299, 1324 (1997).

<sup>48</sup> See Ettelbrick, *supra* note 47, at 122.

<sup>49</sup> See Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 *SANTA CLARA L. REV.* 957 (1999).

<sup>50</sup> Of course, the federal government jumped head first into the regulation of marriage with enactment of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. §1738C (Supp. III 1997)). While the first section of the statute attempts to redefine the full faith and credit clause of the Constitution for the benefit of the states that may not wish to grant legal recognition to same-sex marriages contracted in other states, the second section of the act defines a legal marriage for the purposes of determining entitlement for various federal benefits. See *id.* This Act appears to be the first federal interfer-

obtaining a license to effectuate the marriage ceremony, marriage has been defined as a fundamental right, and the state may not generally prohibit two individuals from becoming married to each other, with only a few exceptions.<sup>51</sup> These exceptions include marriages that may be incestuous or polygamous<sup>52</sup> in nature and, at least until now, marriages between two adults of the same gender.<sup>53</sup> Recent attempts to regulate the establishment of the marital unit itself have generally met with judicial opposition. The Supreme Court said in *Loving v. Virginia*:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . Under our Constitution the freedom to marry, or not marry, a person of another race resides

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ence in the states' power to regulate marriage. See Courtney G. Joslin, Note, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick—Romer v. Evans*, 116 S. Ct. 1620 (1996), 32 HARV. C.R.-C.L. L. REV 225, 245 (1997).

<sup>51</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom on so unsupported a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

<sup>52</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878). The Court stated that: Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

*Id.* at 165.

<sup>53</sup> "Just why homosexuality, incest, and polygamy are all lumped together—aside from the fact that they are all departures from traditional marriage—is unclear. Perhaps because they all depart from tradition?" Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 288 (1995).

The health and consent rationales that justify regulation or prohibition of [incestuous, underage or polygamous] marriages are inapplicable to same-sex marriages. States prohibit consanguineous marriages because such unions threaten the biological health of the family and sexualize what should be a nonsexual relationship. Same-sex marriages, however, neither increase the chance of genetic deterioration, nor undermine the state's interest in desexualizing family relationships. . . . Moreover, although states prohibit underage marriages because the parties are not old enough to give meaningful consent . . . the parties who enter same-sex relationships are adults whose consent is presumed to be meaningful. Finally, states prohibit polygamous marriages, in large part, because legislators believe that such marriages undermine the stability of family relationships. [*Reynolds v. United States*]. More specifically, the multiplicity of parties in polygamous marriages raises concerns about knowledge and consent, support, and inheritance. Same-sex adult couples involve no more parties, and therefore no more concerns, than do non-polygamous heterosexual marriages.

Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2040 n.12 (1996) (citations omitted) [hereinafter *In Sickness and in Health*].

with the individual and cannot be infringed by the State.<sup>54</sup>

In striking down Virginia's anti-miscegenation statute, the Court granted the right to marry status as a fundamental right, thereby compelling strict scrutiny of any statute inhibiting this right.

Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of the Court confirm that the right to marry is of fundamental importance to all individuals.

Building on the foundation set in *Loving*, the Court reviewed the parameters of this fundamental right in *Zablocki v. Redhail*.<sup>55</sup>

[T]he right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, the Court characterized marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress[.]" . . .

More recent decisions have established that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause. . . .

. . . .

. . . [T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter that relationship that is the foundation of the family in our society. . . .

. . . [R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.<sup>56</sup>

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<sup>54</sup> *Loving*, 388 U.S. at 12.

<sup>55</sup> 434 U.S. 374 (1978).

<sup>56</sup> *Id.* at 384, 386 (citations omitted). Despite labeling marriage "fundamental," the Court was less clear on the standard of review. Although one might believe that a fundamental right would trigger a "strict scrutiny" or "compelling state interest" analysis, Justice Marshall used the term "critical examination," perhaps a mid-level standard reserved for some of the Court's decisions examining gender-based classifications. It can even be argued that the statute in question failed under a rational basis review and that the discussion in

Again, however, we are talking about the traditional marriage between an adult male and an adult female.<sup>57</sup> Attempts to redefine the composition of the marital unit have not been successful,<sup>58</sup> although many of the arguments against allowing the establishment of these types of marriages go to the actual function of the marital couple and the marital unit, rather than its establishment.<sup>59</sup> Perhaps our difficulty stems from the fact that we have no clear consensus on the definition of marriage beyond its simple definition of a civil contract.<sup>60</sup> One of the most stunning definitions of marriage is found in *Griswold v. Connecticut*:<sup>61</sup>

Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree 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 in-

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the Court's opinion and the various concurring and dissenting opinions merely cloud the issue.

A subsequent case did not clarify the issue. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court struck down a Missouri regulation limiting the right to marry of state prison inmates. This decision unquestionably utilizes a simple rational basis analysis, thereby never having to clarify the standard of review left open in *Zablocki v. Redhail*.

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Professor Eskridge argues that marriage itself is a social construct. He argues that:

[M]arriage is not a naturally generated institution with certain essential elements. Instead, it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away. Second, the social construction of institutions like marriage is not and cannot be neutral, for it involves the playing out of a society's power relationships. . . . Third, the social construction of marriage is dynamic. Linked as it is to other institutions and attitudes, marriage will change as they change.

William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1434 (1993). See also Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353 (1999).

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"Marriage can . . . be described as a 'legal institution that defines and creates social relations. The law creates the status of husband and wife; it is not a reflection of or response to spousal relations that exist independently of law.' This definition of marriage is functional: it defines the relationship according to what promotes familial and societal stability." *In Sickness and in Health*, *supra* note 53, at 2045. See also RICHARD D. MOHR, A MORE PERFECT UNION – WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS 40 (1994).

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See *supra* note 1. Some of the alleged benefits to society of heterosexual marriages include: "(1) safe sexual relations, (2) procreation and childrearing, (3) the status of women, (4) the stability, strength, and security of the family union, (5) the integrity of the basic unit of society, (6) civic virtue and public morality, (7) interjurisdictional comity, and (8) government efficiency." Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 754 (1998).

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"Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of the parties capable in law of making a contract is essential." N.Y. DOM. REL. LAW § 10 (McKinney 1999). There is no reference in the quoted section, nor in the sections defining void and voidable marriages, to the gender of the participants. This is only inferred by other references to "husband," "wife," "bride" and "groom" in the various sections detailing solemnization and the issuance of the marriage license.

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381 U.S. 479 (1965).

volved in our prior decisions.<sup>62</sup>

If marriage is an intimate association based on substantive due process, equal protection and First Amendment rights, denial of marriage to same-sex couples raises the level of review to a standard that few arguments can sustain.<sup>63</sup>

This is not to say that the state does not derive benefits from marriage. "Marriage advances the state's interest in developing intimate and stable relationships which in turn build 'social stability' and act as an emotional and economic support system as well as a forum for physical intimacy."<sup>64</sup>

For example, it can be argued that a primary purpose of marriage is to create children. Yet, no state requires a fertility test prior to marriage, and in fact, in our society it is not uncommon for elderly people, well past the age of childbearing, to create new marital units.<sup>65</sup> Further, many of the rights and obligations of marriage exist independently of the presence or absence of children.<sup>66</sup> What we are seeking then is to determine the right of government to make these choices and restrictions.<sup>67</sup> The challenge is not to prove to lawmakers the special benefits of marriage; the challenge is to convince lawmakers that nineteenth century models of marriage and family simply no longer serve a large percentage of the population, and that they must tailor benefits and privileges to twenty-first century concepts of the functional family. If we define, first family and then marriage, by their func-

<sup>62</sup> *Id.* at 486.

<sup>63</sup> See Christensen, *supra* note 45, at 1702-03.

<sup>64</sup> Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 928 (1995). See also Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 699 (1990).

<sup>65</sup>

The relationship between marriage and procreation, however, has grown tenuous, and therefore procreation does not provide a compelling state interest [for prohibiting same-sex marriage]. . . . [T]here are many heterosexual couples who cannot or choose not to bear children but still want to get married. States do not deny them the right to marry. The idea that the survival of the race is a compelling state interest that is in jeopardy is simply ludicrous. This country is no longer in danger of becoming underpopulated.

Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461, 468 (1995).

<sup>66</sup> See MOHR, *supra* note 58, at 39 ("While mutual material support might be viewed as guarding the interests of children, other marital rights, such as the immunity against compelled testimony from a spouse, can hardly be grounded in child-related purposes.").

<sup>67</sup>

Professor Wardle states that:

Heterosexual marriages have been given special legal preference because they make uniquely valuable contributions to the state, to society, and to individuals. Heterosexual marriages have been singled out from all kinds of adult relationships for preferred status because they are so important and valuable to society and to the stability and continuity of the state, and to achieving the purposes for which the state exists. The challenge is to prove it to lawmakers and to the public generally—to show that this is still true on the threshold of the twenty-first century.

Wardle, *supra* note 59, at 754. Professor Wardle fails to acknowledge, however, that this model of marriage is rapidly losing favor even among heterosexual couples who, increasingly, divorce at unprecedented rates or simply ignore the benefits of marriage and raise children without "benefit of clergy."

tions<sup>68</sup> and allow certain people into the definition, but exclude others who perform the same function, then we are creating separate classes and raising the question of constitutional discrimination.<sup>69</sup> Even more so must we consider this discrimination when it involves a child who has no control over his or her existence in a particular family unit, nor over whether the parents are married.<sup>70</sup>

Simply put, marriage is a fundamental right that confers on those in a legally recognized marriage certain benefits.<sup>71</sup> If the state is going to deny these benefits to any individual by denying the right to marry, a compelling reason must be established for doing so.<sup>72</sup> Of more concern is that the prohibition on same-sex marriage may actually run counter to compelling state interests such as public health, family preservation and family stability.<sup>73</sup> Professor Eskridge argues that the legal incidents, benefits and obligations of marriage involve rules protecting privacy of the relationship, allowing a single economic unit and creating obligations of support and fidelity, all of which will benefit same-sex couples and their children as well as heterosexual couples.<sup>74</sup>

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Using a functional approach to defining marriage and family is consistent with the policy of encouraging the stabilizing of social values that marriage and family serve. While the current 'bright-line' rule which uses marriage or blood relationship as its benchmark has the advantage of clarity in its application, the ease with which persons of opposite sexes can marry and subsequently divorce in most jurisdictions, adds to the conclusion that mere participation in a formal marriage ceremony does not necessarily indicate commitment to traditional family values. Neither permanence, procreation, economic interdependence nor even sexual exclusivity is currently required for a valid marriage. Indeed, marriage partners could reside separate and apart from one another without sharing any aspects of their lives and still reap all the legal benefits of marriage unless their coupling could be deemed a sham. Defining a family as a community of persons performing the functions of a family would seem to do more to promote the underlying values on which the policy favoring marriage is based. Indeed, an obvious difficulty with the concept of defining family by its functions is the dilemma of imposing higher standards on non-marriage-based families than those imposed on married couples.

Treuthart, *supra* note 46, at 97-98.

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The issue is also raised that the failure of the state to sanction certain types of marriages causes those individuals adversely affected to view the state as indifferent or actively hostile to their happiness; consequently they do not experience the state as essential to the possibility of their individual existence and happiness. This causes a lessening of loyalty to the state, or internalization of this hostility as self-hatred. See Strassberg, *supra* note 4, at 1619-20.

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See Ettelbrick, *supra* note 47, at 139.

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A 1997 compilation by the United States General Accounting Office identified at least 1,049 federal laws classified with marital status as a factor and, presumably, denied to same-sex couples as a result of the Defense of Marriage Act. See 1997 WL 67783 (F.D.C.H.). For a listing of specific rights and responsibilities of marriage in New York, see *Same-Sex Marriage in New York*, 52 REC. OF ASSOC. OF BAR OF CITY OF N.Y. 343 (April 1997). For a similar listing in the District of Columbia, see ESKRIDGE, *supra* note 4, at 66. Both lists, while sweeping and comprehensive, specifically detail the marital benefits of being a "spouse"; regrettably, neither extends the benefits analysis to being a "parent" or "child."

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See Jax, *supra* note 65, at 463-64.

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See *id.* at 471; see also *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (where a special tax benefit was granted to intra-family property transfers).

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See ESKRIDGE, *supra* note 4, at 116-17.

## III. THE CHILD IN A SAME-SEX ADULT HOUSEHOLD

A. *How a Child Becomes a Member of a Same-Sex Family*

Although there can be numerous ways for a child to become part of a family involving same-sex adult partners, three primary methods will be discussed. The first method, perhaps, seems the most obvious: the child is the biological child of one of the adults, who is not presently involved in an intimate relationship and cohabiting with the child's other parent. This means, technically, that the child's parent is free to legally marry his or her partner. The gender status of the adult is relatively unimportant in this scenario because of the overwhelming numbers of children who are the product of divorce or of parents who have never married. Of course, many of these adults and children wind up becoming stepparent and stepchild. It is no different in same-sex adult couples, because one or both of the partners may have had a child from a previous marriage or heterosexual relationship and may now wish to marry another adult, albeit of the same gender. At this point this child is placed in the same situation as would be a child of opposite-gender adults.

The second method in which a child may be the product of a same-sex adult union is by adoption. While many states prohibit the practice of same-sex couples adopting minor children, some allow it. Where adoption is permitted, the anomaly is created that, while the child may be the legal child of both adults, these adults may not legally marry and receive marital benefits for their family unit.

Included in contemporary non-traditional families are same-sex couples in long-term relationships where one partner serves as the second parent to the other partner's biological child without benefit of adoption. These couples often embrace the same traditional concept of family values as heterosexual couples, such as providing support, loyalty, welfare, love and affection.<sup>75</sup> Even though marriage between same-sex couples is not recognized in this country, the non-biological parent may in fact serve as the psychological parent to the child. This parent in fact, however, is not afforded the legal benefits of the marital status and is not recognized as a legal parent of the child.

Same-sex couples are pursuing legal recognition of the relationship between the second parent and the child in order to provide emotional and legal security, without terminating the biological parent's legal rights through second-parent adoptions.<sup>76</sup> Courts are being called upon to reexamine the role of biological ties and other legal relationships in the family against the backdrop of new technologies and changing lifestyles.<sup>77</sup> Some courts have accepted, and some have resisted, the changing definition of "family" in contemporary society, reflecting the tension

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<sup>75</sup> See Sheryl L. Sultan, *The Right of Homosexuals to Adopt: Changing Legal Interpretations of "Parent" and "Family,"* 10 J. SUFFOLK ACAD. L. 45, 46 (1995).

<sup>76</sup> See Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective,* 2 DUKE J. GENDER L. & POL'Y 191, 195 (1995).

<sup>77</sup> See Stewart G. Pollack, *The Art of Judging,* 71 N.Y.U. L. REV. 591, 609 (1996).

between notions of traditional family and a more functional definition which recognizes the changing social permutation and the changing lifestyles of many Americans.<sup>78</sup>

Because adoption proceedings are often sealed, it is difficult to determine how often these second-parent adoptions occur. It is highly likely that second-parent adoptions have occurred quietly in many states, with little notice or record.<sup>79</sup> When decisions are made at the trial court level, these cases are unreported and often do not have precedential value; therefore, within a state, decisions can vary from court to court. Couples often must resort to forum shopping, hoping to be placed on the calendar of a sympathetic judge.<sup>80</sup>

In some states there have been positive advances for same-sex couples. The highest courts of Vermont,<sup>81</sup> Massachusetts<sup>82</sup> and New York<sup>83</sup> have allowed

<sup>78</sup> See *id.* at 608.

<sup>79</sup> See Lambda Legal Defense and Education Fund, Inc., *Adoption by Lesbians and Gay Men, An Overview of the Law in the 50 States* (visited Mar. 9, 1999) <<http://www.lamdalegal.org>> at 3 n.4 (copyright 1997).

<sup>80</sup> See *id.* at 3.

<sup>81</sup> Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). The court stated: [O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are de facto parents may be awarded custody or visitation or be reached for support.

*Id.* at 1276.

<sup>82</sup> *In re Tammy*, 619 N.E.2d 315 (Mass. 1993). The Supreme Judicial Court noted that adoption into "non-standard" families was neither recent nor uncommon and the legislature's permitting adoption by unmarried persons clearly sanctioned and acknowledged these special types of families. See *id.* at 319 n.4.

<sup>83</sup> *In re Jacob* and *In re Dana*, 660 N.E.2d 397, (N.Y. 1995). In this case, the Court of Appeals utilized the same rationale to approve two adoptions: one by a lesbian couple and one by an unmarried heterosexual couple.

[I]n strictly construing the adoption statute, our primary loyalty must be to the statute's legislative purpose – the child's best interest. . . .

This policy would certainly be advanced in situations like those presented here by allowing the two adults who actually function as a child's parents to become the child's legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy (see *In re Tammy*) and eligibility for coverage under both parents' health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child's economic support.

Even more important, however, is the emotional security of knowing that in the event of a biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the coparents separate. Indeed, viewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with



same-sex people to adopt their partners' children. Mid-level courts in the District of Columbia,<sup>84</sup> New Jersey<sup>85</sup> and Illinois<sup>86</sup> have also allowed same-sex, second-parent adoptions, and these cases have not been appealed, setting at least some precedent. Additionally, New Jersey has recently allowed two men to jointly adopt their foster child.<sup>87</sup>

The highest courts of Connecticut<sup>88</sup> and Wisconsin,<sup>89</sup> however, have denied same-sex, second-parent adoptions, as have mid-level courts in Colorado<sup>90</sup> and Ohio.<sup>91</sup> In addition, while the legislature in Florida expressly prohibits adoption by homosexuals,<sup>92</sup> New Hampshire recently repealed a similar statutory ban.<sup>93</sup> However, state agencies have recently enacted regulations in Utah which ban gays from

both parent figures and avoids [a] disruptive visitation battle.

*Id.* at 399 (citation omitted).

<sup>84</sup> See *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995). The case analysis focused primarily on adoption by unmarried couples rather than same-sex couples.

<sup>85</sup> See *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

<sup>86</sup> See *In re K.M. and D.M. to Adopt Olivia*, 653 N.E.2d 888 (Ill. App. Ct. 1996). Again, as in the previous cases, the court engaged in an exercise of statutory construction to reach the conclusion that the adoptions in question were not prohibited by statute and promoted the general purpose of the legislation.

<sup>87</sup> See Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 LAW & SEX 55, 67-68 (1997). Two men sought permission to adopt a foster child but were denied by the New Jersey Division of Youth and Family Services. The New Jersey Superior Court, however, allowed the men to jointly adopt based on the state's best interest of the child standard. The men also brought a class action suit against the state, which then changed its policy to utilize the same adoption standards for unmarried and married couples. See also Judith Havemann, *Gay Couple in N.J. Win Adoption Rights*, HOUSTON CHRONICLE, Dec. 18, 1997, at 2. The practical effects extend only to children in the custody of the state but places unmarried and married couples on the same footing and allows both adults to adopt jointly rather than the two-step process where one person adopts and then the second partner petitions for adoption rights.

<sup>88</sup> See *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

<sup>89</sup> See *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994). Unlike the Connecticut case in the previous footnote, the Wisconsin court, after determining that statutory construction did not permit the adoption, addressed the constitutionality of such denial. The superficial review continually cites to the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>90</sup> See *In re T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996). The court engaged in a constitutional discussion but, in a tortured analysis, applied rational basis rather than intermediate or strict scrutiny. The flaw is obvious in a review from the child's perspective.

<sup>91</sup> See *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

Although we are mindful of the dilemma facing the parties and are sympathetic to their plight, it is not within the constitutional scope of judicial power to change the face and effect of the plain meaning of R.C. 3107.15. This case is not about alternative lifestyles but statutory construction. When we balance the spirit and motivation of the adoption laws (as appellant argues) against the plain meaning of the statutory language created by the state legislature, we are not empowered to find the "spirit" includes the issue presented sub judice.

*Id.* at 1073.

<sup>92</sup> FLA. STAT. ANN. §63.042(3) (West 1997). No person otherwise eligible to adopt under the statute may adopt if he or she is a homosexual.

<sup>93</sup> See H.B. 90, 156th Leg., 1st Sess. (N.H. 1999) (enacted).

adopting foster children,<sup>94</sup> and a recent Arkansas agency enactment bans gays from becoming foster parents.<sup>95</sup>

Adoption is a creature of statute,<sup>96</sup> with rules and regulations that vary from state to state.<sup>97</sup> The statutory policy underlying adoption statutes is to protect the best interest of the child, which is the paramount consideration.<sup>98</sup> However, the courts' broad discretion<sup>99</sup> in construing best interests and in deciding adoption petitions<sup>100</sup> often lacks definition.<sup>101</sup> Critical to a determination of the best interest of the child is stability, continuity in the life of the child and a loving relationship.<sup>102</sup>

Adoption statutes are often read liberally in order to protect the best interests of the child,<sup>103</sup> and this is particularly so where courts have sanctioned same-sex couple adoptions.

There are numerous legal, economic and psychological benefits that serve the child's best interests by having two legally recognized parents. The second parent would have the legal responsibility to provide clothing, food, shelter, educa-

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<sup>94</sup> See Holly Mullen, *Utah Bans Some Adoptions by Gay Couples; Law Covers State-Fostered Children Only; Unmarried Straight Couples Affected Too; Adoption Law Bars Some Placements with Gay Couples*, SALT LAKE TRIBUNE, Jan. 23, 1999, at A1. The board of trustees of the State Division of Child and Family Services voted to ban unmarried heterosexual couples and gay and lesbian partners from adopting state-fostered children. The policy will not affect single parents or private adoptions.

<sup>95</sup> See *Ban on Gay Foster Parents Formally Approved*, AP Newswire, March 25, 1999 (reporting on the enactment by the Arkansas Child Welfare Agency Review Board of a measure banning homosexual foster parents).

<sup>96</sup> Adoption may well be a creature of statute, but the question can be raised whether it has become part of our common law—a tradition so deeply rooted that it is entitled to historical respect or sanctity. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (language used by Justice Scalia).

<sup>97</sup> See Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 64 (1996).

<sup>98</sup> See *In re M.M.D. & B.H.M.*, 662 A.2d 837, 837 (D.C. 1995).

<sup>99</sup> The question of broad judicial discretion is dangerous, however, because gay and lesbian parents are frequently held to a higher standard than heterosexual parents. Sexual orientation is sometimes considered a disqualifying factor for parenting, even though empirical data suggests the falsity of such assumptions. See Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENVER U. L. REV. 75, 94 (1996).

<sup>100</sup> See Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 236 (1995).

<sup>101</sup> See Sultan, *supra* note 75, at 61-62.

<sup>102</sup> See Mitchell Waldman, *Nature and Substance of "Best Interests" Analysis; Factors Considered*, 2 AM. JUR. 2d *Adoptions* §137 (1994). Factors in a best interests analysis vary from case to case and, absent an extreme adverse factor, no single factor is absolute. Some of the factors which have been considered include desires of the child, present or future effects of adoption, emotional and physical needs of the child, the child's emotional ties and interaction with prospective parent, parental abilities of individuals seeking custody, plans for the child, living arrangements, stability of environment, and adjustment of the child to the living situation.

<sup>103</sup> Professor Nayo argues that the right to be adopted deserves recognition as an individual liberty interest of the unadopted child. While she does not distinguish between primary parent and stepparent (second-parent) adoptions, if such a liberty interest exists on behalf of the child, it may provide a benefit to the adoptive parent otherwise denied by statute. See Nayo, *supra* note 35, at 53; see also *infra* Part III.B.

tion and medical care, as well as child support, should the couple separate. If only one parent has legal rights to the child and that parent dies, the child does not have the legal guarantee, and is denied the emotional security, of knowing he or she could continue to live with the surviving parent.<sup>104</sup> If the couple should separate, the child may tragically be denied the right to visitation by his or her non-legal parent.<sup>105</sup>

In addition, if both parents are recognized as legal parent, the child could inherit through intestate succession, be eligible for coverage under health insurance policies and receive Social Security benefits if either parent were deceased or disabled. Hospitals, schools and other institutions would be enabled to allow both parents to make decisions regarding the child.<sup>106</sup>

A child does not comprehend the importance of the legal and economic benefits of adoption. What matters is the strength of the emotional relationship maintained by the child with the parents. A young child does not know about blood ties with a parent; the child is not concerned with the physical realities of conception or whether the relationship develops because of biology or adoption. What is important to the child is the day-to-day relationship with the parent who loves, nurtures and shares the child's companionship, and in effect, becomes the "psychological parent."<sup>107</sup>

It is of the utmost importance for the physical and psychological well-being and development of the child to have an adult who wants and loves the child. If a child is born to parents who do not want the child, the chances for healthy growth and development are greatly reduced.<sup>108</sup> A reading of the relevant court cases has consistently shown that same-sex couples who want legal recognition of their families have planned for and wanted their children and have sought legal recognition as being in the children's best interest. Children deserve no less than that courts be willing to acknowledge these families.<sup>109</sup>

Foster parenting is another way the law creates a legal relationship where no biological tie exists. There are differing views as to whether lesbian and gay individuals should be permitted to be foster parents. For example, Nancy D. Polikoff, a professor of law at American University's Washington College of Law,

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<sup>104</sup> See Bryant, *supra* note 100, at 239-40.

<sup>105</sup> See Nancy S. v. Michele G., 228 Cal. App. 3d 831 (1991), where two lesbians who were raising one of their children separated, and the biological mother sought sole custody. The partner contended she was a psychological parent but the court denied custody or visitation as she was not a legal parent. The court acknowledged the resulting situation was tragic and the child would suffer. See also Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

<sup>106</sup> See Bryant, *supra* note 100, at 240-41.

<sup>107</sup> JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 13, 16-17 (1979).

<sup>108</sup> See *id.* at 20.

<sup>109</sup> The role of the courts in providing for the best interest of the children is most likely the explanation for the relative success that partners have enjoyed in obtaining legal ties to their children through adoption. See Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 177-78 (1995).

believes that gay and lesbian foster parents are a necessity and that there are not enough of them.<sup>110</sup> On the other hand, Joseph Evall, an attorney practicing law in New York City, does not believe that lesbian and/or gay foster parents are necessary.<sup>111</sup>

It also should be noted that no state presently has a statute banning the licensing of gay foster parents, New Hampshire having recently repealed its statutory ban.<sup>112</sup>

Although gay foster parents are becoming more and more prevalent, some members of society still refuse to accept the fact that homosexual individuals, including children, have a right to a family. There are two main advantages to allowing homosexuals to be licensed as foster parents. First, a homosexual is more adept at teaching a homosexual child how to cope with the ridicule and alienation that such a homosexual child will probably face. Although heterosexual parents may be able to teach a homosexual child the requisite coping skills, these parents never experienced the feelings that the children have to deal with and, thus, cannot truly empathize. Second, by prohibiting any individual from becoming a foster parent, society is clearly depriving some children of a family. Where people are willing to take on the difficult job of caring for children as their own, society should not discourage such beneficence based on the foster parent candidate's sexual orientation alone. Homosexuality does not equal bad parenting.

The third method in which a child may become the child of a same-sex union is a deliberate attempt by the partners to create this relationship. This may be the result of a surrogate parenting contract or similar relationship, whereby one of the biological parents is essentially used as a fertility tool and then withdraws from the life of the child he or she creates in favor of the adult partner of the other biological parent.

Lesbians have been the most prolific participants in the same-sex parenting baby boom.<sup>113</sup> They typically make use of artificial insemination with the aid of a sperm donor who is either completely anonymous to them or someone whom they know but who will not be a part of the planned family circle.<sup>114</sup> When a child is born as a result of artificial insemination, there is a major obstacle that stands in the way of that child becoming a member of a societally accepted family: only the biological mother is recognized as having a legal relationship with the child. Even though both partners collaboratively decided to have a child, decided who would actually give birth to the child, and share completely in the upbringing of the child, financially and emotionally, in the eyes of the law the non-biological parent is deemed a "legal stranger" to the child. Because the law does not recognize the

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<sup>110</sup> See Nancy D. Polikoff, *Resisting "Don't Ask, Don't Tell" in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, 48 HASTINGS L.J. 1183 (1997).

<sup>111</sup> See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347 (1991).

<sup>112</sup> See H.B. 90, 156th Leg., 1st Sess. (N.H. 1999) (enacted).

<sup>113</sup> See Christensen, *supra* note 45, at 1730.

<sup>114</sup> See *id.* at 1758.

status of the non-biological parent, the child may be deprived of rights that are usually incident to the parental relationship, such as inheritance rights. If the biological mother should die or become incapacitated due to a debilitating illness, the child's relationship with the non-biological parent or parents, who may be the only other parent(s) the child has ever known, may be severed at the discretion of an unsympathetic judge.<sup>115</sup> The narrow definition of family that refuses to legally recognize the emotional bond between the child and non-biological parent gives no protection to the relationship.<sup>116</sup>

By contrast, where a husband's wife is artificially inseminated by an anonymous sperm donor, the husband, who has no biological connection to the resulting child, typically has immediate parental rights and obligations. In over thirty states, the husband will acquire these parental rights automatically by state statute. Even if there is no statute on the books, the same result will most probably be reached. This is because those states without such statutes rely on the common law presumption of legitimacy, that a husband is deemed to be the father of any child born during a marriage. The non-biological lesbian parent does not have the same protected status, through statute or common law. The only way she could become a legally recognized parent is through the process of adoption.<sup>117</sup>

If gay male couples want to have a biological connection with the child they wish to have, they can enter into a surrogacy arrangement by which a woman agrees to conceive a child with donated sperm provided by one of the partners and then give the child up when it is born to be raised by the donor and his partner. Surrogate contracts are banned in many jurisdictions; however, in a growing number of states, surrogacy arrangements are either explicitly authorized by statute or otherwise legally permitted. The problem is that the statutes are crafted to aid married couples rather than same-sex couples.<sup>118</sup>

The Uniform Status of Children of Assisted Conception Act avoids the outright endorsement of surrogacy contracts, but it does propose a mechanism for legally validating surrogacy arrangements.<sup>119</sup> For qualifying couples, the Act provides that "upon birth of a child to the surrogate, the intended parents are the parents of the child," and the surrogate has no parental role.<sup>120</sup> By definition, "intended parents" are limited to "a man and woman, married to each other, who enter into an

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<sup>115</sup> See *id.* at 1759.

<sup>116</sup> See Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Non-traditional Families*, 21 HAMLINE L. REV. 127, 131 (1997); see also *Holtzman v. Knott*, 533 N.W.2d 49 (Wis. 1995), *In re Alison D.*, 572 N.E.2d 27 (N.Y. 1991); *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991).

<sup>117</sup> See Christensen, *supra* note 45, at 1760.

<sup>118</sup> See *id.* at 1762.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 8(a)(1) (West Supp. 1997)). Of those states that have adopted statutes based on the Uniform Status of Children of Assisted Conception Act, only Arkansas extends the right to contract with a surrogate to an unmarried man. See *id.* (citation omitted).

agreement . . . that they will be the parents of a child born to a surrogate through assisted conception.”<sup>121</sup> Since the term “intended parents” fails to include same-sex couples, the best that can be hoped for in the present state of the law is that the partner who donated the sperm will have parental status and that the rights of the surrogate mother will be relinquished. The partner who is not recognized as having parental status under the law, in order to become a legally recognized parent, will have to begin adoption proceedings, which creates problems for the biological parent.<sup>122</sup>

What must be noted about all of the preceding scenarios is that the child has no voice in the establishment of the parent-child relationship or whether the parents can marry; the reality of the child’s life, at least to the child, does not depend on legal rules or definitions.<sup>123</sup> The child is simply a product of the union – a product which may or may not have rights similar to those of other children whose parents happen to be legally married to each other or at least have the right to be so. The child plays no part in the creation of the family unit; the child merely participates in, and benefits from, the relationships that arise out of the family.<sup>124</sup>

#### B. *A Child’s Right to Be Part of a Family*

The bulk of jurisprudence concerning family relationships is adult-centered<sup>125</sup> – that is, focused on the legal rights of the adult parent (biological, legal or de facto) to maintain a family relationship and to regulate the conduct and well-being of the child.<sup>126</sup> Most of the cases are viewed from the perspective of parent

<sup>121</sup> See Christensen, *supra* note 45, at 1762 (citing . UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3)).

<sup>122</sup> See *id.* at 1763.

<sup>123</sup> See 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 GEO. L.J. 459, 473 (1990).

<sup>124</sup> See Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 392 (1994).

<sup>125</sup> That is not to say that the child’s needs are not relevant in such an adult-centered concept. In her article, Nancy D. Polikoff argues for redefining parenthood to include any adult who serves in a “functional parental relationship” with a child, although she is careful to include in her requirement that the relationship by the non-blood or non-legal adult be created by a legally recognized parent. See Polikoff, *supra* note 123, at 464. One of the points of Professor Polikoff’s theory is that children will ultimately benefit, because expanding the definition of parent will allow courts to be less concerned with legal title and more concerned with pure best interests in determining custody, visitation and guardianship.

In resolving disputes about the custody of children, the court system should recognize the reality of children’s lives, however unusual or complex. Courts should design rules to serve children’s best interests. By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form.  
*Id.* at 469.

<sup>126</sup> Parental rights are closely linked with an historic legacy of viewing the child as the family’s private property, which, like other economic rights, is secured from state expropriation, confiscation, or regulatory taking. See Barbara Bennett Woodhouse, *Out of Children’s Needs, Children’s Rights: The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 325 n.10 (1994) [hereinafter Woodhouse, *Out of Children’s Needs*].

against state and, with limited exceptions, the parent's right to intra-familial privacy is preserved.<sup>127</sup> A new approach is being developed, a child-centered approach, which focuses on the independent rights and needs of the child to develop a liberty interest for the child in establishing or maintaining a family relationship with a parent or one *in loco parentis*. The important work of Gilbert Holmes and Barbara Bennett Woodhouse lead the way in this new analysis of a child's constitutional interests.<sup>128</sup>

All of the aforementioned cases involving family integrity<sup>129</sup> affirmed the integrity of the unitary family.<sup>130</sup> They were brought by the parents against a governmental entity which threatened to take control of decisions that belonged within the family.<sup>131</sup> With the exception of Justice Douglas's dissent in *Yoder*, there is precious little discussion of the child's independent interest as a member of the family.<sup>132</sup> The discourse involving family issues of parent against child deals mostly with aberrant or criminal behavior – situations involving abuse or abandonment.<sup>133</sup>

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Entrenched attitudes about child-rearing present a great obstacle to moving the legal system toward a child-centered jurisprudence and away from the current, adult-centered jurisprudence. See James G. Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053, 1055 (1999).

<sup>127</sup> See generally *Troxel v. Granville*, 120 S. Ct. 2054 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>128</sup> See Holmes, *supra* note 124; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); see also Woodhouse, *Out of Children's Needs*, *supra* note 126. I am especially grateful to Professor Holmes for suggestions he made in the development of this paper.

<sup>129</sup> See cases cited *supra* note 127.

Although [these] cases arose from dissimilar controversies, they uniformly failed to recognize that children have an independent right to maintain or sever family relationships. The courts in each of these cases achieved results arguably consistent with the 'best interests of the child' doctrine, but the individual decisions, in reality, were inconsistent with that doctrine because each focused on the adults'—rather than the child's—status and rights in the relationship. As a result, the courts in these cases in many respects victimized, rather than protected, the children by denying them a voice in resolving questions of and access to relationships with important parent figures.

Holmes, *supra* note 124, at 380.

<sup>130</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). Justice Scalia, writing for a plurality, stated: "[*Stanley v. Illinois*, *Quilloin v. Walcott*, *Caban v. Mohammed* and *Lehr v. Robertson*] rest . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* (citations and footnote omitted).

<sup>131</sup> See cases cited *supra* note 127.

<sup>132</sup> See *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting in part). I am reminded of a case I once tried, an educational neglect proceeding brought against the father because he refused to allow his 17-year-old daughter to participate in physical education, jeopardizing her ability to receive a high school diploma. The objection was for religious reasons. The child herself testified as to the sincerity of her beliefs and the court dismissed the petition, finding that the child held her religious beliefs independently of her father, and it was this distinction (among others) which prevented her from participating in physical education. See *In re Hickey*, 477 N.Y.S.2d 258 (N.Y. Fam. Ct. 1984).

<sup>133</sup> See Dwyer, *supra* note 126, at 1056 ("The rights and preferences of parents may coincide to some

When the Supreme Court considered the issue of whether parents should have the authority to make certain decisions regarding the mental hospitalization of their child in *Parham v. J.R.*,<sup>134</sup> the Court stated:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children . . . .

. . . .

In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.<sup>135</sup>

In the present context, however, all these cases are of limited utility because they are centered on the rights, needs and responsibilities of the adult.<sup>136</sup> Even where the cases acknowledge a child's claim, the child's rights are subordinated to the adult's rights.<sup>137</sup> Viewing these cases from the parent's perspective creates an all-or-nothing resolution of family conflicts.<sup>138</sup> To achieve a constitutional analysis from the perspective of the child, two additional questions must be asked beyond the basic issue of the right to form a family relatively free from gov-

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degree with the interests of children, but rarely do so perfectly and often do so very little.").

<sup>134</sup> 442 U.S. 584 (1979).

<sup>135</sup> *Id.* at 602, 604.

<sup>136</sup> "The Court has in fact said that the interest in family life is one that runs between parent and child, for the benefit of the child, and with responsibilities running from parent to child concomitant with the parent's rights." Nayo, *supra* note 35, at 87. *See also* *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978). If the interest runs "between" parent and child, then the parent cannot be said to have an exclusive hold on the constitutional liberty interest, but the child should have a separate and independent share of it for constitutional adjudicatory purposes.

<sup>137</sup> *See* *Holmes, supra* note 124, at 381. He argues that the Supreme Court has already expanded the constitutional review of family relationships beyond solely a parent-centered model. *See Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977); *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 843 (1977). Even in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), while recognizing the security of children as a purpose of the marriage statutes, the court still decided the issue of same-sex marriage based on the rights of the adults. *See infra* Part V.

<sup>138</sup> This is especially inadequate when the dispute is between a blood or legal relative on the one hand and a *de facto*, but not legal, parent on the other. *See Holmes, supra* note 124, at 362.



ernmental control.

First, we must examine whether a child has any rights or liberty interests of his or her own<sup>139</sup> – whether a child can exist as an independent legal entity separate and apart from the parent.

The recognition of children's liberty interest embodies a jurisprudence and social policy that identifies children as persons who need protection. The liberty interest of children rests philosophically on the need to facilitate the transition of developing citizens from childhood to adulthood and doctrinally on the recognition of children as persons under the Constitution.<sup>140</sup>

If the child possesses separate and definable due process rights,<sup>141</sup> then the child may have standing to challenge a governmental determination, such as the denial of a marriage license to the parents. Where an equal protection claim is asserted, a minor may very well have such standing.<sup>142</sup>

The Court took a major step toward recognizing general fundamental rights for children in 1967 when it established that a minor possessed procedural due process rights in a delinquency proceeding.<sup>143</sup> In *In re Gault*, the Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>144</sup>

In a non-criminal context, the Court stated in *Tinker v. Des Moines Independent Community School District* that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental

<sup>139</sup> "An analysis of the child's liberty interest must extend to children the privileges and immunities accorded 'persons' under the Constitution or must provide an acceptable rationale for excluding children from his constitutional protection." *Id.* at 383 n.155.

<sup>140</sup> *Id.* at 384 n.157.

<sup>141</sup> See *id.* at 396-97. "The Supreme Court has held unconstitutional state statutory schemes that do not accord standing to individuals who have substantive due process rights in family relationships." *Id.* at 396. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 393-94 (1979); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). If the Supreme Court were to recognize a child's liberty interest in such a relationship, it would also have to recognize the child's substantive due process rights and standing in a family-standing dispute. See Holmes, *supra* note 124, at 396-97.

One case which supposedly stands for the proposition that the child has standing to terminate one family relationship and establish another is *Gregory K., In re Kingsley*, No. JU90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part and rev'd in part sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993), where the child allegedly received permission to "divorce" his mother. I think the case is nothing more than a trumped-up termination of parental rights case and, on appeal, the boy's standing was challenged, although the termination and subsequent adoption were upheld.

<sup>142</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 193-97 (1976). The beer vendor in *Craig* was determined to have *jus tertii* standing to assert an equal protection claim on behalf of males aged 18-20 years old in challenging the constitutionality of the Oklahoma statute prohibiting the sale of 3.2 percent beer to males 18 to 20 years of age while placing no such restriction on the sale of beer to females of the same age. See *id.*

<sup>143</sup> See *In re Gault*, 387 U.S. 1 (1967).

<sup>144</sup> *Id.* at 13.

rights which the State must respect, just as they themselves must respect their obligations to the State.”<sup>145</sup>

Cases such as *Gault* and *Tinker* establish, at a minimum, that the child can possess constitutional rights personal to the individual. Where the Court recognizes the constitutional “personhood” of a child, it generally requires the states to go to fairly significant lengths before they can infringe on the rights of these children.<sup>146</sup>

The second inquiry becomes more specific—the child’s right to family benefits independent of the parents.<sup>147</sup> If the child has an independent constitutional right to benefits flowing from the child’s status as a family member, and these benefits are denied simply because the parents cannot marry, a status over which the child has no control, then a constitutional right may flow from the child to the parent and compel the conclusion that the parents must possess the right to marry to preserve the rights of the child.

For the child, even more so than the adult, it is necessary to separate sexuality from the relationship between the parent and child.<sup>148</sup> When conceptualized in this way, the right to the relationship is viewed within the Fourteenth Amendment’s concept of “ordered liberty.”<sup>149</sup> A child-centered analysis reverses the emphasis, but also eliminates some of the arguments leveled against the parents which have been used to sustain the denial of same-sex couples to marry.<sup>150</sup>

Children draw their claims for family membership not from a sense of individual freedom, but from a status of dependency and the need for functional parenting.<sup>151</sup> We must consider the child’s perspective in redefining the term “family” to promote values of nurture, commitment and interdependence.<sup>152</sup> If the child is treated as an actor in a family relationship, rather than an object, the law can give primacy to the child’s needs and reconsider the rights of the surrounding family

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<sup>145</sup> 393 U.S. 503, 511 (1969).

<sup>146</sup> See Nayo, *supra* note 35, at 52-53.

<sup>147</sup> The Ninth Circuit found that a child had a cognizable liberty interest and reasoned that a child’s loss of support, society and companionship of a parent presented a stronger case for recovery (where the father had been killed by police officers) than that of a parent seeking recovery for loss of a child. See *Smith v. City of Fontana*, 818 F.2d 1411, 1418-19 (9th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987).

<sup>148</sup> In fact, legal strides are being made in recognizing nontraditional heterosexual families and the needs of the children of these non-married parents. Rules developed to serve the needs of these families should equally apply to same-sex families. See Polikoff, *supra* note 123, at 543. Polikoff discusses three theories of establishing parenthood used by some courts to grant rights to a non-legal parent: equitable parenthood, child-parent relationship and nonexclusive parenthood. See *id.* 483-91.

<sup>149</sup> See Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 135 (1996) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>150</sup> Such arguments include immorality and personal choice. Where one can argue that an adult at least has some control and some choice over his or her own lifestyle, a child is an innocent bystander and has no control over the composition of the family unit or its other members.

<sup>151</sup> See Woodhouse, *Out of Children’s Needs*, *supra* note 126, at 340.

<sup>152</sup> See *id.*

members through the needs of the child.<sup>153</sup>

#### IV. A CHILD'S BENEFIT IN BEING A CHILD OF A MARRIED COUPLE

##### A. *Tax Benefits*

Federal tax law does not define marital status; instead it defers to state law determinations of marital status.<sup>154</sup> Marital status has a crucial impact upon an individual's federal income tax liability.<sup>155</sup> "Filing status, personal exemptions, exclusions, deductions, and tax credits are affected by whether a taxpayer is single or married."<sup>156</sup> Married couples enjoy many federal tax benefits to which same-sex couples are not entitled. There are some benefits to single people because the single economic unit of a married couple tends to push the couple into a higher tax bracket than two single individuals with the same total income.<sup>157</sup> This marriage "penalty," however, could be eliminated by a modest restructuring of the tax code.<sup>158</sup> Congress's preferential treatment of married couples violates the tax code's goal of horizontal equity; i.e., similarly situated taxpayers are treated disparately instead of at a similar rate as the goal mandates.<sup>159</sup> "[S]ince most married couples operate as a single economic unit, the income tax treats spouses as a single taxpaying unit whose tax liability is dependent upon its total taxable income."<sup>160</sup>

Looking at both same-sex and heterosexual couples, any reasonable person can come to the conclusion that many of the characteristics are the same for both. Their economic arrangements are the same because they live together and share various finances as well as resources. In essence, the same-sex couples act as married heterosexual couples, but their status is not recognized by the federal government. "As compared to same-sex couples, married couples are given preferential treatment by the government, employers, insurers, and private organizations."<sup>161</sup>

It has been estimated that almost two hundred sections of the Tax Code are

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<sup>153</sup> See *id.*

<sup>154</sup> See Daniel J. Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C. DAVIS L. REV. 257, 260 (1983).

<sup>155</sup> See *id.* at 257.

<sup>156</sup> *Id.*

<sup>157</sup> See Jonathan Barry Forman, *What Can Be Done About Marriage Penalties*, 30 FAM. L.Q. 1, 5-10 (1996).

<sup>158</sup> "Given the growing emphasis on family values, Congress just might enact such a marriage-rewarding system, notwithstanding the objections of those unmarried individuals who would concomitantly see an increase in their single penalties." *Id.* at 10.

<sup>159</sup> See Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 45 (1998).

<sup>160</sup> Lathrope, *supra* note 154, at 257-58.

<sup>161</sup> Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 360 (1995).

affected by marital status.<sup>162</sup> The first benefit that married couples are entitled to, but same-sex couples are not, is the right to file joint tax returns.<sup>163</sup> Married taxpayers are generally permitted to file joint returns in which they aggregate their income, gains, losses, deductions and credits.<sup>164</sup> Although married couples may elect to file separately, the rate tables are structured so that separate filing almost always results in increased tax liability. The rates that are applied to married taxpayers filing separate returns are the same as the rates applied to married taxpayers filing jointly with exactly twice as much taxable income.<sup>165</sup> Joint filing allows a married couple to split, in effect, their total income and obtain the benefit of lower marginal tax rates.<sup>166</sup>

"The marital relationship confers upon heterosexual couples special legal and social advantages affecting their taxes, intestate succession, health care, insurance, organizational memberships, and their means of holding real estate."<sup>167</sup> Additional federal tax benefits are granted to couples that marry.<sup>168</sup> Such couples can "transfer wealth and property to each other during marriage completely free of federal income, gift or estate taxes."<sup>169</sup> Gifts can be excluded from gross income, and thus are excluded from taxable income.<sup>170</sup> Also, the Code provides a 100 percent marital deduction for lifetime gifts between spouses.<sup>171</sup>

Married couples do not incur income taxes when they take advantage of various benefits offered by their spouse's employer.<sup>172</sup> Such benefits include health insurance; however, in cases where same-sex couples also get health coverage, only married employees obtain the benefit of the tax exemption for the value of their partner's health coverage,<sup>173</sup> while the employee with a same-sex partner must report the value of the benefit to his or her partner as income and pay taxes on it.<sup>174</sup>

According to the Internal Revenue Code, if a married couple's taxable in-

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<sup>162</sup> See *supra* note 71.

<sup>163</sup> See I.R.C. § 6013(a) (1994 & Supp. II 1996). Tax status is determined at the close of the taxable year. See I.R.C. § 6013(d)(1)(A).

<sup>164</sup> See I.R.C. § 6013(a).

<sup>165</sup> See STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., 2D SESS., INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 8 (Comm. Print 1980).

<sup>166</sup> See *id.*

<sup>167</sup> Chase, *supra* note 161, at 361 (citation omitted).

<sup>168</sup> See Nixon, *supra* note 159, at 47.

<sup>169</sup> *Id.*

<sup>170</sup> See I.R.C. §§ 61, 63, 102(a) (1994).

<sup>171</sup> See I.R.C. § 2523(a) (1994 & Supp. III 1997).

<sup>172</sup> See I.R.C. § 102(c)(1) (1994); I.R.C. § 106 (1994, Supp. II 1996 & Supp. 1997).

<sup>173</sup> 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, 475 (1996).

<sup>174</sup> See *id.*

come<sup>175</sup> combined is \$60,000, then their taxes would be a flat rate of \$6,457.50<sup>176</sup> plus 28 percent of the excess over \$43,050.<sup>177</sup> This would bring the total to \$11,204 for tax year 1999. A same-sex couple, earning the same amount of money but deprived of the ability to legally marry, would have to file separate tax returns. If a same-sex couple with a child were to have one wage earner – that is, one person in the work force while the other person stayed home and cared for the child and the home – and the wage earner earned the same amount of money as the married couple, \$60,000, the same-sex couple would have to pay \$13,453 in taxes for the year.<sup>178</sup> The individual tax return filed by the person in the same-sex relationship, compared to the joint tax return of the married couple, depletes the family's disposable net income.

The difference in the tax amounts is \$2,249. This is considerably more than the married couple has to pay in taxes, and the additional income remains available for use by the family, benefiting the children. The same-sex couples, because they are unable to file a joint tax return, are paying money in taxes they could otherwise spend on their child.<sup>179</sup> As the chart below indicates, the married couple pays less than two individuals, and the availability of a child as an exemption reduces the tax considerably.

The legalization of same-sex marriages and the demise of the Defense of Marriage Act would allow the same-sex couple to file joint tax returns. The same-

<sup>175</sup> Taxable income is defined as the "gross income minus the deductions allowed." I.R.C. § 63(a) (1994). Gross income is defined as "all income from whatever source derived." I.R.C. § 61(a)(15) (1994).

<sup>176</sup> The figures in this paragraph are based on rates for the 1998 tax year.

<sup>177</sup> See I.R.C. § 1(a)(2) (1994 & Supp. IV 1998).

<sup>178</sup> See I.R.C. § 1(c) (1994 & Supp. IV 1998).

<sup>179</sup> The following chart shows the difference more graphically. It assumes a standard deduction and no extra exemptions (unless specified). It also assumes no adjustments to gross income to achieve adjusted gross income. The result is the federal tax based on 1998 tax tables:

Gross Income	Number of Children	Tax
-0-	-0-	-0-
-0-	-1-	-0-
10,000	-0-	461
10,000	-1-	(2271)*
20,000	-0-	1961
20,000	-1-	(174)*
30,000	-0-	3461
30,000	-1-	2356
40,000	-0-	5966
40,000	-1-	3856
50,000	-0-	8766
50,000	-1-	5932
60,000	-0-	11,566
60,000	-1-	8,732
60,000	married, no children	7802
60,000	married, one child	6646

\*Refund due to Earned Income Credit.

sex couple, similarly situated to the heterosexual married couple in terms of income and household composition, would then possess an equal amount of after-tax money to spend on the family.

The regulation of dependent exemptions is another aspect of the tax code that burdens the same-sex couple and hurts the child of that relationship.<sup>180</sup> According to the Internal Revenue Code, if, in a same-sex union, the wage earner is not the biological parent of a child who resides in the household, that wage earner cannot claim the child as a dependent and receive a deduction. Nowhere in the definition of "dependent" in the statute<sup>181</sup> would this type of situation enable the wage earning non-biological parent to fall into the category, which will enable him or her to deduct the dependent child.

Not allowing the parent to deduct the dependent on his or her tax return takes away valuable funds the family could use on the child. The deduction, according to the Code, enables the wage-earning parent to deduct money spent on the dependent from taxable income. If the money is deducted then the amount of income that can be taxed is decreased. The lesser the amount to be taxed, the more money there is for the family to spend. By not allowing the non-biological wage earner of a same-sex relationship to deduct the expenses of the dependent child, the government is depriving that family of valuable resources to provide the same amenities to the child of that relationship.

Another area of taxation that heterosexual married couples receive benefits from deals with the estate and gift tax. The taxes paid upon the death of a spouse include deductions for the surviving spouse. In computing the gross estate, the "value of any interest in property which passes . . . from the decedent to the surviving spouse is deducted from the value of the gross estate."<sup>182</sup> A survivor of a same-sex relationship is not eligible for this tax deduction. The taxes will have to be paid, and that in turn takes away financial resources the surviving parent would be able to spend on the child. The homosexual survivor is similarly situated with that of the heterosexual survivor, yet the gay/lesbian parent will have to pay more taxes and have less to spend on the child.

In addition to the surviving spouse deduction, Title 26 also has a deduction for a gift to a spouse.<sup>183</sup> As mentioned earlier, this only applies to the spouse of a heterosexual marriage. By not forcing the spouse of a marriage to pay tax on a gift, more money can be spent on the child of that marriage. The parent receiving the gift cannot only use the property on the child, but also the money saved on taxes can be spent on the child as well. The "spouse" of the same-sex relationship can give the other a gift, but they will have to pay taxes on the gift, again being denied

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<sup>180</sup> Phillip S. Horne, *Law & Sexuality: A Review of Lesbian and Gay Legal Issues – Challenging Public-and-Private-Sector Benefit Schemes Which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners*, 4 LAW & SEX. 35, 42 (1994).

<sup>181</sup> See I.R.C. § 152 (1994). The definition of dependent does, however, include stepchildren and stepparents and certain in-laws.

<sup>182</sup> I.R.C. § 2056 (1994 & Supp. III 1997).

<sup>183</sup> See I.R.C. § 2523 (1994 & Supp. IV 1998).

a benefit available only to legally married couples.

Same-sex couples use various means to "beat the system" and obtain some of the same privileges that are bestowed on married couples. "One of the more creative methods by which lesbian and gay couples have sought to obtain some of the benefits bestowed upon married couples is to have one partner adopt the other."<sup>184</sup> Adult adoption is the adoption of one adult by another, creating a relationship of parent and child, with the exception that the adopting partner has no legal duty to support the adopted partner. This creates a legal union between the two.

Same-sex couples can also open joint bank accounts because there are no tax ramifications. "Same-sex couples don't qualify for the tax treatment applicable to married couples upon their dissolution."<sup>185</sup> "Support payments between same-sex partners upon dissolution likely would not be income to the recipient partner or deductible to the payer."<sup>186</sup>

Furthermore, there are differences between the estate tax treatment of married couples and unmarried couples. There are special provisions for married couples such as "only one-half of property held in joint tenancy or tenancy by the entirety is included in the estate of a decedent spouse, while the amount included for a [same-sex decedent partner] is determined based upon contribution."<sup>187</sup>

An illustrative example is a situation where the spouse dies and leaves a \$1 million estate to his wife; his estate owes no taxes. But if a partner from a same-sex relationship dies leaving the same amount, then the living same-sex partner would only receive about half of the estate due to taxes owed on it.<sup>188</sup> Thus, a bequest to the other spouse upon death is not taxable under the federal estate laws.

#### B. *Immigration*

Although immigration into the United States is no longer statutorily denied to homosexuals, special immigration standing granted to same-sex spouses is still denied, although similar standing is granted to spouses in legally recognized heterosexual marriages.<sup>189</sup> The effect of this denial may be to prevent a parent of a child from entering or remaining in the United States, denying the child the right to live with his or her parent.

In 1990, Congress repealed the previous provision under which homosexuals were excludable.<sup>190</sup> The definition of spouse, however, was not amended, and

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<sup>184</sup> Chase, *supra* note 161, at 386.

<sup>185</sup> *Id.* at 387.

<sup>186</sup> *Id.* at 391.

<sup>187</sup> *Id.* (citing I.R.C. § 2040 (1994)).

<sup>188</sup> *See id.*; I.R.C. § 2056(a) (1994).

<sup>189</sup> *See* 8 U.S.C. § 1153(a)(2) (1994 & Supp. III 1997).

<sup>190</sup> *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978.

the Defense of Marriage Act specifically defines marriage as "only a legal union between one man and one woman."<sup>191</sup> The Act is binding on federal agencies and administrative bureaus.

Efforts to circumvent this policy have failed. Even before either of the statutes was enacted, a court had ruled that Congress had the power to deny preferential status to spouses of homosexual marriages.<sup>192</sup> There the court found it was not necessary to determine the validity of a Colorado "marriage" between two men. The court relied on Congress' continuing intent to exclude homosexuals and the "ordinary" meaning of the term spouse.

The question of spousal status is important because, under INS rules, a child has no independent standing or status to seek immigration of a parent until the child is twenty-one.<sup>193</sup> It is therefore possible that a minor, whether a United States citizen by birth or adoption, may be separated during childhood from one of the legal parents who is unable to enter this country legally. If any special standing exists, it must exist with the "spouse" or other adult. If, however, the parents are denied the right to marry, this status can never be attained, putting aside the issue of constitutionality of the Defense of Marriage Act.<sup>194</sup>

### C. Government Benefits

In 1996, Congress passed the Defense of Marriage Act (DOMA).<sup>195</sup> The Act defines marriage as a legal union between a man and a woman.<sup>196</sup> The Act also defines the word "spouse" as referring only to people of the opposite sex who are legally married.<sup>197</sup> The Act enables only those individuals who are legally married to be eligible to receive benefits from the federal government.<sup>198</sup> At the time DOMA was enacted, Congress was concerned with retaining the sanctity of heterosexual marriage and promoting the traditional moral teachings reflected in heterosexual-only marriage.<sup>199</sup> What Congress neglected to consider when passing DOMA was the effect the denial of benefits would have on the children of same-sex relationships. These children, because their parents are unable to legally marry,

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<sup>191</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. III 1997)). Moreover, under the Act, "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." *Id.*

<sup>192</sup> See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

<sup>193</sup> See 8 U.S.C. § 1151(b)(2)(A)(i) (1994 & Supp. III 1997).

<sup>194</sup> See Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 127-33 (1996).

<sup>195</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. III 1997)).

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> See H.R. REP. No. 104-664, at 16 (1996), reprinted in 1996 U.S.C.C.A.N. 2919-20.



are the ones who suffer. They are denied benefits that children of marriages receive just because of their parents' legal marital status.

Same-sex couples, with or without children, consider themselves a family. Same-sex couples with children specifically define family to include their child or children. A person in a same-sex partnership considers the child of the relationship part of the family even if that child is not the biological child of one or both of the partners. The federal government, as well as state and local governments, must define family in determining the benefits they will confer on the household. Unfortunately, with the passage of the Defense of Marriage Act, as well as judicial determinations across the country, families formed from same-sex relationships, including ones with children, are not considered a family in the eyes of the law.

The legislative and judicial branches of government, both state and federal, define family in a way that does not include the partner of a same-sex couple. By denying same-sex partners the right to be considered family in the eyes of the law, the child of that union is the one who suffers, even more than the parents. The parents are able to take care of themselves while the child, especially a young child, is dependent on adults. The needs of the child are visible and realistic, yet the government declines to confer benefits on the family because of the gender of the parents.

According to a study conducted by the General Accounting Office, there are over 1,000 "benefits, rights, and privileges [that] are contingent on marriage."<sup>200</sup> These are benefits that a child of a heterosexual marriage can receive. Among these benefits are Social Security benefits that are paid to dependent spouses. Married couples generally receive more benefits than single individuals,<sup>201</sup> and minor children are eligible to receive survivor's benefits.

If the non-biological parent of a same-sex relationship dies by some wrongful act of another, the biological parent will not be able to bring a wrongful death suit against the tortfeasor. Furthermore, because there is no legal family relationship between the deceased and the child, that child will not have standing to sue for wrongful death. If the primary or only wage earner of the same-sex couple is the one that dies, the child will suffer because of the lost finances. That child will be unable to make the person responsible civilly liable for the pain and loss the child feels. The married heterosexual counterpart of the same-sex couple, however, will have standing to sue the wrongdoer for wrongful death, ensuring that the child of that marriage is financially provided for.

The wrongful death statutes in both Texas<sup>202</sup> and Louisiana<sup>203</sup> require the individual bringing the wrongful death action to be a spouse or a child of the deceased. Problems arise if a child is not the biological son or daughter of the de-

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<sup>200</sup> FEDERAL DOCUMENT CLEARING HOUSE, REPORT TO HONORABLE HENRY HYDE JR., *available in* 1997 WL 67783 (F.D.C.H.). *See also supra* notes 71, 162.

<sup>201</sup> This is especially significant where the biological parent has chosen to stay at home and the non-biological parent is the primary wage earner. *See Forman, supra* note 157, at 16.

<sup>202</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.004 (West 1985).

<sup>203</sup> LA. CIV. CODE ANN. art. 2315.1 (West 1986).

ceased parent. The child will not have standing to sue for the death of his or her parent. The term spouse, even though not defined in the statute, is implied to refer only to a person legally married. That would mean that only heterosexual surviving spouses would be entitled to bring a cause of action.

The adverse effects on the child of the same-sex relationship are overwhelming. The child of this relationship will have to suffer the loss and the financial strain of losing a parent. With the possible legalization of same-sex marriage in Hawaii and Vermont, this unequal treatment the child receives could be negated.

D. *Employer (Fringe) Benefits*

Another area of the law that deprives the children of same-sex marriage benefits that children of heterosexual marriages receive deals with employee benefits for federal workers. When a public safety officer has died in the line of duty, the Bureau of Justice Assistance will pay \$100,000 to the surviving family.<sup>204</sup> The only problem is that the surviving family does not include the survivor of a same-sex relationship or the non-biological child of the deceased.

The Federal Government is not the only employer that denies benefits to same-sex partners. A 1992 case in Wisconsin made it painfully clear that without the legal recognition of spouse status, same-sex couples would not be given insurance coverage like their heterosexual married counterparts.<sup>205</sup> In *Phillips v. Wisconsin Personnel Commission*,<sup>206</sup> the court held that insurance coverage for state employees could be limited to spouses and children.<sup>207</sup> The court reasoned that the rule by the Commission did not only affect those in homosexual relationships; it affected unmarried heterosexual relationships as well.<sup>208</sup> What the court failed to take into account was the fact that those heterosexual unmarried couples could get married, something the homosexual couples could not do. The children of those unmarried couples will suffer like the children of same-sex relationships. But, the unmarried parents could get married just to help the child. That is a delicacy the same-sex couple does not have.

By limiting the insurance coverage to spouses and children, the court did not contemplate the effect the decision could have on the children of the same-sex relationships. If the person that can be insured through employment is not the biological parent of the child, then the child cannot be covered.

Similarly, a 1997 New Jersey case, *Rutgers Council of AAUP Chapters v.*

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<sup>204</sup> 42 U.S.C. § 3796 (1994).

<sup>205</sup> See *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* The plaintiff, Jeri-Lynn Phillips, filed a complaint that the denial of her application for family health insurance was employment discrimination. The court rejected her argument that the determination discriminated on the basis of sexual orientation and marital status.

<sup>208</sup> See *id.* at 127.

*Rutgers, The State University*,<sup>209</sup> denied health benefits to same-sex partners of employees. In that case the court discussed the denial as not being violative of the New Jersey Constitution. Nowhere in the opinion did the court mention the negative impact the decision would have on the children of same-sex unions.

The court, instead of looking at the decision as granting a benefit to a same-sex couple, should have viewed the benefit as improving the life of the child or children of that relationship. By legalizing same-sex marriage, the statutes that use the word "spouse" would apply to those same-sex couples that choose to marry. The legalization of same-sex marriage will do away with all the problems that are associated with the interpretation of statutes. It will allow same-sex couples to legalize their relationships and provide for their children. The benefits that children of married heterosexual couples receive are desired by the children of same-sex couples.

Another case dealing with employee benefits, *Ross v. Denver Department of Health and Hospitals*,<sup>210</sup> was decided against the granting of benefits to the lesbian plaintiff. The Colorado Court of Appeals held that the denial of leave of absence so that the plaintiff could take care of her lesbian partner did not violate the Career Service Authority Rules.<sup>211</sup> The court discussed how the denial of the leave of absence was not only prohibited for same-sex couples, but for unmarried heterosexual couples, too.<sup>212</sup> What the court failed to recognize was that heterosexual couples have the option of whether or not to marry. The homosexual couple does not have that option.

By denying the sick leave for the plaintiff the court in essence is saying that the plaintiff must find someone else to care for her partner. This denial threatens the job security of the homosexual employee. If she cannot afford to pay for someone to take care of her partner, then she must leave her job and hope that she will not be fired. If, on the other hand, she is able to muster up enough money to hire someone to care for her ailing partner, then the family has lost valuable dollars on something that a married couple would not have to worry about. Ultimately, by forcing the homosexual couple to hire someone, the child of the relationship is deprived the money that is spent on the care. If the court would have read into the statute or, alternatively, if same-sex marriages were legalized, then the problem would no longer exist. If either were to happen, then the homosexual employee

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<sup>209</sup> 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997). The employees of Rutgers University filed suit against the university for the denial of health benefits for domestic partners of same-sex relationships. The suit was initiated by individual professors as well as the union (Rutgers Council of AAUP Chapters).

<sup>210</sup> 883 P.2d 516 (Colo. Ct. App. 1994). The plaintiff, Mary K. Ross, brought suit alleging discrimination based on sexual orientation because her employer, the Department of Health and Hospitals, refused to grant her sick leave to care for her lesbian partner.

<sup>211</sup> According to the court, the Rules provide "in part that sick leave may be used . . . for necessary care and attendance during sickness . . . of a member of the employee's immediate family." *Id.* at 518. The court went on to cite the definition of family as it appears in the statute. The court stated that immediate family is defined as "husband, wife, son, daughter, mother, father, grandmother, grandfather, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, [and] sister-in-law." *Id.*

<sup>212</sup> *See id.*

would not have to take needed dollars away from her child to take care of her ailing partner.

In *Hinman v. Department of Personnel Administration*,<sup>213</sup> the court held that the denial of dental benefit coverage to homosexual partners of state employees does not constitute discrimination.<sup>214</sup> The court reasoned that the homosexual partners were not being discriminated against because they were homosexuals.<sup>215</sup> They were similarly situated to unmarried heterosexual state employees.<sup>216</sup> The court reasoned that the distinction drawn was favoring the public policy of promoting marriage.<sup>217</sup>

What the numerous courts seem to have overlooked is that heterosexual unmarried couples are not similarly situated with same-sex couples. A recurring theme in these cases is that the court puts the two groups on the same playing field without looking at the possibilities. Heterosexuals can get married; homosexuals cannot. It is impossible to put the two categories of people on the same level. Unmarried heterosexual couples choose not to get married. Homosexual couples do not even have the choice.

The federal government, by statute,<sup>218</sup> has a ban on discrimination in federal employment based on marital status.<sup>219</sup> This statute does not protect homosexual employees because same-sex couples cannot legally marry. The children of married and unmarried heterosexual relationships are protected by this statute. Those children will not have to worry about their parents being fired because they are or are not married. On the other hand, homosexual couples will not have the benefit of using the marital status discrimination ban to ensure that one or both of them are not fired for no other reason than bias. The statute does not cover sexual orientation. If same-sex marriages were legalized, then the ban would apply to married homosexual couples. This would guarantee a fair working environment for all alike. The child, once his parents are legally permitted to marry, will not suffer from the loss of money because his parent is fired due to the parent's marital status. The child will profit from the marital status discrimination ban because his parents will at least be married or will be protected even if they choose not to marry. Until same-sex marriages are recognized, the marital status discrimination ban will not apply to homosexual couples.

Another area of the law that denies the children of same-sex unions bene-

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<sup>213</sup> 167 Cal. App. 3d 516 (1985).

<sup>214</sup> See *id.* at 520.

<sup>215</sup> See *id.* at 524.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.* at 529.

<sup>218</sup> See 5 U.S.C. § 7204 (1994).

<sup>219</sup> See 5 U.S.C. § 7202 (1994) (explaining that the employee can either be female or male and that the spouse, being of the opposite sex, is entitled to the benefits (along with the employee's children)).

fits is the military. The military's policy on homosexuality<sup>220</sup> is referred to as "Don't Ask, Don't Tell." The policy disables a member of the armed services from disclosing his or her homosexuality. By hiding, the service member is unable to apply for benefits for his partner as a spouse or his non-biological child as a dependent.<sup>221</sup> One of the benefits conferred on the dependents of service members is a cost of living allowance in the continental United States.<sup>222</sup> Another benefit given to the family of a service member is death benefits.<sup>223</sup> If a member of the armed forces dies and is covered, there is a hierarchy of beneficiaries who will receive the death gratuity. Nowhere in the statute does it mention a same-sex domestic partner or the child of that relationship. The statute does mention children, but if the child of the relationship is not the biological or adopted child of the decedent,<sup>224</sup> then the child will not be eligible to receive the payment.<sup>225</sup> A similar benefit given to married couples in which one of the spouses is a member of the uniformed services deals with travel and transportation expenses.<sup>226</sup> The statute gives the "dependents of the service member cost of transportation or a monetary allowance if the member is ordered to make a change in permanent station."<sup>227</sup> This allowance, according to the definition of dependent, would not apply to the non-biological child of the uniformed member's same-sex partner.

There are also employment opportunities for the spouses of members of the armed forces. The statute gives "preference to qualified spouses in hiring for any civilian position in the Department of Defense if the spouse is among persons determined to be [the] best qualified for the position."<sup>228</sup> The spouse of the service member will be given special treatment in job hiring. This, in turn, enables the family to bring in more income to take care of the children. The same-sex partner, however, will not be given preferential treatment and will have to work twice as

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<sup>220</sup> See 10 U.S.C. § 654 (1994). See, e.g., *Able v. U.S.*, 88 F.3d 1280 (2d. Cir. 1996) (policy held to be constitutional).

<sup>221</sup> 37 U.S.C. § 401 (a) (1994) (defines a dependent as a spouse, child, parent, stepchild or other unmarried dependent person placed in the custody of the service member by a court of competent jurisdiction).

<sup>222</sup> 37 U.S.C. § 403a allows money to be paid to the dependents of a member of the armed forces if that member is assigned to duty in the continental United States and the dependent(s) lives in a high cost area. The statute defines a high cost area as a place in which "the cost of living exceeds the average cost of living in the continental United States." 37 U.S.C. § 403a(c)(4).

<sup>223</sup> See 10 U.S.C. § 1477 (1994).

<sup>224</sup> See *id.* The statute also applies to a stepchild, but in order to become a stepchild, the biological parent and the new spouse must be legally married.

<sup>225</sup> See 10 U.S.C. § 1477(b). The statute does include a hierarchy of "persons in loco parentis" of the deceased service member, but it makes no such distinction for non-legal children to whom the service member may have been in loco parentis. See *id.* at § 1477(c).

<sup>226</sup> See 37 U.S.C. § 406 (1994 & Supp. III 1997).

<sup>227</sup> *Id.*

<sup>228</sup> 10 U.S.C. § 1784(b)(2) (Supp. III 1997). Spouse is defined as a "husband or wife." 10 U.S.C. § 101(e)(5).

hard to get a job and supplement the income. The money that could have been made if the same-sex partner was given preferential treatment for the job ultimately deprives the child of money. More time may be spent by the non-service member to find a job. Similarly the homosexual parent, even if qualified, will not get special treatment as the spouse of a member of the armed forces.

This statute does take into account non-biological and non-adopted children of the relationship. But, the simple fact is that marital status indirectly affects the eligibility of the recipient of the benefit. The child, because his parents cannot get married, is unable to receive the benefits. The denial of the gratuity to the child because he is not a stepchild of the deceased is a direct link to marital status. Once again, the child of a same-sex partnership is forced to suffer, while the child of a legal marriage is not.

If same-sex marriages were legalized, the military policy banning homosexuals would have to be updated. If a same-sex partner were considered the legal spouse of a member of the armed forces, the denial of benefits to the spouse would be discrimination based on marital status. Furthermore, the biological child of the non-service member, if same-sex marriages were legalized, would be able to benefit from the luxuries the military confers on its members.

#### *E. Other Benefits*

The designation of parent and child entitles the "family" to use of the judicial system for certain purposes that can directly benefit a child upon dissolution of the family unit: child support, custody and visitation. Absent legal recognition of the parent-child relationship, standing is absent, and the two are legal strangers who have no right to enforce support obligations or seek custody or visitation.

The obligation to pay child support is inherently a duty reserved to legal parents (or stepparents). Most statutes are specific on this point and do not extend the obligation beyond a parent or legal guardian.<sup>229</sup> If one of the "parents" is legally a stranger to the child, that parent, upon dissolution of the family unit, will have no concomitant obligation to provide child support. This has the effect of removing from the child the very source of funds that may have supported the child for a considerable period of time, especially if the "non-biological" parent was the primary wage earner in the household.<sup>230</sup>

Seeking custody or visitation is always a situation fraught with peril for a

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For instance, New York places the obligation to pay support on the "parent" of a child under 21. N.Y. FAM. CT. ACT § 413 (1962). The same statute extends that obligation to a legal stepparent on a public charge basis only. N.Y. FAM. CT. ACT § 415.

<sup>230</sup>

If the non-biological parent was also the primary property owner, dissolution of the relationship may deprive the parent and child of property division, including equitable or equal distribution, or community property division. Statutory attempts to grant domestic partner benefits, such as Hawaii's Reciprocal Beneficiaries Act, HAW. REV. STAT. § 572C (Supp. 1998), fail to provide relief. *See* W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 93 (1998-99).

gay or lesbian parent,<sup>231</sup> even if the biological tie is undisputed.<sup>232</sup> Where, as in many families with same-sex adults, one is a biological and legal stranger to the child, the situation becomes even worse. The child, who may recognize the “stranger” as a parent, is not entitled to visitation with that parent or to have the parent seek custody, since these are matters generally reserved only for biological parents. The “second parent” has had to resort to other theories to define their status, including equitable parent status, equitable estoppel, in loco parentis, and de facto parent.<sup>233</sup>

A recent decision by the Supreme Judicial Court of Massachusetts used just such a theory in affirming an order of temporary visitation with the now estranged lesbian partner of the biological parent.<sup>234</sup> The court stated:

The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form relationships with both parents, whether those parents are legal or de facto. See *Adoption of Tammy*. See also J. GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* 12-13 (1996). Thus, the best interests must include an examination of the child’s relationship with both his legal and de facto parent.<sup>235</sup>

There are other tangible economic benefits for families, such as family

<sup>231</sup> For a comprehensive discussion of these perils, including an analysis of the per se and nexus rules, see Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

<sup>232</sup> It is a fact of life that lesbian and gay parents face judicial scrutiny more rigorous than heterosexual parents. See Susan J. Becker, *supra* note 99, at 94. Professor Becker goes on to note that empirical data demonstrates that many common negative assumptions regarding gay and lesbian parents are simply false. See *id.*; see also Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 722 (1998); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOC. 21 (1997). For a further compilation of research on the issue of psychological harm caused to children of gay or lesbian parents, see D’Amato, *supra* note 64, at 933 n.141.

<sup>233</sup> See Elizabeth A. Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 187 (1991); Markey, *supra* note 232, at 751.

<sup>234</sup> See *E.N.O. v. L.M.N.*, 711 N.E.2d 886 (Mass. 1999). See *supra* note 207; see also *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

<sup>235</sup> *Id.* at 891. (citation omitted). It should be noted that the couple had executed a co-parenting agreement that provided for parental status even if the parties were to separate. In the landmark book *Beyond the Best Interests of the Child*, the authors argued that the role of “psychological parent” transcends biology and should be a primary factor used to determine a child’s best interests. See GOLDSTEIN ET AL., *supra* note 107.

memberships to museums and health clubs, frequent flier awards,<sup>236</sup> discounted family travel, and home and health insurance.<sup>237</sup> Family members also have the right to make certain decisions with regard to medical emergencies and guardianship.<sup>238</sup>

#### V. *BAKER V. VERMONT*

Where the State of Hawaii ultimately dared not tread, the Vermont Supreme Court chose to place its footprint on the possible evolution of the definition of marriage. In *Baker v. Vermont*,<sup>239</sup> decided solely on state constitutional grounds, the court unanimously found the denial of marital benefits to same-sex couples to be a violation of the Vermont Constitution's Common Benefits Clause<sup>240</sup> and directed the legislature to craft an appropriate means of effecting its mandate. The opinion, perhaps much more so than the original ruling in *Baehr v. Lewin*,<sup>241</sup> addresses not only the legal benefits of marriage, but also the role of marriage within a contemporary family structure.

Plaintiffs, three same-sex couples, sought marriage licenses from their various town clerks and were refused as ineligible under state marriage laws.<sup>242</sup> The trial court dismissed the complaint, and an appeal was taken to the Vermont Supreme Court.<sup>243</sup> It should be noted that two of the couples have raised children together.<sup>244</sup>

The court was careful to distinguish its analysis from federal equal protection jurisprudence.<sup>245</sup> Noting that Vermont's Common Benefits Clause preceded by nearly a century the Fourteenth Amendment of the United States Constitution, the

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<sup>236</sup> Many frequent flyer awards now allow for companion travel; others may be transferred regardless of relationship. See Ettelbrick, *supra* note 47, at 127.

<sup>237</sup> See *id.*

<sup>238</sup> See Chase, *supra* note 161, at 365-66; see also *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986), *cert. denied*, 475 U.S. 1085 (1986); 392 N.W.2d 310 (Minn. Ct. App. 1986); 478 N.W.2d 790 (Minn. Ct. App. 1991). A seven-year dispute pitted Sharon Kowalski's father against her lesbian partner, Karen Thompson, for guardianship after Kowalski was severely injured in an automobile accident. Although Thompson was ultimately successful, the seven-year legal battle was occasioned because of Minnesota's refusal to accept the relationship of the two women as a legal marriage, leaving Thompson as a legal stranger. The same could happen to the child of a same-sex couple if one of the parents is, technically, a legal stranger.

<sup>239</sup> 744 A.2d 864 (Vt. 1999).

<sup>240</sup> VT. CONST. ch. I, art. 7.

<sup>241</sup> See *supra* note 1.

<sup>242</sup> See *Baker*, 744 A.2d at 867.

<sup>243</sup> See *id.* at 868.

<sup>244</sup> See *id.* at 867.

<sup>245</sup> See *id.* at 870.



court found the purpose of the Common Benefits Clause to be “the elimination of artificial governmental preferments and advantages.”<sup>246</sup> This concept requires the court to look at the result of the discrimination and whether there are valid public interests promoted, rather than identifying the discrimination through a definition of the subject class itself. A result-oriented analysis requires a high threshold of proof to justify discrimination by denying benefits to a particular group or class of individuals.

The State proffered as the principal reason for denying the legal benefits of marriage to same-sex couples the government’s interest in the link between procreation and child rearing.<sup>247</sup> The State sought to use the marriage statutes to define the interrelationship between procreation and child rearing, something it alleged was not possible in same-sex couples who could not conceive a child on their own.<sup>248</sup> The court effectively demolished this purported link by recognizing the legitimate interest of the state “in promoting a permanent commitment between couples for the security of their children.”<sup>249</sup> By changing the subject of the role from married husbands and wives to “couples,” and the object from parents to children, the court recognized that families are created in many different ways. Protection of children, a central theme and purpose of the role of family, cannot justify discrimination simply because of the marital status (or even gender) of the parents.<sup>250</sup>

The court noted that procreation is not an all-inclusive reason for marriage:

It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to “further[ ] the link between procreation and child rearing,” it is significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.<sup>251</sup>

The court went on to note that same-sex parenting was not only a reality but had been affirmatively sanctioned by the Vermont Legislature, which not only

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<sup>246</sup> *Id.* at 876.

<sup>247</sup> *See Baker*, 744 A.2d at 881.

<sup>248</sup> *See id.*

<sup>249</sup> *Id.*

<sup>250</sup> *See id.* at 882. The State offered several other justifications for denial of same-sex marriage, including: providing both male and female role models in child rearing; minimizing legal problems of surrogacy contracts and sperm donors; discouraging marriages of convenience to take advantage of legal benefits; and maintaining uniformity with marriage laws of other states. The court made short work of these arguments, noting that existing Vermont law, for the most part, compelled conclusions other than those the State offered. *See id.* at 884-85.

<sup>251</sup> *Baker*, 744 A.2d at 881 (alteration in original).

removed barriers to same-sex adoption and assisted conception but provided for the security of the subject children upon the dissolution of the domestic relationship.<sup>252</sup> Any attempt of the marriage statute to legitimize children, therefore, exposes children of same-sex couples "to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently."<sup>253</sup> If the "persons" are defined as the children of two parents, then indeed the inability of their parents to marry is subjecting children of same-sex couples to denial of benefits and legal discrimination because of a status beyond their control.

The benefits of marriage were not lost on the court. In reference to *Loving v. Virginia*<sup>254</sup> the *Baker* court noted: "[A]ccess to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society. . . . [T]he marriage laws transform a private agreement into a source of significant public benefits and protections."<sup>255</sup> The court provided an extensive list of legal benefits of marriage provided by various Vermont statutes and cited other collections mentioned previously in this article and elsewhere.<sup>256</sup> Tying the legal benefits of marriage to the state's proffered link between procreation and child rearing as a justification for marital discrimination, the court stated:

While other statutes could be added to this list, the point is clear. The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law – protecting children and "furthering the link between procreation and child rearing" – the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts. Promoting a link between procreation and childrearing similarly fails to

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252 See *id.* at 881-82.

253 *Id.* at 882.

254 388 U.S. 1 (1967).

255 *Baker*, 744 A.2d at 883.

256 See *id.* at 883-84. The court referred to, among others, *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993), see *supra* note 1, and *Chambers*, *supra* note 173.

support the exclusion.<sup>257</sup>

In fashioning a remedy, the court did not specifically direct that marriage licenses be issued to same-sex couples. Rather, the court held only that plaintiffs were entitled under the Common Benefits Clause of the Vermont Constitution “to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”<sup>258</sup> The court noted that its decision granted to same-sex couples the benefits of marriage, but not necessarily the status of marriage itself, deferring to the legislature to determine whether to allow same-sex marriage per se or some form of domestic partnership licensing scheme.<sup>259</sup> Such a holding was not inconsistent with the fundamental basis of its benefits-related analysis, although a spirited partial dissent chastised the court for not directly authorizing the marital status sought by the plaintiffs.<sup>260</sup>

In its conclusion the court went beyond the narrow confines of the definition of marriage to recognize that commitment requires no such labeling:

While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs’ claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case. The State’s interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple’s commitment provides stability for the individuals, their family, and the broader community. Although plaintiffs’ interest in seeking state recognition and protection of their mutual commitment may – in view of divorce statistics – represent “the triumph of hope over experience,” the essential aspect of their claim is simply and fundamentally for inclusion in the family of State-sanctioned human relations.<sup>261</sup>

The court specifically retained jurisdiction to permit the legislature to enact a remedy consistent with the constitutional mandate.<sup>262</sup>

*Baker* resolves little and raises many additional questions. In effect, the court granted the plaintiffs no relief, specifically declining to direct the issuance of

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<sup>257</sup> *Baker*, 744 A.2d at 884.

<sup>258</sup> *Id.* at 886.

<sup>259</sup> *See id.*

<sup>260</sup> *See id.* at 898 (Johnson, J., concurring in part and dissenting in part).

<sup>261</sup> *Id.* at 888-89 (footnote omitted).

<sup>262</sup> *See Baker*, 744 A.2d at 889.

the marriage licenses plaintiffs had sought.<sup>263</sup> The court actually provided nothing other than hope and the expectation that the Vermont Legislature would timely provide a more specific remedy.

The opinion, however, poises Vermont on the threshold of a new era in defining marriage and family by function and content rather than label. In concluding that the state could not deny benefits simply because of marital status, the court recognized that family encompasses more than husband, wife and children, and that other permutations not only existed but were entitled to constitutional protection. Finally, the court recognized that children receive or are denied benefits because of their parents' marital status, yet this status has no relation to the purpose of the benefit or the state justification for selectivity. While the decision does not, ultimately, rest on the rights of the children, it does recognize the effects on the children of the parents' ability to marry and the inappropriate discrimination against the child when a same-sex couple is denied this right.

The Vermont Supreme Court may yet have to revisit this matter to determine whether the legislative response satisfies the judicial mandate.<sup>264</sup> Yet the possibility exists that same-sex couples and their children will be entitled at least to equal benefits, and perhaps to marriage itself, in the foreseeable future. Even more encouraging, the court recognized the special status of the children of a same-sex relationship. The benefits-oriented approach of the Vermont Supreme Court offers some hope of a new, child-oriented analysis and redefinition of marriage based on a more functional definition of family and the benefits flowing from the legally recognized marital relationship.

## VI. DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

Gay men and lesbians who find themselves in long-term, committed relationships have sought to establish domestic partnerships. The public benefit of marriage is important to same-sex couples seeking social acceptance of their relationships, so they choose domestic partnerships as the only comparable option available to them.<sup>265</sup> Over the past two decades, this new legal structure has come to be offered in dozens of municipalities in the United States and Canada.<sup>266</sup> (Some states

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<sup>263</sup> See *id.* at 886.

<sup>264</sup> For the legislative response, see *infra* Part VI, especially the text accompanying notes 272 and 273.

<sup>265</sup> See Adrienne K. Wilson, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 543 (1991).

<sup>266</sup> See *Marvin v. Marvin*, 557 P.2d. 106 (Cal. 1976). The San Francisco Domestic Partnership Ordinance, SAN FRANCISCO, CAL., ADMIN. CODE ch. 62 (1991) states that:

The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives. . . . Domestic Partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership.

have gone even further and created a form of common-law marriage applicable only at death, but it is doubtful if same-sex survivors would qualify for the benefits.)<sup>267</sup>

The goal of a domestic partnership should be to promote personal fulfillment and social productivity, as well as to assure the parties that their rights and expectations will be protected. Domestic partnership legislation should: (1) promote personal choice within stable intimate relations; (2) assist the parties in defining their relationship, thus making them better aware of their rights and obligations; and (3) assist the courts, when necessary, to define relationships and equitably resolve disputes between the parties and with third parties.<sup>268</sup>

An example of this kind of legislation is Hawaii's Reciprocal Beneficiaries Act.<sup>269</sup> This Act was adopted to prevent judicial recognition of same-sex marriages. The rights include family health care benefits for state employees, hospital visitation rights, property and inheritance rights, the right to sue for wrongful death, and the right to protection from domestic violence of a partner. But the Act does not provide marital title to same-sex couples and does not provide the same level of equality to gay and lesbian couples that would be granted automatically upon legalization of same-sex marriage.<sup>270</sup> The Act even states as one of its purposes the preservation of the "unique social institution" of heterosexual marriage.<sup>271</sup>

Vermont appears ready to go further. Its legislative response to the judicial mandate in *Baker v. Vermont*<sup>272</sup> creates a new form of legally sanctioned relationship: the civil union. In essence, the state is creating an entity that is parallel to marriage, granting to same-sex couples virtually all of the legal benefits, protections and responsibilities of marriage, but not the title. This establishment of a civil union will require not only an official license, but also a certification, a form of solemnization. Upon certification, the same-sex couple will become subject to all of the state's laws, rules and regulations relating to a married couple. The statute explicitly equates dissolution of a civil union to the same procedures, rights and

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<sup>267</sup> See Mary Louise Fellows, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998); see also N.H. REV. STAT. ANN. § 457:39 (1992) ("Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for a period of 3 years, and until the death of one of them, shall thereafter be deemed to have legally married."); OR. REV. STAT. § 112.017 (1997) (proposing that a person is considered a surviving spouse if circumstances, including cohabitation for 10 years, are met).

<sup>268</sup> See Craig A. Bowman and Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1187 (1992). Providing for personal choice within domestic relations will promote family stability by allowing individuals to choose relationships that are suitable for them. In addition, domestic partnerships currently provide the only option for legal recognition of same-sex relationships.

<sup>269</sup> See HAW. REV. STAT. § 572C (Supp. 1997).

<sup>270</sup> See Burnette, *supra* note 230, at 87.

<sup>271</sup> See HAW. REV. STAT. § 572C-2 (Supp. 1998); Burnette, *supra* note 230, at 88.

<sup>272</sup> 744 A.2d 864 (Vt. 1999).

obligations as are involved in a civil marriage dissolution.<sup>273</sup>

Where Hawai'i's Reciprocal Beneficiaries Act essentially extends certain specifically enumerated rights and benefits to privately contracted domestic partnerships, Vermont officially creates a new form of relationship, requiring official licensing and certification. Although the statute lists many of the benefits to be extended to civil unions, it also states that a civil union shall receive all the benefits of marriage. It appears, at least under Vermont law, that the only difference between a marriage and a civil union are the name and the gender composition of the couple.<sup>274</sup>

Not all domestic partner benefits are provided by municipalities or other government entities. The business world and the non-profit sector are increasingly providing recognition and benefits to domestic partners.<sup>275</sup> A recent survey indicates that one in four U.S. companies with over 5,000 employees offer domestic partnership benefits, and 13 percent of all U.S. employers offer such benefits.<sup>276</sup>

Further, domestic partnership agreements serve as a form of contractual marriage between the two principals.<sup>277</sup> While some of their arrangements may lack official state sanction, many of the provisions provide, in contract terms, an effective

<sup>273</sup> See 2000 Vt. Acts & Resolves 91. The Act also provides more limited reciprocal beneficiaries relationships for people related by blood or adoption and prevented from establishing a civil union or marriage.

<sup>274</sup> Intriguing issues are raised about the effect of civil unions beyond Vermont's borders. The statute appears to allow non-residents to certify civil unions in the state. Will another state honor the rights, privileges and obligations created by the Civil Union Act when a Vermont couple moves to another state, invoking the Full Faith and Credit Clause? Will another state honor a Vermont civil union and grant its own citizens benefits under the domiciliary state's statutes? I leave these and other interstate recognition issues to another forum.

<sup>275</sup> "Domestic partnership benefits are becoming common not only in the business world, but also in the non-profit sector, most notable in colleges and universities. Some institutions even offer benefits to students, allowing same-sex partners to reside in married student housing and extending health insurance benefits to partners of gay and lesbian students." Caroline J. Lindberg, Note, *Lisa Grant v. South-West Trains: The Limited Utility of Sex Discrimination Arguments in Securing Lesbian and Gay Rights*, 12 TEMP. INT'L & COMP. L.J. 403 (1998). See Marsh King, *UW Regents Allow Benefits for Same-Sex Partners*, SEATTLE TIMES, May 17, 1997, at A1.

<sup>276</sup> See John Hendren, *A Values Judgment: Disney Not Alone in Seeing Economic Benefits from Providing Domestic Partner Benefits (KPMG Peat Marwick Survey)*, PITTSBURGH POST-GAZETTE, June 24, 1997, at B1.

<sup>277</sup> Interestingly, one of the first cases to enforce a private agreement involved a heterosexual couple. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). The parties lived together for seven years without marrying. The court held that express contracts between non-marital partners should be upheld unless the contract was based on "meretricious sexual services" as its consideration. In the absence of an express contract, the courts should look to the conduct of the parties to determine if an implied contract exists. The court may also employ the doctrine of quantum meruit or equitable remedies when warranted. See *id.* at 110.

Two points about *Marvin* should be noted. First, one wonders whether courts will be quicker to find that domestic partnership agreements between homosexuals are based on "meretricious sexual services" as consideration. See, e.g., *Whorton v. Dillingham III*, 202 Cal. App. 3d 447 (1988). Although the services to be provided included chauffeur, bodyguard, social and business secretary, partner and counselor in real estate, because Whorton was also constant companion and lover the court gave unusually careful scrutiny to the contract, ultimately finding it enforceable.

Secondly, one could suggest that even the civil marital contract is based, in some part, on sexual services. But that is a point for another article on another day.

tive substitute for the legal benefits granted only to married couples.<sup>278</sup> With these types of agreements, couples may approach the appearance, legally, of a married couple,<sup>279</sup> although, in the end, they still fall far short.<sup>280</sup> Simply stated, they fail to create a bona fide legally recognized family relationship.<sup>281</sup> The issue is also raised that courts may be more reluctant to enforce domestic partnership agreements, especially between partners of the same gender, than to enforce the rights and responsibilities within the state-sanctioned marriage contract.<sup>282</sup>

Some have suggested that civil union or domestic partnership legislation will serve as an effective substitute for the right of lesbians and gays to marry. But the benefits conferred do not equal all of the statutory rights of the married couple,<sup>283</sup> and those municipalities adopting such programs have little power to extend the benefits beyond its own employees.<sup>284</sup> Thomas Hixson argues that the growth of recognition by private employers of gay and lesbian families is preferable to the public approach;<sup>285</sup> he reasons that the public approach grants benefits regardless of marriage, while the private approach offers only to gays and lesbians a substitute for the marriage they may not legally contract.<sup>286</sup> On the other hand, the different

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<sup>278</sup> See Chase, *supra* note 161; Jane A. Marquardt, *A Will—Not a Wish—Makes It So*, 20 FAM. ADVOC. 35 (1997).

<sup>279</sup> The partnerships include responsibilities of support, commitment and obligation within the economic partnership construct of emerging family law. See Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

<sup>280</sup> "By no fair reckoning could it be said that any alternative status or combination of legal strategies now available or contemplated in the future would bring to gay families the 'image' or 'likeness' of the bundle of rights and obligations that flow from legal marriage." Christensen, *supra* note 45, at 1782.

<sup>281</sup> See Gwendolyn L. Snodgrass, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 76. (1997-98).

<sup>282</sup> See *supra* note 277. See, e.g., Posik v. Layton, 695 So. 2d 759, 767 (Fla. Dist. Ct. App. 1997) ("The State is not condoning the lifestyles of homosexuals or married live-ins; it is merely recognizing their constitutional private property and contract rights.").

<sup>283</sup> "Because most of marriage's legal consequences are the product of statutory invention, it ought to be a relatively simple matter to replicate them in an alternative legal status devised for same-sex couples—if, that is, the political will existed to do so. The problem for simulacrum advocates, of course, is that there is no such will." Christensen, *supra* note 45, at 1734.

<sup>284</sup> A recent attempt by the City of Boston to extend group health benefits ran afoul of a state statute which specifically defined dependents as: "an employee's spouse, an employee's unmarried children under nineteen years of age, and any child nineteen years of age or over who is mentally or physically incapable of earning his own living. . . . Said definition shall also include an unmarried child nineteen years of age or over who is a full-time student in an educational or vocational institution and whose program of education has not been substantially interrupted by full-time gainful employment excluding service in the armed services." Connors v. City of Boston, 714 N.E.2d 335 (Mass. 1999) (citing MASS. GEN. LAWS ANN. ch. 32B (West 1989)).

<sup>285</sup> A curious byproduct of this analysis is that benefits granted to same-sex domestic partners are sometimes denied to heterosexual unmarried partners. See Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999). The court found a distinction in the ability of the heterosexual couple to marry, a right legally denied to same-sex couples.

<sup>286</sup> See Hixson, *supra* note 20, at 501.

approaches – public vs. private – may reflect alternative growing recognition by the public for gay and lesbian family entities.<sup>287</sup>

Interestingly, the very growth of domestic partnership legislation and the granting of benefits, whether public or private, may have another effect: an acknowledgment that individuals in this type of arrangement are entitled to these benefits.<sup>288</sup> If they are, then perhaps we should redefine our societal expectation of who is entitled to benefits, substituting a family-function model for the current marriage-legal family form. On the other hand, to support domestic partnerships for same-sex couples expresses support for the same type of long-term commitment we associate with marriage. To extend marriage to homosexuals would, under these circumstances, broaden, rather than dilute, society's support for marriage as a long-term interpersonal relationship.<sup>289</sup> Perhaps then we can support the concept of same-sex marriage without adversely affecting our conception of the commitment required between the parties and the nature of the marital relationship.

## VII. CONCLUSION

The most obvious fact of same-sex relationships is that the children have no control over the adults' ability or inability to marry. Yet the fact of marital status controls many of the rights and benefits accruing to the child, including the most fundamental right of all, to be included as part of a "family."<sup>290</sup> Children should not bear the burden of this type of legal discrimination against same-sex couples.<sup>291</sup> The state's compelling interest in providing a stable home for the raising of children is a reason to allow, rather than prohibit, same-sex marriages.<sup>292</sup> This paper has demonstrated, hopefully persuasively, that the detriment to children of same-sex couples is pervasive.<sup>293</sup>

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<sup>287</sup> See Christensen, *supra* note 47, at 1305.

<sup>288</sup> See Jax, *supra* note 65, at 490-91. This was the specific ruling of the Vermont Supreme Court in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). See *supra* note 2 and Part V. The court deferred to the legislature, however, on the form: same-sex marriage or some form of domestic partnership.

<sup>289</sup> See Macedo, *supra* note 53, at 289.

<sup>290</sup> "Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects...The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992). Certainly, the parents are not benign to the effects of statutes and cases which deny same-sex marriages, but by placing the primary emphasis on rights denied to the children because of the marital status of the parents, the shift in emphasis should also enhance the constitutional limitation on the states to enact such restrictions.

<sup>291</sup> "[I]nsofar as government controls the benefits and legal rights of family, function, not morality, should govern family definitions and legal access to such benefits." Ettelbrick, *supra* note 47, at 132.

<sup>292</sup> See Strasser, *supra* note 4, at 959.

<sup>293</sup> While I have concentrated on tangible benefits denied to the children of same-sex couples, arguments can be made that there are many intangible benefits which accrue to the children of a marriage, including increased social capital, the elimination of stigmas regarding out-of-wedlock, or illegitimacy status, and



If, as has been argued, marriage is a social construct, rather than a discovery of society,<sup>294</sup> we are capable of rebuilding the definition to encompass new realities and new types of marital and family units.<sup>295</sup> The Supreme Court declared in *Moore v. City of East Cleveland*<sup>296</sup> that the Constitution supports “a larger conception of the family.”<sup>297</sup> We should accept further that the right to marry, so fundamental to our society, can support a more expansive definition than that which is limited to one man and one woman.

It is for these reasons that we must reevaluate our societal opposition to same-sex marriage. While adults may have some freedom of choice, and have the ability to provide for themselves, children of same-sex unions are denied benefits for factors over which they and their parents have no control. The children are denied rights and benefits granted to other children because of the marital status of the parents.

For the first time, a state court has specifically recognized the adverse status of children based on the marital status of the parents. *Baker v. Vermont*<sup>298</sup> represents the first wave of a new jurisprudence, where outdated definitions will be replaced by more contemporary analysis recognizing the inherent rights not only of the adults to a relationship but to the subject children as well. By examining the opposition to same-sex marriages from the perspective of the children, perhaps society will recognize a purpose and function to this new type of “alternate” family and, in the new millennium, more readily accept the legal right of same-sex couples to marry, if not for themselves, then for the sake of their children.

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increased cognitive ability and educational achievement. See Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 426-27 (1996) (citing David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, POL’Y REV. 9 (1994)).

<sup>294</sup> See Eskridge, *supra* note 57, at 1485.

<sup>295</sup> Mohr argues that we have been redefining the function of marriage to remove gender distinctions in the rights, obligations and duties of the marital unit. Having removed these distinctions from the content of marriage, he suggests that the legal form of marriage can also be redefined to include same-sex couples. See MOHR, *supra* note 58, at 37.

<sup>296</sup> 431 U.S. 494 (1977).

<sup>297</sup> *Id.* at 505.

<sup>298</sup> 744 A.2d 864 (Vt. 1999).