

Saint Louis University Public Law Review

Volume 24
Number 1 *Out of the Closet and Into the Light:
The Legal Issues of Sexual Orientation (Volume
XXIV, No. 1)*

Article 12

2005

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Recommended Citation

Wardle, Lynn D. (2005) "Parenthood and the Limits of Adult Autonomy," *Saint Louis University Public Law Review*: Vol. 24 : No. 1 , Article 12.

Available at: <https://scholarship.law.slu.edu/plr/vol24/iss1/12>

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PARENTHOOD AND THE LIMITS OF ADULT AUTONOMY

LYNN D. WARDLE*

I. INTRODUCTION

Cultural anthropologists use the concept of “root paradigms” to explain how society prepares and guides its members to cope with crises of personal, familial and social identity.¹ All societies provide their members with root paradigms that “reflect the assumptions underlying the very nature of existence They guide behavior of both individuals and groups in the crises of life and often require self-sacrifice on the part of individuals in the interest of group welfare.”² Root paradigms “are, at the socio-cultural level, analogous to DNA and RNA at the genetic level.”³ They crystallize the formative validity beliefs of society.

One fundamental root paradigm of most Western societies is “responsible parenthood”—the high commitment of individuals and societies to the welfare of children and posterity. This article addresses two significant challenges to the “root paradigm” of responsible parenthood. The first challenge is the conflict between responsible parenthood and another root paradigm, that of adult personal autonomy. Part II of this article shows that absolute autonomy of parents in matters such as sexual lifestyle conflicts with, and is sometimes irreconcilable with, commitment to the welfare of future generations. For example, parental infidelity deeply harms children. The assumption of parental responsibilities necessarily requires the voluntary subordination or curtailment of some of the parents’ personal autonomy in matters relating to sexual behavior.

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1. See Merlin G. Myers, *The Morality of Kinship*, Speech at the Virginia F. Cutler Lecture (Nov. 15, 1983), in *BYU SPEECHES OF THE YEAR, 1983-84*, at 45 (1984). See also VICTOR TURNER, *DRAMAS, FIELDS AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* 23-59 (1974) (examining how paradigms influence human behavior).

2. Myers, *supra* note 1, at 45.

3. *Id.*

The second challenge to the root paradigm of responsible parenthood comes from efforts to redefine that root paradigm. For example, the movement to legalize adoption of children by same-sex couples can be seen as an attempt to redefine the fundamental root paradigm of responsible parenthood. Part III of this article explains how general legalization of adoption by same-sex couples would radically alter the nature of the root paradigm of responsible parenthood, and would undermine the time-proven dual gender model and ideal of responsible parenthood.

II. RECONCILING TWO ROOT PARADIGMS THAT SOMETIMES CONFLICT

A. *Two Root Paradigms in Western Societies: Autonomy and Posterity*

One root paradigm of the Western world today, especially in the United States and Western Europe, can be called “autonomy.” It involves commitment to protect, foster, and empower individual autonomy, or “independence.”⁴ “Modern Western society has tended to view human dependency as tantamount to subordination, or even as a sign of inferiority.”⁵

This autonomy root paradigm is especially pronounced in the United States. “The American people are well known for stressing the role of individual rights within society.”⁶ As far back as 1831 Alexis de Tocqueville noted that individual “sovereignty” (i.e., liberty) was the “fundamental principle” and “the grand maxim upon which civil and political society rests in the United States.”⁷ More recently, Professor Carl Schneider has written that “[p]erhaps no idea in American life has become so convincing as the belief that each of us is entitled to live autonomously.”⁸ Americans “abhor[] . . . dependence,” to the point that they even “fear ties that bind.”⁹ Even patients who are very sick or terminally ill feel threatened by their loved ones because

4. THE OXFORD REFERENCE DICTIONARY 55 (1986).

5. Akira Morita, *On the Concept of Human Rights—A Cross-Cultural Reconsideration* at 4 (Feldkirch, Aug. 31, 2002) (on file with author).

6. Tatsuo Inoue, *The Poverty of Rights-Blind Communalism: Looking Through the Window of Japan*, 1993 B.Y.U. L. Rev. 517, 518 (1993).

7. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 418 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1953) (1835). *See also id.* (“[E]very man is allowed freely to take that road which he thinks will lead him to heaven, just as the law permits every citizen to have the right of choosing his own government.”).

8. Carl E. Schneider, *Fixing the Family: Legal Acts and Cultural Admonitions*, in *REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE* 181 (Alan J. Hawkins et al. eds., 2002).

9. *Id.*

they so deeply resent being in a status of dependence, even upon wife or husband, parents or children.¹⁰

The values of personal independence and autonomy that comprise this root paradigm strongly influence American family law. The dominant policy in the area of family law over the past thirty years (such as emergence of constitutional doctrine of privacy, enactment of unilateral, no-fault divorce laws, and legitimation of previously prohibited sexual relations, etc.) has tended toward replacing restrictive old public norms with new individually-determined standards (autonomy).¹¹

Another fundamental root paradigm common throughout Western societies is the high commitment of individuals, as well as society, to the welfare of future generations.¹² This root paradigm may be called “responsible parenthood.” The social dimension of this paradigm is commitment to posterity, articulated beautifully in the Preamble of the Constitution of the United States, written in 1787, which reads:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.¹³

The Founders of the American Republic were not acting merely to secure their own liberties, but to secure the blessings of liberty for their posterity. “Posterity” was a word that was used very prominently in many state constitutions and declarations of rights in the founding era.¹⁴ At the Philadelphia Convention of 1787, where the Constitution of the United States was drafted, Roger Sherman reminded his fellow delegates: “We are providing for our posterity, for our children & our grand Children [sic] . . .”¹⁵ Likewise, James Wilson observed: “We should consider that we are providing a Constitution for future generations, and not merely for the peculiar

10. *See id.* at 181-82.

11. *See, e.g.,* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807-08 (1985) (describing the diminution of moral discourse in family law); Jana B. Singer, *The Privatization of Family Law*, 1992 WISC. L. REV. 1443, 1508 (1992) (describing the “privatization” of family law).

12. *See* Myers, *supra* note 1, at 49.

13. U.S. CONST. pmbl (emphasis added).

14. Raymond B. Marcin, “Posterity” in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 276-77 (1993) (citing the Pennsylvania Constitution, Massachusetts Bill of Rights, and Virginia Declaration of Rights).

15. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 288 (Ohio Univ. Press 1966) (1893).

circumstances of the moment.”¹⁶ The fact that Americans still enjoy the liberties won in 1776 may be due in no small part to the fact that the founders of that generation were deeply committed to the welfare not of themselves and their own generation, but that of their children and all posterity.

The importance of responsible parenthood and commitment to posterity has deep roots in Western civilization. One of the best-known examples comes from the last two verses of the Old Testament:

5 Behold, I will send you Elijah the prophet before the coming of the great and dreadful day of the LORD:

6 And he shall turn the heart of the fathers to the children, and the heart of the children to their fathers, lest I come and smite the earth with a curse.¹⁷

This indicates that unless there is a bonding of the generations, turning the hearts of fathers to children and the hearts of children to their fathers, the entire society will be cursed. Similar teachings can be found in many other great world religions. For example, the Qu’ran teaches that children are a bounty from Allah.¹⁸ A famous “hadith” (the sayings of Mohammed and his companions), states: “Paradise lies at the feet of mothers.”¹⁹ The Prophet taught that husbands have the duty to support their families, that women nurturing young children are entitled to special support, and that a father’s salvation and exaltation in heaven depend on his providing properly for and patiently teaching his children.²⁰

16. *Id.* at 376.

17. *Malachi* 4:5-6 (King James). See also THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 98:16-17 (1981) (“Therefore, renounce war and proclaim peace, and seek diligently to turn the hearts of the children to their fathers, and the hearts of the fathers to the children; . . . lest I come and smite the whole earth with a curse, and all flesh be consumed before me.”).

18. HOLY QUR’AN (AL A’RAF) 7:190, available at <http://www.alislam.org/quran/translation/7.html> (last visited Nov. 16, 2004); see also Kathleen A. Portuán Miller, *The Other Side of the Coin: A Look at Islamic Law As Compared to Anglo-American Law—Do Muslim Women Really Have Fewer Rights Than American Women?*, 16 N.Y. INT’L L. REV. 65, 103 (2003).

19. Miller, *supra* note 18, at 103 (citing B. AISHA LEMU, WOMAN IN ISLAM 239 (1992)); Shaikha Kouthar Allie Cader, Family Life in Islam/Women in Islam, Address Before the World Family Policy Forum at Brigham Young University 4 (July 14, 2003) (transcript on file with author) (attributing this saying to the Prophet); Miller, *supra* note 18, at 103-04 (“[T]he Holy Qur’an . . . says, ‘Sacred are family relationships that arise through marriage and women bearing children.’ Motherhood and children are highly valued in the Islamic culture.”); *id.* at 104 (“Mohammed said: ‘He whosever has three daughters and exercises patience with them, feeds them, clothes them according to his own income, will . . . be protected from the hellfire (will have a place in heaven).’”); see also ISLAMI CITY, UNDERSTANDING ISLAM AND THE MUSLIMS, at http://www.islamicity.com/Mosque/uiatm/un_islam.htm (last visited Nov. 16, 2004).

20. See *supra* note 19.

Thus, the root paradigm of responsible parenthood—individual and social commitment to children and to posterity—is deeply rooted in Western and other societies, including America. It is at least as deeply imbedded in Western civilization as the root paradigm of autonomy.

B. The Potential for Conflict Between Autonomy and Posterity

Obviously, there is potential for conflict between these two root paradigms. The commitment to provide for the best interests of children sometimes conflicts with the pursuit or exercise of adult autonomy.²¹ This conflict is especially profound when the sexual practices of adults conflict with their parental responsibilities.²² Some sexual practices adults may choose to enjoy or experiment with raise serious risk of harm for children. Some sexual relations that adults *without* children may engage in with little apparent, short-term detriment for themselves may expose children to grave developmental risks. This is true of some heterosexual and some homosexual practices.

C. An Example: How Parental Infidelity Harms Children

Infidelity to a husband or wife may be deemed improper, especially if the legal commitment of marriage has been made, but if the couple has no children, there seems to be very little social stigma and little or no criminal or civil sanctions in most Western countries.²³ However, when children are involved, spousal infidelity may be treated more seriously because parental adultery may have very severe consequences for children.

21. See FRANK PITTMAN, M.D., PRIVATE LIES: INFIDELITY AND THE BETRAYAL OF INTIMACY 272-73 (1989).

22. *Id.* at 266.

23. I mention this to describe current conditions, not to endorse them. I have criticized the prevailing rule in America which bars consideration of adultery in most custody cases. Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 92 (2002) (adultery is irrelevant in custody cases in most states unless clear, direct harm to the child can be shown); see also Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 50-51 & n.36 (1991) (half of the American states had repealed criminal adultery laws by 1991); see also Miller, *supra* note 18, at 91-92 (adultery is punishable by stoning under Islamic law; fornication is punished by flogging); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1431-32 (2003) (Islamic women in many countries still experience flogging and stoning for sexual offenses); but see Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?* 81 OR. L. REV. 131, 140 n.58 (2002) (“a substantial number of states . . . impos[e] the death penalty for . . . adultery.”). I do not recommend these severe sanctions, but include reference to them to show that infidelity in relationships where children often/usually are present may be treated as a serious offense.

Psychologists explain that parental adultery confuses and frightens children, who often blame themselves for their parents' unhappiness.²⁴ These children think it is because of something that they did or said or failed to do, or perhaps because of their bad thoughts or evil wishes.²⁵ Dr. Frank Pittman stated:

Small children [whose parents commit adultery] tend to develop symptoms of insecurity, regressing to the behavior of younger children. They may exhibit anxiety symptoms, with clinging, bed-wetting, thumb-sucking, fire-setting, temper tantrums, night terrors—in fact, anything that seems an appropriate response to the fear that their family is about to be wiped out.²⁶

Dr. Evelyn Berger adds that children whose parents have been unfaithful may demonstrate “defiance, refusal to eat, irritability, quarrelsomeness, clowning, withdrawing, enuresis, temper tantrums, dawdling, daydreaming, listlessness, sleepwalking, or poor grades at school.”²⁷

For older children whose parents commit adultery, Dr. Pittman reports that “[s]hoplifting, running away from home, and setting fire to the house are frequent ways of acting out. These behaviors may have a certain metaphoric appropriateness.”²⁸ “Suicide attempts among children and adolescents are a frequent response to parental adultery The child is asking, ‘Who is more important? Your child or your affair?’”²⁹ School performance may fall drastically.³⁰ Dr. Pittman notes: “The traumas of infidelity and divorce are overwhelming for children of any age, even children who are fifty years old and grandparents. But perhaps they are hardest on adolescents”³¹ A psychologist wrote of the experience of one boy whose father had left his mother for an adulterous partner; the boy “ran away from home and got into the gay scene [A]ll [his siblings] went through some depression. One of

24. See Wardle, *supra* note 23, at 112-29; see also PITTMAN, *supra* note 21, at 260; WARNER TROYER, *DIVORCED KIDS* 40-42 (1979); JANIS ABRAHMS SPRING PH.D. & MICHAEL SPRING, *AFTER THE AFFAIR: HEALING THE PAIN AND REBUILDING TRUST WHEN A PARTNER HAS BEEN UNFAITHFUL* 124-25 (1996); EVELYN MILLER BERGER PH.D., *TRIANGLE: THE BETRAYED WIFE* 133-34 (1971); DR. JAMES C. DOBSON, *LOVE MUST BE TOUGH: NEW HOPE FOR FAMILIES IN CRISIS* 3 (1996).

25. See BERGER, *supra* note 24, at 134-35.

26. PITTMAN, *supra* note 21, at 262.

27. BERGER, *supra* note 24, at 131.

28. PITTMAN, *supra* note 21, at 262.

29. *Id.* at 263. See also DOBSON, *supra* note 24, at 110 (describing suicide attempt by thirteen-year old after parental infidelity).

30. “A thirteen-year old boy who had been an ‘A’ student began to fail in junior high school. A former intelligence test had placed him in the ‘superior’ group. The school psychologist tested him again, and his score had dropped to the ‘dull normal’ level. This boy loved his father, who had left to live with another woman.” BERGER, *supra* note 24, at 131.

31. PITTMAN, *supra* note 21, at 263.

[his sisters] had epileptic seizures . . . caused by depression . . .”³² A mother whose husband left her for another woman “cried almost incessantly for twelve months, and [later], her thirteen-year-old daughter tried to commit suicide.”³³

The potential impact upon teenage *sexual* behavior is particularly harmful for adolescent children. “Classically, they either become promiscuous . . . or they render themselves sexually undesirable . . .”³⁴ “Children of infidelity, especially the sons of philanderers, are very much at risk to become philanderers themselves.”³⁵ “They may decide that . . . infidelities are normal and marriage is [simply] impossible. They may go even further and decide to give up on the entire opposite sex.”³⁶ Increasingly, children of adulterous parents may turn to homosexual behavior.³⁷

There is a “sleeper effect” upon many children whose parents have been unfaithful, an emotional time bomb that goes off when the child becomes an adult and faces the challenge of forming bonds of trust and intimacy for himself or herself. Dr. Janis Abrahms Spring explains:

[L]ong after the infidelity has been acknowledged or put to rest, [children] may still be scarred, may still be harboring negative feelings about [themselves] and carrying them . . . into [their] most intimate relationships. Riddled with insecurity, [they] may have trouble perceiving [themselves] as a worthy, lovable, special human being. It’s not easy to love, or be loved, when feelings of abandonment, invalidation, or betrayal are core to [one’s] sense of self.³⁸

Dr. Pittman notes: “[M]ost commonly, children [of an adulterous parent] . . . lose their faith in marriage . . . They may decide that . . . infidelities are normal and marriage is [simply] impossible.”³⁹ Dr. Berger writes:

A rejected wife tearfully told her small daughter that her life was ruined. Her father had done something wicked and the situation “wasn’t fair.” “Men are undependable and should never be trusted,” she said bitterly. Her words upset her little girl, but her mother’s hostile, martyred attitude had an even more lasting effect on her daughter’s outlook on marriage and men in general.⁴⁰

By the same token,

[t]he wife who loses her husband to another woman may, without realizing it, rear her son with the idea that men are faithless creatures who can’t be trusted. The son, becoming a man himself, lacks self-acceptance. Infidelity in his own

32. DOBSON, *supra* note 24, at 124.

33. *Id.* at 110.

34. PITTMAN, *supra* note 21, at 263.

35. *Id.* at 268.

36. *Id.* at 266-67.

37. *See* DOBSON, *supra* note 24, at 124.

38. SPRING & SPRING, *supra* note 24, at 125.

39. PITTMAN, *supra* note 21, at 266-67.

40. BERGER, *supra* note 24, at 138.

later years may be due to the suggestions of a poor example, or the lack of self-respect as a male—possibly both.⁴¹

Warner Troyer writes:

All of the adults I interviewed felt the divorce in their childhoods had altered or atrophied their prospects for full and happy marital relationships. Many said they had determined in their youth that they would have no children of their own and had even made that a condition of marriage in later years. Even at forty and fifty years of age and beyond, these former “divorced kids” were fearful of commitment, uncertain as to their ability to maintain enduring relationships. Some, divorced themselves, specifically blamed their parents for their own marital failures; they’d “rushed into marriage to find the emotional security I missed at home” or they had “been conditioned to believe there was no permanence in marriage.”⁴²

A middle-aged man, in counseling to deal with his own infidelities, wrote a letter to his father who had committed adultery and left his wife, the man’s mother, nearly thirty years earlier. In part, the letter said:

For years I couldn’t face how angry I was with you for leaving me, for rarely making me feel you loved me or were proud of me, for making me take care of Mom When I was thirteen and you left, I decided I’d never let anyone get close to me again, and I’d never love anyone again. I kept my promise.⁴³

Thus, absolute sexual autonomy may be incompatible with parental responsibility because it poses serious risk to the emotional welfare and healthy development of children.

D. Resolving the Conflict - Priority for Posterity

When the root paradigms of autonomy and posterity conflict, which should be given priority? Renowned cultural anthropologist, Professor Merlin G. Myers, suggested a way to resolve root paradigm conflict when he indicated that “relationships can be ranked on a continuum on the basis of their moral content.”⁴⁴ He noted that “sacrifice is the ready index to the moral quality of a relationship. If one is willing to sacrifice only a little, morality is small; if much, morality is great.”⁴⁵ Dr. Myers stated:

In a purely technical means-to-end relationship, the failure of the means to achieve the desired end results . . . in a change of means [S]ome . . .

41. *Id.* at 142.

42. TROYER, *supra* note 24, at 146-47.

43. SPRING & SPRING, *supra* note 24, at 130-31. *See also* JULIA THORNE, A CHANGE OF HEART: WORDS OF EXPERIENCE AND HOPE FOR THE JOURNEY THROUGH DIVORCE 136 (1996) (where a son explains his anger towards his father for having an affair).

44. Myers, *supra* note 1, at 50.

45. *Id.* at 55.

human social relationships are like this. When there is delay or imbalance in the reciprocal aspects of the relationship, it may be terminated. (People are then being dealt with as if they were things.) However, in other kinds of relationships, neither delay nor imbalance terminates the association . . . [I]t is morality that makes the difference. The demand for an immediate, or for a strictly equivalent, return for services or presentations given is tantamount to a denial of any moral relationship between the parties, while the presence of delay and imbalance between gift and counter-gift is synonymous with the presence of morality.⁴⁶

Dr. Myers also noted that “the process of human reproduction gives rise to relationships of a special kind having their origin in a unique domain of social life.”⁴⁷ Furthermore:

The domain of kinship predicates a kind of morality characterized by kindness and a predisposition to love and care The words kindness, kin and the German word for child, kind . . . express the moral character of kinship. Kinsmen are expected to be loving, just, and generous one to another. They do not demand strict equivalent returns for services rendered. Kinship morality is automatically binding.⁴⁸

While other social relationships generally are characterized by reciprocity, kinship is not.⁴⁹

This analysis suggests that the assumption of parenthood requires the socially-reinforced voluntary subordination or sacrifice of some degree of personal autonomy. There are things society cannot allow parents to do which it might (and which many nations do) allow autonomous adults who have not assumed the responsibilities of parenting to do. Conversely, there are some things that autonomous adults may choose to do that may, at least temporarily, disqualify them from assuming the responsibilities of parenthood.

In his intriguing book, *The End of History and the Last Man*, Francis Fukuyama agrees with this proposition. He argues that “liberal societies” are likely the epitome of political evolution, but they contain the seeds of their own destruction.⁵⁰ That is because

families don’t really work if they are based on liberal principles, that is, if their members regard them as they would a joint stock company, formed for their utility rather than being based on ties of duty and love. Raising children or making a marriage work through a lifetime requires personal sacrifices that are irrational, if looked at from a cost-benefit calculus. For the true benefits of strong family life frequently do not accrue to those bearing the heaviest

46. *Id.* at 50.

47. *Id.* at 47.

48. *Id.* at 48.

49. Myers, *supra* note 1, at 48.

50. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 324-25 (1992).

obligations, but are transmitted across generations. Many of the problems of the contemporary American family—the high divorce rate, the lack of parental authority, alienation of children, and so on—arise precisely from the fact that it is approached by its members on strictly liberal grounds. That is, when the obligations of family become more than what the contractor bargained for, he or she seeks to abrogate the terms of the contract.⁵¹

Moreover, in the conflict between the root paradigms of autonomy and commitment to the welfare of children and posterity, we must remember that the “moral character of kinship” provides the basis of law and pre-law in all societies.⁵² Parenting provides

the birth of law in human experience and serves the needs for order in all human affairs. The first encounter of the individual with law is the law of his parents, and herein one is conditioned and trained to cope with law as it is applied in the outer world.⁵³

Thus, if law as we know it (liberal, democratic law) is to survive, the traditional root paradigm of priority in social commitment to children must be maintained. The assumption of parental responsibilities necessarily requires the voluntary subordination or curtailment of some of the parents’ personal autonomy in matters relating to sexual behavior. Given the potential harm to children, society has compelling reasons to require parents to refrain from irresponsible sexual behavior.

III. REDEFINING THE ROOT PARADIGM OF COMMITMENT TO THE WELFARE OF CHILDREN

Some rather dramatic, even radical, changes in several of the root paradigms of Western societies have been proposed recently. The movement to legalize adoption by same-sex couples is one prominent example. The effort to legalize adoption by same-sex couples is more than a mere attempt to subordinate the root paradigm of “commitment to the welfare of children” to the root paradigm of “personal adult autonomy of lesbians and gays.” In an even more fundamental sense, the campaign to legalize gay or “second-parent” adoptions represents an attempt to fundamentally redefine the root paradigm of responsible parenting itself by profoundly altering the very nature and ends of parenting. The movement to generally legalize adoptions by same-sex couples represents an attempt to redefine parenthood from a relationship requiring the commitment of both men and women together to the best interests of children, to furthering the child-rearing interests of any one or more autonomous adults.

51. *Id.* at 324.

52. Myers, *supra* note 1, at 49, 51.

53. *Id.* at 51.

A. *The Movement to Legalize Gay Couple Adoption in the United States*

There is a growing, vocal movement in the United States to legalize adoption by same-sex couples. While only a few states have adopted that policy by legislation or supreme court ruling,⁵⁴ there is strong support for the movement among intellectuals. For example, one survey of law review literature published in 1997 found the ratio of publications favoring gay parenting to publications opposing such parenting to be 92:1.⁵⁵

Appellate courts in only twelve states and the District of Columbia have addressed the question whether existing adoption laws allow gay couples to adopt. Appellate courts in seven states and the District of Columbia have interpreted the adoptions laws to allow gay partners to adopt,⁵⁶ while appellate courts in at least five other states have rejected such claims.⁵⁷

54. See, e.g., VT. STAT. ANN. tit. 15A, § 1-102 (2002) (stating in relevant part, “If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent.”); *Sharon S. v. Superior Court*, 73 P.3d 554, 574 (Cal. 2003) (allowing “second parent” adoption); *In re Adoption of Charles B.*, 552 N.E.2d 884, 890 (Ohio 1990) (homosexuals are not as a matter of law ineligible to adopt); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002) (law does not prevent unmarried same-sex partners from adopting a child); *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 2002) (same-sex adoptions allowable). See generally Lynn D. Wardle, *Preference for Marital Couple Adoption-Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345 (2003).

55. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, U. ILL. L. REV. 833, 836-37, 899-06 (1997).

56. See *Sharon S.*, 73 P.3d at 573-74 (allowing adoption by former lesbian partner); *In re M.M.D.*, 662 A.2d 837, 840, 859 (D.C. 1995) (allowing second-parent adoption in stages by a gay male couple); *In re K.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (allowing lesbian partner adoption); *In re C.M.A.*, 715 N.E.2d 674, 679 (Ill. App. Ct. 1999) (former judge did not have authority to prevent later judge from issuing order allowing lesbian partners to adopt); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *Adoption of Galen*, 680 N.E.2d 70, 73 (Mass. 1997); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 554 (N.J. Super. Ct. Ch. Div. 1993); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995); *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1001-02 (N.Y. Sur. 1992); *In re Adoption of Charles B.*, 552 N.E.2d at 885, 889-90 (adoption of severely impaired eight-year-old child by his male counselor not barred because the prospective adoptive parent is a homosexual man living with his male partner); *In re Adoption of R.B.F.*, 803 A.2d at 1202 (exception provision gives court discretion to grant partner’s adoption that otherwise are not allowed by statute); *In re Adoption of M.J.S.*, 44 S.W.3d 41, 56 (Tenn. Ct. App. 2000) (adoption by former same-sex partner as individual allowed); *In re Adoption of B.L.V.B.*, 628 A.2d at 1276; Marc Wolinsky, *Stereotypes, Tolerance and Acceptance: Gay Rights in Courts of Law and Public Opinion*, 19 DEL. LAWYER 13, 18 (2001).

57. *Lofton v. Kearney*, 157 F. Supp.2d 1372 (S.D. Fla. 2001) (two of three intervener couple with group home); *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996) (statutes do not allow lesbian partner adoption; no violation of equal protection); *State v. Cox*, 627 So.2d 1210, 1217 (Fla. Dist. Ct. App. 1993), *aff’d in part and quashed in part on other grounds sub nom. Cox v. Fla. Dep’t of Health & Rehab. Servs.*, 656 So.2d 902, 903 (Fla. 1995); *In re Adoption of Luke*, 640 N.W.2d 374, 383 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio

Legislators in most states have shown little interest in amending the adoption laws to explicitly allow gay couples to adopt. For example, legislatures in six states have passed laws to *allow* gay couple adoption,⁵⁸ while five state legislatures (including one that also allows some gay adoptions) have enacted laws that *bar* to some degree adoption by homosexual couples.⁵⁹

B. *The Sharon S. Decision*

Many of the cases interpreting adoption laws to permit gay adoptions rely on very distorted and flimsy analyses. The recent California Supreme Court decision, *Sharon S. v. Superior Court*,⁶⁰ is a prime example. The facts of this case are rather complicated (as many of these cases are). Sharon and Annette lived together in a lesbian relationship for eleven years.⁶¹ Sharon had one

Ct. App. 1998) (lesbian partner may not adopt without termination of biological parent's rights); *In re Bonfield*, 773 N.E.2d 507, 515 (Ohio 2002) (ruling that lesbian partner is not a parent but can file for shared custody; and noting in *dicta* that "second parent adoption is not available in Ohio"); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1999) (second-parent adoption not permitted under stepparent adoption statutes). *See also In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999) (adoption review board has no authority to waive statutes requiring termination of biological same-sex parent's parental rights if partner adopts) (overturned by CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2000) the following year); *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (noting that Mississippi does not allow same-sex partner to adopt).

58. CAL. FAM. CODE § 9000(b) (West 2002) ("A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides."); CONN. GEN. STAT. § 45a-724(a)(3) (2000) ("Subject to the approval of the Court of Probate as provided in section 45a-727, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated."); N.H. REV. STAT. ANN. § 170-B:4 (1999) (In 1999, New Hampshire legislators repealed that state's 12-year ban on gay adoption and foster parenting); N.Y. DOM. REL. LAW. § 110 (McKinney 1999) (allowing unmarried adults to adopt); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."); *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (interpreting the state's adoption statute as "encouraging the adoption of as many children as possible regardless of the sexual orientation . . . of the individuals seeking to adopt them"). Some of these laws were passed after state courts had interpreted earlier statutes to allow gay couple adoptions.

59. *See* ALA. CODE § 26-10A-6 (2002); FLA. STAT. ANN. § 63.042(3) (West 1985); MISS. CODE ANN. § 93-17-3 (2000); UTAH CODE ANN. § 78-30-1 (2000). *See also* CONN. GEN. STAT. § 45a-726a (2002). *See generally* William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2003).

60. 73 P.3d 554 (Cal. 2003).

61. *Id.* at 558.

child, Zachary, by artificial insemination and Annette adopted that child with Sharon's consent (although it was not then settled whether lesbian partners could adopt). Sharon then conceived again by artificial insemination and gave birth to a second child, Joshua.⁶² Again, Annette filed a petition to adopt Joshua, Sharon signed her consent to that adoption, and the local Department of Health and Human Services performed a home study and recommended approval of the adoption.⁶³ However, before any action was taken on the petition for adoption, Sharon and Annette's relationship became volatile.⁶⁴ Sharon asked Annette to move out and later obtained a domestic violence restraining order against Annette.⁶⁵

Annette filed a motion asking the court to grant her petition to adopt Joshua, and Sharon moved to withdraw her consent to the adoption, asserting that the adoption was not permitted under California adoption laws and claiming that her consent had been obtained by fraud or duress and that withdrawal of her consent was in Joshua's best interest.⁶⁶ A mediator recommended shared custody and the Department of Health and Human Services recommended the adoption petition be granted because Annette had shared paying for Joshua's medical expenses, had been a part of his daily care since birth, and had a close loving relationship with Joshua similar to her relationship with Zachary.⁶⁷ The court-appointed lawyer for Joshua filed a motion to dismiss Annette's adoption proceeding.⁶⁸ When the trial court declined the motion to dismiss the adoption petition, Sharon and the lawyer for Joshua then filed a petition for writ of mandate with the California Court of Appeals.⁶⁹ The appellate court granted the writ and held that California adoption law prohibited adoption by unmarried partners.⁷⁰ The California Supreme Court reversed and remanded.⁷¹

California adoption law specifically provides that "[t]he birth parents of an adopted child are, from the time of the adoption, relieved of all parental rights towards, and all responsibility for, the adopted child, and have no right over the child."⁷² Another provision, however, specifically allows a married stepparent to adopt his or her spouse's child without the termination of the

62. *Id.*

63. *Id.*

64. *Id.*

65. *Sharon S.*, 73 P.3d at 558-59.

66. *Id.* at 559.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Sharon S.*, 73 P.3d at 559.

71. *Id.* at 574.

72. CAL. FAM. CODE § 8617 (West 2002).

natural parents' rights.⁷³ A third provision, recently enacted, also allows registered same-sex domestic partners to adopt the children of each other without terminating the parental rights of the partner who is the child's biological parent.⁷⁴ This case did not involve a married couple (California law does not allow same-sex marriage) or a registered domestic partnership (Sharon and Annette were not registered domestic partners). Thus, the principal legal question was interpretation of these adoption provisions.

There were three opinions filed by the California Supreme Court. The majority opinion of Justice Werdegar, for himself and three other justices, held that the adoption statutes should be interpreted to allow a biological parent to waive the termination of parental rights provision and to allow another person or persons to become co-parents by adoption.⁷⁵ The majority also found that the number of parents was not germane to adoption and held that a biological parent may allow her child to be adopted by other co-parents, not limited to a total of two parents.⁷⁶ The majority opinion construed the termination of parental rights provision as being designed for the *personal benefit* of the parents relinquishing and adopting the child, and so it was deemed waivable, rather than to protect the *public interest*, which could not be waived.⁷⁷ While California courts may not award visitation to a *de facto* parent, the majority did not see any inconsistency between that well-established rule and its decision allowing California courts to award adoption to *de facto* partners.⁷⁸

Two additional justices, Baxter and Chin, filed a separate opinion concurring in part and dissenting in part. They agreed that two parents is better than one, so the statutes should be interpreted to allow "second-parent" adoption by informal same-sex and heterosexual nonmarital cohabiting partners.⁷⁹ However, they argued that only two parents, not more, is best for children, and further argued that California statutes and case law show that parenting in California contemplates a child having not more than two parents.⁸⁰ They construed the termination of rights statute to be designed to protect the public interest, not the personal benefit of the parents relinquishing

73. *Id.* § 8548.

74. *Id.* § 297.

75. *Sharon S.*, 73 P.3d at 561.

76. *Id.*

77. *Id.*

78. *Id.* at 573-74. However, the court agreed that if fraud or duress had been shown Sharon could revoke her consent to adoption, and remanded that issue to the court of appeals. *Id.* at 574.

79. *Id.* at 580.

80. *Sharon S.*, 73 P.3d at 578-79.

or adopting.⁸¹ Furthermore, they found second-parent adoption by cohabiting, same-sex partners to be in the public interest.⁸²

Justice Janice R. Brown filed a separate opinion concurring in part and dissenting in part. After refuting the majority's statutory interpretation, she criticized the majority for "trivializ[ing] family bonds" and "import[ing] the principles of the marketplace into the realm of home and family . . ."⁸³ She read the adoption statutes as specifically authorizing adoption by partners of biological parents in cases of marriage and registered domestic partnership as manifesting a legislative intent to require "a legal relationship between the birth and second parent,"⁸⁴ and to not allow a partner to adopt "unless the birth parent and adopting parent have formally joined together to forge a common future."⁸⁵ In a marriage or registered domestic partnership, she identified the controlling principle as: "If the two adults are uncertain whether the second parent will be a permanent resident of the household, the adoption ought to wait until they are ready for that commitment."⁸⁶ She rejected the majority's "stunted view of parenthood as purely ministerial and economic—signing consent slips and providing health insurance."⁸⁷ She reminded the majority that all "[s]ociety has a considerable stake in the health and stability of families . . . [which] provide the seed beds of civic virtue required for citizenship in a self-governing community."⁸⁸ She ridiculed the majority's "the-more-parents-the-merrier view of parenthood,"⁸⁹ and noted: "The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one."⁹⁰ Single parent adoption presents a "choice . . . between adoption and foster care," whereas "if the birth parent has a relationship with a second parent, and then a third, and then a fourth, the child may be worse off than if the birth parent had simply raised the child alone."⁹¹ She concluded that the decision to allow adoption by partners who lack the legal commitment of marriage or domestic partnership registration "maximizes the self-interest

81. *Id.* at 577.

82. *See id.* at 580-81.

83. *Id.* at 586.

84. *Id.* at 582.

85. *Sharon S.*, 73 P.3d at 585.

86. *Id.* at 587.

87. *Id.* at 586.

88. *Id.*

89. *Id.*

90. *Sharon S.*, 73 P.3d at 587.

91. *Id.*

and personal convenience of parents, but poorly serves the state's children who deserve as much stability and security as legal process can provide."⁹²

The majority opinion is astonishingly flimsy as a matter of legal analysis, long on shallow rhetoric, but short on logic and legal analysis, and inconsistent with adoption, legislative, and case history. It also embraces the most radical policy position. The majority's finding that adoption statutes are intended for the *private benefit* of adults rather than the public benefit is not only glaringly erroneous, but revives the long-discredited notion that children are merely the personal chattels of their parents. The abandonment of the historic practice of dual parenting and the endorsement of group parenting is deeply troubling, as is the almost casual judicial acceptance of that radical position. Just a decade earlier in *Johnson v. Calvert* the California Supreme Court rejected the idea that children can have more than two parents.⁹³ In *Sharon S.*, the same court accepted that position without even citing, much less distinguishing, *Calvert*.

The refusal of the majority and concurring opinions to recognize the danger in the Sharon-Annette relationship is extraordinary. If an unmarried but cohabiting man and woman had begun an adoption proceeding to allow the man to adopt the woman's biological child, but the couple separated before completing the adoption due to high conflict, and the woman had obtained a protective order because of domestic violence committed by the man, it is inconceivable that any responsible court would rule that the mother had to go ahead with the adoption by the hostile ex-partner. But that is effectively what the California Supreme Court majority and concurring opinions required in the *Sharon S.* case, where the only differences from this hypothetical were the gender of the hostile adopting ex-partner and the homosexual nature of the nonmarital relationship between the parties.

Justice Brown's solo dissenting opinion contains the most rigorous legal analysis and the most realistic policy analysis. It is also the most consistent with the root paradigm of responsible parenting. It was courageous for Justice Brown to file her solo opinion. Just a few weeks earlier she had been nominated by President Bush for a seat on the Federal Court of Appeals in Washington, D.C.⁹⁴ Her nomination has been hindered by several Democratic Senators because of her conservative pro-family and pro-life principles.⁹⁵ It showed remarkable integrity for her to write her dissenting opinion in *Sharon*

92. *Id.*

93. *Johnson v. Calvert*, 851 P.2d 776, 781 n.8, 786 (Cal. 1993) (en banc).

94. See AFL-CIO, ISSUES AND POLITICS, *Oppose the Nomination of Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit*, at http://www.aflcio.org/issuespolitics/rogers_brown.cfm (last visited Nov. 16, 2004).

95. Thomas Sowell, *A Lynch Mob Gathers Around Justice Janice Rogers Brown: Part 3*, CAPITALISM MAGAZINE, Oct. 23, 2003, at <http://capmag.com/article.asp?ID=3229> (last visited Nov. 16, 2004).

S. because gays and lesbians, who have considerable influence in the Democratic Party, were sure to be displeased with her *Sharon S.* opinion and, not surprisingly, continued to work (successfully so far) to delay and block her nomination.

C. *Public Opinion in the U.S. and Europe*

A national Gallup poll, conducted May 5-7, 2003, showed that support for adoption by same-sex couples and partners was 49%, while 48% opposed same-sex adoption.⁹⁶ Most other public opinion surveys in the past three years report similar results.⁹⁷

By contrast, the Gallup organization's European Omnibus Survey ("EOS") showed strikingly different results based on interviews with more than 15,000 persons living in thirty European countries in January 2003.⁹⁸ The respondents were grouped into three categories depending on whether they lived in *Old Europe* countries (the fifteen existing EU countries including Austria, Belgium, Denmark, France, Germany, Italy, Netherlands, Sweden, and the UK), *New Europe* countries (the thirteen countries seeking to join the EU, including Bulgaria, Cyprus, Czech Republic, Latvia, Lithuania, Malta, Poland, Romania, and Turkey), or *Not-Aligned-with-EU* countries (Norway and Switzerland). The EOS reported the following: 55% of persons from Old Europe *opposed* the legalization of adoption by homosexual couples throughout Europe, compared to 42% who *supported* it; 57% of persons from Norway and Switzerland *opposed* gay adoption; and 76% of persons in New Europe *opposed* legalization of adoption by same-sex couples while only 17%

96. AMERICAN ENTERPRISE INSTITUTE, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 45 (2004) (compiled by Karlyn Bowman, Resident Fellow, AEI, and Bryan O'Keefe, Staff Assistant, AEI) (citing Gallup opinion survey from May 5-7, 2003).

97. *Id.* (citing PSRA/Kaiser Feb. 7-Sep. 4, 2000 survey reporting 46% favoring and 47% opposing adoption rights for gay spouses; PSRA/Newsweek poll of April 25-26, 2002 finding 46% favoring and 44% opposing adoption rights for gay spouses; ABC poll of Mar. 27-31, 2002 finding 47% favor and 42% oppose homosexual couples being legally permitted to adopt children). Conversely, a Harris Interactive poll in January 2000 reported support for adoption of children by two men or two women living together as a couple at 21% and 22% respectively and opposition at 57% and 55% respectively. *Id.* at 46. However, it is important to note that all of these surveys of public attitudes about allowing same-sex couples to adopt were taken before the June 27, 2003 Supreme Court ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), and it has been reported that since the *Lawrence* decision there has been a "backlash" in public opinion against homosexual relations, including a drop in support for legalized same-sex unions, which had been increasing in support prior to *Lawrence*. See, e.g., Susan Page, *Americans Less Tolerant on Gay Issues: Poss Indicates Backlash*, USA TODAY, July 29, 2003, at A1, available at 2003 WL 5316166.

98. GALLUP EUROPE, THE EUROPEAN OMNIBUS SURVEY, at <http://www.eosgallupeurope.com/homo/index.html> (last visited Nov. 11, 2004).

supported it.⁹⁹ In only four of the thirty countries throughout Europe did a majority of those surveyed favor European legalization of adoption of children by same-sex couples. In twenty-six nations (eleven of the liberal nations of Old Europe, both non-EU nations, and all thirteen of the countries of New Europe), more people reject legalized gay adoption than favor it, with at least 50% of the population (and up to 87% of the population) opposing legalization of adoption by same-sex couples.¹⁰⁰

Conventional wisdom has noted that one difference between European and American attitudes about same-sex families is that European countries are more liberal about permitting and giving equal legal recognition to many forms of consensual adult relations,¹⁰¹ but when it comes to children, Europeans, including the liberal Scandinavian countries, generally have more “conservative” regulation in the interests of children than America. The EOS partially validates that dichotomy because it shows overwhelming opposition to legalizing adoption by homosexual couples in Europe, compared to the wide-spread (albeit possibly thin) support for gay couples adopting in the United States.¹⁰²

D. *Benefits of Father-Mother Childrearing*

“As a matter of public policy, if not of morality, it pays for society to approve of marriage as the best setting for children”¹⁰³ For example, Robert J. Shapiro, Legislative Director and Economic Counsel to Senator

99. *Id.*

100. *Id.*

101. Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 605-07 (2004).

102. Support for same-sex marriage was stronger in Europe, but showed the same difference between Old Europe and New Europe. On the question of whether homosexual marriage should be allowed throughout Europe, the fifteen affluent nations of Old Europe were strongly in favor, 57% to 39% opposed; both of the two non-aligned nations (also very affluent, post-industrial countries) were even more supportive (65% to 31%); but the New Europe nations were even more strongly opposed to same-sex marriage (70% to 23%). A majority of those polled in nine of the fifteen nations of Old Europe favored European same-sex marriage, and in only three of those nations (Greece, Portugal, and Italy) did the majority oppose legalization. Nearly two-thirds of those surveyed in both non-aligned nations favored legalizing same-sex marriage. In twelve of the thirteen nations of New Europe, majorities opposed legalization of same-sex marriage. Thus, of the total of thirty European nations surveyed, majorities in a majority - fifteen - of those nations oppose European legalization of same-sex marriage, while majorities in only eleven nations favor legalization of same-sex marriage. GALLUP EUROPE, *supra* note 98.

103. Michael Novak, *Families: The Best Anti-Poverty Plan*, WASH. TIMES, Feb. 5, 1993, at F1.

Daniel Patrick Moynihan, said: "It is no exaggeration to say that a stable, two-parent family is an American child's best protection against poverty."¹⁰⁴

Adoption by same-sex couples deliberately deprives children of either a father or a mother (and since lesbians adopt more often than gays, most often the deprivation will be of a father). The serious nature of this alteration of the parenting root paradigm cannot be missed. As the distinguished anthropologist Bronislaw Malinowski observed:

The most important moral and legal rule concerning the physiological side of kinship is that no child should be brought into the world without a man . . . assuming the role of sociological father, that is, guardian and protector, the male link between the child and the rest of the community. . . . [In all cultures] there runs the rule that the father is indispensable for the full sociological status of the child as well as of its mother, that the group consisting of a woman and her offspring is sociologically incomplete and illegitimate. The father, in other words, is necessary for the full legal status of the family.¹⁰⁵

Dr. Urie Bronfenbrenner reported that even after controlling for such factors as low income, "children growing up in . . . [single-parent] households are at greater risk for experiencing a variety of behavioral and educational problems, including . . . smoking, drinking, early and frequent sexual experience, and, in the more extreme cases, drugs, suicide, vandalism, violence, and criminal acts."¹⁰⁶ While children adopted by same-sex couples will have two adults caring for them, which will provide some advantages, they will only have parents of a single sex, either two mothers and no father, or two fathers and no mother. The sociological implications of that are uncertain, and very troubling.

Parenting by a father and a mother is best for children because there are gender-linked differences in child-rearing skills; men and women contribute different, gender-based strengths and attributes to their children's development. Although the critical contributions of mothers to the full and healthy development of children have long been recognized, recent research validates the common understanding that fathers, as well as mothers, are extremely important for child development.¹⁰⁷ There is "surprising unanimity"

104. Robert J. Shapiro, *Part One: The Family Under Economic Stress*, in *PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S*, at 12 (1990).

105. BRONISLAW MALINOWSKI, *SEX, CULTURE AND MYTH* 63 (1962). See also WILLIAM J. BENNETT, *THE BROKEN HEARTH: REVERSING THE MORAL COLLAPSE OF THE AMERICAN FAMILY* 87-88 (2001) (discussing the importance of a father figure for child development).

106. Urie Bronfenbrenner, *Discovering What Families Do*, in *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 34 (David Blankenhorn et al. eds., 1990).

107. See *Preface* to *DIMENSIONS OF FATHERHOOD* 14, 14-16 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985); Alan J. Hawkins et al., *Rethinking Fathers' Involvement in Child Care: A Developmental Perspective*, 14 *J. FAM. ISSUES* 531, 532 (1993); Alan J. Hawkins et al.,

among experts that “[m]en nurture, interact with, and rear competently but differently from women: not worse, not better . . . differently.”¹⁰⁸ When fathers nurture and care for their children, they do so not quite as “substitute mothers” but differently, as fathers.¹⁰⁹ For example, some studies show that fathers play with their infant children more than mothers,¹¹⁰ and play more physical and tactile games than mothers.¹¹¹ Mothers tend to talk and play more gently with infant children.¹¹² Mothers smile and verbalize more to the infant than fathers do,¹¹³ and generally rate their infant sons as cuddlier than fathers do.¹¹⁴ One study found that “[m]en encouraged their children’s curiosity in the solution of intellectual and physical challenges, supported the child’s persistence in solving problems, and did not become overly solicitous with regard to their child’s failures.”¹¹⁵ Another study found that six-month-old infants whose fathers were actively involved with them “had higher scores on the Bailey Test of Mental and Motor Development.”¹¹⁶ Infants whose fathers spend more time with them are more socially responsive and better able to withstand stressful situations than infants relatively deprived of substantial interaction with their fathers.¹¹⁷ Psychologist Erik Erikson noted that father love and mother love are different kinds of love; “fathers ‘love more dangerously’ because their love is more ‘expectant . . . more instrumental’ . . . than that of mothers.”¹¹⁸ Fathers more than mothers tend to appreciate the

Turning the Hearts of the Fathers to the Children: Nurturing the Next Generation, 33 BYU STUD. 273, 279-81 (1993).

108. KYLE D. PRUETT M.D., *THE NURTURING FATHER: JOURNEY TOWARD THE COMPLETE MAN* 30-31 (1987).

109. *Id.* at 77, 87.

110. L. Colette Jones, *Father-Infant Relationships in the First Year of Life*, in DIMENSIONS OF FATHERHOOD 92, 103 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985) (citing Irma Rendina and Jean D. Dickerscheid, *Father Involvement with First-Born Infants*, 25 FAM. COORDINATOR 373-79 (1976)).

111. See Jones, *supra* note 110. See generally Heidelise Als et al., *Analysis of Face-to Face Interaction in Infant-Adult Dyads*, in SOCIAL INTERACTION ANALYSIS: METHODOLOGICAL ISSUES 33 (Michael E. Lamb et al. eds., 1979) (infants generally remain more still when held by fathers than mothers, and fathers tend to move the infant’s body or limbs more often than mothers).

112. PRUETT, *supra* note 108, at 33.

113. See Tiffany Field, *Interaction Behaviors of Primary Versus Secondary Caretaker Fathers*, 14 DEV. PSYCHOL. 183, 184 (1978).

114. Jones, *supra* note 110, at 105.

115. Kyle D. Pruett, *The Paternal Presence*, 74 FAM. IN SOC’Y 46, 48 (1993).

116. *Id.*

117. PRUETT, *supra* note 108, at 35 (citing Ross Parke, *Perspectives on Father Infant Interaction*, in THE HANDBOOK OF INFANT DEVELOPMENT 549 (Joy D. Osofsky ed., 1979)).

118. Pruett, *supra* note 115, at 49 (quoting ERIK ERIKSON, *IDENTITY, YOUTH AND CRISIS* 106 (1968)).

value of, and foster child interaction with, extra-familial socializing influences, to provide instrumental leadership, to establish and enforce standards regarding unacceptable emotions and behaviors, and absorb hostility from children best, whereas mothers provide more expressive, integrative, and nurturing childrearing,¹¹⁹ and their love is more unconditional.¹²⁰

Separation of children from their fathers has been called “the leading cause of declining child well-being in our society. It is also the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women.”¹²¹ A report based on studies in Europe concluded that “[f]amily structure [is] clearly associated with” risk factors for adolescents, and children without intact mother-father families are more likely “to be heavy drinkers, have experience of drugs, of heterosexual intercourse, no school qualifications, to be unemployed or, among young women, to have experienced pregnancy.”¹²²

The United States Supreme Court has long recognized that

[t]he institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.¹²³

Six years ago the Alabama Supreme Court expressed it in this way: “While much study, and even more controversy, continue to center upon the effects of homosexual parenting, the inestimable developmental benefit of a loving home environment that is anchored by a successful marriage is undisputed.”¹²⁴ Another state’s court of appeals agreed that a stable, marital family is best for children because it is an “environment in which [the child] will most likely

119. Robert H. Bradley, *Fathers and the School-Age Child*, in DIMENSIONS OF FATHERHOOD 141, 152 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985); BRUCE LOGAN, NEW ZEALAND EDUCATION DEVELOPMENT FOUNDATION, SAME-SEX COUPLES AND THE LAW 6 (2000).

120. Pruett, *supra* note 115, at 49.

121. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995).

122. Helen Sweeting et al., *Teenage Family Life, Lifestyles and Life Chances: Associations with Family Structure, Conflict with Parents and Joint Family Activity*, 12 INT’L J. OF L., POL’Y & FAM. 15, 38 (1998).

123. *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983).

124. *Ex Parte J.M.F.*, 730 So.2d 1190, 1196 (Ala. 1998) (upholding the modification of child custody due to the custodial mother’s open lesbian relationship and the father’s remarriage forming a stable traditional family).

receive not only love, warmth, support, care and concern, but also consistency, stability and physical and spiritual nurture.”¹²⁵

E. Arguments Against Generalized Gay Adoption

There is abundant evidence that nonmarital cohabitation (of heterosexual and same-sex couples)

is an environment of elevated risk to children of child abuse, child sexual abuse, relational instability, exposure to adult domestic violence, economic deprivation, and immoral and dangerous behavior modeling. Most of the studies . . . focus[] on heterosexual nonmarital cohabitation but . . . the advocates and defenders of adoption by same-sex couples failed to provide any credible evidence that gay/lesbian cohabitation is less-risky than nonmarital cohabitation generally. (Indeed, some of the studies cited by supporters of gay parenting have noted high rates of violence and abuse among same-sex couples, confirming those concerns rather than alleviating concerns.)¹²⁶

It is *nonmarital cohabitation* that is identified with special risk to children.¹²⁷

Potential risks of gay couples generally adopting must be honestly recognized. For example, both theory and empirical studies suggest that disproportionate percentages of children raised by homosexual parents may develop homosexual interests and behaviors. “[T]here appears to be some significant differences between children raised by lesbian mothers versus heterosexual mothers in their family relationships, gender identity and gender behavior.”¹²⁸ One study that endorsed gay parenting admitted that 23.5% of the post-adolescent children it studied who were raised by gay or lesbian parents became homosexual, a much higher rate of homosexuality than is found in the population generally.¹²⁹

Advocates of gay adoption argue that it is better to place children with a gay or lesbian couple than to leave some children unplaced for adoption. However, that is not a zero-sum proposition. In Utah, *all* children eligible for adoption through the state’s child welfare agency have been placed for adoption. Most were placed with a mother and father and *none* were reported

125. *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. App. Mar. 30, 1988) (affirming custody modification decree where father was granted custody after establishing a successful nine-year marriage while mother with custody had gone through four lesbian relationships).

126. Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*, 5 J.L. & FAM. STUD. 203, 218 (2003).

127. *Id.* at 218-19.

128. Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children’s Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105, 119 (1993).

129. *Id.*

as being placed with same-sex couples, so exclusion of same-sex couples from adoption does not necessarily mean that children would be left in foster care who otherwise could be adopted.¹³⁰

It is sometimes argued that disallowing gay couple adoption is irrational because in many cases the children concerned are already living in the “at risk” environment with the gay couple, so they may as well have the benefits that would come from adoption by the unrelated parent. But that “dollars-for-risks” argument ignores the loss of the normative value of the law and the message of the law about the high “gold-standard” of parenting environments required of those who adopt. This argument confuses problems of benefits laws with adoption law; if the problem is one of particular benefits, the relevant benefits laws should be amended, not the adoption laws. It also exaggerates the “benefits” available through adoption, most of which can be provided by will, contract, gift, private arrangement, and other forms of private ordering.

Permitting gay adoptions opens the door for legalizing same-sex marriage. One key factor that the Vermont Supreme Court relied heavily upon when it directed the state to legalize same-sex marriage or to create an equivalent

130. Rep. Nora Stephens, Statement Before the Utah House of Representatives Committee (Feb. 17, 2000) (notes on file with author) (relating that in 1999, the Utah Division of Child and Family Services placed 383 children for adoption: 94% with married two-parent homes, 5% with single women, and 1% with single men. In December 1999, 103 children in DCFS were eligible for adoption and all had been placed for adoption. In January/February 2000, 100 children were available for adoption with DCFS; 175 families have applied to adopt children); Holly Mullen, *Utah Bans Some Adoptions by Gay Couples*, SALT LAKE TRIB., June 23, 1999, at A1 (more than 93% (305 of 328) of all children in DCFS custody placed for adoption in 1998 were placed with married couples). Scott Clark, the former Chairman of the Utah Board of Child and Family Services, rejected the claim that disallowing unmarried couples to adopt has impaired adoption in Utah:

The charge that the disqualification of unmarried couples from the adoption of children in state custody would in fact harm the children by reducing the number of prospective adoptive couples appeared to be entirely speculative. No adoptive placements of children with unmarried couples had ever been (knowingly) made by the Division of Child & Family Services. Few, if any, unmarried couples were identified for training for foster care or adoptive placements, although a gay couple . . . claimed to have been trained by the Division of Child & Family Services as prospective foster parents.

Clark, *supra* note 126, at 208. Clark also notes:

The number of children in the custody of the state of Utah hovers in the range of 2,500 to 3,000, and although foster families are always in short supply, the challenges of the Division of Child & Family Services are, for the most part, financial. In 1998 (when the controversy began), the Division of Child & Family Services placed 327 children for adoption; none of the adoptive placements were with unmarried couples. Less than 7% of adoptive placements of children in state custody were with single persons, most of whom were kinship placements.

Id. at 204.

status for same-sex couples in *Baker v. State* was the fact that the legislature had allowed gay and lesbian couples to adopt.¹³¹ The Vermont Supreme Court reasoned in part that if same-sex couples could adopt, there was no justification for not allowing them to marry.¹³² Legislators in Mississippi reportedly were motivated to enact their ban on gay adoptions “by the recognition of civil unions in Vermont”¹³³

Likewise, the majority opinion of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* asserted that its decision to compel the legalization of same-sex marriage was supported by the fact that

the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.¹³⁴

The majority noted: “Adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike.”¹³⁵ Furthermore, the majority in *Goodridge* cited the approval of gay couple adoption, among other things, as proof that “Massachusetts has responded supportively to ‘the changing realities of the American family,’ and has moved vigorously to strengthen the modern family in its many variations.”¹³⁶ Same-sex marriage would save “same-sex couples . . . the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage.”¹³⁷ The approval of same-sex couple adoption is proof that the legislature “has drawn the conclusion that a child’s best interest is not harmed by being raised and nurtured by same-sex parents.”¹³⁸ Concurring, Justice Greaney also emphasized that same-sex marriage was supported because “[t]he rights of couples to have children, to adopt, and to be foster parents, regardless of sexual orientation and marital status, are firmly established.”¹³⁹

131. *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999).

132. *Id.*

133. Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 896 (2000).

134. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

135. *Id.* at 962 n.24 (citing MASS. GEN. LAWS ANN. ch. 210 § 1 (2004) and Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)).

136. *Id.* at 963 (quoting *Troxel v. Granville* 530 U.S. 57, 64 (2000)) (internal citation omitted).

137. *Id.*

138. *Id.* at 965 n.30.

139. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).

Similarly, in *Andersen v. King County*, a Washington trial court relied upon the legalization of gay couple adoption in the state in ruling that same-sex marriage must be legalized.¹⁴⁰ The court's feathery opinion notes that:

Many families today are created through adoption, the foster parent system and assisted reproduction technologies. This last point, by the way, is well illustrated by some of the plaintiffs who, thanks to government recognition of the fact that their sexual orientation is no bar to good parenting, are presently able to enjoy family lives with children.¹⁴¹

The court also emphasized that:

Today the law and society fully recognize (as well they should) the value of children who join the human family by means of in vitro fertilization, sperm donation, egg donation or surrogacy or who join a new family by way of adoption. It rationally serves no state interest to harm certain of those children by devaluing the immediate families that they have joined.¹⁴²

“[P]eer[ing] into the future,” Judge Downing also foresaw that:

Many, many children are going to be raised in the homes of gay and lesbian partners. Present social trends will undoubtedly continue. Gay and lesbian couples will feel the human instinct to wish to raise children, they will have available either the supportive adoption laws or the technological means to begin raising a family and they will enjoy the increasing public acceptance of such families. All this is certain.¹⁴³

The court rejected the additional burden imposed upon gay couples and their families. The court stated “[t]hat they should have to pay for these privileges while others do not, is not supported by the ‘real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made’”¹⁴⁴

While the analysis in this opinion can easily be questioned (as, again, rhetoric was substituted by the court for legal analysis, and judicial endorsement of social trends replaced adherence to the rule of law),¹⁴⁵ the relevant point is that the court clearly linked same-sex marriage and legalized adoption by same-sex couples.

140. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Wash. Super. Aug. 4, 2004).

141. *Id.* at *9.

142. *Id.*

143. *Id.* at *10.

144. *Id.* at *11 (quoting *State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1105 (Wash. 1936)).

145. See *supra* Section III B (discussing the *Sharon S.* case, where the court substituted rhetoric for legal analysis and judicial endorsement of social trends replaced adherence to the rule of law).

IV. CONCLUSION

It is best for children and for society that children be raised by a mother and father who are committed (through marriage) to each other as well as to the child. The marital commitment of the parents to each other reinforces their commitment to the child, and also increases their individual and joint capacity to provide for the child and even to sacrifice for the child's well-being. It is not just the simplistic "addition" that two adults can provide more resources and care for a child than one, rather it is the "multiplication" by which the security of the marital commitment of spouses to each other and to society enhances the abilities and incentives of both to parent well. The marriage commitment exponentially increases the efficiency of the many complimentary roles that men and women perform in parenting functions. Marriage is not just one among many equally good environments for child-rearing; it has been shown to be, by far, the best environment for parenting.

Children are entitled to be raised by a mother and a father whenever possible. The law should not shortchange children by officially approving their adoption into semi-orphan status by same-sex couples. To preserve the historic root paradigm of our society that puts parenting and posterity at a high priority, we must recognize that it requires sacrifice of some things, including some personal autonomy. We must resist the impulse to redefine the relationship and to modify the commitment to accommodate self-serving sexual autonomy interests. "If love is to feature in human relations, selfhood must be given up for otherhood . . . [Adults] must cease to sacrifice others for personal gain and begin to sacrifice themselves for [their children]."¹⁴⁶

Because the state has an important historic *parens patriae* commitment to secure the welfare of children, because the state's interest in protecting vulnerable children must take precedence over its interest in fostering the sexual choices of autonomous adults when those interests conflict, and because all citizens have a stake in promoting the welfare of children (the future of the polis, the future security of the state and its citizens), parenting necessarily imposes some limits upon the autonomy of adults who wish to assume the responsibilities of parenthood. While some adults may fantasize about a world in which there is no conflict between adult sexuality and the needs of children, that is not the real world we live in. Children can be harmed in many ways (direct and indirect, tangible and intangible, immediate and long-term) by many irresponsible behaviors of adults, including some sexual choices available to their parents. The responsibilities of parenthood historically have taken, legally now do take, and ethically should continue to take priority over the autonomy interests of adults regarding their sexual relationships.

146. Myers, *supra* note 1, at 55.

