MARRIAGE, "MAGIC BULLETS," AND MEDICAL DECISION-MAKING: CONTEMPORARY REFLECTIONS ON THEMES IN THE SCHOLARSHIP OF PROFESSOR MARYGOLD S. MELLI

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INTRODUCTION

Reflecting on the life and scholarly work of Professor Marygold "Margo" S. Melli, this article addresses several important contemporary issues in American family law. Professor Melli was not only one of the earliest women to have a career in American legal education, but also one of the most influential. Her scholarly contributions in family law were unsurpassed and her work on behalf of fragile families and poor children was groundbreaking. This article reviews not only her unique career and academic work, but additionally considers whether promoting marriage would contribute to the overall solution to dilemma of fragile families.

Part I provides a brief tribute to Professor Melli and her pioneering academic career and legal scholarship about families and children. Part II

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addresses the interests of low-income and "fragile" families. It considers whether marriage really is a "magic bullet" (or only a pragmatic possibility) to cure poverty for low-income non-marital couples and families, and how marriage affects children in those relationships. Part II also briefly considers the extent to which family law and welfare law reflects our best understanding of the realities of marriage, family poverty, and child well-being. Part III discusses the controversial context of marriage for same-sex couples raising children from a child-welfare perspective. It suggests that the welfare of children ought to be discussed more openly in the debates over legalization of same-sex marriage. Part IV reviews the tension between parental authority and state regulation regarding medical decision-making for children. Recent laws enacted in California and New Jersey barring provision of sexual orientation change efforts (SOCE) raises in a new context the age-old dilemma of striking the proper balance between parental and state interests and authority.

Finally, returning to the life example of Professor Melli, this article concludes with reflections on how our lives are the material, visible, tangible expressions of our intellectual ideas and even our jurisprudence. We express our values and priorities by how we live, what we do, how we do it, and especially how we treat others, more than by what we write and say. Professor Melli's example shows that we should strive for and can hope to achieve harmony between what we profess and how we live.

I. A BRIEF OVERVIEW OF THE GREAT SCHOLARLY AND INDIVIDUAL CONTRIBUTIONS OF PROFESSOR MARYGOLD S. MELLI

Professor Marygold S. Melli's academic career and contributions to legal scholarship about families and children has been groundbreaking. She received her law degree (LL.B.) from the University of Wisconsin in 1950,[1] and served as Note Editor for the Wisconsin Law Review in 1949.[2] While it was unusual for women to attend law school (apply or be admitted) at that time, many law schools admitted women to fill seats left empty by men who were in the military during and shortly following World War II.[3] For example, the Harvard Law Bulletin reported that in 1940, Harvard Law School did not admit any women.[4] But in 1950, the doors finally swung open and fourteen women were admitted to a Harvard class that included 520 men.[5] (Women comprised just

1. Marygold Shire Melli, *How I Got Here*, GARGOYLE, Summer 2007, at 26, 26.

2. Curriculum Vitae of Professor Marygold Shire Melli (Oct. 2008) [hereinafter *Resume*] (on file with author). *See also* Univ. of Wis., *Marygold S. Melli*, http://law.wisc.edu/profiles/msmelli@wisc.edu (last updated Feb. 14, 2013) (discussing generally Professor Melli's career).

3. Whitney S. Bagnall, *A Brief History of Women at CLS: Part 2*, COLUMBIA LAW SCH., http://www.law.columbia.edu/law_school/communications/reports/Fall2002/brief (last visited Mar. 22, 2013).

4. *1871 to 1950: Waiting for the HLS Door to Open*, HARV. LAW BULLETIN, Spring 1999, at 28, 29.

5. *Id.*

2.6 percent of the class.[6]) I suspect that Wisconsin was much more progressive; however, the Harvard class statistics provide some indication as to the general atmosphere of the day.

Professor Melli returned to the law school at the University of Wisconsin just nine years after she graduated to begin her career as a law professor.[7] She continued until 1993, when she took *emerita* status.[8] She developed the family law curriculum at the law school from a single, two-credit course into a range of offerings, including courses on Marriage and Divorce, Parent-Child Relations, Law and the Elderly, and Juvenile Justice.[9] She was also the Director of the Wisconsin Legislative Council's project to revise the Wisconsin Children's Code (1953–55), the drafter of the revised Wisconsin Criminal Code (1950–53), and Executive Director of the Wisconsin Judicial Council (1955–59).[10]

Professor Melli's extensive professional and scholarly service also includes serving as a member of the American Bar Foundation, as a member of the Executive Council of the International Society of Family Law from 1988–2006, including Vice-President of the ISFL from 1991–2000[11] (which is where I came to know her well). She was a member of the Board of Managers of the National Conference of Bar Examiners, 1980–91 (Chair, 1989–90) and of its Multi-State Essay Committee (1985–90), and its Editorial Board (1996–2008).[12] She was a member of the Study Group for the U.S. State Department on International Adoption (1990–93) of the American Law Institute, and one of the original reporters of the ALI Project on Family Dissolution (1989–94).[13] She held various positions with the State Bar of Wisconsin for over thirty years, including Family Law Section Chair (1974–76), and was an Affiliate of the University of Wisconsin-Madison Institute for Research on Poverty from 1980–2008.[14] She has given extensive service to the University of Wisconsin

6. *Id.*

7. *Resume*, *supra* note 2.

8. *Id.*

9. *Id*.

10. *Id.*

11. *Id.* at 11*; see also 5 Women Lawyers to be Honored with 2013 Margaret Brent Awards*, AM. BAR ASS'N (May 7, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/5_women_lawyers_tob.html/

12. *Resume*, *supra* note 2, at 11.

13. *Id., supra* note 2. Melli served on the ALI Project on Family Law before it went off the rails after she was replaced, resulting in the unfortunate publication of a highly ideological and notably *un*influential set of proposed *Principles of the Law of Family Dissolution* that has had virtually no impact on the development of family law. *See generally* A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION at v (2002). *See also* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnotes?*, 42 FAM. L.Q. 573, 576 (2008) (noting that the *Principles* have not been widely enacted into state legislation or followed in state court decisions; its influence has been to serve as an "obligatory footnote" in string citations).

14. *Resume*, *supra* note 2, at 11-12.

and various state, local, and federal government boards, committees, commissions, and agencies.[15]

Professor Melli has been a very productive scholar. She is the author or co-author (or editor or co-editor) of at least twenty-one books or monographs as of 2008.[16] Most of her books deal with family law, and nearly three-fourths of them have concerned parent-child relationships and legal issues concerning children, especially child support, child custody, and juvenile court issues.[17] Additionally, Professor Melli is the author (or co-author) of at least forty-four law review articles and law journal publications; again, three-fourths of her articles deal with family law issues and half of them address legal issues concerning children and parent-child relations.[18] The quality of her scholarship has earned the respect of her academic and professional peers and led others to trust her professionalism, intellect, skill, and judgment.

She has received numerous honors and awards for her legal service,[19] and was the recipient of nine major grants to support her legal scholarship and service.[20] From my experience serving with her in an international scholarly society, I can report that Margo has been not a token or passive member, but an active participant looking for ways to contribute and provide useful service.

Margo balanced the development and application of her professional and scholarly talents in her public/legal life with nurturing and service in her family life. She married the wonderful Joseph A. Melli in 1950, and together they

15. *Id.* at 12-13.

16. *Id.* at 5-7.

17. *Id.*

18. *Id.* at 2-5.

19. *See, e.g., Resume*, *supra* note 2 (receiving the University of Wisconsin System Award for Outstanding Contributions to the Advancement of Women in Higher Education, April 25, 1991; State Bar of Wisconsin, Family Law Section, Award for Outstanding Service to the Family Law Section, January 1997; Law Foundation of Wisconsin, Belle Case LaFollette Award for Outstanding Service to the Profession, January 1994; State Bar of Wisconsin, Special Committee on the Participation of Women in the Bar, and the Award for Lifelong Contributions to the Advancement of Women in the Legal Profession, January 1994. Since 1994, the annual award given by The Legal Association of Women to honor an outstanding Wisconsin individual making significant contributions to women is called the Marygold S. Melli Achievement Award. In addition, she was awarded the Voss-Bascom named Professorship by the Regents of the University of Wisconsin System on Dec. 7, 1984).

20. *Id.* at 2. These include the LaFollette Institute of Public Affairs, Grant to study mediation of child custody disputes in Dane County, Spring 1991; the Institute for Research on Poverty; Child Support Contract with Wisconsin Department of Health and Social Services; Co-principal Investigator 1992–93; Principal Investigator 1980-81, 1990-91, 1991–92, Spring of 1983, Spring of 1984, and Spring of 1988; the U. S. Department of Education, Long Term Care Clinical Program 1985-86, 1986-87, 1987-88, 1988-89, and 1989–90; a grant from the National Science Foundation 1982 (with Howard Erlanger); the Smongeski Research Professor, Fall 1979; a University of Wisconsin Graduate School grant, Summer 1979; a grant from the Faye McBeath Institute on Aging and Adult Life, Spring 1977; as a consultant, Center for Public Representation, Legal Services for the Elderly Project, Fall 1976; and an American Child Guidance Foundation grant, 1962–63.

raised four children.[21] Joe was a labor lawyer with a busy practice in a major law firm in Wisconsin,[22] so we should have no illusions about who did the bulk of the day-to-day caring, comforting, and nurturing of their four children. They had a great marriage, as evident not only by its longevity, but as evident in how much they obviously have enjoyed being with each other—always—in social as well as professional settings. Their happiness and good will is both symbiotic and infectious. As in all good marriages, theirs has thrived by their togetherness and companionship, in thick and thin, in good and bad times.

I had the honor to serve with Margo for many years on the Executive Council of the International Society of Family Law,[23] and I quickly grew to greatly respect her wisdom, good judgment, and good will in those leadership meetings. My wife, Marian, and I also greatly enjoyed being with Margo and Joe, for they exuded happiness, and a contagious zest and enthusiasm for new experiences, new friends, new places, and new explorations. We admire the partnership that Margo and her husband, Joe, displayed so well during those many years when we met at ISFL conferences and business meetings around the world. They were a marvelous team and great example of marital unity, mutual devotion, and support for each other's interests and opportunities.

In honor of Professor Melli, and in reflection on some of the major themes of her scholarship, this article will address contemporary legal issues that concern parents, parenting, and children. It discusses some potential beneficial effects of marriage for fragile families generally, and some concerns about the potential disadvantages to children raised by same-sex couples.

II. IS MARRIAGE A "MAGIC BULLET"? HOW MARRIAGE AFFECTS CHILDREN IN FRAGILE FAMILIES GENERALLY

Is marriage really a "magic bullet" (or only a pragmatic possibility) for curing poverty and other endemic problems for low-income and minority and other marginalized non-marital couples and families? How does marriage of their parents affect children? This section considers those questions and the extent to which family law and welfare law reflects our best understanding of the realities of marriage, family poverty, and child well-being.

For purposes of this paper, the term "marriage" refers to the gender-integrating union of one man and one woman. While the American and European media preference for legalizing same-sex marriage is pervasive and undeniable, as a practical and legal matter, the meaning, impact, and future of this form of relationship are still far from certain. Today, same-sex marriage is legal in barely 8 percent of the nations of the world and just 32 percent of the

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21. Numerous conversations between the author and Professor Melli; *see also Resume*, *supra* note 2.

22. *Joseph A. Melli*, MELLI LAW, S.C., http://www.mellilaw.com/our-attorneys/joseph-a-melli/ (last visited Oct. 8, 2013). *See also Joseph A. Melli*, MARTINDALE.COM, http://www.martindale.com/Joseph-A-Melli/1794564-lawyer.htm (last visited Oct. 8, 2013).

23. *See* THE INTERNATIONAL SOCIETY OF FAMILY LAW: EXECUTIVE COUNCIL ADDRESSES (Sept. 2000), *available at* http://www.isflhome.org/01addexco.pdf.

American states.[24] Same-sex relationships are different in several significant, critical ways from male-female marriages, particularly in regards to the well-being of children and the effects of child-rearing. Those relationships have been too inadequately studied to provide reliable, relevant information; therefore this paper uses the traditional understanding of marriage as the union of two persons of the opposite genders. For the integrity of analysis, same-sex marriage must be set aside and examined separately. Extending family relationship status to partners outside of dual-gender marriage, kinship, and adoption diverts scarce resources away from relationship forms that best protect children and are child-centered, giving those assets to other members of the older generation (adult same-sex couples) in relationships that mostly are adult-centric and uni-generational.[25]

Evidence of the protective effects and positive advantages (social, economic, educational, developmental, etc.) for children being raised by married, biological parents (and the potential disadvantages to children raised in alternative family forms) is extensive and well-established.[26] Thanks to pioneering social scientists such as Sarah S. McLanahan,[27] the potential benefit

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24. *See* App. 1, *infra*. *See also* Lynn D. Wardle, *The Proposed Minnesota Marriage Amendment in Comparative Constitutional Law: Substance and Procedure*, 34 HAMLINE J. PUB. L. & POL'Y 141, 165 (2013) (listing the 17 states, 8 American Indian tribes, and 15 nations (of 193) that permitted same-sex marriage in 2013).

25. *See generally* WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES, OR SOCIETY? *passim* (Lynn D. Wardle ed., 2008).

26. *See generally* A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree,* 6 J.L. & FAM. STUD. 213, 214 (2004) (reviewing social science literature identifying protections and advantages of married, dual-gendered parenting for children); William L. Pierce, *In Defense of the Argument that Marriage Should Be a Rebuttable Presumption in Government Adoption Policy,* 5 J.L. & FAM. STUD. 239, 242-243 (2003) [hereinafter *In Defense of the Argument*] (identifying advantages to children of marital child rearing); Lynn D. Wardle, *Can You Hear the Prayer of the Children? The Quest to Make the World Safer for Children and Families, in* LIBER MEMORIALIS PETER ŠARČEVIČ: UNIVERSALISM, TRADITION, AND THE INDIVIDUAL 371, 374-376 (J. Erauw, V. Taomljenvic & P. Volken eds., 2006) (reviewing evidence that breakdown of the marital family endangers and harms children); Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabitating, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31, 32-33 (2010) (reviewing advantages to children and society of state policies favoring adoption by married partners); Lynn D. Wardle, *The Fall of Marital Stability and the Rise of Juvenile Delinquency,* 10 J.L. & FAM. STUD. 83, 89-90 (2007) [hereinafter *The Fall of Marital Stability*] (reviewing extensive evidence that children raised by divorced or never-married women are at much greater risk of being involved in juvenile delinquency, as well as evidence of other harms and social pathologies); Lynn D. Wardle, *Fragile Families and Family Law, in* FRAGILE FAMILIES AND THE MARRIAGE AGENDA 74 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2005) [hereinafter *Fragile Families and Family Law*] (reviewing risks of informal cohabitations for children and adults).

27. *See, e.g.*, Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 123 (2009) ("The theoretical arguments for the benefits of marriage [for fragile families] are supported by a large body of empirical research, including research on parents' economic and social resources as well as research on outcomes for children and young adults. . ."). *See also Fragile Families and Family Law*, *supra* note 26, at 75-76 (reviewing the fragile family scholarship of McLanahan and others).

of marriage for members of "fragile families" has received some careful study recent decades.

Fragile families include couples, especially those with children, who lack legal status as families, usually because the adults have not married. Sometimes there are legal impediments to marriage, such as an undissolved former marriage. Other times there are cultural or social impediments. The couple may be from unfriendly social groups such as hostile tribes or races or religions. Sometimes family or personal interests are impediments. For example, one or both of the adults is wary of and wishes to avoid the binding "commitments" of marriage, or feels obligated to honor preexisting obligations that seem to be inconsistent. They may see marriage as a burden on or likely source of interference with the pursuit of other personal goals, such as career or education.[28]

Regardless of the marriage barriers, fragile families remain "under the radar" in family law because lawmakers traditionally focus on the problems of the middle and upper classes, the classes most represented in the law-making institutions.[29] The law still enshrines some confining socioeconomic stereotypes that expect (and effectively encourage) the poor to enter into unstable, dysfunctional relationships. Strengthening the culture of marriage in society and providing marriage-skills training would help fragile families, but a special effort is needed to make marriage attractive to and work for many fragile families. [30]

Sara McLanahan and Gary Sandefur reported in *Growing up with a Single Parent: What Hurts, What Helps* that children who were not raised by both of their biological parents were approximately twice as likely to have behavioral and psychological problems, to be poor, to not graduate from high school, and to have children outside of marriage as children raised by their married

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28. *See generally* Claire Dalton, *An Essay in the Deconstruction of Contract Doctrine,* 94 YALE L.J. 997, 1111-1112 (1985) ("Marriage is often presented in the cases as the only way in which men and women can express a continuing commitment to one another. This suggests that when men do not marry women, they intend to avoid all responsibility for them."). *But see* Milton C. Regan, Jr., *Law, Marriage, and Intimate Commitment,* 9 VA. J. SOC. POL'Y & L. 116, 149 (2001) ("[I]t is appropriate for the law to provide more benefits to married than to unmarried couples as one way of encouraging commitment. It is far less plausible today for unmarried couples to maintain that they avoid marriage because they desire to avoid the legal burdens the status imposes. Recent years have witnessed the demise of many legal obligations premised on marriage, the decline of provisions supporting traditional gender roles within marriage, and the increasing willingness of courts to provide for the distribution of financial assets between unmarried persons when their intimate relationship ends. This makes more plausible than ever the assumption that many who do not marry avoid it because they are wary of the symbolic commitment that marriage represents.").

29. The persons who make the laws are from the upper and middle classes; so, it is not surprising that family laws focus on the legal problems. *See Fragile Families and Family Law*, *supra* note 26, at 85.

30. *Id.* at 89. *See generally id.* at vii-viii.

biological parents.[31] Professor McLanahan, herself a single mother,[32] has repeatedly called attention to the disadvantages of structurally incomplete families that she and other scholars calls "fragile families."[33] She has stated: "When I first [began researching this issue] I wanted to demonstrate that single mothers could do just as good a job of raising children as married moms. Unfortunately, the evidence led me to somewhat different conclusions."[34] She has acknowledged that "disruptions [in fragile families]. . .are a source of continued psychological stress and may lead to *clinical depression in children* as well as mothers."[35]

McLanahan further notes that the amount and quality of parental involvement with children is lower in structurally incomplete "fragile" families compared to intact families, and that broader disorganization is evident in, *inter alia,* increased rates of crime and drug abuse.[36] Unsurprisingly, children raised in intact married homes are healthier, have lower rates of substance abuse, are less likely to be victims of physical or sexual abuse, and are less likely to

31. SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1-2 (1994) [hereinafter GROWING UP WITH A SINGLE PARENT].

32. Curriculum Vitae of Sara S. McLanahan (Dec. 2009), http://www.princeton.edu/sociology/faculty/mclanahan/mclanahan_cv.pdf. She also is the holder of a named professorship in Sociology at Princeton, as well as the founding director of the Center for Research on Child Wellbeing. *Id*.

33. *Id*.; IRWIN GARFINKEL & SARA S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 1-2 (1986) [hereinafter SINGLE MOTHERS AND THEIR CHILDREN]; Sara S. McLanahan, *Father Absence and the Welfare of Children, in* COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE 117, 117-118 (1999); Sara McLanahan & Julien Teitler, *The Consequences of Father Absence, in* PARENTING AND CHILD DEVELOPMENT IN "NONTRADITIONAL" FAMILIES 83, 83, 99 (Michael E. Lamb ed., 1999); Anne Case, I-Fen Lin, & Sara McLanahan, *Educational Attainment of Siblings in Stepfamilies*, 22 EVOLUTION & HUMAN BEHAVIOR 269, 269 (2001); Anne Case, I-Fen Lin, & Sara McLanahan, *How Hungry Is the Selfish Gene?* 110 ECON. J. 781, 781 (2000); Sara,McLanahan and Larry Bumpas, *Intergenerational Consequences of Family Disruption*, 94 AM. J. SOC. 130, 130-131 (1988); Sara McLanahan, *Family Structure and the Reproduction of Poverty,* 90 AM. J. SOC. 873, 873-875, 897-898 (1985); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration* 14 J. OF RES. ON ADOLESCENCE 369, 369-371, 388 (2004) [hereinafter *Father Absence and Youth Incarceration*]; Sara McLanahan, *The Consequences of Single Motherhood, in* SEX, PREFERENCE, AND FAMILY 306, 307 (David M. Estlund & Martha C. Nussbaum eds., 1997). *See also* Jane Waldfogel, Terry-Ann Craigie, & Jeanne Brooks-Gunn, *Fragile Families and Child Wellbeing*, 20 THE FUTURE OF CHILD. 87, 87-89, 102 (2010). *See generally Fragile Families and Family Law*, *supra* note 26, at 75-76.

34. Sara McLanahan, *cited in* DAVID MYERS, THE AMERICAN PARADOX: SPIRITUAL HUNGER IN AN AGE OF PLENTY 85 (2000). *See also* Myron Magnet, *The American Family, 1992*, FORTUNE MAG., Aug. 1992, at 42, 43.

35. SINGLE MOTHERS AND THEIR CHILDREN, *supra* note 33, at 11 (pointing out that "[m]other-only families are . . . subjected to numerous . . . forms of economic and social instability, such as income loss, residential moves, and changes in employment and household composition.").

36. *Father Absence and Youth Incarceration*, *supra* note 33.

divorce or become unwed parents than children raised outside of intact marriages.[37]

While "most children raised in single-parent families grow up without serious problems,"[38] The Center for Law and Social Policy has reported, "[r]esearch indicates that, on average, children who grow up in families with both their biological parents in a low-conflict marriage are better off in a number of ways than children who grow up in single-, step- or cohabiting-parent households."[39] Children raised in other family structures were found to be "more likely to achieve lower levels of education, to become teen parents, and to experience health, behavior, and mental problems."[40]

A dozen years ago, Professor Norval Glenn surveyed social science scholarship from the last decade of the twentieth century, and found that "the preponderance of the evidence supports the conclusion that good marriages between biological or adoptive parents generally contribute to the well-being and proper development of children and adolescents."[41] He concludes: "The social scientific evidence for the importance of marriage to adults, children, adolescents, and the society as a whole is about as conclusive as social science evidence can be."[42]

In 2010, the Centers for Disease Control and Prevention published a comprehensive report on marriage and cohabitation in the United States, in which it stated:

> Research findings consistently document associations between formal marital status and health and well-being. Married persons have generally better mental and physical health outcomes compared to unmarried persons. Married persons also live longer, have higher rates of health insurance coverage, and lower prevalence of cardiovascular disease than unmarried persons. Research also indicates that [parental] marriage is positively associated with the health and well-being of children. Children born to unmarried mothers are at greater risk than children born to married mothers for

37. WILLIAM J. DOHERTY ET AL., TWENTY-ONE REASONS WHY MARRIAGE MATTERS 6, 10, 15 (2002). The contributors to the report included such distinguished scholars as, *inter alia,* William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, David Popenoe, Scott M. Stanley, Linda J. Waite, and Judith Wallerstein. *See further,* Maggie Gallagher & Joshua Baker, *Do Mothers and Fathers Matter?* IMAPP POLICY BRIEF (Feb. 27, 2004), http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf.

38. Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being,* CTR FOR LAW AND SOC. POL'Y (May 2003), http://www.clasp.org/admin/site/publications_archive/files/0128.pdf.

39. *Id.* at 6.

40. *Id.*

41. Norval Glenn, *Is the Current Concern About American Marriage Warranted?* 9 VA. J. SOC. POL'Y & L. 5, 18 (2001).

42. *Id.* at 44–45.

> poverty, teen childbearing, poor school achievement, and marital disruption in adulthood.[43]

Family fragmentation and non-formation nearly always harms children because they are so completely dependent upon their families for stability, support, socialization, and nurturing.[44] Professor McLanahan, a leading authority on fragile families, reports that "[b]oys raised outside of intact marriages are two to three times more likely to commit a crime leading to incarceration by the time they are in their early thirties, even after controlling for race, family background, neighborhood quality, and cognitive ability."[45]

Separation and divorce are even "more strongly associated with delinquency than are single-parent households per se."[46] "[T]he prevalence of delinquency in broken homes is 10–15 percent higher than in intact homes."[47] In contrast, "children who grow up in intact, married families are significantly more likely to graduate from high school, finish college, become gainfully employed, and enjoy a stable family life themselves, compared to their peers who grow up in nonintact [sic] families."[48]

The public costs of the disintegration of marital families are profound. They include $112 billion per year state and federal (very conservative estimate);[49] $100 billion per year for fourteen federal programs;[50] the costs of

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43. PAULA Y. GOODWIN, WILLIAM D. MOSHER & ANJANI CHANDRA, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL CENTER FOR HEALTH STATISTICS, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 4 (Feb. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf.

44. *See Fragile Families and Family Law*, *supra* note 26, at 88; *The Fall of Marital Stability, supra* note 26, at 89-100.

45. *The Marriage Movement: A Statement of Principles*, INST. FOR AM. VALUES (June 29, 2000), http://americanvalues.org/catalog/pdfs/marriagemovement.pdf (citing Cynthia C. Harper and Sara S. McLanahan, 1998, *Father Absence and Youth Incarceration*, a paper presented at annual meeting of American Sociological Association). *See further* GROWING UP WITH A SINGLE PARENT, *supra* note 31 *passim*; *see further* Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects, and Politics*, 51 J. MARRIAGE & FAM. 557, 558 (1989).

46. Cesar J. Rebellon, *Reconsidering the Broken Homes/Delinquency Relationship and Exploring Its Mediating Mechanism(s)*, 40 CRIMINOLOGY 103, 103 (2002). Rebellon also interestingly concludes that "recent remarriage has a robust longitudinal effect on status offending, but not on more severe forms of offending." *Id.* at 129.

47. L. Edward Wells & Joseph H. Rankin, *Families and Delinquency: A Meta-Analysis of the Impact of Broken Homes*, 38 SOC. PROBS. 71, 71, 87 (1991) (reviewing extensive literature and meta-analysis of fifty studies).

48. *The State of Our Unions, Marriage in America 2010, When Marriage Disappears: The New Middle America*, THE NATIONAL MARRIAGE PROJECT 52 (Dec. 2010), http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf (citing RON HASKINS & ISABEL SAWHILL, CREATING AN OPPORTUNITY SOCIETY 73, 83-84 (2009), and NICHOLAS H. WOLFINGER, UNDERSTANDING THE DIVORCE CYCLE: THE CHILDREN OF DIVORCE IN THEIR OWN MARRIAGES 73-74 (2005)).

49. *See generally Study: Divorce, Unwed Parenting Cost Taxpayers Billions,* USA TODAY (Apr. 20, 2008), http://usatoday30.usatoday.com/news/nation/2008-04-15-fragmented-families_N.htm; *The Taxpayer Costs of Divorce and Unwed Childbearing*, INST.

Juvenile crime/delinquency; more crime, more child abuse, more public health expenses, higher social services costs, a less-educated workforce, inter-generationally transmitted behaviors, more incarceration, more poverty, more health problems, lower educational achievement, lower employment success, less family stability, etc.[51]

Stanford University has compiled data associated with shorter or longer human life-span for nearly ninety years.[52] The latest report, in 2011, noted that:

> Parental divorce during childhood emerged as the single strongest predictor of early death in adulthood. The grown children of divorced parents died almost five years earlier, on average, than children from intact families. The causes of death ranged from accidents and violence to cancer, heart attack and stroke. Parental break-ups remain, the authors say, among the most traumatic and harmful events for children.[53]

One of the themes emphasized in the scholarship of Professor Melli has been securing adequate support for children.[54] That is a value that should be constant in the law regardless of family structure. It also is important for the law to recognize and encourage, foster and support the family structure that is most likely to insure adequate financial support for children. There is no credible question that the marital family heading by the biological mother and father of children is more likely to provide the most adequate, long-lasting financial support for the children than any other family structure. For example,

> "Poverty rates of cohabiting couple parents are double those of married parents; non-cohabiting single parents with at least a second adult had poverty rates three times as high as among married parents. . . . About 30 percent of cohabiting couples and 33–35 percent of single parents stated that sometime in the past year they

FOR AM. VALUES 17-18 (2008), http://www.americanvalues.org/pdfs/COFF.pdf; *id.* at http://www.americanvalues.org/coff/executive_summary.pdf (executive summary).

50. Steven L. Nock & Christopher J. Einolf, *The One Hundred Billion Dollar Man: The Annual Public Costs of Father Absence*, NAT'L FATHERHOOD INITIATIVE 9-11 (2008), http://www.cfuf.org/Filestream.aspx?FileID=20.

51. *See* Wardle, *The Fall of Marital Stability, supra* note 26, at 98.

52. *See generally About the Center*, STANFORD CENTER ON LONGEVITY, http://longevity3.stanford.edu/about-the-center (last visited Oct. 8, 2013).

53. Laura Landro, *How to Keep Going and Going*, WALL ST. J. (Mar. 9, 2011), http://online.wsj.com/article/SB10001424052748703529004576160601149946420.html (emphasis added) (reviewing HOWARD S. FRIEDMAN & LESLIE R. MARTIN, THE LONGEVITY PROJECT: SURPRISING DISCOVERIES FOR HEALTH AND LONG LIFE FROM THE LANDMARK EIGHT-DECADE STUDY viv-xvi (Hudson St. Press 2011)).

54. *See Resume*, *supra* note 2.

> did not meet their essential expenses. These levels are twice the 15 percent rate experienced by married parents."[55]

Additionally,

> "The child born outside of marriage also is thirty times more likely to live in persistent poverty than is the child whose parents got married and stayed married. Sixty percent of children whose mothers never married will be poor for most of their childhoods, compared to just 2 percent of children whose parents got married and stay married."[56]

The poverty rate for "individuals for whom the head of the family is married was 7 percent. In contrast, among individuals in families with an unmarried head and children present (five-sixths of whom are female unmarried heads), the poverty rate was 40.3 percent."[57]

Indeed, it has been calculated that, over time, marriage "generates an 18%-19% increase in men's earnings, with about one-third to one-half of the marriage earnings premium attributable to higher work effort" and that "higher wage rates and hours worked encourage men to marry and to stay married" such that "being married and having high earnings reinforce each other over time."[58] Professor Robert Lerman has reported that "[M]oving into a married state raises living standards by about 65 percent relative to single parents living with no other adult, over 50 percent relative to single parents living with at least another adult, and 20 percent relative to cohabitation."[59]

Thus, if society cares about the financial well-being of children, society must care about protecting the marital family. It is indisputable that the non-formation of families invariably results in more, not less, government cost, and more intrusive government regulation of private lives and private families.[60]

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55. Robert I. Lerman, *How Do Marriage, Cohabitation, and Single Parenthood Affect the Material Hardships of Families with Children?*, URBAN INST. 20 (July 2002), http://www.urban.org/UploadedPDF/410539_SippPaper.pdf.

56. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 577 (2007) (citing MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE 32 (1996)).

57. Hilary W. Hoynes, Marianne E. Page, & Ann Huff Stevens, *Poverty in America: Trends and Explanations*, J. ECON. PERSPECTIVES 47, 49 (Winter 2006). *See also* Wax, *supra* note 57, at 576 (citing KAY HYMOWITZ, MARRIAGE AND CASTE IN AMERICA 22 (2006)) ("[V]irtually all—92%—of children whose parents make over $75,000 per year are living with both [biological] parents.").

58. Avner Ahituv and Robert I. Lerman, *How Do Marital Status, Work Effort, and Wage Rates Interact?*, 44 DEMOGRAPHY 623, 623 (2007).

59. Robert I. Lerman, *Married and Unmarried Parenthood and Economic Well-Being: A Dynamic Analysis of a Recent Cohort*, URB. INST. 32 (July 2002), http://www.urban.org/UploadedPDF/410540_Parenthood.pdf.

60. *See generally* Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents,* 10 AVE MARIA L. REV. 1 (2011) (reviewing evidences and costs of the disintegration of families); *The Fall of Marital Stability*, *supra* note 26 (reviewing evidence of juvenile delinquency consequences of divorce and marital non-formation); *In*

Marital families are the first and most important "department of health and human services" in any society. The amount of resources families spend on welfare, medical and social services dwarfs the amount the government spends. Therefore, as the institutions of marriage and marital families are weakened, the need for government to step in and provide such basic services increases.[61]

The non-monetary impacts of non-marital parenting also are very costly. For example, a 2010 article in *Demography* noted that, for young men, detrimental disruptions were associated with all non-tradition family forms:

> [E]ach of the nontraditional family structures [studied] is associated with an early transition to fatherhood, relative to having a continuously resident biological father . . . . [T]hose who experienced three or fewer transitions [such as death, divorce, remarriage, cohabitation formations and breakups, etc.] were more likely than the reference group but less likely than those who experienced four or more transitions and those who grew up in a stable, single-mother family to have an early transition to fatherhood. Compared with those who always lived with the father, those who never lived with a father were 2.8 times as likely to become a father, those who experienced four or more transitions were about 2.3 times as likely to become fathers, and those experiencing one to three transitions were 1.8 times as likely to become fathers.[62]

Likewise, a 2009 report in *Child Maltreatment* emphasized that "[a]ll [family types studied other than the intact family] had a higher likelihood of [Child Protective Services] involvement than those in which the biological father of all children resided in the household."[63] Additionally, the educational development of children is impacted by family structure. "The 'World Family

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Defense of the Argument, *supra* note 26, at 244–47; Jill Kirby, *Marriage Makes Us All Richer—Not Poorer,* THE TELEGRAPH (UK), (Feb. 8, 2011), http://www.telegraph.co.uk/family/8311956/Marriage-makes-us-all-richer-not-poorer.html.

61. *In Defense of the Argument*, *supra* note 26*,* at 255–59 (reporting negative social impact on children); *See* Kathryn J. Lopez, *Another Divorce? The Gay-Adoption Movement Has A Familiar Ring*, NAT'L REV. ONLINE 2 (Apr. 12, 2002), *available at* http://www.nationalreview.com/script/printpage.asp?-ref=/lopez/lopez041202.asp; ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 132–42 (1989) (reporting research suggesting that as marriage culture declined in Scandinavia, state spending increased).

62. Sandra L. Hofferth & Frances Goldscheider, *Family Structure and the Transition to Early Parenthood*, 47 DEMOGRAPHY 415, 427 (May 2010); *id.* at 430 ("[B]efore controls were introduced, young men who grew up without a residential father were more than six times as likely to become nonresidential fathers themselves as were those who grew up with both their biological parents, and they were twice as likely to become nonresidential fathers after controls for background factors were added.").

63. Lawrence Berger, Christina Paxson, & Jane Waldfogel, *Mothers, Men, and Child Protective Services Involvement*, 14 CHILD MALTREATMENT 263, 272–73 (Aug. 2009). *See also* Marcia J. Carlson, *Family Structure, Father Involvement, and Adolescent Behavioral Outcomes*, 68 J. MARRIAGE & FAM. 137, 137, 150 (2006).

Map' report by Child Trends, a nonprofit, nonpartisan organization, found that even when controlling for income, children in middle- and high-income countries who live with parents have better educational outcomes than children living with one or no parents."[64]

Thus, in developmental, practical and financial ways, as well as conceptual and symbolic ones, the rising generation (especially) and all of our society "crucially depends on legally enshrining the conjugal view of marriage."[65] While it would be inaccurate to describe marriage as a "magic bullet," it would be misleading to not recognize the strong, positive association between marriage as a family structure and beneficial outcomes for children and their parents.

III. THE IMPACT OF MARRIAGE UPON CHILDREN BEING RAISED BY SAME-SEX COUPLES

How would recognition of adult same-sex relationships as marriages impact the children being raised by those parents or children in other families? How might such recognition benefit children? How could it disadvantage children? How would it impact society in ways that would feed back into family life generally or how would it affect responsible childrearing?

The case for same-sex marriage for the benefit of children being raised in those families is primarily one of resources.[66] Having two legal parents who are legally committed to each other as spouses and to their children by legal responsibilities as co-parents expands the resource pot in many ways. It provides two purses to provide financial support for the children, two adults to supervise, two parents to provide care, two potential sets of extended family to turn to, two different adults to provide perspectives, direction, counsel, and advice, two adults with different emotional and intellectual fonts to help the children develop their own identities. It provides the social resources, contacts, connections, information, knowledge, and wisdom of two family-committed adults that could increase the chances for the full development of each child and that could enhance the development of the entire family. Legalizing same-

64. Christopher Brown & Vincent DiCaro, *Schools of Thought: Our View: The missing piece in education reform? Dads,* CNN (Feb. 11, 2013), http://schoolsofthought.blogs.cnn.com/2013/02/11/our-view-the-missing-piece-in-education-reform-dads/.

65. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?* 34 HARV. J. L. & PUB. POL'Y 247, 248 (2010). *See* SHERIF GIRGIS, ROBERT P. GEORGE & RYAN T. ANDERSON, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 1-3 (Encounter Books 2012).

66. *See generally* Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 587 (2005) (noting benefits of extra social security benefits); Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2377 (2007) (noting more financial support, double hospital/medical decision-making, inheritance, kinship); Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 438–39 (1999) (tax benefits).

sex marriage might also enhance the relationship between the parents and thereby benefit the children,[67] and it could reduce the stigma faced by children raised by same-sex couples.[68] As one writer put it:

> If marriage is a good thing for families and for society, it is a good thing for both traditional and nontraditional families. The legal safety net provided by civil marriage undoubtedly protects children—it protects children's relationships with their parents and the adults who act as their parents; it protects adopted children and biological children equally; it opens the door to countless benefits and obligations.[69]

One problem with that argument is a simple logical flaw. Just because marriage has proven to be constructive for mother-father-headed families (who have gender-complementary characteristics related to the dual-gender composition of the marriage), does not mean that it also must be equally good and produce the same benefits for same-sex couples who lack the dual-gender composition and the gender-complementarity of male-female couples raising children.

It seems questionable to believe that if society extends the label of "marriage" to gay and lesbian relationships, those relationships will automatically acquire the socially and individually beneficial characteristics associated with dual-gender marriage for millennia. Abraham Lincoln once lampooned the flaw in this sort of thinking with a homespun story. He asked how many legs a dog would have if you counted a tail as a leg. To the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg."[70]

The marriage of persons of the same gender is too recent to provide reliable data about the effects of that parenting form on children. The Netherlands, the first nation in the history of the world to legalize same-sex marriage, did so just a dozen years ago in 2001.[71] The first American state to do so, Massachusetts, began to permit same-sex marriage just a decade ago in

67. Ledsham, *supra* note 67, at 2376-77.

68. Gretchen Van Ness, *The Goodridge Decision and the Right to Marry*, 88 MASS. L. REV. 161, 163-64 (2004).

69. *Id.*

70. *See generally* JOHN BARTLETT, FAMILIAR QUOTATIONS 542 (13th ed. 1955); 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 570 (1939).

71. *See generally Reflecting on 12 years of gay marriage in the Netherlands,* EURONEWS, (Jan. 4, 2013), available at http://www.euronews.com/2013/04/01/reflecting-on-12-years-of-gay-marriage-in-the-netherlands/ ("Here, euronews takes a look back on the step-by-step process that made the Netherlands the first country in the world to introduce gay marriage . . . ."); Boris O. Dittrich, *Gay marriage's diamond anniversary,* L.A. TIMES, (Apr. 17, 2011), http://articles.latimes.com/2011/apr/17/opinion/la-oe-dittrich-gay-marriage-20110417 ("the Netherlands became the first country in the world to legalize same-sex marriage . . . .").

2004.[72] The phenomenon of same-sex marriage is still too rare to provide significant relevant, reliable information. As noted above and in Appendix I, only (at most) sixteen nations out of 193 sovereign nations in the world today (barely 8 percent of all sovereign nations) and merely sixteen U.S. states (just 32 percent of the American states) have legalized same-sex marriage.[73] Same-sex marriage remains highly controversial in the United States and is even more controversial around the world. Voters in thirty-one states have quite recently adopted state marriage amendments to prohibit legalization of same-sex marriage and at least forty-seven nations have constitutional provisions which also facially prohibit same-sex marriage.[74]

Just as most nations disallow same-sex marriages, so also adoptions by same-sex couples are rarely permitted. As one authoritative recent article noted:

> [F]ew nations allow same-sex partners or couples to adopt children. Many countries have outright bans on homosexual adoption. Other countries have regulations that appear neutral on their face but in practice exclude LGBT adoption by banning single individuals from adopting. Thus, the only countries from which LGBT individuals or couples may adopt are those countries that either expressly allow homosexual adoption, those that do not specify, or those that allow singles to adopt.[75]

A 2011 law review article by Professor Jennifer Mertus notes that only about a dozen nations allow LGBT single individuals to adopt, and fewer than half of those nations allow some same-sex partners or couples to adopt in some cases.[76] She reports that at least nine nations have explicit prohibitions against LGBT joint adoptions, and *none* of the top five nations sending children to other nations through inter-country adoption in 2009 allow their children to be

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72. Goodridge v. Department of Public Health, 798 N.E.2d 941, 943 (Mass. 2003). Same-sex marriages began the following Spring; *see Same-sex marriage in Massachusetts,* WIKIPEDIA, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Massachusetts (last visited Oct. 8, 2013) ("Same-sex marriage in Massachusetts began on May 17, 2004 . . . .").

73. Wardle, *The Proposed Minnesota Marriage Amendment, supra* note 24, at 165-67, App. 1.

74. *Id.* at 166-168. *See also infra at* App. One of the state marriage amendments was invalidated by federal judges, and when state officials refused to defend the amendment the Supreme Court held that the sponsors of the initiative process lacked standing to appeal. *See infra* note 198.

75. Jennifer B. Mertus, *Barriers, Hurdles, and Discriminations: The Current Status of LBGT Intercountry Adoption and Why Changes Must Be Made to Effectuate the Best interests of the Child,* 39 CAP. U.L. REV. 271, 281 (2011); *id.* at 292–93 ("[V]ery few countries allow joint adoption [by] . . . unmarried couples," heterosexual or same-sex.").

76. *Id.* at 293 n. 149. This produces a potential irony. *Id.* at 304 ("LGBT couples, specifically married couples, have the most difficulty adopting internationally. The group that experiences the second most difficulty is unmarried same-sex couples. In other words, those members of the LGBT community that are in stable, committed, and sometimes legally recognized relationships may actually be at a disadvantage when it comes to adopting internationally.").

placed for adoption with LGBT couples, and only one of them allows LGBT singles to adopt.[77]

The European Court of Human Rights interpreting provisions of the European Convention on Human Rights held, in *E.B. v. France,*[78] that the French decision to bar the adoption by the single lesbian violated the European Convention on Human Rights, articles 8 and 14. The Court, however, affirmed the French adoption policy by which joint adoption is reserved for [dual-gender] married couples.[79] The Court endorsed the finding of the French Report that "the form of organization of the couple constituted by the parents is not in fact neutral in its consequences for the child." [80] More recently, in 2012, the European Court of Human Rights reaffirmed that ruling in *Gas and Dubois v. France,*[81] holding that the refusal of France to allow a woman to adopt her same-sex partner's child did not violate the European Convention on Human Rights.

Concern has been noted by many traditional sending nations that children they send into western nations for adoption may end up being raised by same-sex couples. That may be one reason for the dramatic drop in inter-country adoptions in the past decade; down two-thirds in the U.S. from 2004 to 2011, and down over one-third globally in almost the same period.[82]

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77. *Id.* at 283–88 (China and Ethiopia explicitly bar adoption by same-sex individuals or couples, and while Russia, Ethiopia and the Ukraine do not explicitly ban such adoptions, a *de facto* ban is enforced through other requirements). Since the 2013 Russian moratorium on international adoptions this information has become moot. Robert G. Spector, *International Family Law,* 47 Int'l Law. 147, 155 (2013) ("Russia signed a new agreement with the United States in 2012 concerning the adoption of Russian children. The agreement "tightens the rules for Americans adopting children from the Russian Federation. Specifically, a foreign family can adopt a Russian child only if there is no Russian family found for the child. The deal also provides for more control of the child following the adoption.").

78. E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=827961&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

79. *Id.* at ¶ 49 (distinguishing partner or same-sex couple adoption); *id.* at ¶ 73 (distinguishing unmarried couple adoption).; *id.* at ¶ 76 (presence of partner relevant).

80. *See supra* note 79; *see also* No. 2832 National Assembly of France, Report Submitted on Behalf of the Mission of Inquiry on the Family and the Rights of Children (Jan. 25, 2006), *available at* http://www.vtmarriage.org/resources/france_report_on_the_family.pdf.

81. Affair Gas et Dubois v. France, App. No. 25951/07 (Mar. 15, 2012), *available at* http://hudoc.echr.*coe.int/sites/eng/pages/search.aspx?i=001-109571 at* ¶ 61 (distinguishing *E.B. v. France*); *Id.* at ¶ 65, (distinguishing married couples); *id.* at ¶ 68 (distinguishing married couples); *see also Donna* Bowater, *Gay Marriage Is Not a Human Right, According to European Ruling,* THE TELEGRAPH (UK), Mar. 21, 2012, *available at* http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html. *See also* Schalk and Kopf v. Austria, no. 30141/04, §§ 96-97, ECHR (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605 (the court previously held that the Convention does not require member states to legalize same-sex marriage).

82. Intercountry Adoption Statistics, Sept. 30, 2011, DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, http://adoption.state.gov/about_us/statistics.php (last visited 4 February,

There is growing evidence for concern that legal recognition of same-sex marriage and parenting will weaken the family. The subject, however, has not yet been deeply researched. Many same-sex couples and families tend to be isolated and family-alienated to some extent.[83] From an intergenerational perspective, that estrangement could have seriously detrimental, depriving impacts upon the same-sex couple and their children. It also could cause loss of valuable associations among extended-family members. If, as a general rule, children have a moral right to know and have some association with the families from which they are genetically descended, the serious implications of *laissez-faire* gay and lesbian couple parenting cannot be brushed aside.[84]

Recent scholarship has challenged the credibility of the many studies that purportedly show "no difference" in outcomes for children raised by same-sex couples as compared to those raised by married, biological parents. In 2012, Professor Loren Marks reviewed all fifty-eight studies done by the 2004 American Psychological Association.[85] Marks showed that virtually all of those studies were so plagued by methodological flaws and biases that their conclusions are unreliable and useless for formulating legal policy.[86] Likewise, Professor Mark Regnerus, examining data from the New Family Structures Study of nearly 3,000 young Americans, ages eighteen to thirty-nine, compared children raised in eight different child-rearing family forms on the basis of forty child-outcome variables.[87] Professor Regnerus found "numerous, consistent differences, especially between the children of women who have had a lesbian relationship and those with still-married (heterosexual) biological parents."[88]

2012); Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010,* NATIONAL COUNCIL FOR ADOPTION, ADOPTION ADVOCATE, no. 44, Feb. 2012, at 2. The Selman report covers intercountry adoptions globally from 2004-09.

83. *See generally* John W. Barker & Sheila Kennedy, *The Gay "90s"—Sexual Orientation and Indiana Law,* 27 IND. L. REV. 861, 867 (1994) ("Biological families sometimes are alienated from their gay and lesbian relatives on the basis of their relatives' sexual orientation . . . ."); Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns,* 18 ST. THOMAS L. REV. 511, 526 (2006) (reviewing impact on children of being raised by gay or lesbian parent, and noting that "[i]n a homosexual household, children miss out on seeing . . . important relationships").

84. For some discussion of this alleged moral right, *see* Pamela Bryn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution,* 23 COLUM. J. GENDER & L. 1, 16 (2010); Andrea Mechanick Braverman, *How the Internet Is Reshaping Assisted Reproduction: From Donor Offspring Registries to Direct-to-Consumer Genetic Testing,* 11 MINN. J. L., SCI. & TECH. 477, 485 (2010); Martha Albert Fineman, *Fatherhood, Feminism and Family Law,* 32 MCGEORGE L. Rev. 1031, 1047 n. 109 (2001).

85. Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting,* 41 SOC. SCI. RES. 735, 740 (2012).

86. *Id.*

87. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study,* 41 SOC. SCI. RES. 752, 752 (2012) [hereinafter Regnerus, *How Different?*].

88. *Id.* (abstract). Among the numerous comments on this article are Paul R. Amato, *The Well-Being of Children with Gay and Lesbian Parents,* 41 SOC. SCI. RES. 771 (2012), and David J. Eggebeen, *What Can We Learn from Studies of Children Raised by Gay or*

On twenty-five of the forty outcome measures, the children of mothers who had same-sex relationships differed as young adults from children who spent their entire childhoods with both their married, biological parents but whose mothers had not had (or did not report) same-sex relationships.[89] "For example, [the former] reported significantly lower levels of income, more receipt of public welfare, lower levels of employment, poorer mental and physical health, poorer relationship quality with current partner, and higher levels of smoking and criminality."[90] Professor Regnerus concluded that, while children raised in alternative-style homes may develop and succeed very well, "the probability-based evidence that exists—including additional NFSS analyses —suggests that the biologically intact two-parent household remains an optimal setting for the long-term flourishing of children."[91]

Lesbian Parents? 41 SOC. SCI. RES. 775 (2012). *See* Mark Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 SOC. SCI. RES. 1367 (2012) [hereinafter Regnerus, *Parental Same-Sex Relationships*]. Professor Regnerus has been bitterly attacked by the intolerant extreme of the gay rights movement, members of which filed complaints with his employer, the University of Texas. One bitterly "wrote to UT president Bill Powers on June 21 saying that Regnerus's study was 'designed so as to be guaranteed to make gay people look bad, through means plainly fraudulent and defamatory.'" Peter Wood, *The Regnerus Affair at U.T. Austin,* CHRONICLE OF HIGHER EDUCATION (July 15, 2012), *available at* http://chronicle.com/blogs/innovations/the-regnerus-affair-at-ut-austin/33509. The Wood article describes the attack as "a kind of scorched-earth personal attack, part ad hominem, part innuendo, part fly-specking, and all venom." The University of Texas conducted an inquiry and concluded that there had been no scientific misconduct by Regnerus in his research or his published report of it. *University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct* (Aug. 29, 2012), *available at* http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed. *See* Robert A. Peterson, Research Integrity Officer, Memorandum to Steven W. Leslie et al. at 3 (Aug. 24, 2012), *available at* http://www.utexas.edu/opa/ wordpress/news/files/Regnerus-Inquiry-Report.pdf ("None of the allegations of scientific misconduct put forth by Mr. Rose were substantiated . . . . In brief, Mr. Rose believed that the Regnerus research was seriously flawed and inferred that there must be scientific misconduct. However, there is no evidence to support that inference.").

89. Regnerus, *How Different?, supra* note 61, at 764.

90. *New Studies Challenge Established Views about the Development of Children Raised by Gay or Lesbian Parents*, ELSEVIER (June 10, 2012), http://www.elsevier.com/about/press-releases/research-and-journals/new-studies-challenge-established-views-about-the-development-of-children-raised-by-gay-or-lesbian-parents. Elsevier publishes the journal in which the Regnerus (*supra,* note 87) and Marks (*supra,* note 86) studies appear.

91. Regnerus, *Parental Same-Sex Relationships, supra* note 89, at 1377. *See also* Douglas W. Allen, Catherine Pakaluk, & Joseph Price, *Nontradional Families and Childhood Progress Through School: A Comment on Rosenfeld,* 47 DEMOGRAPHY 755, 755 (2012); Walter R. Schumm, *Are Two Lesbian Parents Better than a Mom and Dad? Logical and Methodological Flaws in Recent Studies Affirming the Superiority of Lesbian Parenthood,* 10 AVE MARIA L. REV. 79, 86–87 (2011); Daniel Potter, *Same-Sex Parent Families and Children's Academic Achievement*, 74 JOURNAL OF MARRIAGE AND FAMILY 556, 556 (2012). Other recent studies have provided further supporting data. For example, based on a survey of 20% of the 2006 Canadian Census, a Canadian economics professor found that children living with gay and lesbian parents were only about 65% as likely to

Critics have suggested that recognition of same-sex marriage, and of same-sex partners as parents, has the potential to dilute the value of marital families, undermine natural family relations, weaken kinship ties, and diminish the relevance of extended families.[92] As one prominent critic of same-sex marriage proposals stated, same-sex marriage "disconnects marriage from its grounding in the human reality that male-female sexual relationships are different from other kinds of relationships, sexual and non-sexual."[93]

Child Trends—a respected nonpartisan research organization—detailed the importance for children's development of growing up in "the presence of two biological parents."[94] They reported that consistent social science research revealed that children in single-parent and stepparent families are more likely to have problems than children who live in intact families headed by two biological parents.[95] Furthermore, children in single-parent and stepparent families are more likely to experience poverty and multiple living arrangements, as well as "lower educational attainment and a higher risk of teen and nonmarital childbearing."[96] The 2002 Child Trends Brief stated, "Thus, it is not simply the presence of two parents, as some have assumed, but

graduate from high school as children living in opposite-sex marriage families. Douglas W. Allen, *High school graduation rates among children of same-sex households,* 11 REV. ECON. HOUSEHOLD 635, 635 (2013).

92. *See, e.g.*, JOHN CORVINO & MAGGIE GALLAGHER, DEBATING SAME-SEX MARRIAGE 176 (2012) (Critics have suggested that the fiction "in law and culture that gay unions are marriages are right now eroding the ideas on which our marriage tradition is founded and the ideals it seeks to realize."); *id.* at 94 (Critics have suggested that "stopping gay marriage is not victory, it is only a necessary step to the ultimate victory: the strengthening of a culture of marriage that successfully connects sex, love, children, and mothers and fathers."); *id.* (noting that "ordinary voters continue to grasp the losses same-sex marriage entails" and emphasizing "how legal classifications affect culture" and " the relationships between civil marriage as a legal institution and marriage as a social institution."). *See generally* Brian Milligan, *Cohabitee Rights Plan Criticized*, BBC NEWS (Nov. 7, 2009), http://news.bbc.co.uk/2/hi/business/8347618.stm (discussing criticisms of proposals from the Law Commission for England and Wales that would give cohabitees similar inheritance rights to those of spouses upon intestacy and thus compromise the inheritance rights of the decedent's parents, siblings, and children).

93. CORVINO & GALLAGHER, *supra* note 92, at 101. *See also id.* at 97 ("The classification system at work in marriage . . . is based on deep human realities, which were not created by government and cannot be changed by government fiat."); *id.* at 98 (the same-sex marriage debate involves "two contradictory truth claims about what marriage is, and why the law is involved with marriage.").

94. KRISTEN ANDERSON MOORE, SUSAN M. JEKIELEK, & CAROL EMIG, CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? 1-3 (2002), *available at* http://www.childtrends.org/files/marriagerb602.pdf. As a matter of political correctness, it is interesting that a droll disclaimer has been added that declares: "Note: This Child Trends brief summarizes research conducted in 2002, when neither same-sex parents nor adoptive parents were identified in large national surveys. Therefore, no conclusions can be drawn from this research about the wellbeing of children raised by same-sex parents or adoptive parents."

95. *Id.* at 1.

96. *Id.*

the presence of *two biological parents* that seems to support children's development."[97] Child Trends concluded that "[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."[98]

Interestingly, according to one commentator, even children raised by same-sex parents, who love their parents, still express their reservations about same-sex parenting while being reluctant to embarrass their parents by expressing those views publicly.[99]

> Still, they described emotional hardships that came from lacking a mom or a dad. To give a few examples: they feel disconnected from the gender cues of people around them, feel intermittent anger at their "parents" for having deprived them of one biological parent (or, in some cases, both biological parents), wish they had had a role model of the opposite sex, and feel shame or guilt for resenting their loving parents for forcing them into a lifelong situation lacking a parent of one sex.[100]

So, as another commentator put it, the problem is that "[w]e have no scientific evidence at all . . . that children raised by same-sex couples benefit if their unions are legally considered marriages."[101] Of course, all adults who are willing to undertake the responsibilities of parenting deserve praise and commendation for their intentions. However, when the form of parenting they offer deprives children of critical relationships, role models, and opportunities all of the available alternatives should be carefully considered first and those offers should be very carefully scrutinized before they are endorsed or approved. The costs to children of being deprived of the developmental advantages child-rearing by both a father and mother should not be brushed aside just for the sake of political trends and socially popular lifestyles. While

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97. *Id.* at 1–2.

98. *Id.* at 6. Child Trends also emphasized that "the quality of the marriage also affects children," and that domestic violence, especially, "can be very destructive to children's development." *Id.* at 2.

99. Robert Oscar Lopez, *Justice Kennedy's 40,000 Children,* PUBLIC DISCOURSE (May 2, 2013), http://www.thepublicdiscourse.com/2013/05/10034/ (Interestingly, according to one commentator, even children of same-sex parents express reservation about same-sex parenting).

100. *Id. See also* Lynn D. Wardle, *The Inner Lives of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 520-26 (2005).

101. Maggie Gallagher, *Will Gay Marriage Benefit Children of Same Sex Couples?*, THE CORNER (Feb. 10, 2010), http://www.nationalreview.com/corner/194100/will-gay-marriage-benefit-children-same-sex-couples/maggie-gallagher (As another commentator put it, "I do not think that same-sex marriage will serve child well-being in any appreciable way, and I don't think there is much sign that this is the goal."). *See also* Maggie Gallagher, *What Evidence Would Change My Mind on Civil SSM?*, THE CORNER (Aug. 23, 2012), http://www.nationalreview.com/corner/314819/what-evidence-would-change-my-mind-civil-ssm-maggie-gallagher.

many social practices (including high rates of non-marital child-bearing and divorce-on-demand) create such child development handicaps for many children, the combined message and practice of legalization of same-sex marriage establishes the ethic of single-gender parenting in a powerful, unique and profoundly troubling way.

This does not necessarily mean that the law should prohibit or restrict parenting by same-sex couples. But it does mean that the outcomes for children of same-sex marriage are legitimate considerations in formulating public policy. Child welfare interests are relevant to whether same-sex marriage should be legalized, and they should be discussed openly, thoroughly and in an atmosphere in which all respectfully-presented positions are welcomed and valued. That is not often the case, especially in the academy.[102]

IV. WHO DECIDES MEDICAL TREATMENT FOR CHILDREN: PARENTS VS. STATES

The challenge to find and maintain the proper balance between the legitimate role of parents and the appropriate role of the state concerning medical treatment for children has arisen in several cases challenging laws prohibiting parents from providing psychotherapy (reparative therapy, denominated "sexual orientation change efforts" or "SOCE" in some legislation) to their children who have unwanted feelings of homosexual attraction. In September 2012 the California legislature enacted the first such law forbidding parents to provide SOCE to their children struggling with unwanted same-sex sexual attraction.[103] The new California law raises profound questions about the proper role of state regulation and potential interference with the constitutional rights of parents to direct the upbringing of their children – including deciding their medical treatment. Two lawsuits challenging the 2012 California "anti-SOCE" law were filed in federal courts in California with conflicting results, and the Ninth Circuit recently resolved the intra-circuit split. [104] Less than a year after California, New Jersey enacted a similar bill.[105] The anti-SOCE statutes and cases are reviewed in Subpart IV. A., *infra.*

The recent New Jersey and California examples are the latest in a long line of circumstances in which there has been tension and conflict between the rights of parents to control the medical treatment given their children and the *parens patriae* interests of the state to regulate such activities in the best interests of children. The cases arose in a variety of circumstances, and came before the Supreme Court of the United States in a variety of contexts. Subpart

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102. *See generally* THE POLITICALLY CORRECT UNIVERSITY (Robert Maranto, Richard E. Redding & Federick M. Hess, eds. 2009); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage,* 1996 B.Y.U.L.REV. 1, 4 (describing bias in academy and academic publications).

103. CAL. BUS. & PROF. CODE §§ 865(a), 865.1 (2012).

104. *See infra,* notes 113 and 114, and accompanying text.

105. S2278, 215th Sen., Reg. Sess. (N.J. 2012); *see also* A3371, 215th Gen. Assemb., Reg. Sess. (N.J. 2012).

IV.B. provides a brief review of those cases and synthesis of the legal doctrines and decisions. Part IV.C. of this paper will suggest a proper balance in the legal approach and applicable jurisprudential principles.

A. The Anti-SOCE Laws and Cases

The growing social acceptance of LGBT relationships and the political momentum accompanying strong media promotion of same-sex marriage[106] have led to several legislative efforts to bar the provision of "sexual orientation change efforts" (herein "SOCE," sometimes called "conversion therapy" or "reparative therapy") to minors. In September, 2012, California Governor Edmund G. Brown, Jr., signed into law S.B. 1172.[107] The law prohibits a "mental health provider" in California from engaging in SOCE with any patient under eighteen years of age.[108] It further provides that "[a]ny sexual orientation change efforts attempted on a patient under eighteen years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider."[109] The California legislature made specific legislative findings to support the new law, including that "[b]eing lesbian, gay or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly [forty] years."[110]

The new California law was challenged by two separate cases in federal court: *Pickup v. Brown* [hereafter *Pickup I*],[111] and *Welch v. Brown.*[112] Both lawsuits asserted that the new law would violate free exercise and free speech liberties. In *Pickup* the district court denied the plaintiffs' motion for a preliminary injunction to keep S.B. 1172 from going into effect, finding that plaintiffs were not likely to prevail on the merits.[113] In *Welch,* however, the federal district court granted the plaintiffs' motion for a preliminary injunction to keep S.B. 1172 from going into effect, finding that plaintiffs were likely to prevail on the merits of their first amendment – free speech claims.[114] The plaintiffs were likely to suffer irreparable harm in the absence of an injunction, the balance of equities tipped in their favor, and an injunction was in the public

106. *See, e.g.,* James McGlone & Claire McMullen, *Pew Study Reveals 5-1 Bias for Same-Sex Marriage in Media Coverage,* THE HERITAGE NETWORK (June 21, 2013), http://blog.heritage.org/2013/06/21/pew-study-reveals-5-1-bias-for-same-sex-marriage-in-media-coverage/.

107. CAL. BUS. & PROF. CODE §§ 865(a), 865.1 (2012).

108. *Id.*

109. *Id*. at § 865.2.

110. *Id*. at § 865(a) (legislative history notes).

111. Pickup v. Brown, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012) (not reported in F.Supp.2d), *stay granted pending appeal in* 2013 WL 411474 (E.D. Cal., Jan. 29, 2013).

112. Welch v. Brown, 907 F.Supp.2d 1102, 1105 (E.D. Cal. 2012).

113. *See supra* note 112 and accompanying text.

114. 907 F.Supp.2d at 1122-23.

interest.[115] However, *Welch* only considers the interests of the specifically named counselor-therapist plaintiffs, not the interests of parents or children because the District Court determined the plaintiffs had no standing to assert or represent the rights of minors or their parents.[116]

The Ninth Circuit addressed the split caused by these two decisions. On appeal, it granted an emergency injunction in the *Pickup* case to preserve the status quo and keep the law from going into effect pending appeal.[117] Thereafter, the district court, which originally denied plaintiff's motion for an injunction request, granted a stay pending appeal.[118] The Ninth Circuit then heard oral arguments for both cases involving S.B. 1172 on April 17, 2013. California's Attorney General's office (which refused to appoint a lawyer to defend Proposition 8, the constitutional amendment banning same-sex marriage) argued that SOCE is unsafe and discredited.[119] The patients' and counselors' groups argued that "[t]here is no evidence of harm among minors" who are provided SOCE.[120] A press account of the arguments reported the following:

> Chief Judge Alex Kozinski asked California's lawyers what evidence exists that the therapy harms children. Deputy Attorney General Alexandra Gordon said the American Psychological Association has found that attempts to change sexual orientation may cause depression and suicidal thoughts. "We don't really have something compelling here, I mean compelling evidence" of harm, said Kozinski.[121]

On August 29, 2013, the Ninth Circuit reversed the grant of the preliminary injunction in *Welch,* affirmed the denial of the preliminary injunction in *Pickup*, and held that the law "does not infringe on the fundamental rights of parents." [122] The appellate court's opinion began by reviewing the history of "aversive treatments" such as inducing nausea, electric shocks, and other extreme measures, including even castration, to change the individual's homosexual orientation.[123] After homosexuality was removed from the DSMMD in 1973,[124] and the American Psychological Association

115. *Id.* at 1122.

116. *Id.* at 1107-08.

117. Pickup v. Brown, No. 12-17681 (9th Cir. Dec. 21, 2012) (granting preliminary injunction pending appeal).

118. Pickup v. Brown, No. 2:12-cv-02497-KJF-EFB, 2013 WL 411474 (E.D. Cal. Jan. 29, 2013) (Order).

119. *See California Seeks to Enforce Ban on Gay Conversion Therapy,* NEWSMAX (April 17, 2013), http://www.newsmax.com/US/california-gay-conversion-therapy/2013/04/17/id/500016.

120. *Id.*

121. *Id.*

122. Pickup v. Brown, 728 F.3d 1042, 1061 (9th Cir. 2013).

123. *Id.* at 1048-49.

124. DSMMD is the Diagnostic and Statistical Manual of Mental Disorders.

concurred that homosexuality is not an illness, the mainstream psychotherapy community slowly (over nearly four decades) rejected the propriety of efforts to change sexual orientation, even though a minority of mental health professionals have continued to provide SOCE.[125]

In some respects, the anti-SOCE laws may be seen as merely an intra-professional dispute about whether "conversion" or "reparative" therapy (SOCE) is legitimate. They may be seen as a sophisticated attempts by one side (the majority faction in the profession) to use the legislature to decisively resolve and end the professional debate. Numerous professional mental health organizations supported the California anti-SOCE law.[126] That special interest influence upon legislation to strengthen the hand of one professional faction over another is hardly novel.[127]

The 2011 California anti-SOCE law bars mental health professionals from engaging in SOCE with any patient under age eighteen. The law, however, specifically protects "psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation."[128] Mental health professionals who engage in SOCE may be subject to professional discipline.[129] The effect of the anti-SOCE law requires "health providers in California who wish to engage in 'practices . . . that seek to change a [minor's] sexual orientation' either to wait until the minor turns eighteen or be subject to professional discipline."[130] The Ninth Circuit noted that the

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125. *See generally* Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law,* 26 S. U. L. REV. 1, 8-10 (1998) ("In 1973, the American Psychiatric Association removed homosexuality from its official list of psychological diseases."); *see generally About NARTH*, NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, http://www.narth.com (last visited 6 March 2014) ("The National Association for Research and Therapy of Homosexuality (NARTH) is a multi-disciplinary professional and scientific organization dedicated to the service of persons who experience unwanted homosexual (same-sex) attractions (SSA).")

126. *Pickup*, 782 F.3d at 1050 (The California anti-SOCE law was based upon "the legislature relied on position statements, articles, and reports published by the following organizations: the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization.").

127. *See generally Corporate Political Influence*, POLITICS, MARKETS, HEALTH AND DEMOCRACY, http://www.uow.edu.au/~bmartin/dissent/documents/health/political_influence.html (last visited September 26, 2013) ("Behind the facade of "one man one vote" is another force which exerts a far more powerful influence - the money corporations spend to get their way . . . .").

128. CAL. BUS. & PROF. CODE § 865(b)(2).

129. *Id.* at §§ 865.1, 865.2.

130. *Pickup*, 728 F.3d at 1050.

California legislature relied heavily upon a Task Force report of the American Psychological Association that the Ninth Circuit described as based upon "a systematic review of the scientific literature on SOCE."[131] The court noted that "[m]ethodological problems with some of the reviewed studies limited the conclusions that the Task Force could draw,"[132] but the appellate court did not decline to rely upon it.

The Ninth Circuit held that the California anti-SOCE law was not subject to heightened judicial review because of its restriction of free speech rights.[133] Relying on two prior circuit decisions, the court emphasized three established principles:

> (1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation.[134]

Because "First Amendment protection of a professional's speech is somewhat diminished,"[135] and because the law primarily regulated conduct, not speech, the court "conclude[d] that the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone."[136] Using rational basis review, the court concluded that the prohibition of SOCE by mental health professionals was rationally justified.

> The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18. *The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse.* The legislature also relied on the opinions of many other professional organizations. Each of those organizations opposed the use of SOCE.[137]

131. *Id.*
132. *Id.*
133. *Id.* at 1055.
134. *Id.* at 1053.
135. *Id.* at 1054.
136. *Id.* at 1056.
137. *Id.* at 1057 (emphasis added).

The court held that the law "is rationally related to the legitimate government interest of protecting the well-being of minors."[138] Brushing aside expressive association claims, the court found the law did not prevent therapeutic relationships but only therapeutic practices. "The therapist-client relationship is not the type of relationship that the freedom of association has been held to protect."[139] The court also rejected the vagueness claim because "the text of SB 1172 is clear to a reasonable person[,]"[140] and the plaintiffs' claim that the law was overbroad because it had only "an incidental effect on speech" that was "small in comparison with the "plainly legitimate sweep" of the law.[141]

The final claim the Ninth Circuit considered briefly was the plaintiffs' assertion that the anti-SOCE law "infringes on their fundamental parental right to make important medical decisions for their children."[142] The court emphasized that: "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[143] Since parents do not have "the right to choose specific treatments for *themselves*,"[144] and since "the Supreme Court has recognized that the state has greater power over children than over adults," [145] "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves."[146] The court held that,

> . . .to recognize the right Plaintiffs assert would be to compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors. [Precedent] lead us to conclude that the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.[147]

California is not the only state to attempt to legislate a ban against SOCE. New Jersey enacted a similar law in August 2013.[148] When a New Jersey state senate committee voted in favor of the bill, USA Today reported (with the bias so common, as noted above):

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138. *Id.*
139. *Id.* at 1058.
140. *Id.* at 1059.
141. *Id.* at 1060.
142. *Id.*
143. *Id.* (quoting *Parham v. J.R.,* 442 U.S. 584, 603 (1979)).
144. *Pickup*, 782 F.3d at 1061.
145. *Id.*
146. *Id.*
147. *Id.*
148. S2278, 215th Sen., Reg. Sess. (NJ 2012)(signed into law on August 19, 2013 as P.L.2013, c.150); *see also* A3371, 215th Gen. Assemb., Reg. Sess. (NJ 2012) (identical substance in bill in Assembly, but with more rhetoric).

> "[T]he contentious practice is on the brink of banishment in New Jersey. A bill outlawing such therapy to those under 18 is headed to the Senate for a vote after the Health, Human Services and Senior Citizens Committee passed it by a 7-1 vote March 18. . . The legislation brings to New Jersey's forefront *a much-criticized practice* while exposing the schism between those who believe a person is born gay or lesbian and those who think it is a choice. . . In New Jersey there is even dispute over what to call the practice. Most organizations refer to the therapy as "sexual orientation change efforts," or SOCE. More common references like reparative therapy and conversion therapy are rejected by proponents as politically charged buzzwords."[149]

The operative language of the 2013 New Jersey bill that was enacted into law provides:

> a. A person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions, shall not engage in sexual orientation change efforts with a person under 18 years of age.
> b. As used in this section, "sexual orientation change efforts" means the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:
> (1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address sexual practices; and

149. Gay conversion therapy sparks culture war in NJ, USA Today, March 31, 2013, available at http://www.usatoday.com/story/news/nation/2013/03/31/gay-conversion-therapy-culture-war/2038981/ (seen 4 June 2013) (emphasis added). Governor Christie waffled on the issue before finally deciding to sign the bill into law. *Id.* ("Last week the issue took hold in the budding race for New Jersey's governorshipFalse [Gov. Chris] Christie said he did not have a "hard-and-fast position" on the practice, but that it might be one of the exceptions to his conservative belief of letting parents parent. The next day a Christie spokesman said the governor does not believe in conversion therapy.")

(2) does not seek to change sexual orientation.[150]

Opponents of the New Jersey law argued that "This ban is harmful because it is a usurpation of parental rights,' . . .[T]his legislation invades the intimacy of the family."[151] Nevertheless, on August 19, 2013, the Republican Governor of New Jersey, Chris Christie, signed the bill into law prohibiting mental health and counseling professionals in that state from providing SOCE to minors,[152] effectively barring parents from providing therapy and professional help for their children with unwanted same-sex attraction.[153]

Similar bills have been or are being considered in other states, as well. For example, a bill has been introduced in the Pennsylvania legislature to impose a ban on SOCE in that state.[154] Similar bills prohibiting SOCE therapy for children reportedly also have been introduced in Massachusetts and Washington state.[155]

Opponents of the anti-SOCE bills, including conservative and religious counselors and therapists and Ex-Gays and their families, claimed that denial of SOCE "denies human rights. [One Ex-Gay organization leader] coined it the 'pro-Jerry Sandusky bill' because, he said, it denies sexually abused children the right to speak to a therapist about their sexuality."[156] They also argue that the SOCE ban infringes parental rights. "But . . . the executive director of Log Cabin Republicans, which advocates for gay equality, said that argument is a distortion. He compared a ban comparable to the law against selling cigarettes to a minor."[157]

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150. A3371, 215th Gen. Assemb., Reg. Sess. (NJ 2012) (introduced Oct. 15, 2012). The Senate Bill contained identical language. S2278, 215th Sen., Reg. Sess. (NJ 2012). The Assembly Bill, which contained more rhetoric and preface, was substituted for the Senate bill. It was passed by both houses on June 27, 2013, and signed into law on August 19, 2013 as P.L.2013, c.150.

151. Bethany Monk, *New Jersey May Become Second State to Ban Sexual Therapy,* CitizenLink, available at http://www.citizenlink.com/2013/08/05/new-jersey-may-become-second-state-to-ban-sexual-orientation-therapy/ (seen 20 August 2013).

152. P.L.2013, c. 150, 215th Leg., Reg. Sess. (NJ 2013).

153. Racioppi, *supra* n. 151 (reporting that bill that would outlaw conversion therapy for any persons under 18 passed Senate committee by 7-1 vote on March 18, 2013); *see* Jon Campbell, *Chris Christie Still Undecided About Sexual Orientation Therapy Legislation,* THE CHRISTIAN POST (Mar. 21, 2013), http://www.christianpost.com/news/chris-christie-still-undecided-about-sexual-orientation-therapy-legislation-92381/.

154. Bethany Monk, *Pennsylvania Legislator Seeks Ban on Therapy,* CITIZENLINK (Oct. 15, 2012), http://www.citizenlink.com/2012/10/15/pennsylvania-legislator-seeks-ban-on-therapy/ (H.B. 2691 introduced October 5, 2012); *see also* Memorandum from Sen. Anthony Williams to all Senate members (Mar. 25, 2013), *available at* http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20130&cosponId=12283 ("Re: Prohibit Sexual Orientation Change or 'Conversion' Therapy for Minors").

155. Christopher Doyle, *Sexual Orientation Therapy Ban: Where Is Tolerance,* THE CHRISTIAN POST (Mar. 19, 2013), http://www.christianpost.com/news/sexual-orientation-therapy-ban-where-is-tolerance-92092/.

156. Racioppi, *supra* n. 153.

157. *Id.*

B. Constitutional Protection for Parents' Right to Make Medical Decisions for Their Children

One fascinating aspect of the federal district court rulings in *Welch* and *Pickup* and of the Ninth Circuit decision is the thin analysis of parental rights in these cases. The constitutional rights of parents to direct the medical care of their children was largely ignored or superficially dismissed. The focus of the arguments has been on free speech rights of counselors, patients and their parents, and on the power of the state to protect what state officials consider to be the health and best interests of minor children. However, parental rights are the key to the correct disposition of the constitutionality of the statutes.

The California federal courts summarily brushed aside the Supreme Court parental rights precedents. The district court in *Pickup* declared: "On the record before it, the court is not prepared to second-guess the Legislature's determination that SOCE therapy cannot at this point be considered "long regarded as useful and meritorious" like private schooling in *Pierce v. Society of Sisters.*[158] *Wisconsin v. Yoder* was distinguished because the court strangely did not think that barring SOCE interfered with religious or moral convictions.[159] The court thought the California anti-SOCE law was like the child labor law upheld in *Prince v. Massachusetts* because SOCE was found by the legislature to be "potentially harmful to minors."[160] *Parham v. J.R.* was distinguished on the superficial basis that the parents and the state were "on the same side" there whereas here the parents and state are at odds.[161]

Moreover, the Ninth Circuit did not grasp the pervasively discrediting extent of the methodological flaws in the studies upon which the APA's 2005 report finding "no difference" between children raised by gay or lesbian parents and those raised by their biological mothers and fathers (which was the key basis for the California legislation and for the federal court decisions upholding it). Every study the APA cited was methodologically flawed.[162]

For nearly a century, the Supreme Court has provided special protection for parents to direct the upbringing of their children, including to providing controversial education, information, and medical treatment to their children,

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158. Pickup v. Brown, 2:12-CV-02497-KJM-EF, 2012 WL 6021465, at *16-18 (E.D. Cal. Dec. 4, 2012) *aff'd,* 728 F.3d 1042 (9th Cir. 2013) (citing Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

159. *Pickup*, WL 6021465, at *17-18 (citing Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972)).

160. *Pickup*, WL 6021465, at *12, 19 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

161. *Pickup*, WL 6021465, at *20 (citing Parham v. J.R., 442 U.S. 584, 602-03 (1979)).

162. Loren Marks, *Same-sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting,* 41 SOC. SCI. RES. 735, 736 (2012) (revealing that "more than three-fourths (77%) of the studies cited by the APA brief are based on small, non-representative, convenience samples of fewer than 100 participants . . . ."). Further, of the 59 studies on which the APA Brief relied, only "33 included a heterosexual comparison group." *Id.*, at 739.

and to insulate them from unwanted influences. [163] The Supreme Court repeatedly emphasized that "the Constitution protects the sanctity of the family precisely because . . . [i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[164] A long line of Supreme Court cases have held that parents enjoy very broad constitutional protection in making decisions about raising their children. Ninety years ago, in *Meyer v. Nebraska*,[165] the Supreme Court of the United States held that the authority of parents to rear their children free of coercive state control is one of the unwritten "liberties" protected by the due process clause of the fourteenth amendment. *Meyer* invalidated a Nebraska law prohibiting any person from teaching or using any language other than English to students who had not passed the eighth grade.[166] It declared that "[w]ithout doubt," among the undefined "liberties" protected by the fourteenth amendment are the rights "to marry, to establish a home and bring up children. . . ."[167] Corresponding to this right of control, "it is the natural duty of the parent to give his children education suitable to their station in life."[168]

Two years after *Meyer*, in *Pierce v. Society of Sisters*,[169] the Supreme Court again underscored constitutional protection for parental rights to make controversial and unpopular decisions regarding the upbringing of their children. The Court held that an Oregon law requiring the parents of virtually all children between the ages of eight and sixteen to send their children to public school for instruction was unconstitutional, effectively eliminating private schools, including parochial schools. Justice McReynolds, writing for the unanimous Court, declared:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with

163. *See generally* Lynn D. Wardle, *Don't Tell My Parents: Parents' Rights Regarding the Provision of Contraceptives to Their Children*, *in* VALUES & PUBLIC POLICY 181 (Gerald P. Regier, ed., 1986).

164. Moore v. City of East Cleveland, 431 U.S. 494 503, 503-04 (1977).

165. Meyer v. Nebraska, *2*62 U.S. 390, 399-400 (1923).

166. *Id.* at 397 (citing 1919 NEB. LAWS c. 249: "Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language").

167. *Meyer, 2*62 U.S. at 399.

168. *Id.* at 400.

169. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

> the high duty, to recognize and prepare him for additional obligations.[170]

While the Court opinion decried the state "standardiz[ation] of . . . children," since the decision about where to send children for their education was made by their parents, the ruling, in reality, established a constitutional protection against state "standardization of parenting."[171]

While upholding a child labor law in *Prince v. Massachusetts*,[172] the Court also reiterated its support for the constitutional rights of parents.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . And it is in recognition of this that [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.[173]

In *Wisconsin v. Yoder*,[174] the Supreme Court in 1972 reaffirmed constitutional protection for parental freedom from state compulsion in deciding matters involving the education and religion of older adolescents. Chief Justice Burger, writing for the Court, explained:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[175]

The majority opinion referred to and declined to reconsider traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions: "It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters*."[176]

Five years later, in *Moore v. City of East Cleveland*,[177] the Supreme Court held that zoning laws could not be written or applied in such a way to as to

170. *Id*. at 534-35.
171. *Id.* at 534.
172. Prince v. Massachusetts, 321 U.S. 158 (1944).
173. *Id*. at 166.
174. Wisconsin v. Yoder, 406 U.S. 205 (1972).
175. *Id*. at 223, 234.
176. *Id.* at 231-32.
177. Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977).

prevent children and grandchildren from residing in the home of their parent and grandparent. In an extensive note, the plurality reviewed the long line of cases in which protection for parental authority and family life had been established:

> In *Wisconsin v. Yoder*, the Court rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children. That right is recognized because it reflects a "strong tradition" founded on "the history and culture of Western civilization," and because the parental role "is now established beyond debate as an enduring American tradition." In *Ginsberg v. New York*, the Court spoke of the same right as "basic in the structure of our society." *Griswold v. Connecticut* struck down Connecticut's anticontraception statute. Three concurring Justices, relying on both the Ninth and Fourteenth Amendments, emphasized that "the traditional relation of the family" is "a relation as old and as fundamental as our entire civilization." (Goldberg, J., joined by Warren, C. J., and BRENNAN, J., concurring). Speaking of the same statute as that involved in Griswold, Mr. Justice Harlan wrote, dissenting in *Poe v. Ullman*, "(H)ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[178]

Justice Brennan's concurring opinion, joined in by Justice Marshall, emphasized that the extended family is protected by the Constitution.

> [T]o sanction the drawing of the family line at the arbitrary boundary chosen by East Cleveland would surely conflict with prior decisions that protected "extended" family relationships. For the "private realm of family life which the state cannot enter", recognized as protected in *Prince,* was the relationship of aunt and niece. And in *Pierce*, the protection held to have been unconstitutionally abridged was "the liberty of parents and guardians to direct the upbringing and education of children under their control" (emphasis added).[179]

Two years later the Supreme Court decided *Parham v. J. R.,*[180] involving a controversial medical treatment decision by parents for children. In that controversial case, two children, J. R. and J. L., were admitted into a state mental hospital without any judicial hearing, but upon the request of their

178. *Id.* at 503 n.12.
179. *Id.* at 510-11.
180. Parham v. J.R., 442 U.S. 584, 602 (U.S. 1979).

parent (in J.L.'s case) or state guardian (in J.R.'s case).[181] The class action claim brought by representatives of these two children against the state (Georgia) asserted that the lack of formal legal hearing before parents committed their children denies due process.[182] The Supreme Court rejected this claim. Instead, it upheld the procedure noting the thorough hospital admission procedures rendered formal legal procedures unnecessary, and stressing the importance of protecting parental authority in making child-rearing decision, including regarding the medical treatment of children. The majority noted:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[183]

Justice Stewart concurred in the (6-3) judgment, also emphasizing the constitutional importance of parental rights, stating, "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it."[184] He further commented, "Under our law, parents constantly make decisions for their minor children that deprive the children of liberty, and sometimes even of life itself. Yet surely the Fourteenth

181. *Id.* at 589-90.
182. *Id.* at 588.
183. *Id.* at 602-03.
184. *Id.* at 621.

Amendment is not invoked when an informed parent decides upon major surgery for his child, even in a state hospital."[185]

The most recent Supreme Court decision dealing with parents' rights, *Troxel v. Granville*,[186] decided in 2000, involving a dispute about whether a mother could restrict grandparent visitation, also emphasized and upheld the primacy of parental rights in childrearing. The plurality declared, "[T]here is a constitutional dimension to the right of parents to direct the upbringing of their children."[187] It observed, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—*is perhaps the oldest of the fundamental liberty interests recognized by this Court*."[188] Six justices agreed that "that the visitation order in this case was an unconstitutional infringement on Granville's *fundamental right to make decisions concerning the care, custody, and control of her two daughters*."[189]

C. Synthesis: Respect Parental Rights

The synthesis of the Supreme Court jurisprudence supports "thick" parental rights, while both of the *Pickup* rulings (in the district court and Ninth Circuit) applied only "thin" versions of the fundamental right of parents to raise their children. The implications of *Parham* for the constitutionality of the new anti-SOCE laws are profound. First, the lower court order in *Parham* and the California law both impinge upon parental discretion in providing medical treatment for minor children. Second, both involved highly controversial forms of treatment. Third, in both cases, parents could not impose the controversial treatment unilaterally (like a parent forcing a child to take unwanted over-the-counter medicine or distasteful home remedy or non-medical treatment). In both cases, the existing procedures provided a professional evaluation before the child would undergo the treatment.

The California and New Jersey no-SOCE-treatment laws, like the laws in *Myers* and *Pierce,* seek to ban parental discretion to engage in childrearing practices which, at least for a particular moment in specific places, has become socially unpopular. But sincere concerns of legislators for others' children do not override the constitutional rights of parents who are actually raising their own children. Nor do they overcome a parent's authority to raise their children in ways that defy popular social conventions in the communities in which they live.

Sadly, the statist paradigm that values state agency control and devalues parental prerogatives is growing.[190] As the new anti-SOCE laws in California

185. *Id.* at 624.

186. Troxel v. Granville, 530 U.S. 57 (2000).

187. *Id.* at 65-66.

188. *Id.* at 65 (emphasis added).

189. *Id.* at 72.

190. *See generally* Lynn D. Wardle, *Intergenerational Justice, Extended and Redefined Families, and the Challenge of the Statist Paradigm*, 3 INT'L J. JURISPRUDENCE. FAM. 167 (2012).

and New Jersey and the *Pickup* decisions illustrate, parental rights (and, derivatively, children's rights also – the first of which is to be raised by their parents) may be diminishing in scope, meaning and value in the contemporary American legal system.

CONCLUSION

Returning to the life example of Professor Melli, it seems appropriate to reflect on how our lives are the material, visible, tangible expressions of our intellectual ideas and even our jurisprudence. We manifest what we value by what we do and how we do it, not merely by what we write and say. We should strive for harmony between what we profess and how we live.

A reminder from Justice Stewart's concurrence in *Parham v. J.R.* provides a fitting concluding reflection: "Issues involving the family . . . are among the most difficult that courts have to face, involving as they often do serious problems of policy disguised as questions of constitutional law."[191] Because they are so difficult, so value-laden, so fraught with implications that go to the most important relationships in our lives, family law issues should be approached with an extra measure of self-restraint, humility, and with great respect for the diverging views of others about these issues. Those qualities are not highly valued in the legal academy, generally, but they have been exemplified in the excellent scholarship and academic collaborative work of Professor Melli. May her marvelous example continue to leaven the empathetic concerns and the quality scholarship of a new generation of family law scholars.

191. Parham v. J.R., 442 U.S. 584, 624–25 (1979).

APPENDIX I

The Legal Status of Same-Sex Unions in the United States and Worldwide

Legal Status—March 10, 2014[192]

A. Legal Allowance of Same-Sex Unions in the U.S.A. (50 states + DC + 3 tribes):

Same-Sex Marriage Legal in Sixteen (16) U.S. States *(+ DC + 5 of the 564 U.S. Indian tribes).*

Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), New York (2011), Maine (2012), Maryland (2012), Washington (2012), Rhode Island (2013), Delaware (2013), Minnesota (2013), California (2013), New Jersey (2013), Hawaii (2013), and New Mexico (2013) – plus the District of Columbia (2010) and the Coquille, Suquamish, Odawa, Santa Ysabel, and Pokagon Band of Potawatomi Tribes. *Voters approved SSM in three states in 2012 (ME, MD, & WA). In five of the states where SSM now is legal (five of the states where it ever has been legal) it was the result of judicial decree or initiative (MA, IA, CA, CN, VT).*[193] *Legislation that will become*

192. This data is the result of my own research. *Compare* Jennifer C. Pizer & Sheila James Kuehl, *Same-Sex Couples and Marriage*, *Model Legislation for Allowing Same-Sex Couples to Marry or All Couples to Form a Civil Union*, (The Williams Institute Aug. 2012) *with Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, (Aug. 19, 2011), available at http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (last visited Aug. 20, 2011). *See also Recognition of Same-Sex Couples Worldwide, Recognition of Same-Sex Couples in the United States*, LAMBDA LEGAL, (Sept. 12, 2011), available at http://data.lambdalegal.org/publications/downloads/fs_recognition-of-same-sex-couples-worldwide.pdf (last visited July 9, 2012); Bea Verschraegen, *The Impact of European Family law on National Legal Systems*, Vol. 2, Central and European Countries after and before the Accession, 63-65 (2011).

193. *See generally Ballot Measures*, BALLOTPEDIA, available at http://ballotpedia.org/wiki/index.php/Portal:Ballot_measures (last visited 30 September 2013). *See e.g.*, Goodridge v. Department of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004); In re Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Crt. San. Fran., Mar. 14, 2005), aff'd In re Marriage Cases, 183 P.3d 384 (Calif. 2008), overturned by Prop 8, November 4, 2008, which amendment was overturned by Perry v. Schwarzenegger, 702 F.Supp.2d 1132 (N.D. Cal. 2010); Varnem v. Brien, 763 N.W.2d 862 (Iowa 2009). Between December 20, 2013 and February 26, 2014, six different federal district court judges ruled that six additional states' marriage laws that do not allow same-sex marriage violate the U.S. Constitution. (Five of the six judges who mandated states to legalize same-sex marriage in these cases were appointed by Democrat Presidents (Obama and Clinton); one was appointed by a Republican President (Bush I).) The cases were, in Utah (Robert J. Shelby- Obama), Ohio (Timothy S. Black - Obama), Oklahoma (Terence Kern- Clinton), Kentucky (John G. Heyburn II- Bush I, comity), Virginia (Arenda L. Wright Allen- Obama), and Texas (Orlando L. Garcia- Clinton). *See generally http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/26/why-6-federal-judges-have-struck-down-state-gay-marriage-bans-in-their-own-words/* . So the political dimension of the judicial trend to force states to legalize same-sex marriage is apparent and is not insignificant.

effective on June 1, 2014 in Illinois will legalize same-sex marriage in that state, also.

Same-Sex Civil Unions Equivalent to Marriage Legal in Three (3) Additional U.S. States:

Nevada (2009), Oregon (2008), & Colorado (2013. (*Some states—including HI, IL, NV, and DC—also allow heterosexual couples to enter into CUs, and some offer both SSM and SSCU.*)[194]

Same-Sex Unions Registry & Specific, Limited Benefits in One (1) More U.S. Jurisdictions

Wisconsin. *Hawaii also allows SSCs reciprocal beneficiaries in addition to SSCUs.*[195]

B. Legal Rejection of Same-Sex Unions in the U.S.A.:

Same-Sex Marriage Prohibited by State Constitutional Amendment (SMA) in Twenty-nine (29) States (60%):[196]

194. *See, e.g.*, Natalie T. Lorenz, *Cohabitation Agreements After the Civil Union Act,* 100 ILL. B.J. 308, 309 (2012) ("The [Illinois] act is also broad in allowing both homosexual and heterosexual couples to enter into civil unions."); *but see* Jessica Knouse, *Civil Marriage; Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 419 n. 295 (2012) ("California and New Jersey allow opposite-sex couples to form civil unions, but only if both members are sixty-two or olderFalse Illinois's proposed statute is the only one that would open up civil unions to all couples of all sexual orientations, regardless of their age.") (quoting John R. Schleppenbach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act,* 17 ELDER L.J. 31, 58 (2009)). *See also* Lynn D. Wardle, *The Legal Status of Same-Sex Marriage and Unions in the USA and the World*, (January 15, 2014), http://www.law2.byu.edu/files/marriage_family/Status_of_SSM-CUs_World_140115.pdf.

195. *See, e.g.*, Dean A. Soma, *Civil Unions in Hawai'I – A One-Year Retrospective,* 17-July HAW. B.J. 4, 6 (2013) ("[I]n 1997, the Hawai'i Legislature enacted the Reciprocal Beneficiaries Act, codified in Hawai'i Revised Statutes Chapter 572C. The purpose of the Act 'is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who arc [sic] legally prohibited from marrying under stale [sic] law'. . .Under the Reciprocal Beneficiaries law, couples who enter into such relationships are afforded such benefits as hospital visitation and medical decisionmaking [sic]; priority to be named legal guardian; some inheritance rights; right to hold property in "tenancy by the entirety"; emergency medical leave to care for partner; right to shared insurance coverage; and protection under Hawai'i domestic violence laws. . .In 2011, civil unions were again approved by the legislature and this time signed into law by Governor Neil Abercrombie on February 23, 2011. The law look effect on January 1, 2012 granting samesex couples the same rights as married couples under the laws of the Stale of Hawai'i.") (quoting Haw. Rev. Stat. Ann. § 572C-1 (Michie 2010)).

196. The total vote rejecting same-sex marriage in votes on the 31 state marriage amendments combined was over 61% (as of Nov. 2012). Lynn D. Wardle, *The Legal Status of Same-Sex Marriage and Unions in the USA and the World*, (January 15, 2014), http://www.law2.byu.edu/files/marriage_family/Status_of_SSM-CUs_World_140115.pdf, California voters also adopted a marriage amendment but the federal district court and Ninth Circuit invalidated that amendment and the Supreme Court ruled that the sponsors of the

Alaska, Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Kentucky, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.[197]

SMA passed in May 2012 in NC (61%); SMA rejected by voters in MN in 2012; initiatives or referenda legalizing SSM approved by voters in ME, MD, and WA in 2012.). Voters have constitutionally banned SSM in 31 states by adopting SMAs. (In AZ voters first rejected SMA in 2006 then approved SMA in 2008; in ME voters first rejected SSM in 2009 then approved in 2012). In 17 of the 26 "blue states" that voted for Obama in 2012 only male-female marriage was then legal: Hawaii, California (since legalized by judicial decree), Oregon, Nevada, Colorado, Minnesota (since legalized), New Mexico, Wisconsin, Illinois, Michigan, Ohio, Pennsylvania, Rhode Island (since legalized), New Jersey, Delaware (since legalized), Virginia, and Florida. (In November 2012, 17 blue states barred same-sex marriage.)[198]

Same-Sex Civil Unions Equivalent to Marriage Prohibited by <u>State Constitutional Amendment in Twenty (20) U.S. States</u> (40%):

Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.[199]

The total vote rejecting same-sex marriage in votes on the 32 proposed state marriage amendments combined was **over 61%** (as of November 2012).[200]

C. Legal Allowance of Same-Sex Unions Globally (of 193 Nations / UN):[201]

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initiative lacked standing to appeal. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D.Cal.2010); *app. dism'd* Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).

197. Wardle, *supra* note 24, at 166, section B. *See also* Lynn D. Wardle, *The Legal Status of Same-Sex Marriage and Unions in the USA and the World*, (January 15, 2014),

198. *See generally* Andrew Harris and David Voreacos, *Gay Marriage Battle Lines Shift as States Grapple with SCOTUS Ruling,* NEWSMAX (Sept. 28, 2013, 11:17 AM), www.newsmax.com/us/gay-marriage-scotus-states/2013/09/28/id/528184 ("The legal map can largely be traced over the political one. All 14 states now allowing same-sex marriage were carried by President Barack Obama, a Democrat, in the 2012 election. Of the 24 states won by his Republican opponent, Mitt Romeny, 21 have bans against gay marriage secured in their constitutions and three bar it by statute. Eight states Obama won also have constitutional bans."); *Election Results*, HUFFPOST POLITICS, (2012), http://elections.huffingtonpost.com/2012/results.

199. Wardle, *supra* note 24, at 166, section B.

200. *Id*.

201. *Gay Marriage Around the World,* PEW RESEARCH, (Dec. 19, 2013), http://www.pewforum.org/2013/07/16/gay-marriage-around-the-world-2013/ (The British House of Commons voted to legalize SSM on Feb. 5, 2013. It is expected to pass another vote in the House of Commons and in the House of Lords by Summer 2013).

Same-Sex Marriage Legally or Ostensibly Permitted in Sixteen (16) Nations*:

The Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), *South Africa** (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), United Kingdom (bill passed but not effective until mid-2014), and possibly *Brazil.*[202] ***South Africa legalized "Civil Unions" which can be can be created by way of "marriage" and can be called "marriages," but the Marriage Act was not amended and only allows male-female marriage. See* Civil Union Act 17 of 2006(s. Afr.). (Available at: http://www.info.gov.za/view/DownloadFileAction?id=67843). *SSM is allowed in some sub-jurisdictions of some other nations (e.g., some states in the USA, Mexico (City), Brazil (10 of 26 states, civil registrars must perform SSM), etc. In Brazil, several declarations or resolutions of dubious legal efficacy and validity have purported to legalize same-sex marriage.*[203]

Same-Sex Non-Marital Unions Equivalent to Marriage Allowed in Eleven (11) Other Nations:*

Ecuador, Finland, Germany, Luxembourg, Slovenia, Andorra, Switzerland, Australia, Austria, Ireland, and Liechtenstein (and some sub-jurisdictions in other nations such as some US states, Mexico City, Greenland, etc.).[204] ***See note re: SSM/CUs in South Africa. Some nations with SSM also allow SSCUs.*

Same-Sex Partnerships (Formal, Limited but Not Equal to Marriage) Allowed in at least Five (5) or More Nations: Columbia, Croatia, Czech Republic, Hungary, Israel.[205]

*D. **Legal Rejection of Same-Sex Marriage Globally:***

At Least Forty-seven (47) of 193 Sovereign Nations (24%) Have *Constitutional* Provisions Explicitly or Implicitly Defining Marriage as Union of Man and Woman:

Constitutions of: Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Bolivia (art. 63), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Burundi (art. 29), Cambodia (art. 45), China (art. 49), Columbia (art. 42),Croatia (art. 61), Cuba (art. 43), Democratic Republic of Congo (art. 40), Ecuador (art. 38), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Hungary (art. M, Constitution/Basic Law of Hungary (25 April 2011) *(effective Jan. 2012*); Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Mongolia (art. 16),

202. Wardle, *supra* note 24, at 166, section C.
203. *Id.* at 148-149.
204. *Id*.
205. *Id*.

Montenegro (art. 71), Namibia (art. 14), Nicaragua (art. 72), Panama (art. 58), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Romania (art. 44), Rwanda (art. 26), Serbia (art. 62), Seychelles (art. 32), Somalia (art. 2.7, draft Constitution 2012); Sudan (art. 15), Suriname (art. 35), Swaziland Constitution (art. 27), Tajikistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (ark. 51), Venezuela (art. 77), Vietnam (art. 64). (At least 12 of these imply dual-gender ("men and women have/may").)[206]

See also Hong Kong Bill of Rights of 1991 (art. 19); Spain (art. 32, but 2005 SSM law upheld Nov 2012).[207]

Examples: Article 24, Constitution of ***Japan****: "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. . . ." Article 110, Constitution of* ***Latvia****: "The State shall protect and support marriage—a union between a man and a woman,. . ." Article 42, Constitution of* ***Columbia****: the family "is formed . . . by the free decision of a man and woman to contract matrimony . . . ." **Uganda** Constitution, Art. 31: "Marriage between persons of the same sex is prohibited."*[208]

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206. *Id*. at 167. *See also* Lynn D. Wardle, *The Legal Status of Same-Sex Marriage and Unions in the USA and the World*, (January 15, 2014), http://www.law2.byu.edu/files/marriage_family/Status_of_SSM-CUs_World_140115.pdf.

207. Wardle, *supra* note 24, at 168.

208. *Id*.