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Adopting the Gay Family

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Adopting the Gay Family

Cynthia Godsoe*

Scholars and policy makers alike have largely overlooked the significant role adoptive parenthood has played in gay family, and ultimately civic, recognition. States have been in the business of creating gay families for decades through the foster care system. This match of orphans and outlaws has resulted in tens of thousands of loving families, even in the “reddest” states. These families were key “facts on the ground” in the marriage debates. In short, adoption has functioned as a stealth path to marriage equality.

Drawing on original qualitative research, this Article brings to the fore the understudied but critically important trajectory of gay foster and adoptive parenthood. It argues that a better understanding of this neglected path challenges two key assumptions underlying the marriage debates and, more broadly, family regulation. First, it challenges the conventional wisdom that marriage should come before parenthood. Recognition of same-sex adoption preceded recognition of same-sex marriage in every state. Second, it debunks the argument that current opposition to new family forms is driven by children’s interests. Marriage myopia kept policy makers’ attention off state-sanctioned parenthood, revealing their opposition to gay families to center largely on sexuality or morality.

This Article theorizes this process of on-the-ground change, highlighting three salient factors: parenthood’s private nature, its diffuse and apolitical gatekeepers, and the “stickiness” and normalizing power of extant families. It concludes by arguing that familial and civic recognition does not, and should not, come only from the status of marriage. Indeed, recent courts, including the United States Supreme Court in Obergefell v. Hodges, have explicitly praised gay adoptive parents when granting same-sex marriage. Recognition thus serves as a necessary state reward for “self-sacrifice” and model caregiving.

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As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. . . . Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

—*Obergefell v. Hodges*,
No. 14-556, slip op. at 15 (U.S. June 26, 2015)

[G]ay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really . . . and unwanted children are a major problem for society.

—*Baskin v. Bogan*,
766 F.3d 648, 662 (7th Cir. 2014)

I. INTRODUCTION

Scholars and policy makers alike have largely overlooked the significant role adoptive parenthood has played in LGB¹ family, and ultimately civic, recognition.² States have consistently been creating lesbian, gay, or bisexual (LGB) families over the past several decades by making lesbians and gay men parents. This match of orphans and outlaws has resulted in thousands of loving families; over 65,000 children have been adopted from state care by openly LGB individuals.³ These families have been key “facts on the ground” in the marriage debates, and these adopters, “straightened”⁴ by parenthood, are now being rewarded for their performance of their civic duty. In short, adoption has functioned as a stealth path to marriage equality.

It was not until the last year that this quiet trajectory was finally recognized. Six of the sixteen plaintiff couples in *Obergefell v. Hodges* adopted or fostered children.⁵ One couple, April DeBoer and Jayne Rowse, sought to marry so they could both be legal parents to the four children they adopted from foster care.⁶ They originally

1. I use the term “LGB” to describe people who self-identify as lesbian, gay, or bisexual. The Williams Institute at UCLA, a prominent think tank on sexual orientation and gender identity law and policy, recently adopted this term. See Abbie E. Goldberg et al., *Research Report on LGB-Parent Families*, WILLIAMS INST. 5 (July 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>. I use “policy makers” here to include both legislators and executive-branch actors because both are involved in family policy.

2. See discussion *infra* Part II.B. Tellingly, both adoptive families and LGB-headed families were not included in the census until very recently—both (coincidentally) were first counted in 2000. See PETER CONN, *ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY* 88 (2013); MARY ANN DAVIS, *CHILDREN FOR FAMILIES OR FAMILIES FOR CHILDREN* 115 (Kenneth C. Land ed., 2011).

3. Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, URB. INST. 7 (Mar. 2007), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF> (noting that these are underestimates). There are no precise data on LGB fostering or adoption, but all estimates are likely to undershoot the actual number. E-mail from Gary J. Gates, Williams Distinguished Scholar, Williams Inst., Univ. of Cal., L.A., Sch. of Law, to author (July 1, 2014, 12:17 PM) (on file with author).

4. See ABBIE E. GOLDBERG, *GAY DADS: TRANSITIONS TO ADOPTIVE FATHERHOOD* 169 (2012) (“[S]ome gay men . . . feel that parenthood makes their sexuality less visible.”).

5. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 149 n.74 (2015), http://www.yalelawjournal.org/pdf/Godsoe_PDF_w3e8dk2x.pdf.

6. *DeBoer v. Snyder*, 772 F.3d 388, 423-25 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015). Each woman adopted two children. See Jerry Markon, *Meet the Couples Who Will Be Part of History in the Same-Sex Marriage Battle*, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/politics/meet-the-couples-who-will-be-part-of-history-in-the-same-sex-marriage-battle/2015/01/16/ee4ce490-9dd5-11e4-bcfb-059ec7a93ddc_story.html.

challenged only the Michigan adoption statute precluding joint adoption by unmarried couples, but, at the trial court's suggestion, amended their complaint to include a challenge to the state's same-sex marriage ban.⁷ The women themselves have recently experienced how much more attention marriage garners than parenthood. As Rowse said: "[I]t really blew up when it became gay marriage. When it was just about gay couples adopting people were, like, 'Ehh . . . [.]' But, when it became about gays getting married, people really got interested."⁸

The DeBoer-Rowse trial and, even more so, subsequent briefings in the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court, focused on the "grim . . . plight of foster children" and the shortage of adoptive parents for unwanted children.⁹ These unwanted children include children conceived via "irresponsible procreation," the DeBoer-Rowse opponents' main argument against same-sex marriage.¹⁰ The lower court struck down the marriage ban, specifically praising the couple's "sacrifices" in adopting special needs children.¹¹ Justice Kennedy detailed the DeBoer-Rowse story in his opinion, observing (in somewhat maudlin fashion) that "for them and their children the childhood years will pass all too soon" and praising their desire to seek "the certainty and stability all mothers desire to protect their children."¹²

Drawing on original qualitative research, this Article brings to the fore the neglected trajectory of LGB foster and adoptive parenting and reveals the substantial work adoption has been doing to build families and advance LGB rights.¹³ It argues that a better

7. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388, *rev'd sub nom. Obergefell*, No. 14-556.

8. *INTERVIEW: Jayne Rowse & April DeBoer—The Women Taking On Michigan's Same-Sex Marriage Ban To Protect Their Family*, ECLECTABLOG (Dec. 2, 2013), <http://www.electablog.com/2013/12/interview-jayne-rowse-april-deboer-the-women-taking-on-michigans-same-sex-marriage-ban-to-protect-their-family.html> (ellipsis in original).

9. *DeBoer*, 772 F.3d at 424 (Daughtrey, J., dissenting); *see* Plaintiffs-Appellees' Brief on Appeal at 16, *DeBoer*, 772 F.3d 388 (No. 14-1341).

10. *See, e.g.*, Brief for Michigan Defendants-Appellants at 52, *DeBoer*, 772 F.3d 388 (No. 14-1341).

11. *DeBoer*, 973 F. Supp. 2d at 775.

12. *Obergefell*, slip op. at 25.

13. I surveyed state legislation and attempted legislation on LGB marriage, foster parenting, and public adoption from 1986 through 2015, using select state legislative archives, archival material available online and provided to me by foster care and adoption agencies and advocacy organizations, media accounts from both mainstream and gay media, and secondary historical and sociological accounts. To complete the narrative, I interviewed several expert attorneys from organizations including the American Civil Liberties Union (ACLU), Lambda Legal, the Human Rights Campaign, and the Gay and Lesbian Advocates

understanding of the long history of LGB adoption challenges two key assumptions underlying the marriage debates and, more broadly, family regulation.

First, it debunks the argument that opposition to the recognition of new family forms is driven by what is best for children. Public adoption, or adoption from the foster care system, is the most highly regulated form of parenthood.¹⁴ While forty-three states banned same-sex marriage by constitutional amendment or statute, only seven ever banned foster or adoptive parenting by statute or by unevenly applied agency policy.¹⁵ Rather than arising independently, attempted bans on fostering and adoption have followed same-sex marriage bans.¹⁶ Adoption from foster care is a significant path to parenthood for LGB people; same-sex couples are six times more likely to be foster parents¹⁷ and up to ten times more likely to adopt than opposite-sex couples.¹⁸ Over one quarter of children of LGB couples are adopted or foster children, and adoptive LGB parenthood is increasing rapidly while LGB parenthood overall is declining.¹⁹ Yet scholars have largely ignored the foster care system and the adoption-

and Defenders (GLAD). This information was compiled into a table. Cynthia Godsoe, *Survey of Attempted LGB Foster and Adoption Bans and Same-Sex Marriage Bans* (Nov. 12, 2015) (unpublished manuscript) (on file with author).

14. The process in every state often includes a criminal record check, a home study, interviews, reference checks, prior certification as a foster parent, training, preplacement at visits, and court approval. See JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* app. 1-A (2015), LexisNexis. To be clear, other kinds of LGB parenthood have also played an important part in LGB marriage and familial recognition. I focus on foster parenting and adoption, both because they are state-regulated and because the costs of and barriers to private and international adoption and assisted reproductive technology (ART) render public adoption the most significant nonbiological route to LGB parenthood. See GOLDBERG, *supra* note 4, at 56-57 (discussing the high cost of private and international adoption).

15. See *infra* Figures 1-2. Even in those states banning adoption, LGB people adopted because states admittedly violated their own policies. See, e.g., *Complaint & Praecept* at 7, 20, *Stewart v. Heineman*, No. CI 13-3157 (Neb. Dist. Ct. Lancaster Cty. Sept. 15, 2015), https://www.aclu.org/sites/default/files/field_document/stewart_and_stewart_v._heineman_-_complaint.pdf (explaining that Nebraska's Health and Human Services agency would neither inquire into an applicant's sexual identity nor remove children currently in LGB households).

16. See *infra* Figure 3.

17. Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. 1 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

18. Goldberg et al., *supra* note 1, at 11. The numbers are even higher for single LGB people. *Id.*

19. Lauren Jow, *UCLA's Williams Institute Research Played Role in Historic Same-Sex Marriage Decision*, UCLA NEWSROOM (June 26, 2015), <http://newsroom.ucla.edu/stories/ucla-s-williams-institute-research-played-role-in-historic-same-sex-marriage-decision>; Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, FAM. FOCUS (Nat'l Council on Family Relations, Minneapolis, Minn.), Winter 2011, at F1, F2.

marriage connection, focusing instead on marriage.²⁰ Marriage myopia has also kept policy makers' attention off this long trajectory of LGB adoptive parenthood, while also revealing that their opposition to gay men and lesbians centers largely on sexuality or morality.²¹

Second, the history of LGB adoption undermines the conventional wisdom that marriage should precede parenthood and that it is the key, and perhaps the only, portal to familial and community recognition. Illustrative is Justice Scalia's lament during the *Hollingsworth v. Perry* oral argument that permitting same-sex marriage would lead to LGB adoption.²² He had it backward. Not one state allowed same-sex marriage *before* adoption.²³ This state-sanctioned parenthood now serves as a "gateway" to recognition of adult intimate relationships.²⁴

The lens of adoptive parenthood illustrates the state's interest in rewarding caregiving. Privatizing dependency is a central function of family law.²⁵ Children are the archetypal dependents, and adoption has always operated in large part to minimize state responsibility for them.²⁶ Connecting LGB adoption to a seminal gay rights case,

20. Those discussing LGB parenthood have concentrated on custody cases or second-parent adoptions, adoptions where one parent is the legal parent and that parent's same-sex partner or former partner seeks to become a child's second legal parent. See Annette R. Appell, *Legal Issues in Lesbian and Gay Adoption*, in ADOPTION BY LESBIANS AND GAY MEN 36, 40 (David M. Brodzinsky & Adam Pertman eds., 2012); CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 13 (2012). A handful of scholars have recounted some of the earlier history of LGB fostering and adoption. See, e.g., Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 305 (John D'Emilio et al. eds., 2000) (reviewing the history of LGB parenting in the United States). Recently, a few scholars have looked at the interaction between marriage equality and parenthood more broadly. See, e.g., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016).

21. See discussion *infra* Part III.

22. Transcript of Oral Argument at 19, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

23. Put another way, not one state legislature banned LGB adoption while permitting LGB marriage. See *infra* Figures 1-3; Godsoe, *supra* note 13.

24. This term came from prominent marriage equality advocate Mary Bonauto, who litigated *Goodridge v. Department of Public Health* and argued for the plaintiffs in *Obergefell v. Hodges*. Telephone Interview with Mary Bonauto, Dir., Civil Rights Project, GLAD (July 29, 2014) (describing how LGB fostering and adoption educated the public for the same-sex marriage debates).

25. See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 J. GENDER SOC. POL'Y & L. 347, 363-64 (2012) ("[F]amily law's doctrines, values, and policies . . . all contribute by design to a regime in which the state has virtually no obligation for care-giving and support of vulnerable young members of the population.").

26. See *infra* text accompanying notes 207-218.

Braschi v. Stahl Associates Co., reveals this functional approach to family recognition.²⁷ In both instances, LGB individuals demonstrated “dedication, caring and self-sacrifice” for nonrelatives, either children or, in Miguel Braschi’s case, a terminally ill man.²⁸ Both also invoke the specter of larger societal problems: the current enormous population of children in foster care and the AIDS and homelessness crises of 1980s New York, respectively. Drawing these previously unconsidered parallels highlights the state’s reward for these model caregivers, rewards both tangible, such as adoption subsidies or a rent-controlled apartment, and dignitary.²⁹ In short, parenthood normalizes lesbians and gay men; adoptive parenthood renders them worthy as citizens.

This Article proceeds as follows. Building on a body of recent legal histories, Part II brings in public adoption to complicate standard accounts of family formation.³⁰ It diagrams the universal state practice of allowing LGB people to adopt children before permitting them to marry.³¹

Part III seeks to explain the puzzle of why states considered regulation of adult intimate relationships like marriage more important than the regulation of the parenthood of children who have, by definition, been abused or neglected. It considers three possible factors: sex, money, and settling for second-best. First, the perceived hypersexuality of LGB people has been (mistakenly) equated with a lack of interest in parenthood and family relationships more broadly. Second, fiscal concerns drive adoption. With approximately 400,000

27. 543 N.E.2d 49 (N.Y. 1989). *Braschi* was the first opinion by a highest state court conferring legal recognition on LGB relationships. See *infra* text accompanying notes 342-352.

28. *Braschi*, 543 N.E.2d at 55.

29. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (describing the dignitary harms of same-sex marriage bans).

30. These include histories both of LGB rights and of adoption. See GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 106-11 (2004); ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* (2008); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013); BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* (2002). Although I am indebted to these thoughtful accounts, they either focus primarily on marriage or ignore LGB adoption.

31. This pattern is starkly different than that in European nations. Every European nation allowed same-sex marriage, or a marriage-equivalent, before or at the same time as allowing LGB adoption. See Development, *The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2007-10 (2003).

foster children nationwide, a quarter of whom are awaiting adoption,³² a conservative estimate of the cost of a nationwide ban on LGB foster parents alone is \$78 to \$130 million.³³ Third, the underground grant of LGB parenthood not only puts the lie to the child welfare arguments, but also starkly reveals the devaluation of the most vulnerable children, those in foster care.

Part IV sketches out the implications of this trajectory of LGB family formation. It highlights three characteristics of this on-the-ground process of change: parenthood's private nature, the diffuse and apolitical caseworkers³⁴ and lower court judges according this status of parenthood, and the power of existing families to influence legal change. The low salience of public family law and adoption, often considered deficits, can be beneficial.³⁵ Unlike marriage, adoptive parenthood does not turn on statutes, constitutional amendments, and high-profile cases. Instead it rests on individual caseworker and lower court decisions, often made for pragmatic rather than ideological reasons.³⁶ In short, a street-level bureaucracy such as the foster care system allows for pockets of "give" in the regulation of intimate relationships.³⁷

Lastly, the financial and human costs of undoing families have played a significant role in the staying power of LGB families.³⁸ Tellingly, plaintiffs have introduced evidence of the number of local

32. In the most recent year for which data are available, 108,746 children in foster care were awaiting adoption. U.S. Dep't of Health & Human Servs., *The AFCARS Report*, ADMIN. FOR CHILD. & FAMILIES (2015), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> [hereinafter *AFCARS Report*] (reporting 2014 data). Perennial shortages of adoptive parents mean that most of them will not be adopted.

33. Gates et al., *supra* note 3, at 19.

34. I use the term "caseworker" to include social workers and other state agency staff who place children in foster and adoptive homes.

35. See *infra* notes 268-278 and accompanying text.

36. Indeed, some caseworkers found that political considerations impaired their ability to best perform their duties. See *infra* notes 308-309 and accompanying text.

37. This account builds on theories of the "disaggregated state," a vision of state actors that has received insufficient attention from legal scholars. See, e.g., Patricia J. Woods & Scott W. Barclay, *Cause Lawyers as Legal Innovators with and Against the State: Symbiosis or Opposition?*, 45 *STUD. L. POL. & SOC'Y* 203, 204-06 (2008) (challenging the model of the state as the central decision maker for society and exploring the benefits of a "disaggregated state"). Those studying the process of social change have largely focused on appellate courts and the political process. See *infra* text accompanying notes 261-264. One prominent exception is Heather Gerken, who has described the potential of disaggregated decision making to allow minority groups to exercise power. See Heather K. Gerken, *Dissenting by Deciding*, 57 *STAN. L. REV.* 1745 (2005).

38. See *infra* notes 131-163 and accompanying text.

LGB households in virtually every recent marriage case.³⁹ Beginning in the 1980s with the AIDS-infected “boarder babies,”⁴⁰ states paired two unwanted groups, foster children and gay men and lesbians aspiring to be parents. Recently, courts that have granted same-sex marriage have explicitly recognized these families and their civic service—one even concluded its opinion with the song “Happy Adoption Day.”⁴¹ Once “skim milk,”⁴² these families are now subversive, changing the institutions of marriage and parenthood.⁴³

II. THE UNDERGROUND/ON-THE-GROUND HISTORY OF GAY PARENTHOOD

There is no uniform history of the American family.⁴⁴ Nonetheless, one account has recently dominated both scholarly and policy conversations in the debates over same-sex marriage. This account posits the typical or historic American family as a conjugal marital household with biological children.⁴⁵ Marriage is framed as the key gateway both to parenthood and to full civic membership. LGB unmarried parents, as well as adoption, complicate this account, to an extent not fully acknowledged. As one long-time advocate

39. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir.) (noting that currently almost 3,000 children are being raised in LGB households in Utah), *cert. denied*, 135 S. Ct. 265 (2014) (mem.); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 764 (E.D. Mich.) (noting that currently 5,300 children are being raised by LGB couples in Michigan), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

40. Stephen Margolis et al., *AIDS Children and Child Welfare*, U.S. DEP'T HEALTH & HUM. SERVICES 9 (Mar. 31, 1988), <http://aspe.hhs.gov/sites/default/files/pdf/73771/aidskids.pdf> (defining “boarder baby” as “a child who resides in a medical facility without medical justification”).

41. *Henry v. Himes*, 14 F. Supp. 3d 1036, 1060 n.26 (S.D. Ohio 2014) (including the adoption song), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, No. 14-556; see also *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir.) (recognizing that many LGB couples foster or adopt abandoned children), *cert. denied*, 135 S. Ct. 316 (2014) (mem.). For further discussion, see *infra* notes 353-362 and accompanying text.

42. Justice Ginsburg famously questioned the notion of two levels of marriage, positing that the version offered to same-sex couples was a “skim milk” one, not as rich or beneficial as the version offered to heterosexual couples. Transcript of Oral Argument at 71, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

43. I use the term “subversive” here not in the usual sense of an organized attempt to overthrow the state, but rather to describe individual families whose daily actions challenge, and perhaps indirectly criticize, the family.

44. For several perspectives, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000), and MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

45. Historians have argued that in fact this household is neither typical nor historically dominant. See MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* (2013).

describes it, "What is documented in courts is *very* different than what [local] social workers knew."⁴⁶

A. *The Conventional Account*

1. Opposite-Sex Families

A unit comprised of a married man and woman and their biological children lies at the center of our discourse about family.⁴⁷ This paradigm posits blood ties as the most powerful bond between people. Courts, scholars, and legislators continue to refer to biological families as "natural."⁴⁸ The belief that adopted children could never be treated the same as biological children remains salient.⁴⁹ This story also delineates gendered marital and parenting roles: father as breadwinner and mother as caregiver.⁵⁰

Central to this script is the marriage-parenthood sequence.⁵¹ Although the Supreme Court held decades ago that the longstanding distinction between legitimate and illegitimate children was

46. Telephone Interview with Ellen Kahn, Dir., Children, Youth & Families Program, Human Rights Campaign (July 22, 2014).

47. See *infra* notes 66-77 and accompanying text (citing arguments made about parenthood and conjugal marriage in opposition to same-sex marriage). The Supreme Court has posited marriage as superior even to biology in according a husband fatherhood over a biological (and de facto) father. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

48. See, e.g., MICH. COMP. LAWS § 700.2114(1) (2015) ("[A]n individual is the child of his or her natural parents, regardless of their marital status."); *In re J.L. & R.L.*, 884 A.2d 1072, 1076-77 (D.C. 2005) (distinguishing "natural" biological children from adopted children); see also Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012) (describing the use of this terminology).

49. Historically, adoptive parents sometimes expressed that "[they did] not expect to love or treat this boy or this girl as [they did their] own child[.]" Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1097 (2003); see also *Keegan v. Geraghty*, 101 Ill. 26, 35 (1881) (describing an adopted child as "alien in blood").

50. See Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1226 (2010) ("[T]he intent and effect of the common law of marriage was to subordinate a woman completely to her husband . . ."); David Blankenhorn, *The Good Family Man: Fatherhood and the Pursuit of Happiness in America* 23 (Inst. for Am. Values, Working Paper No. 12, 1991) (criticizing same-sex marriage because it would undermine the "historically inherited and socially important" family gender differences).

51. My focus on marriage and parenthood is not intended to demarcate these relationships as the only valid ones. On the contrary, I agree with numerous commentators that families should be able to define themselves in myriad ways. See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (arguing that married couples should not be granted rights denied to unmarried couples or single persons). Nonetheless, marriage and parenthood remain the only two constitutionally recognized family relationships; as such, they continue to dominate family law and policy.

unconstitutional,⁵² numerous laws and policies continue to prioritize the marital family.⁵³ Many impact the parent-child relationship, including the marital presumption for fathers, welfare and other public assistance programs, and intestacy laws.⁵⁴ This legal preference for marriage before parenthood is bolstered by a waning but still extant societal stigmatization of nonmarital parenthood.⁵⁵

2. Same-Sex Families

The standard account of same-sex families differs from the above, but is also incomplete. The Stonewall uprising in 1969 is widely considered to be the birth of the gay rights movement.⁵⁶ In the ensuing decades, the movement primarily focused on eliminating employment discrimination and decriminalizing lesbian and gay sex, rather than on gaining family relationship rights.⁵⁷ The secondary attention paid to family law issues centered on marriage rather than parenthood.⁵⁸ Marriage received little public, court, or policy attention until the Hawaii Supreme Court surprised almost everyone

52. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

53. To name just a few, marital families have access to healthcare benefits, bankruptcy protections for domestic-support obligations, joint tax filing, and criminal code protections for family members of government officials. *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013); see also CARLOS A. BALL, *SAME-SEX MARRIAGE AND CHILDREN* 25-28 (2014) (outlining the historic disadvantaging of nonmarital children).

54. See COTT, *supra* note 44, at 221-23 (describing how federal marriage and public assistance laws reflect long-standing familial norms); Megan Pendleton, Note, *Intestate Inheritance Claims: Determining a Child's Right To Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823 (2008) (outlining the history of the "presumption of paternity" in the law and how laws have changed as notions of the family have evolved).

55. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011). The priority given marriage varies significantly by class. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

56. LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* 96-99 (2012).

57. *Id.* at 129-45. One early outline of LGB family law issues is typical. It devotes only fourteen pages to marriage and adult LGB relationships, seven to child custody, and three to foster care and adoption, one of which concerns adult adoption. E. CARRINGTON BOGGAN ET AL., *THE RIGHTS OF GAY PEOPLE* 80-107 (Bantam rev. ed. 1983). But see William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 316 (2013) (reporting that the movement's goals before 1989 included "the rights to raise and adopt children").

58. See ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 175-91 (2006). There are, of course, notable exceptions. See, e.g., BALL, *supra* note 20, at 74-75 (depicting a gay man's custody battle with his ex-wife during the 1970s and 1980s); Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 51 (2005) (recognizing that LGB people have been "openly raising children" since the mid-1970s).

on both sides of the gay rights struggle by ruling in favor of same-sex marriage in 1993.⁵⁹ A decade later, after the *Goodridge v. Department of Public Health* decision,⁶⁰ same-sex marriage exploded as the central battle in the “culture wars” between the right and left. Forty-three states, all but three by constitutional amendment, banned same-sex marriage.⁶¹ Many advocates for same-sex marriage, including most famously Ted Olson and David Boies, sought a Supreme Court decision on constitutional grounds as the end goal.⁶²

Although advocates and scholars largely focused on marriage, the number of children being raised by LGB parents was rapidly increasing.⁶³ In earlier decades, the vast majority of children being raised by LGB parents were biological children, usually from prior heterosexual relationships.⁶⁴ Advocates and policy makers addressing parenthood largely focused on custody and second-parent adoption.⁶⁵ Few considered LGB fostering and adoption.

59. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Hawaii subsequently banned same-sex marriage via constitutional amendment. See HAW. CONST. art. I, § 23. The post-*Baehr* backlash was quick and ferocious; as William Eskridge describes it, “The [Traditional Family Values] movement feasted on the possibility of Hawaii same-sex marriage like a lion on a gazelle.” William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 474 (2001). Prior to this time, a handful of enterprising couples attempted to marry, but were immediately rebuffed, and some advocates debated marriage, but it was not a priority. KLARMAN, *supra* note 30, at 18-22.

60. See 798 N.E.2d 941 (Mass. 2003).

61. See *infra* Figure 1; see also *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), <http://pewforum.org/2015/06/26/same-sex-marriage-state-by-state/> (providing a timeline of state policies on same-sex marriage starting in 1995). This does not include states such as New York that banned marriage by court decision.

62. See Margaret Talbot, *A Risky Proposal: Is It Too Soon To Petition the Supreme Court on Gay Marriage?*, NEW YORKER (Jan. 18, 2010), <http://www.newyorker.com/magazine/2010/01/18/a-risky-proposal>.

63. See WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 5 (2002) (describing how “marriage became the situs for cutting-edge gaylegal [sic] reform”). In 2010, approximately 115,000 same-sex couples reported having children. Daphne Lofquist, *Same-Sex Couple Households*, U.S. CENSUS BUREAU 2 (Sept. 2011), <https://www.census.gov/prod/2011pubs/acsbr10-03.pdf>. As to the increase, see GOLDBERG, *supra* note 4, at 8, citing estimates that in 1990, one in twenty male gay couples and one in five female gay couples were raising children, while in 2000 these numbers had risen to one in five male gay couples and one in three female gay couples.

64. See, e.g., BALL, *supra* note 20, at 30-31; DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, AND THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II* 30-31 (2013) (recounting the experience of LGB individuals with biological children in the 1950s and 1960s).

65. For older and more recent examples, see Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976), and Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009), respectively.

Despite this lack of focus on parenthood itself, opponents of same-sex marriage have framed virtually all their arguments around the marriage-parenthood connection, arguing that expanding marriage will harm children.⁶⁶ These arguments continued to be pressed in recent state and federal cases, despite being disproven by research.⁶⁷ They take several forms. First is the general argument that children in LGB families fare worse than those raised by married biological parents.⁶⁸ This argument is largely conflated with the argument that children with two, particularly two married, parents are better off than those with only one.⁶⁹

Another frequent argument is that, because men and women are different, only an opposite-sex duo can properly parent both boys and girls.⁷⁰ This argument takes as essential the modeling of traditional

66. See, e.g., Respondent's Brief in Support of Petition for Writ of Certiorari at 27, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-571), *rev'd sub nom.* *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015) ("Men and women are different . . . and having both a man and a woman as part of a parenting team could . . . be thought to be a good idea."); *id.* at 28 ("[M]others and fathers provide different benefits . . . to children."); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005) ("Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision."). Proponents of same-sex marriage have also centered their arguments on children, to some critique. I focus here on opponents, however, to illuminate the tension between their position on marriage and their silence or tacit support of LGB adoption. Relatedly, I do not engage with the arguments' empirical validity, which has been discredited, but rather their use by policy makers and advocates. See Cynthia Godsoe, *Marriage Equality and the "New" Maternalism*, 6 CALIF. L. REV. CIR. 145 (2015), http://www.californialawreview.org/wp-content/uploads/2015/11/Godsoe_Marriage_Equality_New_Maternalism.pdf (outlining this discredit).

67. See *infra* notes 240-256 and accompanying text.

68. See Respondent's Brief in Support of Petition for Writ of Certiorari, *supra* note 66; Amicus Curiae Brief of Manhattan Declaration in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 9, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (citing the now discredited research of Mark Regnerus).

69. See, e.g., Amici Curiae Brief of Robert P. George et al. in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 11-15, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) ("[T]he family structure that helps children the most is a family headed by two biological parents . . ."). This argument was also made by amici in other recent same-sex marriage cases. Brief of Amici Curiae United States Conference of Catholic Bishops et al. in Support of Defendants-Appellants & Supporting Reversal at 15, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.) (No. 13-4178), *cert. denied*, 135 S. Ct. 265 (2014) (mem.) ("[S]ocial pathologies bear a strong statistical correlation with child-rearing in family structures other than the stable husband-wife marital home with both biological parents . . .").

70. See Respondent's Brief in Support of Petition for Writ of Certiorari, *supra* note 66; Amicus Brief of the State of Michigan in Support of Petitioners at 8, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) ("Women and men bring undeniably unique gifts to parenting, gifts that are different and complementary.").

gender roles in the home.⁷¹ The Minnesota Supreme Court, the first high court to consider same-sex marriage, expressed this concern: “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”⁷² Similarly, the New York Court of Appeals more recently upheld a same-sex marriage ban, stating, “Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”⁷³ State defendants and amici continued to oppose same-sex marriage on this basis leading up to the Supreme Court’s decision in *Obergefell*.⁷⁴

Defenders of same-sex marriage bans in the most recent cases frequently relied on the “irresponsible procreation” argument.⁷⁵ This argument goes as follows: heterosexual couples are the only ones who can produce children unintentionally; accordingly, marriage is necessary in order to channel heterosexual partners, particularly men, into caring for their children once they have an “accident.”⁷⁶ As commentators have pointed out, this argument is out of step with the arguments outlined above, which posit that same-sex marriage may

71. Amici Curiae Brief of Robert P. George et al. in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal, *supra* note 69, at 22 (“The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being”); *see also* Brief of Amici Curiae United States Conference of Catholic Bishops et al. in Support of Defendants-Appellants & Supporting Reversal, *supra* note 69, at 17 (opposing same-sex marriage because “children need both a mother and father [and] men and women on average bring different gifts to the parenting enterprise” (quoting Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 263 (2011))).

72. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

73. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

74. *See, e.g.*, sources cited *supra* note 66; *see also* Brief in Opposition, *Tanco v. Haslam*, No. 14-562 (U.S. Jan. 16, 2015) (arguing that children need both a mother and a father); Brief of Amici Curiae 76 Scholars of Marriage Supporting Review & Affirmance, *DeBoer v. Snyder*, No. 14-556 (U.S. Jan. 16, 2015) (same).

75. *See, e.g.*, Reply Brief for Petitioners, *Bourke v. Beshear*, No. 14-574 (U.S. Jan. 16, 2015) (arguing that heterosexual marriage is necessary to promote couples raising their biological children); Brief in Response to Petition for Writ of Certiorari, *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015) (same); *supra* text accompanying note 10 (discussing the state’s argument in *DeBoer*).

76. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting) (“[A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood.”); *see also supra* text accompanying note 10 (describing the use of this argument in recent Supreme Court marriage litigation).

harm children.⁷⁷ Indeed, it pays a “backhanded compliment” to LGB people, who are, by biological necessity, intentional parents.

B. A Revised Account

1. Kinship, Not Biology

Adoption has always been considered a “second best” route to parenthood.⁷⁸ Accordingly, it has been largely ignored by policy makers.⁷⁹ Compounding this is adoption’s secret nature. Throughout most of the twentieth century, adoptions were “closed,” with children and biological parents alike unable to discover each others’ identities.⁸⁰ New birth certificates listing the adoptive parents literally erased the past.⁸¹ The “matching” process characterizing adoption until at least the 1970s also assimilated adoptive families into the mainstream. Matched racially, ethnically, religiously, and even intellectually, adopted children were, in successful cases, indistinguishable from biological children.⁸² In this fashion, the state has endorsed many new types of families, albeit *sub rosa*.

This secretive paradigm conceals adoption’s long history.⁸³ Adoptions occurred from the earliest days of the colonies via private bill, indenture, or informal transfer.⁸⁴ Adoption has always been more widely used in the United States than in Europe.⁸⁵ Massachusetts

77. See Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 25 (2009) (“In the accidental procreationist view, gay people are simply incapable of making rash or foolish decisions, at least when it comes to having kids.”).

78. MELOSH, *supra* note 30, at 52 (arguing that this is so because the adoption model “accepts blood as the only authentic medium of affinity”).

79. For instance, Washington D.C. enacted an adoption statute in 1895 and comprehensively amended it in 1937 and 1954. Yet only in 1895 did any legislator speak on the record about the bill, and legislators never discussed who was permitted to adopt under the statute. See *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (outlining this history).

80. See MELOSH, *supra* note 30, at 202.

81. *Id.* at 109, 202.

82. *Id.* at 51-54, 69-76, 102.

83. See CONN, *supra* note 2, at 24-64.

84. See MELOSH, *supra* note 30, at 15 (calling indenture an “established form[] of . . . child exchange”); Cahn, *supra* note 49, at 1107-10 (noting that informal adoption “appears to have been fairly common even before 1851”). Adoptions by private bill were not uncommon; for instance, in Massachusetts, 101 private adoptions occurred between 1781 and 1851. GROSSBERG, *supra* note 44 at 269-70.

85. For instance, adoption was generally used in Britain only to secure the inheritance of property, rather than for the more child protective purposes adoption has served in the United States. See GROSSBERG, *supra* note 44, at 269.

enacted the first adoption statute in 1851,⁸⁶ while Britain did not enact an adoption statute until well into the twentieth century.⁸⁷ Indeed, experts describe adoption as uniquely American in its “embod[iment of] the recklessly optimistic faith in self-construction and social engineering that characterizes much of our history.”⁸⁸

Domestic adoption gained great popularity in the 1930s, peaking in 1970 with 175,000 adoptions.⁸⁹ State and federal governments do not merely sanction adoption; they actively encourage it through numerous policies and funding incentives.⁹⁰ This is particularly true of foster parenting and public adoption. In contrast to other forms of parenthood, adoption requires a home investigation and a court order, embodying “the state’s definition of good parents.”⁹¹ Nonetheless, the growing need for parents has also meant that there are virtually no categorical restrictions on who can adopt.⁹² As of 2010, over 1.5 million children lived with adoptive parents.⁹³

Adoption has consistently been viewed as a civic virtue and even a duty.⁹⁴ Historians have noted that in earlier eras, women were called

86. See Cahn, *supra* note 49, at 1080 (tracing the “origins of modern adoption” to the 1851 Massachusetts statute). For the complete text of the Massachusetts statute, see *Massachusetts Adoption of Children Act, 1851*, ADOPTION HIST. PROJECT, <http://pages.uoregon.edu/adoption/archive/MassACA.htm> (last visited Nov. 6, 2015).

87. *Overview of English Adoption Law*, CTR. FOR ADOPTION POL’Y, <http://www.adoptionpolicy.org/pdf/eu-england.pdf> (last visited Oct. 25, 2015).

88. MELOSH, *supra* note 30, at 10; see also 2 ARTHUR W. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY: FROM COLONIAL TIMES TO THE PRESENT* 144–45 (1918) (describing the surprise of foreigners, including that of historian Alexis de Tocqueville, at the ease of adoption in the United States).

89. CONN, *supra* note 2, at 88.

90. Federal law mandates adoption as the most appropriate permanent placement for children who cannot remain with their birth families. 42 U.S.C. § 671(a)(15)(C) (2012); see also 26 U.S.C. § 23 (granting tax credit for “qualified adoption expenses”); *id.* §§ 137, 151–152 (providing additional tax incentives for expenses incurred during an adoption); Internal Rev. Serv., *Publication 502: Medical and Dental Expenses*, HEALTH SAVINGS ACCOUNTS RESOURCES 4 (2012), https://www.hsaresources.com/pdf/IRS_Pub_502.pdf (explaining that an adopted child is considered the same “as your own child” for federal tax benefits as concerning medical and dental expenses).

91. June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 376 (2006) (quoting Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 L. & SOC’Y REV. 813, 814 (2002) (book review)). This distinguishes adoption from biological and ART parenthood.

92. See *Lofton v. Sec’y of the Dep’t of Children & Family Servs. (Lofton II)*, 377 F.3d 1275, 1301 (11th Cir. 2004) (Anderson, J., dissenting) (remarking that Florida does not ban “[c]hild abusers, terrorists, drug dealers, rapists and murderers” from adopting). This wide net of potential parents further delegitimizes bans on LGB parents.

93. Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 2 (Apr. 2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

94. SARAH POTTER, *EVERYBODY ELSE: ADOPTION AND THE POLITICS OF DOMESTIC DIVERSITY IN POSTWAR AMERICA* 163 (2014). In the early twentieth century, “[a]doption and

upon to fulfill their patriotic duty through motherhood and other caregiving, rather than through voting or other public-sphere activity.⁹⁵ In the first half of the twentieth century, infertile, middle-class women were encouraged to adopt to simultaneously reduce the number of homeless children and overcome the stereotype of the childless woman stereotype as selfish and unpatriotic: “[I]f adoptive mothers could not claim status as real mothers, they could at least receive credit as superior citizens.”⁹⁶ Indeed, Progressive reformers placed adoptive mothers, at least rhetorically, at the pinnacle of morality: “The mother who takes into her heart her own children may be a very ordinary woman, but [she] who takes into her heart the children of others, she is one of God’s mothers.”⁹⁷

Although adoption was less explicitly connected to patriotism after World War II, caseworkers and aspiring adopters continued to link civic participation with parenthood.⁹⁸ This vision persists today, although in even more muted form. Adoptive families and caseworkers still cite civic obligation as a motivation.⁹⁹ This is particularly true in certain communities. For instance, some African-Americans believe that they should adopt because of the disproportionate number of African-American children in foster

foster care were depicted as extensions of women’s civic housekeeping duties, with potential mothers portrayed as rescuers of needy children.” *Id.*

95. For an outline of women’s civic duty to procreate and raise future citizens, see Theda Skocpol’s classic *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

96. Julie Berebitsky, *Redefining “Real” Motherhood: Representations of Adoptive Mothers, 1900-1950*, in *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND CULTURE* 83, 86 (Marianne Novy ed., 2001); see also PATRICIA SUSAN HART, *A HOME FOR EVERY CHILD* 111 (2010) (relating that adoptive mothers could attain “a state of grace and civic duty”).

97. HART, *supra* note 96, at 106 (quoting a 1906 publication). The concept of civic virtue has religious roots, and historically adoption was viewed as both a patriotic act and a blessing. A significant part of the adoption movement still consists of religiously inspired groups. See KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* (2013). This connection may have contributed to the success story of LGB adoption.

98. POTTER, *supra* note 94, at 160 (noting the shift from an emphasis on morality to civic activism).

99. See, e.g., Darcie Moran, *West Michigan Groups Shine Light on Older Foster Care Children During National Adoption Month*, MLIVE.COM, http://www.mlive.com/news/grand-rapids/index.ssf/2014/11/west_michigan_groups_shine_lig.html (last updated Nov. 26, 2014, 9:54 AM) (quoting one adoption agency founder as saying that “[i]t’s our civic duty to not let [foster] children down”).

care.¹⁰⁰ Civic activism also continues to destigmatize nonbiological families.¹⁰¹

Relatedly, adoption has been posited as the solution to a series of social problems. Various, these include heirless families in the colonial period;¹⁰² the masses of homeless, usually immigrant children in the mid-to-late 1800s “requiring” Americanization;¹⁰³ half-American children born abroad, particularly in Korea and Vietnam;¹⁰⁴ racial segregation;¹⁰⁵ and the large number of children currently in foster care.¹⁰⁶ Even a Supreme Court Justice has recognized adoption’s problem-solving potential, positing it as “an important solution” to illegitimacy.¹⁰⁷ Accordingly, adoption has long been a story of “upward mobility”: children from low-income and often racial or ethnic minority families are removed and placed with more affluent and/or Caucasian parents.¹⁰⁸

This paradigm, however, obscures the extent to which adoption simultaneously has pushed the boundaries of the family. Most obviously, it legitimated families who were not blood related,¹⁰⁹ but it has also undercut patriarchy by permitting the transfer of parental rights, expanding concepts of motherhood, and sanctioning single parenthood and nonmarital coparenthood.¹¹⁰ From the 1970s on,

100. See Azzizi Powell, *African American Perceptions of Adoption*, PACT (1997), <https://www.pactadopt.org/app/servlet/documentapp.DisplayDocument?DocID=53>.

101. See POTTER, *supra* note 94, at 162 (noting that “civic activism” has been associated “with increased respectability and suitability for adoptive or foster parenthood”).

102. GROSSBERG, *supra* note 44.

103. See Julie Berebitsky, *Rescue a Child and Save the Nation*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 124, 128 (E. Wayne Carp ed., 2002).

104. See Arissa Hyun Jung Oh, *Into the Arms of America: The Korean Roots of International Adoption* (Aug. 2008) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago); David Lamb, *Children of the Vietnam War*, SMITHSONIAN MAG. (June 2009), <http://www.smithsonianmag.com/people-places/children-of-the-vietnam-war-131207347/?no-ist>.

105. Political philosopher Shelley Burt, for instance, argues that American families help the nation by forming multiracial families through international adoption. Shelley Burt, Exec. Dir., Camphill Found., Speech at the Florida State University Department of Philosophy’s Conference on Virtue and Social Diversity (Mar. 3, 2007).

106. See Gates et al., *supra* note 3, at 1.

107. *Caban v. Mohammed*, 441 U.S. 380, 402 n.2 (1979) (Stevens, J., dissenting).

108. See Cahn, *supra* note 49, at 1089.

109. See U.N. Dep’t of Econ. & Soc. Affairs, *Child Adoption: Trends and Policies*, UNITED NATIONS 14 (2009), http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf (reporting that adoption was not recognized at common law because of the British obsession with “blood ties”).

110. See Berebitsky, *supra* note 103, at 124 (noting that adoption expanded the definition of motherhood). *But see* JULIE BEREBITSKY, *LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851-1950*, at 163-64 (2000) (arguing that

transracial and international adoptions became quite common.¹¹¹ Beginning in the 1980s, as outlined further below, increasing numbers of LGB adults adopted.¹¹² These new types of families often could not pass as biologically related. Although this fact rendered these adoptions less secret than historic ones, the lack of attention paid to adoption, as well as its diffuse decision makers, helped to keep these expanded conceptions of kinship out of the public eye and political battles until thousands of families had been formed.¹¹³

Finally, the conventional account of family formation overestimates parenthood's linkage to marriage.¹¹⁴ Most adoption statutes are, and have always been, silent on the issue of who could adopt.¹¹⁵ No state laws before the 1950s prohibited adoption by single people or unmarried couples, and these two groups did adopt children.¹¹⁶ For instance, in Massachusetts, the high court noted, "Children in earlier times . . . were often adopted into 'non-standard' families."¹¹⁷ Single women in particular were praised as adoptive parents as early as the nineteenth century, and following World War II,

although adoption created nonnormative families in the early twentieth century, it became more conformist in the 1950s).

111. HERMAN, *supra* note 30, at 252. The boundary-erasing potential of adoption has led some to compare regulation of gay families to interracial families and point out telling similarities. See Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733 (2008).

112. Ball, *supra* note 111, at 2753.

113. See Alison Laura Gash, *Below the Radar: How Silence Saves Civil Rights* (2010) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

114. For instance, one prominent critic of same-sex marriage has argued that the state should "[p]reserv[e] the [m]arriage-[c]hildrearing [l]ink" in the adoption context, ignoring the long history of adoption by single parents. Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 *J.L. & FAM. STUD.* 345, 375 (2003).

115. See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837, 842 (D.C. 1995) (noting that the D.C. statute "expressly authorizes adoptions by '[a]ny person,' without limitation" (quoting D.C. CODE § 16-302 (1989))); *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993) (noting that the Massachusetts adoption statute did not "limit the potential categories of persons" who could adopt, instead using "general language to define who may adopt").

116. Robert M. Horowitz & Hiromi Maruyama, *Legal Issues*, in *ISSUES IN GAY AND LESBIAN ADOPTION: PROCEEDINGS OF THE FOURTH ANNUAL PEIRCE-WARWICK ADOPTION SYMPOSIUM* 11, 11 (Ann Sullivan ed., 1995) (reporting that most states define "adoptive parent" as any adult). Typical is California, whose supreme court recently noted that state law had "always permitted adoption without regard to the marital status of prospective adoptive parents." *Sharon S. v. Superior Court of San Diego Cty.*, 73 P.3d 554, 565 (Cal. 2003).

117. *Tammy*, 619 N.E.2d at 319 n.4 (listing nineteenth- and early twentieth-century cases of adoption by single women, single men, and female cousins).

some states began to actively recruit them.¹¹⁸ Today about a third of adoptions are by single adults.¹¹⁹

2. Parenthood First

Significant public and legislative attention has been paid to same-sex marriage and, to a lesser extent, second-parent adoptions and parenthood via assisted reproductive technology (ART).¹²⁰ LGB foster parenting and adoption in the child protection system, however, has remained largely below the radar. Yet this type of family formation has been occurring for decades, long before same-sex marriage was a possibility, and has served as a meaningful avenue to parenthood for gay men and lesbians.¹²¹

Historical accounts do not generally discuss LGB adoption before the 1970s for the simple reason that homosexuality was still criminalized and few people were “out.”¹²² Several historians, however, have reported instances of women cohabiting and raising children together, women who were likely romantically involved.¹²³ Adoption changed dramatically after World War II for reasons including the availability of birth control, the opening up of international adoption, the legalization of abortion, and the crack epidemic. As a result, a larger number of noninfant and non-

118. See MELOSH, *supra* note 30, at 17-18, 107-08. But see BEREBITSKY, *supra* note 110, at 116 (discussing criticisms of single mothers as adoptive parents throughout the last century).

119. Leslie Cooper & Paul Cates, *Too High a Price: The Case Against Restricting Gay Parenting*, ACLU 86 (2006), https://www.aclu.org/files/images/asset_upload_file480_27496.pdf.

120. The path to second-parent adoptions bears some similarities to same-sex marriage, in that the practice was often accomplished via impact litigation and high court opinions. Telephone Interview with Jennifer Pizer, Nat'l Dir., Law & Policy Project, Lambda Legal (Aug. 6, 2014).

121. See BALL, *supra* note 53, at 3 (“[B]y the early 1990s, a growing number of lesbians and gay men in [certain regions] of the country . . . began adopting children, while others started serving as foster parents.”); Adam Pertman & Jeanne Howard, *Emerging Diversity in Family Life: Adoption by Gay and Lesbian Parents*, in ADOPTION BY LESBIANS AND GAY MEN, *supra* note 20, at 20, 26 (citing research, observing that “adoptions by lesbians and gays have been steadily increasing for decades”). Notably, an adoption expert testified in 1996 that “[same-sex couples are] adopting children now. They’re doing a good job of it.” Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *14 (Haw. Cir. Ct. Dec. 3, 1996).

122. See Cynthia Russett, *American Adoption: A Brief History*, in ADOPTION BY LESBIANS AND GAY MEN, *supra* note 20, at 9, 13 (“Gay and lesbian people have always raised children, but until fairly recently did so quietly . . .”).

123. HERMAN, *supra* note 30, at 90-91 (documenting the illustrative case of Jessie Taft and her “life partner” Virginia Robinson, who cohabitated and raised adopted children together in the 1920s); Russett, *supra* note 122, at 10 (reporting that these “Boston marriages” were “common and accepted” from the late nineteenth century through the 1920s).

Caucasian children were available, and parents, including single parents or unmarried couples, were increasingly in demand.¹²⁴ Reflecting this open recruitment, the 1969 version of the Uniform Adoption Act specifically provided that “an unmarried adult” could adopt and did not exclude LGB people from consideration.¹²⁵ There are some documented cases of gay men and lesbians fostering and adopting during this time.¹²⁶ Many more undoubtedly did so quietly.

The earliest foster placements with openly LGB parents occurred in the early 1970s, when a handful of jurisdictions placed teens “with homosexual tendencies” whom no one else would take.¹²⁷ Some were explicitly court-approved.¹²⁸ Openly gay individuals also began to adopt in the late 1970s and early 1980s, although many adopters did not reveal their sexual orientations.¹²⁹ The AIDS crisis prompted numerous city agencies to proactively seek out LGB foster and adoptive parents as uniquely qualified to care for babies with AIDS, or the only ones willing to do so.¹³⁰

Foster parenting and adoption by openly LGB individuals created a backlash in a handful of states.¹³¹ Only Florida and New Hampshire, however, explicitly banned the practice,¹³² with two other states, New Jersey and Massachusetts, settling and permitting these placements.¹³³ The practice quietly continued nationally. By 1991, a

124. Russett, *supra* note 122, at 10-12.

125. UNIF. ADOPTION ACT § 3.2 (UNIF. LAW COMM’N, amended 1971).

126. See RIVERS, *supra* note 64, at 181; Telephone Interview with Mary Bonauto, *supra* note 24 (noting that caseworkers placed children with LGB parents despite unwritten or written policies prohibiting it).

127. D. MERLEE CLUNIS & G. DORSEY GREEN, *THE LESBIAN PARENTING BOOK: A GUIDE TO CREATING FAMILIES AND RAISING CHILDREN* 30 (2d ed. 2003); BALL, *supra* note 20, at 144-45 (describing this practice in New York City, Chicago, Los Angeles, and Minneapolis).

128. Memorandum in Support of Reversal of Department’s Decision To Remove Foster Children at 4, *Babets v. Governor of Mass.*, No. 81083 (Mass. Super. Ct. Suffolk Cty. Sept. 11, 1986).

129. RIVERS, *supra* note 64, at 183. This was often due to explicit agency requests not to know. *Id.* at 181.

130. Telephone Interview with Ellen Kahn, *supra* note 46; see also Margolis et al., *supra* note 40, at 9-10, 14 (documenting the difficulty of finding foster parents to care for AIDS-infected infants).

131. Telephone Interview with Mary Bonauto, *supra* note 24; *The GLAD Docket*, GLAD BRIEFS (Gay & Lesbian Advocates & Defs., Boston, Mass.), Spring 1986, at 1, 1. Even in these cases, policy makers only took a position when the media fueled public reaction; LGB foster care and adoption “were no secret” to executive decision makers. WENDELL RICKETTS, *LESBIANS AND GAY MEN AS FOSTER PARENTS* 44 (1990).

132. GERALD P. MALLON, *GAY MEN CHOOSING PARENTHOOD* 9 (2004).

133. New Jersey adopted the nation’s first nondiscrimination policy in 1997. Press Release, Nat’l Gay & Lesbian Task Force, Task Force Applauds N.J. Gay & Lesbian Adoption

national child welfare agency reported, "All across the country, tens of thousands of lesbians and gay men are already providing homes for many of America's foster children."¹³⁴ Other experts noted that in some places, LGB adoptions were "becoming common."¹³⁵

Foster care and public adoption have long been significant routes to LGB parenthood, considerably more so than for opposite-sex couples.¹³⁶ Thirteen percent of children in same-sex couple households are adopted, versus 3% for opposite-sex couple households.¹³⁷ Same-sex couples are six times more likely to foster parent and four-and-a-half to ten times more likely to adopt than opposite-sex couples.¹³⁸ Self-identified LGB people are currently fostering over 14,100 children and have adopted at least 65,000 children from foster care.¹³⁹ This accounts for 6% of foster children in nonkin care and over 4% of all adopted children in the United States.¹⁴⁰ LGB people also express a greater desire to adopt—one expert recently estimated that over half of LGB adults would consider adoption, versus 37% of non-LGB adults.¹⁴¹ As of 2009, almost 20% of the LGB households with children in the United States included an adopted child.¹⁴²

This data further demonstrates the disruption of the marriage-parenthood sequence. Many LGB couples have fostered or adopted jointly. Although the majority of LGB people adopting from foster

Settlement; Predicts Family Issues To Be a Hot Topic in 1998 (Dec. 18, 1997) (on file with author). Massachusetts agreed to have no categorical exclusions and to focus on the best interests of the child. Press Release, Mass. Office of Human Servs., Agreement Reached in Foster Care Placement Lawsuit (Apr. 4, 1990) (on file with author).

134. RICKETTS, *supra* note 131, at 1; *see also* EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 133 (1990) ("Although no statistical information is available, anecdotal reports suggest that adoptions and foster care by gay men and lesbians are not uncommon.").

135. Bob Knotts, *Lawsuit Seeks To Overturn Ban on Adoption by Gays*, SUN SENTINEL (June 3, 1992), http://articles.sun-sentinel.com/1992-06-03/news/9202120520_1_adoptive-parents-lesbian-task-force-lesbian-adoptions; *see also* MALLON, *supra* note 132, at 24-33 (reporting that foster care and adoption by gay men rose after the 1980s).

136. *See supra* notes 17-19 and accompanying text.

137. Gates, *supra* note 17, at 3.

138. *Id.*; Goldberg et al., *supra* note 1, at 11.

139. Gates et al., *supra* note 3, at 7, 15.

140. *Id.* at 11, 15.

141. *See* Press Release, Williams Inst., Univ. Cal., L.A., Sch. of Law, New Williams Institute Analysis Shows Negative Impacts to Florida Budget of "Conscience Protection" Law (Apr. 7, 2015), <http://williamsinstitute.law.ucla.edu/press/press-releases/new-williams-institute-analysis-shows-negative-impacts-to-florida-budget-of-conscience-protection-law/>.

142. Gates, *supra* note 19, at F2. This estimate includes second-parent adoptions.

care have done so as single people,¹⁴³ single foster and adoptive parents often live with their same-sex partners and, as with all foster homes and adoptions, any adults in the home have to be investigated and approved.¹⁴⁴

My second descriptive claim about LGB families is that, despite their growing prevalence, LGB fostering and adoption never attracted much attention from policy makers or the public.¹⁴⁵ The vast majority of state laws are now, and have always been, silent on the issue.¹⁴⁶ As Figures 1 and 2 demonstrate, forty-three states banned same-sex marriage by statute or constitutional amendment;¹⁴⁷ only seven states ever explicitly banned LGB foster parenting or adoption, three of those merely by unevenly applied agency policy, with one more state banning unmarried couples (all LGB couples at the time) from adopting.¹⁴⁸ No state banned LGB adoption by constitutional amendment. Most bans focused only on couples; single LGB people have long been permitted to adopt in every state except Florida, where they are now also able to adopt.¹⁴⁹ Even in the handful of states

143. See DAVIS, *supra* note 2, at 112 (noting that LGB people “can easily adopt as single parents”). The availability of second-parent adoption in many states means that the second partner can often adopt shortly after the first, closely approximating joint adoption.

144. See HOLLINGER, *supra* note 14, app. 1-A.

145. See Gash, *supra* note 113, at 2; see also *infra* text accompanying notes 151-152, 298 (noting that when states did address LGB fostering and adoption, it almost always followed an LGB marriage decision or related publicity).

146. See Cooper & Cates, *supra* note 119, at 3 (“[M]ost states do not have any specific rules about any aspect of parenting by lesbians and gay men.”); Movement Advancement Project et al., *LGBT Foster and Adoptive Families: Finding Children Forever Homes*, MOVEMENT ADVANCEMENT PROJECT 4 (June 2012), <http://www.lgbtmap.org/file/finding-children-forever-homes.pdf>.

147. See *infra* Figure 1.

148. See *infra* Figure 2. Mississippi has banned both LGB couples and unmarried couples from adopting, but does not ban LGB singles from doing so. See MISS. CODE § 93-17-3(5) (2015). Utah also banned only unmarried couples, not LGB singles. As of October 2014, Utah has allowed LGB married couples to foster and adopt, a move that child welfare officials in the state openly welcomed. See Marjorie Cortez, *Changing Landscape: Same-Sex Couples Among Utah's Newest Foster Parents*, DESERET NEWS (July 12, 2015, 8:05 PM), <http://www.deseretnews.com/article/865632457/Changing-landscape-Same-sex-couples-among-Utahs-newest-foster-parents.html?pg=all> (quoting the Director of the Utah Division of Child and Family Services as lamenting that the ban required them to decline potential parents who “in every other way [were] qualified . . . compassionate[,] loving and caring”). Mississippi has the last remaining LGB adoption ban (only on couples), and that ban is currently being challenged. See Complaint for Declaratory and Injunctive Relief at 3, Campaign for S. Equality v. Mississippi (No. 3:15cv578DPJ-FKB); Jimmie E. Gates, *Same-Sex Adoption Ban Challenged*, CLARION-LEDGER (Nov. 6, 2015, 10:25 PM), <http://www.clarionledger.com/story/news/2015/11/06/miss-same-sex-adoption-ban-challenge/75293888>.

149. For instance, in 2000, Mississippi banned LGB couples and other unmarried couples from adopting, but it never banned LGB single people from doing so. See MISS. CODE § 93-17-3(5) (2000). Florida is widely considered to be an outlier because the ban

banning the practice, gay men and women *still* fostered and adopted because states admitted to violating their own laws or policies.¹⁵⁰ Tellingly, more states prohibit discrimination on the basis of sexual orientation in foster care and adoption than have ever banned LGB people from foster parenting or adopting.¹⁵¹

Not one state allowed same-sex marriage before permitting adoption and foster parenting by LGB people.¹⁵² Indeed, numerous plaintiffs in recent same-sex marriage litigation have fostered or adopted children together.¹⁵³ Public opinion also reflects this pattern: polls consistently show higher levels of support for LGB adoption than same-sex marriage.¹⁵⁴

there resulted from an intense homophobic campaign by the former celebrity Anita Bryant. The ban was overturned by an intermediate appellate court in 2010. See Eskridge, *supra* note 57. Florida officials had previously admitted to violating the ban in practice and declined to appeal the ruling. *Id.* In 2015, the ban was officially repealed. Mitch Perry, *Rick Scott Signs Bill that Repeals Gay-Adoption Ban in Florida*, FLA. POL. (June 11, 2015), <http://florida.politics.com/archives/184793-rick-scott-signs-bill-that-repeals-gay-adoption-ban-in-florida>.

150. For instance, Nebraska allowed children to remain with existing foster and preadoptive parents and “knowingly approved” new homes despite its policy. Complaint & Praecept, *supra* note 15, at 7, 20. The same is true of the brief ban in California. See *infra* note 308 and accompanying text.

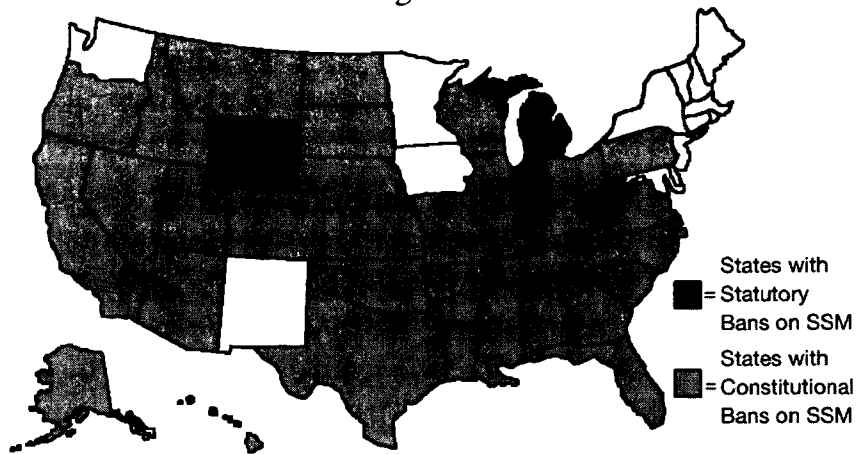
151. Teija Sudol, *LGBT Adoptive and Foster Parenting*, HUNTER C. SCH. SOC. WORK (Oct. 2010), http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/download/TSudol_LGBT%20Issues_InfoPacket.pdf. At least twenty-one states and Washington D.C. ban sexual orientation discrimination more broadly. *Equality from State to State 2013: A Review of State Legislation Affecting the Lesbian, Gay, Bisexual and Transgender Community and a Look Ahead in 2014*, HUM. RTS. CAMPAIGN (2013), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/equalitystatetostate_2013.pdf.

152. Only New Hampshire and Nebraska explicitly banned foster care and adoption by LGB people before banning marriage. See Clay Wirestone, *In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting*, CONCORD MONITOR (June 29, 2013), <http://www.concordmonitor.com/home/5368435-95/for-new-hampshire-a-journey-from-banning-gay-adoption-to-backing-gay-nuptials> (explaining how New Hampshire banned LGB adoption in 1987 before it banned same-sex marriage); Complaint & Praecept, *supra* note 15 (outlining a Nebraska administrative agency’s policy not to place children in same-sex households starting in 1995). Neither state, however, allowed same-sex marriage at the time of their bans.

153. See Godsoe, *supra* note 5 (describing the *Obergefell* plaintiffs); see also Oral Argument at 12:35, 15:36, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) (Nos. 14-2386, 14-2387, 14-2388, 14-2526), *cert. denied*, 135 S. Ct. 316 (2014) (mem.), <https://soundcloud.com/freedom-to-marry/7th-circuit-oral-argument-baskin-v-bogan> [hereinafter *Baskin* Oral Argument] (stating that two plaintiffs are licensed foster parents); Erik Eckholm, *Judge Says Ohio Must Recognize Same-Sex Marriages Performed Out of State*, N.Y. TIMES (Apr. 4, 2014), <http://www.nytimes.com/2014/04/05/us/judge-says-ohio-must-recognize-same-sex-marriages-performed-out-of-state.html> (describing the plaintiffs’ adoption of an Ohio child and their desire to list both parental names on the child’s birth certificate).

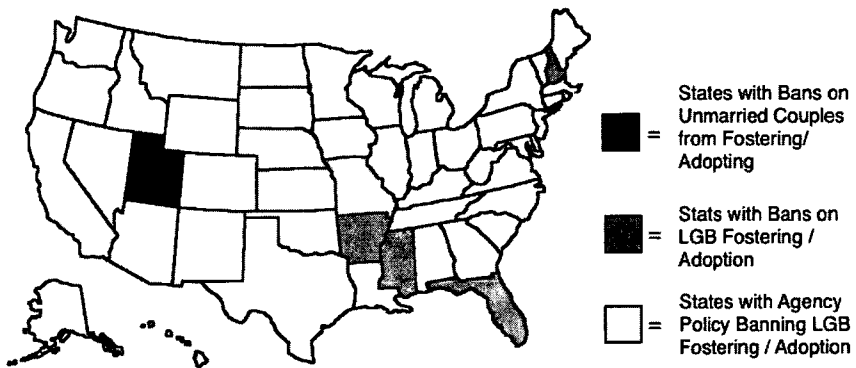
154. The most recent time the two issues were polled concurrently, in 2014, 63% supported gay adoption, versus 55% supporting gay marriage. Art Swift, *Most Americans Say Same-Sex Couples Entitled To Adopt*, GALLUP (May 30, 2014), <http://www.gallup.com/poll/170801/americans-say-sex-couples-entitled-adopt.aspx>. Support for same-sex

Figure 1



Same-Sex Marriage Bans 1973-2014¹⁵⁵

Figure 2



Foster Parenting or Adoption Bans 1977-2014¹⁵⁶

marriage, however, shot up to 60% in the months leading up to the *Obergefell* ruling. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>. People were not asked about adoption at that time. *Id.*

155. *Same-Sex Marriage, State by State*, *supra* note 61.

156. As noted in my methodology, *supra* note 13 and accompanying text, I searched extensively for LGB fostering and adoption bans. The following are the only states I could find with legislative or policy bans of any type. I am erring on the side of overestimating bans, and it is not certain that all of these were actual bans. For instance, I include California because in the 1990s, then-governor Pete Wilson directed agency personnel not to permit LGB adoptions. It was never, however, a written regulation, nor was this policy uniformly implemented. *See e.g.*, RICKETTS, *supra* note 131, at 34; Telephone Interview with Jennifer Pizer, *supra* note 120. Missouri and Nebraska also banned LGB adoption to some degree,

Half of the states with prohibitions on same-sex marriage never attempted to ban foster parenting or adoption.¹⁵⁷ Those that did try almost all failed, despite having successfully banned marriage, most by the onerous process of constitutional amendment.¹⁵⁸ To take just one example, Texas prohibited same-sex marriage first by statute in 2003 and then by amending the state constitution in 2005.¹⁵⁹ Yet none of the multiple bills to ban foster care and adoption by LGB people

but advocates have expressed uncertainty over the years about the actual policy and practice in both states. For instance, in Missouri, there were reportedly some instances where state workers apparently applied an "unwritten policy" against LGB adoption. The ACLU successfully challenged this policy, to the extent it was enforced, in 2006. See Press Release, ACLU, Missouri Judge Rules That Lesbian Can Be Foster Parent (Feb. 17, 2006), https://www.aclu.org/lgbt-rights_hiv-aids/missouri-judge-rules-lesbian-can-be-foster-parent. Nebraska had an explicit written agency policy prohibiting LGB adoption, Neb. Dep't of Soc. Servs., Administrative Memorandum #1-95 (Jan. 23, 1995), but Nebraska did not consistently enforce this policy, see *States with Restrictions on Adoption or Fostering by LGB People*, ACLU, https://www.aclu.org/files/assets/aclu_map1.pdf (last visited Nov. 12, 2015). Indeed, when the agency policy was recently challenged, the state attempted to have the case dismissed by arguing that they did not follow the policy. See *Stewart v. Heineman*, No. CI 13-3157, slip op. at 10 (Neb. Dist. Ct. Lancaster Cty. Sept. 15, 2015), https://www.aclu.org/sites/default/files/field_document/2015.09.16_amended_order.pdf. The court nonetheless held the policy violated equal protection and due process. *Id.* at 11.

The only states that ever legislatively or by regulation banned LGB people, or unmarried couples, from fostering or adoption are Arkansas, Florida, Mississippi, New Hampshire, and Utah. The bans in Arkansas, Florida, New Hampshire, and Utah are no longer in effect, and the ban in Mississippi is currently being challenged. Section 200.3.2 of the Arkansas Minimum Licensing Standards for Child Welfare Agencies was struck down in 2006. Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard, 238 S.W.3d 1 (Ark. 2006). Voters enacted a new ban by referendum, but that ban was also found unconstitutional. Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, 380 S.W.3d 429. Florida's LGB adoption ban, FLA. STAT. § 63.042(3) (1977), was overturned by an intermediate appellate court in 2010, and state officials previously admitted to violating the ban in practice and declined to appeal the ruling, see Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010). Mississippi's statute bans only LGB couples, not singles, from adopting and is currently under challenge. See MISS. CODE § 93-17-3(5) (2000); see Mark Joseph Stern, *Attorneys File Suit Against Mississippi's Gay Adoption Ban, Which Somehow Still Exists*, SLATE MAG. (Aug. 12, 2015, 3:11 PM), http://www.slate.com/blogs/outward/2015/08/12/mississippi_s_gay_adoption_ban_still_exists_roberta_kaplan_will_change_that.html. New Hampshire banned LGB adoption in 1987, N.H. REV. STAT. §§ 170-B:4, -F:6 (1987), but repealed it in 1999, see H.B. 90, 1999 Leg., Reg. Sess. (N.H. 1999). Utah banned only unmarried couples, not specifically LGB people. See UTAH CODE §§ 62A-4a-602, 78B-6-117(3) (2008). As of October 2014, however, Utah has allowed LGB married couples to foster and adopt, a move that child welfare officials in the state openly welcomed. See Cortez, *supra* note 148.

157. See Godsoe, *supra* note 13.

158. See *supra* Figure 2 (displaying the few states that succeeded at banning LGB adoption).

159. TEX. CONST. art. I, § 32, *invalidated by* De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015); TEX. FAM. CODE § 6.204 (2003), *invalidated by* De Leon, 791 F.3d 619.

passed.¹⁶⁰ Indeed, Texas has the fourth largest population of adopted children living with LGB parents, after the more liberal states of California, New York, and Massachusetts.¹⁶¹ Proponents of attempted bans of LGB parenthood found that garnering support, or even interest, was extremely difficult.¹⁶² The few states that did manage to enact these bans did so by considerably smaller margins than marriage bans.¹⁶³

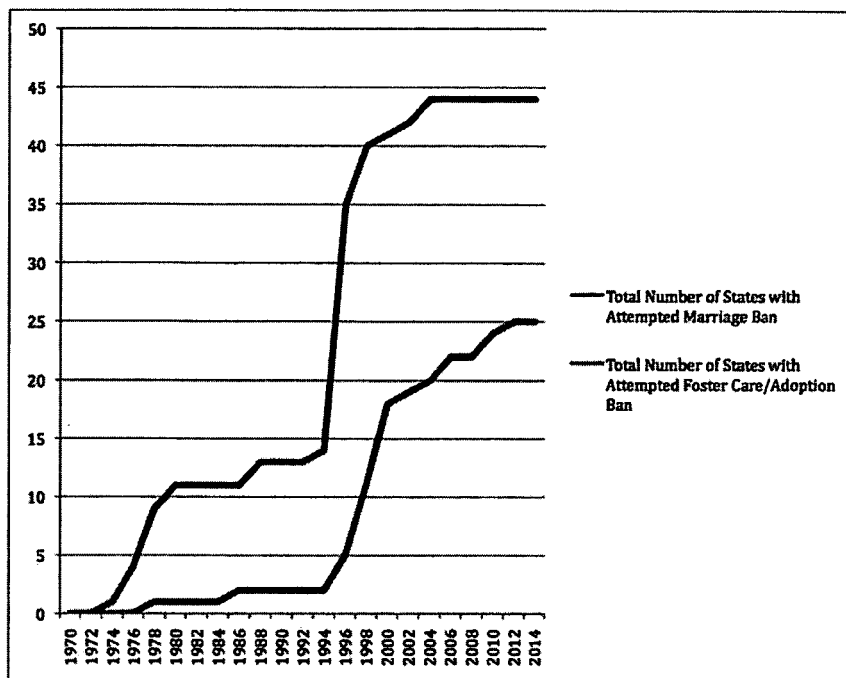
160. See Nate Blakeslee, *Family Values*, TEX. MONTHLY (Mar. 2007), <http://www.texasmonthly.com/articles/family-values/> (describing the multiple failed efforts by Texas state representatives Warren Chisum and Robert Talton to prohibit gay adoption and foster care).

161. Gates et al., *supra* note 3, at 7; see also Memorandum from Gary J. Gates, Blachford-Cooper Distinguished Scholar & Research Dir., Williams Inst., Univ. of Cal., L.A., Sch. of Law, and Taylor N.T. Brown, Policy Analyst, Williams Inst., Univ. of Cal., L.A., Sch. of Law, to Representative Celia Israel, Dist. 50, Tex. House of Representatives (May 14, 2015), <http://escholarship.org/uc/item/7q03m5x2> (estimating that 10,600 adopted children are being raised in LGB-headed households in Texas).

162. Sally Steenland et al., *Faith and Family Equality: An Analysis of Arkansas's 2008 Battle over Same-Sex Adoption*, CTR. FOR AM. PROGRESS 6 (May 2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/antigay_adoption.pdf (quoting a conservative advocate as stating that gathering signatures for the foster parenting/adoption ban was "five times as hard" as it was for the state's marriage ban).

163. Illustrative is Arkansas, where 57% of voters supported an adoption ban and 43% opposed it, while 75% of voters supported a marriage ban. See Katherine Franke, *Judge Overturns Arkansas Adoption Ban: Proof You Can Do Great Pro-Bono Work at a Law Firm*, COLUM. GENDER & SEXUALITY L. BLOG (Apr. 21, 2010), <http://blogs.law.columbia.edu/genderandsexualitylawblog/2010/04/21/judge-overturns-arkansas-adoption-ban-proof-you-can-do-great-pro-bono-work-at-a-law-firm/>.

Figure 3

*Attempted Bans*¹⁶⁴

LGB parenthood was rendered visible only by the marriage debates. Figure 3 illustrates that attempts at regulating LGB parenthood arose *after* significant cases or legislation on same-sex marriage.¹⁶⁵ Every state attempting to enact an adoption ban had already attempted to ban marriage, almost all successfully.¹⁶⁶

Only now, with same-sex marriage the “law of the land,” are policy makers focusing on adoption in an effort to limit LGB families. In spring 2015, with a promarriage equality decision expected, a

164. See Godsoe, *supra* note 13.

165. These significant cases or legislation on same-sex marriage include the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)), *invalidated in part by* United States v. Windsor, 133 S. Ct. 2675 (2013); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); and *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). In 2006, an adoption researcher remarked that “he ha[d]n’t seen this much activity in 15 years as a researcher.” Andrea Stone, *Drives To Ban Gay Adoption Heat Up in 16 States*, USA TODAY, http://usatoday30.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm (last updated Feb. 24, 2006, 12:23 AM). The data also reveal, however, that this attention was neither sustained nor effective. *Id.*

166. See Godsoe, *supra* note 13.

number of states attempted to limit LGB fostering or adoption.¹⁶⁷ Although framed as “conscience clause” exemptions for adoption agencies rather than outright bans, these efforts were still unsuccessful. Bills in Florida, Texas, Alabama, Mississippi, and other states failed, sometimes after opposition even from conservative lawmakers.¹⁶⁸ For instance, in Florida, Republican lawmaker and devout Lutheran Don Gaetz opposed the proposed conscience clause, despite describing himself as “not a champion of gay rights,” because “gay adoptions [already] go on every day” in Florida and that he wanted more children to be adopted.¹⁶⁹ Michigan alone enacted new legislation, legislation that has been widely criticized and is likely to be challenged soon.¹⁷⁰

As it has historically, adoption expanded the boundaries of acceptable families, this time to include LGB-headed households. Concomitantly, it disrupted the marriage-parenthood sequence by granting state-sanctioned parenthood before marriage. Most states did not specifically address LGB adoption. This silence, however, does not necessarily mean ignorance. On the contrary, I argue that silence in the face of this widespread, ongoing practice is often a tacit endorsement of LGB parenthood.¹⁷¹

Given the child-focused rhetoric dominating the marriage debates, what explains the low profile or tacit endorsement of these

167. See, e.g., John Wright, *Texas Lawmakers To Consider Anti-Gay, ‘License To Discriminate’ Adoption Amendment*, DONALDSON ADOPTION INST. (May 13, 2015), <http://adoptioninstitute.org/texas-lawmakers-to-consider-anti-gay-license-to-discriminate-adoption-amendment> (describing an amendment that would permit faith-based adoption agencies in Texas to refuse to place children with LGB people on religious grounds).

168. See, e.g., Mark Joseph Stern, *A Conservative Florida Republican Explains Why He Shot Down an Anti-Gay Adoption Bill*, SLATE MAG. (Apr. 14, 2015, 8:30 AM), http://www.slate.com/blogs/outward/2015/04/14/a_florida_republican_explains_why_he_shot_down_an_anti_gay_adoption_bill.html.

169. *Id.*

170. For instance, Michigan’s largest newspaper wrote an editorial against the legislation; every major child welfare group also condemned it. See *Anti-Gay Adoption Bill Another Shameful Moment for Michigan*, DET. FREE PRESS (June 12, 2015, 12:25 PM), <http://www.freep.com/story/opinion/editorials/2015/06/11/faith-based-adoption/71074414/>. For discussion of a potential challenge, see Kathleen Gray, *ACLU May Challenge Newly-Signed Law on Adoption by Gays*, DET. FREE PRESS (June 11, 2015, 5:38 PM), <http://www.freep.com/story/news/politics/2015/06/11/snyder-michigan-same-sex-adoption-religious/71062938/>.

171. Indeed, earlier court decisions signaled adoption’s importance to the marriage debates. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (noting that “[i]f procreation were a necessary component of civil marriage,” the legislature would have restricted the availability of adoption to a narrower class of people).

significant changes to the family structure? The next Part considers several possible theories.

III. THREE POSSIBLE EXPLANATIONS FOR THE ASYMMETRIC REGULATION OF MARRIAGE AND PARENTHOOD

No one factor can explain this asymmetric family regulation. This Part considers three explanations that seem particularly salient to distinctions between marriage and parenthood: sex, money, and the devaluation of children in American policy.¹⁷² None of these are, in my view, legitimate rationales for family policy; the work they do here is explanatory rather than prescriptive.

A. Sex

One possible explanation for this inconsistency is that parenthood does not raise the specter of sexual activity in the same way that marriage does. Good parenthood is sometimes deemed connected to a type of asexuality, or at least not a robustly expressed sexuality, particularly for mothers.¹⁷³ This theory posits that underlying a significant portion of opposition to same-sex marriage is a distaste for lesbian or gay sex. As Mary Anne Case persuasively argues, “[T]he closer the [LGB rights] issue gets to the gay couple copulating, the more problematic it is for courts and legislators.”¹⁷⁴ The asexuality of parenthood, particularly adoptive parenthood, renders it more palatable than marriage.

1. Normative Sex

Sex has consistently been connected to American community and political identity. Indeed, Brenda Cossman argues, “Citizenship . . . has presupposed a highly privatized, familialized, and heterosexual sexuality . . . predicated on [certain] appropriate sexual

172. There are, of course, additional explanations, but I focus on these three because they are the most helpful in teasing out the distinctions between the regulation of marriage and of parenthood.

173. Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1 (2012). Indeed, when parents violate this by expressing sexuality, particularly gay or lesbian sexuality, courts have often denied them custody. See COURTNEY G. JOSLIN & SHANNON P. MINTER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* §§ 1:2-:16 (2009 ed. 2009).

174. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1682 (1993).

practices”¹⁷⁵ Even in a post-*Lawrence v. Texas* era, this view of nonprocreative, nonmarital sex as unnatural and wrong retains traction. Nonnormative sex continues to be used to delineate “us” from “them,”¹⁷⁶ and our sociolegal system continues to reward the “sexual family,”¹⁷⁷ with marriage policing its boundaries.¹⁷⁸

Lesbians and, particularly, gay men have historically been banished from the polity, viewed as sinners or psychologically deviant.¹⁷⁹ Martha Nussbaum has described how “many people react to the uncomfortable presence of gays and lesbians with a deep aversion akin to that inspired by bodily wastes, slimy insects, and spoiled food—and then cite that very reaction to justify a range of legal restrictions.”¹⁸⁰ This disgust is sometimes framed in terms of disease or pathology.¹⁸¹

Disgust or discomfort with gay sex is at least a partial explanation for the marriage-adoption dissonance. Amici opposing same-sex marriage, for instance, have argued that LGB people’s purported “different [sexual] norms” should exclude them from marriage.¹⁸² Others emphasize the instability of same-sex relationships, arguing that LGB people, again particularly gay men, are likely to rapidly “acquire casual partners.”¹⁸³ The message is that

175. BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 6 (2007).

176. Melissa Murray, *Rights and Regulation: Lawrence v. Texas and the Evolution of Sexual Regulation*, 116 COLUM. L. REV. (forthcoming 2016).

177. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

178. See Abrams & Brooks, *supra* note 77, at 17 (“The [historic] purpose [of marriage] was not to provide stable homes for children but to police *all* sexual activity . . .”).

179. HIRSHMAN, *supra* note 56, at 15-16.

180. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW*, at xiii (2010); see also William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014-18 (2005) (arguing that a view of gay people as “disgust[ing] and contagio[us]” underlies much of the opposition to LGB marriage). One attempted ban on LGB adoption capitalized on this disgust by “graphically describ[ing] sexual acts between same-sex couples.” Steenland et al., *supra* note 162, at 5.

181. Cooper & Cates, *supra* note 119, at 87. Tellingly, one of the only outright bans on foster care and adoption by gay people, New Hampshire’s, began as a bill “prohibiting homosexuals from donating blood” during the panic over AIDS. JOURNAL OF THE SENATE, 1987 Leg., Reg. Sess., at 449 (N.H. 1987).

182. Amici Curiae Brief of Robert P. George et al. in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal, *supra* note 69, at 27-29.

183. See, e.g., Appellant Intervenor’s Response to Amici Curiae Briefs at 1-2, *Andersen v. King Cty.*, 138 P.3d 963 (Wash. 2006) (Nos. 75934-1, 75956-1) (internal quotation marks omitted).

gay men, and perhaps lesbians, are less stable and more risky than heterosexuals.

While rendering them unfit for marriage, the hypersexualization of LGB people simultaneously obscures their other relationships.¹⁸⁴ Suzanne Goldberg and others have argued that sex is posited as the essence of gay identity,¹⁸⁵ with LGB people presumed to be too hedonistic and selfish to want parenthood.¹⁸⁶ Biology is also determinative: because they cannot reproduce through sexual intercourse, LGB people are deemed antifamily, placed “outside the domain of kinship.”¹⁸⁷

2. Singles Only

Although sex is less salient to parenthood than to marriage, even parenthood cannot always obscure a focus on sex when a couple is involved. Nebraska and Arkansas both prohibited unmarried cohabitants from foster or adoptive parenthood.¹⁸⁸ Arkansas explicitly acknowledged that its ban was based on the “immorality” of extramarital sex and/or cohabitation: “[T]he moral breakdown leading to promiscuity and depravity . . . renders one unfit to have custody of a minor child.”¹⁸⁹ The state specified that sex between LGB partners could never be sanctioned because “Arkansas specifically prohibits same sex marriage.”¹⁹⁰

More recently, several states banned or attempted to ban foster parenting or adoption by unmarried or LGB couples, while allowing single LGB people to adopt.¹⁹¹ This stands in contrast to the research

184. See *infra* text accompanying notes 323-325. The inverse is also true: other relationships, particularly parenthood, can obscure sexuality. *Id.*

185. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1388-91 (2010).

186. RIVERS, *supra* note 64, at 214 (claiming that American culture “presumed queer childlessness”).

187. KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 204 (1991).

188. As noted earlier in note 156 *supra*, the Nebraska regulation was recently held to be violative of equal protection and due process. Nebraska also banned “openly homosexual” single people from adopting or fostering, but admitted to violating its own policy. Complaint & Praecipe, *supra* note 15, at 7. The Arkansas regulations were struck down in 2004 and 2011. See Ark. Dep’t of Human Servs. v. Cole, 2011 Ark. 145, 380 S.W.3d 429; Dep’t of Human Servs. & Child Welfare Agency Review Bd. v. Howard, 238 S.W.3d 1 (Ark. 2006).

189. Appellants’ Reply & Response to Cross Appellants at 5, 9, *Howard*, 238 S.W.3d 1 (No. 05-814) (“[I]t is not in the best interest of children to be placed in homes where non-marital sex is taking place.”).

190. *Id.* at 5.

191. See sources cited *supra* note 156 (outlining Mississippi and Utah’s laws). Kentucky proposed such a ban in 2009, but it did not pass. Memorandum from Naomi G.

findings that children raised by two parents usually fare better than those raised by one.¹⁹² A focus on adult sexual relationships, rather than parenting capabilities, also underlies the reasons why some adoption caseworkers have rejected LGB parents. For instance, the only comprehensive study of adoption agency workers' attitudes towards LGB adoption found that 20.3% of workers cited the prospective parent's "lifestyle" and 14.5% of workers cited his or her "sexual orientation" as "incompatible" with adoption.¹⁹³

3. "Nonpracticing Homosexuals"

The division some jurisdictions have drawn between "homosexual status" and "homosexual conduct" is an attempt to bar LGB people who actively engage in same-sex sex, the object of disgust, from certain legal privileges.¹⁹⁴ This status-conduct distinction parallels the Christian precept of "love the sinner, hate the sin."¹⁹⁵ The equation of marriage with sex, or at least procreative sex, renders this approach inapplicable to marriage—LGB spouses are presumed to have sex in a way that parents are not.

Illustrative of this practice are Florida's and Arkansas' restrictions on, respectively, adoption and foster parenting by "practicing homosexuals."¹⁹⁶ The Arkansas regulation's definition of "homosexual" centered on recent sexual conduct: "Homosexual . . . shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving . . . another person of the same gender, and who has engaged in such activity after the foster

Goldberg, Peter J. Cooper Pub. Policy Fellow, Williams Inst., Univ. of Cal., L.A., Sch. of Law, and M.V. Lee Badgett, Research Dir., Williams Inst., Univ. of Cal., L.A., Sch. of Law, to Senator Kathy W. Stein, Dist. 13, Ky. State Senate (Feb. 24, 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kentucky_SB68CostEstimate.pdf.

192. To be clear, the vast majority of children of single parents do well, and much of the difference is based on economic factors. BALL, *supra* note 53, at 71-72.

193. David M. Brodzinsky & Staff of the Evan B. Donaldson Adoption Inst., *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, DONALDSON ADOPTION INST. 24 (Oct. 2003), http://www.adoptioninstitute.org/old/publications/Lesbian%20and%20Gay%20Adoption%20Report_final.pdf.

194. See, e.g., Appellants' Reply & Response to Cross Appellants, *supra* note 189, at 1.

195. One commentator explains: "The religion that generates most of these claims [against same-sex couples] in the U.S. proclaims its obligation to hate the sin but love the sinner. The gay and lesbian community finds that absurdly hypocritical, or just incomprehensible, but it is very real to the . . . believers." *Civil Unions: Making Religious Exemptions Work*, U. CHI. L. SCH. FAC. BLOG (May 10, 2009, 2:41 PM), <http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-making-religious-exemptions-work.html>.

196. See *Lofton v. Sec'y of the Dep't of Children & Family Servs. (Lofton I)*, 358 F.3d 804, 806 (11th Cir. 2004) (stating that the Florida ban "prevent[ed] adoption by practicing homosexuals").

home is approved or . . . reasonably close in time to the filing of the application”¹⁹⁷ The state argued that the regulation “inhibit[s] [only] homosexual conduct,”¹⁹⁸ or “persons who *practice* homosexual conduct or have persons in their home who *practice* same-sex sex,” rather than “‘gay people’ as defined by the ACLU and in the studies presented.”¹⁹⁹ The state’s argument disaggregates sexual activity from parenthood, permitting the latter only for LGB people who abstain.

B. Money

Given the privatization of dependency as perhaps the organizing principle of family law, money provides a second explanation for the attention paid to LGB marriage over parenthood.²⁰⁰

1. Privatized Dependency

Adoption has frequently been influenced by financial considerations. Most children adopted in the late 1800s in the United States were orphans, whose incorporation into a family relieved the community of its caregiving burden.²⁰¹ The precursor to the current child protection system, the “orphan trains,” was prompted by both altruistic and economic concerns. Vast increases in immigration, coupled with bad living and working conditions, created a burgeoning new population of urban poor, including large numbers of youth.²⁰² Reformers sent these children West, simultaneously placing them in Christian, “American” homes and supplying homesteaders with a source of labor.²⁰³ About a quarter of a million children traveled the orphan trains between 1853 and the early 1900s.²⁰⁴ Most were not adopted, instead working in return for board until they reached adulthood.²⁰⁵ This accords with historians’ opinions that finding

197. Dep’t of Human Servs. & Child Welfare Agency Review Bd. v. Howard, 238 S.W.3d 1, 3 (Ark. 2006).

198. Appellants’ Reply & Response to Cross Appellants, *supra* note 189, at 1.

199. *Id.*

200. Susan B. Boyd, *Legal Regulation of Families in Changing Societies*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 255, 264 (Austin Sarat ed., 2004) (“[D]espite its ostensible liberalization and gender neutrality, modern family law is embedded within the trend toward fiscal conservatism and economic retrenchment, including privatization . . .”).

201. MELOSH, *supra* note 30, at 17.

202. See MARILYN IRVIN HOLT, THE ORPHAN TRAINS: PLACING OUT IN AMERICA 20 (1992).

203. *Id.* at 53.

204. *American Experience: The Orphan Trains*, PBS, <http://www.pbs.org/wgbh/amex/orphan/> (last visited Oct. 26, 2015).

205. *Id.*

permanent families for destitute children was secondary to fulfilling the need for labor in the frontier states.²⁰⁶

Fiscal concerns have continued to drive adoption. Children in foster care cost state and federal governments considerable funds. For instance, in fiscal year 2011, the states spent approximately \$12.4 billion on foster care and adoption assistance; the federal government reimbursed them \$6.4 billion.²⁰⁷

These financial realities, coupled with a desire to find permanent homes for children, led to a significant prioritization of adoption of foster children. The Adoption and Safe Families Act (ASFA), enacted by the United States Congress in 1997, reconfigured the child protective system to impose time limits on children's stays in foster care and increased funding and other incentives for adoptions.²⁰⁸ Funding consists both of subsidies to adoptive families and bonuses to states for each child adopted.²⁰⁹ States are also financially sanctioned if children remain in foster care too long.²¹⁰ While the number of children in foster care has remained steady, the adoption rate has increased at a faster pace.²¹¹ Every state, however, still has shortages of foster and adoptive parents.²¹² This is particularly true for children

206. See STEPHEN O'CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* (2001).

207. Emilie Stoltzfus, *Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance Under Title IV-E of the Social Security Act*, GREEN BOOK HOUSE COMMITTEE ON WAYS & MEANS (Oct. 26, 2012), http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R42792_gb_2.pdf; see also Richard P. Barth et al., *A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption*, 80 SOC. SERV. REV. 127 (2006) (estimating that adoption creates savings of approximately \$21,000 to \$126,000 per child over foster care).

208. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

209. Subsequent statutes expanded adoption funding, most recently, the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).

210. See Yesenia Amaro, *Nevada Now in Compliance with Child Welfare Standards, Avoids Big Penalties*, L.V. REV.-J., <http://www.reviewjournal.com/news/nevada/nevada-now-compliance-child-welfare-standards-avoids-big-penalties> (last updated Apr. 4, 2015, 7:28 AM); Brandon Stahl, *Feds Punish Minnesota for Failing Foster Care Standards*, STARTRIBUNE.COM (July 10, 2015, 11:36 AM), <http://www.startribune.com/feds-punish-state-for-failing-foster-care-standards/313088651/>.

211. Press Release, Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Adoption Rate Increases for Children in Foster Care* (Aug. 12, 2013), <http://www.acf.hhs.gov/press/adoption-rate-increases-for-children-in-foster-care> (reporting that adoption rates increased 3.5% from 2003 to 2012).

212. This shortage is very harmful. Terminations of parental rights have far outpaced adoptions, thereby significantly enlarging the gap between children awaiting adoption and those who have been adopted and creating thousands of "legal orphans." Annually, over four

deemed less desirable by potential parents, including older children, children with disabilities, and sibling groups.²¹³

The pressure on states to move children out of foster care has meant casting a wide net for potential parents. States consistently report that finding interested and competent families to adopt is a major challenge.²¹⁴ Not coincidentally, then, the first mainstream support for adoption by LGB people came around the time of ASFA's heightened mandate. In 1995, the nation's largest child welfare organization, the Child Welfare League of America, promulgated an explicit prohibition on sexual orientation discrimination of potential foster parents in its very influential standards for foster care agencies.²¹⁵

More than 400,000 children are in foster care nationwide, with over 100,000 of them awaiting adoption.²¹⁶ At the time of ASFA's enactment, LGB people represented, and continue to represent, a significant pool of interested potential parents, who are also willing to take the hardest-to-place children.²¹⁷ Not surprisingly, then, public adoption agencies for foster children are much more willing and likely to place children with LGB parents than are adoption agencies as a whole. According to a recent study, 90% of public adoption agencies indicated that they were "universally willing to work with gay and lesbian clients," while 60% of all agencies that responded to the survey indicated that they "accepted applications from self-identified lesbians and gays."²¹⁸

2. Children for Cheap

Many LGB people adopt out of the foster care system because of the extremely high costs of ART and private adoption. This is

times as many children exit foster care as legal orphans than are adopted. *AFCARS Report*, *supra* note 32, at 3, 5.

213. See Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 133 n.110 (2013).

214. Gates et al., *supra* note 3, at 1.

215. CHILD WELFARE LEAGUE OF AM., STANDARDS OF EXCELLENCE FOR FAMILY FOSTER CARE SERVICES § 3.18, at 97 (rev. ed. 1995).

216. Gates et al., *supra* note 3, at 1.

217. *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?*, DONALDSON ADOPTION INST. 11-12 (Mar. 2006), http://adoptioninstitute.org/old/publications/2006_Expanding_Resources_for_Children%20_March_.pdf.

218. Brodzinsky & Staff of the Evan B. Donaldson Adoption Inst., *supra* note 193, at 3-4; see also DAVIS, *supra* note 2, at 121 (reporting that 85% of agencies placing children with special needs accepted LGB parents).

particularly true of gay men, for whom the main alternative is the very expensive process of surrogacy.²¹⁹ The relative costs were recently estimated to be \$80,000 to \$120,000 for surrogacy, with 10% to 20% extra “set aside just in case something comes up”; up to \$50,000 for international adoption; \$20,000 to \$30,000 to adopt in the private domestic system; and \$300 to \$500 to adopt out of the foster care system, though that cost is usually reimbursed.²²⁰

Adoption is, despite the rhetoric, a market. There is a clear hierarchy in both the private and public systems—babies are the most valuable, with white female babies at the pinnacle.²²¹ Illustrating this hierarchy, one family was given the following price scale for adoption: \$35,000 plus legal expenses for a Caucasian child, \$24,000 to \$26,000 for a biracial child, and \$18,000 for an African-American child.²²² As was true during the AIDS/HIV crisis, LGB foster and adoptive parents continue to be given the hardest-to-place children, those who are the least desirable on the market.²²³

3. Parents for Cheap

Finally, recent efforts to ban fostering and adoption by gay people have failed at least in part because of the potential fiscal impact.²²⁴ It is significant: a national ban on LGB fostering, not including a ban on adoption, would cost an estimated \$87 to \$130 million.²²⁵ This estimate is conservative because there are many hidden costs to such a ban.²²⁶ These costs have proven to be influential when states consider changes to their existing policies. For instance, a

219. GOLDBERG, *supra* note 4, at 9-10 (“[A]doption represents the more common route to parenthood for male same-sex couples . . .”).

220. Janna Heron, *Adoption vs. Surrogacy Financial Costs*, ABC NEWS (Aug. 16, 2013), <http://abcnews.go.com/Business/cost-comparisons-international-domestic-adoption-surrogacy-foster-adoption/story?id=19962169>.

221. See *Six Words: ‘Black Babies Cost Less To Adopt,’* NPR, <http://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt> (last updated June 27, 2013, 9:46 AM) (describing “the skin-color based fee structure for many adoptions”).

222. *Id.*

223. David M. Brodzinsky et al., *Adoption by Lesbians and Gay Men: What We Know, Need To Know, and Ought To Do*, in *ADOPTION BY LESBIANS AND GAY MEN*, *supra* note 20, at 233, 249. The related market of foster care also reflects this hierarchy, with LGB parents raising nearly one-third of foster children with disabilities. Steenland et al., *supra* note 162, at 25.

224. Advocates cited this as a significant factor in defeating bans in multiple states. See Telephone Interview with Ellen Kahn, *supra* note 46; Telephone Interview with Jennifer Pizer, *supra* note 120.

225. Gates et al., *supra* note 3, at 19.

226. *Id.*

proposed 2002 ban on LGB adopting and fostering in Texas would have cost the state \$76 million over five years,²²⁷ while “a proposed 2008 ban in Tennessee would have cost the state at least \$5.5 million.”²²⁸ A proposed 2009 Kentucky ban on adoption by unmarried couples would have resulted in an estimated 630 children being removed from their current foster homes and 85 children not being adopted, costing the state over \$5.3 million in the first year alone.²²⁹

The costs do not merely include the future costs of additional children in foster care. Instead, they are the costs of dismantling an extant system. State agencies would have to recruit and train new foster parents to replace existing LGB ones, and the increased shortage of parents would necessitate that some children currently in LGB homes be moved into more expensive and less effective institutional care.²³⁰ States with lower adoption rates would lose federal adoption incentive payments.²³¹ Child protection systems, already overburdened and underresourced, cannot afford to take on these additional costs.

Bans also have produced great human costs. Children who “age out” of foster care without being adopted or placed in another permanent home experience much worse outcomes than other former foster children.²³² These poor outcomes impose financial costs estimated at a staggering \$8 billion annually.²³³ More significantly, the lack of permanent homes denies thousands of youth the opportunity to be healthy and productive adults.

C. *Second Best*

It is undoubtedly stating the obvious to say that a powerful hierarchy of families still exists. Various categories of children, forms of parenthood, and adult relationships are disparately esteemed. This

227. See Cooper & Cates, *supra* note 119, at 84.

228. Cynthia Godsoe, *Good Enough To Parent but Not To Marry*, HUFFINGTON POST, http://www.huffingtonpost.com/cynthia-godsoe/good-enough-to-parent-but-not-to-marry_b_3491108.html (last updated Aug. 24, 2013, 5:12 AM).

229. Memorandum from Naomi G. Goldberg & M.V. Lee Badgett to Senator Kathy W. Stein, *supra* note 191.

230. Gates et al., *supra* note 3, at 23.

231. *Id.* at 21.

232. See *COST AVOIDANCE: The Business Case for Investing in Youth Aging Out of Foster Care*, JIM CASEY YOUTH OPPORTUNITIES INITIATIVE 5 (May 2013), http://www.jimcaseyouth.org/sites/default/files/Cost%20Avoidance%20Issue%20Brief_EMBARGOED%20until%20May%206.pdf.

233. *Id.*

Subpart demonstrates how the devaluation of children and functional families actually catalyzed LGB adoption.

1. Foster Families

One indication that children in the public family law system are largely overlooked, even by those asserting children's best interests, is the fact that few state laws have addressed foster parents.²³⁴ Those that have done so typically allowed LGB fostering, even while prohibiting adoption. This was the case in Florida, the first state to consider this issue.²³⁵ Today, Mississippi allows same-sex couples to act as foster parents, but explicitly bans adoptions by same-sex couples.²³⁶

This distinction illustrates the lesser status of foster families and other families not sanctioned by blood or adoption. This inferior status of foster families fails to reflect that the average length of stay in foster care is almost two years²³⁷ and that for many children, foster families are the only families they know. The Supreme Court has recognized this truth, holding that for many long-term foster children, "it is natural that the foster family should hold the same place in the emotional life of the foster child . . . as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals."²³⁸ The inconsistency of treating foster parents differently than "real" parents underlies in part the reasoning of the court that struck down Florida's ban.²³⁹

234. Jennifer Michael, *Defining Family: Piecing Together How Two Moms or Two Dads Fit into the Picture*, CHILD VOICE (Child Welfare League of Am., Washington D.C.), Sept./Oct. 2006, at 12, 12.

235. See *Lofton I*, 358 F.3d 804 (11th Cir. 2004).

236. See MISS. CODE § 93-17-3(5) (2015).

237. See *AFCARS Report*, *supra* note 32.

238. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844-45 (1977).

239. *Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79, 87-88 (Fla. Dist. Ct. App. 2010). Recently released documents show that then-governor Jeb Bush and his staff "were acutely aware of [these] internal inconsistencies." Betsy Woodruff, *Jeb Bush's War on Gay Adoption*, DAILY BEAST (May 22, 2015, 5:25 AM), <http://www.thedailybeast.com/articles/2015/05/22/jeb-bush-s-war-on-gay-adoption.html>.

2. “Save the Children”²⁴⁰

Recently, opponents of same-sex marriage have relied almost exclusively on child welfare arguments.²⁴¹ Each of these arguments has been debunked, and the research they rely on has been proven to be flawed.²⁴² The issue is not, however, whether the arguments are true, but that many policy makers and a significant portion of the public continue to espouse them. Adoption is designed to ensure that children’s interests take precedence over those of their parents and that the guiding standard is a child’s best interests.²⁴³ Given this, what does it mean that many of these policy makers have permitted or ignored LGB adoption?

Several explanations merit consideration. First, policy makers and the general public are less aware of adoption and parenthood policies than policies concerning marriage. Even those deeply engaged in the marriage debates are often ignorant of adoption policies. One state attorney general defending a same-sex marriage ban made this abundantly clear when he admitted during oral argument that “the [Indiana] marriage scheme is set up not with adoption in mind” and that adoption and marriage are “competing issues.”²⁴⁴

This dissonance is compounded by the fact that many people simply do not register the existence of foster children and/or LGB parents. Tellingly, some scholars and advocates appear to assume that no LGB people have fostered or adopted to date. One prominent same-sex marriage opponent, Lynn Wardle, has described adoption as “the ‘gold standard’ of parenting” and has argued that permitting LGB people to adopt “could undermine and weaken the adoption system.”²⁴⁵ As this Article demonstrates, however, LGB people have

240. This heading is intended to be tongue in cheek, suggesting that current child welfare arguments against LGB families are not really about children’s interests, just as Anita Bryant’s campaign of the same name was driven by animus toward LGB people rather than children’s interests.

241. See *supra* Part II.A.2.

242. BALL, *supra* note 53, at 40–44; Michael S. Wald, *Adults’ Sexual Orientation and State Determination Regarding Placement of Children*, 40 FAM. L.Q. 381, 394–400 (2005).

243. See HOLLINGER, *supra* note 14, § 1.01.

244. Baskin Oral Argument, *supra* note 153, at 12:35, 15:36.

245. Wardle, *supra* note 114, at 380. One advocate explained that it “didn’t dawn on [many] folks that [LGB] people were applying to foster and adopt.” Telephone Interview with Leslie Cooper, Senior Staff Att’y, ACLU (July 24, 2014).

been fostering and adopting for years, even in Wardle's home state of Utah.²⁴⁶

Second, perhaps children in foster care are not valued enough to merit a "real" family and LGB people are acceptable merely as parents "of last resort."²⁴⁷ Some policy makers have explicitly stated that they are "settling" by endorsing state-sanctioned parenthood by lesbians or gays.²⁴⁸ For instance, Republican Representative and Speaker of the United States House of Representatives Paul Ryan recently changed his position on LGB adoption, stating, "[I]f there are children who are orphans who do not have a loving person or couple, I think if a person wants to love and raise [that] child they ought to be able to do that."²⁴⁹ Speaker Ryan nonetheless continued to oppose same-sex marriage.²⁵⁰

246. *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir.) (noting that "nearly 3,000 Utah children are being raised by same-sex couples"), *cert. denied*, 135 S. Ct. 265 (2014) (mem.). Mississippi, the last state to ban LGB adoption, has the highest percentage of LGB couples raising children. See Complaint for Declaratory & Injunctive Relief, *supra* note 148, at 3.

247. My thanks to Mary Anne Case for this term. LGB people are consistently given the hardest-to-place children. See *supra* text accompanying note 217. As one gay foster and adoptive parent put it, somewhat bitterly: "[T]he gay couples come along and pick up the trash that the straight people don't want anymore. We end up taking care of [these unwanted children.]" Alana Semuels, *Should Adoption Agencies Be Allowed To Discriminate Against Gay Parents?*, ATLANTIC (Sept. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/>.

248. Many of these parents, however, go well beyond being second-rate or even average parents and seem to be exemplary parents, caring for multiple children with very extensive special needs on whom other potential parents had given up. See e.g., Jack Lessenberry, *Dana Nessel's Dream: One Attorney's Ongoing Battle for Justice*, DET. METRO TIMES (Oct. 1, 2013), <http://www.metrotimes.com/detroit/dana-nessels-dream/Content?oid=2146377> ("They love children and have huge expertise in dealing with front-line medical problems."); see also Jessica Mason Pieklo, *Lawsuit Challenging Nebraska Ban on Gay Foster Parents Can Proceed*, RH REALITY CHECK (May 2, 2014, 3:34 PM), <http://rhrealitycheck.org/article/2014/05/02/lawsuit-challenging-nebraska-ban-gay-foster-parents-can-proceed/> (describing Greg and Stillman Stewart, who were plaintiffs in a challenge of a Nebraska ban, have been a couple for over thirty years, and have adopted five special needs children and want to foster more). Many male foster and adoptive parents also challenge stereotypes about fathers, both straight and gay, through their excellent caregiving. See GOLDBERG, *supra* note 4, at 8 (noting the widespread portrayal of gay fathers "as uninterested in children and as 'antifamily'") (citation omitted); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. PA. L. REV. 921, 967-75 (2005) (describing the ongoing disadvantaging of fathers in custody proceedings based on social stereotypes). At the same time, however, the focus on the monitoring of the female plaintiffs, 100% of whom are parents, risks reinforcing gender stereotypes. See Godsoe, *supra* note 66.

249. Meredith Shiner, *Paul Ryan Supports Gay Adoption, but Not Marriage*, ROLL CALL 218 BLOG (Apr. 30, 2013, 5:13 PM), <http://blogs.rollcall.com/218/paul-ryan-supports-gay-adoption-if-not-marriage/>.

250. *Id.*

The two factors described above undoubtedly contribute to the tension between child welfare arguments and the long history of LGB adoption. Yet another persuasive explanation is that the child welfare arguments are not really about “saving the children,” but rather are cover for moral arguments about marriage and adult sexuality.²⁵¹ After the Supreme Court’s decision in *Lawrence v. Texas* hindered such arguments, conservative advocates turned to children as powerful symbols in their struggle against same-sex marriage.²⁵² Despite the rhetoric, conservative advocates have consistently been less interested in parenthood, “view[ing] same-sex marriage as the most pernicious threat, with LGB parenting an offshoot of a greater ‘evil.’”²⁵³ Constitutional scholar Kenneth Karst has aptly noted: “When political operatives evoke fear about the socialization of children, their central purpose is to mobilize cultural constituencies. Once fears are aroused, a candidate can promise to save the children by using the socialization process, and on this basis seek constituents’ support.”²⁵⁴

The court in *Goodridge* highlighted this disjunction between rhetoric and practice in striking down Massachusetts’ same-sex marriage ban.²⁵⁵ The state’s long history of LGB foster parenting and adoption led the court to conclude, “Either the Legislature’s openness to same-sex parenting is rational in light of its paramount interests in promoting children’s well-being, or irrational in light of its so-called conclusion that a household headed by opposite-sex married parents is the ‘optimal’ setting for raising children.”²⁵⁶ The endorsement of LGB foster and adoptive parenthood in other states similarly defeats the child welfare arguments recently cited against same-sex marriage.

My claim is not that all policy makers and scholars made child welfare arguments against same-sex marriage merely as cynical political maneuvers.²⁵⁷ Rather, I contend that many of them tacitly endorsed LGB foster and adoptive parenting. Given the fact that courts considering same-sex marriage had repeatedly flagged LGB

251. See Tanya Washington, *Suffer Not the Little Children: Prioritizing Children’s Rights in Constitutional Challenges to “Same-Sex Adoption Bans,”* 39 CAP. U. L. REV. 231 (2011).

252. Numerous advocates I spoke with described these arguments as “after-the-fact rationalizations” or political maneuvers. See, e.g., Telephone Interview with Ellen Kahn, *supra* note 46 (describing conservatives’ use of such child welfare arguments after *Lawrence*).

253. Steenland et al., *supra* note 162, at 10.

254. Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967, 971 (2003).

255. 798 N.E.2d 941 (Mass. 2003).

256. *Id.* at 966 n.30.

257. This is, however, certainly a partial explanation.

adoptive parenthood,²⁵⁸ it seems likely that many policy makers turned a blind eye to a practice that was working and saving them money. The frontline caseworkers were in the best position to assess LGB people as potential parents, and the caseworkers overwhelmingly approved of them.²⁵⁹ None of the more visible state actors, including legislators and governors, intervened until after same-sex marriage exploded as a cultural battle. Even then, they focused far more attention on marriage. The timing of the few successful parenthood bans, such as those in Utah and Mississippi, suggests that they were enacted to ward off same-sex marriage rather than to actually change adoption policies.²⁶⁰

LGB adoptive families were largely invisible because of the focus on sex and the related assumption of gay childlessness, the role of families in privatizing dependency, and the devaluation of children in American policy, rhetoric notwithstanding. Their low public salience, however, became an asset. As the next Part elaborates, by not regulating LGB parenthood, policy makers lost the opportunity to do so because of the families already in place, along with their stickiness and their civic contributions as adopters.

IV. IMPLICATIONS

The prior Part offered possible explanations for the focus on marriage over parenthood. This Part now turns to its implications. Specifically, what do the different paths of same-sex marriage and LGB adoptive parenthood reveal about the regulation of families and, more broadly, the process of sociolegal change? My aim here is not just to unsettle standard accounts, but also to highlight this alternative version's significance for current scholarly and policy conversations on the evolution of family law.

A. *The Path to Change*

Scholars and advocates have long debated effective and legitimate paths to change, largely focusing on the decision to target legislatures or appellate courts.²⁶¹ Gerald Rosenberg, Michael

258. See *infra* text accompanying notes 353-360.

259. See *infra* notes 287-305 and accompanying text.

260. Neither ban, and none since the 1970s, prohibits LGB single parents from adopting. If preventing purported harm to children were really the goal of the bans, logically this would have been part of the agenda.

261. See ANDERSEN, *supra* note 58, at 203-20 (outlining this debate in the context of LGB rights).

Klarman, and others have described the perils of relying on courts, arguing that social reform via litigation can trigger a backlash.²⁶² Disputing this, scholars including William Eskridge and Thomas Keck point out the potential gains of litigation.²⁶³ Scott Cummings and Douglas NeJaime posit a multifaceted approach to change that includes both litigation and political advocacy.²⁶⁴ Few scholars have paid attention to change created through the aggregation of dispersed decisions.

My account has the modest goal of complicating, rather than taking sides in, this debate. Effecting change in the adoption system necessarily must include courts, legislatures, and executive agencies and accordingly could be seen as fitting within the framework of a multifaceted approach. I argue, however, that the most accurate characterization is of another process of change altogether, one that is individualized, discrete, and quiet. This contrasts with the many scholars who value “the discursive and political power of courts’ pronouncements” and the concomitant shaping of community identity and increased bargaining power that publicity can bring.²⁶⁵ Indeed, I argue that adoptive parenthood functioned as an effective path to increased family rights largely *because* it was out of the public eye and implemented by apolitical state actors.²⁶⁶ Finally, this story encompasses relatively little intentionality compared to other tales of social change.

262. See KLARMAN, *supra* note 30; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

263. See Eskridge, *supra* note 57, at 25 (discussing important victories in the gay rights movement that were achieved during the 1970s through litigation); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC’Y REV. 151 (2009) (arguing that favorable court decisions for LGBT rights have had a more beneficial impact than the “backlash” theorists claim).

264. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010).

265. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 954 (2011).

266. I use apolitical here in the sense of “politically neutral; without political attitudes, content, or bias.” *Apolitical*, COLLINS DICTIONARIES, <http://www.collinsdictionary.com/dictionary/english/apolitical?> (last visited Oct. 27, 2015). Most caseworkers are career civil servants, rather than political appointees. To a lesser extent, family court judges are also apolitical. They are generally not elected and thus not subject to the same political pressures as other state judges. These actors differ significantly from the actors usually discussed in social change theory, such as policy makers (both legislative and executive), high-profile judicial decision makers (such as appellate court judges), and the movement lawyers (alternately described as “naive rights-crusaders” and “sophisticated political actors”). Cummings & NeJaime, *supra* note 264, at 1241, 1329.

1. Private vs. Public

The nature of marriage as more public than parenthood allows the latter to be more elastic. I use public here not to mean state involvement, but rather to signify salience in policy discourse. The Supreme Court has repeatedly taken note of marriage's public face.²⁶⁷ Most recently, Justice Kennedy lamented that "DOMA . . . tells [same-sex] couples, *and all the world*, that their otherwise valid marriages are unworthy of . . . recognition."²⁶⁸

Parenthood, in contrast, is primarily private. Indeed, the first case outlining parental rights, *Meyer v. Nebraska*, is the earliest comprehensive delineation of a family-centered right against state intrusion.²⁶⁹ Whereas marriage is usually a public affair, requiring at least an appearance before a state-empowered official for a license, the sole interaction between most parents and the state is the filling out and mailing in of a birth certificate form.²⁷⁰ Even "public" adoption is not very public in either the micro or macro sense—adoption proceedings have long been shrouded in secrecy, still often remain sealed, and garner little community attention.²⁷¹

The law governing these matters further contributes to the public-private divide. Outside of the "marriage cases," family law is almost exclusively a domain of unpublished cases, lacking its due of public or scholarly attention.²⁷² Whereas arguments for marriage are constitutional in nature, arguments for parenthood usually revolve around less visible custody and adoption law, with vague standards such as "the best interests of the child."²⁷³ As noted earlier, most state

267. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987) (characterizing marriage as an "expression[] of emotional support and public commitment").

268. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added); see also COTI, *supra* note 44, at 1-2 ("[Marriage] requires public affirmation. It requires public knowledge—at least some publicity beyond the couple themselves[] that is why witnesses are required for the ceremony and why wedding bells ring.").

269. 262 U.S. 390 (1923); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[Parents' rights] decisions have respected the private realm of family life which the state cannot enter.").

270. I do not intend to minimize the significance of parents' listing on a birth certificate. Indeed, courts have recognized that refusing to list both parents on a child's birth certificate because the parents are LGBT is unlawful. See *Henry v. Himes*, 14 F. Supp. 3d 1036, 1055 (S.D. Ohio), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

271. See Appell, *supra* note 20, at 39 (describing adoption decisions as typically "closed, sealed, and rarely yield[ing] published decisions").

272. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

273. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1960 n.8 (2006) ("[T]he

adoption statutes have always been silent on the issue of same-sex couples adopting. The scant attention paid to parenthood generally, and adoption in particular, has provided “cover” for individual judges in more conservative jurisdictions who advanced LGB parenthood.²⁷⁴

Although structural differences between parenthood and marriage explain most of this, some advocates intentionally exploited adoptive parenthood’s low visibility. Believing that “[t]he more [adoption] is in the public eye, the greater the chances conservative legislatures will try to block it,”²⁷⁵ advocates in certain locations agreed not to appeal custody or adoption cases, fearing binding precedent that would constrain gay families and the state actors that were quietly helping them.²⁷⁶ One attorney reported an effort “to keep it quiet and get as many [same-sex adoptions] granted at the trial level before getting an appellate decision.”²⁷⁷ Another expressed a similar view: “Why rock the boat? . . . People were getting adoptions through random judges . . .”²⁷⁸ Sometimes judges themselves worked to keep gay parenthood issues from receiving too much attention.²⁷⁹ In addition to not appealing, advocates refrained from introducing

relative finality of constitutional adjudication heightens [concern with countermajoritarian court decisions] in ways that statutory interpretation and common law adjudication do not.”). Before the rapid change post-*Windsor*, constitutional challenges to adoption bans or denials were rare, and the most high-profile challenge failed. See *Lofton I*, 358 F.3d 804 (11th Cir. 2004). Courts have consistently found that there is no constitutional right to adopt, although there is a right to biologically procreate. See, e.g., *id.* at 809 (“Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state.”).

274. See, e.g., Nan Hunter, *NC Judges Under Attack for Second-Parent Adoptions*, HUNTER JUST. (Sept. 3, 2009), <http://hunterofjustice.com/2009/09/nc-judges-under-attack-for-secondparent-adoptions.html> (reporting “about the backlash against progressive North Carolina judges, whose willingness to grant second parent adoptions became publicly visible”); see also Gash, *supra* note 113, at 64 (noting that in Vermont, “judges ‘confessed’ to granting [same-sex couples] adoptions only in the comfort of judicial retreats in the 1990s”).

275. Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14adoption.html>.

276. Telephone Interview with Jennifer Pizer, *supra* note 120; see also Stacey Winakur, Legal Column, DAILY REC. (Balt.), July 8, 2000, at 1C (reporting that Maryland advocates have “found that when it comes to [LGB adoption], keeping out of radar range of both the media and the legislature has been the best way to challenge traditional notions of what constitutes a family”).

277. Gash, *supra* note 113, at 64.

278. *Id.*

279. See, e.g., GOLDBERG, *supra* note 4, at 85 (describing a Midwestern county where one judge moved all adoptions to his court and consistently and quietly granted LGB adoptions); Nan Hunter, *Baltimore Courts Waive Venue for Maryland’s Gay Adoptive Parents*, HUNTER JUST. (Nov. 15, 2011), <http://hunterofjustice.com/2011/11/waive-venue.html> (outlining how Baltimore’s chief judge waived venue requirements to allow same-sex couples from around the state to adopt).

legislation to clarify the rights of LGB people to adopt, preferring silence that could be interpreted favorably by individual caseworkers and judges.²⁸⁰ It is not clear that this strategy was always successful, but it likely worked sometimes to exploit the low salience of LGB parenthood for policy makers and conservative advocates. Certainly, as I have demonstrated above, any backlash against early marriage equality decisions like *Goodridge* scarcely affected LGB adoption.²⁸¹

The lack of a timely and effective backlash against parenthood offers valuable lessons to advocates. It is a truism that no one strategy serves all purposes. The stealth strategy, however, has not been widely endorsed in the LGB community. Historian John D'Emilio describes the gay liberationist view of coming out as "a profoundly political act that could [also] offer enormous personal benefits."²⁸² Similarly, Harvey Milk, the first elected gay public official, argued that gay rights would be gained only through "tell[ing] the truth about gays! . . . For I'm tired of the conspiracy of silence. . . . I'm going to talk about it. And I want you to talk about it. . . . You must come out."²⁸³ Later activists viewed "silence [as] tantamount to complicity."²⁸⁴ More recently, many working towards same-sex marriage have taken a high-profile approach.²⁸⁵ A caveat is warranted here. I am certainly not advocating a "return to the closet" or arguing that silence is always beneficial to struggles for change; I recognize

280. For instance, one prominent advocate said that she would not have tried to enact a nondiscrimination ordinance for adoption ten years ago and that today she would still hesitate in order not to disrupt the ongoing quiet trend. Telephone Interview with Leslie Cooper, *supra* note 245.

281. See *supra* note 82 and accompanying text.

282. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 235 (2d ed. 1983).

283. Harvey Milk, S.F. Bd. of Supervisors, Speech at the San Francisco Gay Freedom Day Parade (June 25, 1978) (transcript available at http://www.sfproud.org/heritage/documents/1978_harvey_milk_gay_freedom_day_speech.pdf).

284. This quiet path to change also challenges one popular script of gay rights advocacy, the "silence = death" slogan used to draw attention to AIDS. See HIRSHMAN, *supra* note 56, at 192-93 (describing the origins of, and the intent underlying, the "silence = death" slogan used in AIDS awareness campaigns).

285. One of the movement's central players, Evan Wolfson, said, "And the more people talk about it . . . that's how we're moving hearts and minds." *'Hardball with Chris Matthews' for Thursday, May 10, 2012*, NBC NEWS, http://www.nbcnews.com/id/47356785/ns/msnbc-hardball_with_chris_matthews/t/hardball-chris-matthews-thursday-may/ (last updated May 11, 2012, 1:39 PM). Most notoriously, Ted Olson and David Boies put the *Hollingsworth* case on a fast track to the Supreme Court—a strategy that almost backfired. See Talbot, *supra* note 62. Many advocates disagreed with their strategy, including many from the main LGB advocacy organizations. *Id.*

that this approach brings significant costs.²⁸⁶ Nonetheless, this account illustrates that advocates should consider a mix of strategies and that low levels of publicity can sometimes increase the pace of change.

2. Gatekeepers

A related structural difference between parenthood and marriage is the relevant gatekeeper. Before *Obergefell*, decisions about who could marry were generally made by legislatures and, more recently, by appellate courts in response to specific challenges. Rarely were they made by individual frontline state officials. In contrast, custody and, particularly, adoption decisions are almost always made *sub silentio* by individual agency caseworkers or lower courts.²⁸⁷ This allowed for very early state construction of LGB families by state actors who did not want to know the sexual orientation of the adoptive parents—a version of “don’t ask, don’t tell”—or who, more often, welcomed these potential parents.²⁸⁸ As Nancy Polikoff notes in her valuable historical account, “Many social workers, privately supportive of gay adoption but concerned about unsympathetic judges, asked no questions that would require revealing sexual orientation so that they could write reports that portrayed a lesbian or gay applicant simply as a single parent.”²⁸⁹ Gay men and lesbians

286. Many LGB people, however, particularly those adopting in the early years or in more conservative states, understood that “keep[ing] it kind of hush-hush and secret” was the price of parenthood. GOLDBERG, *supra* note 4, at 85; accord MALLON, *supra* note 132, at 39 (“[M]ost gay men [in] this study [applying to foster or adopt] determined early on, or were warned . . . that they should not be open about their sexual orientation Despite the discomfort that they felt at going back into the closet, most of the men in the study did it for expediency.”).

287. See BALL, *supra* note 20, at 13, 15 (finding that “highly individualized litigation” characterizes most parenthood cases); RIVERS, *supra* note 64, at 9 (relating that individual social workers and judges make parenting determinations even in custody cases).

288. RIVERS, *supra* note 64, at 181 (relating that “[m]any adoption agencies followed an informal policy of ‘don’t ask, don’t tell’” in the 1970s); see also Petula Dvorak, *In the District, a Same-Sex Couple’s Adoption Success Story*, WASH. POST (Aug. 2, 2012), https://www.washingtonpost.com/local/in-dc-a-same-sex-couples-adoption-success-story/2012/08/02/gJQAP9O9RX_story.html (citing a Washington D.C. child protection official who claimed that the city was “open to adoptions and foster care by same-sex couples” long before any legislation explicitly permitted it).

289. Polikoff, *supra* note 20, at 316; see also MALLON, *supra* note 132, at 54-55 (“There seemed to be a lot of winking going on between the social worker and us during the home study process. . . . We were clear that we lived together, and she wrote it up as if we were roommates.”); RIVERS, *supra* note 64, at 181 (quoting gay men adopting in the late 1960s and 1970s who noted that the workers never asked if they were gay, indicating that “they didn’t want to know”).

shared a network of “safe” or friendly agencies and individual workers and continue to do so in some states.²⁹⁰

Less positively, the dispersed decision points have resulted in a patchwork of state-created parenthood even more extreme than the former marriage patchwork, where one county, or even one caseworker or judge within a county, will permit adoption while others will refuse it.²⁹¹ Discretion has also been applied to prohibit adoptions where the law does not require those adoptions to be prohibited. For instance, seventeen adoption agency directors in a national survey believed that their states’ laws banned adoption by gay people when it did not.²⁹² Experts seem to agree, however, that on-the-ground discretion has more often helped than hurt gay adoptive parents.²⁹³

Why might this be so? I posit two characteristics of these gatekeepers that may explain their role in the growing tide of adoptive LGB families: they are apolitical and are tasked with making individualized determinations about specific children and parents. The caseworkers and family or surrogate court judges deciding these cases are among the least publicly scrutinized or politicized state actors, reflecting the lack of attention paid to adoption and public family law generally. This lack of attention can be liberating: it frees state agents to make decisions based on individual cases rather than on ideological principles.²⁹⁴

Indeed, many state workers see politics as antiprofessional, an impediment to them doing their jobs properly. One caseworker expressed her frustration when Massachusetts briefly attempted to ban

290. See MALLON, *supra* note 132, at 43-44 (noting that many agencies relied on unwritten policies regarding LGB applicants and describing one worker in the 1980s who was known as “the gay adoption queen”). Advocates describe how workers in certain states continue to work around the system, licensing gay couples separately as single “roommates” to avoid conflict. See Telephone Interview with Ellen Kahn, *supra* note 46.

291. See Tara Siegel Bernard, *A Family with Two Moms, Except in the Eyes of the Law*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/your-money/same-sex-couples-often-face-obstacles-in-establishing-legal-ties-to-children.html> (describing “the lack of consistency across the country [for adoption by gay people] depending on which courthouse you visit, or even within states that have policies”). Not surprisingly, this resulted in some careful forum selection by families and advocates. Telephone Interview with Jennifer Pizer, *supra* note 120.

292. Brodzinsky & Staff of the Evan B. Donaldson Adoption Inst., *supra* note 193, at 20.

293. See, e.g., Telephone Interview with Ellen Kahn, *supra* note 46 (noting that in her experience, the majority of caseworkers do not consider sexuality or sexual orientation during an adoption home study, deeming it to be irrelevant to their professional determination of the best interests of the child).

294. It also gives them political “cover.” See *supra* text accompanying note 33.

LGB fostering and adoption in the 1980s: “[We] are expected to implement a misguided policy. . . . It seems as if political decision-making is replacing clinical judgment and common sense.”²⁹⁵ This is true even of high-level workers; the head of Utah’s Division of Child and Family Services recently welcomed LGB couples as foster and adoptive parents, in contrast to other Utah policy makers, making it clear that he believes that defining families is not part of his agency’s job: “The reality is, we don’t decide how a family is defined. We support kids and families in whatever the family unit is and we keep our personal opinions out of it. . . . [I]f you can’t keep them out of it, then you might want to find another job.”²⁹⁶

Relatedly, adoption decision makers are prohibited from making categorical decisions about certain groups of people. Individualized assessment of potential foster and adoptive parents is required by statute in all states and endorsed by virtually every child protection and adoption organization.²⁹⁷ Parents are evaluated on a case-by-case basis and accepted or rejected based on the particular needs of each child.²⁹⁸ Typical is the judge who, like the agency director quoted above, opined that her personal views on the family are irrelevant in adoption cases: “Families come to us for answers, and we will give them based on the best interest of the child [in that case].”²⁹⁹ As Carlos Ball and Janice Pea note, the issues facing these caseworkers and judges “are not abstract principles of family policy, but whether the particular mother or father before the court can promote the best interests of the particular children involved.”³⁰⁰ This framework

295. RICKETTS, *supra* note 131, at 48.

296. Cortez, *supra* note 148.

297. See, e.g., LA. CHILD. CODE art. 1173 (2015) (detailing the requirements of the “preplacement home study” that is necessary to obtain “certification for adoption”); CHILD WELFARE LEAGUE OF AM., CWLA STANDARDS OF EXCELLENCE FOR SERVICES FOR ABUSED OR NEGLECTED CHILDREN AND THEIR FAMILIES § 4.7, at 113-14 (rev. ed. 1999). The importance of these organizations’ endorsements of LGB foster parenting and adoption cannot be overstated. See Telephone Interview with Leslie Cooper, *supra* note 245.

298. See HOLLINGER, *supra* note 14, § 4.05 (noting that adoption law reflects a commitment to avoid the categorical exclusion of any individual, or class of individuals, from becoming adoptive parents).

299. Hunter, *supra* note 274. One advocate reported that numerous judges granting second-parent adoptions in California in the 1990s made it clear that people should “not . . . read a larger policy message into their decisions.” Telephone Interview with Jennifer Pizer, *supra* note 120.

300. Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 279.

contrasts with the one-size-fits-all family ideal that often drives marriage policy.³⁰¹

Part of the explanation for the beneficial impact of diffuse decision makers is that it is easier to discriminate in the abstract than against actual individuals. Caseworkers meeting individuals whom they know or suspect to be LGB are more likely to individually assess their potential as caregivers, regardless of the caseworkers' personal opinions on same-sex marriage or gay rights. Indeed, historically the most open-minded individuals have been the frontline workers.³⁰² This has been true since the earliest days, long before same-sex marriage became a possibility. Perhaps this is so because these workers meet actual children and adults who want to care for the children or because their "minds are changed" by the successful placement of children with other LGB adults.³⁰³ As one expert described it, frontline caseworkers have "very pragmatic reasons" to focus only on the home's suitability for a child, whereas administrators "may disfavor the same placement because of . . . the potential for negative publicity to the perceived political climate."³⁰⁴

This framework of individual caseworkers and judges as gatekeepers calls into question standard notions about state regulation of the family and highlights the importance of lawmaking by frontline and diffuse decision makers.³⁰⁵ Family court judges and, even less so,

301. I am not claiming that there are not strong parental norms. See Godsoe, *supra* note 213. At least in the adoption context, however, these norms are likely not as sticky as marital norms.

302. Lisa Johnson's story is illustrative. Johnson lived with her lesbian partner in Missouri. A caseworker found their home to be up to standards and referred them to foster parent training. The caseworker described the applicant's partner as a "roommate" and did not inquire into Johnson's sexual orientation because she believed it to be "irrelevant to her task of finding a home that will serve the best interests of the children in the system." The supervisor denied Johnson's application because she "lacked moral or reputable character." Michael, *supra* note 234.

303. Telephone Interview with Jennifer Pizer, *supra* note 120.

304. RICKETTS, *supra* note 131, at 1. Many policy makers have only opposed the practice when it has garnered publicity. For instance, caseworkers in Massachusetts had been placing children with openly LGB people since the mid-1970s and only attempted to change this practice when the media was informed a decade later. See Defendants' Memorandum in Support of Their Motion To Dismiss at 17-18, *Babets v. Governor of Mass.*, No. 81083 (Mass. Super. Ct. Suffolk Cty. Sept. 11, 1986); see also Jill Terreri Ramos, *How Same-Sex Couples Got the Right To Adopt in Massachusetts*, BOS. GLOBE (June 17, 2015), <https://www.bostonglobe.com/magazine/2015/06/17/how-same-sex-couples-got-right-adopt-massachusetts/ulOm76fNVLApennqzrVsl/story.html> (relating that a gay couple had foster children in their care removed because, as an agency worker told them, "there was too much media attention").

305. It may also provoke criticism about the separation of powers and appropriate institutional roles. One North Carolina legislator, for instance, reacted angrily to grants of

agency caseworkers are not generally thought of as policy makers. Yet their actions can not only impact the policy as to individual families, but also, if on a large enough scale, result in significant change. Scholars such as Heather Gerken have exposed the myth of “unitary” democratic bodies and outlined the many levels of decision making.³⁰⁶ This disaggregation, Gerken persuasively argues, offers opportunities for “dissenters,” those who hold minority views in the context of the entire polity, to act as a majority and determine outcomes in a smaller polity unit.³⁰⁷

The account here provides another, largely overlooked, instance of disaggregation. Yet it also differs from the usual dissenter model. Most of the caseworkers and judges were not explicitly disobeying a law or regulation by permitting LGB adoption.³⁰⁸ Some of them undoubtedly knew that the public and policy makers, or even their supervisors, would not approve of LGB adoptive parents and thus kept the practice quiet, deliberately turning a blind eye to gay and lesbian relationships and signaling as much to the families involved.³⁰⁹

Many other gatekeepers, however, may not have been resisting at all, or at least did not see themselves as doing so. To them, the individualized and pragmatic decision of where to place individual children was distinct from the battle over, and even their own views on, same-sex marriage.³¹⁰ This resistance is accordingly more diffuse, subtle, and unintentional than the instances of resistance outlined by other scholars.³¹¹

second-parent adoptions by some judges, stating: “The effect of this is that adoption policy can now be set by our [lower state] court judges All people have to do now is find one district court judge who will do what they want. That’s the lowest common denominator adoption policy.” Hunter, *supra* note 274 (internal quotation marks omitted).

306. See, e.g., Gerken, *supra* note 37, at 1748 (describing the reality, and power, of disaggregated decision making by, for instance, local governments, states, juries, and school committees).

307. *Id.*

308. A few counterexamples are caseworkers and judges in Nebraska, see Complaint & Praecept, *supra* note 15, at 7, 20, and in California in the 1990s. Although then-governor Pete Wilson prohibited adoptions by unmarried couples in California, numerous individual workers and judges nonetheless quietly approved them. See RICKETTS, *supra* note 131, at 34; Telephone Interview with Jennifer Pizer, *supra* note 120.

309. See *supra* text accompanying notes 288-290, 295-299.

310. Nonetheless, numerous caseworkers and adoption agency executives played significant roles in opposing proposed bans on LGB foster care and adoption, from the earliest days. See, e.g., Defendants’ Memorandum in Support of Their Motion To Dismiss, *supra* note 304, at 39 (espousing the Massachusetts chapter of the National Association of Social Workers’ opposition to a state regulation restricting LGB foster parenting).

311. See, e.g., Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 611-12 (2013) (discussing San Francisco Mayor

B. Family Regulation

The influence of these families on same-sex marriage debates rounds out this story of change. The long history of state-sanctioned LGBT parenthood powerfully rebuts the child welfare arguments.³¹² Even more significantly, this account furthers our understanding of the relationship between marriage, parenthood, and civic status. Scholars such as Nancy Cott and Melissa Murray have critiqued marriage's outsized role in civic gatekeeping.³¹³ Others have also emphasized this function of marriage, but view it in a more positive light and, like Justice Scalia, contend that marriage is a route to adoptive parenthood.³¹⁴ Another group of scholars, including Martha Fineman and June Carbone, have argued for increased state recognition of, and support for, parenthood.³¹⁵ The account here complicates these conversations, revealing that parenthood serves as a path to civic status in its own right and that the state has recognized, and indeed rewarded, it in some instances.

This account revives adoption's historic role as a solution to societal problems and the view of adoptive parents as civically virtuous and illustrates adoption's potential to expand the family forms that are deemed legitimate. As their number grew, LGBT parents and their children became increasingly visible, normalizing this family structure. These families are "sticky," or difficult to dismantle, on both an individual and a systemic level. They now constitute valuable "facts on the ground" in the same-sex marriage debates. Finally, courts and legislatures are recognizing LGBT parents' success at caring for the most vulnerable and needy children, earning them the reward of access to marriage.³¹⁶

Gavin Newsom's more public and politically motivated resistance to same-sex marriage bans).

312. See *supra* Part III.C.2.

313. See COTT, *supra* note 44; Murray, *supra* note 176.

314. See Wardle, *supra* note 114.

315. See FINEMAN, *supra* note 177; JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000). June Carbone has also noted adoption's flexibility and perceived political neutrality, which, she argues, make it a valuable path for "untraditional partners who wish to . . . lock in legal recognition of their families." Carbone, *supra* note 91, at 383.

316. See *Obergefell v. Hodges*, No. 14-556, slip op. at 5 (U.S. June 26, 2015). For example, April DeBoer and Jayne Rowse adopted three children, including a premature son who "required around-the-clock care" and a daughter with special needs. *Id.*

1. Facts on the Ground

The more LGB families created across the country, the greater their impact on debates about parenthood and marriage.³¹⁷ Key to this was visibility at an individual level.³¹⁸ LGB couples are “outed” by parenthood. As one adoptive father put it, “[B]eing a gay parent makes you even more visible as a gay person than you’ve ever been before.”³¹⁹

These mothers and fathers, however, did not see adoption as an act of advocacy.³²⁰ This contrasts with some of the original marriage plaintiffs. The first couple who brought suit in Minnesota, for instance, described their lawsuit challenging that state’s same-sex marriage ban as “a political act with political implications.”³²¹ Although they prefer to just “live their lives,” many LGB parents nonetheless feel like “walking political statements.”³²² They do function as such; their interaction with individual caseworkers, judges, and neighbors normalizes LGB parenting.³²³ Parenthood erodes the stereotypes of LGB people as selfish and hedonistic and reveals LGB

317. Adoptive families are only part of this trend. Biological LGB parents, including those from the “lesbian baby boom” of the late 1980s and 1990s, contributed to the increased visibility of gay families, as did the increasing use of ART.

318. See Telephone Interview with Ellen Kahn, *supra* note 46 (confirming that knowing LGB adoptive families has changed some people’s minds about marriage).

319. GOLDBERG, *supra* note 4, at 142; see also MALLON, *supra* note 132, at 108 (“A gay man who has children discovers early on that the delicate question of when and why and to whom to come out is no longer in his control.”).

320. See MALLON, *supra* note 132, at 58 (“I wasn’t trying to make any political type of statement; my goal was to have children . . . [.] I was gonna do whatever I had to do to play the game to get the children.”).

321. Michael Boucai, *When Gay Marriage Was Radical*, HUFFINGTON POST, http://www.huffingtonpost.com/michael-boucai/when-gay-marriage-was-radical_b_3636437.html (last updated Sept. 22, 2013, 5:12 AM).

322. GOLDBERG, *supra* note 4, at 194 (internal quotation marks omitted). And yet because they are outed as a family, rather than as a mere couple, they do not encounter the hypersexualization often dominating people’s perceptions of gay couples. See Case, *supra* note 174, at 1647 n.15 (relating that courts attach less legal significance to homosexuality in custody battles between members of a gay couple than in battles in which a person in a heterosexual marriage seeks a divorce in order to pursue a gay relationship). Children “unsex” gay couples.

323. Every advocate I interviewed emphasized the importance of this “real world experience” in making LGB parenthood acceptable and perhaps even desirable. One symbol of this normalcy is the widespread popularity of *Modern Family*, which features gay adoptive parents Cameron and Mitchell. Contrast this with the situation thirty years earlier when Justice Powell, a moderate who nonetheless was the decisive fifth vote in the majority opinion upholding the criminalization of sodomy in *Bowers v. Hardwick*, famously stated that he had “never met a homosexual,” even though one of his law clerks at the time in fact was gay. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 386 (1998).

people to be “just like us,” navigating the mundane challenges and joys of family life. This reflects the public’s growing acceptance of parenthood as an important path to family formation. Tellingly, when asked whether certain living arrangements constituted a “family,” 78.7% of respondents to a 2003 survey described an unmarried heterosexual couple living with a child as a family, and over 94% described a single person living with a child as a family; in contrast, only 31.1% of respondents found an unmarried heterosexual couple without a child to be a family.³²⁴ The percentage of respondents willing to term LGB couples with children as families increased between 2003 and 2006, an increase that the study found to be statistically significant.³²⁵

By the time states began trying to curb LGB parenthood, LGB families had been in place for decades. This reality made it extremely costly, if not impossible, to dismantle them. The Lofton-Croteau family starkly illustrates this on an individual level.³²⁶ Steven Lofton and Roger Croteau, both pediatric nurses, fostered six children, several with HIV. When one of them, nine-year-old Bert, seroreverted, thus becoming more adoptable, the state attempted to remove him from Lofton and Croteau’s care to place him in an adoptive home, despite the fact that Bert had lived with them since infancy.³²⁷ Once he was no longer tainted with HIV, the child was deemed “too good” for gay parents.³²⁸ The boy’s adamant desire to remain with his self-described family prompted a massive campaign to “let Bert stay,” which included letters sent to the governor from many self-described conservatives who were not “in favor of homosexuality.”³²⁹ Bert was permitted to stay with his fathers, who became his legal guardians.

Courts have recognized the difficulty of undoing extant families on a broader scale. As one court recently stated when striking down a same-sex marriage ban, “[S]tate[s] cannot use [their] domestic

324. BRIAN POWELL ET AL., COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS’ DEFINITIONS OF FAMILY 21 (2010).

325. *See id.* at 29.

326. *See* Maria Carmela Sioco, *What Makes a Family? A Closer Look at Gay Adoption*, CHILD. VOICE (Child Welfare League of Am., Washington D.C.), Nov./Dec. 2009, at 18, 19-20.

327. *Id.* at 19.

328. Telephone Interview with Leslie Cooper, *supra* note 245.

329. *Id.*

relations authority to legislate families *out of existence*.³³⁰ This recognition turns the child welfare arguments on their head; the many children already living in these families should benefit from having married parents.³³¹ Justice Kennedy stated as much when he opined that bans on same-sex marriage “humiliate[] tens of thousands of children now being raised by same-sex couples.”³³² Many of the torrent of decisions invalidating bans on same-sex marriage in the last two years reflect the same view. Typical is the United States Court of Appeals for the Tenth Circuit’s observation of LGB-headed families in Utah: “[N]early 3,000 Utah children are being raised by same-sex couples. Thus childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals.”³³³ Public adoption’s significant part in legitimating LGB families suggests an important role for lived experiences in shaping the law.

2. Reward for Civic Virtue

Recognition of LGB parenthood, however, has not been limited to the observation of the numbers of LGB parents raising children. Indeed, the ability of LGB couples to adopt children, and their successful parenting, were noted by the first courts considering same-sex marriage.³³⁴ Foster and adoptive parenthood not only normalized LGB people, but also rendered them worthy as citizens.

330. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 774 (E.D. Mich.) (emphasis added), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

331. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (“No one disputes that the plaintiff couples are families, that many are parents [together], and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit.”).

332. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

333. *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (mem.); see also *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014) (mem.) (striking down the Oklahoma ban in part because the state allows LGB adoption).

334. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *17-18 (Haw. Cir. Ct. Dec. 3, 1996) (noting that “[LGB] parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children” and reporting that even the state’s expert agreed that LGB parents “are doing a good job” raising children); *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring) (noting the rights of couples to have children, to adopt, and to be foster parents); *Baker v. Vermont*, 744 A.2d 864, 881-82 (Vt. 1999) (noting the “significant number of children [who] today are actually being raised by same-sex parents,” including through adoption, and concluding that same-sex parenthood should support same-sex marriage).

Caseworkers, out of pragmatism, progressive views of family, or a lack of thought, brought together two marginalized groups: children in foster care and gay men and lesbians who wanted to parent.³³⁵ Historically, these families were deemed far inferior, combining the most unwanted children—abandoned or neglected and disproportionately poor and of color—with adults who were often openly reviled by policy makers. LGB people were unwanted as parents, yet in the 1980s, their presumed knowledge about AIDS rendered them useful for caring for “boarder babies,” who would have otherwise languished in hospitals.³³⁶ Having cared for friends and even strangers dying of AIDS, LGB people were well versed in the physical—changing diapers, bathing, giving medication—and emotional challenges of even the most difficult caregiving.³³⁷ Even now, LGB parents continue to be matched with the most hard-to-place children.³³⁸

As a result of these matches, some of the neediest children have been cared for and/or adopted by loving parents.³³⁹ This benefits not only the children themselves, but society as a whole.³⁴⁰ On the other side of the equation, LGB people who were deemed incapable and/or unworthy of being parents created families that they perhaps could not otherwise have formed. As one couple described their decision to foster and ultimately adopt a baby with AIDS: “We both wanted so much to become dads, but like most gay men, we thought that we

335. One adoption expert described this pairing as “mak[ing] sense [because] both groups [LGB people and older or special needs children in foster care] face a competitive disadvantage in the world of adoption.” Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays; Says It’s Bound by Antibias Laws*, BOS. GLOBE, Oct. 22, 2005, at A1.

336. MALLON, *supra* note 132, at 27 (quoting an interview of Terry Boggis, then the director of Center Kids, who described these infants as “almost unplaceable” due to phobia about AIDS and the high level of care they required). One advocate relates that “gay men and lesbians were some of the only people willing to touch babies with HIV or AIDS.” Telephone Interview with Ellen Kahn, *supra* note 46.

337. In the early days of the AIDS epidemic, many of those who were ill and/or dying were isolated or rejected from their families. As a result, LGB communities across the country formed “buddy” systems in which volunteers would visit, care for, and sometimes live with those who were infected. See e.g., *Mission*, ACTIONAIDS, <https://actionaids.org/about/mission> (last visited Oct. 27, 2015) (relating its mission to create “an AIDS-free generation” and listing its services, which include housing, HIV treatment, and education).

338. See *supra* text accompanying notes 124–130, 209, 241.

339. This solution is admittedly only partial because there are too many children in foster care to be adopted by any subset of adults.

340. One court recently recognized this, asking why the states banning same-sex marriage would not want to encourage LGB parents to adopt and strengthen their families by permitting them to marry. *Baskin v. Bogan*, 766 F.3d 648, 662, 664 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (mem.).

would never be able to do that. . . . In retrospect, we were as desperate to become dads as [the agencies] were to get foster parents. *It was a good match for all of us.*³⁴¹

Courts have previously rewarded LGB people for taking on the care of the incapacitated and thus privatizing dependency and relieving the state of any burden. In one of the earliest LGB rights cases, *Braschi*, New York's highest court granted Miguel Braschi the right to retain his same-sex partner's rent-controlled apartment, despite the lack of any prior recognized legal relationship between the two men.³⁴² In analyzing the couple's status, the court explicitly weighed economic factors such as their single household budget, their sharing of family responsibilities, and their joint checking account.³⁴³ The court concluded that Braschi and Leslie Blanchard were a "couple," basing its holding on a functional rather than formalist vision of relationships, what the court referred to as "the reality of family life."³⁴⁴

Central to this groundbreaking decision was family's caregiving function: the court specified that "the dedication, caring and self-sacrifice" of individuals to each other should control.³⁴⁵ Braschi had lived with Blanchard for over ten years and cared for him as he died of AIDS. Although not explicitly mentioned in the pleadings (by Braschi's choice), the then-emergent AIDS crisis shaped the case.³⁴⁶ The justices were sympathetic to Braschi, whose lawyers emphasized his "painstaking care" of Blanchard and who was now ill himself and threatened with eviction.³⁴⁷ On a larger level, the court was informed of the growing epidemic of AIDS and the related problem of homelessness—"the two pressing social issues of [the time]."³⁴⁸ Emphasizing the difficulties that these issues posed for the community, the City of New York filed an amicus brief supporting

341. MALLON, *supra* note 132, at 41-42 (emphasis added).

342. 543 N.E.2d 49 (N.Y. 1989).

343. *Id.* at 55.

344. *Id.* at 53.

345. *Id.* at 55.

346. See CHAUNCEY, *supra* note 30, at 104 (noting that the justices were "deeply influenced by . . . 'the painful facts of AIDS'").

347. PANEL ON MONITORING THE SOC. IMPACT OF THE AIDS EPIDEMIC ET AL., THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES 233 (Albert R. Jonsen & Jeff Stryker eds., 1993) [hereinafter THE SOCIAL IMPACT OF AIDS]; see also William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 95 (1991) (reporting that "Braschi devoted all of his time and energy to caring for [Blanchard]").

348. Rubenstein, *supra* note 347, at 103.

Braschi, noting the city's housing shortage and its growing number of sick.³⁴⁹

There are numerous parallels between the partners in *Braschi* and foster and adoptive parents. In both instances, an individual engaged in caregiving for a dependent (physical or legal) with whom, at least at first, he had no biological or legal connection.³⁵⁰ He thus took on all of the obligations of family with none of the rewards. This is particularly so for foster parents, who take in children they have never before met. Moreover, in both cases, the government was faced with a significant group of people in need of care and a shortage of available resources.³⁵¹ It is not surprising, then, that in *Braschi*, AIDS service providers, like the foster care and adoption caseworkers discussed above, intervened on behalf of Braschi to emphasize an urgent and growing problem and the need to reward those attempting to address it.³⁵² Finally, in both cases, the caregivers sought recognition of their assistance from the state, both symbolic and tangible. Braschi fought eviction from Blanchard's rent-controlled apartment, but also for an acknowledgement of his love and commitment. LGB parents sought marriage both for its expressive value and its real financial benefits.

Recent courts considering same-sex marriage increasingly recognized the significant contributions of LGB parenthood.³⁵³ Most significantly, the Supreme Court in *Obergefell* both praised the individual foster and adoptive parenting of the DeBoer-Rowses and noted the larger trend of LGB adoptive state-created parenthood.³⁵⁴

In 2014, numerous lower courts also specifically noted LGB adoptive parenthood. A federal court in Ohio derided the state's "backward evolution" in reversing its long practice of recognizing out-of-state adoptions by same-sex couples in the shadow of the

349. Philip S. Gutis, *New York Court Defines Family to Include Homosexual Couples*, N.Y. TIMES (July 7, 1989), <http://www.nytimes.com/1989/07/07/nyregion/new-york-court-defines-family-to-include-homosexual-couples.html>.

350. Foster parents have little to no legal standing, and nearly all public adoptive parents must foster first.

351. See *supra* text accompanying notes 216-217.

352. THE SOCIAL IMPACT OF AIDS, *supra* note 347, at 233 (noting that AIDS service providers filed an amicus brief that outlined other situations like Braschi's).

353. See, e.g., *Obergefell v. Hodges*, No. 14-556, slip op. at 15 (U.S. June 26, 2015) ("[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.").

354. *Id.* at 5, 15.

same-sex marriage debates.³⁵⁵ The court ended its opinion with a song entitled “Happy Adoption Day,” whose chorus proclaims, “[A]ll of a sudden this family was born.”³⁵⁶ The trial court in *DeBoer v. Snyder* emphasized the importance of LGB parents and families to the marriage issue: “[S]tate defendants lost sight of what this case is truly about: people. No court record of this proceeding could ever fully convey the personal sacrifice of these two [women] who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples.”³⁵⁷

No court has so firmly established the link between adoptive parenthood and marriage as the United States Court of Appeals for the Seventh Circuit did in its much-lauded opinion in *Baskin v. Bogan*.³⁵⁸ During oral argument, the panel’s questions largely centered on LGB adoption and on the relationship between adoptive families and marriage.³⁵⁹ The opinion maintained this focus, beginning with a discussion of “the welfare of American children,” including children adopted by “homosexual couples.”³⁶⁰ The court noted that LGB couples are more likely to adopt, pointing to much of the data cited above,³⁶¹ and concluded that states “should *want*” LGB adoptive parents to marry.³⁶² Terming the state defendants’ failure to consider adoption when framing their argument “an extraordinary oversight,” the court concluded, as I have argued above, that the long practice of LGB adoption reveals the child welfare arguments against same-sex marriage to largely be pretexts for moralistic discrimination.³⁶³ Both state-defendants’ long histories of permitting LGB adoption demonstrate that policy makers in those states consider LGB people

355. *Henry v. Himes*, 14 F. Supp. 3d 1036, 1057 n.24 (S.D. Ohio) (mandating that Ohio recognize same-sex marriages and adoptions performed outside the state), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell*, No. 14-556.

356. *Id.* at 1061 n.26.

357. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388, *rev’d sub nom. Obergefell*, No. 14-556.

358. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (mem.).

359. Adoption and foster care were raised at least thirty-five times during the oral arguments of the two related cases, *see Baskin* Oral Argument, *supra* note 153; Oral Argument, *Wolf v. Walker*, No. 14-2526 (7th Cir. argued Aug. 26, 2014), http://media.ca7.uscourts.gov/sound/2014/rt.2.14-2526_08_26_2014.mp3, and twenty-two times in the *Baskin* opinion, *see Baskin*, 766 F.3d 648.

360. *Baskin*, 766 F.3d at 654.

361. *Id.* at 663.

362. *Id.* at 664.

363. *See id.* at 662.

to be at least “reasonable” parents.³⁶⁴ Banning marriage is nonsensical, then, because it harms the worthy adoptive parents who are helping to address the “major problem for society” of “unwanted children,” as well as their (now wanted) children.³⁶⁵

V. CONCLUSION: FROM SKIM MILK FAMILIES TO SUBVERSIVE FAMILIES

With all eyes on the battle over marriage in legislatures and high courts, a quieter family revolution has been largely overlooked. Street-level decisions by caseworkers and lower court judges created thousands of families.³⁶⁶ Demonstrating the myriad paths to sociolegal change, these incremental acts have contributed to a sweeping shift in family structure. This account demonstrates that the discretionary and hidden nature of public family law, often deemed to be a flaw, can be beneficial. This story also posits parenthood as a more significant gateway to marriage and to civic recognition than previously understood.³⁶⁷ Becoming parents rendered many LGB people intelligible as peers; their “normalcy” legitimated queer families and catalyzed courts and lawmakers to catch up to society.³⁶⁸ Opponents of same-sex marriage ignored, tolerated, or even praised LGB foster parenting and adoption. In so doing, they undercut their own arguments and unwittingly contributed to marriage’s expansion.

LGB people’s parenthood, particularly adoptive parenthood of a sometimes heroic nature,³⁶⁹ partially underlies their access to the reward of marriage. Their conformity to norms of privatized care, however, brings costs.³⁷⁰ They are being rewarded not only for the performance of their civic duty, but also for their assimilation. This limits their ability to change or transform the family and, particularly,

364. See *id.*; Baskin Oral Argument, *supra* note 153, at 39:00.

365. Baskin, 766 F.3d at 662.

366. See *supra* Part IV.A.2.

367. Although marriage and parenthood remain deeply connected, this connection is not as robust as it once was, nor does it always take the form conventionally assumed. Both adoption and LGB parenthood disrupt the standard account. I plan to further explore the contours of the marriage-parenthood connection in future work.

368. See *supra* text accompanying notes 353-364.

369. See *supra* text accompanying notes 326-333 (describing the Lofton-Croteaus, the DeBoer-Rowsses, and others who took in sick and disabled infants who thrived in their care).

370. Numerous scholars have warned that the marriage equality movement has increased the powerful regulatory pull of marriage and the conformity to its limiting norms. See, e.g., Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1569 (2006) (noting the potential negative consequences of “the absorption of queering the family into same-sex marriage”).

to challenge the state's failure to support dependents such as children.³⁷¹ In an ironic twist, marriage equality may make it more difficult for unmarried couples, gay or straight, to adopt.

These families, however, have also changed the equation. No longer just tolerated, LGB foster and adoptive parents are now sought after. In 2012, the Obama Administration began actively recruiting them.³⁷² More broadly, using the wedge of adoptive parenthood to gain entry into the marriage "club," many LGB people are transforming the meaning of parenthood and family. Illustrative is the family of Kelly Vielmo and Jack Montgomery, a couple who adopted three siblings from foster care before getting married. Rather than doing so quietly, they held an adoption ceremony with over forty guests in attendance and a blessing from a priest.³⁷³ The Vielmo-Montgomerys challenge numerous longstanding assumptions governing family law, including bionormativity, stereotypes about LGB lifestyles and priorities, the secrecy of adoption, family gender roles, and the preeminence of horizontal relationships.³⁷⁴ These families are fulfilling what anthropologist Kath Weston identified as LGB parenthood's "radical potential."³⁷⁵

Adoptive parenthood helped build the path to same-sex marriage. Yet uncovering and considering this history goes beyond marriage; it will aid attempts to bring coherence to family law, as well as equality to the diverse range of families.

371. See Godsoe, *supra* note 5 (arguing that the selection and framing of hetero-normative plaintiffs further limits the transformative potential of marriage equality).

372. Andrea Poe, *Obama Administration Is Recruiting Gay and Lesbian Foster and Adoptive Parents*, HUFFINGTON POST, http://www.huffingtonpost.com/andrea-poe/obama-administration-is-r_b_1923035.html (last updated Nov. 28, 2012, 5:12 AM).

373. See Dvorak, *supra* note 288.

374. *Id.*

375. WESTON, *supra* note 187, at 201; see also NeJaime, *supra* note 20 (arguing that "marriage equality may [continue to] blur, rather than redraw, the line between marital and nonmarital parental recognition").