

SYMPOSIUM: ASSISTED REPRODUCTIVE TECHNOLOGY AND THE RIGHTS OF CHILDREN: ARTICLE: NO DIFFERENCE? AN ANALYSIS OF SAME-SEX PARENTING

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Text

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The principal argument for traditional marriage is that it is uniquely beneficial to children. Accordingly, a key tenet of the campaign for same-sex marriage ("SSM") is that same-sex couples are just as good as other parents; there is "no difference" between the two. This Article analyzes this claim and concludes that it is unsubstantiated and almost certainly false.

I. No Difference from What?

In *Perry v. Schwarzenegger*,¹ the district court pronounced that "same-sex parents and opposite-sex parents are of equal quality."² Some scholars and the Department of Justice make similar claims.³ A crucial problem with the "no difference" claim is determining what is alleged to be no different from what. Defenders of traditional marriage

¹ [*704 F. Supp. 2d 921 \(N.D. Cal. 2010\)*](#).

² [*Id. at 999*](#).

³ Carlos A. Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* 168 (2003) ("The social science literature indicates that lesbians and gay men as a group meet their responsibilities toward their children as well and as completely as do heterosexual parents."); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 *Am. Psychologist* 607, 613 (2006) ("Empirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment."); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, [*40 Fam. L.Q. 381, 400 \(2006\)*](#) (examining a "small number of studies, fewer than ten," none of which "found significant differences in children's development related to their parent's sexual orientation") (footnote omitted).

The Department of Justice has filed a brief claiming that "there is no sound basis for concluding that same-sex couples who have committed to marriages recognized by state law are anything other than fully capable of responsible parenting and child-rearing." *Defendants' Brief in Opposition to Motion to Dismiss, Golinski v. United States Office of Personnel Mgmt.*, Civ. No. 10-00257, at 21 (July 1, 2011).

[*54] claim that children generally fare best when raised by their married, biological parents and (correlatively) that children would not fare as well with same-sex married couples.

Since SSM has been recognized only recently and only in a few jurisdictions, these claims cannot be empirically refuted. In fact, no one has tried. In Perry, the plaintiffs' expert witness could not identify any study comparing children raised by same-sex couples with children raised by their married, biological parents.⁴ Studies of children raised by same-sex couples often compare them with children raised by single mothers.⁵ Others compare them to children raised by divorced heterosexual parents.⁶ Clearly neither comparison group does as well as children raised by their married, biological parents, so on their face the claims carry little weight even if they are true.

Moreover, studies do suggest at least one significant difference of children raised by same-sex couples: they are more likely to engage in homosexuality and to experience greater confusion and anxiety about sex.⁷

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II. Other Methodological Problems

Most studies of same-sex parenting have small, self-selected samples of children who have not been in the household very long and who have been evaluated at a single time rather than followed for a substantial period.⁸

⁴ Defendant-Intervenors-Appellants' Opening Brief at 89, Perry v. Schwarzenegger, No. 10-16696 (9th Cir. filed Sept. 17, 2010) ("Indeed, Professor Lamb could not identify at trial even a single study comparing children raised by same-sex couples with children raised by their married, biological parents.").

⁵ A. Dean Byrd, Conjugal Marriage Fosters Healthy Human and Societal Development, in *What's the Harm?: Does Legalizing Same-Sex Marriage Really Harm Individuals, Families or Society?* 16, 32 (Lynn D. Wardle ed., 2008) [hereinafter *What's the Harm?*] ("The studies on same-sex parenting ... are basically restricted to children who were conceived in a heterosexual relationship whose mothers later divorced and self-identified as lesbians. It is these children who were compared to divorced, heterosexual, mother-headed families."); Elizabeth Marquardt, *Inst. for Am. Values, The Revolution in Parenthood* 22 (2006) ("The biggest problem by far is that the vast majority of these studies compare single lesbian mothers to single heterosexual mothers - in other words, they compare children in one kind of fatherless family with children in another kind of fatherless family.").

⁶ Mary Parke, *Ctr. for Law and Social Pol'y, Are Married Parents Really Better for Children?: What Research Says About the Effects of Family Structure on Child Well-Being* 5 (2003), http://www.clasp.org/admin/site/publications_archive/files/0128.pdf.

⁷ Nanette K. Gartrell et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, 40 *Arch. Sexual Behav.* 1199 (2011) (study finding that children raised by same-sex couples are much more likely than others to identify as at least partly homosexual and to engage in homosexual acts); Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 *Duke J. Gender L. & Pol'y* 127, 149 (2008) ("Available studies provide evidence that children ... raised by lesbian parents are more likely to experience homoerotic attraction, to engage in homosexual relationships, and to show gender non-conforming behaviors."); Walter R. Schumm, *Children of Homosexuals More Apt To Be Homosexuals? A Reply to Morrison and to Cameron Based on an Examination of Multiple Sources of Data*, 42 *J. Biosocial Sci.* 721, 737 (2010) (concluding through meta-analysis that children raised by gay couples are more likely than others to be gay); Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 *Am. Soc. Rev.* 159, 177-79 (2001) (finding that homosexually-parented children are more likely to engage in homosexual and bisexual behavior); Trayce Hansen, *A Review and Analysis of Research Studies Which Assessed Sexual Preference of Children Raised by Homosexuals* (June 30, 2008), http://www.drtraycehansen.com/Pages/writings_sexpref.html (concluding that studies by pro-homosexual researchers suggest homosexual parents raise disproportionate numbers of non-heterosexual children).

⁸ A group of seventy prominent scholars from all relevant academic fields concluded that "the current research on children reared by [same-sex couples] is inconclusive and underdeveloped - we do not yet have any large, long-term, longitudinal studies that can tell us much about how children are affected by being raised in a same-sex household." *The Witherspoon Inst., Marriage and the Public Good* 18 (2008), available at http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf. See also Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbian" Parenting*, 23 *Quinnipiac L. Rev.* 541,

One researcher who supports the gay movement concedes that "there has never been a comprehensive study of same-sex parents and their children from nationally representative data The studies that have been done on same-sex couples ... have mostly been small scale studies of non-random samples from sampling frames that are not nationally representative."⁹

This is not necessarily a result of any impropriety by the investigators. Until recently, few examples of same-sex parenting existed (especially for gay male homes),¹⁰ so a large, longitudinal [*56] study is not yet possible. Given the small number of children now being raised by same-sex couples, getting a statistically significant random sample would be extremely expensive; it would require looking at a very large, random sample of children in order to get information about the one percent or so with same-sex couples. It is not surprising, then, that no one has done this.

Instead, researchers have sought volunteers to be studied.¹¹ The validity of self-selected samples is doubtful. The legal guardians of children - of whatever sexual orientation or legal relationship - are unlikely to volunteer for a study if their children are not doing well. Also, "several of the most important [studies] have been based on samples of women who became parents through assisted reproductive technology," most of whom tend to be white and upper-middle class and whose children would therefore be expected to fare better than children whose parents have lower incomes.¹²

Further, homosexual couples in these studies are intrepid pioneers, keenly aware of the difficulties they face. They would not accept the challenge unless they felt themselves able to conquer the difficulties and were determined to do so. In many social experiments such pioneers succeed, but less impressive people who later try the same thing

[550-56 \(2004\)](#) (listing methodological flaws of these studies, especially use of small, self-selected samples); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, [1997 U. Ill. L. Rev. 833, 897](#) (reporting that "methodological defects and analytical flaws abound in [homosexual-parenting] studies"). The most recent study to claim to prove the success of same-sex parenting is Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 *Soc. Sci. Q.* 292, 292 (2009) (taking issue with the "claim that same-sex marriage will have negative impacts on marriage, divorce, abortion rates, the proportion of children born to single women ... and the percent of children in female-headed households"). It has the same methodological shortcomings as prior studies. See Douglas W. Allen, *Let's Slow Down: Comments on Same-Sex Marriage and Negative Externalities 3* (Dec. 9, 2010) (unpublished manuscript), available at <http://ssrn.com/abstracts=1722764>.

⁹ Michael J. Rosenfeld, *Abstract, The Development of Children of Same-Sex Couples 2*, available at <http://www.stanford.edu/~mrosenfe/Same-sex%20couples%20and%20their%20children,%20abstract.pdf>; see also Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 *Demography* 755, 757 (2010) [hereinafter Rosenfeld, *Nontraditional Families*] (stating that "the sample sizes of [same-sex parenting] studies are too small to allow for statistically powerful tests").

¹⁰ Compare Charlotte J. Patterson, *Am. Psychol. Ass'n, Lesbian and Gay Parenting* 15 (2005), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf> (reporting only two longitudinal studies of lesbian parenting), with Byrd, *supra* note 5, at 16 ("Studies of children raised by male couples are 'virtually non-existent.'").

¹¹ See Paul Cameron, *Homosexual Parents: Testing "Common Sense" - A Literature Review Emphasizing The Golombok & Tasker Longitudinal Study of Lesbians' Children*, 85 *Psychol. Rep.* 282, 318 (1999) (noting that "unlike studies based on random samples, [volunteer-sample] findings can not [sic] be used to generalize to any population"); George A. Rekers, *An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, [18 St. Thomas L. Rev. 325, 401-02 \(2005\)](#) (arguing that "volunteer homosexual parents ... were 'cherry-picked' by the investigators, and are thus not representative of the general population of homosexuals").

¹² Rosenfeld, *Nontraditional Families*, *supra* note 9, at 757; see also Jane E. Miller & Diane Davis, *Poverty History, Marital History, and Quality of Children's Home Environments*, 59 *J. Marriage & Fam.* 996, 1005 (1997) ("The quality of the home environment increases with increasing income"); Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 *J. Marriage & Fam.* 1052, 1058 (2000) ("Most samples studied to date have been composed mainly of White, middle-class, largely professional families."); Rosenfeld, *Nontraditional Families*, *supra* note 9, at 762 (describing a study finding that children in higher income families had lower rates of grade retention in school).

do less well. ¹³ Whatever the success of the pioneers of same-sex [*57] parenting has been, that success may not be matched by others in the future.

Finally, some of these studies find that children raised by their married, biological parents fare best. ¹⁴ They may then claim that this result stems from the "higher socioeconomic status" of these parents. ¹⁵ That conclusion, however, raises the question of the direction of cause and effect. One of the classic justifications for traditional marriage is that having a wife and the prospect or presence of children motivate a man to earn more money and achieve higher status. ¹⁶ Thus higher socioeconomic status may also be a result of marriage.

For lack of evidence, especially about male couples and long-term effects, uncertainty about gay parenting will persist for years. Liberalization of divorce was touted on the seemingly humane premise that some marriages are irreparably broken and that it is better to let the parties end these marriages rather than perpetuate their misery by forcing them either to stay married or to endure a long, bitter, damaging legal battle over questions of fault. ¹⁷ It was argued that children would not be harmed by divorce because they are "infinitely malleable." ¹⁸ "It was fashionable among intellectuals to contend that the best interests of adults also serve the best interests of children. This formerly conventional wisdom has proven to be costly" ¹⁹

[*58] The damage done to children by divorce became evident only many years after divorce laws were liberalized and divorce became more common. ²⁰ The experience with liberalized divorce follows the law of unintended

¹³ Cf. Diane Ravitch, *The Death and Life of the Great American School System* 137 (2010). Ravitch states that charter school experimenters

imagine that it is easy to create a successful school, but it is not. They imagine that the lessons of a successful school are obvious and can be easily transferred to other schools, just as one might take an industrial process or a new piece of machinery and install it in a new plant without error.

Id.

¹⁴ Rosenfeld, *Nontraditional Families*, supra note 9, at 755 (finding that children of heterosexual married couples have the lowest rate of grade retention in school). Note that this group includes adopted children and children living with one biological parent who has divorced the other biological parent and remarried. Such children tend not to do as well as children living with the married, biological parents, so the study does not reveal the full advantages of their latter milieu.

¹⁵ Id.

¹⁶ Steven E. Rhoads, *Taking Sex Differences Seriously* 252-53 (2004) ("Compared with the married, young unmarried men tend to be lazy and unfocused... . Marriage compels men to grow up."); W. Bradford Wilcox et al., *Inst. for Am. Values, Why Marriage Matters* 19-22 (2d ed. 2005) (noting married men have a greater work commitment and make more money).

¹⁷ See, e.g., Jane Lewis, *The End of Marriage?: Individualism and Intimate Relations* 5 (2001).

¹⁸ Seana Sugrue, *The Erosion of Marriage: A Pyrrhic Victory?*, in *What's the Harm?*, supra note 5, at 297, 302-03.

¹⁹ Seana Sugrue, *Canadian Marriage Policy: A Tragedy for Children*, *Inst. of Marriage & Fam. Can.*, Spring 2006, at 23, 23, available at http://www.imfcanada.org/article_files/IMFC_SpringReview.pdf.

²⁰ Studies find that, inter alia, children of divorced parents are more likely to have lower academic achievement and self-esteem and higher levels of depression, delinquency, and aggression. See Margaret F. Brinig, *From Contract to Covenant: Beyond the Law and Economics of the Family* 174-77 (2000); Elizabeth Marquardt, *Between Two Worlds: The Inner Lives of Children of Divorce* 2-3 (2005); Judith Wallerstein et al., *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* xxi-xxv, 26 (2000); Barbara Dafoe Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family* 6-7 (1996). Liberalized divorce also harms women. Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 318-19 (1985); Allen, supra note 8, at 2 n.3 (finding that no-fault divorce precipitated "changes in labor force participation rates for women, increased total hours of work for women, and a feminization of poverty").

The damage of divorce to children takes many forms. E.g., Howard S. Friedman & Leslie R. Martin, *The Longevity Project* 145 (2011) ("Parental divorce during childhood was the single strongest social predictor of early death"); Sara McLanahan &

consequences - major legal changes invariably produce unexpected effects. Likewise, an unprecedented change in the law and meaning of marriage may have detrimental consequences. The studies invoked by the gay movement cannot refute this possibility.

III. Further Reasons for Doubt

There are further empirical evidence and inductive reasons indicating that same-sex married couples almost certainly would not be equally good parents as are married biological parents.

A. Adoption vs. Biology

Every child in a homosexual house has lost at least one biological parent. Loss of a parent is universally regarded as a great misfortune. If the child has one biological parent, the other adult is a stepparent. In fables, stepparents are typically hostile to their step-children.²¹ [*59] Homosexual couples with children often experience competition or jealousy over parenting, and the children often exhibit a preference for or "primary bond" with one parent.²² If one is the child's biological parent, it would be natural for the child to identify the other as secondary, or as not a true parent at all.²³

Alternatively, the child in a homosexual house has lost both parents. This is universally regarded as a tragedy. Adoption can be a great blessing for children whose parents are unable or unwilling to care for them, but even adoption by a traditional married couple is not equal to the biological family.²⁴ If same-sex couples are just as

Gary Sandefur, *Growing Up with a Single Parent* 40-46 (1994) (stating that adolescents with divorced parents are much likelier to drop out of high school than children of continuously married families).

²¹ See Bruno Bettelheim, *The Uses of Enchantment: The Meaning and Importance of Fairy Tales* 66-73 (1975) (discussing "The Fantasy of the Wicked Stepmother"). Cf. W. Bradford Wilcox, *Suffer the Little Children: Cohabitation and the Abuse of America's Children*, *The Witherspoon Inst.* (Apr. 22, 2011), <http://www.thepublicdiscourse.com/2011/04/3181> (discussing high rates of child abuse among cohabiting adults). Children living with a married stepparent probably fare no better than children living with a cohabiting adult. See Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 *J. Marriage & Fam.* 351, 364 (2004) ("Regardless of whether a parent remarries or forms a cohabiting stepfamily, [negative] child outcomes are similar."); Andrew J. Cherlin, *The Marriage-Go-Round 5* (2009) ("Children whose parents have remarried do not have higher levels of well-being than children in lone-parent families ...").

²² See Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 *Child & Adolescent Soc. Work J.* 159, 166-69 (2003); Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who Is Mommy Tonight? Lesbian Parenting Issues*, 43 *J. Homosexuality*, no. 2, 2002 at 1, 10-11.

²³ See Louis DeSerres, *Preserve Marriage - Protect Children's Rights* (Canada), in *What's the Harm?*, supra note 5, at 103, 106 ("This biological imbalance can also be the source of numerous tensions and conflicts that are not likely to benefit the child ..."). In heterosexual couples "a stepparent [or] cohabiting partner often occupies ambiguous family roles characterized by little trust and authority, particularly from the child's standpoint." Brown, supra note 21, at 354. There is no reason to think that this problem would not also occur in same-sex couples.

²⁴ Matthew D. Bramlett et al., *The Health and Well-Being of Adopted Children*, 119 *Pediatrics* S54, S54 (Supp. 2007) (finding that, compared to biological children, adopted children are more likely to have a myriad of health problems); David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 *Future Children* 153, 153 (1993) ("A selective review of the literature indicates that, although most adoptees are well within the normal range of functioning, as a group they are more vulnerable to various emotional, behavioral, and academic problems than their nonadopted peers living in intact homes with their biological parents."); Gail Slap et al., *Adoption as a Risk Factor for Attempted Suicide During Adolescence*, 108 *Pediatrics* e30, e30 (2001) ("Attempted suicide is more common among adolescents who live with adoptive parents than among adolescents who live with biological parents."); Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 *J. Clinical Child Psych.* 447, 447 (1993) (describing a meta-analysis of sixty-six published studies finding that adoptees had significantly higher levels of maladjustment, externalizing disorders, and academic problems than nonadoptees). See also Sharon Vandivere & Karin Malm, U.S. Dep't of Health & Hum. Services, *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents* 5 (2007), which found inter alia:

good as biological parents, then, they must be better than traditional [*60] married couples as adoptive parents. There is no empirical or inductive evidence to suggest that this is true.

Adopted children often crave knowledge of, and contact with, their biological parents and are challenging laws that prevent them having it.²⁵ In effect, these children assert the natural importance of blood ties and a human right of access to their biological parents. The law increasingly acknowledges such a right. The Convention on the Rights of the Child, for example, recognizes the right of every child, "as far as possible ... to know and be cared for by his or her parents."²⁶ Because homosexual couples cannot biologically create children, however, the SSM movement must de-emphasize the importance of blood ties and any right of children of access to their biological parents.²⁷

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B. Special Issues with Same-Sex Couples

In addition to the detriments of adoption even by a traditional married couple, there are reasons to believe that adoption by same-sex couples would raise further problems.

1. Children's Sexuality

The claim that living with a same-sex couple does not affect a child's sexuality is implausible. "It would be surprising indeed if ... children's own sexual identities were unaffected by the sexual identities of their parents."²⁸

Compared to the general population of children, adopted children are more likely to have ever been diagnosed with - and to have moderate or severe symptoms of - depression, ADD/ADHD, or behavior/conduct disorder... . Parental aggravation (for example, feeling the child was difficult to care for, or feeling angry with the child)... . is more common among parents of adopted children than among parents in the general U.S. population (11 compared with 6 percent).

²⁵ Patrick F. Fagan, Fam. Research Council, *Adoption Works Well: A Synthesis of the Literature* 13 (2010), available at <http://downloads.frc.org/EF/EF10K39.pdf> ("At some stage, adopted children commonly desire to get to know their birth mother."); Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* 149 (2006) [hereinafter Somerville, *The Ethical Imagination*] (asserting "children's rights to both a mother and a father, preferably their own biological parents, and to be reared by them, unless there are good reasons to the contrary in the 'best interests' of a particular child"); Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 *Int'l J. Jurisprudence Fam.* 35, 44 (2010) [hereinafter Somerville, *Children's Human Rights*] ("It is now being widely recognized that adopted children have the right to know who their biological parents are whenever possible, and legislation establishing that right has become the norm."); see also David Crary, *Sperm-Donors' Kids Seek More Rights and Respect*, MSNBC.com (Aug. 16, 2010, 7:52 AM), <http://www.msnbc.msn.com/id/38679526> (noting children are "keenly curious" about the men who helped give them life); Vardit Ravitsky & Joanna E. Scheib, *Donor-Conceived Individuals' Right to Know*, *Bioethics Forum* (July 20, 2010, 2:22 PM), <http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4811&blogid=140> ("[A] trend towards making donor identities available is gathering momentum as a growing number of countries adopt laws and regulations banning anonymity.").

²⁶ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49, art. 7 (Nov. 20, 1989). Unfortunately, the United States has not ratified this convention.

²⁷ See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 11 (1999); Susan F. Appleton, *Gender and Parentage: Family Law's Equality Project in Our Empirical Age*, in *What is Parenthood?* (forthcoming) (manuscript at 6-7), available at <http://ssrn.com/abstract=1628232> (arguing for "standards that accord legal recognition to those who perform a family relationship, even in the absence of formal or biological connections"); David Blankenhorn, *Protecting Marriage to Protect Children*, *L.A. Times*, Sept. 19, 2008, at A27 ("Every child being raised by gay or lesbian couples will be denied his birthright to both parents who made him."); Jerry Mahoney, *Mom/Not Mom/Aunt*, *N.Y. Times*, July 18, 2010, at ST6 (ruminating that eggs donated by the sister of a homosexual partner are a gift "more valuable than just a genetic link to our offspring").

²⁸ Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 *Developmental Psychol.* 130, 134 (1995); see also Bruce J. Ellis, *Of Fathers and Pheromones: Implications of Cohabitation for Daughters' Pubertal Timing*, in *Just Living Together: Implications of Cohabitation on Families, Children, and Social Policy* 161, 169 (Alan Booth & Ann C. Crouter eds., 2002) (suggesting that cohabitation, as opposed to marriage, "may lead to earlier pubertal development in

Even young children may sense, or be told by others, that their guardians are unusual - queer - thereby beginning their sexualization at an unusually early age. There is evidence that children raised by homosexuals are more likely to engage in homosexuality and to feel confused about their sexual identity.²⁹

2. Durability and Fidelity

Other aspects of homosexual relationships make same-sex couples less likely to be good parents. Heterosexual relationships are more durable. The bond between woman and man is rooted in the biological need to nurture human infants for a long time.³⁰ The parents' fidelity [***62**] affirms paternity - the identity of the father - which is hidden by promiscuity in some other species, including close relatives of humans, like chimpanzees.³¹ The recognition of paternity makes it possible for the father to care for his own children, which includes caring for their mother - his mate. The recognition of "patrilineal kin" also made it possible to "move forward and establish peaceful relations with other groups."³² For either parent to have sex outside the marriage can disrupt their bond by creating competing demands from other children and the other parent(s).

It would be astonishing if this natural bond, a product of a million years of evolution, were just coincidentally equaled by the bond between same-sex couples, which has no biological basis. The animal kingdom is instructive. In some species male and female mate for life; in many they do not. But in no species do members of the same sex mate for life. Homosexuals have less reason to bond as couples and, when they do, less reason for the bond to be enduring and exclusive. Not surprisingly, then, homosexuals are less inclined than heterosexuals to marry,³³ and gays who do marry have a high divorce rate.³⁴

girls and associated health and psychosocial risks"); A. Dean Byrd, Gender Complementarity and Child-Rearing: Where Tradition and Science Agree, 6 J.L. & Fam. Stud. 213, 214 (2004) ("Children learn about male-female relationships through the modeling of their parents."); Susan Golombok & Fiona Tasker, Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families, 32 Developmental Psychol. 3, 4, 7 (1996) (admitting that "children's sexual orientation may be influenced by attitudes toward sexuality in the family in which they are raised").

²⁹ See supra note 7 and accompanying text.

³⁰ Compare Bernard Chapais, Primeval Kinship: How Pair-Bonding Gave Birth to Human Society 27 (2008) (positing that human society resulted from "the stable breeding bond between a father and mother [which] provided a reliable means for the father to recognize his offspring and for an offspring to recognize his father"), with St. Thomas Aquinas, Summa Contra Gentiles, Bk. 3:II, Ch. 122 (Vernon J. Bourke trans., Image Books 1956):

The needs of human life demand many things which cannot be provided by one person alone. Therefore, it is appropriate to human nature that a man remain together with a woman after the generative act, and not leave her immediately to have such relations with another woman, as is the practice with fornicators.

³¹ Nicholas Wade, New View of How Humans Moved Away from Apes, N.Y. Times, Mar. 10, 2011, at A3 (quoting Dr. Bernard Chapais that ""if you take the promiscuity that is the main feature of chimp society, and replace it with pair bonding, you get many of the most important features of human society").

³² Nicholas Wade, Supremacy of a Social Network, N.Y. Times, Mar. 14, 2011, at D4 (quoting Dr. Bernard Chapais).

³³ E.g., Paul Ames, Dutch Gays Don't Take Advantage of Opportunity to Marry, global post (Apr. 20, 2011), <http://www.globalpost.com/dispatch/news/regions/europe/benelux/110419/netherlands-gay-rights-same-sex-marriage> (reporting that twenty percent of gay Dutch couples are married compared to eighty percent of heterosexual couples); Harry R. Jackson, Jr., What's the Vex of Same-Sex?, Charisma (Oct. 12, 2009, 1:21 PM), <http://charismamaq.com/index.php/blogs/harry-r-jackson/23594-whats-the-vex-of-same-sex> (reporting that in the Netherlands, where SSM is recognized, only twelve percent of gays have chosen to marry); see also Lewis v. *Harris*, 908 A.2d 196, 211, 218 (N.J. 2006) (finding 16,000 same-sex couples living in committed relationships among a state population of 8,500,000, equaling less than 0.4% of the population); Maggie Gallagher & Joshua K. Baker, Inst. for Marriage and Pub. Pol'y, Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe 1 (2006), available at <http://www.marriagedebate.com/pdf/imapp.demandforssm.pdf> (finding that, internationally, between one percent and five percent of gays and lesbians have availed themselves of same-sex marriage).

One study found that only 85,000 same-sex couples had entered into a legally-recognized relationship in America. Gary J. Gates et al., The Williams Inst., Marriage, Registration and Dissolution by Same-Sex Couples in the U.S. 5 (2008). That is about 1/36th

[*63] Where homosexuals (especially gay men) do marry or otherwise enter into a committed relationship, it generally seems to happen later in life than it generally does for normal couples.³⁵ This is not surprising. A normal motive for a traditional marriage is to start a family, so it generally occurs when the couple is young enough to bear children and handle the physical rigors of raising them. Gay couples do not bear children. Further, "gay men tend to be even more preoccupied than most straight women with their bodies, physical **[*64]** attractiveness, attire, adornment and self-presentation."³⁶ They may choose to marry only when they no longer feel attractive enough for the promiscuity of the homosexual "meat market."³⁷

of one percent (0.00027%) of the 308,745,538 people living in the United States in 2010. U.S. Census Bureau, Resident Population of the 50 States, The District of Columbia, and Puerto Rico: 2010 Census (2010), http://2010.census.gov/news/pdf/apport2010_table2.pdf.

In Oregon, 2,600 same-sex couples (or 5,200 people), comprising about twenty percent of Oregon's same-sex couples, registered in the first year after Oregon instituted domestic partnerships, even though these partnerships offered most of the legal protections and benefits of marriage. Bill Graves, Only One-Fifth of Oregon's Same-Sex Couples Opt for Union, The Oregonian (Feb. 3, 2009, 9:07 AM), http://www.oregonlive.com/news/index.ssf/2009/02/domestic_partnership.html. Of the couples, seventy percent were female. Id. Oregon's population was estimated at 3,831,074 in 2010. U.S. Census Bureau, supra. The 5,200 people are less than 0.14 % of the population. See id.

In three years, only 6,500 same-sex couples registered under Vermont's civil-unions law. Pam Belluck, Gays Respond: 'I Do,' 'I Might' and 'I Won't,' N.Y. Times, Nov. 26, 2003, at A1. One reason for the low number is that "couples who came of age in the 1960's and 1970's were more likely to see marriage as a heterosexual institution, symbolizing a system that they could not, or would not, want to be part of." Id. Only 166 of General Motors' 1,300,000 employees claimed the same-sex benefits that the automaker offered. Maggie Gallagher, What Marriage Is For, Wkly. Standard, Aug. 4-Aug. 11, 2003, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/939pxiqa.a.sp>. In short, very few same-sex couples have sought legal recognition when it is available, and most (especially the male couples) had no interest in establishing legal recognition.

³⁴ See, e.g., Gunnar Andersson et al., The Demographics of Same-Sex Marriages in Norway and Sweden, 43 *Demography* 79, 95 (2006); see also Dennis Altman, *The Homosexualization of America, The Americanization of the Homosexual* 187 (1982) ("Among gay men a long-lasting monogamous relationship is almost unknown."); Maggie Gallagher & Joshua K. Baker, Inst. for Marriage and Pub. Pol'y, *Same-Sex Unions and Divorce Risk: Data from Sweden* 1 (2004), available at <http://www.marriagedebate.com/pdf/SSdivorcerisk.pdf> (finding that gay male couples in Amsterdam were fifty percent more likely to divorce, and lesbian couples were over 150% more likely to divorce, than heterosexual couples); Colleen C. Hoff et al., Serostatus Differences and Agreements About Sex with Outside Partners Among Gay Male Couples, 21 *AIDS Educ. & Prevention* 25, 32-33 (2009) (finding that half of gay couples in committed relationships had explicit agreements allowing sex with others); Lawrence A. Kurdek, Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?, 66 *J. Marriage & Fam.* 880, 896 (2004) (finding that the dissolution rate of homosexual couples was higher than that of heterosexual married couples); Maria Xiridou et al., The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam, 17 *AIDS* 1029, 1031 (2003) (finding among a sample of Amsterdam men that gay male partnerships lasted on average 1.5 years and that men in these partnerships had an average of eight casual partners per year).

³⁵ See Gates et al., supra note 33, at 9 (study finding that same-sex couples who married in Massachusetts were considerably older than opposite-sex couples who married at the same time).

³⁶ Judith Stacey, *Fellow Families? Genre of a Gay Male Intimacy and Kinship in a Global Metropolis* (Jan. 25-27, 2002) (unpublished manuscript), available at <http://www.leeds.ac.uk/cava/papers/intseminar3stacey.htm>.

³⁷ This possibility seems consistent with the importance of physical appearance in the gay male marketplace:

In cruising culture, the gay male sexual sport arena, it's all in the gaze. Erotic attraction and connection occur (or fail) in the blink of an eye... . The extraordinary emphasis on the visual at the core of this dynamic imposes painful challenges for gay men seeking eros and intimacy who fall outside desirable standards of beauty and youth.

Id. In *City Boy*, an autobiography of Edmund White, an active homosexual, he reveals that "by age 30 he was too old for the scene in the back rooms and piers." Stacey D'Erasmus, *Glory Days* (review of Edmund White, *City Boy* (2009)), N.Y. Times, Oct. 4, 2009 (Bk. Rev.), at 11.

Many gay men are promiscuous to an extent incompatible with marriage.³⁸ Some gays disdain monogamy as proper only for heterosexuals because they bear children, not a model gays should emulate.³⁹ One says: "Gay liberation was founded ... on a 'sexual brotherhood of promiscuity,' and any abandonment of that promiscuity would amount to a 'communal betrayal of gargantuan proportions.'" ⁴⁰ Promiscuity is implicit in educational materials about homosexuality, which are becoming more common in public schools.⁴¹

Due in part to promiscuity, homosexuals have high rates of disease. Gay men became more cautious about sex after the onset of AIDS, but **[*65]** infection rates soon rebounded to their former levels.⁴² Gay men also suffer disproportionately from many other diseases.⁴³ The tendency of male homosexual acts to spread disease may help explain the revulsion many people feel about them.⁴⁴ Lesbians also suffer high rates of certain diseases and drug abuse.⁴⁵ Homosexuals also have higher rates of suicide, mental illness, and drug and substance abuse.⁴⁶

³⁸ In one study forty-three percent of white male homosexuals reported having sex with 500 or more partners, with twenty-eight percent having 1,000 or more sex partners. Alan P. Bell & Martin S. Weinberg, *Homosexualities* 308 (1978); Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 *J. Sex Research* 349, 354 (1997) (finding similar figures). Homosexual promiscuity is acknowledged by many homosexuals. E.g., Marshall Kirk & Hunter Madsen, *After the Ball* 318-32 (1989). Even gay men with a "steady partner" tend to be promiscuous. Jackson, *supra* note 33 ("In the Netherlands ... homosexual men who have a steady partner have had an average of eight other sexual partners per year; lesbians were found to have more male partners over their lifetime than heterosexual women.").

³⁹ See David A.J. Richards, *Sex, Drugs, Death, and the Law* 53 (1982) (describing relationships, "whether in or outside of marriage," as equal in importance); Michael Bronski, *Behind the Sex Panic! Debate*, *Harv. Gay & Lesbian Rev.*, Spring 1998, at 29, 30; Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, *Lingua Franca*, Oct. 1997, at 26, 31; Sheryl Gay Stolberg, *Identity Crisis; Gay Culture Weighs Sense and Sexuality*, *N.Y. Times*, Nov. 23, 1997, § 4, at 1.

⁴⁰ Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men* 112 (1997) (quoting another source).

⁴¹ See George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 *Tex. Rev. L. & Politics* 359, 431-35 (2011).

⁴² See, e.g., *Ctrs. for Disease Control & Prev., Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex with Men - King County, Washington, 1997-1999*, 48 *Morbidity & Mortality Wkly. Rept.* 773, 775 (1999) ("The incidence of STDs among [homosexual men] declined substantially during the early 1980s as a result of a decrease in sexual risk behavior. However ... STDs among [homosexual men] have increased in some cities.") (citations omitted); Mary E. Northridge, *HIV Returns*, 93 *Am. J. Pub. Health* 860 (2003) ("Having struggled to come to terms with the catastrophic HIV epidemic among [homosexual men] in the 1980s ... are we set to backslide a mere 20 years later ... ?"); see also Press Release, *Ctrs. for Disease Control & Prev., CDC Analysis Provides New Look at Disproportionate Impact of HIV and Syphilis Among U.S. Gay and Bisexual Men* (Mar. 10, 2010), <http://www.cdc.gov/nchhstp/Newsroom/msmpressrelease.html> [hereinafter *CDC Analysis*] (finding that "the rate of new HIV diagnoses among [homosexual men] is more than 44 times that of other men and more than 40 times that of women," partly due to "complacency about HIV risk").

⁴³ *Ctrs. for Disease Control & Prev., Sexually Transmitted Disease Surveillance 2009*, at 33-35 (2010) (finding high and growing rates of syphilis infection among homosexual men); Byrd, *supra* note 5, at 13 (proffering extensive medical evidence which points to greater rates of disease among homosexual men); Anne Rompalo & H. Hunter Handsfield, *Overview of Sexually Transmitted Diseases in Homosexual Men*, in *AIDS and Infections of Homosexual Men* 3, 3 (Pearl Ma & Donald Armstrong eds., 2d ed. 1989) ("STDs remain a major health problem among homosexual men.").

⁴⁴ See Redding, *supra* note 7, at 180-91 (discussing an evolutionary basis for the human emotion of disgust and the widespread feelings of disgust for homosexual acts); cf. Roger Scruton, *Gay Reservations*, in *The Liberation Debate* 108, 122 (Michael Leahy & Dan Cohn-Sherbok eds., 1996) ("[A] society that regards homosexual and heterosexual union as morally on a par... must school itself to regard promiscuity ... as morally neutral.").

⁴⁵ See, e.g., Katherine Fethers et al., *Sexually Transmitted Infections and Risk Behaviours in Women Who Have Sex with Women*, 76 *Sexually Transmitted Infections* 345, 349 (2000).

⁴⁶ See David M. Fergusson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 *Archives Gen. Psychiatry* 876, 876 (1999) ("Gay, lesbian, and bisexual young people were at increased risks of major

Although many homosexuals brag about the absence of [*66] gender discrimination in their relationships, those relationships are often violent.⁴⁷

Some gays blame the pathology of promiscuity and disease on their social oppression.⁴⁸ William Eskridge argues that validating SSM would "civilize[] gay men by making them more like lesbians."⁴⁹ Both claims are weak. Society condemns promiscuity in homosexuals [*67] more than their fidelity or abstinence. One study found HIV infection of gay men in American cities to be highest in San Francisco, a famously gay-friendly city. Its rate was 150% higher

depression ... generalized anxiety disorder ... conduct disorder ... and suicide attempts."); Christine E. Grella et al., Influence of Gender, Sexual Orientation, and Need on Treatment Utilization for Substance Use and Mental Disorders: Findings from the California Quality of Life Survey, 9 *BMC Psychiatry* 52 (2009) (empirical study finding that homosexuals were significantly more likely than heterosexuals to seek mental health and substance abuse treatment); Richard Herrell et al., Sexual Orientation and Suicidality: A Co-Twin Control Study in Adult Men, 56 *Archives Gen. Psychiatry* 867, 873 (1999) ("Reports of lifetime measures of suicidality are strongly associated with a same-gender sexual orientation."); Redding, *supra* note 7, at 156-59 (reviewing literature); Yue Zhao et al., Suicidal Ideation and Attempt Among Adolescents Reporting "Unsure" Sexual Identity or Heterosexual Identity Plus Same-Sex Attraction or Behavior: Forgotten Groups?, 49 *J. Am. Acad. Child & Adolescent Psychiatry* 104, 104 (2010) (study finding homosexual and bisexual youths have higher suicide risk than others); Cassandra Brooks, Meth Use Among Young Gay Men Remains a Pervasive Problem, *Seattle Times* (Aug. 27, 2010, 9:21 AM), http://seattletimes.nwsources.com/html/localnews/2012723709_meth26m.html. Many gay men also suffer from eating disorders. Matthew B. Feldman & Ilan H. Meyer, Nat'l Inst. of Health, Eating Disorders in Diverse Lesbian, Gay, and Bisexual Populations, 40 *Int'l J. Eating Disorders* 218, 218 (2007) (finding that "gay and bisexual men had significantly higher prevalence estimates of eating disorders than heterosexual men").

⁴⁷ Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Extent, Nature, and Consequences of Intimate Partner Violence 30 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> ("Same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants. Among women, 39.2 percent of the same-sex cohabitants ... reported being raped, physically assaulted, and/or stalked by a ... cohabiting partner at some time in their lifetime. Among men, the comparable figure[] [is] 23.1 percent"); Pamela A. Brand & Aline H. Kidd, Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads, 59 *Psychol. Rep.* 1307, 1310-11 (1986) ("Physical abuse by a woman in a committed relationship was reported by 25% of the homosexual women."); Byrd, *supra* note 5, at 12-13 (summarizing several studies finding "significantly higher rates of domestic violence ... in homosexual relationships"); Gregory L. Greenwood et al., Battering Victimization Among a Probability-Based Sample of Men Who Have Sex with Men, 92 *Am. J. Pub. Health* 1964, 1967 (2002) (reporting that their estimates of physical battering among homosexual men "are substantially higher than those reported for heterosexual men and higher than or comparable to those reported for heterosexual women"); Stephen S. Owen & Tod W. Burke, An Exploration of Prevalence of Domestic Violence in Same-Sex Relationships, 95 *Psychol. Rep.* 129, 129 (2004) ("[A] greater percentage of individuals in same-sex relationships are victimized by rape, physical assault, and stalking than of individuals in heterosexual relationships."); Patricia Tjaden et al., Comparing Violence Over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants, 14 *Violence & Victims* 413, 422 (1999) ("These findings suggest that violence is more prevalent among same-sex male couples than either same-sex female couples or heterosexual couples."); Lisa K. Waldner-Haugrud et al., Victimization and Perpetration Rates of Violence in Gay and Lesbian Relationships: Gender Issues Explored, 12 *Violence & Victims* 173, 173 (1997) (finding that "47.5% of lesbians and 29.7% of gays have been victimized by a same-sex partner"); Caroline K. Waterman et al., Sexual Coercion in Gay Male and Lesbian Relationships: Predictors and Implications for Support Services, 26 *J. Sex Research* 118, 118 (1989) (finding "that 12% of the gay men and 31% of the lesbians reported being victims of forced sex by their current or most recent partner").

⁴⁸ See Christopher Banks, Cmty-Univ. Inst. for Soc. Research, The Cost of Homophobia: Literature Review on the Human Impact of Homophobia on Canada 41 (2003), available at http://www.usask.ca/cuisr/docs/pub_doc/health/Banks_HumanCostFINAL.pdf ("Homophobia results in substandard health care for [homosexuals], and ... [they] do not properly access and use the health care system because of homophobia.").

⁴⁹ William N. Eskridge, Jr., The Case for Same-Sex Marriage 84 (1996); see also Jonathan Rauch, Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America 20 (2004) (arguing that gay marriage will "civilize young men ... one of any society's two or three biggest problems").

than in Pittsburgh, not a particularly gay-friendly city, which had the lowest rate.⁵⁰ Similarly, high levels of mental illness among gays are also found in the Netherlands, perhaps the most gay-friendly country in the world.⁵¹

As for marriage civilizing gay men, probably few gay men (especially the young) will marry,⁵² and marriages that are entered into are likely to be short-lived.⁵³ Further, if the threat of deadly diseases from homosexual acts, including the "gay plague" of AIDS, has not deterred gay men's promiscuity, it is unlikely that a wedding ring will. Men are not domesticated by a wedding ceremony and a ring, but by a wife and children.⁵⁴

Gay couples are also more prone to adultery.⁵⁵ This is hardly surprising since, unlike normal couples, adultery in gays does not threaten to create new children who would compete for resources and care with the couple's own biological children.⁵⁶ They may have **[*68]** different expectations or preferences than do normal married couples about adultery⁵⁷ as well as other matters, like the sharing of finances.⁵⁸

Given the fragility of homosexual relationships, children in these homes are more likely to suffer the stresses of divorce and to learn that marriage is temporary, not a lasting relationship of trust. Every child raised by a homosexual couple has already lost at least one biological parent, so a divorce may cause heightened trauma. Given the frequent infidelity in homosexual couples, children in these homes are more likely to witness conflict over infidelity and to see it as a normal part of marriage. Given the frequent violence in homosexual couples, children in these homes are more likely to witness such violence.

⁵⁰ Thomas E. Schmidt, *Straight & Narrow?* 123 (1995) ("The level of [HIV] infection among homosexual men ... ranges from 20 percent in a Pittsburgh study to 50 percent in a San Francisco study.") .

⁵¹ See Theo G. M. Sandfort et al., *Same-Sex Sexual Behavior and Psychiatric Disorder*, 58 *Archives Gen. Psychiatry* 85, 87, 89 (2001) (reporting higher levels of bipolar disorders, depression, and anxiety disorders among homosexual men in the Netherlands).

⁵² See Gates et al., *supra* note 33, at 8 ("Approximately two-thirds of legally recognized same-sex couples are female."); see also *supra* note 33 (concerning the lack of studies of parenting by male couples).

⁵³ See *supra* notes 34 and 38-41.

⁵⁴ See George Gilder, *Men and Marriage* 12-18 (1986); Richard A. Posner, *Sex and Reason* 312 (1992) ("It would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages").

⁵⁵ One study of 156 male couples found that, for them, "fidelity is not defined in terms of sexual behavior but rather by their emotional commitment to each other." David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252 (1984). All the couples who had been together over five years made allowance for outside sexual activity. *Id.* at 253. See also Kirk & Madsen, *supra* note 38, at 330 ("The cheating ratio of 'married' gay males, given enough time, approaches 100%."). Andrew Sullivan exhorts heterosexuals to accept that

there is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman The truth is, homosexuals are not entirely normal; and to flatten their varied and complicated lives into a single, moralistic model is to miss what is essential and exhilarating about their otherness.

Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 202, 203-04 (1995).

⁵⁶ See *supra* text following note 31.

⁵⁷ See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 *Fordham L. Rev.* 1699, 1726 (1998) (conceding that marriage may not have "the same meaning - entailing commitment to the same values - for gay people as for their heterosexual counterparts"); see also *supra* notes 33-41 and accompanying text (discussing low rates of marriage and high rates of promiscuity and divorce among homosexuals).

⁵⁸ See George W. Dent, Jr., "How Does Same-Sex Marriage Threaten You?", 59 *Rutgers L. Rev.* 233, 249-50, 250 n.94 (2007).

A child whose mother cohabits with a man who is not the child's biological father is more likely to be abused than a child living with her biological father.⁵⁹ Every child raised by a gay male couple has at least one unrelated male adult in the home. There is no reason to think that they will fare better than children living with an unrelated heterosexual male. The high rates of child sex abuse among homosexuals and bisexuals are not reassuring.⁶⁰ At the least, given the uncertain effects of homosexual parenting, the children raised by homosexual couples are being treated as guinea pigs, which is troubling.

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3. Parents and Gender

Advocates of same-sex parenting claim there is no difference between having a mother and a father and having two guardians of the same sex.⁶¹ This, too, is implausible. Men and women differ in significant ways.⁶² A growing body of studies confirms: "Mothers and fathers contribute in gender specific and in gender complementary ways to the healthy development of children."⁶³ "Fathers tend to do things differently, ... but not in ways that are worse for

⁵⁹ See Wilcox, *supra* note 21 (citing a new federal study showing that "children living with their mother and her boyfriend are about 11 times more likely to be sexually, physically, or emotionally abused than children living with their married biological parents").

⁶⁰ See Ray Blanchard et al., *Pedophiles: Mental Retardation, Maternal Age, and Sexual Orientation*, 28 *Archives Sexual Behavior* 111, 112 (1999) ("The prevalence of homosexuality among pedophiles may be as high as 30-40%."); Kurt Freund & Robin J. Watson, *The Proportions of Heterosexual and Homosexual Pedophiles Among Sex Offenders Against Children: An Exploratory Study*, 18 *J. Sex & Marital Therapy* 34, 34 (1992) (reporting that "the ratio of heterosexual to homosexual pedophiles was calculated to be approximately 11:1" as opposed to a 20:1 ratio of heterosexuals to homosexuals among the general population).

⁶¹ See Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 *Am. Psychologist* 397, 397 (1999) ("Neither mothers nor fathers are essential to child development, and ... responsible fathering can occur within a variety of family structures.").

⁶² See generally David C. Geary, *Male, Female: The Evolution of Human Sex Differences* (1998) (looking at the differences in the sexes); Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* 343-51 (2002) (offering social, psychological, and biological proofs for the different natures of men and women); Dorion Sagan, *Gender Specifics: Why Women Aren't Men*, *N.Y. Times*, June 21, 1998, § 15, at 1 (stating that hormonal differences affect all organs of the body, abilities, behaviors, and effects of medication).

⁶³ Byrd, *supra* note 5, at 5; accord Wade F. Horn & Tom Sylvester, *Nat'l Fatherhood Initiative, Father Facts* 153-55 (4th ed. 2002) (citing various authorities, all of whom agree that fatherhood is both distinct from motherhood and essential to childhood development); Eleanor E. Maccoby, *The Two Sexes: Growing Up Apart, Coming Together* 256 (1998) ("There ... [is] greater differentiation in the roles of men and women when the 'family' composed of only a man and woman is expanded to include children."); *The Witherspoon Inst.*, *supra* note 8, at 18 ("The two sexes bring different talents to the parenting enterprise, and ... children benefit from growing up with both biological parents."); Ilanit Gordon et al., *Oxytocin and the Development of Parenting in Humans*, 68 *Biological Psychiatry* 377 (2010) (finding that differences in oxytocin (a key hormone involved in parent-infant bonding) between men and women are associated with different parenting behavior); Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 *Developmental Psychol.* 980, 980 (1994) (finding that "two-year-olds showed more ignoring of their fathers, whereas 4-year-olds were more ignoring of their mothers"); Anna Sarkadi et al., *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 *Acta Paediatrica* 153, 153 (2008) (finding that, in a review spanning twenty years of studies and over 22,000 children, fathers reduce behavioral problems in boys and psychological problems in girls, enhance cognitive development, and decrease delinquency); Laurie Tarkan, *Fathers Gain Respect from Experts (and Mothers)*, *N.Y. Times*, Nov. 3, 2009, at D5 (quoting Sara S. McLanahan, professor of sociology at Princeton University, who stated that "in the last 20 years, everyone's been talking about how important it is for fathers to be involved"); cf. Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in *Reconceiving the Family* 90, 106-10 (Robin Fretwell Wilson ed., 2006) (stressing the increased risk of child sexual abuse when an unrelated man - a stepfather or live-in boyfriend - is in the home).

the children. **[*70]** Fathers do not mother, they father." ⁶⁴ The contribution of fathers benefits their children. ⁶⁵ The presence of fathers in the home also benefits the neighborhoods where they live. ⁶⁶

Because of problems like these, "the American College of Pediatricians believes it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or reproductive manipulation." ⁶⁷ Most European countries bar adoption by gays and lesbians. ⁶⁸ A complete prohibition on adoption or foster care by homosexual couples would be inappropriate. In war-torn, impoverished countries, there are starving orphans who would be better off if they were adopted by a carefully-screened homosexual couple. However, adoption by homosexual couples should be limited, requiring a showing that no better placement is possible.

III. Same-Sex Couples and Artificial Reproduction

Not surprisingly, some homosexuals are using artificial means of reproduction. ⁶⁹ Recognition of SSM arguably requires that artificial reproduction (including cloning) be legalized. Since homosexuals cannot create children sexually, the principle of equality arguably **[*71]** entitles them to other means of reproducing. ⁷⁰ This argument has already been accepted in countries that have validated SSM. ⁷¹

In a recent study, fathers who were counseled in parenting spent more time with their children, "and the children were much less aggressive, hyperactive, depressed or socially withdrawn than children of fathers in the control group." Tarkan, *supra*. Studies with animals have found behavioral and even neurological deficiencies in mammals raised without fathers. See Shirley S. Wang, *This Is Your Brain Without Dad*, *Wall St. J.*, Oct. 27, 2009, at B7.

⁶⁴ Tarkan, *supra* note 63 (quoting child psychologist Dr. Kyle Pruett).

⁶⁵ See, e.g., Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 *J. Res. on Adolescence* 369, 384 (2004) ("Controlling for income and all other factors, youths in father-absent families ... had significantly higher odds of incarceration than those from mother-father families."); Erin Pugnet et al., *Fathers' Influence on Children's Cognitive and Behavioural Functioning: A Longitudinal Study of Canadian Families*, 43 *Can. J. Behav. Sci.* 173 (2011) (finding that fathers who actively engage in raising their children can help make their offspring smarter and better behaved).

⁶⁶ See McLanahan & Sandefur, *supra* note 20, at 137 (noting that crime is higher in communities with higher proportions of single-mother families); Amy L. Anderson, *Individual and Contextual Influences on Delinquency: The Role of the Single-Parent Family*, 30 *J. Crim. Just.* 575, 582 (2002) (finding that eighth graders attending schools with a higher proportion of teens from single-parent families committed more violent offenses, regardless of their own family structure).

⁶⁷ Michelle Cretella, *Am. Coll. of Pediatricians, Homosexual Parenting: Is it Time for Change?* 2-3 (2d ed. 2009), available at <http://www.acped.org/Download-document/2-Homosexual-Parenting.html>.

⁶⁸ See Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* 254 (2002); Alyssa LaRenzie, *Laws of Gay Adoption*, eHow.com, http://www.ehow.com/about_5434538_laws-gay-adoption.html (last visited Jan. 16, 2012) (stating that "same-sex couple adoption isn't legal in most nations around the world," but listing nine exceptions in Europe).

⁶⁹ See, e.g., Ball, *supra* note 3, at 166.

⁷⁰ See DeSerres, *supra* note 23, at 104; Anthony C. Infanti, *Dismembering Families*, in *Challenging Gender Inequality in Tax Policy Making: Comparative Perspectives* 159, 161 (Kim Brooks et al. eds., 2011) (arguing that denial of a federal tax deduction for the medical costs of artificial reproduction "contributes to the subordination of lesbian, gay and other non-traditional families"). Under the Universal Declaration of Human Rights, the right to marry includes the right to found a family. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16 (Dec. 10, 1948). To complete this bootstrap circle of reasoning, after SSM is invoked to justify gays' use of artificial reproduction, the possibility of artificial reproduction is then cited to justify SSM. See Karen Struening, *Looking for Liberty and Defining Marriage in Three Same-Sex Marriage Cases, in Moral Argument, Religion, and Same-Sex Marriage: Advancing the Public Good* 19, 41 (Gordon A. Babst et al. eds., 2009) ("Basing exclusive marriage laws on the distinction between assisted and unassisted procreation is arbitrary and irrational ...").

Artificial reproduction generally entails the separation of the resulting child from one or both of its biological parents. To plan deliberately to separate a child from one or both parents seems to be child abuse.⁷² At least in theory, biological parents can act in their own interests; infant or unborn children cannot. Although baby selling is illegal, adults can give or take pay for egg or sperm donations or surrogate motherhood and take steps to prevent the resulting children from having any legal rights against, or contact with, or even knowledge of the identity of their parents. In this way some men have sired hundreds of children.⁷³

Artificial reproduction is more problematic than adoption because the former is harder for the law to monitor. Every adoption must [*72] be approved by a court charged to protect the child. Artificial reproduction gets little legal oversight.⁷⁴ The children created are subject to the whims of adults. Artificial reproduction is also different in that it is irreversible. If an adoption goes awry it can be rescinded, but the artificial creation of a human being cannot be undone. Neither artificially created children nor adoptees have an adequate natural family to which they can return. The difference between the two is that for the artificially created child this happens by the design of the custodial parents.

The law has paid little attention to the rights of children regarding their biological parents because in the past there was no threat to these rights. Children lived with their natural parents unless the parents died, voluntarily surrendered them, or were found unfit by a court. Through artificial reproduction, children may be separated from their biological parents without any of these conditions being present. This separation damages children. As divorce studies confirm, children raised apart from their biological fathers "hunger for an abiding paternal presence."⁷⁵

⁷¹ See DeSerres, *supra* note 23, at 104 (citing a French parliamentary report); Elizabeth Marquardt, How Redefining Marriage Redefines Parenthood, FamilyScholars.org (Dec. 1, 2010, 11:17 PM), <http://familyscholars.org/2010/12/01/how-redefining-marriage-redefines-parenthood/> (indicating that use of third party sperm and egg donors to conceive children "does appear to be increasing in jurisdictions that have recognized same-sex marriage or similar arrangements"). The likelihood that recognition of SSM would "normalize" artificial reproduction also casts doubt on Dale Carpenter's claim that recognition of SSM would reduce the number of "scenarios in which you have multiple adults vying for children." Dale Carpenter, The Unconservative Consequences of Conservative Opposition to Gay Marriage, in *What's the Harm?*, *supra* note 5, at 319, 323.

⁷² See Camille S. Williams, Planned Parent-Deprivation: Not in the Best Interests of the Child, *4 Whittier J. Child & Fam. Advoc.* 375, 376 (2005) ("Intentionally producing a child to be raised without a biological father or a biological mother in the home is to bring the child into existence stripped of part of his or her heritage... . Depriving a child of one parent will surely wound the child in a multitude of ways."); Somerville, *Children's Human Rights*, *supra* note 25, at 44 (drawing an ethical distinction between accidental and deliberate destruction of "children's links to their biological parents, and especially for society to be complicit in this destruction").

⁷³ See Rachel Lehmann-Haupt, Mapping the God of Sperm, *Newsweek* (Dec. 15, 2009, 7:00 PM), <http://www.newsweek.com/id/227104> (featuring a man who is the father of nearly 400 children by sperm donation).

⁷⁴ See Mark Hansen, As Surrogacy Becomes More Popular, Legal Problems Proliferate, *ABA Journal* (Mar. 1, 2011, 6:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/ (stating that state laws governing assisted reproductive technology "vary widely" and that "a majority of states ... have no laws directly addressing surrogacy"); see generally Naomi R. Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* 3 (2009) (recognizing that the "stigma of illegitimacy" has stung the children of sperm and egg donors, with little legal recourse as of yet).

⁷⁵ Kyle D. Pruett, *Fatherhood* 207 (2000). Compare *id.*, and David Popenoe, *Life Without Father* (1996), with Barbara Dafoe Whitehead, *Answered Prayers: Where Is Technological Reproduction Taking Us?*, *Commonweal*, Oct. 20, 2006, at 133 (citing the Institute for American Values study finding widespread identity problems among such children resulting from artificial insemination); see also Elizabeth Marquardt et al., *Inst. for Am. Values, My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 5 (2010) (stating that "on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse."); Marquardt, *supra* note 5, at 17 (stating that damage to children raised by same-sex couples may be greater when "adults purposefully conceive a child with the clear intention of separating that child from a biological parent"); Alessandra Rafferty, *Donor-Conceived and Out of the*

Some of the dangers of artificial reproduction were adumbrated in Aldous Huxley's novel, *Brave New World*.⁷⁶ In this world, people are [*73] created in factories.⁷⁷ Each is endowed with genes appropriate to a certain function and status. Some are given low intelligence but a strong physical constitution so they can perform menial, physical labor. Others get high intelligence and serve as the ruling class.

Some details of Huxley's vision now seem unlikely to occur, but the overall picture is a prescient warning. Artificial reproduction could enable the wealthy to manufacture genetically superior offspring.⁷⁸ This would increase class (and perhaps racial) inequality. In short, it would create genetic castes. Artificial reproduction could actually limit reproductive choice. Those with access to reproductive technology would face a Hobson's choice of either using it to fabricate the most advanced product or, by eschewing technology for natural reproduction, condemn their children to genetic inferiority. It could also worsen gender inequality.⁷⁹

Some people have superior talents that bring them more prestige, fame, and respect than others enjoy. We accept these inequalities because they seem accidental and randomly bestowed. These inequalities would be hard to justify if talents were manufactured products available only to the wealthy. There is another possibility that homosexuals usually ignore. If, as seems likely, genes are at least a substantial factor in determining sexuality, before long science may identify the genes that contribute to homosexuality.⁸⁰ In a culture that honors untrammelled reproductive freedom, what objection could there be to parents' choosing to screen out "gay genes"?

[*74] In the novel *The Elementary Particles* by French writer Michel Houellebecq⁸¹ the problems of the human race are "solved" by eliminating love and replacing natural reproduction with cloning so that all people are genetically identical. This certainly does eliminate inequality, but what then is the purpose of life? Most people would consider this world not idyllic but horrible. It might be better to avoid these problems of artificial reproduction by severely restricting its use to begin with.

More generally, artificial reproduction threatens relationships between children and parents. What will happen to the bonds between parents and their first child when the parents get a genetically enhanced newborn that is bigger, stronger, smarter, healthier, and better looking than the older child?⁸² In short, what will happen to relations

Closet, *Newsweek* (Feb. 25, 2011, 10:00 AM), <http://www.thedailybeast.com/newsweek/2011/02/25/donor-conceived-and-out-of-the-closet.html> (describing anger and injustice felt by donor-conceived persons).

⁷⁶ Aldous Huxley, *Brave New World* (HarperPerennial 1998) (1932).

⁷⁷ *Id.* at 5-7, 13-17 (describing process of manufacturing human beings).

⁷⁸ See Maxwell J. Mehlman & Jeffrey R. Botkin, *Access to the Genome: The Challenge to Equality* 88 (1998) ("Genetic enhancements ... are likely to be excluded entirely from coverage and will only be available to those persons who can purchase them with private funds.").

⁷⁹ Some feminists have warned of the dangers of artificial reproduction under male control. See Christine Stolba, *Overcoming Motherhood: Pushing the Limits of Reproductive Choice*, *Pol'y Rev.*, no. 116, 2002 at 31.

⁸⁰ Most researchers believe that homosexuality is caused by a complex mixture of genes and of experiential and sociocultural factors. See P. Copeland & D. Hammer, *The Science of Desire* (1994); J. Bailey & R. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 *Arch. Gen. Psych.* 1089 (1991); Alvaro Rodriguez-Larralde & Irene Paradisi, *Influence of Genetic Factors on Human Sexual Orientation*, 50 *Investigacion Clinica* 377 (2009). A team of Chinese biologists found that male mice genetically engineered to lack serotonin exhibited homosexual behavior; male mice with serotonin did not. See Janelle Weaver, *Is Homosexuality Based on a Brain Chemical?*, *LiveScience* (Mar. 25, 2011, 8:26 AM), <http://www.livescience.com/13408-brain-chemical-serotonin-sexual-orientation.html>.

⁸¹ Michel Houellebecq, *The Elementary Particles* (Frank Wynne trans., 2001).

⁸² This scenario is not entirely fanciful. An online sperm and egg bank is being established that will accept only donations from beautiful people so that ugly people can have beautiful children. See Jessica Ramirez, *Dating Site Creates Online Sperm and Egg Bank*, *Newsweek* (Jun. 20, 2010, 8:00 PM), <http://www.newsweek.com/blogs/techtonic-shifts/2010/06/21/dating-site-creates-online-sperm-and-egg-bank.html>.

between parents and children when children become manufactured products? Artificial reproduction also threatens to transform what it means to be human. We consider ourselves a different species from Neanderthals and other earlier humanoids. At what point would genetically enhanced beings become so different from us as to become a different species, one that renders homo sapiens as obsolete as the Neanderthals now are? For these reasons some consider most artificial reproduction a denial of the child's human rights.⁸³ Because of its dangers, many foreign countries regulate artificial reproduction.⁸⁴

A total ban on artificial reproduction may go too far. In some cases a married woman and man cannot conceive a child by coitus but only by in-vitro fertilization. It is hard to see a strong objection to this, which does not involve separation of the child from its biological parents. Permitting any artificial reproduction, however, puts the law on a very slippery slope. Immediately there will be demands based [*75] on the cry of "equality" to permit every form of artificial reproduction.⁸⁵ Such demands must be resisted.

IV. The Importance of Blood Ties

Most people instinctively value blood ties. The American slave hymn, *Sometimes I Feel Like a Motherless Child*,⁸⁶ moves most people. Many couples that have difficulty in conceiving a child make heroic efforts to do so, often at great expense and enduring humiliation.

Nonetheless, there is a movement to reduce or eliminate the social and legal significance of the biological nexus between parents and children.⁸⁷ It is argued that "parents" should be those who really perform normal parenting functions.⁸⁸ This would deny biological parents any rights in their children and deprive children of any right in their biological parents, which is even more disturbing.

Because homosexuals can get children only through adoption or artificial reproduction, homosexual activists support the movement to disparage blood ties. William Eskridge says that recognizing SSM "involves the reconfiguration of the family - de-emphasizing blood, gender, and kinship ties Gay experience with 'families we choose' delinks family from gender, blood, and kinship. Gay families ... often form no more than a shadowy connection between the larger kinship groups."⁸⁹ As David Blankenhorn says, children in a homosexual household will not be treated as the victims of a tragedy; rather "it will be explained to everyone, including the children, that something wonderful has happened!"⁹⁰ Homosexuals may tell children conceived by artificial

⁸³ Somerville, *The Ethical Imagination*, supra note 25, at 122 ("The obligations we owe to human beings include not to manufacture them; not to make them into objects or commodities; and to respect their right not to be designed by another human.").

⁸⁴ See generally Merin, supra note 68 (stating that "all European countries except the Netherlands explicitly prohibit lesbians (and single women) from obtaining" alternative reproductive services).

⁸⁵ Compare Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, [76 Geo. Wash. L. Rev. 1457, 1460 \(2008\)](#) (urging courts to focus on reproductive equality rather than making substantive determinations about artificial reproduction), with Andrew B. Coan, *Assisted Reproductive Equality: An Institutional Analysis*, [60 Case W. Res. L. Rev. 1143, 1149 \(2010\)](#) (criticizing Rao's approach).

⁸⁶ See William E. Barton, *Old Plantation Hymns 17-18* (Boston, Lamson, Wolfe & Co. 1899). The hymn stems from the practice of deliberately separating a slave mother and child by the sale of one or another.

⁸⁷ See, e.g., Appleton, supra note 27, at 8 (cataloging feminists who would equalize family law to "dismantle the very performances that we currently associate with mothers and fathers").

⁸⁸ Id. ("'Mothering' refers to an activity or performance, which men as well as women can execute.").

⁸⁹ Eskridge, supra note 27, at 11.

⁹⁰ Blankenhorn, supra note 27.

insemination that they do not [*76] have a mother or a father. ⁹¹ In *Perry v. Schwarzenegger* the court declared, "The genetic relationship between a parent and a child is not related to a child's adjustment outcomes." ⁹²

As Eskridge suggests, validating SSM would affect not only children in homosexual households. By changing the meaning of parenthood it would affect all children. Traditionally, biological parents have inalienable duties to their children. As the adages say, you can choose your friends but not your relatives, and home is where they cannot turn you away. "De-emphasizing blood" and validating "families we choose" implies that biological parents may choose to eschew those duties. If biology is irrelevant, parents have no more rights in or responsibility to their biological children than any other adults. The law could abandon consistency and continue to impose duties on biological parents despite "de-emphasizing blood" in favor of "families we choose," but the new social meaning of parenthood will make it harder to enforce those duties.

Ironically, many same-sex couples who do have children tacitly confirm the importance of blood ties. They often arrange to get an infant who is the biological child of one member of the couple. Many people go further and argue for a "birthright of children to be connected to their mothers and fathers." ⁹³ As a French parliamentary commission put it, "The best interests of the child must prevail over adults' exercise of their liberty." ⁹⁴ The United Nations Convention on the Rights of the Child states that each child "shall have ... as far as possible, the right to know and be cared for by his or her parents." ⁹⁵ David Blankenhorn argues that "children have the right, insofar as [*77] society can make it possible, to know and to be cared for by the two parents who brought them into this world." ⁹⁶

The law has begun to recognize a right of offspring of artificial insemination to know who their fathers are. ⁹⁷ If children born of "surrogate mothers" have not demanded to know who their mothers are, that is only because surrogacy is so new that few children of surrogates are old enough yet to assert their rights.

Does a mere right to know one's biological parents go far enough? These children have already been denied the right to grow up with their real parents. If that happened because their guardians had bought or stolen the child from the parents, we would consider the child gravely wronged and injured. How is the child any less wronged or injured by artificial reproduction?

⁹¹ See Mahoney, *supra* note 27 ("We'd been instructed by our surrogacy agency not to use the 'm-word.' 'This child will have two fathers,' the staff member scolded. 'He or she will have an egg donor and a surrogate, but no mother!'").

⁹² [Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 981 \(N.D. Cal. 2010\)](#).

⁹³ Daniel Cere, War of the Ring, in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* 9, 11 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter *Divorcing Marriage*]; accord Margaret Somerville, What About the Children?, in *Divorcing Marriage*, *supra*, at 63, 67 ("Children ... have a prima facie right to know and be reared within their own biological family by their mother and father.").

⁹⁴ French Nat'l Assembly, Parliamentary Report on the Family and the Rights of Children 9 (2006) (English translation), available at <http://www.marriageinstitute.ca/images/PARLIAMENTARY%20REPORT%20ON%20THE%20FAMILY%20AND%20THE%20RIGHTS%20OF%20CHILDREN.pdf>.

⁹⁵ G.A. Res. 44/25, *supra* note 26.

⁹⁶ Blankenhorn, *supra* note 27; see also Appleton, *supra* note 27, at 13, 13 n.92 (citing a draft manuscript by Daniel Cere which refers to children's rights to a maternal bond and to be connected to their genetically-related parents).

⁹⁷ See *Pratten v. British Columbia (Attorney General)* (2011), 2011 B.C.S.C. 656, para. 215 (Can. B.C. S.C.) ("Based on the whole of the evidence, ... assisted reproduction using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring."). Some children are deploying sophisticated techniques to find their fathers despite legal obstacles. See Rachel Lehmann-Haupt, Are Sperm Donors Really Anonymous Anymore?, *Slate* (Mar. 1, 2010, 9:36 AM), http://www.slate.com/articles/double_x/doublex/2010/02/are_sperm_donors_really_anonymous_anymore.html.

Some argue that children live in homosexual homes already and will continue to do so even if we do not recognize SSM, so we may as well recognize it and give those children the resulting benefits.⁹⁸ This argument assumes, however, that recognizing SSM will affect only homosexuals who marry and will not diminish the existing benefits of marriage. This discussion shows, however, that recognizing SSM will profoundly change the meaning of marriage from a child-centered institution to one intended primarily for the gratification of adults. This change would diminish respect for marriage and probably impair its benefits to children.

Recognizing SSM may not even generate much benefit for children in homosexual households. The benefits of marriage to children arise mainly from binding biological parents. With SSM, this is impossible. Many gay couples have children because one of the child's biological parents left the other and now lives with another adult. I know of no evidence that children benefit if those two people are married, even if [*78] they are of different genders.⁹⁹ It is speculative that children in a gay household will benefit if the adults are in a recognized marriage. The number of children in gay households is also small, so that any benefits to those children would likely be outweighed by damage to the much larger number of other children.¹⁰⁰

Conclusion

The claim that there is "no difference" between homosexual and heterosexual parents¹⁰¹ is ambiguous. If it means that same-sex couples are as good as single parents, the statement may be true, but it is largely irrelevant to the debate over same-sex marriage. If it means that same-sex parents are just as good as married, biological parents, the statement is not supported by any substantial evidence and is almost certainly false. Empirical studies indicate some problems with same-sex parenting, and inductive reasons give further cause for concern.

Supporters of SSM want to change marriage - an institution that has been fundamental in every culture across the globe throughout history - in a way that, with a few recent exceptions, has never been tried before. Minimal prudence dictates that we not make such a radical change without strong evidence that it will do no harm. In other words, the burden of proof should be on advocates of SSM - and they cannot sustain that burden.¹⁰² Same-sex marriage should not be recognized at law, artificial reproduction by homosexuals should not be permitted, and adoption by same-sex couples should be allowed only in limited circumstances.

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⁹⁸ See, e.g., Carpenter, *supra* note 71, at 320 ("At least a million children in this country are being raised by gay parents, either single or in a couple. None of these children have the protections and benefits marriage would provide for them.").

⁹⁹ There is some contrary evidence. See *supra* note 21.

¹⁰⁰ Carpenter, *supra* note 71, at 320. Carpenter gives some numbers that are hard to reconcile. At one point he estimates the number of such children as "at least a million." *Id.* However, he also recites an estimate of 777,000 same-sex couple households and says that "about 20% of all male couple households in the United States and about one-third of all female couple households in the United States are raising children." *Id.* That would mean 200,000-250,000 such households, which would have to have an average of four to five children each to bring the total of children to 1,000,000. That seems unlikely.

¹⁰¹ See, e.g., Silverstein & Auerbach, *supra* note 61.

¹⁰² See Redding, *supra* note 7, at 143 (admitting that the risk from making fundamental changes in family law "argues for setting a fairly demanding standard when relying on lesbian parenting research in guiding public policy").