Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology

Catherine E. Smith†

Introduction

In 1994, Sarah and Mary fell in love. Although their state offered no legal recognition for gay and lesbian couples, they moved in together and built a life as a couple.[1] *Five years later, after alternative insemination, Sarah gave birth to their child, Lucy. Although Mary was prohibited from adopting Lucy in their state, they raised her jointly with the intent to both be parents to Lucy and to share equal parenting responsibilities. In 2010, Mary, Sarah, and Lucy were in a car accident. Sarah and then eleven-year-old Lucy escaped without injury, but Mary suffered devastating injuries and died days later.*

Gay and lesbian rights litigation and scholarship offer a broad range of theories defining, limiting, and expanding the

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†. Associate Professor of Law and Associate Dean of Institutional Diversity and Inclusiveness, University of Denver Sturm College of Law. I extend thanks to *Law and Inequality* for its excellent symposium, "Family Values: Law and the Modern American Family." Thanks to Rebecca Aviel, Nancy Ehrenreich, Jennifer Holladay, Holning Lau, Angela Onwuachi-Willig, and Shannon Minter. I would also like to thank Diane Bull for her excellent research assistance, and the students in my spring semester Gender, Sexuality, and the Law course for their excellent feedback. This article is dedicated to Zoe Jane Smith-Holladay—my rowdy, biological five-year old whose non-bio mom, Jennifer, is as much of a mom to Zoe as I am.

1. Thirty-six states fail to provide comprehensive statewide recognition of same-sex couples. *See* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 FAM. ADVOC., Winter 2010, at 10, 10. Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont offer same-sex marriage; California, Nevada, New Jersey, Oregon, and Washington offer civil unions or domestic partnerships. HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY AND OTHER RELATIONSHIP RECOGNITION LAWS 1 (2010), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf. Even in states that offer same-sex marriage, same-sex families are denied federal benefits because of the Federal Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)); *see* Bonauto, *supra*, at 14.

rights of Sarah and Mary as a same-sex couple. Far less attention has been dedicated to exploring the rights of children of same-sex couples,[2] many of whom, like Lucy, live in states that have minimal, if any, legal protections against discrimination on the basis of sexual orientation.

Lucy faces a host of roadblocks in seeking many benefits and privileges, particularly as they relate to Mary, her non-biological lesbian parent—benefits and privileges that children of heterosexual parents are afforded as a matter of course because of affinity, consanguinity, or adoption.[3] Even after an eleven year child-parent relationship defined by emotional, psychological, and financial support, Lucy and Mary are legal strangers.[4] Before Mary's death, Lucy was denied the right to be adopted by Mary.[5] Had Mary and Sarah split up, Lucy would not have been legally entitled to financial support, visitation, or a custodial arrangement with Mary.[6] Immediately after the accident, Lucy could be denied hospital visitation for the last days of Mary's life because she failed to qualify as Mary's "immediate family member."[7]

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2. For contributions to this area of scholarship, see Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999 (2008); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411 (1999).

3. For a more comprehensive discussion and list of rights, benefits, and privileges, see Graham, *supra* note 2, at 1034–36; Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, MOD. AM., Summer–Fall 2007, at 3, 4–6; Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, HUM. RTS., Spring 1999, at 7, 7–11; Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006).

4. *See* Silverman, *supra* note 2, at 447 ("Absent legal recognition of the parent-child relationship, standing is absent, and the two are legal strangers . . . ."); Castic, *supra* note 3, at 5–6.

5. Ten states and the District of Columbia have laws permitting second-parent adoptions by same-sex couples. HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: SECOND PARENT ADOPTION 1 (2010), http://www.hrc.org/documents/parenting_laws_maps.pdf. Within an additional fifteen states, same-sex couples have been successful in obtaining second-parent adoptions in some jurisdictions. *Id.*

6. Graham, *supra* note 2, at 1016–19; William Mason Emnett, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433, 437 (1997) ("By and large, courts . . . have refused to extend custody or visitation rights to gay co-parents.").

7. *Cf.* Lewis v. Harris, 908 A.2d 196, 202–03 (N.J. 2006) (recounting, in a challenge to New Jersey's same-sex marriage ban, the denial of hospital and medical facility privileges to same-sex partners, including an instance where one partner gave birth to the couple's child).

Lucy's rights after Mary's death are even bleaker. She would not be entitled to Mary's Social Security benefits or considered an heir to Mary's estate if Mary died intestate.[8] In addition, in most jurisdictions, Lucy would be precluded from bringing a wrongful death claim or seeking recovery for emotional harm from potential defendants.[9] These are simply a few of the benefits and privileges Lucy and children like her are denied and will be denied when it comes to their non-biological gay or lesbian parents.[10]

An underdeveloped area of sexual orientation and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children of same-sex families.[11] Oddly enough, the most recent cases denying gays and lesbians the right to marry or to adopt rely heavily on the importance of conceiving and raising children. Yet legal doctrines on the rights of children are rarely invoked.[12]

This Essay argues that there is strong precedent for children of same-sex couples to challenge the inequalities they face because of discrimination against their gay and lesbian parents. Although a reasonable litigation arena for pursuing the rights of a child of gay and lesbian parents may be in a same-sex marriage ban case,

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8. *See* Silverman, *supra* note 2, at 442 (discussing Social Security benefits for children of same-sex couples); Maureen B. Cohon, *Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 DUQ. L. REV. 495, 508 (2003) ("[I]f the partner who is not legally recognized as a parent dies intestate, his or her estate will not pass to the children because they have no legal relationship to the partner.").

9. *See* Silverman, *supra* note 2, at 442–43; Castic, *supra* note 3, at 5; *see also* John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171 (2005) (providing an in-depth look at the unjust effects wrongful death laws have on surviving members of same-sex couples).

10. For sources providing more comprehensive lists of rights, benefits, and privileges, see *supra* note 3. For real life stories of the psychological and social toll these denials have had on children, see Sarah Wildman, *Children Speak for Same-Sex Marriage*, N.Y. TIMES, Jan. 20, 2010, at E1.

11. For an in-depth discussion of the rights of foster children of color to be adopted by gay and lesbian parents, see Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1 (2008). Other areas within the realm of third-party claims could include exploring the theories on behalf of parents or other family members who experience discrimination because of their familial connection to someone who is lesbian, gay, bisexual, or transgender (LGBT). There is also room to explore associational claims by those who face discriminatory acts by virtue of their friendship or business dealings with LGBT individuals or families.

12. *See* Castic, *supra* note 3, at 7–8 ("To the extent that the plight of the children of same-sex couples is addressed, it is done as a secondary matter."). For a list of the privileges afforded heterosexual couples and mono-racial families, see Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231 (2009).

a claim need not be launched on such a grand scale to address the rights of a child of same-sex parents. As explained later in this Essay, a more direct and perhaps less controversial approach could be a child plaintiff challenging a government denial of a privilege or benefit, like the denial of a wrongful death recovery for the loss of his or her non-biological gay or lesbian parent.[13] Whether joining a marriage case or simply staking claim to a government benefit, a child plaintiff as a litigant—standing in his or her own right and seeking recourse for a cognizable federal or state constitutional injury—may serve as the Achilles' heel of an already faltering anti-gay rights movement.[14]

Part I of this Essay provides a brief overview of equal protection law and its application to discrimination on the basis of sexual orientation. It then describes the most prominent rationales deployed by government defendants in same-sex marriage cases to justify same-sex marriage prohibitions. Part II explains the virtually non-existent status of children of same-sex couples in equal protection law. These children are rarely plaintiffs in same-sex marriage litigation, or in cases—outside of the marriage context—challenging state actions that deny them government benefits because the state fails to legally recognize the child's relationship to his or her non-biological gay or lesbian parent. Part II then explores government rationales from the perspective of a child litigant denied the right to pursue a wrongful death claim of a non-biological gay or lesbian parent, and explains how these rationales—based in biology, legitimacy, and dual-gender parenting—are unlikely to prevail. These rationales, used to deny same-sex couples legal recognition of their relationships and gay and lesbian adoptions, have withstood rational basis review in many jurisdictions. These same rationales are more difficult to justify when applied to child plaintiffs because they fly in the face of existing equal protection jurisprudence designed to protect the rights and interests of children. This Essay briefly concludes by raising concerns about a children's rights perspective that warrant further research and reflection.

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13. A child of heterosexual parents can generally file a wrongful death claim for the loss of either parent, whether the child's parents are married or not, as long as paternity is established. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (allowing illegitimate children of the deceased to recover damages in the wrongful death of their mother); Daniels v. Greenfield, 15 So.3d 908 (Fla. Dist. Ct. App. 2009) (discussing the role of paternity in a wrongful death case); Sanders v. Tillman, 245 So.2d 198 (Miss. 1971) (discussing the application of Mississippi's wrongful death statute to the deceased's illegitimate son).

14. This Essay will not address issues of standing.

This Essay, exploring the rights of children of same-sex couples, comes with some caveats. First, at a glance, it may appear to solely advocate for same-sex marriage as the legal solution. This essay is not intended to directly advocate for same-sex marriage. Marriage could be one solution, at least prospectively, for children raised by many same-sex couples; however, it is not the only solution.[15] State and federal recognition of gay and lesbian adoptions and/or second-parent adoptions might also serve as legal remedies.[16] The focus of this Essay is on the rights of the child, and in that respect, it should serve as a political bridge for advocates on both the right and the left who may reject gay and lesbian marriage, albeit for very different reasons.

Second, by framing the discussion around a same-sex couple with a child, this Essay is both progressive and conservative in some aspects. It does not argue for a normative vision that offers protection for all children, regardless of their parental or family arrangements.[17] It offers a pragmatic approach to the disparate treatment of children of same-sex couples. It offers a progressive vision by challenging the hetero-normative structures of marriage and parenting by advocating for recognition of same-sex couples and their children. On the other hand, it is conservative by reinforcing the very structure that privileges a two-parent household and children in those households over other family constructions or extended families. Yet, shattering the barriers that prevent children of same-sex couples from enjoying the equal benefits and privileges available to children of opposite-sex couples may clear the legal pathway for a more expansive reading of parental relationships, responsibilities, and obligations for other children whose parents also fail to conform to the traditional nuclear family.[18] A focus on the rights of children of same-sex parents could be the route to same-sex marriage or second parent

15. Marriage recognition would seem to be the most practical solution for governments attempting to sort out the rights and responsibilities of the same-sex family unit, but homophobia and (other –"isms") are often far more powerful than practicality.

16. For potential solutions, see Vincent C. Green, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399 (1996); Rosato, *supra* note 3.

17. For a critique of arguments by both opponents and proponents of same-sex marriage and a theory that advocates social and legal support for all children, see Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005).

18. For an argument that LGBT families should explore how the definition of the traditional nuclear family is used to deny non-conforming families benefits and privileges, see Catherine Smith, *Queer as Black Folk*, 2007 WIS. L. REV. 379, 402–07.

adoption; it could also be the legal stepping stone to a more expansive definition of what types of child-adult relationships should be entitled to legal recognition by focusing on the rights and well-being of children.[19]

I. Equal Protection Law and Sexual Orientation

A. Basic Equal Protection Law

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."[20] Most legislation is presumed valid and will be upheld if the classification delineated by the statute is rationally related to a legitimate state interest.[21] As this test is traditionally understood, it is extremely deferential to the government's stated interests, and the means chosen to achieve those interests need only be reasonable; even to the extent that "legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data."[22] Further, the means chosen need only be a reasonable way to accomplish the government's objectives.[23] Although the rational basis standard has been described more recently as having two distinct versions, the "weak and strong approaches," most cases decided under rational basis review are decided in favor of the government.[24]

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19. In 2006, Ariela Dubler wrote an excellent essay based on the historical lessons of *McLaughlin v. Florida*, 379 U.S. 184 (1964), that offers two ways to view *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* could be viewed as either the doctrinal precursor to same-sex marriage, or "[could] be seen as the beginning of the extension of constitutional protection to a range of sexual practices that do not fall within monogamous marriage. Or perhaps it will spawn both." Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006).

20. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is binding on the federal government via the Fifth Amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (explaining that the Court has always treated "Fifth Amendment Equal Protection claims . . . precisely the same as . . . equal protection claims under the Fourteenth Amendment").

21. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (holding unconstitutional a city's requirement that a proposed group home for the mentally retarded obtain a special use permit because there was no rational basis for believing the group home would pose a threat to the city's legitimate interests).

22. Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).

23. *Id.* The burden of proof is on the plaintiff to show that the government's chosen methods are in fact unreasonable. *Id.*

24. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 514–

When a statute classifies on the basis of race, alienage, or national origin, however, the laws are subject to the highest level of review—strict scrutiny—and upheld "only if they are suitably tailored to serve a compelling state interest."[25] A court must determine that the government's purpose is "compelling" and the law must be "necessary" as a means of accomplishing that purpose.[26] In other words, the law must be the least restrictive or least discriminatory alternative.[27] Few government regulations withstand this most rigorous level of scrutiny.[28]

In between rational basis and strict scrutiny falls an intermediate level of review applicable to, for example, gender classifications and non-marital children.[29] Under intermediate scrutiny, the classification must be "substantially related to a sufficiently important government interest."[30] While not to the same extent as under strict scrutiny, few government regulations withstand intermediate scrutiny.[31]

Although the Supreme Court has explicitly declined to extend strict or intermediate scrutiny to government classifications based

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17 (2004). *But see* Romer v. Evans, 517 U.S. 620, 632–33 (1996) (striking down, in a rare deviation from typical rational basis review, Colorado's Amendment 2 because it was impermissibly driven by animus against gays and lesbians).

25. *City of Cleburne*, 473 U.S. at 440.

26. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007) (discussing the history and practice of strict judicial scrutiny).

27. *See Kramer*, 395 U.S. at 627; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529 (1997) ("Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government interest. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."); R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1283 n.19 (1994) ("At strict scrutiny, the Court applies the compelling governmental interest, direct relationship, and least restrictive alternative legislative fit test.").

28. *See Kramer*, 395 U.S. at 627. The burden of proof under strict scrutiny is on the government. *See id;* Korematsu v. United States, 323 U.S. 214, 219 (1944).

29. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that failure to provide support rights for nonmarital children violates equal protection).

30. *City of Cleburne*, 473 U.S. at 441. The government also has the burden of proof under intermediate scrutiny. *See* Parham v. Hughes, 441 U.S. 347 (1979) (applying intermediate scrutiny to the denial of a father's claim for the wrongful death of his child because the father had not legitimated the child).

31. *City of Cleburne*, 473 U.S. at 453–54.

on mental disability,[32] age,[33] or poverty,[34] it has yet to address what level of scrutiny is applicable to classifications on the basis of sexual orientation.[35]

The vast majority of federal and state courts to address the level of scrutiny for sexual orientation discrimination apply rational basis review.[36] This selection of the lowest level of review, with rare exception, ensures that a gay or lesbian plaintiff's equal protection challenge will be unsuccessful.[37] Under rational basis review, courts have denied gays and lesbians the benefits and privileges exercised by heterosexuals in a host of areas including adoption,[38] high-level security clearance,[39] bankruptcy protections,[40] and the most contested issue today, same-sex marriage.[41]

The next Section will discuss the rationales government defendants advance when denying same-sex couples the right to marry and prohibiting gay and lesbian adoption. In most federal and state courts, these rationales have been sufficient to withstand rational basis review.

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32. *Id.* at 442 (declining to use a heightened standard of review for classifications based on mental disability).

33. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (declining to use a heightened standard of review for classifications based on age).

34. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (declining to use a heightened standard of review for classifications based on poverty).

35. *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996) (declining to designate a specific standard of review to classifications based on sexual orientation, but analyzing a challenge to Colorado's constitutional amendment denying certain rights to homosexual persons under rational basis review). The Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), overturned the criminalization of homosexuality in a Texas statute, but did so based on the right to privacy and fundamental liberties of the Due Process Clause. The Court referred to the equal protection claim as "tenable" but did not address what level of scrutiny would apply. *Id.* at 574–75.

36. *See, e.g., Romer*, 517 U.S. at 623–26 (applying rational basis review to a challenge of Colorado's constitutional amendment denying certain rights to homosexual persons); Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (applying rational basis review to an action brought by same-sex couples against New Jersey state officials' actions in refusing to issue them marriage licenses).

37. *But see Romer*, 517 U.S. at 623–26 (striking down a Colorado amendment that would have precluded governmental protection against discrimination based on sexual orientation after applying rational basis review).

38. Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

39. High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990).

40. *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

41. *E.g.*, Andersen v. King County, 138 P.3d 963 (Wash. 2006) (denying marriage rights).

B. Same-Sex Marriage and Adoption Ban Rationales

In the legal battles over same-sex marriage, the most frequent arguments advanced by government defendants are based in traditional notions of marriage between a man and a woman. This Essay will briefly explain the three major arguments.[42]

1. Biology

The first argument is deeply rooted in notions of procreation and biological connections. The biology argument asserts that marriage should be limited to a man and a woman, not two men or two women, because only a man and a woman can produce a child that is biologically related to both of them.[43] For example, in *Andersen v. King County*,[44] in which gay and lesbian plaintiffs challenged Washington's Defense of Marriage Act[45] as a violation of Washington's privileges and immunities clause,[46] the state argued that "partners in a marriage are expected to engage in exclusive sexual relations with children the probable result and paternity presumed."[47] The court found this rationale to be related to a legitimate state interest because, absent third party involvement, no other relationship has the potential to create a child that is biologically related to both parents.[48]

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42. For a general overview of these arguments, see Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2752 (2008). For academic arguments supporting these government rationales, see Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 773–74, 779–80 & 790–91 (2002); 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, 797–99 (2001). *But see* Lewis v. Harris, 908 A.2d 196, 217 (N.J. 2006) ("The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children.").

43. *See* Gallagher, *supra* note 42, at 774.

44. 138 P.3d 963 (Wash. 2006).

45. In 1998, Washington adopted the state's Defense of Marriage Act, limiting marriage to unions between a man and a woman, and prohibiting marriage for couples other than one male and one female. WASH. REV. CODE § 26.04.020 (1998).

46. Courts interpreting Washington's privileges and immunities clause apply the same constitutional analysis as that applied to the U.S. Constitution's Equal Protection Clause. *Andersen*, 138 P.3d at 972. Plaintiffs also challenged the state's Defense of Marriage Act as a violation of privacy and the state's equal rights amendment. *See id.* at 973. The Supreme Court of Washington rejected the application of a suspect or quasi-suspect classification to gays and lesbians, applying the deferential rational basis standard of review to the state legislature's decision to allow only opposite-sex couples to marry. *See id.* at 975.

47. *Id.* at 982.

48. *Id.*; *see* Wilson v. Ake, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (noting the state's argument that Florida's Defense of Marriage Act "fosters the

2. Legitimacy

The second rationale invoked by government defendants in same-sex marriage challenges is related to the first, but focuses on encouraging the rearing of a biological child within a marriage, as opposed to outside of it.[49] By this rationale, legislatures are justified in encouraging marriage for opposite-sex couples who have relationships that result in children, because it is preferable to having children raised by unmarried parents.[50] A variation on this argument is that states must encourage opposite-sex marriage because these couples' sexual relations can lead to pregnancy accidentally, something that cannot happen in same-sex relations.[51] The unique heterosexual ability to accidentally have children creates a state incentive to encourage and promote stability in marriage for these children.[52]

In *Hernandez v. Robles*, the same-sex marriage ban challenge in New York, the state's highest court clarified this point: "the Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples . . . [who] can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result

development of relationships that are optimal for procreation, thereby encouraging the 'stable generational continuity of the United States.'" (citation omitted)); Standhardt v. Superior Court *ex rel.* Maricopa, 77 P.3d 451, 462 (Ariz. Ct. App. 2003); Conaway v. Dean, 932 A.2d 571, 630–31 (Md. 2007); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The court in *Andersen*, 138 P.2d at 980–85, also agreed with the state that the need to resolve conflicting rights and obligations of same-sex couples in relation to a child is another rational basis for limiting marriage to opposite-sex couples. Although the procreation argument has been successful in most jurisdictions, some courts have refused to find a same-sex marriage ban rationally related to the encouragement of procreation and the raising of a couple's biological child. In *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), a case involving a same-sex marriage ban challenge, the Massachusetts Supreme Court found that denying marriage licenses to same-sex partners violated the equal protection provision of the state constitution. *Id.* at 969. The court declined to decide whether the statute infringed on a fundamental right or targeted a suspect class because the state's policy was unconstitutional under the most minimal rational basis inquiry. *Id.* As to the procreation argument, the Court found that the statute failed to be rationally related to providing a "favorable setting for procreation" because fertility and procreation are not prerequisites to obtaining a marriage license. *Id.* at 961. The court reasoned that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.*

49. *See* Morrison v. Sadler, 821 N.E.2d 15, 23–27 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen*, 138 P.3d at 982.

50. *Morrison*, 821 N.E.2d at 25; *Hernandez*, 855 N.E.2d at 6–7; *Andersen*, 138 P.3d at 982.

51. *Hernandez*, 855 N.E.2d at 7.

52. *Id.*

of accident or impulse."[53] The court theorized that this potential accident or impulse on the part of opposite-sex couples creates a greater danger that children will be raised in "unstable" homes than with same-sex couples.[54]

3. Dual-Gender Parenting

The third argument invoked is that government defendants have a legitimate interest in limiting marriage and adoption to opposite-sex couples because "children thrive in opposite-sex marriage environments . . . ."[55] In *Lofton v. Secretary of the Department of Children and Family Services*,[56] a challenge to Florida's ban on homosexual adoption, the Eleventh Circuit explained that the regulation was permissible under the Equal Protection Clause because it was rationally related to the best interests of Florida's adopted children by placing them in homes with married heterosexual parents.[57] Florida, the court found, had a legitimate interest in encouraging the "optimal" family structure, which included a home with both a mother and father, because of the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[58] The court dismissed the plaintiffs' argument that Florida's role-modeling rationale was not rationally related to its objectives of dual-gender parenting because the state allowed single heterosexual persons to adopt, on the grounds that gays and lesbians were not similarly situated to heterosexual singles.[59] The court explained that, unlike gays and lesbians, heterosexual

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53. *Id.* at 7.

54. *Id.* The Massachusetts Supreme Court in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) found that limiting marriage to opposite-sex couples was not related to ensuring that children are raised in an "optimal" setting with one parent of each sex, because the demographics of the U.S. family make it difficult to describe the average family and the state offered no evidence to show that denying same-sex couples marriage would increase the number of opposite-sex couples raising children. *Goodridge* at 963. The court also added that extending marriage to same-sex couples would offer a more stable family structure for the children in those households. *Id.* at 962–64; *see also* Baker v. State, 744 A.2d 864, 884 (Vt. 1999) (rejecting the argument that Vermont public policy favored opposite-sex parents as "patently without substance" in light of statutes permitting same-sex adoption and offering legal protections in the event of dissolution of same-sex relationships).

55. *Andersen*, 138 P.3d at 983.

56. 358 F.3d 804 (11th Cir. 2004).

57. *Id.* at 819–20.

58. *Id.* at 818. For further background on these arguments, see Ball, *supra* note 42, at 2752–56.

59. *Lofton*, 358 F.3d at 821–22.

singles have a greater probability of *eventually* establishing a stable dual-gendered household.[60]

These three arguments, successfully deployed against same-sex couples, could play out very differently if and when a child is a plaintiff in a same-sex marriage case, or in a suit in which the child is denied a government benefit—like a wrongful death recovery—of a non-biological gay or lesbian parent.

II. The Children of Same-Sex Couples as Plaintiffs

A. Identifying the Cognizable Injury

Courts and commentators have no problem identifying the many benefits and privileges that children of same-sex families are denied, even as they refuse to extend these protections to those children by granting recognition of their parents' unions or allowing gays and lesbians to adopt.[61]

In *Standhardt v. Superior Court of Arizona*,[62] a gay male couple challenged Arizona's same-sex marriage ban as violative of their fundamental right to privacy under both the federal and state constitutions.[63] After holding that same-sex marriage was not a fundamental liberty interest, and that gays and lesbians were not a suspect or quasi-suspect class, the Arizona Court of Appeals upheld the marriage provision because the state's limitation on marriage was rationally related to its legitimate interest of "encouraging procreation and child-rearing within the stable environment traditionally associated with marriage."[64] The court further explained that "although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity was insufficient to negate Arizona's link between opposite-sex marriage, procreation, and child-rearing."[65]

Despite the acknowledged "inequity" that children of gay and lesbian parents may experience, these children are relegated to the sidelines even as the debate about their parents' rights and

60. *Id.* at 822.

61. *E.g.*, Andersen v. King County, 138 P.3d 963, 990 (Wash. 2006) (noting that "the record is replete with examples as to how the definition of marriage negatively impacts gay and lesbian couples and their children" but nevertheless upholding the constitutionality of the state's Defense of Marriage Act).

62. 77 P.3d 451 (Ariz. Ct. App. 2004).

63. *Id.* at 454.

64. *Id.* at 461.

65. *Id.* at 463.

responsibilities simmers, percolates, boils, and often erupts in the intense national battle over gay and lesbian adoption and same-sex marriage.[66] It is rare for advocates to advance—and for courts to consider—the potential rights and remedies of actual children of gay and lesbian couples, as demonstrated by the lack of precedent that the trial court noted in *Varnum v. Brien*,[67] a challenge to Iowa's same-sex marriage ban.[68] In *Varnum*, the children of same-sex couples joined their parents as plaintiffs in asserting due process violations of their fundamental rights to privacy and familial association, as well as equal protection violations stemming from the state's classification on the basis of legitimacy status.[69] The court summarily dismissed the children's equal protection and due process claims as lacking "any precedent directly on point supporting the proposition that the minor Plaintiffs may assert such 'derivative' claims."[70]

Fortunately for the children in *Varnum*, their parents' push for same-sex marriage was successful.[71] The Iowa Supreme Court struck down the state's same-sex marriage ban, eliminating state-sanctioned discrimination against both gays and lesbians, and their children.[72] Yet, equal treatment is not a reality for most children of gay and lesbian families in the United States.[73] At the

66. Benjamin D. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2396 (2007) ("Children of same-sex couples exist and do so in growing numbers, but they are often forgotten in a same-sex-marriage debate that focuses on the rights of their parents and the propriety of the parents' own relationship.").

67. No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007) (unpaginated) *aff'd*, 763 N.W.2d 862 (Iowa 2009).

68. *Varnum*, 763 N.W.2d 862.

69. *Varnum*, 2007 WL 2468667.

70. There is a question as to whether such claims are "derivative" or in fact direct claims by the child; for example, the children of the *Varnum* plaintiffs were not parties to the appeal heard by the Iowa high court. *Varnum*, 763 N.W.2d at 872 ("The twelve plaintiffs comprise six same-sex couples who live in committed relationships.").

71. *Id.* at 901.

72. *See id.* at 885 (finding that the challenged statute, which required that marriage be between persons of the opposite sex, while neutral on its face, was "targeted at gay and lesbian people as a class"); *id.* at 901 (noting that the de facto ban on same-sex marriage was not in "the best interests of the children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage"); *id.* at 906 (holding the statute to be in violation of the equal protection provision of the Iowa Constitution). Note, however, that these protections extend only to those existing under state law, not to federal protections that may hinge on marital status. *See* Silverman, *supra* note 2, at 418 n.50.

73. Ledsham, *supra* note 66, at 2375 ("[W]hereas illegitimacy-based discrimination against children of other-sex couples has largely faded from the legal (and social) landscape, discrimination against children of same-sex couples because of their parentage persists.").

2000 Census, twenty percent of same-sex couples in the United States are raising at least one child under eighteen.[74] As of 2005, an estimated 270,313 children were living in households headed by same-sex couples.[75] Similar to Lucy's family in the opening vignette, a majority of same-sex couples with children live in states that provide no protection against sexual orientation discrimination,[76] and these children are impacted by such discrimination.

At the time of this Essay, the author was not aware of a federal or state court that had considered the level of review applicable to claims made by a child of same-sex parents.[77] This Essay submits that the legal arguments asserted in the same-sex marriage and adoption cases would not withstand an equal protection challenge if deployed to deny children of gays and lesbians the benefits and protections equal to those awarded children of opposite-sex couples. After all, such a case would not be focused on the injuries to the parents and merely speculating on the theoretical, indirect harms inflicted on the child of a gay or lesbian claimant, as in *Standhardt*.[78] The court would be faced with a child—standing in his or her own right—seeking recourse for a cognizable state or federal constitutional injury. There are strong precedents and policy rationales to elevate the level of review for children of same-sex parents to intermediate scrutiny, ensuring that disparate treatment by government defendants would be struck down as violations of the equal protection of laws.

B. Children's Rights Trump the Three Pillars of Exclusion

A bedrock principle of equal protection law is that the government may not harm individuals in minority groups by erecting barriers that "make[] it more difficult for members of one group to obtain a benefit than it is for members of another

74. ADAM P. ROMERO ET AL., THE WILLIAMS INST., CENSUS SNAPSHOT: UNITED STATES 2 (2007), http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf.

75. *Id.*

76. For a comprehensive look at state laws prohibiting discrimination on the basis of sexual orientation, see Human Rights Camgaign, Maps of State Laws & Policies, http://www.hrc.org/about_us/state_laws.asp (last visited May 11, 2010).

77. In the case In the Matter of Jacob, 86 N.Y.2d 651,667 (1995), the court alluded to a potential equal protection violation of the children for failure to allow adoption by non-biological unmarried heterosexual parents and non-biological same-sex parents. The author would like to thank Shannon Minter for bringing this case to her attention.

78. *See supra* notes 62–65.

group."[79] Governments' rationales have been successful in stemming the tide of same-sex equality, as evidenced in the previous Section.[80] When cast from a children's rights perspective, however, it becomes far more difficult for the government to defend the three major justifications—rooted in biology, legitimacy, and dual-gender parenting. Well-established equal protection jurisprudence, and children's rights precedents and policies that exist outside the gay and lesbian rights context, are principles that should also apply within the gay and lesbian rights context. The next Section will return to the introductory vignette to address the government rationales from the perspective of a child of a same-sex couple in the context of a wrongful death claim denial.[81]

Let's assume that Lucy sues a negligent defendant for the wrongful death of Mary. Wrongful death claims focus primarily on pecuniary loss to the plaintiff from the negligent, reckless, or intentional death of a loved one.[82] Increasingly, states allow plaintiffs to recover for their emotional suffering as well.[83] Although the list of eligible plaintiffs varies by state, most limit wrongful death recovery to the deceased's spouse, children, parents, or siblings.[84] Therefore, Lucy would not fit within the statutory definition of a person entitled to file suit for her losses resulting from Mary's death caused by the negligent defendant. Legally, Lucy is not Mary's daughter. In fact, Sarah, Mary's same-sex partner of eleven years, also would fail to qualify in the state in which they live.[85] Because Lucy's relationship with Mary fails to

79. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

80. *See supra* Part I.B.

81. For additional arguments challenging states' rationales from a child's viewpoint, see Castic, *supra* note 3, at 9–13.

82. For further explanation of wrongful death statutes, see John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953–59 (2000–2001); Culhane, *supra* note 9; Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1 (2005). These articles do an excellent job of identifying the limitations of wrongful death statutes.

83. *See, e.g.*, Green v. Bittner, 424 A.2d 210, 215 (N.J. 1980) ("[W]e know of no public policy which would prohibit awarding damages that fully compensate . . . for the emotional suffering caused by the [wrongful] death.").

84. These statutory limitations prevent not only members of same-sex families, but also members of many other family relationships that fail to conform to the traditional nuclear family, from seeking recovery. *See* Culhane, *supra* note 82, at 942–63.

85. For a discussion of the first same-sex wrongful death victory, see Shannon Minter, Expanding Wrongful Death Statutes and Other Death Benefits to Same-Sex Partners - Human Rights Magazine, http://www.abanet.org/irr/hr/summer03/

fit within the state's statutory definition, the defendant in our fictional lawsuit can seek dismissal of Lucy's suit for failure to state a claim. In subsequent motions, Lucy could challenge the wrongful death statute as a violation of the Equal Protection Clause because it denies her a benefit to which children of opposite-sex couples are entitled. The defendant can invoke the state's Defense of Marriage Act, or can simply raise the same range of government rationales as in the same-sex marriage and gay and lesbian adoption cases.[86] This Essay will briefly explore why each rationale should fail when invoked to defeat Lucy's wrongful death suit. It will do so by first analyzing the second rationale of legitimacy, then turning to the dual-gender parenting rationale, and finally evaluating the biology rationale.

1. Legitimacy

The government's rationale that it should encourage child-rearing within a marriage as opposed to outside of it has been a successful rationale in most jurisdictions denying same-sex couples marriage equality.[87] Courts find that legislatures are justified in encouraging marriage for opposite-sex couples who have relationships that result in children because it is preferable to having children raised by unmarried parents.[88] This rationale essentially encourages the "legitimacy" of children. However, such arguments of legitimacy/illegitimacy have been rejected as a permissible basis for denying government benefits to children raised by single or unmarried parents.[89] Well-settled equal protection law mandates that a state "may not invidiously discriminate against illegitimate children by denying them

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expanding.html (last visited May 13, 2010); *see also* Culhane, *supra* note 82, at 976.

86. Procedurally, the equal protection challenge could be raised in different ways; however, that is not the focus of this Essay.

87. *See* Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006).

88. *See supra* note 50 and accompanying text.

89. This rationale often incorporates the argument that, insofar as it is preferable for children to be raised by married couples, government actors are justified in prohibiting same-sex marriage in order to encourage marriage for opposite-sex couples. *Morrison*, 821 N.E.2d at 25 (remarking that the institution of marriage encourages opposite-sex couples "to stay together and raise a child or children together"); *Hernandez*, 855 N.E.2d at 7 (noting that the state could rationally support proscribing same-sex marriage on the grounds that "promoting stability in opposite-sex relationships will help children more."); *Andersen*, 138 P.2d at 982 (asserting that "encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.").

substantial benefits accorded children generally."[90] Children of same-sex couples are in a similar position as the children in these other marital status cases. Lucy would be denied a benefit awarded other children because her two mothers are prohibited from marrying each other, or obtaining some form of state recognition of their relationship as a couple, and because there is no state recognition of Lucy's relationship to her non-biological mother, Mary.

A quick review of two non-marital status cases offers a clear picture of the impact of such discrimination and why equal protection jurisprudence eschews it. In fact, in these cases, the Supreme Court has found claims alleging discrimination against children because of their parents' marital status sufficient to apply intermediate scrutiny. In 1967, Thelma Levy sued Louisiana on behalf of five children seeking wrongful death recovery for the loss of their mother, whose death was allegedly caused by her treating physician.[91] The case also challenged a Louisiana statute which denied a "right to recover" to children born outside of marriage.[92] The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claims on the grounds that the children were not "legitimate," insofar as "morals and general welfare . . . discourage[] bringing children into the world out of wedlock," and the Louisiana Supreme Court denied certiorari.[93] The U.S. Supreme Court reversed the state court, finding the action to be invidious discrimination when the child engaged in no action or conduct relevant to the harm visited upon the mother.[94]

In *Weber v. Aetna Casualty & Surety Co.*,[95] the Supreme Court struck down a similar Louisiana provision that awarded worker's compensation proceeds to a deceased worker's children born of his marriage but denied those same proceeds to children born outside of the marriage.[96] Henry Clyde Stokes died of work-related injuries and, at the time of his death, was living with Willie Mae Weber.[97] Stokes and Weber were not married, but

90. Gomez v. Perez, 409 U.S. 535, 538 (1973). For further discussion of the illegitimacy cases and children of same-sex families, see Ledsham, *supra* note 66.

91. Levy v. Louisiana, 391 U.S. 68, 69–70 (1968).

92. *Id.* at 70.

93. *Id.* (quoting Levy v. Louisiana, 192 So. 2d 193, 195 (La. Ct. App. 1967)).

94. *Id.* at 72; *see also* Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968) (invalidating a Louisiana statute that barred recovery for damages to the mother of an illegitimate child while allowing recovery to the parents of a legitimate child under the Fourteenth Amendment's Equal Protection Clause).

95. 406 U.S. 164 (1972).

96. *Id.* at 164.

97. *Id.* at 165.

maintained a household of five children.[98] One of the children was born to Stokes and Weber, while four others had been born to Stokes and his wife, Adlay Jones, who had been committed to a mental hospital years earlier.[99] Weber and Stokes' second child was born shortly after Stokes' death.[100]

The four marital children filed a worker's compensation claim for their father's death, and Weber claimed compensation benefits on behalf the non-marital children.[101] However, under Louisiana worker's compensation law, "unacknowledged illegitimate"[102] children were not treated the same as children born to married parents.[103] They were considered "other dependents" entitled to recovery only if there were not enough surviving dependents in line before them to exhaust the maximum benefits.[104] The four children from Stokes' marriage were awarded the maximum allowable amount, leaving the two children from the non-marital partnership between Stokes and Weber with nothing.[105] In reversing the Louisiana Supreme Court, the U.S. Supreme Court explained that, consistent with prior cases, treating children born outside of marriage differently than those born inside it is impermissible discrimination.[106] "An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[107] The *Weber* Court further explained its position:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 165–66.

102. *Id.* at 167–68. It was not possible for Stokes to acknowledge his two children with Weber because Louisiana prohibited acknowledgment of children whose parents were incapable of marrying at the time of conception. *Id.* Stokes remained married to Jones, making it impossible for him to marry Weber. *Id.* at 171 n.9.

103. *Id.* at 167–68 (noting that the Louisiana law allowed "legitimate children and acknowledged illegitimates" equal recovery, while relegating "unacknowledged illegitimate children" to a lesser status).

104. *Id.* at 168.

105. *Id.* at 167.

106. *Id.* at 169.

107. *Id.*

> the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[108]

There is much to glean from jurisprudence on the rights of marital and non-marital children applicable in the context of children raised in same-sex families. The *Weber* Court supported its decision by explaining that Stokes had as much affinity for his non-marital children as he did for his four children born within his marriage, and that all of his children had lived with him and were "equally dependent upon him for maintenance and support."[109] The same arguments support recognizing the relationship between Lucy and Mary. To deny Lucy the hard-earned benefits derived from her non-biological parent because of moral disdain for her lesbian parents' conduct runs contrary to the basic precepts delineated in the non-marital status cases.[110] Whatever the popular opinion of gays and lesbians may be, even if it includes elements of moral disdain, it cannot justify discrimination against their children.

Furthermore, if the equal protection jurisprudence for children of same-sex parents is consistent with that in the non-marital children cases, the government rationales will be subject to intermediate scrutiny, and thus must be "substantially related to a sufficiently important government interest."[111] This is a hurdle that even the most anti-gay state is unlikely to surpass when faced with a child plaintiff with demonstrable and compensable injuries.

2. Dual-Gender Parenting

The second rationale government defendants invoke to prevent same-sex marriage and gay and lesbian adoptions is that there is a legitimate government interest in limiting marriage to opposite-sex couples because "children thrive in opposite-sex marriage environments."[112] As explained below, this is a faulty rationale to deny a child of same-sex parents wrongful death recovery.

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108. *Id.* at 175 (footnote omitted).

109. *Id.* at 169–70.

110. *See id.* at 164; Levy v. Louisiana, 391 U.S. 68 (1968); *see also* Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); Graham, *supra* note 2, at 1031–32 (discussing the rights of same-sex parents and their children as compared to other classes).

111. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

112. Andersen v. King County, 138 P.3d 963, 983 (Wash. 2006); *see supra* Part I.B.3.

In *Lofton v. Secretary of Children & Family Services*,[113] gay foster parents and guardians challenged Florida's ban on gay adoption.[114] In addition to a fundamental right to privacy and due process claim, the plaintiffs argued the state ban violated equal protection law because the prohibition on gay and lesbian adoption was not rationally related to Florida's interest in furthering the best interests of adopted children.[115] As to the plaintiffs' equal protection claim, the Eleventh Circuit held that the adoption ban was permissible because it passed the rational basis test.[116] The Florida statute assured that adopted children's best interests were met by placing them in homes with married, heterosexual parents.[117] According to the court, Florida had a legitimate interest in encouraging the optimal family structure that included a home with both a mother and father because of the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[118]

The gender-based assumptions that women and men bring inherent differences to child-rearing and parental responsibilities—differences which render same-sex couples incapable of successful child-rearing by comparison—rest on gender stereotyping, as scholars have explained.[119] This gender stereotyping is more focused and acute when viewed from the perspective of a child plaintiff.

The U.S. Supreme Court has held that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of

113. 358 F.3d 804 (11th Cir. 2004).

114. *Id.* at 807–08.

115. *Id.* at 820. If found, the lack of a rational relationship would fail even the lowest level of scrutiny under the rational basis test. *See supra* notes 21–24 and accompanying text. Since there were no fundamental rights at stake and the foster parents were not considered a suspect class, the court used rational basis. *Lofton*, 358 F.3d at 817–18.

116. *See Lofton*, 358 F.3d at 818–26.

117. *See id.*

118. *Id.* at 818.

119. It is well established in academic literature that homophobia and sexism are intricately linked. For a thorough discussion of stereotyping and homophobia, see SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 27–43 (1988). When a young teenage boy is called a "faggot" on the sports field, in the school yard, or in the hallways of our educational institutions, because the boy is "effeminate," or "throws like a girl," both the perpetrator and the victim of such insults, and those witnessing these exchanges, experience homophobia as a weapon of sexism. *Id.* The message these acts convey is that the teenage boy is expected to retreat to a socially acceptable gender role and behavior. *Id.* The boy is expected to perform his male gender role with masculinity—to throw like a boy and to act like a boy. *Id.* The alternative is bleak: he will face ostracism, ridicule, and disdain. *Id.*

males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[120] Such gender distinctions are also subject to intermediate scrutiny.

To deny Lucy wrongful death benefits because she does not have both male and female parents, but instead two women as parents, is to treat her differently based on the idea that there are inherent and static qualities and characteristics to child-rearing that are uniquely male and uniquely female.[121] The *Lofton* court did not explain or list any inherently "female" or "male" qualities but simply presumed that these qualities existed and were necessary to raise (as opposed to conceive) a child.[122]

Perhaps the court was implying that men cannot provide a nurturing environment for children, or that women cannot provide adequate financial support or teach male children about sex and sports. These types of assumptions fall squarely within the gender stereotyping that has been deemed impermissible in other contexts in equal protection jurisprudence, including decisions about parenting.[123]

In *Caban v. Mohammed*,[124] the Supreme Court analyzed a New York law that permitted an unwed mother to block the adoption of her child by denying consent to the potential

120. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982); *see also* United States v. Virginia, 518 U.S. 515, 549–51 (1996) (discussing gender stereotyping in military academies); Frontiero v. Richardson, 411 U.S. 677 (1973) (discussing gender stereotyping of women members of the U.S. Armed Service and the dependency, or non-dependency, of their husbands); Ball, *supra* note 42, at 2765 (discussing Supreme Court cases that prohibit gender stereotyping).

121. *See* Ball, *supra* note 42, at 2768 ("The normative notion[] that optimal child care depends on something unique about mothers as women conflates social expectations and roles imposed on parents according to their sex/gender with seemingly natural and intrinsic characteristics that distinguish women from men (and vice versa)."); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 725–48 (2003); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 413 (2000); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 274–76 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188, 232 (1998).

122. *Lofton*, 358 F.3d at 819–20.

123. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (holding that a state statutory scheme requiring husbands to pay alimony to their wives, but not allowing husbands to apply for alimony payments from their wives, was impermissible gender-based discrimination); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (addressing social security benefits and discrimination toward mothers who choose to work rather than remain at home).

124. 441 U.S. 380 (1979).

adoptee(s).[125] The unwed father of a child was not afforded the same consent-based objection to prevent the adoption of his child.[126] Abdeil Caban and Maria Mohammed lived together for five years, during which they had two children.[127] After ending their relationship, both Caban and Mohammed married different people.[128] Caban challenged the gender-based distinction in the law as an equal protection violation after his parental rights to his children were terminated and the adoptions were granted to the mother's then-husband.[129] The U.S. Supreme Court struck down the statute as an unconstitutional gender-based distinction.[130] Mohammed argued that the distinction between unmarried mothers an unmarried fathers was based on a fundamental difference between them, because "a natural mother, absent special circumstances, bears a closer relationship with her child" than a father.[131] The Court rejected this assertion, finding that "maternal and paternal roles are not invariably different in importance," and even if unwed mothers were closer to their newborn children, "this generalization concerning parent-child relations would become less acceptable as the age of the child increased."[132] The Court went on to "reject . . . the claim that the broad gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[133]

Although the same-sex marriage and adoption debate was beyond the contemplation of the Court at the time *Caban* was decided, the Court's central point applies to a dual-gender household requirement. Gender stereotypes about the role of men and women in parenting are impermissible rationales to deny children of same-sex parents the equal benefits enjoyed by children of opposite-sex parents. A government defendant faced with a wrongful death claim by Lucy would have a formidable challenge in offering a important government interest that does

125. *Id.* at 385.
126. *Id.*
127. *Id.* at 382.
128. *Id.*
129. *Id.*
130. *Id.* at 394.
131. *Id.* at 388.
132. *Id.* at 387–89. The author would like to thank Pamela Karlan for bringing her attention to this case.
133. *Id.* at 389.

not stereotype the child-rearing and parenting abilities of her two mothers.[134]

3. Biology

Finally, denying a child wrongful a death because the child does not have both male and female biological parents is unpersuasive as well when pitted against the best interest of a child seeking damages for the loss of a non-biological parent.

First, courts (and society) prioritize biology in defining parenting responsibilities, yet biology is not the sole determinant of who may be a parent. As the modern U.S. family changes, "[b]iology is increasingly called upon to share its privileged status as the foundation stone of parenthood with caregiving and other social values."[135] The understanding that biology is not the sole criteria to be a parent is reflected in state recognized parent-child relationships, such as the marital presumption rule,[136] adoption,[137] and the legal recognition of stepparents and de facto parents.[138] Although states rely heavily on biology to regulate and enforce

134. It is problematic for a state to presume that there are gender specific prerequisites to parenting that are in fact demonstrated in heterosexual U.S. households with children. As *Caban* demonstrates, outside the context of gay or lesbian relationships, government attempts to regulate the intimate decisions of families in order to compel parents to conform to gender stereotypes would likely fail under equal protection law, but are also likely to be struck down under the fundamental right to privacy. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (allowing a state law imposing alimony obligations based on gender to be challenged on equal protection grounds); Pierce v. Massachussetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that custody, care and nurture of a child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children").

135. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126 (Supp. 2006). *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983) (finding that a biological link, by itself, does not merit "substantial protection" under the Due Process Clause in the way that demonstrating a full commitment to the responsibilities of parenthood and child-rearing would); Quilloin v. Walcott, 434 U.S. 246 (1978) (denying a biological father's due process challenge to the mother's husband's adoption of his child). For a discussion of the de-emphasis of the biological connection and focus on other factors, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

136. *See, e.g.*, ALA. CODE § 26-17-204 (2009) (establishing a presumption of paternity if a man is married to the child's mother).

137. *See, e.g.*, MINN. STAT. § 259.59 (2008) (establishing legal rights under adoption).

138. *See, e.g.*, MINN. STAT. § 257.025 (2008) (granting custody rights to individuals, including stepparents and de facto parents when in the "best interests of the child").

parental and financial obligations to children, this biological link is an unnecessary proxy for the policing function when addressing the relationship between Lucy and her non-biological parent, Mary. When there is a non-biological parent affirmatively seeking parental responsibility—financially, psychologically, and socially—biology should not be a prerequisite.[139] Even if the couple splits up, the steps taken by gay and lesbian couples to become parents of a child offer sufficient indicia to assess whether the non-biological parent assumed parenting rights and responsibilities of a child.

More importantly, the biology argument is unrelated to the very purpose of state benefits and provisions designed to protect children. The purpose of the wrongful death claim, as an example, is to provide recovery for emotional, financial, and caretaking losses to the child in the household.[140] These losses are present whether the parents are in same-sex or opposite-sex unions. To deny the child recovery based on the absent biological link is contrary to the basic principles of wrongful death actions and tort law—that the dependent child is placed in the position she would have been in had the tortious act never occurred. To ignore the eleven year parent-child relationship between Lucy and Mary leaves Lucy without financial compensation for her losses (both economic and emotional) and grants the negligent defendant a windfall.

This Essay selected wrongful death as an example; however, there are many government benefits that could be similarly challenged. As the New Jersey Supreme Court explained in its ruling striking down its state's same-sex marriage ban:

> We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers' Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the children of married parents receive such assistance.[141]

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139. *See* Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 307 (2008) ("[S]tates are beginning to give lesbian and gay couples quasi- or actual marital status that entitles these couples to be treated the same as married couples under all aspects of family law. For example, a handful of states apply marital presumptions to children born to couples in civil unions and permit lesbians and gays to adopt their partner's child just as a stepparent would." (footnotes omitted)).

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

141. Lewis v. Harris, 908 A.2d 196, 218 (N.J. 2006).

Considering the many state and federal benefits denied children of same-sex couples, it is shocking that there has not yet been a reported case. In the coming years, a situation may arise in which a plaintiff's attorney accepts a case, believing it to be a basic tort claim or administrative appeal, and unwittingly (or not) steps into a future foundational constitutional case for sexual orientation discrimination and children's rights law.

Conclusion

There are certainly upsides and downsides to pursuing the rights of children of gays and lesbians that must be thoroughly vetted. On one hand, it may be too conservative; on the other, law tends to be incremental. On one hand, a focus on the rights of children of gays and lesbians offers another avenue to push for equality by recognizing that discrimination extends to individuals because of their relationships to gays and lesbians; on the other, it may be viewed as bootstrapping or an end-run around lawful discrimination against gays and lesbians. On one hand, a child-centered approach to gay and lesbian issues may contribute to the children's rights movement,[142] or to the redefinition of what child-adult relationships warrant legal recognition in some capacity; on the other, the same principles developed to seek recourse for these children could be used to challenge the rights of gay and lesbian parents.[143] On one hand, gay and lesbian rights advocates could be vilified for "exploiting" their children; on the other, the failure to advocate for the rights of children of gay and lesbian parents can be faulted as well.

The concerns raised about a children's rights approach do not change the reality that children of same-sex couples are denied financial, psychological, and social benefits enjoyed by children of opposite-sex couples. As the non-marital status cases clearly demonstrate, the government cannot deny non-marital children the same protections afforded marital children because of morality and/or invidious animus. The same principle should apply to

142. *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Barbara Barrett Woodson, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994).

143. *See, e.g.*, Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 171 (2005) (explaining how the focus on adults in same-sex marriage cases "flies in the face of the enormous public and private efforts currently underway to strengthen marriage—efforts that are largely premised on the widely accepted relationship between healthy children and stable families.").

children of gay and lesbian parents, particularly after *Romer v. Evans*,[144] prohibiting animus-driven legislation that targets gays and lesbians, and *Lawrence v. Texas*, which, although a fundamental right to privacy case, calls into question purely morality-driven government decisions related to sexual orientation.[145]

The children of same-sex couples face disparate treatment in relation to their parents' sexual orientation because of the hetero-normative pillars of biology, legitimacy, and dual-gender parenting. None of these pillars, standing alone, or in operation with one another, justify the exclusion of children of gay and lesbian families from the equal protection of the law.

144. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court declared Colorado's Amendment 2 unconstitutional, failing a rational basis test under equal protection law because it was not rationally related to any legitimate state interests and was impermissibly driven by animosity toward gays and lesbians.

145. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down Texas' sodomy statute as an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment, reversing its holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court dismantled the underpinnings of *Bowers*, including the assertion that anti-sodomy laws have "ancient roots," and explained that despite deep religious and moral beliefs that condemn homosexual sodomy, the majority may not use the power of the state to enforce its views on society through criminal law enforcement. *Lawrence*, 539 U.S. at 558.