



TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii

INTEREST OF AMICI CURIAE . . . . . 1

ARGUMENT . . . . . 2

I. MARRIAGE IS A COVENANT BETWEEN A MAN AND A WOMAN FOR THE PURPOSE OF SECURING THE WELL-BEING OF CHILDREN THAT TYPICALLY RESULT FROM THE COUPLE’S UNION. . . . . 5

II. SUPREME COURT DECISIONS ESTABLISHING MARRIAGE AS A FUNDAMENTAL RIGHT ARE PREMISED ON THE INEXTRICABLE LINK BETWEEN MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN, AND THE PROCREATION THAT TYPICALLY RESULTS FROM THAT UNION. . 7

    A. The Supreme Court’s Decision in *Baker v. Nelson* Dispels Any Argument that *Loving v. Virginia* and *Turner v. Safley* Support A Right to Same-Sex Marriage. . . . . 9

    B. *Lawrence v. Texas* Established Homosexuals’ Right to Be Free From Government Intrusion Into Their Relationships, Not A Right to Government Endorsement of Their Relationships. . . . . 10

III. REDEFINING MARRIAGE TO INCLUDE SAME-SEX COUPLES WILL EVENTUALLY DIMINISH MARRIAGE AND ENDANGER THE WELL-BEING OF CHILDREN. . . . . 13

    A. The State’s Interest in Responsible Procreation Is Not Invalidated By the Fact that Some Gay Couples Acquire Children Through Adoption Or Third Party Medical Assistance. . . . . 19

    B. Extending Marriage to Same-Sex Couples Threatens Children Precisely Because It Diminishes the Importance of Children Being Raised by Their Own Biological Parents. . . . . 23

    C. Approving Same-Sex Marriage Conveys the Message that Children Do Not Need Parents of Both Sexes. . . . . 29

    D. Studies Purporting to Show that Children Raised in Gay and Lesbian Households Fare No Worse than Children in Traditional Homes Have Serious Methodological Flaws . . . . .

. . . . .	35
<b>IV. ONCE MARRIAGE IS REDEFINED TO INCLUDE SAME-SEX UNIONS, THERE IS NO PRINCIPLED BASIS UPON WHICH TO EXCLUDE ANY TWO OR MORE PEOPLE WHO HAVE A CLOSE INTERPERSONAL RELATIONSHIP. . .</b>	<b>40</b>
<b>CONCLUSION . . . . .</b>	<b>45</b>

**TABLE OF AUTHORITIES**

**CASES**

<i>Baker v. Nelson</i> , 409 U.S. 810 (1972) . . . . .	9,10
<i>Baker v. Nelson</i> , 191 N.W.2d 185 (Minn. 1971) . . . . .	9,10
<i>Ballard v. United States</i> , 329 U.S. 187, 193 (1946) . . . . .	29
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986) . . . . .	12
<i>Eisenstadt v. Baird</i> , 405 U.S. 438, 453 (1972) . . . . .	22
<i>Goodridge v. Department of Pub. Health</i> , 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting) . . . . .	14-15,21
<i>Griswold v. Connecticut</i> , 381 U.S. 479, 486-99 (1965) . . . . .	8,9
<i>Halpern v. Att’y Gen.</i> , [2003] 65 O.R.2d 161 . . . . .	24,37
<i>Hicks v. Miranda</i> , 422 U.S. 332, 344 (1975) . . . . .	10
<i>Lawrence v. Texas</i> , 539 U.S. 553 (2003) . . . . .	10-12
<i>Lewis, et al. v. Harris</i> , 378 N.J. Super. 168, 185 n.2 (N.J. Super. Ct. App. Div. 2005) . . . . .	5
<i>Lofton v. Sec’y of the Dept of Children and Family Services</i> , 358 F.3d 804, 817, 818 (11th Cir. 2004) . . . . .	12,34
<i>Loving v. Virginia</i> , 388 U.S. 1, 12 (1967) . . . . .	8,9
<i>Morrison v. Sadler</i> , 821 N.E.2d 15, 24 n.10, 25 (Ind. Ct. App. 2005) . . . . .	14,19 n.6
<i>Samuels v. New York Department of Health</i> , No. 1967-04 RJI No.	

10104077742 (N.Y. Sup. Ct. 2004) . . . . . 12

*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) . . . . . 7-8

*Standhardt v. Superior Ct of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003) . . . . . 12

*Turner v. Safley*, 482 U.S. 78, 100 (1987) . . . . . 9

*United States v. Virginia*, 518 U.S. 515, 533 (1996) . . . . . 29

*Washington v. Glucksberg*, 521 U.S. 702, 720-21 . . . . . 12

*Wilson v. Ake*, 354 F.Supp. 2d 1298 (M.D. Fla. 2005) . . . . . 12

*Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) . . . . . 8

**STATUTES**

N.J.S.A. § 26:8A-1, *et seq.* . . . . . 13 n.1

**OTHER AUTHORITIES**

Saint Thomas Aquinas, *Summa Theologiae, Supplementum*, Question 41, article 1, resp. . . . . . 6

Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 *Developmental Psychology* 130, 133-134 (1995) . . . . . 38

P. A. Belcastro et al., "A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning," *Journal of Divorce and Remarriage* 20 (1993): 105, 106 . . . . . 37

A. P. Bell and M. S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (New York: Simon and Schuster, 1978), pp. 308, 309 . . . . . 43 n.12

A. P. Bell, M. S. Weinberg, and S. K. Hammersmith, *Sexual Preference* (Bloomington: Indiana University Press, 1981) 43 n.12

H.B. Biller, *Fathers and Families: Paternal Factors in Child Development* 1-3 (1993) . . . . . 32

David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* 25, 219 (1995) . . . . . 31-32

Dan Cere & Mary Ann Glendon, <i>The Future of Family Law: Law &amp; the Family Crisis in North America</i> 14 (Institute for American Values 2005).	2-3,24,35,41
Brenda Cossman and Bruce Ryder, <i>What is Marriage-Like Like? The Irrelevance of Conjuality</i> , 18 <i>Can. J. Fam. L.</i> 269, 323 (2001)	41
David Cramer, "Gay Parents and Their Children: A Review of Research and Practical Implications," 64 <i>Journal of Counseling and Development</i> 504, 506 (April 1986)	37
Timothy J. Dailey, <i>Homosexual Parenting: Placing Children at Risk</i> , 1 available at <a href="http://www.orthodoxytoday.org/articles/DaileyGayAdopt.htm">http://www.orthodoxytoday.org/articles/DaileyGayAdopt.htm</a>	36
William J. Doherty, et. al., <i>Why Marriage Matters: 21 Conclusions from the Social Sciences</i> 17 (New York City: Institute for American Values, 2002)	26-28
Gillian Douglas, <i>An Introduction to Family Law</i> , 30-31 (2001)	42
Tim Drake, <i>Couples Ask: What's Wrong With In-vitro Fertilization?</i> , <i>Nat'l Catholic Register</i> , Aug.14, 2004, available at <a href="http://catholiceducation.org/article/medical_ethics/me0064.html">http://catholiceducation.org/article/medical_ethics/me0064.html</a> .	19-20
Elizabeth F. Emens, <i>Monogamy's Law: Compulsory Monogamy and Polyamorous Existence</i> , 29 <i>N.Y. U. Rev. L. &amp; Soc. Change</i> 277 (2004)	42
William N. Eskridge Jr., <i>Gaylaw: Challenging Apartheid in the Closet</i> 11 (Harvard University Press 1999)	23-24
Maggie Gallagher and Joshua K. Baker, <i>Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child</i> , 4 <i>Margins</i> 161, 162, 177,179-80 (2004)	28,36-37,40
Mary Gauvain and Ruth Duran Huard, <i>Family Interaction, Parenting Style, and the Development of Planning: A Longitudinal Analysis</i> ," 13 <i>Journal of Family Psychology</i> 75-92 (1999)	31
Sandra L. Hofferth and Kermyt G. Anderson, <i>Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment</i> , 65 <i>Journal of Marriage and Family</i> 213, 224 (Feb. 2003)	33-34

2 James Kent, *Commentaries on American Law* 74 (3d ed. 1838) . . . 7

L. Keopke et al., *Relationship Quality in a Sample of Lesbian Couples with Children and Child-free Lesbian Couples*, 41 *Family Relations* 225 (1992) . . . . . 39

Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 *Hastings Const. L. Q.* 653, 657 (2005) . . . . . 14,22

Stanley Kurtz, *No Explanation*, Nat'l Rev. Online, at <http://www.nationalreview.com/kurtz/kurtz200406030910.asp>. (June 3, 2004) . . . . . 17-18

Stanley Kurtz, *The End of Marriage in Scandanavia*, *The Weekly Standard*, February 2, 2004, at 9 ( Available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp>) . . . . . 18

Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* 6 (2001) . . . . . 39

John Locke, *Second Treatise on Government*, chap. VII, sec. 78 . . . . . 6

Eleanor Maccoby, *The Two Sexes* 284 (Harvard University Press 1998) . . . . . 30-31

Dorothy Martin, "Fathers and Adolescents" in *Dimensions of Fatherhood*, 181 (Shirley M.H. Hanson and Frederick W. Bozett eds., Sage Publications 1985) . . . . . 33

Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* *Child Trends Research Brief* (Washington, DC: Child Trends, June, 2002), 1 (Also available at <http://www.childtrends.org/files/MarriageRB602.pdf>) . . . . . 25

Carin Neitzel and Ann Dopkins Stright, *Mothers' Scaffolding of Children's Problem Solving: Establishing a Foundation of Academic Self-Regulatory Competence*, 17 *Journal of Family Psychology* 75-92 (2003) . . . . . 32

Deborah Orr, *Mothers as Moral Educators: Teaching Language and Nurturing Souls in Mothers and Daughters*, Eds. O'Reilly and Abby (Lanham, MD: Rowman & Littlefield 2000), at 172 . . . . . 31

Charlotte J. Patterson et al., *Children of Lesbian and Gay Parents: Research, Law and Policy*, in *Children and the Law: Social Science and Policy* 10-11 (Bette L. Bottoms et al., eds. 2000) . . . . . 40

William L. Pierce, *Adopting Numbers*, Nat'l Rev. Online, at <http://www.nationalreview.com/comment/comment-pierce082703.asp>. (Aug. 27, 2003) . . . . . 20

David Popenoe, *Life Without Father* 144, 146 (Harvard University Press 1996) . . . . . 30

David Popenoe, *The Controversial Truth: Two Parent Families Are Better*, N.Y. Times, Dec. 26, 1992, at A21 . . . . . 35

Kyle D. Pruett, *Fatherneed* 41-52 (New York Press 2000) . . . . . 33

Kyle D. Pruett, *Role of the Father*, 102 *Pediatrics* 1253-1261 (1998) . . . . . 31

John Rawls, *Justice as Fairness: A Restatement* 162 (Harvard University Press 2001) . . . . . 3

Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. Pub. L.* 449, 449 (2004) . . . . . 6

Steven E. Rhoads, *Taking Sex Differences Seriously* 83 (2004) . . . . . 26

"Sex Survey Results," *Genre* (October 1996) . . . . . 43

Pitirim Sorokin, *The American Sex Revolution* (Boston: Porter Sargent Publishers, 1956), pp. 144, 146. . . . . 4-5

Judith Stacey & Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159, 166 (2001) . . . . . 39

Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 *N.C. L. Rev.* 1501, 1606 (1997) . . . . . 30

"Survey Finds 40 percent of Gay Men Have Had More Than 40 Sex Partners:" *Lambda Report*, January 1998, p. 20 . . . . . 43

United Nations Convention on the Rights of the Child, Art. 7 . . . . .

.....	23
U.S. Department of Health and Human Services, Administration for Children and Families, "Costs of Adopting: A Factsheet for Families," <a href="http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf">http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf</a> (published June 2004) . . . . .	19 n.6
August 8, 2004 Letter of Professors. M. van Mourik, A. Nuytinck, R. Kuiper, J. Van Loon PhD, & H. Wels PhD, available at <a href="http://www.marriagedebate.com/mdblog/2004_07_04_mdblog_archive.htm#1089307372607082">http://www.marriagedebate.com/mdblog/2004_07_04_mdblog_archive.htm#1089307372607082</a> . . . . .	11,42
Richard G. Wilkins, <i>The Constitutionality of Legal Preferences for Heterosexual Marriage</i> , 16 Regent U. L. Rev. 121, 127, 133 (2003-2004) . . . . .	26,27
Robin Wilson, "Children at Risk: The Sexual Exploitation of Female Children after Divorce," 86 Cornell Law Review 251, 256 (2001) . . . . .	

## INTEREST OF AMICI CURIAE

Amicus Monmouth Rubber & Plastics, Corp. is a corporation organized under the laws of the State of New Jersey and having a principal place of business at 75 Long Branch Avenue, Long Branch, New Jersey. Monmouth Rubber & Plastics, Corp. is in the business of manufacturing closed cell sponge rubber and plastic foam, and has a total of fifty full-time employees, all of whom are provided with co-sponsored health insurance benefits as part of their overall compensation package.

Monmouth Rubber & Plastics, Corp. and John M. Bonforte, Sr., principal of Monmouth Rubber & Plastics (hereinafter, "Monmouth Rubber & Plastics") hold a firm belief in preserving the traditional family, which defines marriage as between only one man and one woman, as is currently defined in the State of New Jersey. As such, *amicus curiae* Monmouth Rubber & Plastics, et al. submit this brief in support of all New Jersey children that will be drastically affected by the outcome of this case. In addition, Monmouth Rubber & Plastics has a substantial interest in the outcome of this case due to the high costs associated with extending health insurance benefits to a potentially new group of "same-sex marriages."

By Order of the Court below, Monmouth Rubber & Plastics, Corp. has been granted amicus status as a private business interest group.

### **ARGUMENT**

Plaintiffs urge this Court to redefine the institution of marriage to include same-sex couples. Plaintiffs' theme is that marriage is a malleable institution and the historic limitation of the marital estate to one man and one woman is archaic, arbitrary, and serves no legitimate purpose. Plaintiffs argue, as do all gay marriage advocates, that marriage is only about a loving commitment between two adults, and, therefore, the sex of the participants is irrelevant. Plaintiffs are wrong, and their thesis is much akin to maintaining that baseball is still baseball, even if a broom is exchanged for the bat and a chair is substituted for home plate.

Marriage is one of the most meaningful of human social institutions because of its link to creating and raising the next generation. In short, "if human beings did not reproduce sexually, creating infants with their long periods of dependency, marriage would not be the universal human social institution that it is." Dan

Cere & Mary Ann Glendon, *The Future of Family Law: Law & the Family Crisis in North America* 14 (Institute for American Values 2005). The state's purpose in civil marriage is to channel "the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce." *Id.* at 12. Natural law theorist, John Rawls, explains the matter cogently:

As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. This mutual attraction is inherently linked to the "reproductive labor" that is essential to the intergenerational life of all societies, including modern liberal societies. *The default position for men and women attracted to the opposite sex, absent strong social norms, is too many children born without fathers, too many men abandoning the mothers of their children, and too many women left alone to care for their offspring. If law and culture choose to "do nothing" about sexual attraction between men and women, the passive, unregulated heterosexual reality is multiple failed relationships and millions of fatherless children.*

John Rawls, *Justice as Fairness: A Restatement* 162 (Harvard University Press 2001) (emphasis added).

Thus, at its core, civil marriage represents

society's recognition of several unalterable facts: men and women often have sex; babies often result; and those babies, generally speaking, thrive best when their mother and father are committed to each other's and the child's well-being. Establishing an equivalency between same-sex couples and heterosexual unions undermines society's historic and compelling interest in promoting lasting bonds between men and women, in order to give children both a mother and father and to bond them to one another and their offspring. If all loving, sexually intimate relationships between two adults are equally worthy of society's approval and encouragement, then the bonds between men and woman that produce each succeeding generation are no longer unique. The result of such a paradigm shift will ultimately imperil the well-being of the nation's children and society itself. As the eminent Harvard sociologist Pitirim Sorokin concluded, no society has ceased to honor the institution of marriage and survived. Sorokin considered traditional marriage and parenting as the fulfillment of life's meaning for both individuals and society:

Enjoying the marital union in its infinite richness, parents freely fulfill many other paramount tasks. They maintain the procreation of the human race. Through their

progeny they determine the hereditary and acquired characteristics of future generations. Through marriage they achieve a social immortality of their own, of their ancestors, and of their particular groups and community. This immortality is secured through the transmission of their name and values, and of their traditions and ways of life to their children, grandchildren, and later generations.

Pitirim Sorokin, *The American Sex Revolution* (Boston: Porter Sargent Publishers, 1956), pp. 144, 146.

**I. MARRIAGE IS A COVENANT BETWEEN A MAN AND A WOMAN FOR THE PURPOSE OF SECURING THE WELL-BEING OF CHILDREN THAT TYPICALLY RESULT FROM THE COUPLE'S UNION.**

Contrary to Plaintiffs' assertions throughout their brief, marriage is not just about intimate relationships between adults. As the Appellate Division properly noted below, "the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society's view that this institution plays an *essential role* in propagating the species and child rearing." 378 N.J. Super. 168, 185 n.2 (N.J. Super. Ct. App. Div. 2005) (emphasis added).

The institution of marriage has existed since time immemorial, as a bond between a man and a woman for the purpose of procreation. Saint Augustine identified the three essential elements of marriage to be

"procreation, fidelity, and lifelong unity." Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. Pub. L. 449, 449 (2004).

Philosopher and theologian St. Thomas Aquinas agreed that marriage's primary purpose was "the procreation of children, but also their upbringing and their training in the perfect state of man, which is the state of virtue." Saint Thomas Aquinas, *Summa Theologiae, Supplementum*, Question 41, article 1, resp.

Political theorists of liberal democracy have emphasized the inextricable link between marriage and procreation. John Locke's *Second Treatise on Government* states;

[Marriage] is made by a voluntary compact between man and woman; and tho' it consist chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation; yet it draws with it mutual support and assistance, and a communion of interests too, as necessary not only to unite their care and affection, but also necessary to their common off-spring, who have a right to be nourished, and maintained by them, till they are able to provide for themselves.

John Locke, *Second Treatise on Government*, chap. VII, sec. 78. A leading figure of the New York bar, Chancellor James Kent described marriage as a natural law concept pre-dating all government, including that

of America. Kent wrote:

The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age, it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of marriage, a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.

2 James Kent, *Commentaries on American Law* 74 (3d ed. 1838).

The notion that marriage involves nothing more than a loving commitment and sexual intimacy between any two people is surely not supported by any historical authority.

**II. SUPREME COURT DECISIONS ESTABLISHING MARRIAGE AS A FUNDAMENTAL RIGHT ARE PREMISED ON THE INEXTRICABLE LINK BETWEEN MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN, AND THE PROCREATION THAT TYPICALLY RESULTS FROM THAT UNION.**

The Supreme Court's pronouncements on marriage as a fundamental right consistently emphasize the inextricable and profoundly important link between marriage and child-rearing. State sanctioned unions between one man and one woman are important because "marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v.*

*Oklahoma*, 316 U.S. 535, 541 (1942); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

In *Zablocki v. Redhail*, the Court reemphasized this connection between marriage, procreation, and child-rearing by placing the "decision to marry" on "the same level of importance as decisions relating to procreation, childbirth, child-rearing, and family relationships." 434 U.S. 374, 386 (1978). The Court reasoned that if the "right to procreate means anything at all, it must imply some right to enter" the marital relationship. *Id.* In *Griswold v. Connecticut*, Justice Goldberg also stressed the indissoluble relationship between marriage and procreation. 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to *marry and raise a family* are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family - a relation as old and as fundamental as our entire civilization - surely does not show that the Government was meant to have the power to do so.

*Id.* at 495 (emphasis added).

**A. The Supreme Court's Decision in *Baker v. Nelson* Dispels Any Argument that *Loving v. Virginia* and *Turner v. Safley* Support A Right to Same-Sex Marriage.**

In their effort to redefine marriage as a close personal relationship between any two people, Plaintiffs claim support from the Supreme Court's decisions in *Loving v. Virginia*, 338 U.S. 1 (1967) and *Turner v. Safley*, 482 U.S. 78, 100 (1987). They argue that because there was no deeply rooted tradition of "interracial marriage" or "inmate marriage," *Turner* and *Loving* cannot be understood to embrace the centuries-old definition of marriage as limited to a man and a woman. (Pb24, 48-49). It is absurd to suggest that *Loving* and *Turner* are not limited to the historical institution of marriage as a union of one man and one woman.

More importantly, however, in *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court implicitly rejected the argument that *Loving v. Virginia* supported a claim that the Fourteenth Amendment required states to permit same-sex marriages. In *Baker*, the Minnesota Supreme Court held that *Loving* did not support the argument that a ban on same-sex marriages violated the

Fourteenth Amendment. 191 N.W.2d 185 (1971). The court explained that *Loving*, which struck down anti-miscegenation laws, was decided solely on the grounds of the patent racial discrimination of such statutes, and that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187. On appeal, the United States Supreme Court dismissed the case "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). Under procedural rules in effect at the time, the Court's dismissal represented a decision on the merits that the constitutional challenge presented was insubstantial. *Baker* remains binding on the lower courts. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Thus, five years after it decided *Loving*, the Supreme Court affirmed the conclusion that the right to same-sex marriages could not be derived from *Loving*.

**B. *Lawrence v. Texas* Established Homosexuals' Right to Be Free From Government Intrusion Into Their Relationships, Not A Right to Government Endorsement of Their Relationships.**

The Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 553 (2003), provides no support for redefining

marriage to include same-sex couples. *Lawrence* was not about the right to have state sanction of an intimate relationship; it is essentially about the right to be let alone. In *Lawrence*, the Supreme Court held that the Constitution gives homosexuals the right to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Id.* at 567. *Lawrence* bears only on what homosexuals may do in the privacy of their home; it does not command the public to call homosexual relationships marriages. What plaintiffs in this case seek, however, is not to be let alone. They seek to be accorded public recognition and approval. They seek to convert the privacy and liberty shield created in *Lawrence* into a public policy sword which states that homosexual relationships must be publicly acknowledged, condoned, recognized, and normalized. See Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 Regent U. L. Rev. 121, 127 (2003-2004).

Moreover, the *Lawrence* Court explicitly cautioned against taking its holding too far. *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons

seek to enter." 539 U.S. at 578.

Finally, although *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court did not hold that homosexuals have a fundamental right to engage in sodomy. The Court did not engage in the substantive due process analysis traditionally used in determining whether it should announce a new fundamental right. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21. Nor did the Court apply strict scrutiny to the plaintiffs' claims. Rather, the Court held that the Texas sodomy law served no rational purpose. *Lawrence*, 539 U.S. at 578. Thus, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." *Lofton v. Sec'y of the Dept of Children and Family Services*, 358 F.3d 804, 817 (11th Cir. 2004).

Nearly every court that has considered the impact of *Lawrence* on the issue of same-sex marriage has concluded that it does not support the minting of a new fundamental right. See *Wilson v. Ake*, 354 F.Supp. 2d 1298 (M.D. Fla. 2005); *Standhardt v. Superior Ct of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Samuels v. New York Department of Health*, No. 1967-04 RJI No. 10104077742 (N.Y. Sup. Ct. 2004).

### **III. REDEFINING MARRIAGE TO INCLUDE SAME-SEX COUPLES WILL EVENTUALLY DIMINISH MARRIAGE AND ENDANGER THE WELL-BEING OF CHILDREN.**

If any two or more individuals can "marry" and secure all of the benefits of civil marriage, then civil marriage loses potency as a means of encouraging responsible procreation. Government affirmation must be limited to those who are able to engage in the desired behavior. To illustrate the point in another context, suppose the government allowed everyone the same charitable tax deduction regardless of whether they ever gave anything to charity. The purpose of the government's tax deduction policy is to encourage those who are able to give to charities. If a general deduction is extended to all citizens regardless of whether they give, charitable giving would almost certainly decrease.

The institution of civil marriage is deployed to convey the seriousness of sexual relationships that result in children.<sup>1</sup> This is especially crucial for heterosexual males who have no physical connection to

---

<sup>1</sup> While it is true that the New Jersey legislature has largely eviscerated the unique status of marriage by extending the benefits of marriage to civil unions, N.J.S.A. § 26:8A-1, *et seq.*, it should not be presumed that calling same-sex unions marriage will have no negative repercussions on the institution of marriage among heterosexuals, given the significant social meaning of marriage.

their offspring after conception. See Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 *Hastings Const. L. Q.* 653, 657 (2005). The Indiana Court of Appeals recognized this unassailable fact recently in upholding Indiana's Defense of Marriage Act:

The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual "responsible procreation." Therefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by "natural" means.

*Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005).

One of the three dissenting Justices in *Goodridge v. Department of Pub. Health*, explained:

Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined[,] ... but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism... .The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family

*responsibilities on the other.* The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting) (emphasis added).

Gay and lesbian sex cannot produce children. Therefore, homosexual couples need no inducement to procreate responsibly. Gay couples who want children must spend substantial time, money and effort to adopt or to engage in asexual fertilization attempts. There is, of course, no such difficulty among fertile heterosexual couples. Such couples lose incentive to marry if marriage is nothing more than a government stamp of approval on all dyadic intimate relationships. Proof of this point has been accruing for years in

European countries that have adopted same-sex marriage. A year ago in Holland, the first country to adopt same-sex marriage, five Dutch scholars wrote a letter addressed to "parliaments of the world debating the issue of same-sex marriage." In the letter, the scholars advance a compelling case that gay marriage in the Netherlands has contributed to the decline of married heterosexual couples and to an exponential increase in out-of-wedlock births.<sup>2</sup> The authors reported substantial statistical evidence documenting the decline of Dutch marriage since gay marriage became legal, and conclude:

Over the past fifteen years, the number of marriages has declined substantially, both in absolute and in relative terms. In 1990, 95,000 marriages were solemnized (6.4 marriages per 1,000 inhabitants); by 2003, this number had dropped to 82,000 (5.1 marriages per 1,000 inhabitants). This same period also witnessed a spectacular rise in the number of illegitimate births--in 1989 one in ten children were born out of wedlock (11 percent), by 2003 that number had risen to almost one in three (31 percent). The number of never-married people grew by more than 850,000, from 6.46 million in 1990 to 7.32 million in 2003. It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their

---

<sup>2</sup> August 8, 2004 Letter of Professors. M. van Mourik, A. Nuytinck, R. Kuiper, J. Van Loon PhD, & H. Wels PhD, available at [http://www.marriagedebate.com/mdblog/2004\\_07\\_04\\_mdblog\\_archive.htm#1089307372607082](http://www.marriagedebate.com/mdblog/2004_07_04_mdblog_archive.htm#1089307372607082).

offspring.

. . . .

[T]here are good reasons to believe the decline in Dutch marriage may be connected to the successful public campaign for the opening of marriage to same-sex couples in The Netherlands. After all, supporters of same-sex marriage argued forcefully in favour of the (legal and social) separation of marriage from parenting. In parliament, advocates and opponents alike agreed that same-sex marriage would pave the way to greater acceptance of alternative forms of cohabitation.

In our judgment, it is difficult to imagine that a lengthy, highly visible, and ultimately successful campaign to persuade Dutch citizens that marriage is not connected to parenthood and that marriage and cohabitation are equally valid 'lifestyle choices' has not had serious social consequences.<sup>3</sup>

Similarly, Scandinavia has seen a dramatic decrease in heterosexual marriages since gay marriage was adopted. British demographer David Coleman and senior Dutch demographer Joop Garssen have written that "marriage is becoming a minority status" in Scandinavia. In Denmark, a slight majority of all children are born within marriage, but 60 percent of first-born children are born out-of-wedlock. Danish demographers Wehner, Kambskard, and Abrahamson argue that marriage has ceased to be the normative setting

---

<sup>3</sup> *Id.*

for Danish family life.<sup>4</sup>

In certain Norwegian counties where gay marriage is widely accepted, heterosexual marriages have declined and out-of-wedlock births have risen far greater than rates for Norway as a whole. In one county where gay marriage was widely accepted and even preached in local churches, 82 percent of first-born children were born out-of-wedlock. Sixty-seven percent of all children born in the same county were born out-of-wedlock, mainly to cohabiting couples. Stanley Kurtz, *The End of Marriage in Scandanavia*, *The Weekly Standard*, February 2, 2004, at 9.<sup>5</sup> Cohabiting couples in Scandinavia break up at two to three times the rate of married couples. *Id.*

Thus, delinking parenthood from marriage and equalizing under the law a variety of alternative lifestyles may free adults to live in the diverse family types they choose, but it seriously undermines the law's historic role of protecting the best interests of children.

---

<sup>4</sup> Stanley Kurtz, *No Explanation*, *Nat'l Rev. Online*, at <http://www.nationalreview.com/kurtz/kurtz200406030910.asp>. (June 3, 2004).

<sup>5</sup> *Available at* <http://www.weeklystandard.com/Content/Public/Articles/00/000/003/660zypwj.asp>.

**A. The State's Interest in Responsible Procreation Is Not Invalidated By the Fact that Some Gay Couples Acquire Children Through Adoption Or Third Party Medical Assistance.**

That some same-sex couples adopt children, or produce them with third party assistance does not detract from society's interest in protecting the institution of marriage. Only a minute percentage of all children born are the result of technological intervention in human reproduction. Moreover, third party-assisted reproduction is unevenly successful and very expensive.<sup>6</sup> One study concludes that less than 0.5 percent of infertile couples successfully avail

---

<sup>6</sup>

The Indiana Court of Appeals in rejecting state constitutional claims to same-sex marriage in *Morrison v. Sadler*, 821 N.E.2d 15, 24 n.10 (Ind. Ct. App. 2005) noted that:

The average cost of one IVF cycle in the United States, and it frequently takes multiple cycles in order to succeed, has been estimated at \$12,400, which usually is not covered by health insurance. See American Society of Reproductive Medicine, "Frequently Asked Questions About Infertility," <http://www.asrm.org/Patients/faqs.html> (last visited November 5, 2005). Current estimates of adoption costs range from zero, in some instances, to as much as \$ 40,000 or more. See U.S. Department of Health and Human Services, Administration for Children and Families, "Costs of Adopting: A Factsheet for Families," [http://naic.acf.hhs.gov/pubs/s\\_cost/s\\_costs.pdf](http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf) (published June 2004).

themselves of in vitro fertilization.<sup>7</sup> Given that reality, some scholars have questioned whether there is ever likely to be a significant interest among homosexual couples in adoption and asexual reproduction. See Kmiec, *supra*, at 657.

Similarly, only a very small fraction of all adopted children are in homosexual households. Of the 1.6 million children in adopted households, less than 2 percent were in gay or lesbian households.<sup>8</sup> By comparison to the 58,000 or so adopted children in gay settings, there are close to 60 million biological children under 18 according to the 2000 Census.<sup>9</sup> Thus, society's profound interest in channeling responsible procreation into marriage relationships between the man and woman who produce the children is not in the least diminished by the fact that some same-sex couples can adopt children, or produce them through third party assistance.

---

<sup>7</sup> Tim Drake, *Couples Ask: What's Wrong With In-vitro Fertilization?*, Nat'l Catholic Register, Aug.14, 2004, available at [http://catholiceducation.org/article/medical\\_ethics/me0064.html](http://catholiceducation.org/article/medical_ethics/me0064.html).

<sup>8</sup> William L. Pierce, *Adopting Numbers*, Nat'l Rev. Online, at <http://www.nationalreview.com/comment/comment-pierce082703.asp>. (Aug. 27, 2003).

<sup>9</sup> *Id.*

Gay marriage advocates set up another straw man, arguing that because some heterosexual couples do not have children, there is no real link between marriage and procreation. The Massachusetts Supreme Judicial Court accepted this notion in *Goodridge. Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 962-64 (Mass. 2003). The state's purpose in promoting marriage is not, however, to ensure that couples have children. The state's interest in promoting marriage is to encourage individuals whose sexual activity results in children to be married to each other. That some married couples do not have children is immaterial to society's interest in promoting an institution that responsibly channels procreation.

Additionally, the legitimacy of the procreative state interest does not depend upon excluding from marriage those who cannot or choose not to have children. Gay marriage advocates often make this argument but it is a red herring. Promoting responsible procreation logically separates same-sex couples from other nonprocreative heterosexual couples. See Kmiec, *supra*, at 657. Without an unconstitutional intrusion into the privacy rights of heterosexual couples, it is not possible to exclude heterosexual couples who cannot

or choose not to reproduce. The government may not intrude "into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In any event, even if it were constitutional to ask heterosexual couples whether they were able and intended to have children, in many cases, the answers would be largely unreliable. Couples often change their minds with respect to whether to have children, and infertility is not necessarily a static, irremediable condition. It is not uncommon for couples to conceive after years of infertility, sometimes with no third party medical assistance.

The reality is that the vast majority of those who do marry are capable and inclined toward having children and then to rearing them responsibly. "While the state can tolerate a modest level of disinterest or inability to procreate, it is far more questionable whether any state can rationally be indifferent to sustaining its population by giving public marital sanction to individuals who, because of physical reality and the nature of their sexual relationship, cannot procreate." See Kmiec, *supra*, at 657.

**B. Extending Marriage to Same-Sex Couples Threatens Children Precisely Because It Diminishes the Importance of Children Being Raised by Their Own Biological Parents.**

Fragmenting parenthood and valuing "intentional" parenthood over all else will ultimately leave children more, rather than less, insecure. Cere & Glendon, *supra*, at 38. The overwhelming weight of social science data establishes that the well-being of the nation's children depends in enormous measure on healthy marriages between men and women who procreate the children. Civil marriage is ultimately about protecting the right of children to know and be raised by both of their biological parents. This central truth is recognized in the United Nations Convention on the Rights of the Child, which states that "the child shall . . . have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents.*" (Art. 7) (emphasis added).

Gay marriage advocates concede that gay marriage would profoundly affect children. A leading gay rights advocate, William Eskridge, has observed that gay marriage

involves the reconfiguration of family – de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal

commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.

William N. Eskridge Jr., *Gaylaw: Challenging Apartheid in the Closet* 11 (Harvard University Press 1999).

Recent Canadian court decisions creating the right to same-sex marriage evaluate two features: the unity of the couple and functional parenthood (that is, the day-to-day raising of children). The procreative link between marriage and children is eliminated along with the right of children to know their parents. *Halpern v. Att'y Gen.*, [2003] 65 O.R.2d 161. More significantly, Canada's proposed new Civil Marriage Act eliminates the category of "natural parent" across federal law. In other words, parenthood loses its natural relationship to sexuality and childbirth, and becomes merely a legal construct. See Cere & Glendon, *supra*, at 39.

Thus, state-approved same-sex marriage sends the message to all citizens, including heterosexuals who might some day be parents, that it is immaterial to the state whether children are raised by their biological

mother and father. Under the paradigm shift in which marriage is about adult close relationships, adults choose the relationships that best suit them at the moment and children are expected to adapt. But social science evidence establishes that many adult constructions of parenthood are decidedly against the best interests of children. The scholarly consensus is "that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage." Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief (Washington, DC: Child Trends, June, 2002), 1.<sup>10</sup> Compiling statistical data, the authors demonstrate that "children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes" in all areas. *Id.* at 6.

The risk of physical or sexual abuse rises

---

<sup>10</sup>

*Also available at*

<http://www.childtrends.org/files/MarriageRB602.pdf>.

exponentially when children are cared for in the home by adults unrelated to them. One scholar reports:

Large numbers of stepfathers become disengaged from parenting and compete with the child for the mother's time. Stepfathers praise and hug their children significantly less than biological fathers do. They are less likely to have intense conversations with them. Even worse, child abuse goes way up when stepfathers are present. Stepfathers commit most of this abuse, but even biological mothers are more abusive when they remarry than when they remain single. The rate of infanticide increases by 6,000 percent, and sexual abuse increases by a multiple of eight in stepfamilies as compared with traditional families.

Steven E. Rhoads, *Taking Sex Differences Seriously* 83

(2004). Study after study establishes that children living with single mothers, stepfathers, or mother's boyfriends are more likely to become victims of child abuse. See William J. Doherty, et. al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* (New York City: Institute for American Values, 2002).

Surveying the data, Doherty found that: 1) "a preschooler living with a stepfather was 40 times more likely to be sexually abused than one living with both of his or her biological parents, and 2) "although boyfriends contribute less than 2 percent of nonparental childcare, they commit half of all reported child abuse by nonparents" *Id.* at 17. See also Robin

Wilson, "Children at Risk: The Sexual Exploitation of Female Children after Divorce," 86 Cornell Law Review 251, 256 (2001).

Similarly, the research literature supporting the social value of marriage between men and women is significant. Twelve scholars<sup>11</sup> compiled evidence and reached the following conclusions about family structure:

1. Marriage increases the likelihood that children enjoy warm relationships with both parents. *Id.* at 7.
2. Cohabitation is not the functional equivalent of marriage. *Id.* at 7-8.
3. Children raised outside of intact married homes are more likely to divorce or become unwed parents themselves. *Id.* at 8.
4. Marriage reduces child poverty. *Id.* at 9.
5. Divorce increases the risk of a school failure for children, and the likelihood that they will not graduate from college and achieve high status jobs. *Id.* at 11-12.
6. Children in intact married homes are healthier, on average, than children in other family forms. *Id.*
7. Children born to married parents have sharply lower risk of infant mortality. *Id.* at 12.

---

<sup>11</sup> The scholars were William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, David Popenoe, Gloria G. Rodriguez, Isabel V. Sawhill, Scott M. Stanley, Linda J. Waite, and Judith Wallerstein. See William J. Doherty, et. al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* (New York City: Institute for American Values, 2002).

8. Children from intact married homes have lower rates of substance abuse. *Id.* at 12-13.
9. Divorce increases rates of mental illness and distress in children, including the risk of suicide. *Id.* at 14-15.
10. Boys and young men from intact married homes are less likely to commit crimes. *Id.* at 15-16.
11. Married women are less likely to experience domestic violence than cohabiting and dating women. *Id.* at 16-17.
12. Children raised outside of intact marriages experience significantly elevated risks of child abuse. *Id.* at 18.

The authors concluded that:

Marriage is more than a private emotional relationship. It is also a social good. Not every person can or should marry. And not every child raised outside of marriage is damaged as a result. But communities where good-enough marriages are common have better outcomes for children, women, and men than do communities suffering from high rates of divorce, unmarried childbearing, and high-conflict or violent marriages.

*Id.* at 18; see also Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 *Margins* 161, 162 (2004) (concluding that "family structure does matter, and that a married mother and father is the family structure that best protects children").

**C. Approving Same-Sex Marriage Conveys the Message that Children Do Not Need Parents of Both Sexes.**

State approval of gay marriage also sends the message that it is unimportant whether children have both a mother and a father. Fathers and mothers become fungible and the state thereby ignores abundant social science data establishing that both boys and girls do best when they have parents of both sexes. As Supreme Court Justice Ruth Bader Ginsburg has pointed out, the "two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). "Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533. Appreciating the innate differences between men and women and the unique contributions each sex makes in child-rearing is fundamentally at odds with the same-sex claim that "the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women" that makes the presence of both genders

within a family unnecessary. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1606 (1997).

Author and sociologist David Popenoe reports that mothers and fathers contribute differently to their children's development. David Popenoe, *Life Without Father* 144, 146 (Harvard University Press 1996). Popenoe explains, "Through their play, as well as in their other child-rearing activities, fathers tend to stress competition, challenge, initiative, risk taking and independence. Mothers in their care-taking roles, in contrast, stress emotional security and personal safety." *Id.* Parents also discipline their children differently: "While mothers provide an important flexibility and sympathy in their discipline, fathers provide ultimate predictability and consistency. Both dimensions are critical for an efficient, balanced, and humane child-rearing regime." *Id.*; see also Eleanor Maccoby, *The Two Sexes* 284 (Harvard University Press 1998).

Mothers provide their children nurture and care-giving, role modeling and identity formation, instruction and relationships, and moral formation. As

one expert has articulated it, "[t]he power and the ethical import of mothering lie in the ability of actual mothers to nurture complete human souls and to teach both their daughters and their sons to insist on the expression of their full humanity in all areas of their lives." Deborah Orr, *Mothers as Moral Educators: Teaching Language and Nurturing Souls* in *Mothers and Daughters*, Eds. O'Reilly and Abby (Lanham, MD: Rowman & Littlefield 2000), at 172; see Eleanor Maccoby, *The Two Sexes* (Harvard 1998), 284-85; David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* 219 (1995) ("Mothers are more likely to pay attention to a child's physical and emotional needs. For the child, motherly love is more conditional, comforting, and the foundation of human attachment fostering empathic character in children."); Kyle D. Pruett, *Role of the Father*, 102 *Pediatrics* 1253-1261 (1998) ("as adolescents develop psychological and sexual independence, the mother's femininity clarifies her son's heterosexual interest and encourages her daughter in her path towards womanhood."); Mary Gauvain and Ruth Duran Huard, *Family Interaction, Parenting Style, and the Development of Planning: A Longitudinal Analysis*, 13 *Journal of Family Psychology* 75-92

(1999); Carin Neitzel and Ann Dopkins Stright, *Mothers' Scaffolding of Children's Problem Solving: Establishing a Foundation of Academic Self-Regulatory Competence*, 17 *Journal of Family Psychology* 75-92 (2003) ("The cognitive and emotional support of mothers is very important in helping a child develop "self-regulatory behavior.").

Abundant social science data also establish in "virtually all human societies, children's well-being depends decisively on a relatively high level of paternal investment." David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* 25 (1995). A growing body of evidence shows that fathers contribute vital aspects to their children's development, including: 1) behavioral skills/self control, 2) responsibility and autonomy, 3) intelligence/problems solving skills, 4) role model of husband/father, and 5) sexual identity. See H.B. Biller, *Fathers and Families: Paternal Factors in Child Development* 1-3 (1993) ("Children that have formed paternal attachments, in addition to maternal attachments, are stimulated in their development and tend to be more socially adaptable than their counterparts that are attached to mothers only.");

Dorothy Martin, "Fathers and Adolescents" in *Dimensions of Fatherhood*, 181 (Shirley M.H. Hanson and Frederick W. Bozett eds., Sage Publications 1985) ("There is a relationship between paternal nurturance and enhanced masculine identity in teen boys."); Kyle D. Pruett, *Fatherhood* 41-52 (New York Press 2000) ("Fathers who are involved encourage their sons to identify with and model that fathering behavior when they have sons of their own.").

Absentee fathers present a substantial risk of emotional and developmental problems for their children. In a study comparing the involvement of married and unmarried fathers with residential biological and nonbiological children under the age of 13, the authors concluded that biological fathers participated more in their children's activities, engaged in more warm activities per week with their child, and had better attitudes towards fathering than their nonbiological counterparts. Sandra L. Hofferth and Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 *Journal of Marriage and Family* 213, 224 (Feb. 2003). Using a nationally representative sample, the authors analyzed the engagement, availability, participation,

and warmth of residential fathers in married biological parent, unmarried biological parent, married stepparent, and cohabitating father families using three different perspectives: biology, sociology, and selection. Marriage continues to differentiate paternal investment levels, as do age of child and financial responsibility to nonresidential children.

The study also found that children of two married biological parents had lived with their father 99 percent of the time. Children of two unmarried parents had lived with their father 94 percent of the time. Stepchildren and children of a cohabitating partner, however, had lived with their father only 46 percent and 48 percent of the time respectively. *Id.* at 221. Sixty-five percent of stepchildren had no or minimal contact with their nonresidential biological father. *Id.*

A federal appellate court recently upheld a state's ban on same-sex adoption, noting the state's interest in protecting "[the] vital role that dual-gender parenting plays in shaping sexual and gender identity." *Lofton v. Sec'y of the Dept. of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004).

More than a decade ago, Sociologist David Popenoe

stated "I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: On the whole, for children, two-parent families are preferable." David Popenoe, *The Controversial Truth: Two Parent Families Are Better*, N.Y. Times, Dec. 26, 1992, at A21. States that accept gay marriage advocates' efforts to dismiss or debunk the significance of biological parenthood, and the importance of dual-gender parenting are "standing on very thin ice." Cere & Glendon, *supra*, at 39. While it is true that many children grow up in alternative family structures and develop into well adjusted adults, it is also true that many of society's ills are rooted in adult alternative lifestyle choices in which children are the chief victims. Now is not the time for New Jersey to retreat from promoting the ideal of children being raised by both their biological parents in stable homes. Leveling marriage into nothing more than a close relationship between two consenting adults would constitute just such a retreat.

**D. Studies Purporting to Show that Children Raised in Gay and Lesbian Households Fare No Worse than Children in Traditional Homes Have Serious Methodological Flaws.**

Although several studies in recent years have purported to show that children raised in gay and

lesbian households fare no worse than those reared in traditional families, those studies fail to meet acceptable standards for psychological research. Their conclusions are therefore questionable. Such studies are also of questionable validity because they are driven by political agendas instead of an objective search for truth. Openly lesbian researchers, such as Charlotte Patterson for example, conduct research with an interest in portraying homosexual parenting in a positive light. See Timothy J. Dailey, *Homosexual Parenting: Placing Children at Risk*, 1 available at <http://www.orthodoxytoday.org/articles/DaileyGayAdopt.htm>; Gallagher & Baker, , *supra*, at 179-180.

Scholars conducting numerous reviews of the literature on sexual orientation and parenting, have concluded that nearly all of the studies of homosexual parenting have major flaws which render suspect the studies' conclusions. One particularly thorough review was conducted by Steven Nock, a sociologist at the University of Virginia, who reviewed several hundred studies at the request of the Attorney General of Canada. Nock concluded: "Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or

execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research." Gallagher & Baker, *supra*, at 177 (citing Nock Aff. P 3, *Halpern v. Att'y Gen.*, [2003] 65 O.R.2d 161).

Another scholar, David Cramer, reviewed twenty studies on homosexual parenting, and concluded:

The generalizability of the studies is limited. Few studies employed control groups and most had small samples. Almost all parents were Anglo-American, middle class, and well educated. Measures for assessing gender roles in young children tend to focus on social behavior and generally are not accurate psychological instruments. Therefore it is impossible to make large scale generalizations . . . that would be applicable to all children.

David Cramer, "Gay Parents and Their Children: A Review of Research and Practical Implications," 64 *Journal of Counseling and Development* 504, 506 (April 1986).

In another study published in the *Journal of Divorce and Remarriage*, the authors reviewed fourteen studies on homosexual parenting according to accepted scientific standards. Their "most impressive finding" was that "all of the studies lacked external validity." P. A. Belcastro et al., "A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning," *Journal of*

Divorce and Remarriage 20 (1993): 105, 106.

Several other scholars have criticized gay parenting studies' for 1) small sample size; 2) failing to obtain a truly representative sample due to sources of sampling bias; 3) failing to use a random sample; and 4) using samples with characteristics that are inappropriate for the crucial development research question involved in the study. For example, in 1995, a renowned Berkeley sociologist Diana Baumrind evaluated several parenting studies, including the work of Charlotte Patterson and David Flaks. In her assessment, Professor Baumrind analyzed the claim that children raised by homosexual parents do not experience any adverse impacts and that those children are at no greater risk of developing a homosexual sexual orientation than are children raised in the traditional family institution. Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 *Developmental Psychology* 130, 133-134 (1995). Baumrind identified the following research methods as problematic in the research she reviewed: 1) use of small, self-selected convenience samples; 2) reliance on self-report instruments; and 3) biased study populations consisting of disproportionately

privileged, educated, and well-off parents. *Id.* at 134. Consequently, Baumrind questioned the validity of the conclusions on both "theoretical and empirical grounds." *Id.*

Similarly, in 2001, researchers Robert Lerner and Althea Nagai looked at forty-nine separate parenting studies before concluding that "the methods used in these studies are so flawed that the studies prove nothing." Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* 6 (2001); see also L. Keopke et al., *Relationship Quality in a Sample of Lesbian Couples with Children and Child-free Lesbian Couples*, 41 *Family Relations* 225 (1992) ("Conducting research in the gay community is fraught with methodological problems").

Even researchers sympathetic toward gay parenting have noted methodological limitations in existing research. See, e.g., Judith Stacey & Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159, 166 (2001) (acknowledging "there are no studies of child development based on random, representative samples of [same-sex couple headed] families").

One of the most serious flaws of gay parenting

studies is that the vast majority of these studies compare single lesbian mothers to single heterosexual mothers, rather than comparing single lesbian mothers to traditional two-parent homes. Gallagher & Baker, *supra*, at 179. Charlotte Patterson, a leading researcher on gay and lesbian parenting admitted, "Most studies have compared children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families." Charlotte J. Patterson et al., *Children of Lesbian and Gay Parents: Research, Law and Policy*, in *Children and the Law: Social Science and Policy* 10-11 (Bette L. Bottoms et al., eds. 2000). "Studies comparing children of single lesbian mothers with children of single heterosexual mothers cannot be used" to undermine the well-established conclusions "on the benefits of the married, intact biological family over alternative family forms." Gallagher & Baker, *supra*, at 180.

**IV. ONCE MARRIAGE IS REDEFINED TO INCLUDE SAME-SEX UNIONS, THERE IS NO PRINCIPLED BASIS UPON WHICH TO EXCLUDE ANY TWO OR MORE PEOPLE WHO HAVE A CLOSE INTERPERSONAL RELATIONSHIP.**

Once marriage is reconfigured as merely one of many equally valid examples of a close relationship, no principled rationale exists for refusing legal

recognition to all forms of long-term friendship and mutual care. See Cere & Glendon, *supra*, at 31. As Eric Lowther, a member of the Canadian Parliament pointed out in the context of a debate about legislation extending government benefits to same-sex couples:

There are many types of gender relationships: siblings, friends, roommates, partners, et cetera. However, the only relationship the government wants to include is when two people of the same gender are involved in private sexual activity, or what is more commonly known as homosexuality. No sex and no benefits is the government's approach to this bill. Even if everything else is the same, even if there is a long time cohabitation and dependency, if there is no sex there are no benefits. Bill C-23 is a benefits-for-sex-bill. It is crazy.

Brenda Cossman and Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugalality*, 18 Can. J. Fam. L. 269, 323 (2001).

Indeed, if the procreative component of marriage is cast aside as irrelevant, it is hard to see why the government should care about, much less condone, any sexually intimate relationships. As one commentator observed:

should constitutional law abandon the principle that reproductive sex has a unique role, there will be no basis left upon which to draw principled constitutional distinctions between sexual relations that are harmful to individuals or society, and relations that are beneficial. In fact, the same arguments that would seemingly require

constitutional protection for same-sex marriage would also require constitutional protection for any consensual sexual practice or form of marriage. After all, once the principled line of procreation is abandoned, we are left with nothing more than sex as a purely sensory experience.

Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 Regent U. L. Rev. 121, 133 (2003-2004).

A survey of recent scholarly literature reveals that bans on polygamy are the next target. Professor Gillian Douglas of Cardiff Law School has criticized traditional views of marriage as "ideological" and has suggested that bigamy laws are similarly suspect: "The abhorrence of bigamy appears to stem again from the traditional view of marriage as the exclusive locus for a sexual relationship and from a reluctance to contemplate such a relationship involving multiple partners." Gillian Douglas, *An Introduction to Family Law*, 30-31 (2001). A prominent professor from the University of Chicago Law School wrote a major work this year setting forth a legal defense of polyamory. See, e.g., Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y. U. Rev. L. & Soc. Change 277 (2004).

Gay couples, in particular, stand to gain from the

invalidation of polygamy laws because such laws render impossible marriage among three homosexual, bisexual or transgendered persons who might wish to cooperate to conceive a child. Additionally, given the documented promiscuity among homosexual males,<sup>12</sup> polygamy laws also threaten the lifestyle choices of those men who may wish to marry numerous sexual partners.

In the malleable world of sexually intimate, long-term, committed relationships, firm distinctions are easily eroded. Severed from its link to the biology of heterosexual reproduction, marriage will eventually be transmogrified into something unrecognizable. Only by giving special status and protection to heterosexual monogamous marriage, can society protect the institution of marriage as a uniquely valuable form of

---

<sup>12</sup> A. P. Bell and M. S. Weinberg, in their classic study of male and female homosexuality, found that 43 percent of white male homosexuals had sex with five hundred or more partners, with 28 percent having 1,000 or more sex partners. A. P. Bell and M. S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (New York: Simon and Schuster, 1978), pp. 308, 309; See also A. P. Bell, M. S. Weinberg, and S. K. Hammersmith, *Sexual Preference* (Bloomington: Indiana University Press, 1981). A survey conducted by the homosexual magazine *Genre* found that 24 percent of the respondents said they had had more than 100 sexual partners in their lifetime. The magazine noted that several respondents suggested including a category of those who had more than 1,000 sexual partners. "Sex Survey Results," *Genre* (October 1996), quoted in "Survey Finds 40 percent of Gay Men Have Had More Than 40 Sex Partners:" *Lambda Report*, January 1998, p. 20.

human interaction, and the only sexual union capable of producing children. To give the same status and approval to relationships that do not share the characteristics that make marriage uniquely valuable—that is, to call something marriage that is not really marriage—will stifle the message that marriage is uniquely valuable.

**CONCLUSION**

Amici Curiae, Monmouth Ruber & Plastics Corp. And John M. Bonforte, Sr., respectfully requests this Court to affirm both the ruling of the Superior Court of New Jersey, Law Division, Mercer County, and the ruling of the Superior Court of New Jersey, Appellate Division.

Respectfully Submitted,

---

Demetrios K. Stratis, Esq.  
**Law offices of Demetrios K. Stratis, LLC**  
201 Willowbrook Boulevard  
Wayne, N.J. 07470  
(973) 256-7700  
(973) 256-3570

**Vincent P. McCarthy, Esquire**  
CT Bar No. 100195

**Laura B. Hernandez, Esquire**  
VA Bar No. 29853

**Kristina J. Wenberg, Esquire**  
CT Bar No. 421555

**American Center for Law & Justice, Northeast, Inc.**  
P.O. Box 1629, 8 South Main Street  
New Milford, CT 06776  
(860) 355-1902  
Fax: (860) 355-8008