LESBIAN AND GAY FAMILIES: GENDER NONCONFORMITY AND THE IMPLICATIONS OF DIFFERENCE

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For several years now, critics and proponents of lesbian and gay families have been debating the significance of the social science literature that has studied lesbian and gay parents and their children. As in many areas of social science research, the meaning and implications of the empirical data are highly contested. On one side of the debate, critics question the validity of the studies while suggesting that they nonetheless raise troubling concerns about the negative consequences for children of having lesbian and gay parents.[1] On the other side, proponents defend the validity of the studies and contend that the sexual orientation of lesbian and gay parents does not harm their children.[2]

In the last two years, two important reviews of the research have been added to the growing literature in this area. The first is a report issued by the Committee on Psychosocial Aspects of Child and Family Health ("the Committee") of the American Academy of Pediatrics ("AAP").[3] The Committee's report reviews the research and finds that no meaningful differences exist between children raised by lesbian and gay parents and children raised by heterosexual parents. The report concludes that "parents' sexual orientation is not a variable that, in itself, predicts their ability to

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1 *See, e.g.*, Paul Cameron, *Homosexual Parenting: Testing "Common Sense" – A Literature Review Emphasizing the Golombok and Tasker Longitudinal Study of Lesbian's Children*, 85 PSYCHO. REP 282 (1999); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV 833.

2 *See, e.g.*, Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV 253; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV 1025 (1992).

3 *See* Ellen C. Perrin, et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002) [hereinafter *Technical Report*].

* Indicates page numbering from journal of original publication — 31 Capital University Law Review 691 (2003).

provide a home environment that supports children's development."[4] The second is an essay written by sociologists Judith Stacey and Timothy Biblarz titled "(How) Does the Sexual Orientation of Parents Matter?"[5] In their essay, Stacey and Biblarz, who are otherwise supportive of families, headed by lesbians and gay men, argue that the social science research raises provocative questions about possible differences in the children studied.[6] In particular, they note that there appear to be differences in the gender and sexual preferences and behavior of the children of lesbian and gay parents when compared to those of the children of heterosexual parents.[7] Although the authors call for more research to be conducted, they nonetheless find it intriguing that some of the existing research (despite claims to the contrary made by the researchers themselves) raise the possibility that important and significant differences exist between the two groups of children.

Both of these publications have received an immense amount of attention in the popular press.[8] Although there is of course no necessary correlation between the attention paid by the popular press to academic-type publications on the one hand and their importance or lasting impact on the other, I do believe that these two recent publications mark a significant turning point in the debate over parenting by lesbians and gay men. The Committee report, coming from such an august and highly respected organization as the American Academy of Pediatrics, will likely be very influential. In fact, it would not be surprising if the AAP's position on this issue, at least as reflected in the conclusions reached by its Committee, has an impact similar to the decision thirty years ago by the American Psychiatric Association to remove homosexuality from its diagnostic manual.[9] The fact that starting in 1973, the professional organization of psychiatrists in the United States no longer considered homosexuality to be a mental illness, has had a positive impact in destigmatizing homosexuality and has to some extent served as a

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4 *Id.* at 343.

5 Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AMER. SOC. REV 159 (2001).

6 *See id.* at 161.

7 *See id.* at 168-71.

8 *See, e.g.*, Bettina Boxall, *Sociologists Challenge Data on Gay Parenting*, L.A. TIMES, Apr. 27, 2001, at B1 (discussing the Stacey and Biblarz essay); Erica Goode, *Group Wants Gays to Have Right to Adopt a Partner's Child*, N.Y. TIMES, Feb. 4, 2002, at A17 (discussing the AAP report); Erica Goode, *A Rainbow of Difference in Gays' Children*, N.Y. TIMES, July 17, 2001, at F1 (discussing the Stacey and Biblarz essay); Bill Hoffman, *Study on Kids of Gay Parents Stirs a Flap*, N.Y POST, June 14, 2001, at 18 (discussing the Stacey and Biblarz essay); Jeremy Manier, *Doctors Support Gay Adoption*, CHI. TRIB., Feb. 4, 2002 (discussing the AAP report).

9 *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 101-54 (1981).

counterweight to the still pervasive, but not quite so hegemonic understanding of homosexuality as a disease and an abnormality.[10] By the same token, the fact that a committee of the professional organization of *pediatricians* has issued a report concluding that allowing lesbians and gay men to become parents is consistent with the best interests of children will further undermine the position taken by those who view a parent's same-gender sexual orientation as either inherently or potentially harmful to her or his children.

The impact of the Stacey and Biblarz essay, however, is a little harder to predict. On the one hand, it is clear that opponents of lesbian and gay families will welcome the essay. In fact, it has already been cited by commentators who do not believe that lesbians and gay men should become parents,[11] by judges in denying custody to lesbians and gay men,[12] and by state lawyers when defending the constitutionality of laws that treat lesbians and gay men differently than heterosexuals.[13] Opponents of gay rights will undoubtedly

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[10] *See id.* at 155-95.

[11] *See, e.g.*, James C. Dobson, *Pediatricians vs. Children: Flimsy Findings on Gay Parenting*, WASH. TIMES, Feb. 12, 2002, at A15; Dale M. Schowengerdt, Comment, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage,"* 14 REGENT U. L. REV 487, 506-08 (2001-02); Lynn D. Wardle, *Constitutional Claims for Gay Couple Adoptions and the Marriage Factor in Adoption* (forthcoming, BYU L. REV 2003).

[12] Chief Justice Moore of the Alabama Supreme Court, in a case that denied a lesbian mother's petition for modification of the custody held by her former husband, wrote a concurring opinion in which he stated that

> [h]omosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one's ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child.

See Ex Parte H.H., 830 So.2d 21, 37 (Ala. 2002) (Moore, C.J., concurring). The Stacey and Biblarz essay was one of several sources cited by the Chief Justice in support of his position. *See id.*

[13] The constitutionality of the Massachusetts ban on same-sex marriage is currently being litigated. In legal papers, the Commonwealth of Massachusetts cites the Stacey and Biblarz essay in support of its position that the legislature can rationally conclude that children are better off when raised by heterosexual married couples. *See* Commonwealth of Massachusetts, Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment, *Goodridge v. Department of Public Health*, Massachusetts Superior Court C.A. No. 01-1647-A, Dec. 21, 2001, at 63-64 [hereinafter *Commonwealth's Memorandum in Opposition*]. The Commonwealth's motion for summary judgment was granted and the case is currently on appeal. *See* Kathleen Burge, *Judge Dismisses Same-Sex Marriage Suit–7 Gay Couples Plan to Appeal*, BOSTON GLOBE, May 9, 2002, at B6.

(*continued*)

continue to make much of the suggestion, raised in an essay written by two sociologists who are supportive of lesbian and gay families, that there are in fact differences in the preferences and behavior of children of lesbians and gay men when compared to children raised by heterosexuals. The more interesting, and to some extent less predictable, question is how *supporters* of lesbian and gay families will address the suggestions of difference raised by Stacey and Biblarz.

In this article, I explore some of the policy and legal implications of difference as it relates to parenting by lesbians and gay men. In Part I, I summarize the findings and conclusions of both the AAP's Committee report and the Stacey and Biblarz essay.[14] I dedicate the remainder of the article to a discussion of the implications of one of the differences noted by Stacey and Biblarz, namely, the differences in gender role conformity among the children of lesbians and gay men, as compared to that of the children of heterosexual parents. In Part II, I explain why, even if further research confirms Stacey's and Biblarz's initial suggestion that there are differences in gender role conformity between the two groups of children, it does not follow that our society should as a policy matter make it more difficult for lesbians and gay men to become parents.[15] I argue that not all *differences* in this area should be equated with *harm*, especially when those differences relate to nonconformity with traditional gender roles and expectations.[16] I also argue that our social norms relating to parental autonomy counsel against state interference in internal family matters in the absence of clear harm.[17] The value of parental autonomy fosters a form of pluralism and diversity in the preferences and behavior of children that should be encouraged and celebrated rather than feared. In Part III, I argue that a reliance by a state on the need to avoid gender role nonconformity and to promote what it takes to be proper gender identity among children as a justification for prohibiting lesbians and gay men from adopting fails to pass constitutional muster under the Equal Protection Clause.[18]

I. LESBIAN AND GAY PARENTS: SIMILARITIES AND DIFFERENCES

The two recent publications on lesbian and gay parents noted above

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It should be noted that it is not just attorneys opposing gay rights positions who have relied on Stacey's and Biblarz's work. In the Massachusetts case, for example, the Stacey and Biblarz essay has been cited in an amicus brief in support of the plaintiffs. *See* Brief of the Mass. Psychiatric Society et al., *Goodridge v. Dept. of Health*, Mass. Supreme Judicial Ct., SJC-08860, Nov. 8, 2002, at 25-26, 31-35.

14 *See infra* notes 20-79 and accompanying text.

15 *See infra* notes 80-128 and accompanying text.

16 *See infra* notes 80-128 and accompanying text.

17 *See infra* notes 129-38 and accompanying text.

18 *See infra* notes 139-253 and accompanying text.

represent two distinct approaches to the research literature in this area. The Committee report for the most part emphasizes the similarities between lesbian and gay parents (and their children) on the one hand and heterosexual parents (and their children) on the other while the Stacey and Biblarz essay highlights differences.[19] I summarize the findings and conclusions of each publication below.

A. *The Report by the Committee of the American Academy of Pediatrics*

The Committee's report seeks to address the issue of whether the same-gender sexual orientation of parents negatively affects the well-being and development of children.[20] The report begins with a description of the challenges faced by lesbian and gay parents.[21] In addition to facing the same obstacles that many heterosexual parents also confront such as limitations on time and finances, lesbian and gay parents face unique challenges; they usually for example, unlike most heterosexual parents, plan and make decisions involving *how* to form families (for example, via artificial insemination or adoption).[22] They must also seek to secure, as best they can, the legal rights of the nonbiological or nonadoptive parent. This is a challenge usually not faced by heterosexual parents, most of whom automatically qualify for a host of legal rights and protections based on either their marital status or their biological connection to the child.[23] Finally, the report notes the challenges presented to lesbian and gay parents by the "emotional pain and restrictions imposed by heterosexism and discriminatory regulations."[24] The report explains how in some states same-gender coparents (unlike heterosexual spouses) cannot gain legal parental rights over their partners' children without first terminating the partners' parental rights.[25] The report also notes that lesbians and gay men have historically been prevented from becoming adoptive or foster parents and that many have been denied custody and visitation rights of children conceived in heterosexual marriages.[26] The justification for the differential treatment of

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19 It should be noted that Stacey and Biblarz do not focus only on differences. They also note similarities between the children of lesbian and gay parents and those of heterosexual parents in areas such as self-esteem, psychological well-being, and cognitive abilities. *See infra* notes 67-68 and accompanying text.

20 *See Technical Report, supra* note 3, at 341.

21 *See Technical Report, supra* note 3, at 341-42.

22 *See Technical Report, supra* note 3, at 341.

23 *See Technical Report, supra* note 3, at 341-42.

24 *See Technical Report, supra* note 3, at 341.

25 *See Technical Report, supra* note 3, at 342. For examples of state appellate opinions that have so held, see In re Adoption of T.K.J., 931 P.2d 488, 491 (Colo. Ct. App. 1996); In re Adoption of Luke, 640 N.W.2d 374, 378 (Neb. 2002); In re Adoption of Jane Doe, 719 N.E.2d 1071, 1072-73 (Ohio. Ct. App. 1998); In re Angel Lace M., 516 N.W.2d 678, 682-84 (Wis. 1994).

26 *See Technical Report, supra* note 3, at 341.

lesbian and gay parents by the law is often based on the presumption that the children of lesbians and gay men "would experience stigmatization, poor peer relationships, subsequent behavioral and emotional problems, and abnormal psychosexual development."[27]

The scientific literature, however, suggests that this presumption is based more on myth and stereotype than on hard data.[28] The report's review of that literature covers three broad sets of studies. The first seeks to assess the attitudes, behavior, and adjustments of lesbian and gay parents.[29] The research in this area has found "more similarities than differences in the parenting styles and attitudes of gay and nongay fathers."[30] By the same token, the research also shows that lesbian mothers score the same as heterosexual mothers in "self-esteem, psychologic adjustment, and attitudes toward child rearing."[31]

The second set of studies looks at the gender identity and sexual orientation of children raised by lesbians and gay men.[32] As to the former, the report concludes that

> [n]one of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be of the other sex, or consistently engaged in cross-gender behavior. No differences have been found in the toy, game, activity, dress, or friendship preferences of boys or girls who had lesbian mothers, compared with those who had heterosexual mothers.[33]

As to sexual orientation, the report notes that no differences in sexual attraction or self-identification as lesbian or gay has been found in the children of lesbian and gay parents when compared to the children of heterosexual parents.[34] The report does note, however, that one study (the Tasker and Golombok study) found that the children of lesbian mothers were "slightly more likely to consider the possibility of having a same-sex partner, and more of them had been involved in at least a brief relationship with someone of the

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27 *Technical Report, supra* note 3, at 342.

28 *See Technical Report, supra* note 3, at 342-43.

29 *See Technical Report, supra* note 3, at 342.

30 *Technical Report, supra* note 3, at 342 (citing Jerry J. Bigner & R. Brooke Jacobsen, *Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and NonGay Fathers*, 23 J. HOMOSEXUALITY 99 (1992)).

31 *See Technical Report, supra* note 3, at 341 (citing David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEVELOPMENTAL PSYCHOL. 105 (1995); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES OF SEXUAL BEHAV 167 (1986)).

32 *See Technical Report, supra* note 3, at 342.

33 *See Technical Report, supra* note 3, at 342.

34 *See Technical Report, supra* note 3, at 342 (citing FIONA TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT (1997)).

same sex."[35] (I will return to the Tasker and Golombok study, which is addressed at some length by Stacey and Biblarz.)[36]

The third and final research area discussed in the Committee report covers the emotional and social development of children.[37] The studies in this area have primarily compared children raised by lesbians who are divorced with children of divorced heterosexual mothers. No differences have been found in personality measures, peer group relationships, self-esteem, behavioral difficulties, academic success, and quality of family relationships.[38] The studies do show, however, that the self-esteem of adolescents whose mothers have partners (regardless of their gender) is higher than those of youngsters whose mothers are single.[39] The studies also suggest, in the only category where the report highlights differences, that the children of lesbian parents are "more tolerant of diversity and more nurturing toward younger children than children whose parents are heterosexual."[40]

Despite this last suggestion of difference, the degree of similarity between the children of lesbian and gay parents and the children of heterosexual parents noted in the report is striking. In this respect, the report is one of several reviews of the social science literature that have appeared in the last few years that have reached the same conclusion.[41] The report, however, as already noted, has the added weight and legitimacy of having been issued by a Committee of the American Academy of Pediatrics.

B. *The Stacey and Biblarz Essay*

The Stacey and Biblarz essay differs from most other reviews of the literature written by individuals who are not clearly opposed to parenting by lesbians and gay men because, rather than emphasizing the similarities between the children of lesbians and gay men and the children of heterosexual parents, it highlights the findings of difference. Stacey and Biblarz are both prominent sociologists who are clearly supportive of diversity in family structure and composition in general, and of families headed by lesbians and

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35 *See Technical Report, supra* note 3, at 342 (citing S. Golombok, F Tasker, & C. Murray, *Children Raised in Fatherless Families from Infancy: Family Relationships and the SocioEmotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCH. 783 (1997)).

36 *See infra* notes 58-61 and accompanying text.

37 *See Technical Report, supra* note 3, at 343-44.

38 *See Technical Report, supra* note 3, at 343 (citing S. Golombok and M. Rutter, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCH. 551 (1983); C.J. Patterson, *Children of Lesbian and Gay Parents*, 19 ADV CLIN. CHILD. PSYCHOL. 235 (1997)).

39 *See Technical Report, supra* note 3, at 343.

40 *Technical Report, supra* note 3, at 343.

41 *See* sources cited in *supra* note 2.

gay men, in particular.[42] And yet the authors argue that while much of the social science literature shows no important differences between the two groups of children, there are sufficient indications of at least some differences that merit further study and consideration.

Stacey and Biblarz question the assumption under which opponents and proponents of families headed by lesbians and gay men – as well as those who have conducted the research – have operated for a long time. In particular, they question the assumption that the purpose of the research should be to determine whether the parenting styles of lesbians and gay men, and their corresponding effects on their children, are essentially the same as those of heterosexuals.[43] They argue that this is an intrinsically defensive and strategically counterproductive position for supporters of lesbian and gay families to take given that it allows opponents of those families to set the terms of the debate by using the married heterosexual couple as the standard of comparison.[44] The assumption then becomes that *any* difference in parenting styles and outcomes must mean that the children of lesbians and gay men are somehow being harmed or deprived by the sexual orientation of their parents.

Stacey's and Biblarz's essay begins with a discussion of the powerful effects of "social prejudice and institutionalized discrimination against lesbians and gay men," which, according to the authors "exerts a powerful policing effect on the basic terms of the psychological research and public discourse on the significance of parental sexual orientation."[45] Stacey and Biblarz argue that there are strong social forces and biases that encourage researchers and commentators alike to treat the married heterosexual couple as the reference point for comparing all other kinds of families. They call this the "implicit hetero-normative presumption,"[46] one that drives both the research and the wider debate among academics over the meaning and implications of that research. Although many of the researchers themselves might not personally abide by the presumption, Stacey and Biblarz argue that their research is driven by it: "Because anti-gay scholars seek evidence of harm, sympathetic researchers defensively stress its absence."[47] When we frame the debate

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42 For representative examples of their work, see Timothy J. Biblarz & Greg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families*, 62 J. MARRIAGE & FAMILY 533 (2000); Timothy J. Biblarz & Adrian E. Raftery, *Family Structure, Educational Attainment, and Socio-Economic Success: Rethinking the "Pathology of Matriarchy,"* 105 AMER. J. SOC. 321 (1999); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996); and JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA (1990).

43 *See* Stacey & Biblarz, *supra* note 5, at 160, 162.

44 Stacey & Biblarz, *supra* note 5, at 162.

45 Stacey & Biblarz, *supra* note 5, at 160.

46 Stacey & Biblarz, *supra* note 5, at 160.

47 Stacey & Biblarz, *supra* note 5, at 160.

around the hetero-normative presumption, Stacey and Biblarz argue, we become defensive about and suspicious of any suggestion of difference. This has led researchers to either ignore or downplay some of what the authors consider to be the intriguing (albeit still preliminary) findings of difference between the children of lesbians and gay men and those of heterosexuals.[48] The authors ultimately call for the replacement of a hierarchical framework that places families headed by married heterosexual couples at the top, with an alternative normative approach that values differences in family structures and dynamics.[49]

After arguing for this kind of paradigm shift, Stacey and Biblarz proceed to reconsider the research by highlighting findings of difference.[50] Almost all the studies they review conclude that no differences between lesbian and gay parents and their children were found when compared to heterosexual parents and their children.[51] Stacey and Biblarz note, however, that those conclusions are not always supported by the findings. The authors note that

> on some measures meaningful differences have been observed in predictable directions. For example, lesbian mothers in [one study] reported that their children, especially daughters, more frequently dress, play and behave in ways that do not conform to sex-typed cultural norms. Like-wise, daughters of lesbian mothers reported greater interest in activities associated with both 'masculine' and 'feminine' qualities and that involve the participation of both sexes, whereas daughters of heterosexual mothers report significantly greater interest in traditionally feminine, same-sex activities.[52]

Stacey and Biblarz also note that a few studies suggest that the daughters of lesbian mothers express a greater interest in pursuing occupations and careers (such as law, medicine, and engineering) that have traditionally been dominated by men, than do the daughters of heterosexual mothers.[53]

The evidence relating to the sons of lesbian mothers is more mixed on the issue of gender role conformity, or what Stacey and Biblarz call "gender

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48 Stacey & Biblarz, *supra* note 5, at 162-63.

49 Stacey & Biblarz, *supra* note 5, at 163-64.

50 Stacey & Biblarz, *supra* note 5, at 167-69.

51 Stacey & Biblarz, *supra* note 5, at 167-69.

52 Stacey & Biblarz, *supra* note 5, at 168 (citing Green, *supra* note 31, at 167).

53 Stacey & Biblarz, *supra* note 5, at 168 (citing Green, *supra* note 31, at 167 and Alisa Steckel, *Psychosocial Development of Children of Lesbian Mothers*, *in* GAY AND LESBIAN PARENTS 75 (Frederick W Bozett ed., 1987)). In the Green study, "53 percent (16 out of 30) of the daughters of lesbians aspired to careers such as doctor, lawyer, engineer, and astronaut, compared with only 21 percent (6 out of 28) of the daughters of heterosexual mothers." Stacey & Biblarz, *supra* note 5, at 168.

preferences and behavior."[54] In some areas, such as aggressiveness and play preferences, the sons evinced conduct that was less gender-typical than the sons of heterosexual women. And yet, in other areas, such as occupational goals and dress, the sons were *more* gender conformist.[55] Stacey and Biblarz add that in another study that compared lesbian mothers with heterosexual mothers, it was found that the latter were more likely to prefer that their children engage in activities which are consistent with their gender, while the preferences of the lesbian mothers were gender-neutral.[56] Stacey and Biblarz conclude that:

> Such evidence, albeit limited, implies that lesbian parenting may free daughters and sons from a broad but uneven range of traditional gender prescriptions. It also suggests that the sexual orientation of mothers interacts with the gender of children in complex ways to influence gender preferences and behavior. Such findings raise provocative questions about how children assimilate gender culture and interests – questions that the propensity to downplay differences deters scholars from exploring.[57]

On the issue of the sexual orientation of the children of gay and lesbian parents, Stacey and Biblarz emphasize the Tasker and Golombok study. This study followed about two dozen children raised by lesbian mothers into young adulthood to compare their sexual preferences and behavior with those of roughly the same number of children raised by heterosexual mothers.[58] In their study, Tasker and Golombok found that six of the twenty-five young adults raised by lesbian mothers reported having had at least one same-gender sexual relationship, while none of the twenty young adults raised by heterosexual mothers had.[59] In addition, a greater number (fourteen out of twenty-two or sixty-four percent) of the children of lesbian mothers stated that they had considered participating in a same-gender relationship as compared to the children of heterosexual mothers (three out of eighteen, or seventeen percent).[60] According to Stacey and Biblarz, the results of the Tasker and Golombok study show that the sexual orientation of parents influences the sexual orientation of children.[61]

Another area of difference discussed by Stacey and Biblarz is the higher

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54 Stacey & Biblarz, *supra* note 5, at 168.

55 Stacey & Biblarz, *supra* note 5, at 168.

56 Stacey & Biblarz, *supra* note 5, at 172 (citing Beverly Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. 536 (1981)).

57 Stacey & Biblarz, *supra* note 5, at 168-70.

58 Stacey & Biblarz, *supra* note 5, at 170 (citing TASKER & GOLOMBOK, *supra* note 34).

59 Stacey & Biblarz, *supra* note 5, at 170.

60 Stacey & Biblarz, *supra* note 5, at 170.

61 Stacey and Biblarz, *supra* note 5, at 170-71.

level of participation, and more adept parenting skills, evinced by the partners of lesbian mothers, as opposed to stepfathers and other male partners of heterosexual mothers. "These findings imply that lesbian co-parents may enjoy greater parental compatibility and achieve particularly high quality parenting skills, which may help explain" the further findings that the parenting partners of the lesbian mothers who used donor insemination "report feeling closer to the children than do" the male partners of heterosexual mothers who also used donor insemination.[62] Similarly, when comparing children born through donor insemination in both lesbian and heterosexual households, the children in the former report feeling more attached to lesbian co-parents than those in the latter group feel toward the male partners of their mothers.[63] Stacey and Biblarz suggest that when we combine these studies of families headed by two lesbians with the "[r]esearch [which] suggests that, on average, mothers tend to be more invested in and skilled at child care than fathers,"[64] it is possible to conclude that gender and sexual orientation are "*interacting* to create new kinds of family structures and processes – such as an egalitarian division of child care – that have fascinating consequences for . . . child development."[65] This is precisely the kind of intriguing difference, the authors argue, that is left unexplored if the aim of the research is to try to show the lack of difference between lesbian and gay family households and heterosexual ones.[66]

Stacey and Biblarz do not only highlight differences; they also note the research findings of similarities in self-esteem, psychological well-being, and cognitive abilities. In these crucial areas, no differences have been found in the children of lesbians and gay men when compared to those of heterosexual parents.[67] Furthermore,

> levels of closeness and quality of parent/child relationships do not seem to differentiate directly by parental sexual

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62 Stacey & Biblarz, *supra* note 5, at 174 (citing Anne M. Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349 (1997)); Raymond W. Chan et al., *Psychosocial Adjustment among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443 (1998); David Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. 105 (1995)).

63 Stacey & Biblarz, *supra* note 5, at 174-75 (citing Valory Mitchell, *The Birds, the Bees . . . and the Sperm Banks: How Lesbian Mothers Talk with Their Children about Sex and Reproduction*, 68 AM. J. ORTHOPSYCHIATRY 400 (1998); TASKER & GOLOMBOK, *supra* note 34).

64 Stacey & Biblarz, *supra* note 5, at 175 (citing FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES (1991); RONALD L. SIMONS & ASSOCIATES, UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES: STRESS, INTERACTIONS, AND CHILD OUTCOME (1996)).

65 Stacey & Biblarz, *supra* note 5, at 175.

66 Stacey & Biblarz, *supra* note 5, at 179.

67 Stacey & Biblarz, *supra* note 5, at 176.

> orientation, but indirectly, by way of parental gender. Because every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's "best interest."[68]

Stacey and Biblarz in this last passage imply that the differences that they emphasize earlier in their essay, namely, those associated with gender role conformity and sexual preferences and behavior, should not be part of a legal "best interests of the child" analysis. They imply that the only relevant criteria in that type of analysis are matters such as self-esteem, well-being, and levels of affection and closeness between parents and children. As a practical matter, however, it is not likely that either state policy makers, judges, or the opponents of lesbian and gay families will soon view differences associated with gender and sexual preferences and behavior as irrelevant to questions relating to the legal standard of what is in the best interests of children. It is therefore necessary to explore some of the policy and legal implications of the differences noted by Stacey and Biblarz. This is particularly true in the area of gender roles where the evidence noted by Stacey and Biblarz, when aggregated, reaches a minimum threshold of plausibility that suggests that the sexual orientation of parents may be associated with the degree of conformity with gender roles and expectations among children. As a result, I believe that even while we wait for more research to be conducted in this area, it is necessary to begin exploring the policy and legal implications of these potential differences.

I do not believe, however, that we are anywhere near a minimum threshold of plausibility for Stacey's and Biblarz's other conclusion that parents influence the sexual orientation of their children.[69] This is the case for two reasons. First, in order to support their position, Stacey and Biblarz rely on only one study (Tasker and Golombok). They do not discuss the many studies that show that the children of lesbians and gay men are no more likely than the children of heterosexual parents to be lesbian or gay.[70] In the area of sexual

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[68] Stacey & Biblarz, *supra* note 5, at 176.

[69] Stacey & Biblarz, *supra* note 5, at 171.

[70] *See, e.g.*, Frederick W. Bozzett, *Children of Gay Fathers*, *in* GAY AND LESBIAN PARENTS 39, 47 (Frederick W. Bozett ed., 1987); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, *in* HOMOSEXUALITY AND THE FAMILY 123 (Frederick W. Bozett ed., 1992); Ghazala Alzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY & HUM. DEV. 235, 241 (1993); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 546-47 (1979); Ann O'Connell, *Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on*

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preferences and behavior, unlike that of gender role conformity, the suggestions of difference have not been found in multiple studies. We should be careful before we reach any conclusions, even tentative ones, regarding the transmissibility of sexual orientation from parents to children based on only one study of roughly twenty-five children of lesbian mothers.[71] It seems to me that whatever conclusions are reached from only one study are likely to be so speculative so as to be both useless and dangerous.[72] Second, anyone who wants to argue plausibly that parents influence the sexual orientation of their children must in some way address the obvious and seemingly relevant fact that the vast majority of lesbians and gay men were raised by *heterosexual* parents. Stacey and Biblarz do not address this issue.[73]

Her Adolescent Children, 63 SMITH C. STUD. SOC. WORK 281, 286 (1993).

[71] The only other study cited by Stacey and Biblarz to support their position is J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEV. PSYCHOL. 124 (1995). According to Stacey and Biblarz, the Bailey "study also provides evidence of a moderate degree of parent-to-child transmission of sexual orientation." Stacey & Biblarz, *supra* note 5, at 171. The Bailey study, however, is at best inconclusive on the issue. First, the vast majority (sixty-eight or ninety-one percent) of the seventy-five sons of gay fathers who participated in the study and whose sexual orientation could be rated with confidence were heterosexual. *See* Bailey et. al., *supra*, at 126. Second, "sexual orientation was not positively correlated with the amount of time that sons lived with their fathers." Bailey, *supra* note 62, at 128. "In fact, gay sons had lived for a somewhat shorter time with their fathers, 6.4 years versus 11.2 years for heterosexual sons . . . ." Bailey, *supra* note 62 at 126. Although the authors acknowledge that the sample of nonheterosexual children in the study was quite small, they note that their finding, "[i]f replicated in a larger sample . . . would provide strong evidence against an environmental influence of gay fathers on their sons' sexual orientations." Bailey, *supra* note 62, at 128.

[72] The Commonwealth of Massachusetts, for example, in defending the constitutionality of its ban against same-sex marriage, relies on Stacey's and Biblarz's interpretation of the Tasker and Golombok study to support the view that "adolescent girls raised by lesbian parents tend to be more sexually active and adventurous than girls raised by opposite-sex parents. Given the strong state interest in limiting teenage pregnancies, this finding alone could rationally lead the Legislature to limit marriage to opposite-sex couples." *See Commonwealth's Memorandum in Opposition*, *supra* note 13, at 64 (citing Stacey & Biblarz, *supra* note 5, at 171). Interestingly, but perhaps not surprisingly, the Commonwealth in its legal papers fails to note that Stacey and Biblarz add that the sons of lesbian mothers "evince the opposite pattern- [they are] somewhat less sexually adventurous and more chaste" than the sons of heterosexual parents. Stacey & Biblarz, *supra* note 5, at 171.

[73] It is important to distinguish between the "parent-to-child transmission of sexual orientation," Stacy and Biblarz, *supra* note 5, at 171, and the possibility that the children of lesbian and gay men who have a same-gender sexual orientation may be more willing to act on that orientation than the children of heterosexual parents. As to the former, as already noted, I disagree with Stacey's and Biblarz's conclusion that there is sufficient empirical evidence to support the view that lesbian and gay parents play a role in transmitting a same-gender sexual orientation to their children. *See supra* notes 69-72 and accompanying text. As to the latter, however, it is not unreasonable to believe that the children of lesbian and

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Given that most of the research points in the opposite direction from Stacey's and Biblarz's contention regarding the transmissibility of a same-gender sexual orientation from parents to children, I think it is more fruitful to explore the implications of possible difference in the parenting by lesbians and gay men in the area of gender role conformity. Although we need more studies to be able to reach any firm conclusions that the gender-related differences in the children are real and that they are actually caused by, as opposed to merely correlated to, the sexual orientation of the parents, I believe, as noted above, that a minimum threshold of plausibility in regards to difference has been reached on this issue.[74] For the remainder of this article, therefore, I will operate under the assumption that we not only have reached this minimum threshold, but also that future research will confirm the initial suggestions that there are, in general, differences in gender role conformity among the children of lesbians and gay men when compared to the children of heterosexual parents.[75] I make this assumption in order to focus fully on the implications of difference in this area, and in particular on the effects of such difference on the

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gay men "would feel freer to explore and affirm [same-gender sexual] desires." Stacey & Biblarz, *supra* note 5, at 163. It is also, however, not unreasonable to believe that the children of progressive heterosexual parents who have made it clear that they see nothing wrong with a same-gender sexual orientation "would feel freer to explore and affirm [same-gender sexual desires]." Stacey & Biblarz, *supra* note 5, at 163. In other words, just because children in some households feel freer to express a same-gender sexual orientation does not mean that the parents who lead those households played a role in *determining* that sexual orientation.

[74] One of the subject matters that merits future research is the role that nonparental influences, including friends and the culture itself, as represented in, for example, television and movies, play in determining the gender role conformity of children. There are some experts who argue that nonparental sources of gender modeling play a greater role in determining whether children express preferences and behavior that are consistent with what is expected of them because of their sex than do the sex or sexual orientation of parents. Cognitive developmental theorists, for example, "emphasize that children actively construct for themselves, from the gendered world around them, what it means to be male or female, and they adopt behaviors and characteristics that they perceive as being consistent with their own sex." Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of their Children? Findings From A Longitudinal Study of Lesbian Families*, 32 DEV. PSYCHOL. 3, 4 (1996). From a cognitive developmental perspective, therefore, "gender stereotypes, rather than parents, are viewed as being the primary source of gender-related information." *Id.*

[75] I say "in general" because to argue that there are differences in the gender role conformity of the children of lesbians and gay men is obviously not to suggest that every child raised by a lesbian or gay parent will abide by fewer traditional gender roles and expectations. No one disputes that there are some children of lesbian and gay parents who are *more* gender conforming than many children of heterosexual parents, and that there are some children of heterosexual parents that are *less* gender conforming than many children of lesbian and gay parents. The point that Stacey and Biblarz make is that at least some of the research suggests that, in general, the children of lesbians and gay men abide by fewer gendered roles and expectations than do the children of heterosexual parents. *See* Stacey & Biblarz, *supra* note 5, at 168.

equality claims by current and prospective lesbian and gay parents.

Before proceeding with the discussion, however, I want to address an important issue of terminology. In the study of gender development in children, a distinction is often made between gender identity and gender role. "Gender identity is a person's concept of [himself or herself] as male or female; gender role includes the behaviours and attitudes which are considered to be appropriate for males and females in a particular culture."[76] By emphasizing differences in gender *preferences and behavior*, Stacey and Biblarz focus on issues of gender roles rather than on those of gender identity.[77] The authors do not, for example, contend that there are differences in the self-perception of the daughters and sons of lesbians and gay men as to their respective femaleness and maleness when compared to the daughters and sons of heterosexual parents. For this reason, most of my discussion of gender issues in this article will fall under the category of gender role, rather than that of gender identity, as that term is used in the social science literature. It should be noted, however, that concerns about gender roles among the children of lesbians and gay men often bleed into issues of gender identity because some critics of lesbian and gay families believe that the lack of dual gender parenting can make children confused and anxious about their gender identity.[78] In addition, as we will see in Part III, one of the justifications used to support a prohibition against adoption by lesbians and gay men is the concern that children raised by them will not develop what the state takes to be proper gender identity.[79] It is important to keep in mind, therefore, that the distinction between gender role and gender identity emphasized in the social science literature often becomes blurred in the legal and political debates over parenting by lesbians and gay men.

II. GENDER ROLE CONFORMITY AMONG CHILDREN OF LESBIANS AND GAY MEN: THE NORM OF EQUALITY AND THE DILEMMA OF DIFFERENCE

The principle of equality, at least as reflected in American law, requires that the party demanding equal treatment be similarly situated to the party who is receiving the benefit or protection that is the subject of the equality claim.[80]

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[76] Susan Golombok, *Lesbian Mother Families*, *in* WHAT IS A PARENT? A SOCIO-LEGAL ANALYSIS 161-62 (Andrew Bainham et al. eds., 1999).

[77] *See* Stacey & Biblarz, *supra* note 5, at 168-70.

[78] *See, e.g.*, sources cited in *infra* note 122.

[79] *See infra* notes 141–46 and accompanying text.

[80] "Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same." 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2 (3d. ed. 1999). This position is consistent with liberal political theory in as much as that theory grounds its conception of equality on the notion of sameness. For liberal theory, the fact that individuals share certain valuable traits and capacities, such as the

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The way in which we define the adverb *similarly* in the previous sentence, of course, matters a great deal. On the one hand, if we consistently interpret it narrowly and demand strict equivalence before we recognize the applicability of the principle of equality, then we end up not only circumscribing the ambit of that principle, but also undermining other important values such as diversity and pluralism. This is so because under an overly narrow interpretation of "similarly situated," the incentive is for individuals and groups who want to rely on equality norms – as a way of attaining fair and just treatment by society – to ignore or underplay differences between themselves and others. On the other hand, as already noted, the requirement that parties be similarly situated to some degree is, at least in the U.S., usually a prerequisite for the application of equality laws. When minorities in the U.S. struggle to attain equal treatment, therefore, there is often tension between an acknowledgment of difference and a demand for equality.

Marginalized groups that have been subjected to discrimination and oppression and who seek redress through equality claims often face a dilemma between, on the one hand, emphasizing those commonalities they share with majority groups – commonalities that serve as the basis for the demand for equal respect and treatment – and, on the other hand, acknowledging the values of pluralism and diversity that can lead to an appreciation and even celebration of important differences between majority and minority groups.[81] Marginalized groups such as women, racial minorities, the disabled, and lesbians and gay men, in other words, often face the dilemma of how to account for differences that distinguish them from the privileged majorities without, at the same time, compromising their right to equal and fair treatment. Women, for example, in their struggles for equality in a patriarchal society, have had to cope with the fact that on some matters (most obviously those associated with the ability of some women to become pregnant) they are different from men. And yet many feminists have argued that our understanding of equality must account for those differences.[82] This has meant that meaningful equal opportunity in the workplace, for example, demands that employers not penalize women because they might become pregnant and if they do become pregnant, equality requires that employers accommodate the

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ability to reason and the capability for self-determination, gives the concept of equality its normative bite because those shared attributes impose moral and political obligations on the state to treat *everyone* with equal respect and concern. A liberal understanding of equality grounded on notions of sameness has been challenged, among others, by feminist theorists. *See* Carlos A. Ball, *Looking for Theory in all the Right Places: Feminist and Communitarian Components of Disability Antidiscrimination Law* (forthcoming, 2004).

[81] *See generally* Martha L. Fineman, *Challenging Laws, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990).

[82] *See id.* at 34-39; *See also* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV 1279, 1304-35 (1987).

pregnancy.[83] The disabled have also had to formulate their claims to equality from within a framework of difference.[84] The principle of reasonable accommodation, which undergirds statutes such as the Americans with Disabilities Act,[85] for example, has at its core the idea that some individuals with disabilities must be treated differently (i.e., they must be provided with accommodations not offered to non-disabled individuals) in order for them to have equal access to the jobs and services that are made available as a matter of course to the able-bodied.[86]

There is an obvious difference between lesbian and gay parents and heterosexual parents. The former have a same-gender sexual orientation (and if they are raising children with a partner, the partner is of the same gender), while the latter have an opposite-gender sexual orientation (and if they are raising children with a partner, the partner is of the opposite gender). The argument by supporters of lesbian and gay families has always been that this difference by itself does not matter because it does not translate into meaningful differences in the preferences, behavior, well-being, and self-esteem of the children of lesbians and gay men. Stacey's and Biblarz's suggestion that the sexual orientation of parents may lead to some differences in the gender role conformity of their children presents supporters of lesbian and gay parents with the dilemma of how to combine demands for equality with an acknowledgment (and perhaps even celebration) of difference. The issue now becomes whether the existence of differences such as those associated with gender role conformity (again, assuming that the differences are confirmed through future study and research) precludes or undermines demands by lesbian and gay parents for equal treatment. I think the answer to that question is no for two principal reasons. First, the existence of *differences* in the parenting styles of lesbians and gay men, and their corresponding effects on children, does not automatically translate into *harm* to children. As Stacey and Biblarz argue, we need to move beyond the paradigm that, in the context of parenting by lesbians and gay men, equates any difference with harm. This is especially true in the area of gender roles and expectations, where what is taken to be normal and preferred is infused with stereotypical understandings of the supposedly (and inherently) different and complementary parenting roles of men and women that, it is argued, play a crucial part in the proper development of children.[87] Second, even if one does not agree with the position that I will defend below, namely, that there is nothing distinctive

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[83] *See generally* Lucinda Finely, *Transcending Equality Theory: A Way out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986) (discussing differing notions of equality as they affect the issue of pregnancy by female employees).

[84] *See generally* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L. J. 1 (1996).

[85] 42 U.S.C. §§ 12101-12213 (2000).

[86] *See* Karlan & Rutherglen, *supra* note 84.

[87] *See infra* notes 91–128 and accompanying text.

about fathering or mothering that depends on one's sex, there is an additional reason why the existence of difference in the area of gender role conformity should not preclude or undermine equal treatment for lesbian and gay parents: To deny equality claims in this context would be inconsistent with the value of parental autonomy, a value that we as a society take seriously.[88] I explore both of these arguments below. I leave until Part III the more strictly legal argument that I want to defend, namely, that even assuming that the children of lesbian and gay parents in general are less gender role conforming than the children of heterosexual parents, it would be unconstitutional for the state to use that as a rationale for making it more difficult for lesbians and gay men to become parents and to raise children.[89]

A. *Difference Does Not Necessarily Entail Harm*

Martha Minow, in her book *Making All the Difference: Inclusion, Exclusion, and American Law*, discusses the dilemma of difference faced by historically marginalized groups.[90] Minow argues that those who have suffered from institutional and pervasive discrimination are stigmatized and hindered by either emphasizing or ignoring differences.[91] Whatever choice marginalized groups make, Minow notes, has its own set of potentially negative consequences.[92] To emphasize differences can further isolate and stigmatize those who are already viewed by the majority and privileged groups with hostility and contempt.[93] "Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind."[94] To ignore differences can mean leaving in place and unacknowledged normative and policy preferences that disfavor marginalized groups.[95] Minow adds that "[t]he possibility of reiterating difference, whether by acknowledgment or nonacknowledgment, arises as long as difference itself carries stigma and precludes equality."[96] "If to be equal one must be the same," Minow argues,

> then to be different is to be unequal and even deviant. But any assignment of deviance must be made from the vantage point of some claimed normality: a position of equality implies a contrasting position used to draw the relationship – and it is a relationship not of equality and inequality but of

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88 *See infra* notes 129–38 and accompanying text.

89 *See infra* notes 139–253 and accompanying text.

90 *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

91 *See id.* at 20.

92 *See id.*

93 *See id.*

94 *Id.*

95 *See id.* at 50.

96 *Id.*

superiority and inferiority.[97]

Equality, in other words, is an inherently relational concept. In order to determine whether a particular individual or group is entitled to equal treatment it is necessary to have a normative point of reference or comparison.[98] "Differences, inequalities, and cases of unequal treatment are determined relationally in the sense that they are judged as deviations from a presumed standard or norm."[99] Minow, for example, notes that when we determine the rights to accommodation (and thus to equality) enjoyed by a disabled student who is hearing impaired, we usually compare both her abilities and needs to those of the hearing student.[100] The hearing student becomes the point of reference from which we "determine who is different and who is normal."[101] This is the case despite the fact that "the hearing student differs from the hearing-impaired student as much as she differs from him, and the hearing student undoubtedly has other traits that distinguish him from other students."[102]

Notice that the existence of a reference point by itself is not problematic; a reference point is required because in determining whether someone is entitled to equality in a particular context, we need to ask whether X is equal to Y in the characteristics or qualities that are relevant in that context. What does become problematic is when the normative point of reference goes unstated and unexamined.[103] The idea, then, is not necessarily to get rid of reference points; the idea is to think about how the choice of a particular reference point is crucial to our understanding of what equality requires. Given that we often assume that the normative reference point must be what the majority, often without much thought or consideration, deems to be normal or acceptable, we fail to appreciate fully how deviation from the reference point stigmatizes minority groups, while simultaneously limiting the scope and application of equality principles. It is for this reason that we quickly assume that in an area of social policy as sensitive and important as that involving parenting and children that any difference from the normative reference point must entail harm to the children involved. And if there is harm to the children, then by definition those who are causing the harm are not eligible for equal treatment.

It is difficult to disagree with the proposition that the normative reference

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97 *Id.* (footnotes omitted).

98 *See id.* at 51.

99 CHRISTINE M. KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL THEORY 2 (1998).

100 *See* MINOW, *supra* note 90, at 51.

101 MINOW, *supra* note 90, at 51.

102 MINOW, *supra* note 90, at 51.

103 As Minow notes, the choice of the reference point "promotes the interests of some but not others; it can remain unstated because those who do not fit have less power to select the norm than those who fit comfortably within the one that prevails." MINOW, *supra* note 90, at 51.

point in the debate over parenting by lesbians and gay men is, as Stacey and Biblarz note, that represented by the married heterosexual couple.[104] The point of comparison for lesbian and gay parents has not been single parents or unmarried parents or grandparents raising children, but has instead been the married heterosexual couple. It is that type of relationship that constitutes the gold standard through which the skills and effects of lesbian and gay parents are assessed.

In the area of parenting, as in so many other areas of social policy and research, what gets constituted as the normative reference point is frequently idealized and simplified. Given the popularity of marriage among heterosexuals, it is misleading to speak of the married heterosexual couple, and their children, in unitary and monolithic terms. The characteristics, attributes, and dynamics of the relationships of married heterosexual couples, and their effects on children, run across a broad range. Families headed by heterosexual married couples (to say nothing of less traditional families) are varied and diverse, though much of the academic literature on them collapses their variability and homogenizes them for theoretical or other purposes.[105] In the context of the growing debate over lesbian and gay families, when the question is asked whether lesbian and gay parents are the same as heterosexual parents, it is usually accompanied by the assumption that (1) the heterosexuals in question are married; (2) married heterosexuals constitute the (only) appropriate reference point; and (3) it is possible to speak of both groups in a unitary fashion, when in fact there are within each group a great deal of variability and diversity.

An important component of the largely unstated and unquestioned reference point represented by an idealized and simplified conception of married heterosexual couples is the idea that men as fathers and women as mothers have unique and complementary skills and attributes that are absent whenever a women tries to father a child and a man tries to mother a child.[106] Many who defend the hetero-normative reference point in parenting strongly believe that there is a connection between biological sex and attributes, contributions, and performance as a parent. Male parents are expected to do most of the work outside of the home and to have secondary responsibility for the caring of the children, while female parents are expected to have primary responsibility for childcare, even as many female parents also pursue work outside of the home.[107] The male parent, then, is supposed to be the provider and protector, while the female parent is supposed to be the nurturer and the

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104 *See* Stacey and Biblarz, *supra* note 5, at 162.

105 I thank Ellen Lewin for articulating this point to me in this way and for helping me think through the issue.

106 *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1-4 (2000).

107 *See, e.g., id.*

primary caretaker.[108] Although no one denies that male parents can, for example, provide care and nurture to their children, supporters of the heteronormative reference point believe that the essence of paternal care and nurture is different from that of maternal care and nurture, or as Lynn Wardle puts it, "father love and mother love are different kinds of love."[109] The conclusion that is reached, then, is that children who are raised by either gay or lesbian couples or by single parents (regardless of sexual orientation) are missing out on the sex-specific parenting skills and attributes that are provided by a parent of the other sex. Only children raised by a heterosexual married couple, it is argued, can "see and experience the innate and unique abilities and characteristics that each sex possesses and contributes to their combined endeavor."[110]

It is undoubtedly true that the idea that parents have specific skills and attributes that vary according to their sex is deeply ingrained in our culture and is reflected in the way in which many male parents and many female parents actually seek to fulfill what are taken to be their (different) parental obligations. The crucial question is whether these apparent differences in parental skills and attributes are explained primarily by "the innate and unique abilities and characteristics that each sex possesses"[111] or by understandings and expectations of what it means to be a man and a father or a woman and a mother in our society. The fact that there are countless men (regardless of sexual orientation) who are providing their children with those benefits that are supposed to be unique to female parents and that there are countless women (regardless of sexual orientation) who are providing their children with those benefits that are supposed to be unique to male parents suggests that the male vs. female parental distinctiveness is more a question of gender than it is of biological sex. In other words, given that there are countless parents of one sex that display and effectuate the parenting skills and attributes that are supposed to be distinctive of the other would suggest that those skills and attributes have more to do with socially constructed (and often stereotypical) understandings of what it means to be a female parent and a male parent than with inherent biological and psychological differences between men and women.[112]

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[108] In defending a traditional understanding of parental roles within families, Lynn Wardle counsels that "[f]athers must selflessly return to their role as providers and protectors of their families, and mothers must return lovingly to nurture their children." Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. WES. INT'L L. J. 1, 21 (2000).

[109] *Wardle, supra* note 1, at 858.

[110] State of Vermont's Brief, Baker v. State, 744 A.2d 864 (Vt. 1999) [hereinafter *Vermont Brief*], *available at* http://www.vtfreetomarry.org/statepart2.htm.

[111] *Id.*

[112] For a brief review of the way in which gender stereotypes as applied to parenting roles were initially formed and have since been transformed in American history, see Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in* (*continued*)

The ways in which we have come to confuse the supposed internal and intrinsic sex-specific parenting skills and attributes of men and women with externally imposed social norms and expectations that assign roles and responsibilities depending on one's sex is evident from the arguments made by opponents of parenting by lesbians and gay men. Lynn Wardle, for example, in writing the most comprehensive critique of parenting by lesbians and gay men that has so far appeared in a law review, argues that "[a]mong the most important reasons why heterosexual parenting is best for children is because there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) strengths and attributes to their children's development."[113] Wardle adds that "[a]lthough the critical contributions of mothers to the full and healthy development of children has long been recognized, recent research validates the common understanding that fathers, as well as mothers, are extremely important for child development."[114] In order to support this position, Wardle quotes a passage from a book by David Blankenhorn on the problems associated with children raised without fathers. "The consequences for children of effective fatherhood are compellingly beneficial," Wardle argues, for the following four reasons (quoting Blankenhorn):

> First, it provides them with a father's physical protection. Second, it provides them with a father's money and other

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the Family Court, 25 FLA. ST. U. L. REV. 891, 896-906 (1998). McNeely notes that as the United States moved from an agrarian to an industrialized society during the second half of the nineteenth century, there were important changes in the roles of male and female parents. *See id.* at 897-98. The former now were spending increased amounts of time away from home, becoming even more clearly than before the source of financial well-being for the family, while mothers stayed behind taking care of the children by themselves, cementing the understanding of them as the primary caretakers of children. *See id.* at 898. Prior to the second half of the nineteenth century, the courts, in the few divorce cases that were adjudicated, almost always awarded custody to fathers because children in an agrarian society played an important role in the financial well-being of the family by working in the fields. *See id.* at 897. With the advent of industrialization and urbanization, however, the law changed dramatically so that by the beginning of the twentieth century, it was mothers who were overwhelmingly preferred by judges in the awarding of custody through the application of the tender years doctrine. *See id.* at 900-03. Around this time, the idea that there was something uniquely valuable about maternal love and care began to appear in judicial opinions. *See id.* at 899. As a representative example, McNeely cites the following from a 1916 opinion by the Washington Supreme Court: "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and moreover, a child needs a mother's care even more than a father's." *Id.* (quoting Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916)). It is this kind of stereotypical assumption about the connection between sex and parenting that is still very much with us today, even if it is now expressed in ways that are more tempered and subtle.

[113] Wardle, *supra* note 1, at 857.

[114] Wardle, *supra* note 1, at 857 (footnote omitted).

> material resources. Third, and probably most important, it provides them with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to the identity, character, and competence of children. Fourth, and most obviously, paternal investment provides children with the day-to-day nurturing – feeding them, playing with them, telling them a story – that they want and need from both of their parents.[115]

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[115] Wardle, *supra* note 1, at 859-60 (quoting DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25 (1995)). It is interesting to note that Blankenhorn recognizes the important role that social construction plays in our understanding of the differences between male and female parents. Blankenhorn, for example, argues that

> [m]en, more than women, are culture-made. Fatherhood, in particular, is . . . a 'metaphysical' idea – an imperfect cultural improvisation designed not to express maleness but to socialize it. It derives less from sexual embodiment than from a social imperative: the need to obligate men to their offspring. Consequently, ideas about masculinity and fatherhood are inextricably rooted in social functions.

BLANKENHORN, *supra*, at 17 (citation omitted). For arguments that the differences between men and women, including those between male and female parents, are explained mostly by biology and not culture, *see* Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 S.W. L. J. 617, 620-54 (1984).

Professor Wardle also relies on the work of Kyle Pruett, and in particular on Pruett's book *The Nurturing Father*, to support his position that parents contribute unique and distinctive benefits based, at least in part, on their gender. *See* Wardle, *supra* note 1, at 857-61 nn. 120, 125, 130, 151, 158 (citing KYLE PRUETT, THE NURTURING FATHER (1987)). In a more recent book, however, Pruett makes clear that he believes that there are many more similarities than differences in the parenting styles of male and female parents. Thus, Pruett argues that "gender does not a parent make; a child does. Mothers and fathers share much more of the competent nurturing domain than they do not, and that is what matters to children." KYLE PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD 24 (2000). Pruett also notes that "[m]en and women are similarly predisposed emotionally to nurture their children in most ordinary circumstances although they are usually not similarly prepared or supported by society or their own particular families to do so." *Id.* at 22. Furthermore, "[p]arental nurtur[e], warmth, and closeness are shown over and over again to be connected to healthy child development regardless of whether it is the mother or father at the helm." *Id.* at 21.

Although Pruett in FATHERNEED proceeds to discuss studies that suggest differences between male and female parents, there is little support in that discussion for the idea that those differences are intrinsic to the biological sex of the parents. For example, Pruett notes that

(*continued*)

I want to explore briefly each of the four reasons provided in this passage as a way of supporting my contention that when opponents of parenting by lesbians and gay men (as well as other forms of nontraditional families – such as families headed by single parents – that lack dual gender parenting) think that they are basing their arguments on intrinsic differences between male and female parents, they are instead simply perpetuating tired (though powerful) stereotypes based on gender roles and the different expectations of parents according to their sex.

The first reason provided in the passage quoted above, namely, physical strength, would seem to be sex-specific rather than a result of social understandings of gender roles. It is true, after all, that men are generally physically stronger than women. There are many women, however, who are stronger than many men. As a result, there are many fathers who are physically weaker than many mothers. Furthermore, even if women are, in general, less strong than men, that does not mean that women are, in general, not capable of providing the necessary physical protection to their children when necessary. In addition, there are other criteria that are relevant to the ability of a parent to provide physical protection to her or his children, one of which is obvious: the parent must be physically present in order to protect the child when needed. The fact that most male parents are stronger than most

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"[b]y six weeks of age, infants can distinguish their father's voice from their mother's voice. While a quiet and alert infant will attend more quickly to mother's voice, an upset or fretting infant will calm more readily to the father's voice." *Id.* at 25. The fact that infants can distinguish between the voices of their female and male parents and that there might be different responses based on the characteristics of those voices (higher on average for female parents and lower for male parents) does not mean that an infant would not be able to distinguish the voices of two parents of the same gender.

In other differences discussed by Pruett, there may be important cultural factors at play. Thus, for example, Pruett notes that male parents engage in more rough-and-tumble play with their children than female parents. *Id.* at 28. And yet, Pruett also points out that "the amount of rough-and-tumble play [varies] across cultures: American fathers seem to use it liberally, whereas men in Sweden, for example, and in many preindustrial cultures do not." *Id.*

Much of Pruett's work is aimed at showing the advantages to children of having involved fathers as opposed to non-involved fathers. Pruett makes clear that the effect of fathers who engage in the raising and nurturing of their children is consistently positive in the lives of children of all ages. Pruett's main point is that the contributions by fathers to parenting should not be minimized or ignored. Such a position, however, is not inconsistent with gay rights positions. In fact, Pruett in FATHERNEED makes it clear that he supports parenting by gay men. *Id.* at 133-34. (He does not address parenting by lesbians because his work focuses on parenting by men.). Although calling for more research, Pruett argues that "what we do know tells us repeatedly that being a gay parent presents no measurable limitation to providing competent and meaningful care to children." *Id.* He adds "that there is no reason for concern about the developmental or psychological competence of children living with gay fathers." *Id.* at 134.

female parents is meaningless if the former are not spending considerable amounts of time with their children in order to provide physical protection when needed. A child would be better off being protected by a physically weaker parent who is around than by a physically stronger parent who is not. All of this suggests that the ability to physically protect children is not as sex-specific as some suppose. It is not surprising, however, that the ability of the male parent to provide physical protection to the family is often part of the argument for the existence of sex-specific parenting skills and attributes; such an ability is a crucial component of the way in which society has traditionally conceived the male role within the family: The expectation is that the (strong and virile) man should protect the (weak and defenseless) children and mother.

The second supposedly sex-specific benefit noted in the passage above that emanates from "effective fatherhood" is the "father's money and other material resources."[116] Reliance on this rationale to explain why children should have access to a male parent shows, perhaps more clearly than any other, that what some think of as distinctly male parenting traits and capabilities are nothing more than the result of the way in which we organize ourselves as a society according to gender. To the extent that fathers have greater access to money and other material resources has nothing to do with their biological sex and has everything to do with the way in which we privilege and financially reward work outside of the home (the traditional domain of males) as opposed to work inside of the home (the traditional domain of females). It is our privileging of what has traditionally been considered to be male work that gives a distinctive value to male parenting in the form of material resources. If we were to change our norms, that is, if we were to give women an equal opportunity to compete and succeed outside of the home, while not simultaneously expecting them to do most of the work inside of it (including most of the childcare), then the seemingly male-specific advantage of being able to provide material resources to the family would no longer be viewed in sex-specific terms.

The fourth benefit noted in the passage above (I leave for last a discussion of the third benefit) is "the day-to-day nurturing . . . that [children] want and need from *both* of their parents."[117] I emphasize the word *both* in the previous sentence because many of the arguments for sex-specific parenting skills and attributes are in effect arguments for having children raised by two parents as opposed to one. Since, in most cases, it is the male parent who abandons the family,[118] it is not surprising that much of the literature in this area focuses mostly on the importance of fathers in the lives of children.[119]

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[116] Wardle, *supra* note 1, at 859.

[117] Wardle, *supra* note 1, at 860 (emphasis added).

[118] *See* Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L. REV 339, 352 (1996) (noting "the unprecedented degree to which men appear to be abandoning the father/husband role").

[119] *See supra* sources cited in note 115.

The issue of whether children benefit from having two parents, and concomitantly, whether children who are raised by one parent are harmed by the absence of a second parent, is an important and complicated subject that I cannot address here. My point is this: Even if one were to concede for purposes of argument that it is better for children to be raised by two parents rather than one, that proposition does not by itself provide support for the idea that the *sex* of the two parents must be different. We should not, in other words, conflate issues associated with the sex of parents with the advantages to children of having a second source of material and emotional support. In fact, it is precisely because children can benefit in many ways from the presence of a second parent that several state supreme courts have allowed the partners of lesbian and gay parents to adopt the latter's children.[120]

I have left the third reason stated in the passage quoted above for last because I believe that the perceived importance of the need for "paternal cultural transmission" (as articulated in the passage) is a particularly problematic component of the view that parenting skills and attributes are sex-specific. One of the concerns that proponents of the sex-specific understanding of parenting seem to have with the fact that a growing number of lesbians and gay men are becoming parents is that those parents will not contribute, and, in fact, will interfere with, the transmission of what the proponents take to be appropriate gender roles.[121] It is an implicit part of this argument that male children can best learn from their male parents what it means to be a complete man and a good father and that female children can best learn from their mothers what it means to be a complete woman and a good mother.[122]

It is no coincidence that many who are troubled by lesbian and gay families are also troubled by the breakdown of traditional gender roles within heterosexual families and by the fact that mothers who work outside of the home are by necessity spending less time with their children than those who do not.[123] As these critics see it, the questioning of and nonabidance by traditional

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[120] *See, e.g.*, In re Jacob, 636 N.Y.S.2d 716, 719-20 (N.Y 1995); In re M.M.D. v. B.H.M., 662 A.2d 837, 840 (D.C. Cir. 1995); In Re Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993); In re Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002).

[121] *See* Wardle, *supra* note 1, at 860 (arguing that "[p]arents are important as role models for their children of the same gender because children learn to be adults by watching adults") (footnote and internal reference omitted); Wardle, *supra* note 1, at 863 (arguing that "[h]omosexual parenting poses particular risks for the emotional and gender development of children" and that children "have stronger gender identity when they are reared in two-parent, dual-gender families").

[122] Wardle, *supra* note 1, at 854 (expressing concern that some "studies have reported that boys raised by homosexual mothers may have a lower self-image regarding masculinity"); *see also* Cameron, *supra* note 1, at 294 (noting that "common sense" tells us that "[c]hildren raised by homosexuals, lacking regular input from and experiences with both a father and a mother, should be more apt to exhibit gender confusion of various sorts").

[123] *See* Wardle, *supra* note 108, at 4 (arguing "that children are less cooperative and

(*continued*)

gender roles on the part of parents brings confusion and anxiety to children while permitting parents (read: mothers) to displace or shift their responsibilities to others (largely paid childcare workers). The fact that a family headed by two men or two women in a sexually intimate and committed relationship might be allowed to raise children when such an open arrangement would have been unfathomable only a few decades ago, is for many a further sign of the challenges confronted by the traditional family and the norms associated with it. This is why critics of lesbian and gay families will be simultaneously troubled and energized by the suggestion in Stacey's and Biblarz's essay that the gender preferences and behavior of the children of lesbians and gay men do not conform to traditional gender norms. Critics will be troubled because it will confirm their fear that the sons of lesbians and gay men will be less masculine and more feminine than the sons of heterosexual parents and that the daughters of lesbians and gay men will be less feminine and more masculine than the daughters of heterosexual parents. It will energize them because they will view this kind of systematic nonabidance by traditional gender norms as harmful to both the children of lesbians and gay men and to the broader society.

The greater gender nonconformity on the part of the children of lesbians and gay men, if confirmed by future research, while constituting a form of difference is harmful only if we view gender nonconformity itself as harmful. For at least two generations we have been as a society moving away from the idea that one's biological sex should limit the range of one's interests and ambitions. We should not, therefore, automatically conclude that if the daughters and sons of lesbian and gay parents are in general abiding by fewer traditional gender roles, that they are harming either themselves or society. In fact, we should think of this difference in exactly the opposite way not only because it adds to diversity and pluralism in our society (as I will argue in the next section), but also because it further contributes to the undermining of the idea that if one is of one sex or another, that means that one should not pursue certain objectives, aspirations, or passions (as either children or adults). The breaking down of traditional gender roles empowers individuals to take greater control of their destiny and discourages them from feeling constrained by predetermined expectations of their abilities and dreams. If lesbian and gay parents, whether consciously or not, contribute to the further weakening of gender-based understandings of the traits and capacities of individuals, that would be a *positive* consequence of their parenting.

The idea that men have certain skills and attributes that women lack and vice versa has been part of an hegemonic and oppressive system that has privileged the former at the expense of the latter. Our understandings of gender differences are neither neutral nor benign. Our attribution of gender

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more aggressive when raised in day care programs that separate them from their mothers and place them in institutional settings during the working day") (citation omitted).

roles, and our expectations that everyone abide by them, is part of a complex and powerful norm-engendering patriarchal regime that seeks to assign roles, and distribute privileges and burdens, based on gender.[124] And it is the family in general, and the family headed by a heterosexual married couple in particular, which has been the main source of *transmission* of those norms. It is from within the traditional family that boys are taught to expect the privileges they can look forward to enjoying fully as adult men and girls are taught to meet the obligations that will be expected of them as adult women. It may very well be that future research will confirm what Stacey and Biblarz suggest, namely, that lesbian and gay families will enable or promote greater flexibility and opportunities in matters related to gender roles and expectations. If that turns out to be the case, that would be a beneficial rather than a harmful difference between families headed by lesbians and gay men and families headed by heterosexuals. The fact that lesbian and gay families contribute to the de-gendering of social norms and expectations associated with parenting is beneficial because it will (1) help undermine traditional gender roles, (2) expand the opportunities and potential objectives of all children regardless of their biological sex, and, perhaps most importantly, (3) force us to focus on those issues that should matter most in the area of family law and policy, namely, whether children are receiving adequate love, care, moral guidance, protection, and emotional and material support from their parents.

Opponents of lesbian and gay families use gender as a proxy, believing that if the family includes a female parent then the children in that family are likely to receive some benefits and if there is a male parent they are likely to receive distinct others. The problem is that gender serves as a rather imperfect proxy in this area. As already noted, countless lesbian and gay parents who are raising children as couples, as well as an even greater number of single parents (regardless of sexual orientation), are providing wonderful forms of love, care, moral guidance, protection, and emotional and material support to their children. We must, in thinking about the principles that should guide family law and policy, focus on whether parents are providing their children with the basic necessities of life (broadly understood) rather than using the gender of the parties as a proxy for determining the same.

We should not, therefore, consider it harmful that the daughters of lesbian mothers generally express a greater interest in, for example, playing sports or in entering traditionally male professions than do the daughters of heterosexual mothers.[125] It should also not trouble us, and we should not consider it harmful, that some studies suggest that the sons of lesbian mothers are less aggressive and have play preferences that are different from those of the sons of heterosexual mothers.[126]

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124 *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 124-33 (1989).

125 *See* Stacey & Biblarz, *supra* note 5, at 168.

126 *See* Stacey & Biblarz, *supra* note 5, at 168.

There are, of course, clear losers whenever a patriarchal system that awards benefits and imposes obligations according to a person's sex is further undermined. Those losers are the men who have been in a privileged and subordinating position vis-a-vis women and who have received most of the benefits and few of the burdens in a patriarchal society. I suppose the sons of lesbians and gay men might in that sense lose privileges and advantages if the parenting styles of their parents contribute to a further undermining of traditional gender roles in our society. But the obvious point is this: The gains that men enjoy under patriarchal norms and values come at the expense of women.

To acknowledge that there might be observable differences in the preferences and behavior of the children of lesbians and gay men when compared to children of heterosexual parents raises complicated issues for supporters of lesbian and gay families. It raises the real possibility that critics of gay families will use an acknowledgment of difference as a way of bolstering their position that difference in family arrangements, structures, and dynamics is usually inconsistent with the best interests of children. It also requires a further conversation about the implications of those differences. In a way, the debate is simpler if we operate under the understanding (or the hope) that there are no differences because then it is harder for critics of lesbian and gay families to justify the differential treatment of lesbian and gay parents. But as I have argued in this section, we should not assume that any difference automatically translates into harm, especially in the area of gender role conformity.

The idea that there are parenting skills and attributes that are sex-specific is deeply ingrained in our society. It is, in fact, one of the principal reasons for the objection to parenting by lesbians and gay men. For many critics, the idea that a child should have both a mother and a father, each of a different sex, is as self-evident as the fact that marriage can only be between a man and a woman.[127] The very idea that a man can act and serve as a mother and that a woman can act and serve as a father seems to many intrinsically incorrect. Many find parenting by lesbians and gay men threatening because it questions long-held assumptions about the connection between gender and parenting. But we need to begin thinking of "mother" and "father" as verbs rather than as nouns. We should focus, in other words, on what it means *to* mother and *to* father a child, rather than on the sex of the parent who does the mothering or fathering.[128] Gay and lesbian parents are both mothering and fathering their

[127] Wardle's scholarship, for example, links both of these issues. *Compare* Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV 735 (1998) (critiquing same-sex marriage) *with* Wardle, *supra* note 1 (critiquing parenting by lesbians and gay men).

[128] As we further de-gender parenting, it will become possible to do away with the terms "mother" and "father" altogether and to replace them with the word "parent" used both as noun and verb.

children. If future research establishes that one of the consequences of delinking mothering and fathering from the biological sex of parents is that the children of such parents in general abide by fewer traditional gender roles, we should not, for the reasons pointed out here, automatically conclude that those differences harm either the children involved or society at large.

B. *Parental Autonomy, Pluralism, and Diversity*

It is not necessary to agree with the arguments made in the previous section relating to the negative implications of traditional gender roles and the need to de-gender parenting in order to take issue with the efforts of opponents of gay rights to make it more difficult for lesbians and gay men to become parents. It is possible, for example, to believe that male parents are in general better at carrying out certain parental responsibilities and female parents better at carrying out others, and still remain open to the idea that lesbians and gay men can be good parents who do not, simply because of their sexual orientation, harm their children. Because the views on gender roles and parenting presented in the previous section are controversial and contested, it is necessary for gay rights proponents to also develop an alternative argument for the toleration and even celebration of the differences in gender roles and behavior among the children of lesbian and gay parents (if those differences are confirmed through future research) without having to accept the arguments raised above. The value of parental autonomy, and the corresponding appreciation for pluralism and diversity that it engenders, can serve that purpose.

Before I explain why this is the case, I want to address a possible criticism of raising notions of parental autonomy in this context. It could be objected that considerations of parental autonomy are relevant only when there is a parent-child relationship already in existence. It could be argued, therefore, that notions of parental autonomy are not relevant in deciding the prior question of who should be allowed to parent. There are at least two responses to this objection in the context of parenting by lesbians and gay men. First, it seems appropriate, in considering whether an entire group of individuals should be prevented from becoming parents, to discuss whether the grounds used to support such an exclusionary policy could also be used to limit the discretion or freedom of individuals once they become parents. If the grounds used to justify the exclusionary policy could also be used to limit the autonomy of parents, then we know that those grounds must be taken seriously. To give an obvious example: considerations of parental autonomy cannot trump the harm caused by the physical abuse of children. Therefore, it would be entirely legitimate for the state to prohibit those who have a history of perpetrating physical abuse from adopting. On the other hand, if the grounds used to justify the exclusionary policy would be insufficient to limit the discretion or freedom of individuals once they become parents, then that counsels against using those grounds as an argument for exclusion.

The second reply to the objection of relying on the value of parental

autonomy to help us decide who should be permitted to be a parent in the first instance is that in many cases of parenting by same-gender couples, in particular lesbian couples where one of the partners has given birth to a child, there is *already* a legally recognized parent. The issue then becomes whether to recognize the other de facto parent as a de jure parent. In these increasingly common cases of second parent adoption, in other words, considerations of parental autonomy are present because there is already a parent-child relationship in existence.

Having addressed the possible objection, I turn now to explain the autonomy argument. We as a society give parents considerable deference in deciding how to raise their children. It is parents in our society who decide what kind of moral and spiritual guidance to provide their children, as well as how to provide for their material and emotional well-being. The Supreme Court has on several occasions held that parents have a fundamental right to make important decisions about their children and how they should be raised.[129]

The upshot of this deference to the discretion and priorities of parents is that in our culture we allow parents, within fairly broad parameters, to raise children as they think best. Of course, this deference is not absolute. There are limits to it when the conduct or omissions (in particular those associated with neglect) of parents harm children.[130] The issue for us is whether the encouragement, whether purposeful or not, by parents of preferences and behavior on the part of their children that are not gender role conforming falls within or without the broad spectrum of parental decisions that our society as a general matter leaves to the discretion of parents.

In our society, the ability and willingness of parents, regardless of sexual orientation, to abide by traditional gender roles is in flux. Over approximately the last two generations, we have, as a cultural and legal matter, made great strides toward breaking down the constraints and barriers that limit and circumscribe the lives of individuals based on their sex. Family structures and dynamics have not been immune to these changes. The result is that in many households headed by heterosexual married couples, there is today less of an abidance by traditional gender roles than was present a few decades ago. Male parents, while still not meeting their full share of childcare responsibilities, are

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[129] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000); Pierce v. Society of Sisters, 268 U.S. 510, 518-19 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[130] The issue of whether children are in fact harmed by particular actions or omissions of their parents can of course be the subject of much dispute. In fact, as already noted, the debate over lesbian and gay parenting often revolves around the issue of whether children are being harmed by the sexual orientation of their parents. *See supra* notes 1-2 and accompanying text. I do not mean to suggest, therefore, that it will always be clear when the minimum threshold of harm has been reached that would justify a restriction on rights to parental autonomy. My point is a more limited and obvious one, namely, that rights to parental autonomy are circumscribed by the need to protect children from harm.

as a general matter doing more than a generation or two ago.[131] Similarly, although female parents are still doing considerably more childcare than their male counterparts,[132] a significantly higher number of them are also working outside of the home, many pursuing careers and professional ambitions in areas that until relatively recently were largely pursued only by men.[133] A growing number of children in heterosexual households, therefore, are observing their parents behaving in ways that only a generation or two ago were even more clearly inconsistent with gender role expectations. Given that many heterosexual parents are themselves abiding by fewer traditional gender roles, a failure that would also presumably have an impact on the willingness of their children to abide by traditional gender roles,[134] it is more difficult to argue that the parenting choices that lesbian and gay parents are making that might affect the gender role conformity of their children fall outside of the previously-mentioned broad spectrum of decisions that our social norms and laws hold are best left to parents.

To further illustrate what I mean by this, I would like to compare parenting by lesbians and gay men on the issue of their children's gender role conformity with the issue of home schooling of children. There is a growing number of parents in this country who, because of religious beliefs or because of the perceived poor quality of public schools in some areas (or both), are choosing

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131 *See* Adele Eskeles Gottfried et al., *Role of Maternal and Dual Earner Employment Status in Children's Development: A Longitudinal Study from Infancy Through Early Adolescence*, *in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 55, 59 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994) (discussing research showing that fathers in families where mothers work outside of the home are more involved with their children when compared to fathers whose wives are not employed).

132 For a review of the literature on this subject, see Beth Ann Shelton, *Understanding the Distribution of Housework Between Husbands and Wives*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 343 (Linda J. Waite et al. eds., 2000).

133 *See* Phyllis T. Bookspan, *A Delicate Imbalance: Family and Work*, 5 TEX. J. WOMEN & L. 37, 44-45 (1995). In addition, single parents are raising a growing number of children. *See* U.S. Census Bureau, *America's Families and Living Arrangements* 7 (2000) (noting that "[s]ingle-mother families increased from 3 million in 1970 to 10 million in 2000, while the number of single father families grew from 393,000 to 2 million"). Single parents have no choice but to effectuate the parenting skills and attributes associated with parents of both genders.

134 *See* Alan Booth and Paul R. Amato, *Parental Gender Role Nontraditionalism and Offspring Outcomes*, 56 J. OF MARRIAGE & FAM. 865, 866, 872 (1994) (finding that nontraditional families, which for purposes of study were defined as those "in which mothers are employed, fathers contribute to household labor and child care, and parents hold egalitarian attitudes toward gender roles," are "significantly associated with offspring holding nontraditional gender role attitudes"); *see also* Constance Hardesty et al., *Paternal Involvement and the Development of Gender Expectations in Sons and Daughters*, 26 YOUTH & SOCIETY 283, 290 (1995) (finding that greater amounts of nurture by (heterosexual) fathers leads to less traditional gender role conformity by their sons).

to educate their children at home.[135] As a policy matter, one can articulate arguments, reasonable on their face, as to why such choices by parents may be harmful to both children and society. It may be harmful to educate children at home because it isolates them from the broader community, disadvantages them in the important process of socialization, and does not expose them, on a continuous basis akin to what takes place in many public schools, to other children of different backgrounds, races, religions, and cultures.[136] The argument can also be made that home schooling is bad for society. If all parents kept their children at home, we would have no public schools, institutions which have historically played crucial roles in the transmission of cultural, democratic, and civic values.

I find these arguments against home schooling interesting and plausible, but I do not think that they are strong enough to trump the value of parental autonomy. This would be the case even if it could be shown empirically that children who are home schooled in fact do have problems socializing with others or turn out as adults to be less tolerant of diverse people and ideas. The kind of education that children receive is a decision that is best left to parents given that it plays a crucial role in determining the values, priorities, and objectives of children as they develop into adults. Similarly, it should also be up to parents (regardless of sexual orientation) to decide whether to encourage, or at least not discourage, their children from pursuing activities and interests that are not usually associated with their sex. These are the kinds of decisions that should be made by parents and not by the state.

The pluralism and diversity in the preferences, behaviors, and priorities of children that accompany giving parents a great deal of autonomy in deciding what is best for their children is something to be encouraged and celebrated rather than feared. We are enriched as a society and as a culture when we encourage pluralism and diversity in the ways in which children are raised. It is true that it would be possible to collect all of the social science research conducted on children raised by parents whose values and priorities are

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[135] According to the National Household Education Surveys ("the surveys"), there were 790,000 children home schooled in the United States in 1999, up from 640,000 in 1996. *See* Kurt J. Bowman, *Home Schooling in the United States: Trends and Characteristics*, U.S. Census Bureau, Working Papers Series No. 53 (Aug. 2001), *available at* http://www.census.gov/population/www/documentation/twps0053.html. "[T]he parents of 30 percent of home-schoolers felt the regular school had a poor learning environment . . . . Another theme [found in the surveys] had to do with religion and morality. Religion was cited by 33 percent of parents and morality by 9 percent." *Id.*

[136] For a summary of these and other objections to home schooling, see A. Bruce Arai, *Homeschooling and The Redefinition of Citizenship*, 7 EDUC. POL'Y. ANALYSIS ARCHIVES, (Sept. 6, 1999), *at* http://epaa.asu.edu/epaa/v.7n.27.html. For a response to the policy objections to home schooling, see, for example, Bruce D. Page, Jr., Note, *Changing Our Perspective: How Presumptive Invalidity of Home School Regulations Will Further the State's Interest in an Educated Citizenry*, 14 REGENT U. L. REV. 181 (2001-02).

different from those of the majority of the population and on families with internal structures and dynamics that are different from those of the traditional family headed by a married heterosexual couple. We could then catalogue the ways in which families that are perceived and described as "alternative" families differ from what are taken to be "normal" families. We could also, through laws and policies, create all sorts of incentives and disincentives for parents to abide by the values and priorities, as well as to replicate the internal family structures and dynamics, that the majority considers most beneficial to children and to society. But ultimately we have to ask ourselves the following: would our children and our society be better off as a result? I suggest not. I suggest that what we would gain in terms of uniformity and predictability as reflected in the preferences and behavior of children, we would more than lose in terms of pluralism and diversity and ultimately in a lack of compassion and understanding on the part of both adults and children for those who lead lives in ways that differ from majoritarian norms.

As mentioned above, the value of parental autonomy, and the pluralism and diversity in family arrangements that emanate from it, cannot always trump other considerations.[137] There are instances when society can legitimately place limits on parental autonomy to protect children from clear psychological or physical harm. For proponents of regulations that would limit parental autonomy, however, this should be a fairly difficult burden to meet, especially when the regulations would apply to an entire class of current and prospective parents (e.g., lesbian and gay parents) rather than proceeding on a case-by-case basis to determine whether particular individuals have the skills, traits, and capacities to be good parents. I would suggest that the fact that the daughters of lesbians and gay men, for example, may be more interested in "masculine" clothing or in careers that have traditionally been the prerogative of men and that the sons of lesbians and gay men may be less interested in sports or more interested in nurturing younger children than are the sons of heterosexual parents,[138] is not enough to meet that high burden. The desire by critics of lesbian and gay families to attain the goal of transmitting what they take to be appropriate gender roles and identities from parents to children is not enough to trump what should be the strong presumption that, in most matters, we should allow parents to raise their children as they deem best.

III. GENDER ROLES, LESBIAN AND GAY PARENTS, AND THE CONSTITUTION

I have so far made what can be categorized as prudential or policy arguments as to why, even if the children of lesbian and gay parents are less gender role conforming than the children of heterosexual parents, that should not change the way in which society views or regulates parenting by lesbians

137 *See supra* note 130 and accompanying text.

138 *See supra* notes 52–57 and accompanying text.

and gay men. The following question, however, remains: what happens when a state nonetheless attempts to use this difference as a justification for denying lesbians and gay men, for example, the opportunity to adopt?[139] The state of Florida, for instance, in defending its complete ban on lesbians and gay men from adopting,[140] argues that having children raised by two married parents of different genders promotes (among other goals) proper gender identity among children.[141] Florida's adoption ban was recently upheld in the face of constitutional challenges in *Lofton v. Kearney*.[142] The court concluded that the state's argument that heterosexual married couples, unlike lesbian and gay parents, provide children with "proper gender role modeling"[143] (as well as a

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[139] It might also be possible that states may want to use differences in gender role conformity among the children of lesbian and gay parents as a justification for codifying a rebuttable presumption that having a lesbian or gay parent is not consistent with the best interests of children. This is the recommendation made by Lynn Wardle in Wardle, *supra* note 1, at 893-97 Such a presumption would be applicable in custody, visitation, and adoption cases. Wardle, *supra* note 1, at 894. I will limit myself here to exploring the constitutionality of an outright ban on adoption. Janice Pea and I raise constitutional concerns about Wardle's proposed rebuttable presumption in Ball & Pea, *supra* note 2, at 331-38.

[140] *See* FLA. STAT. ANN. § 63.042(3) (West 2002).

[141] The state argues that it is in the best interests of children to be placed in homes with heterosexual married couples. "In such homes, children have the best chance to develop optimally, due to the vital role dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling." Brief for Appellees at 16, Lofton v. Kearney, 157 F Supp. 2d 1372 (S.D. Fla. 2001) [hereinafter *Florida's Brief]; see also id.* at 4 (noting that it is the state's position that "it is in the best interest of children to be placed with married mothers and fathers whose respective male and female influences provide heterosexual role modeling and promote proper sexual and gender identification").

[142] 157 F Supp.2d 1372 (S.D. Fla. 2001).

[143] *Id.* at 1383. Some states have made a similar argument in defending their bans against same-sex marriages from constitutional challenges. The state of Vermont, for example, has argued that it has a legitimate interest "in promoting child rearing in a setting that provides both male and female role models." Baker v. Vermont, 744 A.2d 864, 884 (Vt. 1999) (internal citation omitted). Massachusetts has argued that its ban on same-sex marriage is not unconstitutional because

> [i]n addition to their primary purpose of fostering procreation per se, the marriage statutes were intended to ensure that children would not only be born in wedlock but also reared by their mothers and fathers in one self-sufficient unit with specialized roles for wives and husbands. Even though sex roles today are not as specialized as they were when the marriage statutes were first enacted, the Legislature could still rationally believe that the optimal setting for raising children is a two-parent family with one parent of each sex.

See Commonwealth's Memorandum in Opposition, supra note 13, at 63 (citation and footnote omitted).

more stable home life and an absence of social stigmatization)[144] was "arguable"[145] and "plausible"[146] and thus sufficient to satisfy the rational basis test.

I do not believe that a state can constitutionally justify denying lesbians and gay men the opportunity to adopt on the grounds that their children, in general, exhibit preferences and behavior that are inconsistent with traditional gender roles or what the state considers to be proper gender identity. As I explain below, I believe that the use of such a justification by the state to support exclusionary adoption policies on the basis of sexual orientation fails heightened scrutiny and cannot even survive rational basis review under the Equal Protection Clause.

It is of course true that just because the state should not be permitted to rely on the need to transmit particular gender roles and expectations from one generation to the next as a justification for denying lesbians and gay men the opportunity to adopt does not mean that the state would not be able to rely on other justifications to defend the differential treatment. I want to note briefly, however, that the other state arguments mentioned by the *Lofton* Court can also be questioned. The first additional argument is that married heterosexual couples are more stable than lesbian and gay couples.[147] I do not know of any empirical studies that compare the stability of the relationships of married heterosexual couples with that of lesbian and gay couples who are raising children together. But even if it is reasonable to believe that the relationships of married couples are generally more stable than those of unmarried couples, there is nonetheless a fundamental unfairness in denying lesbians and gay men in committed and long-term relationships the opportunity to marry while simultaneously relying on that state-enforced prohibition to exclude categorically all lesbians and gay men, as the state of Florida currently does, from having the opportunity to demonstrate that they are capable of being good adoptive parents.[148] Lesbian and gay couples in Florida are prevented from demonstrating that their relationships are stable regardless of their commitment to their partners or of how many years or even decades they have been together. The goal, then, seems to be not to want stable couples per se – if it were, then the state would have to concede that at least *some* lesbian and gay couples would qualify. The goal is to prevent *all* lesbians and gay men from

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144 *Lofton*, 157 F Supp. 2d at 1383.

145 *Id.* at 1384.

146 *Id.* at 1385.

147 *See id.* at 1383.

148 I am not suggesting that this fundamental unfairness would be a sufficient ground for a court to conclude that Florida's argument in favor of the adoption ban that is based on the greater stability of married relationships would not pass constitutional muster under the rational basis test. As already noted, I limit myself in this article to a discussion of the constitutionality of another justification for the ban, namely, the state's interest in promoting gender role modeling. A detailed discussion of the stability argument is beyond the scope of this article.

adopting, quite independent from the stability of their relationships or the beneficial impact of that stability on children.

The unfairness of relying on marriage as a rationale for prohibiting lesbians and gay men from adopting is compounded by the fact that individuals in Florida *do not have to be married* in order to adopt. I will below explore the equal protection implications of this fact as they relate to the constitutionality of the state's interest in promoting proper gender role modeling.[149] For now, I simply want to emphasize the unfairness of using marriage as a criterion for excluding lesbians and gay men when that same criterion is not required of other potential adoptive parents.

The second additional argument noted by the *Lofton* Court is the stigmatization that accompanies having lesbian or gay parents, a stigmatization that, it is argued, might harm children.[150] The stigmatization argument was rejected by the Supreme Court in *Palmore v. Sidoti*.[151] In that case, a Caucasian parent who was fighting for custody of her child was denied custody because she was having a relationship with an African-American man.[152] The Court held that the possible social stigmatization that the children might suffer because their mother was in an interracial relationship was an impermissible ground for the denial of custody.[153] The Court famously noted that "[t]he Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[154] Several state courts, including a Florida appellate court, have relied on *Palmore* to reject the use of social stigmatization as a rationale for denying lesbians and gay men custody and visitation rights.[155] Furthermore, the stigmatization rationale, which after *Palmore* is constitutionally suspect, will in all likelihood, as a practical matter, become weaker as lesbian and gay relationships and families in this country continue to enjoy greater tolerance and acceptance.

There are currently only two states that have statutory bans on adoption that specifically target lesbians and gay men.[156] Mississippi law prohibits

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149 *See infra* notes 184-85 and 227-32 and accompanying texts.

150 *See Lofton*, 157 F Supp. 2d at 1383.

151 466 U.S. 429 (1984).

152 *See id.* at 429.

153 *See id.* at 434.

154 *Id.* at 433.

155 *See, e.g.*, S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1988); Jacoby v. Jacoby, 763 So.2d 410, 413 (Fla. Dist. Ct. App. 2000); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987); *But see* S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (concluding, in a child custody case, that it is legitimate for the court "to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of 'the alternative lifestyle' their mother has chosen" and distinguishing *Palmore* because that case involved race).

156 New Hampshire recently repealed its complete ban on adoption by lesbians and gay men. *See* WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, SEXUALITY, GENDER, AND THE LAW 323 *(continued)*

"couples of the same gender" from adopting.[157] Florida, as already noted, prohibits all lesbians and gay men, whether single or as couples, from adopting.[158] I argue in the first section below that prohibiting lesbian and gay couples from adopting, when unmarried heterosexual couples are permitted to adopt, is a form of sex classification that merits heightened scrutiny under the

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(Supp. 2001). Utah, on the other hand, recently amended its adoption statute to reflect the legislature's finding "that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." UTAH CODE ANN. §78-30-9 (2002). Given that the Utah statute on its face treats heterosexual cohabiting couples in the same way that it does same-gender cohabiting couples, the sex classification argument, discussed below, see *infra* note 163-213 and accompanying text, might not succeed. Three other kinds of arguments, however, might be helpful in a future constitutional challenge to the Utah statute. First, it seems quite clear that the principal motivation behind the recent statutory amendment was to prohibit lesbians and gay men from adopting. *See* ESKRIDGE & HUNTER, *supra*, at 324. A motivation to deny lesbians and gay men, and no others, opportunities and protections afforded by law is relevant in assessing the constitutionality of a law. *See* Romer v. Evans, 517 U.S. 620, 627(1996); *Cf.* Hunter v Underwood, 471 U.S. 222, 233 (1985) (holding that facially neutral law violates equal protection if intent was to discriminate against blacks and it had discriminatory impact on them); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (noting that a law that is "impartial in appearance" but that in practice "make[s] unjust and illegal discriminations between persons in similar circumstances" is unconstitutional). I discuss *Romer* in *infra* notes 221-22 and 238-43 and accompanying text. Second, Utah adoption law still allows single people to adopt. *See* UTAH STAT. ANN. §78-30-9 (2002) ("Nothing in this section limits or prohibits the court's placement of a child with a single adult who is not cohabiting" with another person.). As I discuss below, this fact is relevant in considering whether there is a rational relationship between a state's interest in the promotion of what it considers to be proper gender role modeling and the way it chooses to attain that goal. *See infra* notes 227-32 and accompanying text. Third, the fact that heterosexuals can marry, and thus are potentially eligible to adopt, but lesbian and gay couples cannot, might also be relevant in assessing the constitutionality of an otherwise neutral law that distributes benefits according to marital status. *See* Tanner v. Oregon Health Sciences University, 971 P 2d 435, 448 (Or. Ct. App. 1998) (holding that the denial of insurance benefits to the unmarried partners of employees violated the state constitutional rights of lesbian and gay employees because the "benefits are made available on terms that, for gay and lesbian couples, are a legal impossibility"). For a discussion of the use of marital status as a way of precluding lesbians and gay men from adopting, see Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results* (forthcoming 2003).

[157] MISS. CODE ANN. § 93-17-3(2) (2002).

[158] *See supra* notes 140-46 and accompanying text. In 1999, the Arkansas Child Welfare Agency Review Board issued a regulation prohibiting lesbians and gay men from serving as foster parents. (It also renders a heterosexual person ineligible to foster parent if there is a lesbian or gay person living in the same residence with her or him.) The constitutionality of the regulation is currently being challenged in court by the ACLU. *See* Amy Upshaw, *Foster Parent Ban on Gays to Remain-- Judge: Issue too Big not to get hearing*, ARK. DEMOCRAT-GAZETTE, Nov. 9, 2002, at 13 (reporting that trial judge denied motions for summary judgment filed by plaintiffs and by the state).

Equal Protection Clause.[159] (An argument can be made that Mississippi is currently such a jurisdiction, though my discussion below will not be focused on Mississippi or any other specific state.)[160] I also argue that the gender role

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[159] *See infra* notes 163-71 and accompanying text.

[160] The sex-based discrimination argument that I make below is premised on an adoption scheme that allows unmarried opposite-gender couples to adopt but prohibits same-gender couples from doing so. *See infra* notes 163-213 and accompanying text. The dispositive eligibility criterion for prospective adoptive couples in such a jurisdiction, therefore, is not marital status but is instead the sex of the individuals who seek to adopt together. It is not clear whether Mississippi law allows heterosexual unmarried couples to adopt jointly. The Mississippi adoption statute could be interpreted as allowing only single individuals and married couples to adopt. The statute states that "[a]ny person may be adopted by an unmarried adult or by a married person whose spouse joins in the petition." MISS. CODE ANN. § 93-17-3(1) (2002). Mississippi's Department of Human Services interprets the statute as prohibiting unmarried couples from adopting. *See* Mississippi Department of Human Services, *Application Process for the Adoption of a Child*, (May 1, 1999) (on file with author). This is not, however, the only possible interpretation. Statutes from other jurisdictions containing similar language have been interpreted to allow unmarried couples to adopt. The New York adoption statute, for example, provides in part that an "adult unmarried or an adult husband and wife together may adopt another person." N.Y DOM. REL. § 110. The New York Court of Appeals has interpreted this language as permitting the unmarried partners of legal parents to adopt the latter's children. *See, e.g., In re* Jacob, 636 N.Y.S.2d 716, 719-20 (N.Y 1995); *see also In re* M.M.D. & B.H.M., 662 A.2d 837, 842 (D.C. 1995) (arguing that "the language [of the adoption statute] specifying restrictions that apply 'if' a petitioner has a 'spouse' does not provide a basis for inferring that Congress consciously decided to exclude unmarried couples from eligibility to adopt").

Furthermore, the fact that the Mississippi Legislature believed it necessary to amend the statute so as to prohibit explicitly couples of the same gender from adopting suggests that the statute as previously written did not categorically require couples to be married in order to adopt jointly. If couples in Mississippi prior to the recent amendment had to be married to adopt, there would have been no need to amend the statute. Interestingly, the Mississippi Supreme Court recently affirmed the granting of separate adoption petitions brought by a former boyfriend of a child's deceased mother and by the child's maternal grandmother. *See* In Re Adoption of P.B.H., 787 So.2d 1268 (Miss. 2001). Although the two petitioners were clearly not a couple, the granting of their separate petitions shows that in Mississippi it is possible for two unmarried people to be the adoptive parents of the same child.

In some states, the rule prohibiting lesbian and gay couples from adopting is the result of judicial interpretation rather than of legislative enactment that specifically excludes them. In Wisconsin, for example, the state Supreme Court has interpreted the adoption statute as not allowing the partners of lesbian and gay parents to adopt without first terminating the parental rights of the latter. *See* In Re Angel Lace M., 516 N.W.2d 678, 682-84 (Wis. 1994). That court has not addressed the issue of whether two unmarried heterosexual individuals can adopt jointly, see In re Interest of Z.J.H., 471 N.W.2d 202, 209 n. 11 (Wis. 1991), *overruled on other grounds by* In re Custody of H.S.H.-K., 533 N.W.2d 419, 434 (Wis. 1995), though the

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modeling justification for this kind of state-sponsored gender classification fails to satisfy heightened scrutiny.[161] I argue in the second section that such a justification is also constitutionally impermissible under rational basis review.[162]

A. *Parental Gender Role Modeling and Heightened Scrutiny*

Most efforts by lesbian and gay litigants to convince courts that laws and policies which make distinctions on the basis of sexual orientation should be subjected to heightened judicial review under the Equal Protection Clause have been rejected.[163] The *Lofton* Court followed those decisions in refusing to apply heightened scrutiny to assess the constitutionality of Florida's adoption ban.[164] Despite the fact that most courts that have looked at the issue have concluded that lesbians and gay men are not a suspect class, this does not mean that adoption laws and regulations that allow unmarried heterosexual couples to adopt but prohibit lesbian and gay couples from doing so are automatically exempt from heightened scrutiny. This is so because such an exclusionary policy is subject to challenge on the basis that it constitutes sex-

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language of the adoption statute, see WISC. STAT. ANN. §48.82(1)(a)&(b) (2002), could be interpreted as requiring that all couples who intend to adopt jointly be married. *But see* In re Jacob, 636 N.Y.S.2d 716 (N.Y 1995) (interpreting statute with similar language as permitting unmarried couples, including unmarried heterosexual couples, to adopt jointly). If a jurisdiction that prohibits second-parent adoption by lesbian and gay couples were to allow adoptions by unmarried heterosexual couples, the sex discrimination arguments made in this section of the article would apply.

[161] *See infra* notes 172-213 and accompanying text.

[162] *See infra* notes 214-53 and accompanying text.

[163] *See, e.g.*,Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-74 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989). These courts have concluded that if the state can prohibit same-gender sexual acts (such as sodomy), then it is not inherently suspect for the state to classify individuals according to "whether they have engaged in or have a propensity to engage in homosexual acts." *See Thomasson*, 80 F.3d at 915 (discussing heightened scrutiny issue in the military content); *see also High Tech Gays*, 895 F.2d 571 (arguing that given that the state can criminalize same-gender sodomy, "it would be incongruous to expand the reach of equal protection" by treating lesbians and gay men as a suspect class). Some courts have also viewed having a same-gender sexual orientation as a mutable characteristic that makes lesbians and gay men ineligible to receive a suspect class designation. *See id.* at 573-74; *Woodward*, 871 F.2d at 1076. The only federal appellate court that has held that lesbians and gay men are a suspect class was a panel of the Ninth Circuit. *See* Watkins v. United States, 847 F.2d 1329, 1349 (9th Cir. 1988). That opinion was later vacated by the full court, which decided the merits of the case without reaching the heightened scrutiny issue. *See* Watkins v. United States Army, 875 F.2d 699 (1989) (en banc).

[164] Lofton v. Kearney, 157 F. Supp.2d 1372, 1382 (Fla. 2001). The court also rejected the argument that the gay plaintiffs had a due process right to privacy and intimate association that would require the state to defend its policy through the existence of a compelling state interest. *See id.* at 1378-80.

based discrimination in addition to sexual orientation discrimination. A prospective male adoptive parent in such a jurisdiction, for example, can jointly adopt a child with another person as long as the co-adoptor is a woman, but not if the latter is a man. This is a form of sex discrimination that should be subject to heightened scrutiny. It is the sex of the members of a couple that determines, at least in part, whether they are allowed to adopt in the same way that it is the sex of prospective spouses that determines whether, under marriage laws, they are permitted to marry.

In the marriage context, the Hawaii Supreme Court in *Baehr v. Lewin* concluded that the state's ban on same-sex marriage was a sex-based classification because the marriage statute, "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."[165] As a result, the court required that the state demonstrate a compelling interest that was narrowly tailored in order to save the ban from a challenge under the state constitution's equal protection provision.[166] The same argument can be made in the context of an adoption ban that distinguishes between same-gender couples and opposite-gender couples. The fact that the state only prohibits the former category of couples from adopting makes the ban a sex-based classification. If Adam were eligible to adopt as long as he did so with Barbara but not with Carl, makes the latter's sex an essential element of the exclusionary policy.

It is easy to foresee a state's possible response to the use of sex discrimination arguments as a way of challenging a ban on adoption by lesbian and gay couples. The first likely response would be that the ban is not sex discrimination because the burden imposed by the restriction applies to both sexes equally. There is, in other words, no burden imposed on women that is not imposed on men and vice-versa. The same kind of argument proved to be unsuccessful in *Loving v. Virginia*.[167] In that case, where Virginia's anti-miscegenation statute was challenged on inter alia equal protection grounds, the Supreme Court rejected the state's equal application defense.[168] The state argued that because the ban on interracial marriage was equally applicable to both whites and blacks, that meant that the statute was not a race-based

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[165] 852 P.2d 44, 64 (Haw. 1993). *But see* Singer v. Hara, 522 P.2d 1187, 1990-95 (Wash. Ct. App. 1974) (rejecting plaintiffs' argument that ban on same-sex marriage is a form of impermissible gender discrimination).

[166] Under the Hawaii Constitution, classifications on the basis of sex are subject to strict scrutiny, the least deferential form of review. *See id.* at 58. The U.S. Supreme Court has held that under the federal Constitution, sex classifications should be subjected to an intermediate form of review. As a result, sex classifications under the federal Equal Protection Clause must advance an important state interest and they must be substantially related to the attainment of that interest. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

[167] 388 U.S. 1 (1967).

[168] *See id.* at 8.

classification and thus did not violate the Equal Protection Clause.[169] The Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[170] Similarly, the fact that an adoption ban applies to both sexes equally should not exempt it from heightened judicial review.[171]

A second likely response on the part of a state to a sex-based classification challenge to a prohibition on adopting imposed only on lesbian and gay couples, which is related to the first response, is that neither men nor women are being denied the opportunity to adopt. If a jurisdiction *only* bans lesbian and gay *couples* from adopting, then single men and women (including single lesbians and gay men) are permitted to adopt. As a result, the state might argue, no one is being denied the opportunity to adopt on the basis of *sex* alone. The rejoinder to this state argument is that a category of individuals who want to adopt, namely, those who want to do so jointly with another person, are indeed being treated differently based on the sex of the co-adoptor. Therefore, even if there is no distinction on the basis of sex made for those who want to adopt as *single* individuals, there is nonetheless a sex-based classification for those who want to adopt as *couples*.

Although there is, of course, no guarantee that a court would view a ban on lesbian and gay couples from adopting as a form of sex-based classification, it is nonetheless interesting to explore whether, assuming a court were to apply heightened scrutiny, the state's interest in having children raised by a man and a woman in order to provide children with appropriate gender role modeling could survive that form of scrutiny. I do not believe it could. It is constitutionally impermissible for the state to be in the business of promoting the perpetuation of traditional gender roles from one generation to the next.[172] The idea that women (in this case mothers) are better able to provide children with certain benefits and that men (in this case fathers) are better able to provide *distinct* benefits is exactly the kind of impermissible reliance on traditional gender stereotypes that the Supreme Court, in other contexts, has rejected.[173] In *United States v. Virginia*, for example, the state of Virginia argued that women students were incapable of benefiting from the application by the Virginia Military Institute ("VMI") of what it called the "adversative method" of instruction.[174] That method was characterized by "[p]hysical rigor,

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169 *See id.*

170 *Id.*

171 The court in *Baehr v. Lewin* relied extensively on *Loving* in concluding that Hawaii's ban on same-sex marriage constituted an improper form of sex discrimination, thus implicitly rejecting the equal application defense. Baehr v. Lewin, 852 P.2d 44, 62-63 (Haw. 1993).

172 United States v. VMI, 518 U.S. 515, 534 (1996) [hereinafter *VMI*].

173 *See, e.g., id.*, J.E.B. v. Ala. ex. rel., 511 U.S. 127 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

174 *VMI*, 518 U.S. at 540.

mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[175] The state justified the categorical exclusion of women from VMI by arguing that there are important "psychological and sociological differences" between men and women that made the application of the adversative method to women less beneficial and effective.[176] The Court rejected the state's position noting that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[177] The Court added that in meeting its high burden in gender-classification cases, the state cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[178] Yet, this is precisely what a state has to argue to support its position that dual gender parenting is necessary for "proper gender role modeling."[179] It has to argue that male and female parents have "different talents, capacities, or preferences" that allow, when they parent together, for what the state believes are the proper forms of gender role modeling and the transmission of what it considers to be proper gender identity.

There is arguably no area where there are stronger or more pervasive fixed notions of the supposedly different talents, capacities, and preferences of men and women than in the area of parenting.[180] The Court has told us repeatedly that we must be skeptical of laws or policies that serve to perpetuate those fixed notions.[181] As the Court has noted, "[w]hen state actors . . . rel[y] on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."[182] This is precisely what takes place when the state has a categorical rule that requires that the parties be of a different sex whenever two individuals apply to adopt together. A state could presumably try to argue that only *couples* should be allowed to adopt and an attempt to defend that particular policy preference would not have to depend on sex-based classifications or justifications. But once the state decides to ban only *some* couples from adopting based on the sex of the partners, then the burden is on the state to provide a justification that is "exceedingly persuasive."[183]

It is also relevant to the constitutional analysis that *every* state in the nation, including Florida and Mississippi (the two states that currently have explicit statutory restrictions on who can adopt based on sexual orientation),

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175 *Id.* at 522 (citation omitted).

176 *Id.* at 549.

177 *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

178 *VMI*, 518 U.S. at 533 (citations omitted).

179 Lofton v. Kearney, 157 F.Supp.2d 1372, 1383 (Fla. 2001).

180 *See supra* notes 106-27 and accompanying text.

181 *See, e.g.*, *VMI*, 518 U.S. at 541; J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 140 (1994); *Hogan*, 458 U.S. at 725.

182 *J.E.B.*, 511 U.S. at 140.

183 *VMI*, 518 U.S. at 533.

allows single individuals to adopt.[184] Single parents (regardless of sexual orientation), however, are also unable to provide the supposed indispensable and unique benefits for children that accompany dual gender parenting. If there are in fact essential differences between mothering and fathering that are associated with a parent's sex, then a single father, for example, is as unable to provide the requisite benefits to his children as are two gay fathers who are adopting a child together. It is unclear why the state's interest in promoting dual gender parenting, in order for parents to provide what it considers to be proper gender role modeling so that those children can develop what it takes to be proper gender identities, is applicable only when there are two parents of the same sex, but not when there is only one parent.[185]

It seems intuitive to many people that children benefit from having both a mother and a father. Those who challenge the constitutionality of adoption policies that exclude on the basis of sexual orientation do not need to question that intuition, except to the extent that it is connected to the *sex* of the parents. It is an unquestionably important state interest that as many children receive the benefits that we traditionally associate with *the acts and practices* of mothering and fathering. It becomes an impermissible form of sex classification, however, when the state assumes, in effect, that only women can be mothers and that only men can be fathers.

Those who want to deny lesbians and gay men opportunities to have their intimate and familial relationships recognized and protected by law (through institutions such as marriage and adoption) usually point to the fact that there are indisputable physical differences between men and women and that those differences *matter*. Physical differences, in other words, are often the starting point for normative and legal positions that consider the sexual intimacy and relationships of opposite-gender couples to be more valuable than those of same-gender couples. Thus, for example, for new natural law theorists, it is the physical complementarity of men and women that allows them to form a real union. For new natural law theorists, only reproductive-like sexual acts can lead to the creation of "a real organic union," a union that can only be formed between individuals with different and complementary sexual organs.[186] According to new natural law lawyers, then, only through penile-vaginal intercourse is there a "unitary action in which the male and the female become literally one organism."[187] The sexual acts of lesbians and gay men, it is argued, "cannot make them a biological (and therefore personal) unit."[188]

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184 *See* Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J. L. & SOC. PROBLEMS 91, 95 (1996).

185 I return to this issue below in *infra* notes 227-32 and accompanying texts.

186 Patrick Lee & Robert P George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 143 (1997).

187 *Id.* at 144.

188 John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV 1049, 1066 (1994).

This normative position has its counterpart in legal discourse and arguments. The State of Vermont, for example, in defending its ban against same-sex marriage, argued that the physical differences between men and women, which allow them to reproduce, justify the use of gender as an eligibility requirement for marriage.[189] Whatever might be the merits of that argument in the marriage context,[190] it is wholly inapplicable in the adoption context where by definition the connection between children and reproduction is severed. In the adoption context, same-gender couples and opposite-gender couples are similarly situated on the issue of reproduction.[191] The physical differences between men and women, therefore, are irrelevant. In order to distinguish between same-gender couples and opposite-gender couples in the context of adoption, then, the state cannot rely on physical differences between men and women. Instead, it must rely on normative assessments of what men and women, as distinct groups of individuals, are capable of realizing and accomplishing as parents. And this is constitutionally problematic because as Andrew Koppelman puts it, "[s]ince it began subjecting sex-based classifications to heightened scrutiny, the Court has *never* upheld a sex-based classification resting on *normative* stereotypes about the proper roles of the sexes."[192]

The recent Supreme Court opinion in *Nguyen v. Immigration & Naturalization Service* can help illustrate this point.[193] At issue in that case was a statute that sets forth the citizenship eligibility requirements for individuals born abroad and out of wedlock when only one of the parents is an American citizen. If the American citizen is the female parent, then the child is deemed to have acquired citizenship at birth.[194] If the American citizen is the male parent, however, there are additional affirmative steps that need to be

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[189] *Vermont Brief, supra* note 110. The state argued that "there is a physical element to marriage," namely, "the ability, actual or assumed, to have sexual intercourse leading to procreation." The state added that its interest in limiting marriage to opposite-gender couples "is not based upon out-moded views of men and women" but is instead "grounded upon the rich physical and psychological differences between the sexes that exist to this very day." *Vermont Brief, supra* note 110.

[190] I dispute the merits of the argument in the marriage context in CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 117-25 (2003).

[191] Although it is true that some opposite-gender couples may be different from all same-gender couples to the extent that the former might have the option to reproduce and are foregoing that option in order to adopt, that difference is not relevant. What matters is that in the adoption context, neither set of couples is using reproduction in order to form a parent-child relationship.

[192] Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y. L. REV 197, 168 (1994).

[193] 533 U.S. 53 (2001).

[194] *See id.* The only requirement imposed on a female parent is that she have been physically present in the United States for at least one year before the birth of the child. *See* 8 U.S.C. §1409(c) (2000).

taken before citizenship can be conferred.[195] One of those steps requires that the child, prior to turning eighteen years of age, be legitimated under state law, or that the father acknowledge paternity in writing and under oath, or that paternity be established through adjudication.[196] The constitutionality of the statute was challenged by a permanent resident plaintiff whose father did not pursue one of those three options before the plaintiff, who was being deported after being convicted of certain crimes, turned eighteen.[197] The plaintiff argued that the citizenship-conferral scheme contained in the statute is an impermissible form of sex-based discrimination because it imposes burdens on male parents that it does not impose on female parents.[198]

In upholding the constitutionality of the statute, the Court repeatedly stressed the *physical* differences between men and women.[199] The Court noted that the statute "takes into account a biological difference between the parents."[200] The statute, the Court added, "addresses an undeniable difference in the circumstance of the parents at the time a child is born. . . ."[201] The Court explained that because only women give birth to children, and, by necessity, must be present at the time of birth, it is easier to establish the biological relationship between a mother and a child than it is between a father and a child. This is particularly relevant, the Court added, in the types of cases regulated by the citizenship statute since in many instances the American father is a visitor to the foreign country for only a short period of time.[202] The Court noted that the American citizen father might not know that he conceived a child before returning to the United States, and the foreign mother might not know the identity of the father.[203] Given the greater difficulty and uncertainty in establishing the biological connection to a child born abroad and out of wedlock when the American citizen is the father, as opposed to when she is the mother, the Court concluded that the differential treatment called for by the statute is based on the circumstances surrounding a child's birth rather than on "irrational or improper" stereotypes of the differences between men and women.[204]

Although the Court's conclusion that the citizenship statute passes constitutional muster under heightened scrutiny can be questioned,[205] the

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195 *See Nguyen*, 533 U.S. at 60.

196 *See* 8 U.S.C. §1409(a)(4).

197 *See Nguyen*, 533 U.S. at 57-58.

198 *See id.* at 58.

199 *See id.* at 71.

200 *Id.* at 64.

201 *Id.* at 68.

202 *See id.* at 62-68.

203 *See Id.* at 65-66.

204 *See id.* at 68.

205 Justice O'Connor, in a forceful dissent, noted several weaknesses in the majority's opinion including its penchant for "hypothe[tisizing] about the interests served by the statute" *(continued)*

important point for our purposes is that the Court's reasoning in *Nguyen* does not help a state defend the constitutionality of a ban on adoption by lesbian and gay couples based on the differences between male and female parents. This is because the circumstances of a child's birth, which are different for female parents because only they give birth, are not relevant to the question of whether only opposite-gender couples should be allowed to adopt.

It is often argued that it is the circumstances of birth, and the fact that it is the female parent who carries the child to term, that helps to make female parenting different from male parenting.[206] Because of the gestation and birth experiences, the bond between mother and child, it is argued, is distinct from the very beginning of the relationship. In fact, the Court in *Nguyen* concluded that the state had an important interest in

> ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States. In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres *in the very event of birth* . . . . The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.[207]

The Court added that the same opportunity is not available, "as a matter of *biological inevitability*, in the case of the unwed father."[208]

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rather than "inquir[ing] into the actual purposes" as well as its failure "carefully to consider whether the sex-based classification is being used impermissibly as a 'proxy for other, more germane bases of classification.'" *Id.* at 78-79 (O'Connor, J., dissenting) (internal references and citations omitted).

[206] *See, e.g.*, George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POLY. 581, 611 (1999); Lynn D. Wardle, *"Multiply and Replenish" Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV J.L. & PUB. POL'Y. 771, 792-93 (2001).

[207] *Nguyen*, 533 U.S. at 65 (emphasis added) (citation omitted).

[208] *Id.* (emphasis added). It has to be noted that in *Nguyen* it was the father and not the mother who developed a relationship with the child. The Court did not address the inconsistency between what happened factually in the case and its opinion about what happens in most cases.

The Court in *Michael M. v. Superior Court of Sonoma Cty*, 450 U.S. 464 (1981), also relied on the physical differences between men and women to reject an equal protection challenge to a California statute under which only men could be charged with the crime of statutory rape. The Court argued that "young men and young women are not similarly situated

(*continued*)

The issue of biological inevitability emphasized by the Court in *Nguyen* is irrelevant in the adoption context. Attempts to defend a sex-based classification in the context of adoption law cannot be predicated on events surrounding gestation and birth because, as far as adoptive parents are concerned, the fact that women give birth to children and men do not is irrelevant. An adoptive mother obviously has no gestation or birth-related connection to her child. Instead, a sex-based classification in adoption law can only be justified on the grounds that men and women have inherently different skills and attributes as parents that have no connection to birth events and processes. And it is precisely the idea that men and women have different skills and attributes, *disconnected to issues of biological or physical differences*, which has never survived heightened judicial scrutiny under the Equal Protection Clause.

Finally, it should be noted that under heightened scrutiny, it does not matter that there may be empirical support for the state's position that there are observable differences between the preferences or conduct of men and women in a particular context. Thus, the fact that the research may suggest "that, on average, mothers tend to be more invested and skilled at child care than fathers,"[209] does not by itself justify a differentiation by the state in the area of parenting on the basis of sex. The fact that many female parents behave in ways that society *expects* them to *because of their sex* does not insulate state action in this area from constitutional challenge if that action promotes or perpetuates gender stereotypes. David Cruz puts this point well when he argues that

> as predicates for differential distribution of rights, privileges, or obligations . . . sex or gender differences are [problematic]. Where some trait or capacity occurs more often in women than men, or vice versa, but is present in at least one woman and one man, a decision to treat men and women differently on the basis of that trait or capacity converts an imperfect (albeit highly accurate) descriptive generalization into a binding normative command.[210]

It is not surprising, therefore, that the Court, "in numerous cases where a measure of truth has inhered in the generalization, . . . has rejected official actions that classify unnecessarily and overbroadly by gender when more

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with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity." *Id.* at 464.

209 Stacey & Biblarz, *supra* note 5, at 175.

210 David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV 997, 1007-08 (2002). Cruz analogizes between religious beliefs and beliefs about sex and gender. In the same way that the state must be neutral as to the former, Cruz argues, it must also "neither endorse nor disapprove gender beliefs." *Id.* at 1009.

accurate and impartial functional lines can be drawn."[211] The Court has made it clear that it is impermissible for the state to use sex or gender as a "proxy for other, more germane bases of classification."[212]

In the adoption context, there are more accurate and relevant ways of making distinctions among prospective adoptive parents than relying on sex and gender. Adoptive parents must go through a rigorous application process to demonstrate their physical, psychological, and material abilities to be good parents. They must demonstrate that they have the ability to provide their children with adequate love, care, moral guidance, protection, and emotional and material support. Those are ultimately the more appropriate and relevant bases for deciding who should be allowed to adopt. To rely on the sex of the parties as a way of categorically excluding some potential adoptive parents impermissibly uses sex as a proxy for other more relevant criteria while simultaneously contributing to the perpetuation of stereotypical gender roles in our society.

It is one thing for gender stereotypes in general and those related to parenting skills and attributes in particular to be as widespread in our society as they are. It is, from a constitutional perspective, a different matter altogether when the state takes it upon itself to promote and reiterate those stereotypes through laws that exclude particular individuals from state-sponsored opportunities and benefits because of their sex. As Cruz argues, "[w]hile private individuals and groups should largely remain free to believe what they will about the sexual division of humankind, under the Constitution, government must give up its roles in reinforcing gender ideologies and social divisions based on sex and gender."[213]

The idea that men as fathers have unique skills and attributes that women as mothers do not and vice versa, while deeply ingrained in our culture, is nonetheless a form of gender stereotyping that is impermissible under equal protection jurisprudence. In the same way that in the *VMI* case there were female student applicants who had the skills and attributes necessary to participate in and benefit from the educational methods used by that

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[211] Nguyen v Immigration & Naturalization Serv., 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting) (citation omitted); *see also* J.E.B. v. Ala., 511 U.S. 127, 139 n. 11 (1994) (noting that the Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization") (citations omitted); Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975) (noting that although "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support[,] such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support" (citation omitted)).

[212] Craig v. Boren, 429 U.S. 190, 198 (1976).

[213] Cruz, *supra* note 210, at 999-1000.

institution, there are many women (regardless of sexual orientation) who have the skills and attributes that we usually associate with male parenting. Similarly, the social assumption and bias has always been that men are inherently less able to provide their children with a form of love and care that is as deep and as selfless and as meaningful as "maternal" love and care. If there were clear evidence of harm (as opposed to mere difference) among the children of lesbians and gay men because they in general abide by fewer traditional gender roles and expectations as a result of their parents' sexual orientation (again, assuming the future research confirms this), then the need for the state to promote gender role modeling might be an important enough state interest to survive heightened judicial scrutiny. But in the absence of such evidence, the state has nothing to go on other than (admittedly long-held) intuitions and assumptions about what men are (in)capable of providing and what women are (in)capable of providing as parents to their children.

B. *Parental Gender Role Modeling and Rational Basis Review*

The reliance by a state on the need to promote what it takes to be a proper form of gender role modeling for children as a justification for a ban on adoption by lesbians and gay men would also, as I explain below, be improper under rational basis review. I will here, as in the previous section, limit myself to the issue of gender role conformity among children. It is of course true that even if a state cannot rely on the gender role modeling rationale to support a law that prohibits lesbians and gay men from adopting, it might still nonetheless be able to muster other types of justifications for such a law that would satisfy the rational basis test. My objective here is simply to show why a state should be required to look elsewhere for such justifications.

Under rational basis review, the state must have a legitimate purpose for the classification and the means chosen must be rationally related to that purpose.[214] Even though this is a highly deferential standard of review, the Court has used it on several occasions to strike down laws.[215] Professors Rotunda and Nowak explain the content of the rational basis test as follows:

> Although the rationality test . . . involves a very high degree of deference to the legislature, courts should strike down laws under the rationality test when it is clear that there is no purpose for a classification other than denying a benefit (even if it is not a fundamental right) to a group (even a non-suspect classification) when the denial of the benefit can serve no possible purpose other than the desire to discriminate against

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214 *See* Heller v. Doe, 509 U.S. 312, 330 (1993).

215 *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

a group which is disfavored by the legislature.[216]

In *City of Cleburne v. Cleburne Living Center*, for example, the Court applied the rational basis test to invalidate the application of a zoning ordinance that resulted in the denial of a special use permit requested by the operators of a community home for the mentally disabled.[217] The Court found that all the reasons provided by the City as to why the special use permit was denied lacked a rational relationship to any legitimate government interest. The Court rejected the City's argument that the negative reactions of the neighbors to the presence of mentally disabled individuals in the area were a sufficient ground to justify the denial of the permit.[218] Similarly, arguments related to the possible flooding of the area and how that might impact individuals living in the group home could not be distinguished rationally from concerns about how flooding might affect other types of multi-resident facilities (such as nursing homes and hospitals) that were allowed to operate in the area without having to apply for a special use permit.[219] In the end, the Court concluded that the denial of the permit "appears to us to rest on irrational prejudice against the mentally retarded."[220]

Similarly, the Court in *Romer v. Evans* applied rational basis review to strike down a state constitutional amendment approved by Colorado voters that prohibited state and local governments from enacting anti-discrimination laws on the basis of sexual orientation.[221] The Court was troubled by the fact that the amendment imposed a broad form of legal disability upon only one group of citizens based on their status. The Court held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[222] Although I will return to *Romer* below and apply its reasoning to an adoption ban imposed only on lesbians and gay men, the point for now is that rational basis review can, under certain (admittedly limited) circumstances, strike down state laws that impose unequal burdens on a distinct group of individuals.

The transmission of traditional gender roles and preferences from one generation to the next is, for the reasons discussed in the previous section, not a legitimate state interest.[223] The fact that under rational basis review we ask

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216 ROTUNDA & NOWAK, *supra* note 80, at 246.

217 473 U.S. 432 (1985).

218 *See id.* at 448.

219 *See id.* at 449. Other explanations proffered by the City for the denial of the permit, all of which were rejected by the Court, included the need to protect the residents of the home from possible physical aggression on the part of students at a nearby high school and the total number of individuals who would be living at the home. *See id.* at 449-50.

220 *Id.* at 450.

221 517 U.S. 620 (1996).

222 *Id.* at 633.

223 *See supra* note 172-213 and accompanying text.

only whether there is a legitimate state interest (as opposed to under intermediate heightened scrutiny review where we ask whether there is an *important* state interest)[224] would not help the state in this case. The transmission and perpetuation of gender stereotypes through state policy is a per se illegitimate objective in the same way that a state policy that perpetuates stereotypical assessments of the skills and attributes of members of racial minorities is per se illegitimate.[225] As noted in the previous section, the promotion by the state of what it considers to be proper gender role modeling is necessarily based on the notion that parents have "different talents, capacities, or preferences" based on their sex.[226] It is constitutionally impermissible for the state to base policies on such presumptions of gender stereotypes.

Even if a court were to find that the promotion of a particular kind of gender role modeling through dual gender parenting is a legitimate state interest, prohibiting lesbians and gay men from adopting is not a means that is rationally related to the pursuit of that interest. This is the case as long as single individuals are permitted to adopt, as they are in every state in the nation.[227] Even if one were to concede that the state has a legitimate interest in having children raised by parents of different genders because, presumably, the parent of one gender can offer benefits to the children that a parent of the other gender cannot and because the children will learn from their dual gender parents what the state considers to be appropriate gender identities, it is nonetheless entirely arbitrary to permit single women and single men to adopt (as long as they are heterosexual), but prohibit other single women and men (i.e., lesbians and gay men) from adopting.[228] As noted in the previous section, the supposed advantages of dual gender parenting is equally absent from both categories of households.[229] A single woman who is heterosexual and a single woman who is a lesbian are equally unable to provide those benefits to children that are supposed to be specific to male parents. Similarly, a single man who is heterosexual and a single gay man are equally unable to provide those benefits to children that are supposed to be specific to female parents. And yet in many states, adoptions by single individuals constitute a significant percentage of the total number of adoptions. In Florida, the only state that categorically bans all lesbians and gay men from adopting, for example, *twenty five percent* of the adoption placements are made to parents who are single.[230]

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224 *See supra* sources cited in note 166.

225 *See* J.E.B. v. Alabama, 511 U.S. 127, 139 (1994) (rejecting the state's assumption "that gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender").

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

227 *See supra* note 184 and accompanying text.

228 The scenario outlined here is the current state of the law in Florida.

229 *See supra* notes 184-85 and accompanying text.

230 The State in the *Lofton* litigation stipulated to this fact. *See* Appellants' Brief at 28,

(*continued*)

The State's objection to households headed by lesbians and gay men – namely, that "[b]y their very nature, such households are necessarily motherless or fatherless, and are not stabilized by marriage"[231] – applies equally to all households headed by single parents.[232]

Furthermore, Florida regularly places children with lesbian and gay foster parents.[233] And yet, under Florida law those very same foster parents are ineligible to adopt those very same children because of the parents' sexual orientation. If the State of Florida is correct in arguing that lesbian and gay adoptive parents are unable to provide their children with what it considers to be proper gender role modeling, then neither can lesbian and gay foster parents. Although it is true that in some instances foster placements can be for a relatively short period of time, in many other instances children can be with the same foster parents for many years.[234] This means that Florida is allowing some children to be raised by lesbians and gay men (as foster parents) for

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Lofton v. Kearney, (pending before 11th Cir.) (No. 01-16723-DD) [hereinafter *Appellants Brief*]. In Miami-Dade, the percentage of adoption placements in single family households is over forty percent. *See id.* Furthermore, given the much greater number of children who need to be adopted than the number of available married heterosexual couples willing to adopt, the ban against adoption by lesbians and gay men does not advance the stated government interest in having children placed with heterosexual married couples. *See id.* at 29-30. If every married heterosexual couple in Florida that was interested in adopting did so, there would still be thousands of children waiting to be adopted. *See id.*

231 *Florida's Brief, supra* note 141, at 16.

232 The court in *Lofton* concluded that lesbian and gay parents "are not similar in all relevant aspects to other nonmarried adults" because heterosexual "[n]onmarried adults, unlike homosexuals, can get married." Lofton v. Kearny, 157 F. Supp. 2d 1383, 1385 (Fla. 2001). As Mark Strasser argues, however, the court failed to recognize that the Florida adoption statute operates under a different kind of classification than does the Florida marriage statute. The former classifies according to sexual orientation, while the latter classifies according to gender. Lesbians and gay men are prohibited from adopting, but they are not, strictly speaking, prohibited from marrying because they can marry someone of the opposite gender (as some lesbians and gay men do before realizing that they have a same-gender sexual orientation). *See* Strasser, *supra* note 156 (forthcoming, 2003). A single heterosexual who has no interest in marrying would still be allowed to adopt in Florida, but a lesbian or gay person would be categorically prohibited from adopting even if they were, for example, already married to someone of the opposite gender. *See id.*

233 *See Appellants' Brief, supra* note 230, at 31. The State also allows lesbians and gay men to become the legal guardians of children after the rights of the legal parents have been terminated. In fact, another plaintiff in *Lofton* was a gay man who became the legal guardian of a child under Florida law at the request of the child's biological father. (The child's biological mother was deceased). *See id.* at 10.

234 In fact, the State of Florida placed eight children in the home of Steven Lofton (all of whom were either HIV-positive or had been diagnosed as having AIDS). *See id.* at 7. "Although some of the children Lofton took care of were with him in temporary placements, four, all of whom he took in as infants, were not." *Id.* At the time of the lawsuit, two of those four children were fourteen years old and a third one was eleven. *See id.* The fourth child died of AIDS when she was six. *See id.*

many years even though those parents are, according to the State in the adoption litigation, unable to provide the children with what it considers to be proper gender role modeling. The fact that Florida allows (heterosexual) single parents to adopt and lesbians and gay men to be foster parents suggests that the ban on adoption by lesbians and gay men has less to do with concerns about proper gender role modeling and more to do with a steadfast (and irrational) objection to the idea that the law should recognize lesbians and gay men as full parents.

A state defending an exclusionary adoption law could retort by contending that the argument raised here – that single heterosexual parents and lesbian and gay foster parents are as unable to provide children with what the state considers to be proper gender role modeling as are prospective lesbian and gay adoptive parents – is one of an improper fit between the classification used to exclude some from a state-sponsored opportunity and what the state is trying to accomplish. Under rational basis review, that fit does not have to be precise. It is possible, in other words, for a law or regulation to be either overinclusive or underinclusive without running afoul of the rational basis test. One of the cases usually cited for this proposition is *Massachusetts Board of Retirement v. Murgia* in which the Court rejected an equal protection challenge to a law that, because of concerns about physical fitness, mandated that uniformed police offices retire by the age of fifty.[235] Even though the fit between the means and the ends in *Murgia* was not perfect, because there were undoubtedly some police officers over the age of fifty who would still be able to do their jobs well, the Court concluded that the law nonetheless satisfied the rational basis test.[236] The fact that "the State perhaps has not chosen the best means to accomplish" its objective does not make those means irrational.[237] In the context of the adoption ban, therefore, a state could argue that the fact that single heterosexuals are allowed to adopt, and even the fact that some lesbians and gay men are allowed to be foster parents, does not make the gender role modeling justification for prohibiting lesbians and gay men from adopting an irrational one. That kind of underinclusiveness, a state can argue, does not render the adoption ban unconstitutional under rational basis review.

It is interesting to note that Justice Scalia, in his dissent in *Romer,* relied on *Murgia* and other similar cases to support the proposition that Colorado's constitutional amendment did not run afoul of the rational basis test.[238] Justice Scalia argued that if it is constitutional for a state to criminalize same-gender sexual conduct after *Bowers v. Hardwick,*[239] then it is per se constitutional for

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235 *See* Mass. Bd. of Ret. V. Murgia, 427 U.S. 307, 314 (1976) (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

236 *See* Murgia, 427 U.S. at 316.

237 *See id.*

238 Romer v. Evans, 517 U.S. 620, 642-43 (Scalia, J. dissenting).

239 478 U.S. 186 (1986).

a state to enact laws that disfavor, but do not punish, homosexuality.[240] Justice Scalia was not troubled that the former regulation (i.e., the criminal statute) requires a particular kind of conduct on the part of the person being regulated, while the latter negatively affects individuals simply based on their status as lesbians and gay men, because, in his opinion, "where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct."[241] Thus, the fact that the constitutional amendment was overinclusive, in the sense that it negatively affected some individuals who are lesbian or gay but who do not engage in the conduct (same-gender sodomy) that a state is permitted to criminalize, was not constitutionally problematic for Justice Scalia because the rational basis test does not require anything more than a rough correspondence between means and ends.

Justice Scalia's arguments, however, were rejected by the majority in *Romer*. The Court gave much weight to the fact that lesbians and gay men in Colorado, after the enactment of the constitutional amendment, were put "in a solitary class" because they "but no others" were deprived of a host of "specific legal protection from the injuries caused by discrimination."[242] The fact that lesbians and gay men were singled out in this way indicated to the Court that what was driving "the amendment seems inexplicable by anything but animus toward the class it affects," and therefore, the constitutional amendment "lacks a rational relationship to legitimate state interests."[243]

The concern that the Court had in *Romer* is present in the exclusionary adoption laws of states such as Florida and Mississippi. The adoption statutes in those states explicitly prohibit lesbians and gay men, *and no others*, from adopting. In both states, one can be a convicted felon, even a convicted murderer or child abuser, and still not be categorically and statutorily denied the opportunity to adopt in the same way that lesbians and gay men are denied. The only category of individuals that is specifically excluded under the Florida and Mississippi adoption statutes from having the opportunity to demonstrate that they are qualified to be adoptive parents is that consisting of lesbians and gay men. This would suggest that what is motivating the categorical bans is a form of animus or irrational prejudice against the targeted group. The fact that not even convicted murderers and child abusers are targeted in this fashion suggests that lesbians and gay men are being singled out for differential treatment based on improper and irrational motivation on the part of the state.

The irrationality of categorically banning adoption by lesbians and gay men but not doing so for any other group (including convicted murderers) can

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240 *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

241 *Id.* at 642 (Scalia, J., dissenting). Scalia also noted that lesbians and gay men in Colorado who did not engage in sodomy could bring an as applied challenge to the constitutional amendment. *See id.* at 643.

242 *Id.* at 627.

243 *Id.* at 632.

be illustrated through the Florida case of *Ward v. Ward*.[244] After the Wards divorced in 1992, the father agreed that the mother should have primary custody of the couple's daughter.[245] The mother, who was a lesbian, retained custody of the child for several years until the father petitioned to have primary custody transferred from his former wife to himself because he believed that the mother's relationship with another woman was adversely affecting the child.[246] The trial court agreed and ordered that primary custody be changed from the mother to the father.[247] Although there was no allegation that the mother engaged in improper conduct in front of her child, the trial court concluded that what it believed was the daughter's "problematic behavior" (such as cursing and making sexually suggestive comments) was the result of the mother's lesbian relationship.[248] The court of appeals affirmed the trial court's ruling, concluding that the lower court had not abused its discretion.[249]

What is striking about *Ward* is that the father, who could have prevailed only by meeting the high burden of demonstrating a substantial and material change in circumstances since the original decree awarding custody, was a convicted murderer who had served eight years in prison for murdering his first wife.[250] Whether the court in *Ward* was correct in transferring custody from the lesbian mother to the convicted murderer father is not what is crucial here. What is important for our purposes is that under Florida adoption law, the convicted murderer father in *Ward* would not have been categorically denied the opportunity to adopt another child, if he had wanted to do so, while the lesbian mother would have been so denied. Mr. Ward was able to convince the court in the custody proceeding that he had learned from his past mistakes, stayed out of trouble since his release from jail, and stabilized his life though a new marriage and steady work.[251] Under the Florida adoption statute, Mr. Ward would have had a similar opportunity to convince the State that allowing him to adopt would be consistent with a child's best interests. In

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244 742 So.2d 250 (Fla. Dist. Ct. App. 1996).

245 *See id.* at 252.

246 *See id.* The mother also had a daughter from a previous marriage living in her house. This daughter, who was twenty-six years old at the time, was also a lesbian. The daughter's female partner also lived in the same house. *See id.*

247 *See id.* at 253.

248 *See id.* at 252-53.

249 *See id.* at 253.

250 *See id.*

251 *See id.* The court noted that

> [e]xcept for minor traffic offenses . . appellee has not been charged with or convicted of any criminal offense since being released from prison. He has also maintained stable employment and is presently married to Rita Ward, who testified that she has a good relationship with C.W., that she loves C.W., and felt that C.W returned her love.

Id.

contrast, the lesbian mother in *Ward* would have been categorically banned from adopting based solely on her sexual orientation.

The singling out of only one group of individuals to categorically exclude them from the opportunity to adopt is constitutionally problematic under the reasoning of *Romer*. In order to justify the targeting of lesbians and gay men and imposing on them a unique and categorical legal disability, the state needs more than the aim of promoting what it considers to be proper gender role modeling.[252] As noted at the beginning of this section, it may well be that a state would be able to justify the ban on grounds that are not related to the degree of gender conformity on the part of the children of lesbians and gay men. The gender argument, however, is an important part of what a state such as Florida relies on to prohibit lesbians and gay men from adopting. To disqualify the gender role modeling argument makes it more likely that a law such as Florida's will be seen for what it is, namely, one that "serve[s] no possible purpose other than the desire to discriminate against a group which is disfavored by the legislature."[253]

IV. CONCLUSION

Much of the disagreement between critics and defenders of lesbian and gay families has centered on the meaning and implications of the social science research that has studied those families. Most supporters of lesbian and gay families have contended that there are no differences in either the parenting styles of lesbians and gay men or the preferences and behavior of children of lesbians and gay men when compared to heterosexual parents and their children.

Following up on Stacey's and Biblarz's important essay, I have attempted in this article to move beyond the disagreement over the meaning and implications of the empirical data by conceding to critics, for purposes of argument, that there are in general differences in gender role conformity between the two groups of children. As we have seen, this concession changes

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[252] The Court in *Romer* was troubled by the sheer number of legal disabilities that the Colorado constitutional amendment imposed on lesbians and gay men. *See* Romer v. Evans, 517 U.S. 620, 629-32 (1996). It could be objected, therefore, that a law that limits itself to prohibiting lesbians and gay men from adopting should be distinguished from one that, like the Colorado amendment, is more expansive in its coverage. There are at least two responses to this objection. First, it can be argued that the "animus" component of *Romer* is more important than the "breadth" component. *See generally* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL. RTS J. 89 (1997) (arguing that the Court struck down the Colorado amendment because of its impermissible purpose). Second, the Court in *Cleburne* held the state action in that case unconstitutional because of the "irrational prejudice against the mentally retarded" that motivated it, even though the state action was limited to the narrow issue of the denial of a special permit under zoning law. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985). For a discussion of *Cleburne*, see *supra* notes 217-20 and accompanying text.

[253] NOWAK and ROTUNDA, *supra* note 80, at 246.

the terms of the debate by forcing us to focus not on whether there are differences, but instead on the normative and policy implications of those differences. As we have also seen, the idea that children require dual gender parenting for proper (gender) development is inextricably linked to the notion that parents have unique skills and capabilities that are specific to their sex. It is also linked to the idea that society has an interest in promoting traditional gender-related preferences and behavior.

More than a century ago, the Supreme Court in *Bradwell v. Illinois* held that it was constitutional for a state to ban women from the legal profession.[254] A concurring opinion written by Justice Bradley and joined by two other Justices noted that

> the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.[255]

Rather than pursuing careers outside of the home, Justice Bradley counseled, "[t]he paramount destiny and mission of woman [should be] to fulfil the noble and benign offices of wife and mother."[256]

With the virtue of hindsight and moral progress, we can look back in disbelief at the way in which Justice Bradley's opinion relied on rigid, narrow, and ultimately specious understandings of the abilities and potential of women, and the supposed natural differences between men and women, to justify and defend what is (to us now) an obviously impermissible discriminatory policy on the part of the state. It may take another century for most people, including most judges and legislators, to understand that the view that parents have skills and attributes that are determined by their sex is similarly problematic, especially when it is incorporated into state policies that exclude certain individuals from certain opportunities (such as lesbians and gay men from adopting). In the meantime, however, we need to argue, as I have attempted to do here, that the problem lies not with the parenting of lesbians and gay men, but with the normative positions, based on stereotypical understandings of gender roles, that are used to evaluate and assess the effects of that parenting.

Because there are no fathers (if we limit that term to male parents) in families headed by lesbians and there are no mothers (if we limit that term to female parents) in families headed by gay male parents, lesbian and gay parents, by their mere existence, present an ideological challenge to the traditional gender roles from within the very site (the family) where those roles

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[254] 83 U.S. (16 Wall.) 130 (1872).

[255] *Id.* at 141 (Bradley, J., concurring).

[256] *Id.*

are supposed to be transmitted from one generation to the next. Stacey and Biblarz, in their essay reviewing the research on lesbian and gay parents, raise the possibility that the ideological challenge may have empirical repercussions in terms of the gender role conformity of children raised by lesbians and gay men. As I have argued in this article, however, those repercussions are negative only if there is independent normative or practical value in traditional gender roles. The more we question those roles, and the more we argue that behind them are normatively vulnerable positions that in practice constrain the potential and dreams of at least half the population, the more likely it will be that lesbian and gay parents will no longer be seen as a threat either to the well-being of their children or to the welfare of society.