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NO DIFFERENCE?: AN ANALYSIS OF SAME-SEX PARENTING

- George W. Dent, Jr.¹

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* the District Court pronounced that “same-sex parents and opposite-sex parents are of equal quality.”² Some scholars 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 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 or confirmed. 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

¹ Schott-van den Eynden Professor of Law, Case Western Reserve University School of Law.

² Mimeo. Op. at 127.

³ See e.g., Michael S. Wald, *Adults’ Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 400 (2006); Gregory N. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCH. 607, 611 (2006) (stating that “[e]mpirical 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”); CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 168 (“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.”) (footnote omitted).

⁴ ER 263-87.

⁵ “[T]he 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

parents.⁶ Clearly neither comparison group does as well as children raised by their married, biological parents, so on its face these 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 Again, the absence of longitudinal data and of statistically significant samples mandates caution in weighing these findings. However, these new findings do raise suspicion that there may be other differences from same-sex parenting that have not yet been uncovered.

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

family.” Steven Nock, *quoted in* THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS 21-22 (INST. FOR AMERICAN VALUES 2006) [hereinafter THE REVOLUTION IN PARENTHOOD]. *See also* 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 (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.”).

⁶ *See, e.g.,* Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being* 6, available at www.clasp.org.

⁷ *See* 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 (2010) (meta-analysis finding that children raised by gay couples are much more likely than others to be gay); Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POLICY 127, 143-44, 147-51 (2008) (reviewing studies and concluding that homosexuality does seem to be more common among children raised by same-sex couples); Traycee Hansen, *A Review and Analysis of Research Studies Which Assessed Sexual Preference of Children Raised by Homosexuals* (2009), available at http://www.drtycehansen.com/Pages/writings_sexprefprt.html (concluding that studies by pro-homosexual researchers “can’t be used to make definitive statements, [but] are suggestive that homosexual parents are rearing disproportionate numbers of non-heterosexual children”); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 AM. SOCIO. REV. 159 (2001) (study finding homosexually parented children are more likely to experience sexual confusion and to engage in homosexual and bisexual behavior).

time rather than followed for a substantial period.⁸ One researcher who clearly supports the gay movement concedes:

[T]here 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 been mostly 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 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.

⁸ A group of 70 prominent scholars from all relevant academic fields concluded: “The current research on children raised by [same-sex couples] is inconclusive and underdeveloped--we do not yet have any large, long-term studies that can tell us much about how children are affected by being raised in a same-sex household.” WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2006) [hereinafter MARRIAGE AND THE PUBLIC GOOD]. See Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPIAC L. REV. 541 (2004) [hereinafter Wardle, *Considering the Impacts*] (listing methodological flaws of these studies, especially use of small, self-selected samples). See also Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 [hereinafter Wardle, *Potential Impact*]. 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. xx (2009). It has the same methodological shortcomings as the prior studies. See Douglas W. Allen, *Let’s Slow Down: Comments on Same-Sex Marriage and Negative Externalities* 3 (Dec., 2010), 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%20and%20their%20children,%20abstract.pdf>. See also Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755, 757 (2010) (stating that the sample sizes of studies of same-sex parenting remain too small for statistically powerful tests) [hereafter Rosenfeld, *Nontraditional Families*].

¹⁰ See Charlotte Patterson, *Lesbian and Gay Parenting* 15, available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf> (reporting only two longitudinal studies of lesbian parenting and none of gay male parenting). See also Byrd, *supra* note x, at 16 (“Studies of children raised by male couples are virtually non-existent.”).

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," who tend to be "white, upper-middle class women."¹² They may not be representative of the broader population.

Further, homosexual couples in these studies are intrepid pioneers, keenly aware of the obstacles they face. They would not take up the challenge of same-sex parenting 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 do less well.¹³ Whatever the success of the pioneers of same-sex parenting has been, that success may not be matched by others in the future.

Finally, some 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. A classic justification for marriage is that having a wife and the presence or prospect of children motivates a man to earn more money and achieve higher status.¹⁶ Thus higher socioeconomic status of married couples may be a result of marriage.

¹¹ See Paul Cameron, *Homosexual Parents: Testing "Common Sense"--A Literature Review Emphasizing Golombok & Tasker Longitudinal Study of Lesbians' Children*, 85 PSYCHOL. REP. 282, 318 (1998); 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 Homosexuality-Behaving Member*, 18 ST. THOMAS L. REV. 325, 401-02 (2005).

¹² Rosenfeld, *Nontraditional Families*, *supra* note x, at 757. See also Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1058 (2000).

¹³ See DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* x (2010).

¹⁴ See Rosenfeld, *Nontraditional Families*, *supra* note xx, at 755, 770 (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 See *id.*

¹⁶ See *infra* note xx.

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 to perpetuate their misery by forcing a couple 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 “[I]t was fashionable among intellectuals to contend that the best interest of adults also serve the best interests of children. This once conventional wisdom has proven to be gravely mistaken. . . .”¹⁹

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 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

¹⁷ See 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 x, at 302.

¹⁹ Seana Sugrue, *Canadian Marriage Policy: A Tragedy for Children*, REPORT, INST. FOR MARRIAGE & FAMILY CANADA 2 (May 31, 2006), *quoted in* Lynne Marie Kohm, *What’s the Harm to Women and Children?: A Prospective Analysis*, in *WHAT’S THE HARM?*, *supra* note x, at 79, 86.

²⁰ 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* (2005); JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND THE FAMILY* (1996). Liberalized divorce also harms women. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). It took almost forty years before rigorous studies were possible, and they showed the great damage wrought by liberalized divorce. Allen, *supra* note x, at 2.

One striking datum: “the single strongest social predictor (as opposed to personality predictor) of early death was parental divorce during childhood.” Katherine Bouton, *Eighty Years Along, a Longevity Study Still Has Ground to Cover*, N.Y. TIMES, Apr. 19, 2011, at D3 (citing a finding in HOWARD S. FRIEDMAN & LESLIE R. MARTIN, *THE LONGEVITY PROJECT: STARTLING DISCOVERIES FOR HEALTH AND LONG LIFE FROM THE LANDMARK EIGHT-DECADE STUDY* (2011)).

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 with homosexual guardians 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 step-parent. In fables step-parents are typically hostile to their step-children.²¹ Homosexual couples with children often experience competition or jealousy over parenting, and the children often have 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 with homosexual custodians 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

²¹ See BRUNO BETTELHEIM, *THE MEANING AND IMPORTANCE OF FAIRY TALES* 66-73 (1975) (discussing “The Fantasy of the Wicked Stepmother”).

²² See Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who Is Mommy Tonight? Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY No. 2, at 1, 10-11 (2002); Susan Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 CHILD & ADOLESCENT SOC. WORK J. No. 3, at 159, 166-69 (2003).

²³ See Louis DeSerres, *Preserve Marriage--Protect Children’s Rights*, in *WHAT’S THE HARM?*, *supra* note x, at 106 (“This biological imbalance can also be the source of numerous tensions and conflicts that are not likely to benefit the child. . . .”).

²⁴ See David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 THE FUTURE OF CHILDREN 153, 153 (Spring, 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 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 330 (Aug. 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 (1993) (meta-analysis of 66 published studies finding that adoptees had significantly higher levels of maladjustment, externalizing disorders, and academic problems than nonadoptees); Matthew D. Bramlett et al., *The Health and Well-Being of Adopted Children*, 119 PEDIATRICS, Supp. 2007, at S54. See also SHARON VANDIVERE ET AL., *ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 5 (2007), which found *inter alia*:

good as biological parents, they must be *better* than traditional married couples as adoptive parents. It would be astounding if this were true, and there is no evidence to suggest that it is.

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 to 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 deny the importance of blood ties and any right of children to access to their biological parents.²⁷

B. Special Issues with Same-Sex Couples

[C]ompared 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/HAD, or behavior/conduct disorder. . . . [P]arental 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 See Patrick F. Fagan, *Adoption Works Well: A Synthesis of the Literature* 13 (Family Research Council, Nov., 2010) (“At some stage, adopted children commonly desire to get to know their birth mother.”). “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.” MARGARET SOMERVILLE, *THE ETHICAL IMAGINATION: JOURNEYS OF THE HUMAN SPIRIT* 147 (2006). “Children also have a right to be reared within their biological families and to have a mother and a father, unless an exception can be justified as being 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. JURISP. FAM. 35, 35 (2011). See also David Crary, *Sperm-Donors’ Kids Seek More Rights, Want to End Anonymous Sperm Donation*, available at <http://www.app.com/apps/pbcs.dll/article?AID-2010100812064>; Vardit Ravitsky & Joanna E. Scheib, *Donor-Conceived Individuals’ Right to Know*, The Hastings Center, *Bioethics Forum* (July 20, 2010), available at <http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4811&blogid=140>.

²⁶ Convention on the Rights of the Child, G.A. Res. 44/25, at 166, 168, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), reprinted in 28 I.L.M. 1456 (1989), available at <http://www.ochr.org/english/law/pdf/crc.pdf>. Unfortunately, the United States has not ratified this convention.

²⁷ See *infra* note x and accompanying text.

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 Even young children may sense, or be told by others, that their guardians are unusual--queer--thereby initiating 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 necessity to nurture human infants for a long time.³⁰ The parents' fidelity 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 lets a father care for his own children, which includes caring their mother--his mate. The recognition of "patrilineal kin" also made it

²⁸ Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCH. 130, 134 (1995). See also A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAMILY STUD. 213, x (2004) ("Children learn about male-female relationships through the modeling of their parents."); Bruce 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 (A. Booth & A. Crouter eds., 2002); Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study*, 32 DEVELOPMENTAL PSYCH. 3 (1996).

²⁹ See *supra* note x and accompanying text.

³⁰ Discussing the emergence of human beings from other primates, Dr. Bernard Chapais, a primatologist, said: "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." *Quoted in* Nicholas Wade, *New View of How Humans Moved Away from Apes*, N.Y. TIMES, Mar. 11, 2011, at Ax. See generally BERNARD CHAPAIS, PRIMEVAL KINSHIP (2008).

³¹ See Wade, *supra* note x ("the presence of both parents revealed the genealogical structure of the family, which is at least half hidden in chimp societies").

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. A comparison with other species is instructive. Among some animals male and female mate for life; among 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 bond, 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

³² *Id.* (quoting primatologist Bernard Chapais). See also Nicholas Wade, *Supremacy of a Social Network*, N.Y. TIMES, Mar. 15, 2011, at D4.

³³ See Paul Ames, *Dutch Gays Don't Take Advantage of Opportunity to Marry* (Apr. 20, 2011), available at <http://www.globalpost.com> (reporting statistics from the Netherlands national statistics agency that “just 20 percent of gay Dutch couples are married, compared to 80 percent of heterosexual couples”); Harry R. Jackson, Jr., *What's the Vex of Same-Sex*, TownHall.com, Oct. 12, 2009, available at <http://townhall.com/Common/PrintPage.aspx?g=c9bc9aad-468e-49e2-9e1c-03225fd7ba2> (reporting that in the Netherlands, where SSM is recognized, only 12% of gays have chosen to marry). See also Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, 3 IMAPP POLICY BRIEF No. 1, 1, 6 (Apr. 26, 2006), available at <http://www.marriage Debate.com/pdf/imapp.demandforssm.pdf>. In 2006 the New Jersey Supreme Court found that there were “16,000 same-sex couples living in committed relationships” among a state population of 8,500,000. *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006). Those 32,000 people are less than 0.4% of the population. One study found that only 85,000 same-sex couples had entered into a legally recognized relationship in America. That is about 1/18th of 1% of the U.S. population. Gary J. Gates, M.V. Lee Badgett & Deborah Ho, *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.* 5 (July 2008), available at <http://www.ssrn.com/abstract=1264106>.

In Oregon 2,600 same-sex couples [thus 5,200 people], comprising about 20% of the of Oregon's same-sex couples, registered in the first year after Oregon instituted domestic partnerships, even though this offered most of the legal protections and benefits of marriage. Steve McKinsey, *Only One-Fifth of Oregon's Same-Sex Couples Opt for Union*, THE OREGONIAN, Feb. 2, 2009, available at http://blog.oregonlive.com/news_-impact/2009/02/domestic_partnerships.html. 70% were female. Oregon's population was estimated at 3,790,060 in 2008. See <http://quickfacts.census.gov/gfd/states/41000.html>. Thus those 5,200 people are less than 0.0014% of the population.

In three years only 6,500 couples registered under Vermont's civil union law. See 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

Where homosexuals (especially gay men) do marry or otherwise enter into a committed relationship, it generally happens 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 to 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 attractiveness, attire, adornment and self-presentation.”³⁶ They may choose to

1970’s [tended] 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 it offered. *See* Maggie Gallagher, *What Is Marriage For?*, WKLY. STANDARD, Aug. 4/Aug. 11, 2003, *available at* LEXIS, Nexis Library, The Weekly Standard File. In short, very few same-sex couples have sought legal recognition when it is available, and most (especially the males couples) had no interest in establishing legal recognition.

³⁴ *See* Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006) (“divorce-risk levels are considerably higher in same-sex marriages”); DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL* 187 (1982) (“[A]mong gay men a long-lasting *monogamous* relationship is almost unknown.”); Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection in America*, 17 AIDS 1029, 1031 (2003) (finding that 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); Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden*, IMAPP POLICY BRIEF, May 3, 2004 (study of registered partnerships in Sweden finding that gay male couples were 50% more likely to divorce, and lesbian couples were over 150% more likely to divorce than heterosexual couples); C.C. Hoff et al., *Serostatus Differences and Agreements About Outside Sex Partners Among Gay Couples*, 21 AIDS EDUC. & PREVENTION x (2009) (study finding that half of gay couples in committed relationships had explicit agreements allowing sex with others); Lawrence Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. FAMILY & MARRIAGE 893 (Nov. 2004) (finding that the dissolution rate of homosexual couples was more than three times that of heterosexual married couples, and the dissolution rate of lesbian couples was more than four times that of heterosexual married couples).

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

³⁶ Judith Stacey, *Fellow Families? Genre of a Gay Male Intimacy and Kinship in a Global Metropolis* (2006), *available at* <http://www.leeds.ac.uk/CAVA/papers/intseminar3Stacey.htm>

marry only when they no longer feel attractive enough for the promiscuity of the homosexual “meat market.”³⁷

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 infection rates soon rebounded to their former levels.⁴² Gay men also suffer disproportionately from many

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

In cruising culture, the gay male sexual sports 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.

³⁸ In one study 43% of white male homosexuals reported having sex with 500 or more partners, with 28% having 1,000 or more sex partners. MARTIN S. BELL & ALAN P. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-09 (1978). See also Paul Van den Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 *J. SEX RESEARCH* 354 (1997) (finding similar figures). Homosexual promiscuity is acknowledged by many homosexuals. See MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL* 280-347 (1990). Even gay men with a “steady partner” tend to be promiscuous. See Jackson, *supra* note x (reporting that “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: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 53 (1982); Michael Bronski, *Behind the SexPanic! Debate*, *HARV. GAY & LESBIAN REV.* 29 (Spring 1998); Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, *LINGUA FRANCA* 27 (Oct. 1997); Sheryl Gay Stolberg, *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* xx (1997).

⁴¹ See George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, x *TEX. REV. L. & POLITICS* x, x (2011).

⁴² See Centers for Disease Control and Prevention, *CDC Analysis Provides New Look at Disproportionate Impact of HIV and Syphilis Among U.S. Gay and Bisexual Men*

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 Although many homosexuals brag about the

(Mar. 10, 2010), *available at*

<http://www.cdc.gov/nchstp/Newsroom/msmpressrelease.html> (report finding that “the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and more than 40 times that of women,” and even greater discrepancies for syphilis) [hereafter CDC Analysis]. This report stated that one reason for the high rate of HIV infection among gay men is “complacency about HIV risk.” *See also* Centers for Disease Control, *Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex with Men--King County, Washington, 1997-99*, MORBIDITY & MORTALITY WKLY. REPT., Sept. 10, 1999, at 773; Byrd, *supra* note x, at 14 (summarizing several studies).

⁴³ *See* Byrd, *supra* note x, at 13-14 (summarizing several studies); Anne Tompalo & H. Hunter Handsfield, *Overview of Sexually Transmitted Diseases in Homosexual Men*, in AIDS AND INFECTIONS OF HOMOSEXUAL MEN 3 (Pearl M. & Donald Armstrong eds., 2d ed. 1989) (“homosexual men were known to be at high risk of acquiring sexually transmitted diseases”); Centers for Disease Control, *Sexually Transmitted Disease Surveillance 2009*, at 33 (Nov. 2010) (finding high and growing rates of syphilis infection among homosexual men).

⁴⁴ *See* Roger Scruton, *Gay Reservations*, in THE LIBERATION DEBATE 108, 122 (Michael Leahy & Dan Cohn-Sherbok eds., 1996); Redding, *supra* note x, at 180-91 (discussing the evolutionary basis for disgust and the widespread feelings of disgust for homosexual acts)..

⁴⁵ *See* Katherine Fethers, et al., *Sexually Transmitted Infections and Risk Behaviors in Women Who Have Sex with Women*, 76 SEXUALLY TRANSMITTED INFECTIONS 345 (2000).

⁴⁶ *See* D.M. Ferguson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES GEN. PSYCH. 876 (1999) (study concluding: “Gay, lesbian and bisexual young people were at increased risks of major depression . . . generalized anxiety disorder . . . conduct disorder . . . [and] suicide attempts.”); Richard Herrel *et al.*, *Sexual Orientation and Suicidality*, 56 ARCHIVES OF GEN. PSYCH. 867 (1999) (study finding that “same gender sexual orientation is significantly associated with each of the suicidality measures”); 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*, 19 BMC PSYCH. 52 (2009), *available at* <http://www.biomedcentral.com/1471-244X/9/52> (empirical study finding that homosexuals were twice as likely to seek mental health, and substance abuse treatment); Redding, *supra* note x, 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. OF CHILD & ADOLESCENT PSYCH. 89 (2010) (study finding homosexual and bisexual youths have higher suicide risk than others). Many gay men also suffer from eating disorders. Stacey, *supra* note x; Cassandra

absence of gender discrimination in their relationships, those relationships are often abusive.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 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 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

Brooks, *Meth Use Among Gay Men Remains a Pervasive Problem*, SEATTLE TIMES, Aug. 27, 2010.

⁴⁷ See Byrd, *supra* note x, at 12-13 (summarizing several studies); Lisa K. Waldner-Haugrud et al., *Victimization and Perpetration Rates of Violence in Gay and Lesbian Relationships: Gender Issues Explored*, 12 VIOLENCE & VICTIMS 173 (1997) (reporting that “47.5% of lesbians and 29.7% of gays have been victimized by a same sex partner); P.A. Brand & A.H. Kidd, *Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads*, 59 PSYCH. REPTS. 1307 (1986) (finding reports of abuse in 30% of lesbian relationships); C.K. Waterman et al., *Sexual Coercion in Gay Male and Lesbian Relationships: Predictors and Implications and Support Services*, 26 J. SEX RESEARCH 118 (1989); S. Owen & T.W. Burke, *An Exploration of the Prevalence of Domestic Violence in Same-Sex Relationships*, 95 PSYCH. REPTS. 129 (2004); U.S. Dep’t of Justice, Office of Justice Programs, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey 30* (July, 2000), available at <http://www.ncjrs.gov/txtfiles1/nij/181867.txt> (“Same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants—39% of lesbians reported being raped, physically assaulted, and/or stalked by a cohabiting partner at some time in their lifetimes, compared to 21% of heterosexual women. Among men, the comparable figures are 23.1% and 7.4%.”).

⁴⁸ See Christopher Banks, *The Cost of Homophobia: Literature Review of the Economic Impact of Homophobia on Canada*, available at http://lgbthealth.net/downloads/research/Human_Impact_of_Homophobia.pdf.

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* 19-21 (2004).

⁵⁰ “The estimated level of [HIV] infection among homosexual men ranges from 20% in a Pittsburgh study to 50% in a San Francisco study.” THOMAS E. SCHMIDT, *STRAIGHT & NARROW* 27 (1995) (citing many studies).

⁵¹ T.G. Sandfort et al., *Same-Sex Behavior and Psychiatric Disorder*, 58 ARCHIVES GEN. PSYCH. 87 (2001).

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 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

⁵² See Gates et al. *supra* note x, at 8 (finding that two-thirds of same-sex couples that entered into a legally recognized relationship were female). See also *supra* note x.

⁵³ See *supra* note x and accompanying text.

⁵⁴ See GEORGE GILDER, *MEN AND MARRIAGE* 12-18 (1993); RICHARD A. POSNER, *SEX AND REASON* 312 (1992) (stating that the presence of children helps to keep married couples together).

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 one another.” All the couples who had been together over five years made allowance for outside sexual activity. DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 252-53 (1984). See also KIRK & MADSEN, *supra* note x, at 330 (study finding that “the cheating ratio of ‘married’ gay males, given enough time, approaches 100%”). Andrew Sullivan exhorts heterosexuals to develop a 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* 202-03 (1995).

⁵⁶ See *supra* notes x-x and accompanying text.

⁵⁷ See Craig 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* note x (discussing understandings and practices concerning fidelity among gay couples).

⁵⁸ See George W. Dent, Jr., “*How Does Same-Sex Marriage Threaten You?*,” 59 *RUTGERS L. REV.* 233, 250 & n.94 (2007).

violence in homosexual couples, children in these homes are more likely to witness domestic violence and to understand it as a normal part of marriage.

A child whose mother lives with a man other than his biological father is more likely to be abused by that man than a child living with his biological father is likely to be abused by him.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 such a child will fare better than a child living with an unrelated heterosexual male. The high rates of child sex abuse among homosexuals and bisexuals⁶⁰ are also a cause for concern. 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.

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

⁵⁹ See W. Bradford Wilcox, *Suffer the Little Children: Cohabitation and the Abuse of America’s Children* (Apr. 22, 2011), *available at* <http://www.thepublicdiscourse.com/2011/04/3181> (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 R. Blanchard et al., *Pedophiles: Mental Retardation, Maternal Age, and Sexual Orientation*, 28 ARCHIVES OF SEXUAL BEHAVIOR 111 (1999); Kurt Freund & Robin J. Watson, *The Proportions of Heterosexual and Homosexual Pedophilia: An Explanatory Study*, 18 J. SEX & MARITAL THERAPY 34 (1992).

⁶¹ See Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 397 (1999).

⁶² See generally STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 343-50 (2002); DAVID C. GEARY, *MALE, FEMALE: THE EVOLUTION OF HUMAN SEX DIFFERENCES* (1998); 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 x, at 5; Ilanit Gordon et al., *Oxytocin and the Development of Parenting in Humans*, 68 BIO. PSYCH. 377 (Aug. 15, 2010) (finding that hormonal differences between men and women are associated with different parenting behavior). “In the last 20 years, everyone’s been talking about how important it is for fathers to be involved.” Sara S. McLachlan, professor of sociology and public affairs at Princeton University, *quoted in* Laurie Tarkan, *Fathers Gain Respect from Expert (and Mothers)*, N.Y. TIMES, Nov. 3, 2009, at D5. See also MARRIAGE AND THE PUBLIC GOOD, *supra* note x, at 18; WADE HORN & TOM SYLVESTER, *FATHER FACTS* 153 (2002); ELEANOR E.

ways that are worse for the children. 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 by 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 worn-torn, impoverished countries there are starving orphans

MACOBY, TWO SEXES: GROWING UP APART, COMING TOGETHER (1998); Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children’s Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCH. 980 (1994); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 90, 106-10 (Robin Fretwell Wilson, ed. 2006); A. Sarkadi et al., *Father’s Involvement and Children’s Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 ACTA PAEDIATRICA 153 (2008) (review spanning 20 years of studies including over 22,000 children found that fathers reduce behavioral problems in boys and psychological problems in girls, enhance cognitive development, and decrease delinquency).

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.” See 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 x.

⁶⁴ Child psychologist Dr. Kyle Pruett, *quoted in* Tarkan, *supra* note x, at D5.

⁶⁵ “[C]ontrolling for income and all other factors, youths in father-absent families . . . had significantly higher odds of incarceration than those of other-father families.” Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 385-86 (2004)

⁶⁶ See SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS? 137 (1994) (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 American College of Pediatricians, *Homosexual Parenting: Is It Time for Change?* (rev’d Mar. 26, 2009), *available at* <http://www.acped.org/?CONTEXT=art&cat=22&art=50&BISKIT=2920801063>.

⁶⁸ See YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 254 (2002).

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 entitles them to other means of reproducing.⁷⁰ This argument has already been accepted in some countries that have validated SSM.⁷¹

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

⁶⁹ See BALL, *supra* note x, at 166 (stating that “changes in reproductive technology have made it possible for lesbians and gay men to have biological children”).

⁷⁰ See Anthony C. Infanti, *Dismembering Families*, Univ. of Pittsburgh Legal Stud. Research Paper No. 2009-11 (April 2009), *available at* <http://www.ssrn.com/abstract=1374492> (arguing that denial of a federal tax deduction for the medical costs of artificial reproduction “contributes to the subordination of lesbian and gay families as well as many other nontraditional American families”). See also DeSerres, *supra* note x, at 104-05. Under the Universal Declaration of Human Rights the right to marry includes the right to found a family. UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art 16.1. 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 Streuning, *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, 38 Gordon A. Babst et al., eds. 2009).

⁷¹ See DeSerres, *supra* note x, at 104 (citing a French parliamentary report); Elizabeth Marquardt, *How Redefining Marriage Redefines Parenthood* (Dec. 1, 2010), *available at*, <http://familyscholars.org/2010/12/01/how-redefining-marriage-redefines-parenthood/> (stating facts indicating that use of third party sperm and egg donors to conceive children “does appears 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 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 xx, at 319, 323.

⁷² See Camille W. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375 (2005); SOMERVILLE, *supra* note x, at 147 (drawing ethical distinction between accidental and deliberate

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 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 also differs from adoption in that the former 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. Children artificially conceived and raised apart from their biological fathers “hunger for an abiding paternal presence.”⁷⁵

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. 16, 2009, at xx, available at <http://www.newsweek.com/id/227104> (discussing a man who is the father of nearly 400 children by sperm donation).

⁷⁴ See Mark Hansen, . . . and *Baby Makes Litigation*, ABA J. 53, 54-55 (March 2011) (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 (2009).

⁷⁵ KYLE PRUETT, FATHERNEED 207 (2000); see also DAVID POPENOE, LIFE WITHOUT FATHER (1996). See also Barbara Dafoe Whitehead, *Answered Prayers: Where Is Technological Reproduction Taking Us?*, COMMONWEAL, Oct. 20, 2006, at 133 (citing study finding widespread identity problems among such children resulting from artificial insemination); THE REVOLUTION IN PARENTHOOD, *supra* note 54, at 17 (stating that damage to children raised by same-sex couples may be greater when “[a]dults purposefully conceive a child with the clear intention of separating that child from a biological parent.”). See also ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED

Some dangers of artificial reproduction were adumbrated by Aldous Huxley in his novel, *Brave New World*. In this world, people are created in test tubes in laboratories. Each child is given 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 implausible, but the overall picture is a prescient warning. Artificial reproduction could enable the wealthy to manufacture genetically superior offspring.⁷⁶ 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 and using natural reproduction, condemn their children to genetic inferiority. Artificial reproduction could also worsen gender inequality.⁷⁷

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.⁷⁸ In a culture that honors untrammelled reproductive freedom, what objection could there be to parents' choosing to screen out "gay genes"?

In the novel *The Elementary Particles* by French writer Michel Houellebecq⁷⁹ the problems of the human race are "solved" by eliminating love and replacing natural

THROUGH SPERM DONATION 5 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.") (Inst. for American Values 2010); Alessandra Rafferty, *Donor-Conceived and Out of the Closet*, NEWSWEEK, Feb. 25, 2001, at x.

⁷⁶ See generally MAXWELL J. MEHLMAN & JEFFREY R. BOTKIN, ACCESS TO THE GENOME: THE CHALLENGE TO EQUALITY (1998).

⁷⁷ Some feminists have warned of the dangers of artificial reproduction under male control. See Christine Stolba, *Overcoming Motherhood: Pushing the Limits of Reproductive Choice*, POLICY REV., Dec. 2002-Jan. 2003, at x.

⁷⁸ 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?* (Mar. 25, 2011), available at <http://www.livescience.com/13408-brain-chemical-serotonin-sexual-orientation.html/>

⁷⁹ MICHEL HOUELLEBECQ, THE ELEMENTARY PARTICLES (1998).

reproduction with cloning so that all people are genetically identical. This certainly does eliminate inequality, but what then is the purpose of life? What happens to the idea that every person is unique and has a right to his own personality and beliefs and to choose his own, unique life plan? Most people would consider Houellebecq's 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 second child who is bigger, stronger, smarter, healthier, and better looking than the first?⁸⁰ In short, what will happen to relations between parents and children when children become manufactured products? Artificial reproduction 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 be 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.⁸¹ Because of its dangers many foreign countries regulate artificial reproduction.⁸²

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 on the cry of "equality" to permit every form of artificial reproduction.⁸³ Such demands must be resisted.

IV. THE IMPORTANCE OF BLOOD TIES

⁸⁰ 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 Dating Site Creates Online Sperm and Egg Bank*, NEWSWEEK, Available at <http://www.newsweek.com/blogs/techtonic-shifts/2010/06/21/dating-site-creates-online-sperm-and-egg-bank.html>.

⁸¹ "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 being." SOMERVILLE, *supra* note x, at 122.

⁸² *See generally* CAHN, *supra* note x; MERIN, *supra* note x, at 254 (stating that "all European countries except the Netherlands explicitly prohibit lesbians (and single women) from obtaining" alternative reproductive services)..

⁸³ *See, e.g.*, Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008) (urging courts to focus on reproductive equality rather than making substantive determinations about artificial reproduction); Andrew B. Coan, *Assisted Reproductive Equality: An Institutional Analysis*, 60 CASE W. L. REV. 1143 (2010) (*semble*).

Most people instinctively value blood ties. The American slave hymn, *Sometimes I Feel Like a Motherless Child*, moves most people.⁸⁴ Many couples that have difficulty in conceiving a child make heroic efforts to do so, often at great expense and enduring humiliating and painful medical procedures.

Nonetheless, there is a movement to reduce or eliminate the social and legal significance of the biological nexus between parents and children.⁸⁵ It is argued that “parents” should be those who really perform normal parenting functions.⁸⁶ This would deprive biological parents of any rights in their children and deny children any rights in their biological parents. Most people would consider that prospect appalling.

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.”⁸⁷ 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!”⁸⁸ Homosexuals may tell children conceived by artificial insemination that they do not have a mother or a father.⁸⁹

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

⁸⁴ The hymn stems from the practice of deliberately separating a slave mother and child by the sale of one or another. See WILLIAM E. BARTON, *HYMNS OF THE SLAVE AND THE FREEDMAN* 17 (n.p.d.).

⁸⁵ They are not the only supporters. Feminists who want to diminish or abolish the rights of biological fathers (including sperm donors in artificial insemination) are also advocates. See Susan Frelich Appleton, *Gender and Parentage: Family Law’s Equality Project in Our Empirical Age 6-7* (June 21, 2010), available at <http://ssrn.com/abstract=1628232>.

⁸⁶ See *id.*

⁸⁷ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING APARTHEID IN THE CLOSET* 11 (1999).

⁸⁸ David Blankenhorn, *Protecting Marriage to Protect Children*, L.A. TIMES, Sept. 19, 2008, at xx.

⁸⁹ See Jerry Mahoney, *Mom/Not Mom/Aunt*, N.Y. TIMES, July 16, 2010, at x (reporting that the author and his homosexual partner were told by their 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.’” See also *supra* note 53.

can't turn you away. "De-emphasizing blood" and validating "families we choose" imply 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 would 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 get an infant who is the biological child of one member of the couple. Many people consider this inadequate and argue for a "birthright of children to be connected to their mothers and fathers."⁹⁰ As a French parliamentary commission put it, "The interests of the child must outweigh the exercise of the freedom of adults."⁹¹ 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."⁹² David Blankenhorn argues that "children have the right, insofar as society can make it possible, to know and to be cared for by the two parents who brought them into this world."⁹³

The law has begun to recognize a right of offspring of artificial insemination to know who their fathers are.⁹⁴ 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

⁹⁰ 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). *See also* Margaret Somerville, *What About the Children?*, *in id.* at 67.

⁹¹ Commission Report to Parliament on the Family and the Rights of Children 48, National Assembly, France (Jan. 25, 2006) (Eng. translation), *quoted in* DeSerres, *supra* note 48, at 112.

⁹² UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD, Art. VII (1989).

⁹³ Blankenhorn, *supra* note x, at xx. *See also* Daniel Cere, *Toward an Integrative Account of Parenthood, in* WHAT IS PARENTHOOD? X, x (Daniel Cere & Linda McClain, eds. forthcoming) (referring to children's rights "to a maternal bond" and to "be connected to their genetically-related parents").

⁹⁴ *See* Neal Hall, *Daughter of Sperm Donor Seeks to Know Identity of Biological Father*, VANCOUVER SUN, Oct. 27, 2008, at xx. Some children are deploying sophisticated techniques to find their fathers despite legal obstacles. *See* Rachel Lehmann-Haupt, *Are Sperm Donors Really Anonymous Anymore?*, SLATE, March 1, 2010, available at <http://www.slate.com/toolbar.aspx?action=print&id=2243743>.

consider the child gravely wronged and injured. How is a child any less wronged or injured by artificial reproduction?

Some argue that many children already live with homosexual adults 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.⁹⁵ This argument assumes, however, that recognizing SSM will affect only homosexuals who marry and will not diminish the existing benefits of marriage. This discussion here 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 with homosexual guardians. The benefits of marriage to children arise mainly from binding them with their 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 they are of different genders. 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.⁹⁶

Conclusion

The claim that there is “no difference” between homosexual and heterosexual parents⁹⁷ 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 where the issue is whether SSM is just as good as traditional marriage. If the claim is 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.

⁹⁵ See Carpenter, *supra* note x, at 320.

⁹⁶ Dale Carpenter gives some numbers that are hard to reconcile. At one point he estimates the number of such children as “at least a million.” Carpenter, *supra* note x, at 320. However, he also recites an estimate of 777,000 same-sex couple households and says that “about 20% or all male couple households in the United States and 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.

⁹⁷ See *supra* note x and accompanying text.

Supporters of SSM want to change marriage--an institution that has been fundamental in every culture in every corner of the globe throughout history--in a way that, with a few recent exceptions, has never been tried before. Minimal prudence forbids such a radical change until we have strong evidence that it will do no harm. In other words, the burden of proof should be on advocates of SSM. They cannot sustain that burden now, and it unlikely that they will ever be able to do so because only traditional marriage is rooted in human nature.⁹⁸ Accordingly, same-sex marriage should not be recognized at law, artificial reproduction should be permitted only to traditional married couples, and adoption by same-sex couples should be allowed only in limited circumstances.

⁹⁸ See Redding, *supra* note x, at 143 (stating that the importance of these issues “argues for setting a fairly demanding standard when relying on lesbian parenting research in guiding public policy.”).