RESCUING CHILDREN FROM THE MARRIAGE MOVEMENT: THE CASE AGAINST MARITAL RESTRICTIONS ON ADOPTION AND ASSISTED REPRODUCTION[1]

by

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Much of the current cultural debate about marriage in the United States focuses on the need for children to be raised by heterosexual married couples. In the current atmosphere, it is important to examine how marriage functions in contexts where parent-child relationships are determined by more than just genetics and marital presumptions. This Article argues that the favoritism toward marriage in adoption and assisted reproduction relates neither to the purposes of marriage nor to child welfare. Part I subjects marital restrictions on assisted reproduction to an interpretivist microscope, and Part II undertakes a comprehensive comparison of step-parent adoption and second-parent adoption. Both Parts raise concerns that are further addressed in Part III's look at how the contemporary marriage movement, in advocating for favored treatment of married couples at all levels of society, ultimately undermines the welfare of children whose best hope lies with parents for whom marriage is not an option.

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INTRODUCTION

Much of the current cultural debate about marriage in the United States focuses on whether children need to be raised by heterosexual married couples. On one side of the spectrum, the Human Rights Campaign urges policymakers to take note of the many same-sex couples who are raising children and are doing so well. On the other side, marriage-movement groups like the Family Research Council and Focus on the Family claim that society is imperiled whenever a child is not raised by a heterosexual married couple.[3]

[3] *See* Margery Beck, *Senators React to Advertisement*, JOURNAL STAR (Omaha), June 29, 2004; James Dao, *Legislators Push for State Action on Gay Marriage*, N.Y. TIMES, Feb. 27, 2004; Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004.

In the current atmosphere, it is important to examine how marriage functions in contexts where parent-child relationships are determined by the state rather than through the application of natural-law principles. One of these is adoption, where the state plays the primary role in naming new parents for an adoptable child. Another is assisted reproduction, where traditional approaches to parentage often fail to identify the parents of a child born via unfamiliar methods of reproduction. In both of these contexts, the state undertakes to assess whether those petitioning for a declaration of parentage are fit to be parents and whether the child's being raised in the home they offer is in that child's best interests.

This Article argues that the favoritism toward marriage in adoption and assisted reproduction relates neither to the purposes of marriage nor to child welfare. Part I subjects marital restrictions on access to assisted reproduction to an interpretivist microscope and concludes that using marriage as a gatekeeper in that context conflicts with the value our society places on consistency, neutrality and integrity in the law. Part II begins with a comprehensive comparison assisted reproduction and adoption and then examines the role of the law in regulating step-parent adoption and second-parent adoption. Part II criticizes in particular how marriage functions as a proxy for the parental fitness of individuals who seek to adopt their step-children and reveals the wrongheadedness of the possible justifications for allowing marriage to play this role. Part II concludes with an argument for harmonizing the law of step-parent and second-parent adoption. Both Parts I and II raise concerns that are further addressed in Part III's look at how the contemporary marriage movement, in advocating for favored treatment of married couples at all levels of society, ultimately undermines the welfare of children whose best hope lies with parents for whom marriage is not an option.

I. MARRIAGE AND ASSISTED REPRODUCTION

Marriage has played a prominent role in the development of the law and policy that govern assisted reproduction. The effect has been to restrict the use of assisted reproduction to those in socially sanctioned intimate relationships and to erect barriers to its use against those who are not. While these barriers are no longer as salient in the artificial insemination context as they once were, they continue to exist and to be particularly prominent in the regulation of surrogacy.

A. Marriage and Artificial Insemination

Whereas artificial insemination was once considered adulterous,[4] restriction of the use of this technology to married couples is becoming less and less common. The Uniform Parentage Act (UPA), as first promulgated in 1973, contained a section addressing the use of artificial insemination by married couples.[5] The Act provided that if, under the supervision of a physician, a wife were artificially inseminated with a donor's semen and with the consent of her husband, the husband would be the father of the resulting child.[6] The UPA further provided that a donor of semen to a licensed physician was not the father of a resulting child unless the woman artificially inseminated was his wife.[7] These provisions did not prohibit single women from being artificially inseminated; they merely prevented single women from becoming the sole parents of their children through artificial insemination. The language referring to married couples and licensed physicians was eliminated in 2000 in order to "provide[ ] certainty of

[4] *See* Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963); Strnad v. Strnad, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
[5] *See* UNIF. PARENTAGE ACT § 5 (repealed 2000), 9B U.L.A. 407 (2001).
[6] *See* UNIF. PARENTAGE ACT § 5(a) (repealed 2000), 9B U.L.A. 407 (2001).
[7] *See* UNIF. PARENTAGE ACT § 5(b) (repealed 2000), 9B U.L.A. 408 (2001).

nonparentage for prospective donors."[8] The new provisions permit single women to become the sole parents of the children born to them via artificial insemination.[9] Notably, the language of the new UPA, unlike that of the former UPA, is inclusive not only of unmarried women,[10] but also of unmarried opposite-sex couples, whether or not those couples are intimately involved with each other.[11] The provision is said to "reflect[] concern for the best interests of nonmarital as well as marital children of assisted reproduction . . . ."[12]

Most states regulate access to and the ramifications of artificial insemination in one way or another. Some states specifically ban the use of artificial insemination by any but married couples,[13] a more restrictive position than even that taken by the 1973 UPA. Some states adopted the language of the 1973 UPA without revision[14] or otherwise employed language that referred only to married couples.[15] Other states altered the UPA's provisions slightly so as not to

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[8] UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).
[9] *See* UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.").
[10] *See* UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("UPA (2000) further opts not to limit nonparenthood of a donor to situations in which the donor provides sperm for assisted reproduction by a married woman.").
[11] *See* UNIF. PARENTAGE ACT § 703, 9B U.L.A. __ (Supp. 2003); *cf.* Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African-American Adults Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other Should Be Allowed to Jointly Adopt and Co-parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997).
[12] *See* UNIF. PARENTAGE ACT § 703 cmt., 9B U.L.A. __ (Supp. 2003).
[13] *See, e.g.*, OKLA. STAT. tit. 10, § 553 (1998).
[14] *See, e.g.*, ALA. CODE § 26-17-21 (1992); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106(2) (2001); NEB. REV. STAT. § 126.061(2) (1989); VA. CODE ANN. § 20-158(3) (Michie 2000); VA. CODE ANN. § 32.1-257(D) (Michie 2000). A married woman is, of course, not required to obtain the consent of her husband to be artificially inseminated. *See* Shin v. Kong, 95 Cal. Rptr. 2d 304, 310 (Ct. App. 2000).
[15] ALA. CODE § 26-17-21 (1992); ALASKA STAT. § 25.20.045 (Michie 2000); FLA. STAT. ch. 742.11(1) (Harrison 2001); GA. CODE ANN. § 19-7-21 (1999); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46 § 4B; MICH. COMP. LAWS ANN. § 333.2824(6) (West

sever the paternity of the donor where the recipient's husband did not consent to the insemination.[16] Such provisions do not explicitly disallow single women from employing artificial insemination, but courts construing them have found no protection for single women who want to use these provisions to combat assertions of paternity by sperm donors.[17] Another group of states addressed this problem by severing the paternity of the donor in all cases where the recipient was not the donor's wife.[18] In this respect, these statutes mirror the language of the new UPA, which provides likewise.[19] None of this is to suggest, however, that single women do not nonetheless experience discrimination based on marital status in the provision of artificial insemination by private clinics.[20] When they do and elect to self-inseminate with the sperm of a

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1997); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106 (2001); NEB. REV. STAT. § 126.061 (1989); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OKLA. STAT. tit. 10, § 551-53 (1998); TENN. CODE ANN. § 68-3-306 (1996). *But see In re* Michael, 636 N.Y.S.2d 608, 609 (N.Y. Sur. Ct. 1996) (statute applied to woman unmarried at time of birth who later married).

[16] *See* ALASKA STAT. § 25.20.045 (Michie 2000); ARK. CODE ANN. § 9-10-201 (Michie 1998); FLA. STAT. ch. 742.11 (1) (Harrison 2001); GA. CODE ANN. § 19-7-21 (1999); 750 ILL. COMP. STAT. 40/2 (2001); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46, § 4B (2001); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); N.H. REV. STAT ANN. § 168-B:3(II) (1994); N.M. STAT. ANN § 40-11-6(A) (Michie 2001); N.Y. DOM. REL. LAW § 73(1) (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OKLA. STAT. tit. 10, § 552 (1998); TENN. CODE ANN. § 68-3-306 (1996).

[17] *See* R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family after the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 240 (2000).

[18] *See* CAL. FAM. CODE § 7613(b) (West 1994); COLO. REV. STAT. ANN. § 19-4-106(2) (West 1999); CONN. GEN. STAT. § 45a-775 (2001); IDAHO CODE § 39-5405(1) (Michie 1998); KAN. STAT. ANN. § 38-1114(f) (1995); N.J. STAT. ANN. § 9:17-44(b) (West 1993); OHIO REV. CODE. ANN. § 3111.95(B) (Anderson 1994); OR. REV. STAT. § 109.239(1) (1990); WASH. REV. CODE § 26.26.050(2) (2001); WIS. STAT. § 891.40(2) (2000); WYO. STAT. ANN. § 14-2-103(b) (Michie 2001). *But see Shin*, 95 Cal. Rptr. 2d at 310 (concluding statute does not apply where husband's consent not obtained) (citing Jhordan C. v. Mark K., 224 Cal. Rptr. 530, 537-38 (Ct. App. 1986).

[19] *See* UNIF. PARENTAGE ACT §§ 702, 703, 9B U.L.A. 355, 356 (2001).

[20] *See* Charo, *supra* note 17, at 241; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 150-51 (2000); Holly J. Harlow, *Paternalism Without*

known donor,[21] they run the risk that courts will apply the distinction between known and unknown sperm donors that has been so prominent in the case law,[22] despite statutory plain language,[23] and recognize the paternity of the donor.[24] The distinction, curiously, is nowhere acknowledged in the new UPA.[25]

Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 175 (1996); Audra Elizabeth Laabs, *Lesbian ART*, 19 LAW & INEQ. 65, 82 (2001); *see also* Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1217 (1995-96) (noting disparities based on race in the provision of fertility services); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 940-42 (1996) (suggesting underlying causes of racial disparity in fertility treatment).

[21] *See* DeLair, *supra* note 20, at 163.

[22] *See* Charo, *supra* note 17, at 241-42, 247. *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 357, 362 (App. Div. 1994); *In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (statutory protection of recipient does not apply where parties had an agreement that donor's parental rights would be preserved); C.O. v. W.S., 64 Ohio Misc.2d 9,11 (1994) (same); *In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1997, at 3 (reporting ruling that "the act does not intend to bar a known donor from trying to assert his parental rights"). *But see* McIntyre v. Crouch, 780 P.2d 239, 243 (Or. 1989) (holding statute applies even where physician does not perform insemination, donor is not anonymous, and recipient is unmarried); Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994) (known donor not entitled to legal recognition of paternity because he agreed not to assert paternity); *In re* Matthew B, 284 Cal. Rptr. 18, 34 (Cal. Ct. App. 1991) (surrogate stipulated to the paternity of the intending father).

[23] *See, e.g.*, *In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1997, at 3 (reporting ruling that act barring paternity claim by donor who is not the wife of the recipient did not apply to bar a known donor from trying to assert his parental rights); *see* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 904 (2000) ("[A]lthough facially neutral, the law discriminates in practice between sperm donors who give directly to users and those who give to sperm banks.").

[24] *See, e.g.*, Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (Ct. App. 1986). Similarly, whereas a sperm donor's agreement not to assert paternity may be enforceable, *see* Leckie v. Voorhies, 875 P.2d 521 (Or. Ct. App. 1994), an agreement releasing a sperm donor from any obligation for child support in exchange for his sperm is not, *see* Ferguson v. McKiernan, No. J. A15043-04 (Pa. Sup. Ct. Jul. 22, 2004).

[25] Indeed, some language appears to invite courts to continue drawing the distinction. Professor John Sampson, who served as the reporter for the new UPA, has commented that a donor who intends to be a father "can be found not to be a 'donor' [, since] if the understanding between him and the mother was that they intended him to have parental rights, . . . " he would resemble a husband who contributes his own sperm to be used by his wife for assisted reproduction. *See*

Institutions and commentators have assumed various positions on restricting artificial insemination in some way relating to marriage. On one extreme is the Catholic Church, which simply disapproves of assisted reproduction in any form. Others believe regulations limiting artificial insemination to married couples violates the constitutional guarantee of equal protection.[26] As a policy matter, many disapprove of single parenthood and revile the growing single-motherhood-by choice movement made possible by the lowering of discriminatory barriers to artificial insemination.[27] Others more specifically disapprove of "special" rules for artificial insemination that allow single women to become sole parents but withhold the same option from single women who have children via coitus.[28] At least some of this concern about single motherhood appears related to concerns about legitimacy and support for children.[29]

Although the debate over sole legal parenthood for single women who employ artificial insemination continues, and although single women will continue to face private discrimination

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Uniform Parentage Act (2000) (with Unofficial Annotations by John J. Sampson, Reporter), 35 FAM. L. Q. 83, 162 n.73 (2001). The inclusion of unmarried opposite-sex couples in the 2002 revisions of the UPA may be an attempt to address the status of known donors.

[26] *See In re* Michael, 636 N.Y.S.2d at 609 ("[T]he court [is unaware] of any distinction, based upon marital status, being mandated by law with regard to a woman's right to be artificially inseminated. It might very well be unconstitutional for the law to try to make such a distinction.") (citing Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995)); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 682, 683-84 (1985); Garrison, *supra* note 24, at 911 n.341 (reasoning from right-of-privacy jurisprudence that "the state cannot deny access to a means of achieving pregnancy based on marital status.").

[27] *See, e.g.*, Barbara Dafoe Whitehead, *The Decline of Marriage as the Social Basis of Childrearing*, *in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 3, 5 (David Popenoe, Jean Bethke Elshtain, et al., eds. 1996) (in a chapter on how it is best for children to be raised by their married parents, describing "single mothers by choice" as women who are committed more to expressing their individuality than to the welfare of their children) [hereinafter PROMISES].

[28] *See* Garrison, *supra* note 24, at 843, 873, 879, 882.

[29] *See* UNIF. PARENTAGE ACT § 705(a)(1), 9B U.L.A. 357 (2001). If the husband and wife have not lived together since her insemination, and if the husband never held the child out as his own,

from fertility clinics, at the level of law policy marriage has by and large lost its force as a regulatory barrier to artificial insemination.

his lawsuit may be brought at any time. *See* UNIF. PARENTAGE ACT § 705(b), 9B U.L.A. 357 (2001)

B. Marriage and Surrogacy

Although most statutes governing surrogacy simply outlaw the practice,[30] a few states have enacted provisions that permit certain individuals to become parents via surrogacy.[31] Most of these statutory schemes permit only married couples to commission surrogates for this purpose.[32] Thus, unlike in the context of assisted reproduction, marriage remains a controlling influence on the law and policy governing surrogacy.

Most of the National Conference of Commissioners on Uniform State Law's (NCCUSL) enactments on surrogacy have restricted the use of surrogacy to married couples. The 1973 version of the UPA did not address surrogacy, but in the 1980's, the Commission promulgated a uniform act known as the Uniform Status of Children of Assisted Conception Act (USCACA). The USCACA embodied two options relating to surrogacy, one, Option A, permitting it but closely regulating it, the other, Option B, outlawing surrogacy. The act was largely unsuccessful and was repealed by the 2000 overhaul of the UPA. As a part of this overhaul, NCCUSL promulgated a comprehensive set of provisions which governed the ability of married couples to commission surrogates, which incorporated the USCACA with little change but the elimination of Option B.

In 2002, NCCUSL again revamped the UPA's Article 8 to eliminate the restriction on the use of surrogacy to married couples. The change permits married or unmarried heterosexual

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[30] *See* Garrison, *supra* note 24, at 851.

[31] *See* ARK. CODE ANN. § 9-10-201 (Michie 1998); FLA. STAT. ch. 742.13(2) (Harrison 2001); NEV. REV. STAT. 126.045(4)(a) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(XII), 168-B:17(III) (1994); VA. CODE ANN. § 20-160(B)(9) (Michie 2000).

[32] Statutes in Florida, Nevada, New Hampshire, Virginia all contain provisions requiring at least one of the intending parents to be a genetic parent of the child. *See* FLA. STAT. ch. 742.13(2) (Harrison 2001); NEV. REV. STAT. 126.045(4)(a) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(XII), 168-B:17(III)(1994); VA. CODE ANN. § 20-160(B)(9) (Michie 2000).

couples to engage a surrogate. Whether this change of position was due to the tepid response of legislatures or the vociferous opposition by the American Bar Association (ABA) to the UPA has not been made public. What is known is that family-law expert Professor Joan Heifetz Hollinger served as a liaison between NCCUSL and the ABA in a vigorous and sustained effort "to ensure that the principle of equal treatment of all children without regard to the marital status of their parents [was] followed throughout the new UPA."[33] Hollinger argued that a child born to an unmarried man and woman, including children born through assisted reproduction or in the context of a gestational agreement, should have the same rights and relationship with his or her parents or intended parents as a child born to a married couple. Her successful effort seems to have been motivated less by purely constitutional concerns as by the need to align the legal treatment of marital and nonmarital children, the hallmark of the UPA since its original promulgation in 1973.[34]

Like the USCACA, the UPA's Article 8 in either its former or new-and-improved form has been of little interest to legislative bodies. Only two states, Virginia and North Dakota, made use of the USCACA, and only Texas, the home state of the reporter of new UPA, enacted the 2000 form of Article 8, albeit with some revisions. Utah, the home state of another reporter, considered enacting Article 8 in its 2000 form, but that initiative was defeated in the 2004 legislative session.[35] As for the 2002 form of Article 8, a bill in substantially that form was introduced in Illinois but was left pending in committee at the end of the 2004 legislative

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[33] *Newsletter*, Family and Juvenile Law Section, Association of American Law Schools, May 2003.
[34] *See In re* Raphael P., 118 Cal. Rptr. 2d 610, 626 (Cal. Ct. App. 2002) (quoting Johnson v. Calvert, 19 Cal. Rptr. 2d 494, 497 (1993)).
[35] SB 45; http://www.le.state.ut.us/~2004/htmdoc/sbillhtm/sb0045s02.htm.

session.[36] A bill brought in Maine expanded the scope of Article 8 to permit an individual as well as couples to engage a surrogate, but the bill also died in committee at the end of the session.[37] No legislature is currently considering the enactment of any form of Article 8.

C. Interpreting Marriage-based Restrictions on Assisted Reproduction

In 2002, I argued that functional theories of parenthood–not marriage–are what support intentional parentage in the context of assisted reproduction.[38] In the course of my analysis, I took issue with Professor Marsha Garrison's argument that no good policy justifies different parentage rules for assisted reproduction cases than apply to children born of coitus.[39] Although I disagree with Garrison's articulation of traditional parentage principles and her views on parentage-determination policy in assisted-reproduction cases, I did state then and continue to believe that her "interpretive approach" has much to offer policymakers. The approach, for example, helps demonstrate that marriage-based restrictions on surrogacy conflict with sound social policy.

1. The "Interpretive Approach"

Garrison's interpretive approach is borrowed from the work of tax scholar Professor Edward McCaffery[40] and is called "interpretivism" by McCaffery and constitutional law

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[36] HB 4742; http://www.legis.state.il.us/legislation/billstatus.asp?DocNum=4742&GAID=3&DocTypeID=HB&LegID=9341&SessionID=3

[37] LD 1851; http://janus.state.me.us/legis/LawMakerWeb/summary.asp?ID=280012496.

[38] Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage,* 53 HAST. L.J. 597 (2002).

[39] *See id.* at 632-39.

[40] *See* Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 46 n.30 (1998) [hereinafter Garrison, *Evaluation*]. In his article, *The Uneasy Case for*

scholars.[41] Interpretivism is an interpretive approach supportive of the living Constitution and other doctrines that grew out of the critical legal studies and process theory movements and that undergirds American liberalism.[42]

Garrison invokes McCaffery's approach to policy formulation by asking family policymakers to engage in a multi-principle dialectic consisting of constitutional requirements, contemporary laws, and legislative trends.[43] Doing so affords policymakers awareness of society's actual practices and beliefs[44] and thereby to leaven their rulemaking with consistency[45] and neutrality,[46] avoiding the myopia of "top-down" argumentation, mere intuition, or sloganeering. The result is family policy of integrity,[47] respectful of family law's expressive function,[48] and commanding broad public support.[49] Applied in any legal context, interpretivism

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Wealth Transfer Taxation, 104 YALE L.J.283, 286- 87 (1994), McCaffery describes his preferred method of policy formulation: "The political freedom to seek new answers makes more important the grounding of [policy] on the at least implicit ideas and conceptions of a modern democratic society, and calls for a more careful and sensitive reading of our actual practices. Careful and sensitive interpretation, in turn, helps to lead politics to reasonable answers." *Id.* at 287.

[41] *Id.* at 287. See, e.g., Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). Mark Tushnet criticizes the interpretive and neutral-principles approaches to constitutional interpretation in Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983), finding these approaches internally incoherent.

[42] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

[43] *See* Garrison, *supra* note 24, at 844, 845, 878, 901.

[44] *See id.* at 842. "A core tenet of interpretivism is that meaningful actions and beliefs substantially constitute social life." BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF THE LAW 247 (1997).

[45] *See id.* at 842, 878, 911.

[46] *See id.* at 897 ("gender neutrality may be constitutionally required"); 920.

[47] *See id.* at 879.

[48] The expressive function of the law refers to how it signals "the underlying attitudes of a community or society." Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000). On the expressive function of family law, see Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

resembles the analogical reasoning that characterizes the traditional process of judicial decisionmaking.[50] At the same time, given its emphasis on consistency and neutrality in the law, interpretivism appears to set the standard for legislation on a higher than merely rational basis, somewhere in the broadly undefined realm of heightened scrutiny. In other words, an "uncommonly silly law" that would survive rational basis scrutiny, then, might well fail to meet the demands of interpretivism. **Rational basis with bite (see Kramer U. of Ill. Article).**

2. Interpretivism and Marriage-Based Restrictions on Surrogacy

Marriage has been an important part of social systems worldwide for millennia. Its value to contemporary American society is primarily as a socially sanctioned locus for sexual activity, procreation, and support for children. Despite the importance of marriage to society generally, an interpretivist stance with regard to marriage-based restrictions on surrogacy demonstrates that such restrictions run counter to sound social policy. First, surrogacy legislation has nothing to do with the primary purposes of marriage–the legitimation of sexual activity and the legitimation of children. Second, the marital relationship of the intending parents is insufficient to guarantee two-parent support for the children born of surrogacy. Third, marriage-based restrictions on surrogacy do not encourage marriage. Finally and perhaps most important, marriage-based

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[49] *See* Garrison, *supra* note 24, at 841, 847.

[50] *See id.* at 843 ("The common law method employed by Anglo-American courts for generations is, of course, another application of the interpretive perspective."); 873 ("The methodology could perhaps be described as a form of legal casuistry. Certainly it bears a strong resemblance to the traditional process of analogical reasoning utilized by judges."); 873 ("The example of judicial decisionmaking helps to differentiate the interpretive approach from both the top-down methodology and the intuitive approaches . . . ."); 875 ("Process engaged in by judges offers an excellent model for a lawmaking heuristic . . . ."); 876 (stating that a national commission's approach "strongly resembled the traditional process of judicial decisionmaking"); Garrison, *Evaluation*, *supra* note 40, at 47 n.32 ("The interpretive approach is consistent with the ideal of public reason as the means by which a society makes decisions.").

restrictions on surrogacy conflict with interpretivism's commitment to consistency and neutrality in the law. For all of these reasons, marital-status exclusions in the law of surrogacy lack the legal integrity that is interpretivism's overriding objective.

a. Sexual Intercourse

Marriage apologists tend to extol marriage with great generality. It has been lauded as the foundation of the family, as essential to the advancement of civilization, as essential to the propagation of humanity, and even as critical to economic prosperity. While it is tempting to agree with such globalizing statements, the purpose of marriage, according to a meticulously documented article by Professor Sally Goldfarb, is heterosexual intercourse.[51] Goldfarb's assiduous research into this question is further bolstered by its consistency with the longstanding belief that sexual activity outside of marriage is corrosive of the social fabric. Marriage has always been thought an effective repository for sexual energies that if left unregulated would wreak havoc on the integrity of society.[52] As a theoretical and practical matter, marriage makes sex legitimate for and readily available to the marital couple, effectively diminishing their need to expend energy and resources pursuing sexual partners.

It goes without saying that these beliefs about the proper place for sex have nothing to do with assisted reproduction. Indeed, sexual intercourse has explicitly been defined as lying

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[51] *See* Sally Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285, 287, 288, 293, 295, 296, 301 (1998).

[52] This notion has resonance in religious writings explaining how "[m]arriage takes the demon out of sexual intercourse." JAMES H. OLTHUIS, I PLEDGE YOU MY TROTH 33 (1975). It is also consistent with the notion that marriage is not simply for procreation, but is "first of all for the partners . . . ." *Id.* at 45. The Catholic Church's Canon 1055 contains a similar idea: Marriage is "ordered toward the good of the spouses and the procreation and education of children . . . ." MICHAEL SMITH FOSTER, ANNULMENT: THE WEDDING THAT WASN'T 12 (1999). Indeed, an

beyond the scope of assisted reproduction. It would defy logic, then, to argue that marriage-based restrictions on assisted reproduction have the effect of extolling the value of marriage as a repository for heterosexual intercourse. Limiting forms of assisted reproduction to married couples, then, cannot be justified as advancing marriage's role in the regulation of human sexual relations.

b. Legitimation of Children

Marriage's value to society has been said to lie in part in its power to legitimate offspring. Marriage-based restrictions on surrogacy, then, might be understood as a way of channeling legitimacy of birth. But legitimacy of birth is not achieved by restricting surrogacy to married couples. In fact, were legitimacy of birth any longer of importance in the regulation of family relationships, inheritance and other matters, it would be necessary to acknowledge that no child born of a gestational agreement is legitimate. This is because the law has never recognized legitimation based on the fact of marriage alone. Legitimation by marital presumption has always depended upon a child's being "born to" a marriage, and this, in turn, has required that the wife perform at least the gestational function of reproduction. Moreover, the marital presumption of legitimacy is a presumption of paternity, not of maternity. This is not to suggest that presumptions of paternity do not apply to the establishment of maternity[53] but simply that marriage does nothing to alter the presumption that the woman who gestates a child is the child's mother. By way of illustration, if a single woman gives birth to a child by a married man, the

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ecclesiastical annulment on the basis of impotence is not available for sterility but simply for an inability to perform sexual intercourse. *See id.* at 17.

[53] Although rare, cases where a presumption of maternity is raised in favor of a woman with no biological link to the child do exist. *See, e.g.,* In re Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002). The presumption was in no way related, however, to the woman's marital status.

man's wife is not presumed to be the child's mother, even if the man's wife contributed her egg to the arrangement.[54]

Not only do marital restrictions on surrogacy not promote legitimacy of birth; the very argument that they are intended to strains credulity. NCCUSL itself originally promulgated the UPA to end discrimination against nonmarital children, and this laudable objective has been carried forward in the UPA's new formulation.[55] It would be contradictory to issue a pronouncement of the inherent dignity of all children regardless of their birth status and simultaneously to express concern about the legitimacy of children born of surrogacy. Such a stance would moreover render the UPA internally inconsistent: Article 6 of the UPA permits alleged fathers to rebut the marital presumption of legitimacy, and Article 7 promotes single motherhood by denying the paternity of sperm donors. Thus, marriage-based restrictions on surrogacy are not intended to and moreover could not ensure legitimacy of birth.

c. Two-Parent Support

Perhaps the most instantly appealing justification for marriage-based restrictions on surrogacy is the strong societal policy which favors charging at least two persons with support obligations for each child and identifying them at the earliest possible point in time, thus making it as unlikely as possible that the child will at any time become a public charge.[56] Marriage is without doubt a particularly efficient tool by which to ground two-parent support. When a child

[54] *See, e.g.,* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003); Doe v. Doe, 710 A.2d 1297 (Conn. 1998).
[55] *See* UNIF. PARENTAGE ACT art. 2, 9B U.L.A. __ (2001) ("[C]hildren born to parents who are not married to each other have the same rights . . . as children born to parents who *are* married to each other.").

is born to a married couple, gestational and marital-presumption parentage are called into play, and the law requires the couple to support the child. Under this rubric, which applies based on easily obtainable public facts, there is no point in time when the identity of those responsible for the support of the child is in doubt.[57] Although it does not necessarily follow, this assumption about marriage brings along with it the view that unmarried couples, by contrast, will be less likely to provide children with two-parent support. This view applies in particular to unwed fathers, whose paternity is not always established as a legal matter.

As we have already seen in Part II.C.2.b, *supra*, marital-presumption parentage applies in surrogacy cases in ways the parties to gestational agreements wish to circumvent. When a child is born to a surrogate, the marital presumption points to the surrogate mother and her husband or the surrogate and the genetic father as the responsible parties. Two-parent support for children born of surrogacy, then, is not dependent upon restricting surrogacy to married couples. The aim of surrogacy legislation is not to identify the parties responsible for a child in the first instance but simply to shift responsibility for the child to other parties by overcoming the traditional presumptions and decreeing a different set of obligations. It can do so in at least three different ways: (1) requiring that the intended parents adopt the child after the child's birth,[58] (2) mandating state approval of surrogacy agreements at the time of their creation and decreeing their ramifications,[59] or (3) issuing pre-birth declarations of parentage.[60] Under all three approaches, two-parent support is achieved through provisions that have nothing to do with

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[56] Aside from the interest in child support, the two-parent model seems driven by the idea that each child should have one mother and one father, no more and no less. This basis for justifying marriage-based restrictions on surrogacy is discussed in Part II.C.2.e *infra.*
[57] *See* J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002).
[58] *See In re* Baby M., 537 A.2d 1227 (N.J. 1988).
[59] *See, e.g.,* UNIF. PARENTAGE ACT art. 8, 9B U.L.A. __ (2001).

marriage and involve judicial intervention not required when a married couple has a child via traditional means. Under the Uniform Parentage Act's Article 8 and similar statutory schemes, for example, the intending parents, whether married or not, must embody their intentions in a written document and must submit this document to the court for judicial pre-approval.[61] If they fail to do so, they are not relieved of an obligation to support the child. The document is simply given no effect and traditional parentage rules apply.[62] Even if they are not recognized as the child's legal parents at its birth, though, the intending parents are still liable for support under the specific terms of Article 8 if they refuse to adopt the child.[63] Also, if the intending parents decide not to comply with the terms of the agreement at any time that it remains executory after impregnation of the surrogate, their obligation to support the child is unaffected. [64] In consequence, even if the intending couple's intentions toward the child changed, they would not be relieved of their support obligation. Similar obligation attaches if the marriage of the

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[60] *See, e.g.,* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 433 (Mass. 2001).
[61] *See* UNIF. PARENTAGE ACT § 801(a), 9B U.L.A. 362 (2001) (providing that agreement must be in writing); UNIF. PARENTAGE ACT § 803, 9B U.L.A. 364 (2001) (explaining requirements for judicial pre-approval of gestational agreement); FLA. STAT. ANN. ch. 63.212(1)(i) (West Supp. 2001) (providing for review by the court of pre-planned adoption arrangements and requiring filing of petition in connection with pre-planned adoption agreement); FLA. STAT. ANN. ch. 63.212(1)(i)(2) (West Supp. 2001) (outlining required terms of pre-planned adoption agreement); N.H. REV. STAT. ANN. § 168-B:21, § 168-B:25 (1994) (laying out judicial preauthorization provisions and mandatory signed surrogacy contract terms); VA. CODE ANN. § 20-159 (Michie 2000) (providing for validity of written surrogacy contracts); VA. CODE ANN. § 20-160 (Michie 2000) (judicial preauthorization provision).
[62] *See* VA. CODE ANN. § 20-158(E), § 20-162 (Michie 2000); UNIF. PARENTAGE ACT § 809(a), 9B U.L.A. 369 (2001).
[63] *See* UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) ("[I]ndividuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child."); UNIF. PARENTAGE ACT § 809(c), 9B U.L.A. 369 (2001).
[64] *See* N.H. REV. STAT. ANN. § 168-B:8(IV) (1994) ("A breach of a surrogacy contract by the intended parents shall not affect their support obligation.").

intending parents ends in separation or divorce.[65] These provisions suggest that responsibility may have to be recognized completely apart from parentage, again underscoring the lack of any useful presumptions in these cases.

This elaborate set of regulations demonstrates the lack of any role for marriage in either determining or solidifying support obligations for children born of surrogacy. Instead, the rules of obligation in Article 8 are simply necessary substitutions for support obligations that would otherwise flow automatically from well established presumptions of parentage, including those grounded in marriage, that the parties to surrogacy agreements wish to avoid. These rules mirror what Professor June Carbone has found to be a trend in other areas of family law. Carbone notes that, more and more, "marital status has been supplanted by financial and emotional maturity as the indicia of responsible parenthood."[66] Financial and emotional maturity are, of course, precisely what a court in validating a gestational agreement wants most to ascertain about the intending parents. Evidence of marital status, though, is neither necessary nor sufficient for establishing these traits. Since the support provisions of Article 8 and other similar regulations ensure two-parent support for *any* child born of a gestational agreement and do not look to marriage for any reason having to do with ensuring two-parent support, interpretivism supports the rejection of marriage-based restrictions on surrogacy.

d. Encouragement of Marriage

As a matter of public policy, we value marriage in part because we believe married couples will discharge a set of responsibilities toward each other and that their doing so will have many salutary effects on our society. As a consequence, we bestow upon married couples

[65] *See* VA. CODE ANN. § 20-158(C) (Michie 2000).

"numerous benefits . . . and protections,"[67] with the intention of encouraging people to become and stay married. The vast majority of these protections and benefits have been associated with marriage for a very long time and have become firmly established as indelible markers of marriage's revered status. Perhaps marriage-based restrictions on surrogacy are drawn with this policy in mind. If so, these restrictions are in complete accord with established public policy.

While it has been true that marriage has historically been endowed with numerous privileges and benefits, these benefits have remained relatively fixed through time. It is rare occurrence that married couples are made the sole beneficiaries of newly created privileges. Instead, recent legislative initiatives to encourage or benefit marriage have taken one of three forms: (1) clarifying the definition of marriage at both the federal and the state levels; (2) lowering barriers to entry, and (3) lowering barriers to exit.

Those advocating for clarification that marriage may only exist between two persons of opposing genders seek not to benefit married couples alone but to reaffirm heterosexual marriage as the organizing principle essential to the integrity of society.[68] Much of the language developed by this initiative describes the "natural" or "traditional" family as attainable only through the marriage of one man with one woman.[69] At the same time, any elitist or exclusionary overtones that might emanate from such a conception of marriage are tempered by its easy availability. The law demands less mental capacity to marry than is required either to make a basic will or enter into a simple contract, and even minors, with proper parental or court approval, are permitted to marry. The court system has been cooperative in this project. In his

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[66] JUNE CARBONE, FROM PARTNERS TO PARENTS (2000).
[67] AN ACT RELATING TO CIVIL UNIONS (H. 847), LEGISLATIVE FINDINGS § 1(4) (Vt. 2000).
[68] *See* discussion of the marriage movement, *infra*.
[69] http://www.nyx.net/~jkalb/rants/family_congress.html

research, Professor Milton Regan has discerned a judicial trend toward applying a more exacting level of scrutiny against state regulation of marriage than was true forty years ago.[70] Barriers to exit have been dramatically dismantled by the widespread appearance of no-fault divorce provisions throughout the 1970s. Although the impact of such provisions is the subject of intense debate,[71] some expert commentators firmly believe that no-fault regimes encourage marriage if only because removing the coercive aspects of marriage helps make it more palatable to those who would otherwise be hesitant to give it a try. Furthermore, no-fault divorce does not conflict with policy favoring *re*marriage.[72] Statistics support at the very least the view that the effect of no-fault divorce provisions on the marriage rate is benign. Despite the rise in the number of divorces that no-fault provisions has made possible in the last thirty years, there has been no corresponding plunge in the marriage rate. Indeed, perhaps because of the existence of no-fault divorce, marriage is at present experiencing an increase in popularity.[73]

There is good reason to doubt that marriage-based restrictions on surrogacy encourage marriage. NCCUSL initially included a marriage requirement in its uniform surrogacy

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[70] *See* Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L. Q. 647, 652, 655 (1999) (describing the present application of a more demanding level of scrutiny to state regulation of marriage than was applied forty years ago). Professor Mary Ann Glendon attributes this more demanding level of scrutiny to the recognition of marriage as a "fundamental right" in *Loving v. Virginia*. *See* Mary Ann Glendon, *Marriage and the State: The Withering away of Marriage*, 62 VA. L. REV. 663, 668 (1976)

[71] *See* F. Carolyn Graglia, *A Non-Feminist's Perspectives of Mothers and Homemakers under Chapter 2*, 2001 B.Y.U. L. REV. 993, 995, 996, 1002 [hereinafter Graglia, *Non-Feminist*].

[72] *See* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 584 n.415 (2001).

[73] Mireya Navarro, *Spreading the Pope's Message of Sexuality and a Willing Spirit*, N.Y. TIMES, June 7, 2004, at B1; Barbara Dafoe Whitehead & David Popenoe, *For Richer and for Poorer, Marriage Makes a Comeback*, BOSTON GLOBE, May 12, 2002, at E8. *But see* David Blankenhorn, *The Marriage Problem*, AMERICAN EXPERIMENT QUARTERLY, Spring 2003, at 61,

provisions not to encourage marriage but because it had the utmost sympathy for married couples who, after struggling for years to procreate only to discover they have waited too long to adopt, turn to surrogacy as a last act of desperation. From this perspective, gestational surrogacy actually appears to be something that most couples would *not* want from marriage. Restricting gestational surrogacy to married couples, then, would have little impact on a couple's decision to marry. Although marriage-based surrogacy restrictions provide little encouragement to marry in the first instance, they perhaps provide an incentive for couples near the end of a long and painful journey of infertility to *stay* married so that they may pursue surrogacy. That aim would certainly comport with the public policy favoring fostering the longevity of intact marriages. The aim could just as effectively be accomplished, though, in the absence of marriage-based restrictions on surrogacy. It is quite hard to see, in other words, how the inclusion of *un*married couples in surrogacy legislation would inspire couples who are already married to divorce before entering into a surrogacy agreement. As a final possibility, then, marriage based restrictions might actually force unmarried couples who have not been able to procreate and now want to enter a gestational agreement to get married at last. Such a scenario is not impossible to envision, though it would no doubt arise very seldom. In any event, a marriage entered into for the sole purpose of executing a gestational agreement is probably not at all what the policy of encouraging marriage is meant to accomplish. At the very least, such a marriage is not the "deserving" one NCCUSL was referring to when it initially included marriage-based restrictions in the 2000 UPA. In the final analysis, then, marriage-based restrictions on surrogacy appear to have very little or nothing to do with encouraging marriage.

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66 (explaining that the belief in a "marriage turnaround" is based on weak and inconclusive demographic evidence) [hereinafter Blankenhorn, *Marriage Problem*].

e. Concerns about Consistency and Neutrality

Interpretivism requires social policy to exhibit consistency and neutrality if it is to command broad public support. In the context of surrogacy, interpretivism calls marriage-based restrictions into question both on the basis of their inconsistency with well settled constitutional principles related to procreative liberty and to the differential treatment of marital and non-marital children.

i. Restrictions on Access to Reproductive Options

Although it is permissible to limit the procreative freedom of prisoners and probationers,[74] it is simply not consistent with the American constitutional tradition to condition the procreative rights of others upon their marital status. Even if one could argue that a case like *Skinner v. Oklahoma* expresses an essential linkage between marriage and procreative liberty,[75] such a reading ultimately falters under the weight of more recent Supreme Court pronouncements guaranteeing procreative liberty to the married and the unmarried alike. The marriage-procreation link is also absent from parental-autonomy jurisprudence. *Parham v. J.R.*, for example, nowhere suggests a relationship between marriage and the presumption that parents act in the best interests of their children.[76] If the presumption were dependent upon a marital relationship, *Parham* would have asserted as much, since the Supreme Court had recognized the procreative rights of unmarried persons nearly a decade before it decided that case. Unmarried parents benefit as fully from the presumption as do their married counterparts.

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[74] Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1039 (2002); State v. Oakley, 635 N.W.2d 760 (Wis. 2001), *cert. denied*, 537 U.S. 813 (2002).
[75] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

Without a link between marriage and procreative liberty, what the issue becomes for surrogacy is whether it falls within the ambit of procreative freedom and thus outside of the realm of behavior it is permissible to restrict on the basis of marital status. Some courts and commentators believe that assisted reproduction, including surrogacy, is constitutionally protected procreation. Perhaps the best known commentator on the constitutional dimensions of assisted reproduction, Professor John Robertson, has concluded that "collaborative reproduction [including surrogacy] is an important part of procreative liberty."[77] Some courts hold similar views on assisted reproduction, at least in part. The New Jersey Supreme Court, for example, has stated that artificial insemination is a constitutionally protected procreative interest. Some federal courts agree, and at least one has deemed engaging a gestational surrogate an act of procreative liberty.[78] Insofar as equal protection is concerned, a New York court (in *In re Michael*) has stated in dicta that it might be a violation of equal protection for a statute to allow

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[76] *See* J.R. v. Parham, 442 U.S. 584 (1979).
[77] *See also* Garrison, *supra* note 24, at 856.

[78] Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (embryo transfer); Cameron v. Board of Education, 795 F. Supp. 228, 237 (S.D. Ohio 1991) (artificial insemination). In *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002), the plaintiffs argued that Utah's statutorily mandated determination of parentage in surrogacy cases violated their constitutional right to procreative liberty. The court saw the issue less as one whether surrogacy was a constitutional right (the statute did not outlaw surrogacy *per* se, and the court admitted the U.S. Supreme Court had made no pronouncement on the matter, *see* 261 F. Supp. 2d at 1275) but whether the statute unduly restricted their parental rights by forcing genetic parents to adopt their own children. *See* 261 F. Supp. 2d at 1279. *Lifchez* and *Cameron* suggest procreative liberty encompasses surrogacy, since in those cases third parties collaborated in the reproductive process. It may be, though, that *J.R.* means the protection extends to intending parents who contribute their gametes to the reproductive process. This would mean that gestational surrogacy is protected but that traditional surrogacy is not. **CONUNDRUMS WITH PENUMBRAS: THE RIGHT TO PRIVACY ENCOMPASSES NON-GAMETE PROVIDERS WHO CREATE PREEMBRYOS WITH THE INTENT TO BECOME PARENTS, 78 Wash. L. Rev. 625, 651 (2003)**

only married women the right to employ assisted reproduction,[79] and NCCUSL has described one of the aims of its newly revamped Uniform Parentage Act as the "constitutional protection[] of the procreative rights of unmarried . . . women."[80] Older cases and commentary sometimes take a different view, suggesting that surrogacy is a far cry from procreative freedom and is, moreover, unethical. Legislation outlawing surrogacy sends the strong message that it is in conflict with important social policies and deeply held values.

These various viewpoints on the procreative character of surrogacy at best leave unresolved the issue of whether surrogacy is included in our understanding of constitutionally protected procreative activities. They also indicate that surrogacy as a method of having children is not widely embraced. Given that most jurisdictions have no legislation on surrogacy, and of the ones that do, most simply outlaw the practice, we realize that our society is at the very least undecided whether surrogacy is acceptable. If interpretivism were merely concerned with the scope of constitutionally protected procreative activity and contemporary views on surrogacy, it would not be offended by outlawing surrogacy altogether or limiting it to married couples. As a matter of our contemporary values, then, an outright rejection of gestational agreements would not offend the interpretive approach.

Furthermore, even where surrogacy is condoned, it may be that marriage-based restrictions–although they do nothing to encourage marriage–are a way of expressing profound respect for marriage. This sentiment was precisely what drove the inclusion of a marriage-based restriction on surrogacy in the 2000 version of the UPA. Indeed, the Conference's express

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[79] *See, e.g., In re* Michael, 636 N.Y.S.2d 608, 609 (Surr. Ct. 1996) ("Nor is the court aware of any distinction, based upon marital status, being mandated by law with regard to a woman's right to be artificially inseminated. It might very well be unconstitutional for the law to try to make such a distinction.").

position in support of the restriction was that married couples entering gestational agreements are "*the most deserving class of persons* that would participate in these agreements."[81] Moreover, legislative initiatives aimed at creating special rights for married couples, albeit rare, are hardly unknown. The Family and Medical Leave Act of 1993, in spite of its stated policy that workplace leave should be available in ways that support family integrity, contains a narrow definition of "immediate family member" that excludes unmarried couples from the ambit of its protections. Married couples received a sweeping exemption from taxation in 1981 when Congress supplemented our unified transfer tax system with the unlimited marital deduction. Even President Bush's "healthy marriage initiative" could be construed as a measure enshrining "special rights" for married couples only.[82] When Vermont passed its civil union legislation in 2000, it cataloged around thirty ways in which marriage was accorded special status under Vermont law.[83] Marriage-based restrictions on surrogacy may simply be another way our society elects to express that marriage is valuable, significant, and revered.

As explained above, however, interpretivism is not concerned merely with one set of contemporary values or constitutional guarantees. Other values, constitutional guarantees and consistency in the law are equally important. Equal protection, for example, could be raised as a barrier to permitting only married couples to participate in gestational agreements.[84] Even if surrogacy itself is not widely embraced, equality of treatment certainly is and is arguably embodied in the general trend, described by Professor Mary Ann Glendon almost thirty years

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[80] UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).
[81] UNIF. PARENTAGE ACT art. 8, 9B U.L.A. __ (2001) (emphasis supplied).
[82] *See Marriage Proposal,* SALT LAKE TRIB., Jan. 17, 2004, at A10.
[83] *See* 15 VT. STAT. ANN. § 1204.
[84] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

ago, that "legal distinctions between the married and the unmarried . . . are being erased."[85] Finally, consistency in the law appears undermined by treating non-sexual forms of reproduction differently from sexual forms of reproduction.[86]

The force of these observations is that it is not essential to determine whether surrogacy is a fundamental right or to worry that surrogacy is not a widely embraced method of reproduction in order to establish that where a state chooses to endorse surrogacy, it must do so in a way that does not exclude unmarried couples. This conclusion is not changed by the fact that our legal system condones discrimination on the basis of marital status unless that discrimination lacks a rational basis. For social policy to achieve the broad social acceptance that is the aim of interpretivism, it must aim to satisfy a higher standard than mere rational basis. In other words, whereas "an uncommonly silly law" might have a rational basis to shield it against constitutional attack, such a law would not survive under interpretivism's more exacting microscope. Even if discrimination on the basis of marital status is certain to survive rational basis scrutiny in many contexts, society's commitment to equal treatment and interpretivism's commitment to consistency in the law would successfully call into question the integrity of such an exclusion in the context of surrogacy regulation.

ii. Equal Treatment of Non-Marital Children

A final problem with marriage-based restrictions on surrogacy is their inconsistency with interpretivism's commitment to neutrality. As explained above, these restrictions are neither intended to have nor do they have the effect of promoting legitimacy of birth. Neither do they play a role in securing child welfare. To the extent thatthese restrictions nonetheless serve a

[85] Glendon, *supra* note 70, at 665.

significant expressive function in creating the illusion of legitimacy of birth, they nonetheless run afoul of what are now firmly established constitutional and social commitments to equal treatment. In brief, we agree that the law should be neutral toward a class of persons that is blameless in incurring unfavorable treatment. To regulate surrogacy so as to permit only the birth of children who appear to be legitimate undermines neutrality by perpetuating the very legitimacy/illegitimacy distinction that has been fully discredited at the highest level of our judiciary.[87] Not only would such regulation be inimical to equal treatment but it would also be an improper use of the law to give public effect to private biases.[88] Thus, any purpose of using a marriage requirement to promote legitimacy of children is out of step with constitutional principles and contemporary views of children's rights. It moreover is not in keeping with the need for neutrality in the formulation of sound social policy.

Exclusion of unmarried couples from entering into surrogacy agreements is unjustified when examined through the lens of interpretivism. The exclusion does not encourage marriage or promote the purposes of marriage. Instead, it appears to conflict with important constitutional tenets opposed to state interference with procreative choices with no corresponding enhancement of our society's interest in securing two-parent support for each child. At the same time, the exclusion undermines significant commitments to consistency and neutrality in the law that are the hallmarks of sound social policy. Therefore, any state considering regulating gestational agreements would be well advised not to restrict the ability of unmarried couples to execute such

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[86] *See* Garrison, *supra* note 24, at __.

[87] *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); Trimble v. Gordon, 430 U.S. 762, 775 (1976); Reed v. Campbell, 476 U.S. 852, 855 (1986); Gomez v. Perez, 409 U.S. 535 (1973); Mills v. Habluetzel, 456 U.S. 91, 101 (1982); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968).

[88] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

agreements.

II. MARRIAGE AND ADOPTION

A. Adoption and Surrogacy: Comparisons and Contrasts

The question of how surrogacy should be regulated invariably invites comparisons between surrogacy, about which little regulation exists,[89] and adoption, which is highly regulated. Although the question has been debated for over almost twenty years,[90] the extent to which surrogacy should track adoption's regulatory model is still far from settled.[91] Some see surrogacy and adoption as substantially congruent in their aims and thus adoption as the appropriate template for surrogacy.[92] Others find important and even stark differences between the two that inspire them to reject situating surrogacy within an adoption framework.[93]

Differences of opinion on this matter appear to depend upon whether one believes surrogacy is like adoption because it is not procreative[94] or less like adoption because it is.[95] In

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[89] *See Surrogate Mom's Custody Fight*, CBS NEWS, Jul. 9, 2004, *available at* http://search.atomz.com (last visited Sept. 18, 2004); *Many States Still Lacking Surrogacy Laws*, ASSOC. PRESS, June 1, 2004, *available at* http://msnbc.msn.com/id/5113759.

[90] *See, e.g.*, Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 212-13 (Ky. 1986).

[91] *Compare* UNIF. PARENTAGE ACT art. 8, 9B U.L.A. __ (2001) (requiring adoption-like home study to assess fitness of prospective parents) *with* LD 1851; http://janus.state.me.us/legis/LawMakerWeb/summary.asp?ID=280012496 (bill proposing surrogacy regulation dispensing with adoption-like evaluations of parental fitness and best interests of the child). *See also* Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction, in* FAMILIES BY LAW: AN ADOPTION READER 299, 302 (Naomi R. Cahn & Joan Heifetz Hollinger eds. 2004).

[92] *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[93] *See, e.g.*, Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1138 (Mass. 2001) (cited in J.R. v. Utah, 261 F. Supp. 2d 1268, 1288 (D. Utah 2002)).

[94] Adoption, a non-procreative quest for parenthood, is not a constitutionally protected right. *See* Griffith v. Johnston, 899 F.2d 1427, 1437 (5th Cir. 1990); S.B. v. L.W., 793 So.2d 656, 662 (Miss. 2001) (Payne, J., concurring).

exercising their procreative liberty, coital progenitors benefit from a presumption of fitness and need make no showing of their fitness before exercising the parental prerogatives that stem from their act of procreation.[96] To regulate access to adoption or surrogacy in a particular way, then, becomes a question of to what extent the state should be permitted to oversee one's decision to become a parent.

Surrogacy and adoption *are* similar in many ways. Both typically originate with infertility, provide methods for establishing legal parentage outside of the context of biological relationships,[97] and invest one's intentions to become a parent with legal significance.[98] Both often involve the presence of third parties in the reproductive process and thus raise questions about the importance of genetic and gestational ties to the determination of parentage. Other social-policy questions triggered by both adoption and surrogacy are the value of secrecy over transparency, the commodification of children, and the exploitation of women. Finally, both surrogacy and adoption trigger deeply ingrained suspicions and fears about mothers who "reject" their children.[99]

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[95] It remains the subject of considerable debate whether assisted reproductive techniques are exercises of procreative liberty. There has been no pronouncement binding on all states on this issue. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). If surrogacy is a fundamental right, then restricting its use to married intending parents is unquestionably inconsistent with contemporary American constitutional guarantees. As discussed above, it is also contrary to sound social policy.

[96] J.R. v. Utah, 216 F. Supp. 2d 1268, 1284 n.24, 1288 (D. Utah 2002); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 31 (1994).

[97] *See generally*, PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 119 (1993).

[98] MADELYN FREUNDLICH, ADOPTION AND ASSISTED REPRODUCTION xii (2001). The intent to parent may not be sufficient to determine parentage in surrogacy cases. *See* Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Comm. Pleas 1994).

[99] *In re* Baby M., 537 A.2d 1227, 1238 (N.J. 1988) (surrogacy contract called for termination of maternal rights and adoption by father's wife "regardless of any evaluation of the best interests of the child").

There is also much to distinguish surrogacy from adoption.[100] The most salient difference is that adoption begins after a child or fetus already exists; surrogacy, though, is used to start the reproductive process in the first place.[101] Adoption, a child-focused service, requires parental fitness and the child's best interests to be shown; surrogacy, an adult-focused service, requires only a showing of fitness to parent.[102] The two are not equally valued by society, given the nearly overwhelming desire for and bias in favor of genetically-related children.[103] Thus, the possibility of a genetic tie to a child born through assisted reproduction may make that choice appear more understandable and legitimate in a society that extols consanguineous relationships and regards non-consanguineous relationships with suspicion if not derision.[104]

Since adoption is substantially older than is surrogacy, adoption is at present also much more regulated than is assisted reproduction.[105] Although existing surrogacy reveals the definite influence of adoption law, it is important to note that adoption law typically requires both the prospective parents' fitness and the best interests of the child to be assessed before the adoption becomes final. Existing surrogacy regulation, by contrast, is concerned only with parental fitness. Post-birth assessments of a child's best interests do not occur under existing surrogacy regulation as they do post-placement in adoption. [106]

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[100] *See generally* JOAN HEIFETZ HOLLINGER, 2 ADOPTION LAW AND PRACTICE § 14.04.
[101] *See* Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986).
[102] *See* FREUNDLICH, *supra* note 98, at 19.
[103] *See id.* at 2-3; *see also* Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, *in* FAMILIES BY LAW: AN ADOPTION READER 313, 315 (Naomi R. Cahn & Joan Heifetz Hollinger eds. 2004) (discussing the scope of "genetic essentialism").
[104] *See* Elizabeth Bartholet, *Adoption and the Parental Screening System*, *in* FAMILIES BY LAW, *supra* note 103, at 72, 73; Irving Leon, *Nature in Adoptive Parenthood*, *in* FAMILIES BY LAW, *supra* note 103, at 88, 88 (mentioning "the prejudice, often subliminal but pervasive, against [nonbiological parenthood] . . . .").
[105] *See* FREUNDLICH, *supra* note 98, at 75.
[106] *See* Storrow, *supra* note 72 at 661 n.446.

B. The Role of Marital Status in Adoption Law

Although marriage is not a necessary condition for exercising procreative liberty or for benefiting from the powerful presumption that coital progenitors are fit parents who will act in their offspring's best interests, marital status is an important eligibility criterion for both adoption and surrogacy. In both contexts, marital status acts, albeit in different ways, both procedurally as a standing requirement and substantively as a measure of parental fitness. As we saw in Part I, surrogacy regulation nearly invariably permits only married couples to employ this method of having a child. Adoption law by and large expresses a preference for married couples. It generally prohibits *un*married couples from adopting an unrelated child jointly,[107] but it does allow single persons to adopt in the absence of a willing married couple.[108] Under the view of adoption and surrogacy as mere privileges, legislation denying standing on the basis of marital status is not constitutionally suspect, even though it may not satisfy the more exacting rigors of interpretivism. Nonetheless, despite our societal commitment to the institution of marriage, the reason why the privilege of adoption is not in all cases reserved for married couples is that such a

[107] *But see In re* Joseph, 684 N.Y.S.2d 760 (Surr. Ct. 1998) (permitting stranger adoption by unmarried couple); *In re* Carl, 709 N.Y.S.2d 905 (Fam. Ct. 2000). Courts have allowed two individuals not in an intimate relationship to adopt the same child. *See, e.g., In re* T., 318 N.W.2d 200 (Iowa 1982). In In re *A.R.*, 378 A.2d 87 (N.J. Cty Ct. Prob. Div. 1977), the court permitted an unwed father to adopt his own child as a "stepfather" where he was prevented from marrying the mother because of her incapacity. 378 A.2d at 89. A Louisiana court has rejected the application of biological parents to adopt their own child. *See In re* Meaux, 417 So. 2d 522 (La. Ct. App. 1982).

[108] *See, e.g.*, Leslie C. v. Maricopa County Juvenile Court, 971 P.2d 181 (Ct. App. 1997). *See generally* Elizabeth Bartholet, *Adoption and the Parental Screening System, in* FAMILIES BY LAW, *supra* note 103, at 72, 72; SANFORD N. KATZ, FAMILY LAW IN AMERICA 174 (2003).

bright-line rule will fail to serve the interests of children in all cases, no matter the view of some that institutionalized care is preferable to being raised by unmarried parents.[109]

Despite the fact that one need not be married to adopt, marriage does impose certain constraints on how adoption proceeds. For example, the spouse of a married person who wishes to adopt must join the petition.[110] Under step-parent adoption provisions, a parent whose spouse wishes to adopt her child need not terminate her parental rights.[111] Unmarried couples are considered singles, and, as mentioned above, in most jurisdictions are not permitted to adopt jointly. In certain jurisdictions, the legally recognized parent of a child may consent to the adoption of the child by the parent's nonmarital partner. Known as "[s]econd or co-parent adoption,"[112] such a procedure could be used where the child is biologically related to the parent but could also be employed to permit the unmarried couple to adopt the same child, albeit not jointly but in tandem. New laws in some states may outlaw adoptions by cohabiting unmarried couples altogether, even adoption in tandem; the best interests of children is declared by these jurisdictions never to lie with unmarried parents.

C. Step-parent and Second-parent Adoption

The special cases of step-parent and second-parent adoption are especially good lenses through which to examine more closely how marital status functions in adoption. Both step-

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[109] *See* William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law,* 31 CAP. U. L. REV. 787, 788 (2003) (recommending institutionalized care for adoptable children in the absence of "ideal" heterosexual married couples). **38 New Eng. L. Rev. 643**
[110] HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 908 (1988).
[111] *See* Joan Heifetz Hollinger, *Second Parent Adoptions Protect Children with Two Mothers or Two Fathers, in* FAMILIES BY LAW, *supra* note __, at 235, 235.
[112] *Id.*

parent and second-parent adoption result in a child's having at least two legally recognized parents.[113]

1. Step-parent Adoption

Step-parent adoption is recognized in all states and permits a parent's new spouse to adopt and become a co-parent of the child. It is typically engrafted upon an adoption statute as an exception to the rule that a child's former parents' parental rights must be terminated before the adoption can be approved. The right of the child to inherit from or through the parent whose rights are terminated varies from state to state.[114]

In contrast to the typical adoption trajectory, taking the prospective adoptive couple through an initial home study, a waiting period, and a post-placement home study before a hearing is commenced and a final decree issued,[115] step-parent adoption provisions streamline the process in order to give great weight to a parent's spouse's petition to adopt the child. Most significant is that, in contrast to the trend mandating pre- and post-placement home studies in adoption cases, such evaluations and even waiting periods are routinely waived in step-parent adoption cases,[116] unless the adoption is contested.[117] Moreover, the duration of the marriage is

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[113] *See In re* Sharon S., 2 Cal. Rptr. 3d 699, 703 n.2 (2003).

[114] *Compare* 20 PA. C.S. § 2108 (severing right to inherit from natural parent but not other natural kin) *with* MD. ESTATES & TRUSTS CODE ANN. § 1-207(a) (severing right to inherit from and through natural parent) *and* TEX. PROB. CODE § 40 (retaining inheritance rights). The Uniform Probate Code severs the right of adopted children to inherit from and through their natural parents except in the case of step-parent adoption. *See* UNIF. PROB. CODE § 2-114.

[115] The trend is toward more evaluation of the adoptive couple and the placement, making pre- and post-placement home studies increasingly mandatory.

[116] *See* KATZ, *supra* note 108, at 175; *In re* Galen, 680 N.E.2d 70, 73 n.2 (Mass. 1997) (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE COMMONWEALTH OF MASSACHUSETTS (1996)).

[117] *See, e.g., In re* Wagner, 1999 WL 689971 (Ohio Ct. App. June 30, 1999).

typically of no significance in step-parent adoption,[118] though some states do impose a waivable requirement that the marriage have endured for at least one year.[119]

The justification for relaxing or doing away with typical adoption requirements is to take account of the fact that the petitioner already lives with the child before an adoption petition is filed.[120] In this context, it is said that a pre-placement assessment would not "fit the facts" of the case.[121] Curiously, though, a post-placement study, though it *does* fit the facts is also not required.[122] Naturally, such lack of evaluation does not free a court from its responsibility for making a best-interests determination in step-parent adoption cases,[123] but, without the objective evaluations typically required in adoption, the body of evidence available for making such a determination will understandably be under the control of the petitioners themselves,[124] will thus likely reflect only favorably on them,[125] and will typically lack assessments by independent child welfare professionals.[126] Perhaps even more disconcerting is that no one present at the hearing will be inspired to ask the court to take judicial notice of studies showing that children are at greater risk of harm at the hands of step-parents than they are from biological parents living

[118] *See* In re Adoption No. 90072022/CAD, 590 A.2d 1094 (Md. Ct. App. 1991); Douglas E. Abrams & Sarah H. Ramsey, *A Primer on Adoption Law*, JUV. & FAM. CT. J., Summer 2001, at 23, 25.
[119] *See In re* Webber, 859 P.2d 1074, 1076 (N.M. Ct. App. 1993) (construing one-year requirement not to be jurisdictional).
[120] *See* In re Adoption No. 90072022/CAD, 590 A.2d 1094, 1095 n.2 (Md. Ct. App. 1991).
[121] UNIF. ADOPTION ACT § 4-108(a)(1).
[122] UNIF. ADOPTION ACT § 4-110; UTAH CODE § 78-30-3.5.
[123] *See* KATZ, *supra* note 108, at 175 ("Judicial approval is still required . . . . ").
[124] *See In re* Galen, 680 N.E.2d 70, 72 (Mass. 1997) (noting that in waiver cases the only evidence submitted to the court is evidence "submitted by the petitioners").
[125] *See id.* at 74 (O'Connor, J., dissenting)
[126] *See id.* at 72.

together or from a biological parent living without a partner.[127] The studies may well not contemplate the class of step-parents who desire to adopt their step-children, but a mere desire to adopt is insufficient to support a best-interests determination in any adoption context.[128] Nonetheless, experts have not hesitated to criticize the relaxation of requirements for step-parent adoption as contributing to child abuse in the home.[129]

It could be said that in relaxing the requirements for adoption, the law is merely pursuing the constitutionally mandated presumption that the parent will act in the best interests of her child in choosing a new parent for the child. But granting a legal parent such power would appear anomalous, especially since, under the traditional approach, legal parentage does not exist in the absence of a genetic, gestational, presumed, or adoptive relationship, and an already legally recognized parent, no matter the force of the best-interests presumption, has no power to vest a new parent of her choice with any of these. What this analysis of step-parent adoption provisions makes clear, then, is that relaxation of the requirements for adoption in this context is due solely to the fact that the legal parent has remarried. In sharp contrast to the traditional adoption trajectory, the quality of the marriage, the duration of the marriage, and especially the quality of the step-parent/step-child relationship are virtually irrelevant to the step-parent adoption decision.

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[127] *See* INSTITUTE FOR AMERICAN VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 17 (2002) [hereinafter WHY MARRIAGE]. Succession cases show how a step-parent's interests can be inimical to their step-children's. *See, e.g.*, Via v. Putnam, 626 So. 2d 460 (Fla. 1995). Moreover, adoption by a step-parent may impair a child's right to inherit from or through either biological parent and may at the very least create intra-family disharmony. *See, e.g., In re* Brittin, 664 N.E.2d 687 (Ill. Ct. App. 1996).

[128] *See* Garrison, *supra* note 24, at 861 ("Even in cases of adoption . . . intentions are insufficient to effect a rights transfer . . . .).

[129] *See* Abrams & Ramsey, *supra* note 118, at 25.

2. Second-parent Adoption

Second-parent adoption is a procedure whereby a legally recognized parent's committed partner may adopt and become a co-parent of the child. It is statutorily permitted in some states,[130] but more typically is justified by provisions authorizing adoption by "any individual,"[131] liberal construction of step-parent adoption provisions,[132] by the clear import of or by inferences drawn from other express provisions,[133] and by consistency with the policy of adoption law.[134] Because step-parent adoption provisions are not directly applicable, then, second-parent adoption may be unavailable in states where all other types of adoption result in the termination of parental rights prior to the final decree.[135] Where termination is not statutorily mandated, however, but is merely expressed as the usual consequence of an adoption, the theory of waiver of statutory rights and benefits permits a court to grant a second-parent adoption with

[130] *See* Hollinger, *supra* note 110, at 237.
[131] *See, e.g., In re* R.B.F., 803 A.2d 1195, 1202 (Pa. 2002); *In re* Sharon S., 2 Cal. Rptr 3d 699, 717 (2003); *In re* E.O.G., 28 Pa. D. & C.4th 262, 265 (Ct. Comm. Pleas 1993); *In re* H.N.R., 666 A.2d 535, 538 (N.J. Super. 1995);*In re* K.M., 653 N.E.2d 888, 893 (Ill. Ct. App. 1995)
[132] *See, e.g., In re* H.N.R., 666 A.2d 535 (N.J. Super. 1995).
[133] *See, e.g., In re* R.B.F., 803 A.2d 1195, 1201 (Pa. 2002) (citing 23 PA. C.S. § 2901) (statute provides for waiver of requirements for adoption upon showing that requirement's purpose has otherwise been met or is irrelevant); *In re* K.M., 653 N.E.2d 888, 894 (Ill. Ct. App. 1995) (interpreting "related child" provision); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at **21-22 (Apr. 24, 1996) (discussing waiver of "statutory parent" requirement).
[134] *See, e.g., In re* Sharon S., 2 Cal. Rptr. 3d 699, 715-20 (2003); *id.* 2 Cal. Rptr. 3d at 729 (Baxter, J., concurring); *In re* M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (listing state's interest in stable homes through "permanent placement of children with adoptive families" and "legal protections and advantages that a two-parent adoption provides"); *In re* E.O.G., 28 Pa. D. & C.4th 262, 265 (Ct. Comm. Pleas 1993); *In re* H.N.R., 666 A.2d 535, 538 (N.J. Super. 1995); *In re* K.M., 653 N.E.2d 888, 895 (Ill. Ct. App. 1995); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *21 (Apr. 24, 1996).
[135] *See, e.g., In re* Luke, 640 N.W.2d 374, 377 (determining child not to be adoptable because not relinquished) (Neb. 2002) *In re* Sharon S., 2 Cal. Rptr. 3d at 707 (citing Murdock v. Brooks, 38 Cal. 596, 602 (1869)).

no effect on the original parent's rights.[136] In all, second-parent adoption is recognized in twenty-eight states.[137] A handful of other states has concluded that second-parent adoptions are not authorized under the adoption laws of those states but otherwise declines to express any opinion about whether such adoptions could serve the best interests of children.[138] Several states, though, have made affirmative strikes against second-parent adoption. Florida explicitly outlaws adoption by gay and lesbian persons,[139] Mississippi bans adoption by same-gender couples,[140] and Utah bans adoption by unmarried cohabiting couples.[141] Oklahoma denies full recognition of adoptions by gay and lesbian couples in other states by restricting adoption to no more than one person of the same sex.[142] Administrative-agency rules in Arkansas and Nebraska disqualify gays and lesbians from serving as foster parents, effectively preventing them from adopting children in state care.[143]

Although analogous to step-parent adoption, second-parent adoption does not require the parent to be married to the party seeking to adopt the child. Thus, second-parent adoption is in most jurisdictions the only mechanism an individual can use to adopt his or her partner's

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[136] *See, e.g., In re* Sharon S. 2 Cal. Rptr. 3d at 707, 708, 712.
[137] *Id.*, 2 Cal. Rptr. 3d at 719 n.21 (2003).
[138] *See, e.g., In re* Luke, 640 N.W.2d 374 (Neb. 2002).
[139] FLA. STAT. § 63.042(3).
[140] MISS. STAT. § 93-17-3(2).
[141] UTAH CODE § 78-30-1(b). The Utah legislation was passed to prevent judges from construing the broad language of the adoption statute as permitting second-parent adoptions. Critics of these "stealth" adoptions considered them beyond the scope of the legislatively conferred authority to grant adoptions, SALT LAKE TRIBUNE, Dec. 31, 2000, and as *per se* not in a child's best interest, UTAH CODE § 78-30-9(3)(a). The new legislation prohibits any unmarried and cohabiting couple from adopting a child jointly or any single person from adopting his cohabiting partner's child. UTAH CODE § 78-30-1(b). "Cohabiting" is specifically defined in the statute as living together and having a sexual relationship. UTAH CODE § 78-30-1(b). The statute does not expressly forbid adoptions by committed partners living in separate residences and would appear to allow kinship adoptions by relatives living in the same household.
[142] 10 OKLA. STAT. 2001 § 7502-1.4(A).

children. For gay and lesbian couples, who cannot marry in most jurisdictions, second-parent adoption is the only way to provide children protections they would otherwise achieve through step-parent adoption. This legal device has been described as consistent with the reality of children's lives and calculated to forge the strongest legal bond possible between a child and those functioning as his parent.[144]

Commentators opposed to second-parent adoption opine that it is contrary to children's best interests,[145] beyond the competence of family court judges,[146] and even immoral.[147] Other commentators accuse grants of second-parent adoption petitions to be devoid of any serious inquiry into the best interests of the child, based on an erroneous view of adoption as a fundamental right, and precursors of "new and bizarre" family structures that will inexorably lead to judicial recognition of three-, four-, and five-parent families.

D. Parental Fitness and Children's Interests

From a policy perspective, it is impossible not to discern the wide gulf between streamlined step-parent adoption cases where a perfunctory if any best-interests inquiry takes place and blanket prohibitions on second-parent adoption. If nothing more, setting up a

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[143] *See* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=15293&c=104

[144] *See In re* Sharon S., 2 Cal. Rptr. 3d 699, 716 (2003) (no suggestion made by any party, *amicus*, or court that second-parent adoption cannot achieve the objectives of adoption); *id.*, 2 Cal. Rptr. 3d at 715-16 (cataloging legal and nonlegal benefits to children adopted through second-parent adoption).

[145] *See* Duncan, *supra* note 109, at 800; Lynn Wardle, *ThePotential Impact of Homosexual Parenting on Children,* 1997 UNIV. ILL. L. REV. 833, 882.

Duncan and Wardle also attack second-parent adoption as a restyling of adoption as a fundamental right, *see* Duncan, *supra* note 109, at 801, and exaggerations, *see* Wardle, *Potential Impact*, *supra* note 145, at 883, *i.e.*, questioning how these extra-legal configurations of adults and children could be characterized as families.

[146] *In re* D.J.L., 16 S.W.3d 263 (Ark. 2000). Wardle, *Potential Impact*, *supra* note 145, at 882 ("conclusory").

procedural obstacle to adoption deprives the court of making the individualized assessments that we know the best-interests inquiry contemplates.[148] Inevitably, into this gulf fall children who would benefit from being adopted by a second parent rather than otherwise never having two legal parents and thus whose best interests could be served by the adoption. This is particularly poignant in cases of artificial insemination where as a matter of law in many jurisdictions and as a practical matter in others a child has only one legal parent.[149] An argument for harmonizing the law of step-parent and second-parent adoption follows.

1. Streamlining: Parental Fitness by Proxy

Emerging from the sketch of how step-parent adoption works is the sense that marriage alone acts as a virtual proxy for or at the very least a presumption in favor of a child's best interests. Marriage embodies the notion of the permanent, loving home that every child deserves. By contrast, the absence of marriage carries with it no such notion/and at worst that the child will suffer untold indignities that will be visited on society at large. This role for marriage is certainly not unknown in other areas of family law and could be explained as consistent with our existing legal tradition in two different ways. First, a parent's marriage to someone who is not also the parent of her child could be said to raise a presumption of parentage similar to marital-presumption parentage. This presumption, in turn, raises the presumption that the presumed parent acts in the best interests of his child. The court can then take notice of this presumption and grant the adoption in the absence of any evidence that would undermine the presumption. This explanation of the existence of streamlining in step-parent adoption is

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[147] CLARION-LEDGER (Jackson, Miss.), Feb. 24, 2000.
[148] *See* Abrams & Ramsey, *supra* note 118, at 25 (noting that the best-interests standard looks to what "will best promote the welfare of the particular child").

admittedly convoluted and forced. More convincing as an explanation might simply be that the presumption that legal parents act in the best interests of their children validates the legal parent's choice of another parent for her child as in that child's best interests in the absence of evidence to the contrary. Both approaches suggest that as long as there is marriage, very little in the way of further inquiry is needed to validate the adoption.

Given that neither of the presumptions just described has ever functioned in this way in family law, neither of the foregoing explanations justifies streamlining in step-parent adoption. First, marital-presumption parentage requires that the child be born *to* the marriage so as to lend credence to what it supposes about procreative facts; in the step-parent adoption context, then, the most basic premise behind marital-presumption parentage is absent. If marital-presumption parentage cannot be made to fit a possibly procreative context like surrogacy,[150] it certainly cannot be made to fit adoption, which wholly lacks any procreative aspect. Second, the presumption that a parent acts in the best interest of her child is not a presumption that *establishes* parentage but one that arises from an already recognized parent-child relationship. The presumption is inoperative where no genetic tie or already decreed adoption exists. Thus, the presumption has no application to a pending adoption matter.

Just as a marriage requirement in the context of surrogacy fails to serve any justifiable purpose or raise any presumptions that we associate with marriage, streamlining on the basis of marriage in step–parent adoption cases is similarly unprincipled because it as well has no basis in familiar parentage presumptions and does not comport with the need to evaluate rigorously the best interests of the child in every adoption case.

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[149] *See In re* Sharon S., 2 Cal. Rptr. 3d 699, 716, 718 n.19 (2003).
[150] *See* Part I, *supra*.

2. Making Children Unadoptable: In Whose Interest?

In contrast to streamlining of the procedures undertaken in step-parent adoption cases, where inquiry into the best interest of the child is perfunctory at best, second-parent adoption, where permitted, requires the full range of evaluations of the adopted child's best interests to take place. This approach seems consistent with focusing on the interests of children in adoption cases instead of on the relationship or interests of the prospective parents[151] and is, moreover, consistent with the methods that have traditionally been used to achieve those interests. Where second-parent adoption is not permitted, only by marrying her domestic partner may an individual be deemed fit to adopt and become a co-parent of the domestic partner's child. As we have already seen, however, marriage is not a suitable proxy for parental fitness or for children's best interests. As we will see below, second-parent adoption is the only way some children can ever hope to have two legally recognized parents. The refusal to allow second-parent adoption, or even to make it a more burdensome procedure than step-parent adoption, then, seems more geared toward granting privileges to married couples than toward ensuring the best interests of children.

Contrary to the criticisms of second-parent adoption, an examination of second-parent adoption cases reveals the courts' painstaking and probing examination of the circumstances of the individual children in each and every case in search of the decision that will most promote the best interests of the child. Despite the clear analogy to step-parent adoption procedures,[152]

[151] *See In re* R.B.F., 803 A.2d 1195, 1198 (Pa. 2002); *In re* E.O.G., 28 Pa. D. & C.4th 262, 265 (Ct. Comm. Pleas 1993).

[152] *See* Joan Heifetz Hollinger, *Second Parent Adoptions Protect Children with Two Mothers or Two Fathers, in* FAMILIES BY LAW, *supra* note 110, at 235, 235; *In re* Galen, 680 N.E.2d 70, 73 n.2 (Mass. 1997) (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE

there is never any waiver of home studies or waiting periods of the sort we see in that context. Even where the law provides a mechanism whereby a second-parent adoption petitioner may apply for a waiver, invariably such requests must be supported by "numerous affidavits and letters attesting to the longevity and strength of the relationship between the prospective adopters and legal memoranda in support of such a waiver . . . ."[153] By contrast, a step-parent's request for a waiver is almost always routinely granted with no supporting documentation.[154] Moreover, the evaluations required often include a costly bonding assessment by a licensed psychologist *in addition to* the significantly less expensive home study by a social worker. Invariably, courts hearing these petitions focus on the financial benefits that will accrue to the child, including support, inheritance rights, Social Security benefits and health insurance[155] and on the emotional benefits a child reaps from adoption.[156] But beyond this, the courts recognize that these adoptions differ significantly from stranger adoptions. A child is not being "reborn" into a new family where all ties to his prior family are erased. Instead, "the children's existing familial bonds" are respected and given legal recognition.[157] Nothing about how the child experiences

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COMMONWEALTH OF MASSACHUSETTS (1996)) (describing step-parent adoption as second-parent adoption's closest model); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *21 (Apr. 24, 1996).

[153] *See In re* Galen, 680 N.E.2d 70, 73 n.2 (Mass. 1997) (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE COMMONWEALTH OF MASSACHUSETTS (1996)).

[154] *See id.*

[155] *In re* R.B.F., 803 A.2d 1195, 1198 (Pa. 2002); *In re* E.O.G., 28 Pa. D. & C.4th 262, 266 (Ct. Comm. Pleas 1993); *In re* M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (also listing disability insurance and education, housing, and nutrition assistance); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *5 (Apr. 24, 1996).

On the question of how second-parent adoption affects inheritance rights under the UPC, see JESSE DUKEMINER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 105 (6th ed. 2000).

[156] *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at **4, 5, 6 (Apr. 24, 1996).

[157] *In re* R.B.F., 803 A.2d at 1198; *see also In re* H.N.R., 666 A.2d 535, 541 (N.J. Super. 1995); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *4 n.5 (Apr. 24, 1996).

love, care, and commitment changes after these adoptions except for the greater assurance of *continuity* of love, care and commitment that accompanies an adoption decree.[158] The effort is plainly to afford the children involved the greatest legal protections in the most permanent, stable, supportive, and nurturing home these children can hope to have.[159]

None of these cases proceeds along the lines of vindicating the petitioner's "right" to adopt the child.[160] Completely absent from these decisions is any sense that the marital status of these committed couples is in any way contrary to the best interests of the children, or that it renders the petitioners unfit to be parents. On the other hand, in contrast to the step-parent cases, where the marriage itself appears to establish a right to adopt the child, courts in second-parent cases remain open to hearing evidence that living in the home of a same-sex couple will harm the children, and they seek to balance whatever "negative effects" might be present with the benefits to be acquired.[161] Such a painstaking balancing of the factors is utterly absent from step-parent cases, where the fact of marriage alone renders the otherwise mandatory best-interests inquiry superfluous.

Critics of second-parent adoption are more concerned with finding new ways to bolster the privileged position of married couples in society than they are with promoting the best interests of each and every child according to his or her personal circumstances. Brigham Young family law professor Lynn Wardle, for example, was among those who testified in favor of

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[158] *In re* E.O.G., 28 Pa. D. & C.4th 262 267 (Ct. Comm. Pleas 1993); *In re* H.N.R., 666 A.2d 535, 541 (N.J. Super. 1995).
[159] *See, e.g., In re Sharon S.*, 2 Cal. Rptr. 3d 699, 715-16 (2003) (cataloging legal and nonlegal benefits for children adopted by a second parent); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *37 (Apr. 24, 1996).
[160] *See In re Sharon S.*, 2 Cal. Rptr. 3d at 716, 720-21 (2003) (partner not seeking to adopt based on past relationship as caregiver).
[161] *In re* E.O.G., 28 Pa. D. & C.4th 262, 267 (Ct. Comm. Pleas 1993).

Utah's adoption ban. At the time, Wardle described having been troubled that a number of Utah judges were sympathetic to gay and lesbian couples who sought legal recognition of the parent-and-child relationships within their families.[162] The resulting law definitively pronounces that it is never in the best interest of any child to have unmarried parents. This pronouncement effectively serves as a standing requirement preventing a cohabitant from petitioning to adopt a child as a second parent. The requirement preempts a fact-based inquiry into the best interests of the child in question.

More recently, Wardle has claimed the ban is justified because at any given time in Utah there are enough married couples petitioning to adopt all of Utah's adoptable children.[163] Wardle neglects to mention that second-parent adoption petitions are never brought for the adoption of children in state custody. Rather, second-parent adoption petitions are brought by individuals who seek to adopt and become a co-parent of a domestic partner's child. What Wardle would like to overlook is that the children who are the subject of second-parent adoption petitions are extremely unlikely ever to be available for adoption by a married couple. Most of these cases involve artificial insemination using donor sperm of women who with their partners planned and prepared for the conception, birth and rearing of this child.[164] In all of these cases, both women have reared the children since birth, and so it is unsurprising that the children have

[162] *See* SALT LAKE TRIBUNE, Dec. 31, 2000.
[163] Conversation at Conference on Adoption and the Family System, Brigham Young University, September 25, 2003.
[164] *See, e.g., In re* R.B.F., 803 A.2d 1195, 1198 (Pa. 2002); *In re* Galen, 680 N.E.2d 70, 71 (Mass. 1997); *In re* H.N.R., 666 A.2d 535, 536 (N.J. Super. 1995); *In re* Baby Z., 1996 Conn. Super. LEXIS 1091, at *2 (Apr. 24, 1996). *See* Hollinger, *supra* note 110, at 235.

bonded with and consider both of them to be their parents.[165] Even *more* than in step-parent cases, where the step-parent more than likely has *not* been committed to or reared the child since his or her birth, the adoptions in second-parent adoption cases seem tailor-made to promote the child's best interests.[166]

In the academic literature, Wardle has assumed a different stance toward second-parent adoption than he did when he testified before the Utah Legislature. Writing on the "least detrimental alternative" approach to adoption in the 1997 edition of the *Illinois Law Review*, Wardle conceded that certain "less-than-perfect . . . adoption arrangements are the best options for a particular child," even if those arrangements are "exceptional cases" involving "less-than-ideal parents."[167] Unfortunately, Wardle did not bring his scholarly opinion to the attention of the Utah Legislature in 2000 when he lobbied *against* permitting adoption even in such exceptional cases. The result of his legislative advocacy is that Utah courts are no longer permitted to consider even the least detrimental alternative in second-parent adoption cases, since an unmarried cohabitant can no longer achieve standing to bring an adoption petition in the first instance. Second-parent adoptions are altogether prohibited.

Restrictions on standing to petition to adopt, under any microscope, seem extraordinary, especially given that the best interest of the child is the paramount concern in any adoption.[168] Courts agree with the professor in Wardle that the possibility that a "least detrimental alternative" exists in any given case means that standing to petition to adopt should be liberal in

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[165] *See, e.g.*, *In re* Sharon S., 2 Cal. Rptr. 3d 699, 704 (2003); *In re* Galen, 680 N.E.2d 70, 74 (Mass. 1997) (O'Connor, J., dissenting) ("The child is already united with his mother, having lived with her since birth."); *In re* H.N.R., 666 A.2d 535, 541 (N.J. Super 1995).
[166] *See In re* H.N.R., 666 A.2d 535, 537, 539 (N.J. Super. 1995); Hollinger, *supra* note 110, at 236.
[167] Wardle, *Potential Impact*, *supra* note 145, at 882-83.

scope to permit courts to assess "the potential [of the applicant] to successfully parent a child in foster care or adoption."[169] Even the Utah Supreme Court has embraced the least-detrimental-alternative ethic by stating that the issue in every adoption should be

> whether children who are subject to adoption have a right to have as adoptive parents those who may be the only people who can give the children the reasonable nurture, care, guidance, and love as a foundation for realizing their highest potential as human beings.[170]

Although recognizing the prerogative of the legislature "to determine how the most basic social unit in society should be organized," [171] the court nonetheless described adoption as "the kind of case in which a trial judge should not be bound by . . . rigid standards."[172] In short, the court recognized that the best interests inquiry is "fact-specific"--one focusing on whether "the interests of *these children* will [] be promoted by permitting their adoption by *these petitioners.*"[173] As such, "a blanket exclusion" of an entire of class of persons from standing is simply bad public policy.[174]

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[168] *See In re* W.A.T., 808 P.2d 1083, 1086 (Utah 1991).
[169] *In re* Luke, 640 N.W.2d 374, 384 (Neb. 2002) (Gerrard, J., dissenting) (quoting county court's order) (internal quotation marks omitted).
[170] *In re* W.A.T., 808 P.2d 1083, 1087 (Utah 1991) (Stewart, J., concurring).
[171] *Id.*, 808 P.2d at 1087 (Stewart, J., concurring). In *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), the court, applying the rational-basis test in response to a constitutional challenge, upheld a ban on petitions for adoption brought by gays and lesbians. *See* 157 F. Supp. 2d at 1383, *aff'd sub nom.* Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004).
[172] *Id.*, 808 P.2d at 1087 (Stewart, J., concurring); *see also id.*, 808 P.2d at 1085 (describing the role of the trial court in the "highly sensitive area of child adoption); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 942 (2000) (discussing the "functional justifications [that] support this institutional design").
[173] *Id.*, 808 P.2d at 1086.
[174] *Id.; cf. In re* E, 279 A.2d 785, 789, 796 (N.J. 1971) (reversing trial court's determination that petitioners were unfit to adopt given their lack of belief in a "Supreme Being").

Since legal protection of child welfare was not Professor Wardle primary concern when he advocated for adoption reform in Utah, he presumably also supports Oklahoma's new policy of *nullifying* the legal tie between a child and a gay or lesbian parent who has adopted the child in another state.

Were critics like Wardle at all concerned about child welfare, they would devote their energy to promoting two-parent support for every child rather than fomenting disapproval of gay and lesbian couples and diminished legal protections for their children. Even if Wardle's legislative priorities were congruent with his academic ones, he has demonstrated that in the final analysis he favors depriving certain children of the chance to have two legally recognized parents if doing so adds luster to the meaning of marriage. As we will see below, Wardle's views in this regard are consistent with those of others within what has become known as "the marriage movement."

III. THE MARRIAGE MOVEMENT

The American marriage movement is a loose amalgam of initiatives reacting to the decline of the heterosexual, marital nuclear family,[175] defined as a heterosexual married couple raising the children born to the two of them in one household. The movement views heterosexual marriage as central to societal integrity and aims to identify and dismantle or deflect any forces that threaten its primacy. To accomplish this aim, the movement pursues two objectives: (1) strengthening the status of heterosexual marriage in the formulation of social

[175] *See* DAVID POPENOE, DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES 34 (1988), *cited in* David Blankenhorn, REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 14 (David Blankenhorn, Steven Bayme, et al., eds., 1990) [hereinafter REBUILDING]. *See also* Blankenhorn, *Marriage Problem*, *supra* note 73, at 61.

policy; and (2) assisting individual heterosexual couples in contracting enduring and satisfying marriages.[176] In general, the movement targets any family system, legal mechanism, or social force that undermines or stands as an alternative to heterosexual marriage. Specific targets consist largely of manifestations of "individualism": no-fault divorce, same-sex marriage, unmarried and single parenthood, and stepparent families.[177]

This Part offers a close reading of the literature of the marriage movement and argues that the claims of the movement, presented as broad, encompassing, and up-to-date, are in actuality much narrower and more retrograde than they are made to appear. First, the movement's articulation of the important public role of marriage—the glue which holds the whole of society together—is based on functions that no longer have currency in contemporary postindustrial society. Second, the form of marriage the movement seeks to reinvigorate has been deemed violative of the equality principles of a civilized society. Perhaps most surprising is the movement's position on children. Like Professor Wardle's stand on second-parent adoption, children's welfare, although figuring prominently in the marriage movement's

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[176] David Blankenhorn accuses critics of the marriage movement of "undermin[ing] the possibility of evaluating a collective interest in marriage" by improperly shifting the terms of the dialogue "from a sociological and anthropological discussion of marriage as an institution to a therapeutic discussion of individual (good and bad) marriages . . . ." Blankenhorn, *Marriage Problem*, *supra* note 73, at 68. This Article focuses solely on marriage as an institution; the pre- and post-marital counseling initiatives of the marriage movement are beyond its scope.

On the objectives of church-based community marriage initiatives, *see* Paul James Birch, Stan E. Weed, and Joseph A. Olsen, *Assessing the Impact of Community Marriage Policies on U.S. County Divorce Rates*, at 1 (2004), *available at* http://www.smartmarriages.com. For an account of the beginnings of "The Marriage Enrichment Movement," see David R. Mace, *The Marriage Enrichment Movement*, *in* PREVENTION IN FAMILY SERVICES: APPROACHES TO FAMILY WELLNESS 98 (David R. Mace ed. 1983).

[177] BLANKENHORN, REBUILDING, supra *note* 175, at 10-11(indicating individualism as the primary contributor to moral decay because of its damage to marriage, societal integrity, and child welfare); Barbara Dafoe Whitehead, *The Decline of Marriage as the Social Basis of*

literature, turns out at best to be of secondary concern and at worst to be antithetical to the movement's primary objective of elevating the position of married couples by any means available.

A. Historical Antecedents of the Marriage Movement

From a historical perspective, there has perhaps always been a marriage movement. Marriage has played an important role in the development of both Western and Eastern civilization, although it has taken on different forms and functions throughout history. The ancient Egyptians and Israelites revered marriage as did the ancient Greeks and Romans. In American history, heterosexual marriage has been extolled as "'the foundation of the family,'"[178] as essential to the advancement of civilization,[179] to democracy,[180] to the propagation of humanity,[181] and to economic prosperity.[182] Not surprisingly, the law has for a long time favored

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Childrearing, *in* PROMISES, *supra* note 27, at 3, 12 (explaining that children may be resentful of or hostile to a stepparent).

[178] *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

[179] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 17-18, 26, 46, 77, 116-18, 121, 219 (2000); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502 (1992) (quoting JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 156 (1967)).

[180] *See* Katherine Shaw Spaht, *Marriage: Why a Second Tier Called Covenant Marriage?* 12 REGENT UNIV. L. REV. 1, 1 (1999).

[181] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.").

[182] *See* Bashaw v. State, 9 Tenn. (1 Yer.) 177 (1829); Maddox v. Maddox, 52 Va. (11 Gratt.) 804 (1854) (describing marriage, and its concomitant procreation, as essential to national prosperity); *see also* COTT, *supra* note 182, at 81-82, 121, 157, 179; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1159 (1999) (quoting testimony from 1996 House of Representatives's Defense of Marriage Act debates describing the "traditional [marital] family as the foundation of prosperity and happiness"); Katherine Shaw Spaht, *For the Sake of Children: Recapturing the Meaning of*

and continues to favor the institution of marriage. In order to promote marriage,[183] the law provides easy access to marriage by opposite-sex couples,[184] fosters harmony within existing marriages,[185] and, when marriages end in divorce, encourages the parties to remarry.[186] These same ideas, along with the message that marriage is divinely sanctioned,[187] are also present in religious perspectives on marriage.[188]

B. The Work of the Marriage Movement

The contemporary American marriage movement's primary appeal to history is the view that marriage has been revered by every society and has played a critical role in the development of civilization. Instead of focusing and elaborating on the meaning of marriage throughout history, however, the movement devotes its energy to championing the marital American family of the early to mid-1960s and expresses concern about contemporary trends away from that

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Marriage, 73 NOTRE DAME L. REV. 1547, 1551 n.10 (1998) ("[T]he link . . . between a healthy family and a robust economy . . . is clear and firm." (quoting Daniel Yankelovich, *Foreign Policy After the Election*, 71 FOREIGN AFF. 1, 3-4 (1992))).

[183] *See* Stubbs v. Ortega, 977 S.W.2d 718, 722 (Tex. App. 1998) ("[I]t is still the public policy of this state to foster and protect marriage and to discourage divorce. . . .").

[184] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 99-100 (1987) (holding a state may not refuse to allow prisoners to marry except for compelling reasons); Zablocki v. Redhail, 434 U.S. 374, 389-90 (1978) (holding a state may not condition permission to marry on compliance with a child support order); Regan, *supra* note 70, at 652, 655 (1999) (describing the present application of a more demanding level of scrutiny to state regulation of marriage than was applied forty years ago).

[185] *See* Niemann v. Niemann, 317 S.E.2d 472, 474 (S.C. Ct. App. 1984) ("[P]ublic policy relating to marriage is to foster and protect it.").

[186] *See In re* Wagner, 159 A.2d 495, 499 (Pa. 1960) (noting "the policy of looking with favor upon remarriage"). To reconcile the policy favoring remarriage with the policy disfavoring divorce, the law developed the nisi divorce decree, which delays the divorce decree becoming absolute in order to provide both "a cooling-off period to encourage reconciliation" and the prevention of immediate remarriage. Ladd v. Ladd, 640 A.2d 29, 33 (Vt. 1994) (Morse, J., dissenting).

[187] *See* OLTHUIS, *supra* note 52, at 20.

[188] *See, e.g.*, FOSTER, *supra* note 52, at 6.

model.[189] The marriage problem we face today, in short, is that, since the early 1960s, American society has undergone an alarming shift from "familism" to "individualism,"[190] and the price of this has been the decline of marriage.

The early work of the contemporary marriage movement was in reaction to the "divorce culture" of the United States. The divorce culture was a product of the increasing individualism in American society and was embraced optimistically as an antidote to unhappiness.[191] The marriage movement published research on the detrimental effects of divorce on individuals and society (even stepfamilies and remarriage were said to be detrimental) and lobbied for more restrictive divorce laws, covenant marriage, and preferential welfare regulation for the married poor.[192] In particular, the movement has pointed to feminism and two-career couples as having injurious effects on marriage and the family.[193] More recently, the movement has expressed concern over cohabitation and single parenthood, said to be among the deleterious fallout of the divorce culture. Undergirding all of the marriage movement's initiatives is the call "to create

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[189] *See* David Blankenhorn, *American Family Dilemmas, in* BLANKENHORN, REBUILDING, *supra* note 175, at 8-9 (describing "*the dimensions and consequences of changes in the family during the past quarter century*" as the primary point at issue between opponents in the current discussion about marriage and the family).
[190] Blankenhorn, *Marriage Problem, supra* note 73, at 61.
[191] *See* Maggie Gallagher, *Re-creating Marriage, in* PROMISES, *supra* note 27, at 233, 234.
[192] Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning about the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 342 (2002) (detailing initiatives); Nina Bernstein, *Strict Limits on Welfare Benefits Discourage Marriage, Studies Say*, N.Y. TIMES, June 3, 2002, at A1. http://patriot.net/~crouch/pro.html (divorce reform web site).
[193] Graglia, *Non-Feminist*, *supra* note 71, at 995, 996, 1002; BRIAN C. ROBERTSON, THERE'S NO PLACE LIKE WORK: HOW BUSINESS, GOVERNMENT, AND OUR OBSESSION WITH WORK HAVE DRIVEN PARENTS FROM HOME; DON BROWNING, MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS MARRIAGE AND WHAT TO DO ABOUT IT 162 (2003) [hereinafter BROWNING, MODERNIZATION]; Don Browning, MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE 109, 297 (Martin King Whyte ed. 2000) [hereinafter COMMUNITARIAN].

and lead a marriage movement that spans the world." [194]

The claims of the marriage movement that are of particular relevance to the current discussion are (1) that marriage is the building block of society, (2) that marriage contributes to the well being of children and (3) marriage is currently in crisis. Each of these will be examined in turn.

1. Marriage Is the Building Block of Society

Building upon the historical evidence that marriage has played an central role in the organization of society going back millennia[195] and upon the conviction that marriage has been essential to the trajectory of civilization[196] and continues to ensure the integrity of society,[197] a basic tenet of the marriage movement is that marriage is not simply a personal choice grounded in the right to privacy but is an important social good.[198] The individual goods that accrue in larger measure to heterosexual married couples than to unmarried persons—primarily physical and mental health, physical security, sexual satisfaction, and wealth—ensure a healthy, happy

[194] *See* David Blankenhorn, *Should Public Policy Favor Marriage and Children?*, THE FAMILY IN AMERICA, Sept. 2000, at 1, 7 [hereinafter Blankenhorn, *Public Policy*]; *see also* COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 3 (1995) (calling for rebuilding "a family culture based on enduring marital relationships") [hereinafter MARRIAGE IN AMERICA].

[195] *See* Blankenhorn, *Public Policy*, *supra* note 194, at 6; INSTITUTE FOR AMERICAN VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 6, 18 (2002) [hereinafter WHY MARRIAGE].

[196] *See* MARRIAGE IN AMERICA, *supra* note 194, at 4 (describing marriage as "the institution which most effectively teaches the civic virtues of honesty, loyalty, trust, self-sacrifice, personal responsibility, and respect for others . . . .").

[197] *See* Carl Hulse, *Senate Hears Testimony on a Gay Marriage Amendment*, N.Y. Times, Mar. 4, 2004, at A22 ("[M]arriage is a key social institution.") (reporting testimony of Federal Marriage Amendment proponents).

[198] INSTITUTE FOR AMERICAN VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 6, 18 (2002) [hereinafter WHY MARRIAGE].

citizenry.[199] But more than this, marriage generates "social capital"--inter-family and intergenerational bonds that embed married couples and their children within larger social networks and direct their efforts to the good of all.[200] By contrast, the unmarried lack the significant family support that would devolve to them from their combined kinship groups acting on the coded obligations that "being married" triggers.[201] In sum, marriage "has a [beneficially] transformative effect on [the] attitudes and behavior" of society as a whole, so much so that some marriage-movement commentators have dubbed marriage a "seedbed[] of American democracy."[202]

Since societal integrity depends on marriage, threats to marriage create the risk of society's downfall.[203] On a small scale, contemporary divorce culture makes unmarried and married people alike unhappy, lonely, and increasingly suspicious of any form of commitment.[204] But on a larger scale, divorce, nonmarital births, the absence of fathers, and the deinstitutionalization of marriage–called collectively "family disruption"–exacerbate world

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[199] *See id.* at 9-10, 13-14, 14-15, 16-17. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

[200] *See* Barbara Dafoe Whitehead, *Testimony before the United States Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Children and Families,* April 28, 2004, *available at* http://marriage.rutgers.edu/Publications/Print/Print%20Whitehead%20TESTIMONY.htm [hereinafter, Whitehead, *Testimony*].

[201] *See id.*

[202] David Blankenhorn, *Conclusion, in* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY 271, 274, 280 (Mary Ann Glendon & David Blankenhorn eds. 1995).

[203] Barbara Dafoe Whitehead, *Dan Quayle Was Right*, 271 ATL. MONTHLY 47 (Apr. 1993) [hereinafter Whitehead, *Dan Quayle*].

[204] *See* MARRIAGE IN AMERICA, *supra* note 194, at 7.

hunger, overpopulation, destruction of the environment, and AIDS.[205] Some believe that this disruption results from forces such as individualism, modernization and globalization.[206] Given the importance of marriage as the building block of society, all marriage-movement commentators call on the government to promote marriage.[207]

2. Marriage Contributes to the Well Being of Children

Since marriage is essential to societal integrity, it naturally has an important public function from which all of society, including children as a class, benefit. But marriage also plays an important private role in the lives of individual children. For over a decade, the marriage movement has asserted that the quality of life of American children grows worse each year.[208] This is said to be due to the devaluation of children and child rearing resulting from our divestment from marriage.[209] According to the marriage movement, the intact, biological married family is the setting in which individual children do best. Children raised in step-parent, single-parent, adoptive, or gay or lesbian households do not fare nearly as well. In the adoption context, the movement urges restriction to adoption to married couples but does not oppose adoption by single persons. The movement does, however, oppose the trend toward open adoption in domestic placements. To the extent the movement acknowledges the blended

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[205] BROWNING, MODERNIZATION, *supra* note 193, at 31. Although marriage is believed to contribute to economic prosperity, *see supra* note 182 and accompanying text, the crisis in marriage has not been linked with an economic downturn. Indeed, to some, it seems likely that the individualistic impulses that give momentum to the economy are likely to cause workers to devalue marital ties. Moreover, a weak economy can wreak havoc even on otherwise strong marital and familial ties. *See* ALAN WOLFE, MORAL FREEDOM 48 (2001) (noting the linkage between the workplace and marital disloyalty).

[206] BROWNING, MODERNIZATION, *supra* note 193, at 1, 9-10, 41, 215.

[207] *See, e.g.*, Whitehead, *Testimony*, *supra* note 200; Blankenhorn, *Public Policy*, *supra* note 194, at 7.

[208] *See, e.g.*, David Blankenhorn, *Introduction*, *in* REBUILDING, *supra* note 175, at xiv.

[209] *Id.* at 8.

families that result from divorce, it believes "[c]hildren who live with a parent and stepparent do not fare much better than children who live with a single parent."[210] For this reason, the movement approves of married stepparent adoptions, since they provide even greater certainty for the child than does the mere remarriage of his parent. The movement does not, however, approve of second-parent adoptions by same-sex partners.

All of these positions are subsumed in the movement's goal to reinscribe marriage "as the unique repository of sexual life and procreation"[211] and its advocacy for social policies that promote childbearing and child rearing within a marital, nuclear-family structure.

The deleterious effects of divorce on children are of particular concern to the marriage movement.[212] In general, children of divorce have a tendency to disbelieve in the permanency of relationships; they consequently experience varying degrees of insecurity in their lives, including an inability to make meaningful connection with other human beings.[213] Not only does divorce harm children, but so does being raised by cohabiting, same-sex, or single parents. Like children of divorce, such children experience disadvantages that haunt them well into their adult lives. These disadvantages lead such children to make anti-marriage choices that then send damaging ripple effects into society for generations to come.

In an effort to disseminate widely the message that marriage benefits children and non-marriage, the Institute for American Values published *Why Marriage Matters: Twenty-One*

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[210] *See* MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE 5 (Martin King Whyte ed., 2000).
[211] *See* INSTITUTE FOR AMERICAN VALUES, THE EXPERTS' STORY OF COURTSHIP 8 (2000).
[212] *See* MARRIAGE IN AMERICA, *supra* note 194, at 4, 6.
[213] *See* INSTITUTE FOR AMERICAN VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 4 (noting that children whose parents divorced are more likely to divorce) [hereinafter STATEMENT OF PRINCIPLES].

Conclusions from the Social Sciences.[214] *Why Marriage Matters* discusses social-science studies of the effects of family disruption and how the conclusions we can draw from those studies suggest the need for a renewed commitment to marriage. *Why Marriage Matters* laments that children who grow up with unmarried parents increases the likelihood that those children will have no relationship with their fathers and that, later in life, they will themselves divorce or become unwed parents.[215] These children are more likely than children with married parents to experience poverty, to achieve less educationally and professionally, and to suffer substance abuse.[216] They are less physically and emotionally healthy[217] and are more likely to commit criminal acts and commit suicide.[218]

Since heterosexual marriage is the institution "most likely to meet children's needs and safeguard their interests,"[219] the marriage movement advocates revitalizing this battered institution in a form in which the interests of children come first.[220]

3. Marriage Is Currently in Crisis

For all the good that marriage brings to society and to children, it nonetheless is, says the marriage movement, currently suffering a crisis that threatens to destroy our way of life. The root of the crisis is that marriage is no longer perceived as a union based on self-sacrifice and duty, but simply one meant to last only so long as each member of the married couple experiences personal satisfaction. In other words, marriage has lost its reputation as serving an important public function and has become just another way of pursuing private ends. Against

[214] WHY MARRIAGE, *supra* note 198, at 4.
[215] *See id.* at 7, 8.
[216] *See id.* at 9, 10, 11, 12
[217] *See id.* at 11, 14.
[218] *See id.* at 15, 16.
[219] MARRIAGE IN AMERICA, *supra* note 194, at 4.

this backdrop of marital crisis, the marriage movement remains committed to the goal of helping more marriages succeed.[221]

C. The Literature of the Marriage Movement

1. The Mainstream Press

The most well known texts in the marriage movement are of course intended for a wide audience and written by authors who choose a conversational, journalistic writing style for ease of reading. Both social historian Barbara Dafoe Whitehead's and journalist Maggie Gallagher's writings on marriage possess this appeal. Whitehead's essay *Dan Quayle Was Right*, published in the April 1993 issue of the *Atlantic Monthly* placed her in the national spotlight. She later expanded the ideas contained in the essay into the book *The Divorce Culture*. Gallagher is best known for her provocative, early marriage-movement book *Enemies of Eros* and for her more recent collaborative effort *The Case for Marriage*.

In *Dan Quayle Was Right*, Whitehead focuses squarely on the detrimental effects of familial disruption on children and society. She concludes it is good for children to grow up in intact families where they live with both of their married biological parents and not as good if they grow up in disrupted families. She premises her conclusion on the difference between "intact" and "disrupted" families. Familial disruption encompasses the full range of circumstances under which a child is not raised by his or her married biological parents. It includes not only the disintegration of a child's biological parents' marriage through separation or divorce, but also the fact of a child's being born out of wedlock. A child born to an unmarried committed couple also suffers disruption because of the risk that the cohabiting couple will break

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[220] *See id.*

up. A child living in a stepparent family is a victim of familial disruption for the same reason. Even a single woman and the child she intentionally plans and prepares to have and to raise by herself are an example of a disrupted family, not so much because the child lacks an identifiable father, but because the child "must come to terms with [the mother's] love life and romantic partners."[222] Whitehead equivocates on whether adopted children are victims of disruption, but the emphasis in her discussion on the value of the biological tie suggests that adopted children, too, are victims of familial disruption. With the incidence of familial disruption on the rise, concludes Whitehead, too many children are growing up in circumstances that are not as good for them as growing up with their married biological parents.[223]

It is understandable that Whitehead's article created the stir it did when it was published over ten years ago and that it continues to be cited in discussions of the marriage problem, particularly the "dilemma" of single motherhood. A similar chord was struck by Maggie Gallagher's *Enemies of Eros* five years earlier. Through essays with titles such as *Baby Lust, Mother Love*; *The Murder of Marriage*; and *Sex Acts Phil Donahue Never Taught You*, Gallagher, a journalist, amazed readers with her sustained diatribe against the destabilizing effects of no-fault divorce and other ramifications of the rampant individualism that had

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[221] *See* STATEMENT OF PRINCIPLES, *supra* note 213, at 7.

[222] Whitehead, *Dan Quayle*, *supra* note 203.

[223] Whitehead's most recent effort to tackle the marriage problem is an examination of professional women who want love, marriage, and commitment but who lack it in a divorce culture devoid of romance. *See* Barbara Dafoe Whitehead, *Why There Are No Good Men Left: The Romantic Plight of the New Single Woman* (2003). Whitehead describes the plight as follows: (1) while pursuing their careers, women "hook up" for casual sex and delay relationships; (2) when their foothold in the career ladder is firm and they are ready for romance and marriage, they have very few available men to choose, and set their expectations are too high; (3) at that point in their lives, all they have left is a succession of commitment-phobic men who fail to live up to their expectations of being rescued by a knight in shining armor. *Id.* Whitehead then describes the "new courtship system" she discerns is emerging to help these

overtaken America.[224] Punctuated by tragic stories of people whose lives have been forever damaged by these social phenomena, *Enemies of Eros*, highly acclaimed upon its publication, continues to be a wake-up call for a society hobbled by its own lack of respect for the public role of marriage.

2. Religious and Academic Perspectives

The marriage movement is not merely advanced by the mass-media contributions described above. Able legal and social-science scholars have also contributed to the discussion. I group the academic and theosophist contributions to the marriage movement literature because of the large overlap between the two. In general, academic writing within the marriage movement is informed by a Christian-based approach to morality[225] and is reflected in the longstanding collaboration between the Religion, Culture and the Family Project at the University of Chicago Divinity School and the National Marriage Project of Rutgers University.

Professor Wardle, discussed above in Part II, is the leading legal academic figure in the marriage movement. He believes the legal academy has erected a taboo against any public defense of heterosexuals-only marriage,[226] and he hopes to enrich the resulting impoverished academic discourse by arguing not only that the Constitution guarantees no right to same-sex marriage[227] but that legal recognition of same-sex marriage necessarily requires legal protection

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melancholy women find lasting love. *Id.*

[224] MAGGIE GALLAGHER, ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT (1989).

[225] *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. Rev. 1, 19 (noting that, in the period between 1990 and 1995, the sole "full" defense in American law reviews of heterosexuals-only marriage was on religious grounds).

[226] *See id.* at 18, 22. An issue of the *Regent University Law Review* seeks to combat the same taboo through its publication of articles on homosexuality. *See* 14 REGENT UNIV. L. REV. Number 2 (2002).

[227] *See id.* 28-58, 62-95.

for socially objectionable practices such as polygamy, bigamy, and incest.[228] In addition to fashioning legal arguments against same-sex marriage, Wardle also makes philosophical ones. He asserts, for example, that the essence of marriage is the blending of opposing sexual identities, something same-sex marriage cannot achieve.[229]

Those in agreement with Wardle have articulated similar arguments about the scope of the Constitution[230] and the soundness of a heterosexuals-only definition of marriage.[231] But Professors Collett and Wilkins see the essence of marriage slightly differently than does Wardle. Although Collett agrees with Wardle that the importance of marriage is that it is a "union of sexual difference," she also emphasizes its potential to create new human life and in this way focuses more squarely on heterosexual sexual intercourse than does Wardle.[232] Wilkins focuses solely on the sexual act: the fundamental importance of heterosexual marriage is the reproductive look of heterosexual copulation, no matter the sterility of the participants or the

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[228] *See* Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal,* 2001 B.Y.U. L. REV. 1189, 1201.

[229] *See* Lynn D. Wardle, *Marriage, Relationships, Same-Sex Unions, and the Right of Intimate Association,* in MARRIAGE AND SAME-SEX UNIONS: A DEBATE, at 190, 196 (Lynn D. Wardle, Mark Strasser, et al., eds. 2003) [hereinafter SAME-SEX UNIONS]. *Cf.* Katherine Shaw Spaht, *Beyond* Baehr: *Strengthening the Definition of Marriage,* 12 B.Y.U. J. Pub. L. 277, 278, 285 (1998) ("sexual complementarity"); Teresa Stanton Collett, *Should Marriage Be Privileged? The State's Interest in Childbearing Unions, in,* SAME-SEX UNIONS, *supra* note 229, at 152, 157 (defining marriage as a "union of sexual difference") [hereinafter Collett, *Privileged*].

[230] *See, e.g.*, Lino A. Graglia, *Single Sex "Marriage": The Role of the Courts*, 2001 B.Y.U. L. REV. 1013 (vilifying the "activism" of courts that articulate constitutional rationales in support of same-sex marriage).

[231] *See, e.g.*, William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT UNIV. L. REV. 119, 125 (2002) (polygamy).

[232] *See* Collett, *supra* note 229, at 157; *see also* Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. UNIV. L. REV. 1245, 1249-50 (1998). Wardle touches only briefly on the symbolic importance of heterosexual coitus in *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation,* 24 HARV. J.L. & PUB. POL'Y 771, 800 (2001) and in *Image, Analysis, and the Nature of Relationships, in* SAME-SEX UNIONS, *supra* note 229, at 115, 117.

contraception employed in the act.[233] To Wilkins, a husband's phallic penetration of his wife's vagina is a potent symbol that transcends the actual fertility of individual married couples and channels and promotes responsible procreative behavior on a societal level.[234] Indeed, because of its reproductive appearance, heterosexual coitus is the only sexual act by which two persons become one flesh.[235] Both Collett and Wilkins emphasize that the sexual act must have reproductive potential, even if the participants are infertile,[236] but they disagree on whether the choice to be infertile through contraception vitiates the purpose of marriage.[237] Professor Robert George states that the act must be "reproductive in type."[238] No matter their disagreement on the status of different coital acts, these scholars believe the march of civilization has depended upon the enshrinement of this powerful symbol in the institution of marriage. In their view, to open up the institution of marriage to participants who lack the capacity to engage in heterosexual coitus would threaten the very disintegration of civilization.

Social science perspectives round out the academic work of the marriage movement. The most prominent social scientist in the movement is undoubtedly Professor Linda J. Waite, a sociologist at the University of Chicago and co-author, with Maggie Gallagher, of *The Case for Marriage*. Although not an academic monograph (Harvard University Press withdrew from the

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[233] Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT UNIV. L. REV. 121 (2003). Neither "reproductive potential" nor "reproductive in type" accurately describes the coitus of infertile couples. Solely in an effort to clarify the analysis of these scholars presented here, I elect the terms "reproductive look" and "reproductive in appearance."

[234] *Id.* at 131.

[235] *See id.* 132.

[236] *See id.* Collett, *Privileged*, *supra* note 229, at 157.

[237] *Cf.* Wilkins, *supra* note 233, at 132 (no difference between use of contraception and infertility) *with* Collett, *Recognizing*, *supra* note 232, at 1261 (contraception vitiates marriage because of "willful refusal to enter full communion").

project upon reviewing the manuscript),[239] *The Case for Marriage* has been defended by Waite herself as similar in scholarly value to her other academic work.[240] The book draws on a decade of research and begins with the premise that Americans have developed an ambivalence towards marriage, at once aspiring to it as an important, even sacred, step on the road to happiness and fulfillment but simultaneously suspecting it to be an arrangement in which the participants must abandon their cherished personal freedom.[241] Generating the ambivalence are legal and demographic forces. First, in developed nations, the agrarian economy of the pre-industrial age has given way to a postindustrial economy where marriage is less critical to human survival.[242] Second, no-fault divorce has rendered marriage nothing more than any other unilaterally terminable "adult affair."[243] In short, marriage has become privatized, just one of many options for arranging intimate relationships.

The result of these developments, according to Waite, is that marriage has lost its public function of channeling people into new units of production in which they commit to creating goods for themselves, their children, and the rest of society. In return, society agrees to

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[238] *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2497 (1997).

[239] The controversy surrounding Harvard's decision is beyond the scope of this Article. Waite and Gallagher comment on the controversy in an interview archived at http://www.massnews.com/past_issues/2001/jan%202001/0101marriage3.htm

[240] *Id.*

[241] *See* WAITE & GALLAGHER, *supra* note 199, at 2-3, 34, 174.

[242] *See id.* at 174. Vanderbilt University Professor Virginia Abernethy made this same point almost thirty years ago, *see* Virginia D. Abernethy, *American Marriage in Cross-Cultural Perspective*, in CONTEMPORARY MARRIAGE: STRUCTURE, DYNAMICS, AND THERAPY 33, 38 (Henry Grunebaum & Jacob Crist, eds., 1976) [hereinafter CONTEMPORARY MARRIAGE], and made the additional point that marriage no longer functions in American or other postindustrial societies as a mechanism for forging alliances that consolidate wealth or confirm politicoeconomic arrangements, *see id.* at 36-37.

[243] *Id.* at 7.

recognize, respect, and benefit the unit.[244] The acknowledgment and support of this public role is critical to triggering marriage's "unique power" to provide a better society for everyone.[245]

Whereas marriage has an important public function that must be reaffirmed, *The Case for Marriage* asserts that cohabitation does not. As an arrangement easy to put on and then cast off, cohabitation lacks the type of permanent commitment we associate with marriage. It is understandably appealing to those who desire above all to maintain their independence and not relinquish any personal freedom by bearing responsibility for another. Without the "deeper partnership" of marriage, though, cohabitation neither promises nor offers the many private goods that marriage does.[246]

The bulk of *The Case for Marriage,* like *Why Marriage Matters,*[247] is devoted to describing these many private goods. Not only does the married couple benefit (better health, sex, and money), but so do their children (better health, education, and better prospects for happiness and prosperity going into adulthood). The reader is then left to link these goods with the social goods described earlier. On the topic of same-sex marriage, *The Case for Marriage* takes no explicit stand; the authors themselves cannot agree on its importance.[248] The strong implication made by the book, however, aligns well with Whitehead's view that children do best when raised in one household by their married biological parents. As such, the book is most forcefully aimed at strengthening societal commitment to opposite-sex marriage,[249] and so, unsurprisingly, no agenda for legislating same-sex marriage is included in the authors' talking

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[244] *See id.* at 17, 20-23.
[245] *Id.* at 11, 17, 34
[246] *Id.* at 45.
[247] *See supra* notes 214-18 and accompanying text.
[248] *See* WAITE & GALLAGHER, *supra* note 199, at 200.

points for "Renewing Marriage."[250] *The Case for Marriage*, then, provides no support for same-sex marriage and offers many of the arguments against it made by other marriage-movement commentators.

D. Interpretive Problems of the Marriage Movement

The literature of the marriage movement conveys strong messages about the good of marriage, the danger to a society not adequately committed to marriage, and the need to recommit to the idea of marriage. Although couched in broad, encompassing language, and bolstered by appeals to the important role marriage has played throughout history, these claims are in fact much narrower than they appear, contain notions antithetical to the ethic of equality upon which our society is based, and use concerns about child welfare as a makeweight to support pleas for special benefits for married couples.

1. Narrow Claims

One of the problems with Whitehead's analysis is that her definition of disruption is overinclusive. For Whitehead, marriage between a child's biological parents is itself the measure of "intactness" of families. Other families are "disrupted" in some way, and, if not exactly doomed to lives of poverty and misery, are at least worse off than intact families. But to describe a family headed by an unmarried committed couple as already disrupted because the couple is more likely to split up than is a married couple makes little sense. Similarly, if as Whitehead claims, the tragedy of familial disruption is a child suffering the loss of a parent, it is unclear how the woman who plans and prepares to give birth to a child and to raise the child alone warrants characterization as disrupted or broken apart. If families that are likely to self-

[249] *See id.* at 188 (introducing talking points to "help more men and women succeed in . . . marriage").

destruct are "disrupted," then so are married couples who as a class, according to Whitehead, are as likely to divorce as not. Applied consistently, Whitehead's amorphous definition of disruption swallows the category of intactness she sets out to defend.

Although "intact" families are those that are best for children, it turns out that only "well functioning" intact families can truly meet children's needs. Indeed, in her recent testimony before a Congressional subcommittee discussing plans to bankroll marriage initiatives that would make the poor less dependent upon public subsidies, Whitehead praised low-conflict, long-lasting marriages, stating that it was these marriages in particular that benefit adults, children, and society. The categorical association of marriage with intactness, so prominent in *Dan Quayle Was Right*, was utterly missing. With this new objective in mind, Whitehead urged Congress to strive to "reduce the barriers to healthy marriage." But beyond referring several times to how divorce harms children, she failed to suggest what barriers to good marriages Congress should help dismantle or how the proposed legislation would accomplish the task . As a practical matter, Congress has little control over how easy it is to obtain a divorce, since divorce provisions are largely a matter of state, not federal, law. Furthermore, the subcommittee that solicited her testimony was considering legislation not so much aimed at saving already contracted marriages but in promoting marriage among the not yet married.

Finally, Whitehead and other marriage movement commentators give us no reason to believe that we are plagued not by a marriage problem but by a divorce problem. Too much divorce does suggest that many heterosexual marriages are not the well functioning ones that benefit society. Moreover, experts have made a convincing case that divorce affects children in insidious and devastating ways well into their adult lives. But concern about divorce does not

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[250] *See id.* at 200-01 (expressing ambivalence about same-sex marriage).

translate into the broad theory of family disruption Whitehead posits. Many couples do not marry but do the hard work of maintaining a household and raising children. They are as connected to expansive family and social networks as are many married couples and in some cases are more so. Like married couples whose marriage functions well, these are not the couples who are contributing to a divorce culture that harms society. Indeed, divorce may be a symptom of a marital family that never was intact to begin with. Nonetheless, within Whitehead's rubric, well functioning unmarried couples are disrupted, while even the most dysfunctional married couple is intact. The flaws in Whitehead's reasoning are themselves symptoms of the movement's attempts to breathe new life into its cause by expanding the scope of the discussion from "the divorce problem" to "the marriage problem." But the shift in scope has brought with it many inconsistencies and contradictions. Not surprisingly, then, the marriage movement has been largely unsuccessful in expanding its claims beyond its initial claim that the wide availability of no-fault divorce in this country has placed marriage (and by extension society) in crisis.[251]

Distilled to its essence, Whitehead's thesis is difficult to assail: divorce is a symptom of marital breakdown, and children do best when their parents have a well functioning relationship. While these ideas are simple and true, they are nonetheless much too narrow to support the grand claims about marriage Whitehead and other marriage-movement commentators have been making for well over a decade.

2. Equality Concerns

In addition to adopting narrow premises in its attempt to support broad, encompassing

[251] *See, e.g.*, WAITE & GALLAGHER, *supra* note 199, at 76-85 (explaining the marriage crisis as a product of the divorce culture).

assertions, the marriage movement betrays an unsettling commitment to a form of marriage marked by inequality. While expressly rejecting the inequality model of marriage at every turn, the movement continues to champion the ability of marriage to contribute to economic prosperity. The contradiction here lies in the fact that the form of marriage which contributes most to economic prosperity is laden with rigidly balkanized gender roles long decried from the highest levels of our judiciary as in conflict with our most cherished constitutional guarantees.

Social historian John Demos's account of marriage suggests that the ability of marriage to contribute to economic solidity lay in its strictly defined roles for men and women. Building block idea is Women within this framework provided the sustenance, shelter, and sexual outlets men needed to restore themselves for renewed forays into the marketplace. These ideas recall the marriage movement's insistence that marriage is the building block of society, a notion probably linked to the important organizing and subsistence functions that marriage formerly fulfilled but which have fallen away in our age.[252] This historical form of marriage has been described as a tool for the political and economic subjugation of women, an oppression of long duration in which the law continues to be complicit.[253] In particular, Professor Martha Fineman has developed an intricate and compelling theory positing that within rhetoric about the importance of marriage to society lies the privatization of dependency on a grand scale.[254] According to this theory, this rhetoric masks the traditional nuclear family's true function in

[252] *See* Abernethy, *supra* note 242, at 39.
[253] *See* COTT, *supra* note 182, at 62-67; Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 169-70 (1999) (cataloguing inequities); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 289-306 (1997) (associating marriage with slavery and involuntary servitude); Regan, *supra* note 70, at 649-50 (cataloguing inequities).
[254] See Martha Albertson Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 400.

serving as a locus for inevitable and derivative dependency.[255] With the onslaught of marital breakdown, Fineman urges that marriage is no longer capable of fulfilling this role and advocates its abolition as a legal category.[256] To replace marriage, Fineman advocates a re-envisioned family focusing on the mother-and-child caretaking relationship as the core unit of family intimacy.[257]

The marriage movement purports to reject the inequality model of marriage so vividly explicated by Demos and Fineman and to refashion it into an equal partnership where both spouses bear responsibility for breadwinning, housekeeping and child rearing. Such shared roles of course create an increased demand for third-party childcare, which commentators in the marriage movement criticize as detrimental to children.[258] While creating more financial wealth for individual couples, these shared roles also create inflationary pressure, which can lead to more time spent working and less time in the home. Faced with this inconsistency, other marriage-movement commentators make clear that the equal-partners-in-marriage model is *not* a desirable way to place marriage back on solid footing, or at least should not be an overriding concern. One view posits that a culture committed to children cannot be fixated on equality and

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[255] *See* Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 92 (1998); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200, 2205 (1995).

[256] *See* FINEMAN, NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 164, 228 (1995) [hereinafter FINEMAN, NEUTERED MOTHER]; Jeffrey Evans Stake, Michael Grossberg, Martha Fineman, Akhil Reed Amar, Regina Austin, & Thomas S. Ulen, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 542 (1998) ("Marriage is no longer able to serve its historic role as the repository for dependency.").

[257] *See* FINEMAN, NEUTERED MOTHER, *supra* note 256, at 228, 230-32.

[258] *See* F. Carolyn Graglia, *The Housewife as Pariah*, 18 HARV. J.L. & PUB. POL'Y 509, 515 (1995) (referring to "the vagaries of surrogate care") [hereinafter Graglia, *Housewife*].

autonomy but upon dependence and obligation.[259] Another view posits that role sharing in marriage is too dangerously "androgynous"[260] and robs of a marriage of the opposing forces that generate the sexual desire so essential to conjugal fidelity. The debate continues. No consensus has yet emerged from the marriage movement as to how, in reinvigorating marriage, we can avoid resurrecting long-rejected gender-based inequities.

The marriage movement recognizes its dilemma: the goals it claims marriage achieves cannot be satisfied without returning to anachronistic roles in marriage, but extolling such marriages would cause the movement to lose coveted political ground. For the time being, the movement is forced to proclaim its commitment to equality in marriage in the vaguest of terms, without acknowledging that such a commitment contradicts many of its most adamantly held positions.

3. Inadequate Concern for Child Welfare

Much of the marriage movement's efforts to promote marriage is actually detrimental to children. In Focus on the Family's latest effort in support of the Federal Marriage Amendment to outlaw same-sex marriage, a forlorn young boy stares out from a newspaper advertisement and asks, "Why don't [certain senators] believe every child needs a mother and a father?" A warning follows: "Homosexual marriage intentionally creates fatherless families or motherless families. Think about it." The advertisement is but one example of how the marriage movement uses images of suffering children in its quest to engrave a heterosexual definition of marriage on the Constitution. The advertisement tells readers that not supporting the Marriage Amendment

[259] *See* Maggie Gallagher, *A Reality Waiting to Happen: A Response to Evan Wolfson, in* SAME-SEX UNIONS, *supra* note 229, at 12.
[260] *See* Graglia, *Non-Feminist*, *supra* note 71, at 995, 996, 1002; *see also* Graglia, *Housewife*, *supra* note 258, at 515.

will deprive children of a mother and a father. But in the telling, the advertisement misassociates marriage with parenthood in a rhetorical tactic that has become the trademark of the heterosexuals-only marriage movement.

Little of substance lies behind the appeals to children's welfare in the campaign to outlaw same-sex marriage. At its website, Focus on the Family warns readers that same sex marriage will "rip kids apart emotionally." The argument proceeds as follows: unmarried people have too much sex with too many partners, and individual gays and lesbians are the worst offenders, typically tallying a thousand or more sexual partners over a lifetime. That's not good for children. What's more, in the wake of the rising divorce rate among heterosexuals, blended families and shared-custody arrangements that confuse children have mushroomed. While this parade of horribles might support arguments for planned parenthood or pre- and post-marital counseling, it has nothing to do with same-sex marriage or its effect on kids' emotional lives. The website offers clarification: "More than ten thousand studies have concluded that children do best when they are raised by loving and committed mothers and fathers." But this declaration, recalling our discussion of Whitehead, *supra*, merely restates a well known truism that has nothing to do with marriage. That children do best when raised by good parents who function well together is not the least bit controversial, but it happens also not to support a call for heterosexuals-only marriage. Underneath both Focus on the Family's and Whitehead's calls for marriage reform is a simple message that children suffer without love and support and that love and support may diminish when parents are distracted by the basic struggle to get along. Using this message about child welfare as a way of promoting a ban on same-sex marriage at best seems counterintuitive: the ban will not guarantee love and support even for children who live together with their married heterosexual parents, and it will do nothing to assuage the

ravages of divorce. Moreover, if the married family is a locus in which children thrive, we should do what we can to promote *more* marriage, not less.

Efforts to outlaw same-sex marriage, if successful, are destined to harm certain children. Part of the objection to same-sex marriage is that it would allow married gay and lesbian couples to adopt each other's children under stepparent adoption statutes. Such adoptions would give the children of same-sex couples all the legal protections and benefits of having two parents, one of the primary goals of parentage law.[261] As explained above in Part II, children of assisted reproduction, who in some cases have only one legal parent and a second functional parent they have known since birth, would benefit the most. Recognizing this fact, the marriage movement must nonetheless believe that the welfare of these children is the cost required to protect opposite-sex marriage with a constitutionally enshrined ban on its same-sex equivalent. In the end, however, the argument that privileging heterosexual marriage is critical to ensuring the welfare of children falls apart when it comes to light that some children will actually suffer under such a myopic and rigidly exclusionary view of the value of marriage.

CONCLUSION

Restrictions on adoption and assisted reproduction exist in various forms. Restrictions based on marital status are particularly prevalent and intractable. Whereas the emphasis on marriage has fallen away from the regulation of artificial insemination, and whereas single persons are universally permitted to adopt children (albeit not on equal footing with married couples), new proposals to regulate surrogacy invariably restrict the use of surrogacy to married couples. Such restrictions, viewed under an interpretive microscope, fail to achieve the

[261] *See* Garrison, *supra* note 24, at __.

minimum standard of consistency and neutrality to which our system of justice adheres. Furthermore, particularly in adoption, favoritism toward married couples can render some children unadoptable, an outcome that seems particularly draconian and lacking in integrity.

Given that marriage has for millennia been an important presence in societies throughout the world, the belief that the world would be unrecognizable in its present form without it is completely understandable. The marriage movement has for over a decade worked strenuously to reverse what it sees as a societal decline produced by the divorce culture. To its credit, the movement seems genuinely concerned with engineering a safer, more salutary society for all. Its efforts, however, harbor certain alarming traits. Not only do they appear to be unrelated to any serious consideration of child welfare, but they might well require a return to a form of marriage that has been discredited as inimical to the equality guarantees of our constitutional system. Under close scrutiny, the broad, encompassing claims of the marriage movement reduce to a narrow and uncontroversial truism: children do best when they are raised by loving and supportive parents. Were this truism to be implemented to the fullest extent, marital restrictions on adoption and assisted reproduction would be abolished.