

## In the Interest of Children of Same-Sex Couples

by

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### I. Introduction

Despite the prevalence of nontraditional families around the country<sup>1</sup>, the laws of jurisdictions nationwide fail to meet the needs of same-sex families. While a number of jurisdictions have expanded the rights of same-sex couples, no jurisdiction has extended to same-sex couples the right to marry except Massachusetts.<sup>2</sup> Due to the inability to legally marry, some same-sex couples enter into secular or religious marriage ceremonies.<sup>3</sup> Denial of same-sex marriage has had far reaching implications on same-sex couples and their children. Children of married spouses enjoy unique family stability and economic security due to their parents' legally recognized relationship that children of

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<sup>1</sup> As of the 2000 consensus, fewer than one-quarter of all families represented the traditional model. See R. Brent Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 678 (2005).

<sup>2</sup> See *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), in which the Supreme Court of Massachusetts ruled that “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.” *Id.* at 968. Recently, outside of the United States, Spain and Canada have extended the right to marry to same-sex couples. Clifford Krauss, *Gay Marriage Is Extended Nationwide in Canada*, N.Y. TIMES, June 29, 2005, at A4; Renwick Mclean, *Spain Legalizes Gay Marriage; Law Is Among the Most Liberal*, N.Y. TIMES, July 1, 2005, at A9.

<sup>3</sup> Patricia M. Logue, THE RIGHTS OF LESBIAN AND GAY PARENTS AND THEIR CHILDREN (2002), available at: [http://www.aaml.org/files/public/Journal\\_vol\\_18-1-5\\_Gay\\_Rights.pdf](http://www.aaml.org/files/public/Journal_vol_18-1-5_Gay_Rights.pdf)

same-sex couples do not.<sup>4</sup> In addition, in most states, same-sex unmarried couples do not enjoy benefits related to taxation, health insurance, family and medical leave, hospital visitation, workers compensation and more.<sup>5</sup> The United States General Accounting Office identified over one thousand federal benefits the receipt of which is dependent on marriage.<sup>6</sup>

Permitting same-sex couples to marry would make accessible legal, economic and social support which already accompany and facilitate heterosexual marriage. Moreover, the psychological and health benefits associated with that support would follow. The American Psychological Association and the New Jersey Psychological Association conclude that:

Empirical research has consistently shown that lesbian and gay parents do not differ from heterosexuals in their parenting skills, and their children do not show any deficits compared to children raised by heterosexual parents. It is the quality of parenting that predicts children's psychological and social adjustment, not the parents' sexual orientation or gender. If their parents are allowed to marry, the children of same-sex couples will benefit from the legal stability and other familial benefits that marriage provides<sup>7</sup>.

Ending the ban on same-sex marriage would be in the best interest of the children of same-sex couples both legally and psychologically.<sup>8</sup> Section II of this article provides an overview of statutory protections and rights of same-sex couples nationwide, focusing on the jurisdictions that afford the broadest statutory protections. Section III advances the proposition that even if

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<sup>4</sup> Estimates are that between six and ten million children nationwide have gay and lesbian parents. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Refining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990).

<sup>5</sup> Galit Moskowitz, *Same-sex cases—different results*, 13 N.J. LAW. 343 (2003).

<sup>6</sup> General Accounting Office, Memo from Office of the General Counsel to The Honorable Henry J. Hyde, Jan. 31, 1997, available at <http://www.gao.gov/archive/1997/og97016.pdf>. at 2. This tally was conducted before the passage of the Defense of Marriage Act precluding federal recognition of same-sex marriages on September 21, 1996.

<sup>7</sup> Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants at 3-4, n.4, *Lewis v. Harris* 2003 WL 23191114 (No. A-2244-03T5), available at <http://www.apa.org/psyclaw/lewis-v-harris.pdf>.

<sup>8</sup> *Id.*

statutory protections of same-sex couples across the country granted all of the rights of marriage, the fact that a different status is thrust upon same-sex couples dictates that these couples are inherently unequal. Section IV discusses the various mechanisms that enable a child to become part of a family with same-sex parents. Section V outlines the various inequities bestowed upon children of same-sex couples due to their parents' inability to legally marry and argues that until this is remedied, these children will not be on par with their counterparts being raised by married couples. This article concludes that the best interests of children reared by same-sex couples will not be adequately safeguarded if their parents are not permitted to legally marry.

## **II. An Overview of Statutory Protections and Rights for Same-Sex Couples Across the Nation**

The laws regarding same-sex rights vary throughout the country. Vermont is the only state in the nation that has established civil unions for same-sex couples.<sup>9</sup> Two states, Vermont and Hawaii, provide reciprocal beneficiary relationships, and only three states provide for domestic partnership registries: California, Maine and New Jersey.<sup>10</sup> Same-sex couples who are registered as domestic partners, enter into civil unions, or are reciprocal beneficiaries are afforded certain state conferred rights. Despite the existence of these provisions expanding the rights and responsibilities of same-sex couples, such expansion is meager in comparison to the federal rights and responsibilities that are afforded to married couples.<sup>11</sup> The federally enacted Defense of Marriage Act ("DOMA")<sup>12</sup> acts as a barrier to affording same-sex couples federally conferred rights that are based on marital status. Vermont, through its statutes providing

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<sup>9</sup> VT. STAT. ANN. tit. 15, §§ 1201-02, 1204 (2002).

<sup>10</sup> American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* 38 FAM. L.Q. 339, 379 (2004) available at <http://www.abanet.org/family/whitepaper/fullreport.pdf>. [hereinafter *White Paper*].

<sup>11</sup> *Id.*

<sup>12</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. III 1997)).

recognition of civil unions, is the only state that has granted same-sex couples all of the state conferred rights akin to marital status, but only while the couple resides in Vermont.<sup>13</sup> Therefore, couples who enter a civil union in Vermont, but then leave the state no longer enjoy the same protections they did while residing in Vermont. As a result, same-sex couples, unlike their married counterparts, face the likelihood that their legally recognized relationship in Vermont will not be recognized outside of the state. Such is also true with regard to the children of these same-sex couples.

Vermont, New Jersey, California and Hawaii are the states that bestow the broadest statutory protections on same-sex couples. Such benefits include the right to make health care decisions, hospital visitation as well as family leave, workers compensation, state tax deductions and more.<sup>14</sup> During the summer of 2004, the legislature in Maine also enacted a law designed to afford some limited property rights to same-sex couples.<sup>15</sup> This statute provides for inheritance protections for domestic partners who are defined as “person[s] who [have] signed and filed in the office of the secretary of state a notarized affidavit attesting to a domestic partnership.”<sup>16</sup>

Around the country the most common state afforded protection to same-sex partners is health benefits to domestic partners of state employees. Such benefits include medical care benefits, life insurance, long term care benefits, bereavement leave or family sick leave.<sup>17</sup> Some states are more limited in that they only offer domestic partners the rights to hospital visitation or health care decision making.<sup>18</sup>

As mentioned above, Vermont is the only state that provides for civil unions of same-sex partners, and New Jersey, California and Maine are the only states that provide for domestic partnerships. Domestic partnership laws vary among the three states that employ them. The following subsections provide a brief description of the laws regarding domestic partnerships in New

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<sup>13</sup> See *White Paper*, *supra* note 10, at 28-29.

<sup>14</sup> *Id.*

<sup>15</sup> ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A) (2003).

<sup>16</sup> *Id.*

<sup>17</sup> *White Paper*, *supra* note 10, at 22.

<sup>18</sup> *Id.*

Jersey, California and Maine. Despite the fact that these states are among the most expansive in offering state-conferred rights to same-sex couples, the laws vary between the states and are still lacking because they do not permit same-sex couples to marry. These couples and their children are deprived of the rights and benefits afforded to married spouses and their children.

#### A. California

California has recognized domestic partnership registration since January 2000.<sup>19</sup> At the time, such registry only afforded same-sex couples two distinct rights - domestic partner benefits for some state employees and hospital visitation.<sup>20</sup> In January 2002, California expanded the rights of domestic partners by affording same-sex couples and different-sex couples, with at least one partner being over the age of sixty-two, an additional twelve rights and the opportunity to formalize their relationships.<sup>21</sup> Again in January 2005 California's domestic partnership laws were expanded to extend almost all state conferred rights that inure to married spouses to domestic partners which include but are not limited to, tort claims for spouses of the injured or deceased, stepparent adoption, housing protections, communication privileges, child custody, visitation and financial support of dependent children<sup>22</sup> as well as "access to family court for dissolution of relationships for long term partners, couples with children and couples with significant assets."<sup>23</sup>

In spite of the 2005 expansion of California's domestic partnership laws, California domestic partners are now similar to their Vermont counterparts who enter into civil unions in that they do not enjoy over a thousand federal rights that are enjoyed by married spouses.<sup>24</sup> In addition, domestic partners in California, as well as those who are joined by civil unions in Vermont, may find that their formalized relationships are not recognized in other states.<sup>25</sup>

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<sup>19</sup> *Id.* at 23.

<sup>20</sup> *Id.*

<sup>21</sup> See CAL. FAM. CODE § 297(b)(6)(B) (West Supp. 2004).

<sup>22</sup> See *White Paper*, *supra* note 10, at 23.

<sup>23</sup> See CAL. FAM. CODE § 297.5(a) (West 2004).

<sup>24</sup> See *White Paper*, *supra* note 10, at 24.

<sup>25</sup> *Id.*

### B. *Maine*

Maine has afforded limited rights to domestic partners since 2001.<sup>26</sup> Since that time Maine law compels health care service providers, such as insurance companies conducting business in Maine, to offer medical coverage to domestic partners of employees who maintain medical coverage for themselves.<sup>27</sup> The law dictates that domestic partners must be offered medical coverage according to the same terms and conditions offered to married spouses.<sup>28</sup> Nonetheless, health care insurers are entitled by law to require documented proof of the domestic partner's relationship by way of an affidavit.<sup>29</sup>

More recently, Maine codified intestate inheritance for domestic partners<sup>30</sup> and established a domestic partnership registry.<sup>31</sup> A couple may enter into a domestic partnership if both are mentally competent; they have been legally domiciled in the state of Maine for at least one year; neither party is married or in another domestic partnership; and each is the sole domestic partner of the other and intends to remain so.<sup>32</sup> Once domestic partners are registered as such, they are afforded the same rights as married spouses with regard to "inheritance under the intestacy laws . . . ; election against a will; right to make funeral and burial arrangements; right to receive victim's compensation; and preferential status to be named as a guardian and/or conservator in the event that his or her domestic partner is incapacitated."<sup>33</sup>

### C. *New Jersey*

New Jersey's Domestic Partnership Act was signed into law in January 2004 and took effect in July 2004.<sup>34</sup> Same-sex couples over the age of eighteen or heterosexual couples over the age of sixty-two may register as domestic partners as long as they meet

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<sup>26</sup> *Id.* at 25.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* citing 2001 ME. PUB. L. ch. 347, § 2, 5; ME. REV. STAT. ANN. tit. 24-A, §§ 2741-A, 2832-A (2003).

<sup>29</sup> *White Paper*, *supra* note 10, at 26.

<sup>30</sup> See ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A) (2003).

<sup>31</sup> *Id.* at tit. 22, § 2710.

<sup>32</sup> *Id.*

<sup>33</sup> *White Paper*, *supra* note 10, at 26.

<sup>34</sup> N.J. STAT. ANN. § 26:8A-1 (West Supp. 2004).

certain criteria.<sup>35</sup> There are only eight rights and obligations which extend to domestic partners under the New Jersey Domestic Partnership Act:

- 1) the right to sue employers, landlords, lenders or others for discrimination;
- 2) the right to hospital visitation even if the couple has not registered as a domestic partnership;
- 3) the power to make medical decisions on behalf of the partner in the event of incapacitation;
- 4) the right of domestic partners to file joint state tax returns and the ability to claim a partner as a dependent;
- 5) the right to inherit joint property without being subject to the New Jersey inheritance tax;
- 6) an obligation to support each other financially during the course of the domestic partnership;
- 7) the right to divorce-like proceedings before a Superior Court judge in order to terminate the partnership; and
- 8) an obligation that insurance companies include domestic partners in their coverage plans but only if employers voluntarily agree to offer domestic partner benefits.<sup>36</sup>

Unlike California and Maine, New Jersey recognizes domestic partnerships, civil unions and other similar relationships entered into outside New Jersey so long as such relationships were valid in the jurisdiction in which they were created.<sup>37</sup> New Jersey's Domestic Partnership statute also sets forth bases for termination of the domestic partnership which are akin to grounds for divorce.<sup>38</sup> The grounds for dissolution of a domestic partnership include: voluntary sexual intercourse with someone other than one's domestic partner; desertion for twelve months or more; separation for eighteen months or more; voluntary drug or alcohol addiction for a period of twelve months or more; institutionalization or mental illness for twenty-four or more months; and imprisonment for eighteen months or more.<sup>39</sup> Also, in cases of domestic partnership between different-sex couples, the do-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *White Paper*, *supra* note 10, at 26.

<sup>38</sup> *Id.* at 27.

<sup>39</sup> *Id.*

mestic partnership shall automatically terminate if the couple enters into a legally recognized marriage.<sup>40</sup> New Jersey health care insurers, employers and other individuals do not require that a same-sex couple file an affidavit as to their domestic partnership.<sup>41</sup>

Under the Domestic Partnership Act, same-sex couples are not on par with their married counterparts because they are not afforded all of the rights that inure to married couples. For example, New Jersey, as with many other states, does not extend a presumption of parentage to the non-biological parent in a same-sex relationship.<sup>42</sup> The Domestic Partnership statute does not allow for joint adoption, and it does not provide for inheritance rights in the absence of a will.<sup>43</sup> In addition, the New Jersey Domestic Partnership statute does not require private employers to offer health insurance for domestic partners or permit recovery for loss of consortium or provide for equitable distribution of assets upon the termination of the partnership.<sup>44</sup> Most notably, however, the statute is entirely inadequate in that it fails to create custody rights for non-biological parents and fails to create child support obligations.<sup>45</sup> Simply put, it fails to protect the children of domestic partners.

New Jersey's Domestic Partnership statute was recently challenged in *Lewis v. Harris*<sup>46</sup> in which plaintiffs, who are same-sex couples, sought the right to marry.<sup>47</sup> In denying this right, the Appellate Division placed great emphasis on decisions in other jurisdictions:

Relying upon decisions in other jurisdictions that have rejected same-sex couples' claims of a constitutional right to marry, we concluded that the determination whether to extend the same benefits to same-sex partners as to spouses involves "political and economic issues to be decided by the elected representatives of the people."<sup>48</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> N.J. STAT. ANN. § 26:8A-1 (West Supp. 2004).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 266.



The New Jersey Appellate Division further emphasized, among other reasons, that the Domestic Partnership Act stops short of permitting same-sex couples to marry and said:

Congress's enactment in 1996 of the Defense of Marriage Act, the New Jersey Legislature's recent enactment of the Domestic Partnership Act, which confers substantial legal rights upon same-sex couples but stops short of recognizing the right of members of the same-sex to marry, and the strongly negative public reactions to the decisions in *Goodridge* and in lower courts of other states that have held the limitation of the institution of marriage to the opposite sex to be unconstitutional, demonstrate that there is not yet any public consensus favoring recognition of same-sex marriage. Therefore we reject plaintiffs' claim that the New Jersey Constitution requires extension of the institution of marriage to same-sex couples. Although same-sex couples do not have a constitutional right to marry, they have significant other legal rights.<sup>49</sup>

As a result of the Appellate Division's decision in *Lewis v. Harris*<sup>50</sup> and the shortcomings of New Jersey's Domestic Partnership law, same-sex couples continue to be denied the legal recognition that they deserve, to the detriment of their children.

### III. Separate Is Not Equal

Even if statutory protections grant same-sex couples across the country all of the rights of marriage, the fact that a different status is thrust upon same-sex couples dictates that these couples are inherently unequal. As Judge Collester eloquently stated in his dissent in *Lewis v. Harris*<sup>51</sup>: "The right to marry is to my view a fundamental right of substantive due process protected by the New Jersey Constitution and, . . . the exclusion of plaintiffs from the right cannot be justified by tradition or procreation."<sup>52</sup> Judge Collester further elaborated:

Our Constitution and the Federal Constitution require that all similarly situated people be treated alike. . . . It is disingenuous to say that plaintiffs are treated alike because they can marry but not the person they choose. By prohibiting them from a real right to marry, plaintiffs as well as their children suffer the real consequences of being "differ-

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<sup>49</sup> *Id.* at 274.

<sup>50</sup> *Id.*

<sup>51</sup> 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005).

<sup>52</sup> *Id.* at 289 (Collester, J., dissenting).

ent.” . . . we have learned after much pain that “separate but equal” does not substitute for equal rights.<sup>53</sup>

If same-sex couples are denied the right to marry, they are treated as second-class citizens based entirely on sexual orientation. The differentiation of same-sex couples perpetuates a stigma attached to homosexuality that has negative effects on committed homosexual couples and their children. The American Psychological Association and the New Jersey Psychological Association argue that:

Legal prohibitions against same-sex marriage convey society’s judgment that committed intimate relationships with people of the same sex are inherently inferior to heterosexual relationships, and the participants in a same-sex relationship are inherently less deserving than heterosexual couples of society’s recognition. Through that judgment, . . . [states perpetuate] power differentials that afford heterosexuals greater access than nonheterosexuals to the variety of resources and benefits . . . [thus] . . . according disadvantaged status to the members of one group relative to another.<sup>54</sup>

In addition to being treated as second-class citizens and being stigmatized, same-sex couples are denied the social, psychological and health benefits associated with marriage. It is well settled among social scientists that marriage as a social institution has a profound effect on the happiness of those who inhabit it.<sup>55</sup> Studies have shown that married men and women experience superior mental and physical health compared to their single counterparts.<sup>56</sup> Such superior mental and physical health may be attributed in part to greater economic and financial security that is often enjoyed by married couples.<sup>57</sup> Health benefits of legal marriage are particularly notable in the midst of traumatic events

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<sup>53</sup> *Id.* at 290 (Collester, J., dissenting).

<sup>54</sup> See Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, *supra* note 7, at 33.

<sup>55</sup> *Id.* at 24-25.

<sup>56</sup> *Id.* citing N.J. Johnson et al., *Marital Status and Mortality: The National Longitudinal Mortality Study*, 10 ANNALS EPIDEMIOLOGY 224 (2000); C.E. Ross et al., *The Impact of the Family on Health: The Decade in Review*, 52 J. MARRIAGE & FAM. 1059 (1990); R.W. Simon, *Revisiting the Relationships Among Gender, Marital Status, and Mental Health*, 107 AM. J. SOC. 1065 (2002).

<sup>57</sup> See Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, *supra* note 7, at 24-25.

such as illness, death or incapacitation of a partner. Stress in times of trauma can be mitigated if a spouse has a sense of personal control. For example, a legal spouse is granted access to his or her incapacitated partner in times of illness and can make important health decisions regarding their care.<sup>58</sup> In contrast, depending on the jurisdiction in which they live, many same-sex couples are not entitled to the same deference. Arguably, “[s]uch barriers to assisting and supporting one’s partner, or even having contact with her or him, substantially compounds the stress inevitably associated with a health crisis for both partners. Such an experience is likely to add a layer of psychological trauma to what is already a highly stressful event.”<sup>59</sup>

Not only does marriage have distinct psychological benefits, as a legal institution marriage provides access to economic and social benefits as well as a host of federally and state conferred rights to which same-sex couples are not privileged. For instance, the law acknowledges the importance of open communication between spouses.<sup>60</sup> This is manifested in the marital privilege, which precludes a spouse from being obligated to testify against one’s spouse.<sup>61</sup> Same-sex couples are not afforded this safeguard solely because of their inability to marry.<sup>62</sup> Therefore, at times when it is critical for same-sex couples to communicate with one another when serious problems arise that may have legal ramifications, same-sex partners may refrain from communicating with one another to their detriment.<sup>63</sup>

Marriage provides couples with an added sense of stability and commitment. The marital commitment is a function of internal as well as external forces in that external forces serve as constraints or barriers to dissolving a marriage. Such constraints include feelings of obligation to one’s spouse and children, financial concerns, religious beliefs and legal restrictions.<sup>64</sup> While such barriers may not prevent all married couples from seeking

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 28.

<sup>60</sup> *Id.* at 29.

<sup>61</sup> *Id.* at 30.

<sup>62</sup> See Brief of American Psychological Association and the New Jersey Psychological Association as Amici Curiae in support of Plaintiffs-Appellants, *supra* note 7, at 30.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

dissolution of their marriages, for some “the presence of barriers is negatively correlated with divorce, suggesting that barriers contribute to staying together for at least some couples in some circumstances.”<sup>65</sup> In certain marriages these barriers help keep family units together, thus benefiting children. It follows that in certain circumstances the children of same-sex couples would benefit if their parents were faced with similar barriers to dissolving their relationships. But such barriers or constraints exist only when the ability to legally marry exists.

It is well settled that the right to marry is fundamental.<sup>66</sup> However, many opponents of homosexual marriage argue that same-sex couples should not be permitted to marry because one of the cornerstones of marriage is an ability to biologically procreate and same-sex couples are unable to do so. “The marriage is procreation argument singles out the one bridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage.”<sup>67</sup> Nevertheless, the United States Supreme Court has long recognized that there are numerous non-procreative reasons why couples marry. For instance, the Supreme Court in *Turner v. Safely*<sup>68</sup> reiterated four non-procreative “attributes” of marriage.<sup>69</sup> First, marriage represents an expression of emotional support and public commitment.<sup>70</sup> Second, marriage is an expression of religious faith as well as personal dedication.<sup>71</sup> Third, it offers the prospect of physical “consummation.”<sup>72</sup> Finally, “marital status often is a pre-condition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits [such as] . . . legitimation of children born out of wedlock.”<sup>73</sup> Like opposite-sex

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<sup>65</sup> *Id.* at 31, citing T.B. Heaton & S.L. Albrecht, *Stable Unhappy Marriages*, 53 J. MARRIAGE & FAM. 747 (1991); L.K. White & A. Booth, *Divorce Over the Life Course: The Role of Marital Happiness*, 12 J. FAM. ISSUES 5 (1991).

<sup>66</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>67</sup> *Goodridge*, 798 N.E.2d at 962.

<sup>68</sup> 482 U.S. 78 (1987).

<sup>69</sup> *Id.* at 94.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Turner v. Safely*, 482 U.S. at 96.

couples, same-sex couples should be entitled to exercise their fundamental right to marry and enjoy the many “attributes” of marriage.

The procreation argument is also diminished by the United States Supreme Court’s consistent recognition that married couples have the right not to procreate. In *Griswold v. Connecticut*<sup>74</sup> and *Eisenstadt v. Baird*<sup>75</sup> alike, the Supreme Court opined that government could not interfere with married or unmarried couples’ decisions about sex, procreation and the use of contraception.<sup>76</sup> “If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>77</sup>

Furthermore, bans on same-sex marriage do not advance society’s interest in procreation. As the Supreme Court in Massachusetts in *Goodridge v. Department of Public Health*<sup>78</sup> ruled, “if procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible boundary of nonmarital child-bearing and the creation of families by non-coital means.”<sup>79</sup>

Jurisdictions throughout the nation acknowledge that heterosexual as well as homosexual couples are becoming parents through other methods than biological procreation. Some of these methods include adoption, donor insemination, and surrogacy.<sup>80</sup> In addition, many of these jurisdictions also foster a strong public policy of supporting children’s relationship with their parents, no matter what their parents’ sexual orientation or familial configuration is.<sup>81</sup> For example, New Jersey Supreme

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<sup>74</sup> 381 U.S. 479, 485 (1965).

<sup>75</sup> 405 U.S. 438, 453 (1972).

<sup>76</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965);

<sup>77</sup> *Eisenstadt v. Baird*, 405 U.S. at 453.

<sup>78</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>79</sup> *Id.* at 961-62.

<sup>80</sup> See *Parenting Options for Same-Sex Couples in the U.S.*, available at: <http://www.buddybuddy.com/parent.html> (last visited on June 2, 2005).

<sup>81</sup> “The manner in which courts treat a parent’s sexual orientation as a factor in deciding child custody and visitation varies markedly from state to state and court to court. [However], [t]he trend in the law is for courts to treat a parent’s sexual orientation as a neutral factor—similar to a parent’s non-mari-

Court Justice Virginia Long, in her concurrence with the landmark decision, *V.C. v. M.J.B.*,<sup>82</sup> noted:

[W]e should not be misled into thinking that any particular model of family life is the only one that embodies “family values.” Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide for their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion) are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes. . . . In other words, the nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created. The values attached to the family. . . . can exist in . . . settings including families created by unmarried persons regardless of their sexual orientation.<sup>83</sup>

By pinning the definition of marriage to the ability to biologically procreate, the stigma and prejudice associated with same-sex relationships are exposed. This same procreation restriction is not placed on opposite sex marriages between older couples or those who choose to remain childless. Such an exclusionary definition deprives not only same-sex couples of their fundamental right to marry, but also deprives children of same-sex couples the right to be part of a legally recognized family.

#### **IV. Mechanisms That Enable a Child To Become a Member of a Same-Sex Family**

It is well known that many same-sex couples are raising families together in the United States.<sup>84</sup> Same-sex couples can be-

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tal heterosexual relationship—which will not justify loss of custody or a restriction on visitation unless the parent’s sexual orientation or activities can be shown to have harmed the child.” See *White Paper*, *supra* note 10, at 13, citing *Damron v. Damron*, 670 N.W.2d 871, 875 (2003); *In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990); *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1048, 1051 (3d Dist. 1996).

<sup>82</sup> 748 A.2d 539, 556-58 (N.J. 2000) (Long, J., concurring).

<sup>83</sup> *Id.* at 556-57 (Long, J., concurring).

<sup>84</sup> The American Bar Association Family Law Section estimates there are approximately four million same-sex parents raising approximately eight to ten million children. The American Civil Liberties Union offers a somewhat higher

come parents in a number of ways. First, the child of the same-sex couple can be the biological child of one of the partners.<sup>85</sup> The non-biological same-sex partner is akin to a stepparent. Second, adoption is a means by which same-sex couples can become parents. A number of states permit second-parent adoption;<sup>86</sup> however, New Jersey is the first state to permit simultaneous adoption by both adults at the outset, conferring the same legal rights and responsibilities for the adopted child upon both the adoptive parents.<sup>87</sup> New Jersey's simultaneous adoption is a significant distinction from second-parent adoption because it helps protect the adopted child should one of the parents become ill or die. Moreover, if the child were hospitalized both parents would have access to their child, thus benefiting the child.<sup>88</sup>

Where adoption is permitted, the anomaly is created that, while the child may be the legal child of both adults, these adults may not legally marry and receive marital benefits for their family unit. Included in contemporary non-traditional families are same-sex couples in long-term relationships where one partner serves as a second parent to the other partner's biological child without benefit of adoption. These couples often embrace the same traditional concept of family values as heterosexual couples, such as providing support, loyalty, welfare, love and affection . . . the non-biological parent may in fact serve as the psychological parent to the child. This parent . . . however is not afforded the legal benefits of the marital status and is not recognized as a legal parent of the child."<sup>89</sup>

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estimate of eight to thirteen million children being raised by same-sex parents. Lambda Legal Defense & Education Fund has estimated that between six and fourteen million children are being raised by same-sex couples throughout the United States. See *Parenting Options for Same-Sex Couples in the U.S.*, *supra* note 80.

<sup>85</sup> 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, 424 (1999).

<sup>86</sup> A list of states (and jurisdictions within states) allowing step-parent adoption is available at Human Rights Campaign, Second-Parent/Stepparent Adoption Laws in the U.S., at [http://www.hrc.org/Template.cfm?Section=Your\\_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13383](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13383)

<sup>87</sup> See American Civil Liberties Union, New Jersey Becomes First State to Allow Joint Adoptions by Lesbian and Gay Couples, at <http://www.aclu.org/news/n121797a.html>.

<sup>88</sup> See *Parenting Options for Same-Sex Couples in the U.S.*, *supra* note 80.

<sup>89</sup> See Silverman, *supra* note 85, at 424.

Psychological, legal and economic benefits serve a child's best interests by having parents whose relationships are legally recognized. For example, if the parents were to separate, the non-biological parent would have the legal obligation to continue to support the child.<sup>90</sup> Legal recognition of same-sex partners would also prevent a child from being devastatingly denied the right to visit with the non-legal parent. Also, if only one parent has legal rights of access to the child and that parent dies, the child is placed in a situation void of legal guarantees and emotional security. Such child may be unable to continue living with the non-legal parent.<sup>91</sup> More often than not, children do not fathom the legal and economic benefits of adoption or the significance of same-sex marriage. Of import, however, is the emotional bond between a parent and child as well as the day to day relationship with loving parents.<sup>92</sup>

The third method by which same-sex couples may become parents is by surrogacy via artificial insemination, usually by an anonymous sperm donor. In most states the problem that arises in such situations is that only the biological mother is deemed to have a legal relationship with the child. Despite the fact that both same-sex partners collaboratively decided to become parents and completely share in the upbringing of their children, the non-biological parent is often deemed a legal stranger.<sup>93</sup> California, Massachusetts, Vermont, Illinois and New Jersey are the only five states in the country that recognize parentage in a same-sex partner who consents to the other's artificial insemination.<sup>94</sup> A New Jersey trial judge recently held that "New Jersey's Artificial Insemination Statute—which protects a child's relationship with a non-biological father who consents to his spouse's artificial insemination—should apply equally to a same-sex couple who show a sufficient level of commitment."<sup>95</sup> In so holding, the judge acknowledged the rights of same-sex couples to co-parent

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<sup>90</sup> *Id.* at 427-428.

<sup>91</sup> See Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 236 (1995).

<sup>92</sup> See Silverman, *supra* note 85, at 428.

<sup>93</sup> *Id.* at 429.

<sup>94</sup> Lisa Brennan, *Judge Rules Lesbian Partner Can Be Second Mother on Birth Certificate*, 180 N.J. L.J., May 30, 2005, at 11.

<sup>95</sup> *Id.* at 11.



and permitted the non-biological partner to be listed on the child's birth certificate as the second mother.

Of import is that, while family units are formed by various means, the children of same-sex unions are not entitled to the same legal status as are children of legally married heterosexual couples. This is entirely because of their parents' inability to marry. Also of importance

is that the child has no voice in the establishment of the parent-child relationship or whether the parents can marry; the reality of the child's life, at least to the child, does not depend on legal rules or definitions. The child is simply a product of the union—a product which may or may not have rights similar to those of other children whose parents happen to be legally married to each other or at least have the right to be so. The child plays no part in the creation of the family unit; the child merely participates in, and benefits from, the relationships that arise out of the family.<sup>96</sup>

Extending the ability to marry to same-sex couples will safeguard the best interests of children of these couples by placing all children on equal footing without regard to their parents' marital status or their parents' sexual orientation.

## V. Inequities Bestowed Upon Children of Same-Sex Parents

### A. Legal

Again, it is undisputed that millions of children throughout the nation are being parented by same-sex couples.<sup>97</sup> No logical explanation exists as to why these children do not deserve the protection and security that marriage provides—the same protection and security enjoyed by their counterparts being raised by different-sex married couples. As the *Goodridge*<sup>98</sup> court noted:

Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of

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<sup>96</sup> See Silverman, *supra* note 85, at 431, citing 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, 473 (1990); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 392 (1994).

<sup>97</sup> See American Bar Association, *supra* note 84.

<sup>98</sup> *Goodridge*, 798 N.E.2d 941 (Mass. 2003).

same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a “stable family structure in which children will be reared, educated and socialized” . . . It cannot be rational . . . to penalize children by depriving them of State benefits, because the State disapproves of their parents’ sexual orientation.<sup>99</sup>

Nonetheless, jurisdictions nationwide fail to place children of same-sex couples on par with those of different-sex married couples. For example, in New Jersey, to ensure that a child will be cared for by two loving adults, the statutes contain a presumption that a husband is the “parent” of a child born by his wife.<sup>100</sup> Similarly, in Washington, children born into marriage are presumed to be the offspring of their parents, whether conceived through intercourse or assisted reproduction.<sup>101</sup> Since the presumption of parentage in these jurisdictions, as in many throughout the nation, does not extend to children born of same-sex couples, these children are not protected in the same way as those born to married couples.

By limiting the presumption of parenthood to married couples, children born to same-sex partners are at risk because the law does not create joint responsibility for their welfare. Therefore, until the non-biological parent of the child born to a same-sex couple adopts the child, that parent will remain a legal stranger.<sup>102</sup> In many instances, the child will not benefit under intestacy statutes and may have no right to child support in the event of separation of their same-sex parents. In cases where an adoption has not been completed, a former same-sex partner may have the daunting task of proving “psychological parenthood” to gain access to the child if the adults’ relationship ends.<sup>103</sup>

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<sup>99</sup> *Id.* at 964 (citations omitted).

<sup>100</sup> See N.J. STAT. ANN. § 9:17-43 (2002); *In re Trust Created by Agreement Dated Dec. 20, 1961*, 765 A.2d 746, 752-53 (N.J. 2001), *cert. denied sub nom*, *Ryan v. Johnson*, 534 U.S. 889 (2001) (reiterating that legislative intent reflects well-settled common law principles that a child born in wedlock is presumed to be the offspring of the husband and the wife).

<sup>101</sup> Amicus Curiae Brief of Children’s Organizations in Support of Respondents, Heather Andersen and Leslie Christian, et al., *Anderson v. Washington*, No. 75934-1, (Wash. February 14, 2005), 2005 WL 901982.

<sup>102</sup> *Id.*

<sup>103</sup> See *V.C. v. M.J.B.*, *supra* note 82.

In the landmark decision of *V.C.v. M.J.B.*<sup>104</sup> the New Jersey Appellate Division held that a same-sex partner seeking parenting time with a child must prove all of the following elements of “psychological parenthood”:

- 1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; 2) that the petitioner and the child lived together in the same household; 3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation [a petitioner’s contribution to a child’s support need not be monetary]; and 4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.<sup>105</sup>

These criteria differ drastically from the basic assumption that the parent of a child raised by different sex parents should have parenting time or visitation regardless of his/her bond with the child or his/her prior financial commitment to the child. As a result, the children of same-sex couples are not on par with those of married couples, since their child-parent relationship may be in jeopardy if their parents separate.

A number of economic inequities are also bestowed upon children of same-sex couples due to their parents’ inability to legally marry. Children are affected by their parents’ tax status. Federal tax laws do not define marital status, but rather defer to state law determinations of marriage.<sup>106</sup> Marital status has a vital impact upon an individual’s federal income tax liability.<sup>107</sup> One’s status as married or single also affects deductions, tax credits and personal exemptions.<sup>108</sup> Legally married spouses enjoy a wide array of tax benefits to which same-sex couples are not privy,<sup>109</sup> including the right to benefit from filing joint tax returns.<sup>110</sup> Since same-sex partners are not entitled to the same tax benefits

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<sup>104</sup> 748 A.2d 539.

<sup>105</sup> *Id.* at 551.

<sup>106</sup> See Silverman, *supra* note 85, at 436.

<sup>107</sup> *Id.*

<sup>108</sup> See Daniel J. Lathorpe, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C. DAVIS L. REV. 257, 260 (1983).

<sup>109</sup> See Silverman, *supra* note 85, at 436.

<sup>110</sup> *Id.* at 437.

as their married counterparts their tax liability is generally higher. Therefore, same-sex partners are paying money in taxes that would otherwise be available as a financial resource to their children.

In addition, married couples are permitted by federal law, to “transfer wealth and property to each other during marriage completely free of federal income, gift or estate taxes.”<sup>111</sup> Also, married spouses do not incur income tax liability when they take advantage of numerous benefits offered by their spouse’s employer. Such benefits may include health insurance.<sup>112</sup> Nonetheless, a same-sex partner is required to report the health insurance provided to a partner as income and pay taxes on it.<sup>113</sup>

Children are also affected by their parent’s immigration status. While homosexuals are statutorily permitted to immigrate to the United States, same-sex spouses are not, even though heterosexual spouses are.<sup>114</sup> “The effect of this denial may be to prevent a parent of a child from entering or remaining in the United States, denying a child the right to live with his or her parent.”<sup>115</sup>

Many government benefits that require marriage as a prerequisite also exclude the children of same-sex partners. This is so due to the enactment of the DOMA which defines marriage as a legal union between a man and a woman.<sup>116</sup> “According to a study conducted by the General Accounting Office, there are over 1,000 ‘benefits rights and privileges [that] are contingent on marriage.’”<sup>117</sup> These benefits include social security benefits that are paid to dependent spouses as well as survivor benefits to minor children upon the death of a parent.<sup>118</sup>

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<sup>111</sup> *Id.* citing Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 45 (1998).

<sup>112</sup> See Silverman, *supra* note 85, at 437.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 440.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 441 citing Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. III 1997)).

<sup>117</sup> See Silverman, *supra* note 85, at 442 citing FEDERAL DOCUMENT CLEARINGHOUSE, REPORT TO HONORABLE HENRY HYDE, JR., available in 1997 WL 67783 (F.D.C.H.).

<sup>118</sup> See Silverman, *supra* note 85, at 442.

Further, because there is no legal relationship between the deceased non-biological parent and the child, the child does not have standing to sue the tortfeasor in a wrongful death action.<sup>119</sup> Once again the child is placed in a situation in which financial resources may become limited especially if the deceased non-biological parent was the primary wage earner.<sup>120</sup>

As a result of their parent's inability to marry, children of same-sex couples are disadvantaged in more ways than one. Until this is remedied children will continue to befall personal and economic inequities pertaining to taxes, immigration, government benefits and much more.

### B. *Psychological*

Coupled with the legal detriments that children face as a result of their parents' inability to marry are also psychological repercussions. Children of same-sex parents do not have a clearly defined legal relationship with their non-biological same-sex parent, particularly in situations in which the family does not have the financial means to complete a second parent adoption.<sup>121</sup> According to the American Psychological Association and the New Jersey Psychological Association:

Such legal clarity is especially important during times of crisis, ranging from school and medical emergencies involving the child to the incapacity or death of a parent. The death of a parent is a highly stressful occasion for a child and is likely to have important effects on the child's well-being. In those situations the legal bonds afforded by marriage can provide the child with as much continuity as possible in her or his relationship with the surviving parent, and can minimize the likelihood of conflicting or competing claims by non-parents for the child's custody.<sup>122</sup>

Moreover, there is currently a great deal of stigma associated with children being born out of wedlock. Traditionally, these children have been characterized as illegitimate or bastards.<sup>123</sup> While the stigma associated with illegitimacy has de-

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 443.

<sup>121</sup> See Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, *supra* note 7, at 50.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 52.

creased, being born to unmarried parents is still vastly considered undesirable.<sup>124</sup> This stigma may have a stressful impact on children who are labeled as such.<sup>125</sup> Children of same-sex couples will also indirectly bear the societal pressures associated with their parents' homosexuality.<sup>126</sup> For example, same-sex parents may experience greater stress in their relationship because they do not enjoy the same social support and recognition as heterosexual couples. The consequences of their parents' stress will ultimately affect the children.<sup>127</sup>

## **VI. Conclusion**

While great strides have been made nationwide towards expanding the rights of same-sex partners, none but Massachusetts have recognized a same-sex couple's right to marry.<sup>128</sup> Perhaps other jurisdictions will follow but in the meantime, children of these unions are greatly disadvantaged both legally and psychologically by their parents' inability to marry. Until same-sex couples are permitted to legally marry the best interest of their children will not be adequately safeguarded.

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<sup>124</sup> *Id.*

<sup>125</sup> See Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, *supra* note 7, at 52.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Goodridge, 798 N.E.2d 941.