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OBERGEFELL'S AMBIGUOUS IMPACT ON LEGAL PARENTAGE

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> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. … The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.
>
> United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)

> *Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.*
>
> Obergefell v. Hodges, 135 S. Ct. 2584, 2600-01 (2015).

The lawyers who structured the campaign for marriage equality for same-sex couples emphasized that denying these adults access to marriage harmed their children whom they were actually raising. They crafted this argument at least partially in response to their opponents' claim that opposite-sex married families are uniquely well-suited to raising children and that the ban on same-sex marriage was constitutional because it promoted childbearing within opposite-sex marriages.[1] While a few state courts accepted the opponents' claim,[2] more accepted the counterargument that the

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1. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1236–40 (2016).

2. Standhardt v. Superior Ct. *ex rel.* Cty. of Maricopa, 77 P.3d 451, 462–64 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 22–26 (Ind. Ct. App. 2005); Conaway v. Dean, 932 A.2d

children of same-sex couples were harmed when their parents were denied access to marriage.[3] Of course, the Supreme Court also accepted the latter argument in *Windsor* and *Obergefell* and said that it supported the conclusion that bans on same-sex marriage and refusal to recognize same-sex marriages from other jurisdictions violate the Fourteenth Amendment.[4] As a few scholars have written, these cases also have the potential to affect the law of parent-child relations more broadly, particularly the law that determines who is a legal parent.[5] However, how the cases will affect this area of the law is at best ambiguous.

For more than thirty years, the central question of the law of parentage has been when and to what extent determinations of legal parenthood should be based on biological relationship, marriage to a child's biological parent, or functioning as or intending to be a parent.[6] This question is embedded in the excerpts from the Supreme Court decisions at the beginning of this article. On the one hand, the Court is endorsing the claim that children whose parents are married are better off socially and legally than nonmarital children; the language in both opinions could easily be taken to support legal rules that encourage or prefer childrearing within marriage.[7] On the other hand, the Court's argument assumes that both members of the

571, 635 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 982–84 (Wash. 2006).

3. *See, e.g.*, Goodridge v. Dep't of Public. Health, 798 N.E.2d 941, 956–57 (Mass. 2003); Kerrigan v. Comm'r of Public Health, 957 A.2d 407, 474–75 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008); Lewis v. Harris, 908 A.2d 196, 217–18 (N.J. 2006).

4. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013); Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).

5. *See* NeJaime, *supra* note 1, at 1190; Joanna L. Grossman, *Parentage without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 718 (2016).

6. Many scholars have made the arguments for recognizing and protecting children's relationships to adults who take on parental responsibilities toward them. One of the earliest and most influential articles is Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984). I discuss the basic issues in Leslie J. Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461 (1996).

7. Even while celebrating the successes of the marriage equality movement in state courts before *Windsor* and *Obergefell*, some legal scholars expressed concern about the risk that legal parenthood would become even more strongly tied to a marriage as an unintended consequence. Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722 (2012); Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L. Q. 495, 496 (2014).

A number of scholars have criticized *Obergefell*'s valorization of marriage to the possible detriment of other family arrangements generally. Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23 (2015); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1283 (2015); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 71–73 (2015); *see also* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1518 (2016); Ruth Colker, *The Freedom to Choose to Marry*, 30 COL. J. GENDER & L. 383, 406–07 (2016).

same-sex couple are in fact parents of the children, even though it is highly likely that only one adult is biologically related to the child.[8] The unspoken premise of the argument is that both are parents because both function as parents (and often, but not always, both participated in the decision-making process that led to the child's conception and birth).

At the root of the debate over legal parenthood is, for children, the relative importance of blood ties and legal relationships between adults compared to the children's own relationships with adults who function as their parents and develop emotional bonds with them. Proponents of the view that the child's relationships matter more argue that a child's greatest need is for a close, stable relationship with an adult committed to the child's welfare, and that the law of parenthood should protect such a relationship.[9] Few, if any, seriously question the importance of protecting these relationships between children and their adult caregivers; the debate is over the best way to protect all children generally and to advance other social goals.

The traditional law of parentage protected functional parenthood, though not expressly. It provided that marriage to a child's mother was the only way that anyone except the mother became a legal parent (other than by adoption) through a centuries-old rule that is still viable today: a married woman's husband is presumed to be the father of her children.[10] When most children were born to married women, this rule served to identify as the legal father the man who was most likely to be a child's biological and social father.[11] However, as non-marital childbearing increased dramatically, relying primarily on marriage to determine legal paternity became unsustainable. The law of parentage for non-marital children has developed two strands. One emphasizes the needs of the child support enforcement system and bases legal parentage on biological paternity. The other is used mostly to determine custody and related issues and focuses on the psychological and functional relationships between the child and the adults. However, the biology-based strand of the law is often taken as the norm, while

8. The exception would be where one woman provides the egg that is fertilized and then carried to term by another woman. Even then, some people debate whether gestation counts as biological motherhood. *See generally* Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption,* 22 BYU J. PUB. L. 289 (2008); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From,* 2 GEO. J. GENDER & L. 1 (2000).

9. The classic article expressing this view is Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

10. *See* Part III *infra.*

11. *See* notes 37–39 and accompanying text *infra*.

the claims to protect functional relationships are treated as exceptions.[12] The dominance of biologically based paternity also affects marital children, particularly when a husband's legal paternity is challenged on the basis that he is not the biological father.[13] Faced with the tacit expectation that legal parenthood depends on biological parenthood, proponents of functional parenthood must constantly struggle for the acceptance of their position.

This article examines how the law in the various states balances claims to base legal parentage on biology, function, and marriage, and how the Supreme Court's same-sex marriage decisions are affecting that balance. It concludes that the decisions are having some impact in the lower courts, particularly by supporting recognition of the parental claims of adults who are not biologically related to children whom they have raised with their same-sex partners. However, these decisions are limited and cannot protect children and their functional parents adequately in all situations. Therefore, legislative solutions are still needed.

The first part of this article describes changing social conditions that have generated today's uncertainty about the law of legal parenthood. The second part analyzes statutes and case law that directly recognize functional parenthood through such doctrines as de facto parentage, with a focus on recent decisions with mixed results from Oklahoma,[14] Maryland,[15] Massachusetts,[16] New York,[17] and Wyoming.[18] The third and fourth parts examine more traditional rules of parentage, first when children are born to married women, and then when the mothers are not married. Each part includes a discussion of cases extending these principles to children of same-sex couples. The final part returns to the questions of the adequacy of current law and the need for legislation to improve the situation.

I. THE SOCIAL CONTEXT OF THE LAW OF PARENTAGE

In 2015 in the United States, about fifty-one million children younger than eighteen, or 69%, lived with both parents.[19] The parents of most of

12. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support,* 42 IND. L. REV. 611, 632 (2009) [hereinafter Harris, *The Basis for Legal Parentage*].

13. Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1296 (2013) [hereinafter Harris, *Reforming Paternity Law*].

14. Ramey v. Sutton, 362 P.3d 217 (Okla. 2015).

15. Conover v. Conover, 141 A.3d 31, 38 (Md. 2016).

16. Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016).

17. Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, 2016 WL 4507780 (N.Y. Aug. 30, 2016).

18. L.P. v. L.F., 338 P.3d 908, 908 (Wyo. 2014).

19. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS OF CHILDREN: 2015, tbl.C2, (Annual Social and Economic Supp. Nov. 2015),

these children were married, but three million children, or 4% of all children under eighteen, lived with both biological parents who were not married to each other.[20]

On the other hand, almost a third of all children, more than nineteen million, did not live with both parents because of the high rates of non-marital births, divorces, and breakups of informal domestic partnerships. Most of them live with their mothers. In 2015, 7.1 million of all children lived with a mother who was divorced or separated, while 8.3 million lived with a mother who had never been married. Another 1.6 million lived with a father who was divorced or separated, and 842,000 lived with a father who had never been married.[21] The incidence of children not living with both parents is unlikely to decline, mostly because of the high non-marital birth rate. In 2014, 40.2% of all births in the United States were non-marital.[22]

Many children not living with both parents currently live or will live in blended families because of the strong tendency of divorced[23] and single[24] parents to form new romantic relationships during their children's

http://www.census.gov/hhes/families/files/cps2015/tabC2-all.xls [hereinafter ARRANGEMENTS OF CHILDREN: 2015] (Household Relationship and Living Arrangements of Children Under 18 years, by Age and Sex: 2015).

20. *Id.*

21. Some 2.9 million children lived with neither parent. *Id.*

22. Brady E. Hamilton et al., *Births: Final Data for 2014*, 64 Nat'l Vital Stat. Rep. 12, tbls.1–4, tbl.B (Dec. 23, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf. Women of color are more likely than white women to have children outside marriage. In 2014, 29.2% of births to non-Hispanic white mothers were non-marital, compared to 52.9% of births to Hispanic mothers, and 70.9% to non-Hispanic black mothers. *Id.*

23. Rose M. Kreider, *Remarriage in the United States*, U.S. CENSUS BUREAU (2006), https://www.census.gov/hhes/socdemo/marriage/data/sipp/us-remarriage-poster.pdf.

24. In the United States, non-marital families are much less stable than marital families. ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY, (2009); ELIZABETH MARQUARDT ET AL., THE PRESIDENT'S MARRIAGE AGENDA FOR THE FORGOTTEN SIXTY PERCENT *in* THE STATE OF OUR UNIONS, 6–8, 31 (Nat'l Marriage Project & Inst. for American Values, 2012). Evidence from the Fragile Families and Child Well-Being Study, a major longitudinal study of about 5,000 children and their parents that includes a disproportionate number of non-marital children, shows that the relationships of unmarried parents are fragile; a year after birth, 48% of the fathers in the study were living away from their child, 56% were at three years and 63% were at five years. Marcia J. Carlson, Sara S. McLanahan & Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 461 (2008). The study includes children born in seventy-five hospitals in twenty cities in the U.S. with a population over 200,000. The study uses baseline data collected between 1998 and 2000. Mothers and fathers were interviewed at birth, and follow-up interviews were done when the children were one, three, and five years old. Results of the study are generalizable to urban areas with a population of more than 200,000. SARA MCLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY in BASELINE NATIONAL REPORT, at *2 (Rev. 2003). Re-partnering was the norm in the Fragile Families study. By the time a child was five years old, more than half had seen their mother's romantic partner move out or a new partner move in, 39% had experienced one or two of these changes, and 15% had experienced three or four changes. Sara McLanahan, *Fragile Families and Children's Opportunities* tbl.4 (Working Paper No. WP12-21-FF, (2012), http://crcw.princeton.edu/workingpapers/WP12-21-

minorities. In 2015, of all adults living with their own children younger than eighteen, 14% had been married twice, and 2.3% had been married three or more times. Only 11% had never been married.[25] And parents often live with other romantic partners to whom they are not married; in 2015, 2.4 million children lived in a household that included a parent's unmarried opposite-sex partner who was not also the child's parent.[26]

While most children live with two opposite-sex parents, almost 220,000 children lived in a household headed by a same-sex couple in 2013.[27] Of the 783,100 same-sex couples in the United States in 2014, 16% were living with at least one child who was the legal child of at least one of them.[28] In 2013, the Williams Institute reported that nearly half of LGBT women are raising a child younger than eighteen, and a fifth of LGBT men are.[29] Children of same-sex parents also commonly live in blended families, since most children being raised by lesbians were conceived in prior heterosexual relationships.[30]

As these data show, of the 30% of American children who do not live with both biological parents, most at some point live in a household that includes a parent's new partner, many of whom become caretakers for the children.[31] In at least some circumstances, these adults become functional parents, and both they and the children need legal protection for their relationships. The same is true for some of the 2.9 million children who live with neither parent,[32] though they are not the focus of this paper. The next section of this paper discusses statutes and case law that provide this pro-

FF.pdf. The average number of residential partner changes was three times higher among unmarried mothers than among married mothers. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE CHILD., Fall 2010 at 22.

25. Jamie M. Lewis & Rose M. Kreider, *Remarriage in the United States*, U.S. CENSUS BUREAU, 7 tbl.2 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/acs/acs-30.pdf.

26. ARRANGEMENTS OF CHILDREN: 2015, *supra* note 19, at tbl.C2.

27. GARY J. GATES, THE WILLIAMS INSTITUTE, LGBT PARENTING IN THE UNITED STATES (2013), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/ (last visited Oct. 17, 2016).

28. U.S. CENSUS BUREAU, HOUSEHOLD CHARACTERISTICS OF OPPOSITE-SEX AND SAME-SEX COUPLE HOUSEHOLDS, tbl.1, (Survey 2014), http://www.census.gov/hhes/samesex/files/ssex-tables-2014.xlsx.

29. GATES, *supra* note 27 at 2.

30. *See* Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, FAMILY FOCUS ON LGBT FAMILIES F1 (Winter 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/family-formation-and-raising-children-among-same-sex-couples/; *see also* Karen L. Brewster et al., *Demographic Characteristics of Lesbian Parents in the United States*, 33 POPULATION RES. POL'Y REV. 503, 524 (2014).

31. ARRANGEMENTS OF CHILDREN: 2015, *supra* note 19, at tbl.C2.

32. *Id.*

tection on the express basis of giving legal recognition to functional parent-child relationships.

II. DE FACTO PARENTHOOD OTHER THEORIES TO RECOGNIZE FUNCTIONAL RELATIONSHIPS

The major legal barrier to permitting an adult who is not a child's biological or adoptive parent to have access to the child over the parent's objection is the Supreme Court's decision in *Troxel v. Granville*.[33] *Troxel* is an ambiguous decision without a plurality opinion, but at its core it provides due process protection for the childrearing decisions of "fit" parents, particularly decisions about whether the children will spend time with other adults who are not legal parents. While the dominant interpretation of *Troxel* is that it means a parent's decision can be overridden to avoid detriment to the child, some states require proof that the parent's decision will harm the child or even that the parent is unfit.[34]

At least thirty-two states have statutes or case law that sometimes allows a functional non-biological parent to seek custody or visitation over a legal parent's objection, notwithstanding *Troxel*.[35] Eight states have statutes that create these rights,[36] and another eighteen have cases that recognize a relationship called "de facto parent," "psychological parent," or person standing "*in loco parentis*."[37] In some of these states, the de facto

33. 530 U.S. 57, 65 (2000).

34. See David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution,* 2001 BYU L. REV. 1075, 1081–1083, 1087 (2001) for discussions about how *Troxel* protects parental rights*, see generally* Sonya C. Garza, *The* Troxel *Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009); Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615 (2012). The Uniform Law Commission has published a draft Uniform Non-Parental Rights to Child Custody and Visitation Act that discusses *Troxel* extensively and proposes legislation that is clearly within the boundaries set by the constitution. NON-PARENTAL CHILD CUSTODY VISITATION ACT, UNIF. LAW COMM'N (Draft, June 3, 2016), http://www.uniformlaws.org/shared/docs/Non-Parental%20Rights%20to%20Child%20Custody%20and%20Visitation/2016AM_Non-ParentalRights_Draft.pdf.

35. *See also* Nancy D. Polikoff, From Third Parties to Parents: The Case of Lesbian Couples and Their Children, 77 LAW & CONTEMP. PROBS. 195, 208 (2014); Joslin, *Leaving No (Nonmarital) Child Behind, supra* note 7, at 498–05.

36. COLO. REV. STAT. ANN. § 14-10-123(1)(c) (2016); DEL. CODE ANN. tit. 13, § 8-201(c) (2016); D.C. Code §§ 16-831.01–16.831.13 (2016); HAW. REV. STAT. § 571-46(a)(2) (2006); IND. CODE § 31-17-2-8.5 (2016); KY. REV. STAT. ANN. § 403.270 (West 2016); MONT. CODE ANN. § 40-4-228 (2015); OR. REV. STAT. § 109.119(1) (2015); TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2016).

37. Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982); Bethany v. Jones, 378 S.W.3d 731, 738 (Ark. 2011); Riepe v. Riepe, 91 P.3d 312, 315 (Ariz. Ct. App. 2004); Laspina-Williams v. Laspina-Williams, 742 A.2d 840, 843–844 (Conn. Super. Ct. 1999); King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005); Conover v. Conover, 141 A.3d 31, 35 (Md. 2016); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004); LaChapelle v. Mitten, 607 N.W.2d 151, 159 (Minn. Ct. App. 2000); Latham v. Schwerdtfeger, 802 N.W.2d 66, 66 (Neb. 2011); V.C. v. M.J.B.,

parent has the status of legal parenthood and stands on equal footing with other legal parents.[38] In others, the de facto parent is not a legal parent and must overcome the *Troxel* presumption that the legal parent's decisions about access control.[39] In another five states, courts have held that a statutory presumption that a person taking a child into his or her home and holding the child our as his or her cannot always be rebutted by evidence that the adult is not the child's biological parent; the effect is that the adult is the child's legal parent.[40] Finally, New York has adopted a unique doctrine that protects functional parents sometimes. In 2016, the New York Court of Appeals in *Brooke S.B. v. Elizabeth A.C.C.* refused to recognize a broad doctrine of de facto parenthood.[41] Instead, it adopted what amounts to a waiver theory: If the biological parent and the functional parent agreed to conceive and raise a child as co-parents, the functional parent has the legal status of a parent, and has standing to seek custody because of the agreement.[42] On the other hand, courts in at least seven states have recently refused to recognize any of these doctrines or to provide any remedy to functional parents.[43]

Many, but not all, of the cases about whether to recognize de facto parenthood or a similar theory were based on disputes between lesbian couples at the time their relationships broke up. These include *Brooke S.B.* and three other very recent cases. Two of these cases overruled earlier deci-

748 A.2d 539, 551 (N.J. 2000); Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010); Ramey v. Sutton, 362 P.3d 217, 219; Jones v. Jones, 884 A.2d 915, 917 (Pa. Super. Ct. 2005); Rubano v. DiCenzo, 759 A.2d 959, 968 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d 161, 161 (Wash. 2005) (en banc); *In re* Clifford K., 619 S.E.2d 138, 155–56 (W. Va. 2005); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995). New York has a different rationale for granting parental status to some functional parents and is not included in this count. *See* discussion *infra* at text accompanying notes 42–44.

38. *See, e.g.*, *C.E.W*, 845 A.2d at 1151; *V.C.*, 748 A.2d at 549; *In re Parentage of L.B.*, 122 P.3d at 180–81. *See also* Smith v. Guest, 16 A.3d 920, 931 n.61 (Del. 2011) (citing cases).

39. *See e.g.,* R.D. v. A.H., 912 N.E.2d 958 (Mass. 2009).

40. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581 (Colo. App. 2013); Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Partanen v. Gallagher, 59 N.E.2d 1133 (Mass. 2016); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014); Chatterjee v. King, 280 P.3d 283, 288 (N.M. 2012). These cases and the statutes they interpret are discussed *infra* at text accompanying notes 113-135.

41. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016). (N.Y. Aug. 30, 2016). For an application of *Brooke S.B.* to a parentage dispute among a gay couple and a surrogate mother, *see* Matter of Frank G. v. Renee P.-F., 37 N.Y.S.3d 155 (App. Div. 2016) (gay partner of biological father of children has standing to seek custody although surrogacy agreement not enforceable against mother).

42. *Brooke S.B.*, 61 N.E.3d at 500.

43. D.M.T. v. T.M.H., 129 So.3d 320, 347 (Fla. 2013); *In re* Scarlet Z.-D., 11 N.E.3d 360, 360, 362 (Ill. App. Ct. 2014); McGaw v. McGaw, 468 S.W.3d 435, 435 (Mo. Ct. App. 2015); *In re* Thompson, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999); *In re* Hayden C.G-J., No. M2012-02701-COA-R3CV, 2013 WL 6040348, at *4 (Tenn. Ct. App. Oct. 18, 2013); Jones v. Barlow, 154 P.3d 808, 808 (Utah 2007); Moreau v. Sylvester, 95 A.3d 416, 423 (Vt. 2014); L.P. v. L.F., 338 P.3d 908, 908 (Wyo. 2014).

sions and recognized the de facto parent doctrine,[44] and the third ruled that a presumption that a person holding out a child as her own cannot necessarily be rebutted by proof that the adult is not the child's genetic mother.[45]Acknowledging the constitutional protection for parental decisions about who will have access to their children under *Troxel*, the courts that adopted the de facto parent doctrine concluded that acceptance of same-sex marriage undermined the premises of the older cases, though they were careful to distinguish de facto parents from other adults who might seek custody or visitation over a parent's objection.[46] Both courts placed de facto parents on a legal par with biological or adoptive parents. In *Conover v. Conover*, the Maryland high court wrote:

> Additionally, the passage of time and evolving events have rendered [the overruled case] obsolete . . . . Maryland's recognition of same-sex marriage in 2012—Civil Marriage Protection Act, Ch. 2, 2012 Md. Laws 9—undermines the precedential value of [the overruled case]. Our state's recognition of same-sex marriage illustrates the greater acceptance of gays and lesbians in the family unit in society . . . .
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> . . . .
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> . . . In light of our differentiation . . . between "pure third parties" and those persons who are in a parental role, we now make explicit that de facto parents are distinct from other third parties. We hold that de facto parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis. The best interests of the child standard has been "firmly entrenched in Maryland and is deemed to be of transcendent importance." With this holding we fortify the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships.[47]

The Oklahoma Supreme Court expressed similar views in *Ramey v. Sutton*, citing *Obergefell* as part of the reason to overrule the earlier case rejecting de facto parenthood:

> Since [the earlier decision], the Supreme Court of the United States ("SCOTUS") has ruled that marriage is a constitutionally guaranteed fundamental right for same sex couples in every state in this nation and affirming the longstanding constitutional right to have a family and raise children, Obergefell v. Hodges, 576 U.S. — (2015). Today we

44. *See Conover*, 141 A.3d at 35 (overruling Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) and Ramey v. Sutton, 362 P.3d 217).

45. Partanen v. Gallagher, 59 N.E.2d 1133 (Mass. 2016).

46. However, the Maryland court did not tie legal recognition of functional parents to marriage, citing the work of Professor Nancy Polikoff. *Id.* at 46–47.

47. *Id.* at 46, 50 (internal citations omitted).

> [acknowledge] the rights of a non-biological parent in a same sex (sic) relationship who has acted in loco parentis where the couple, prior to . . . Obergefell, supra, (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child . . . .
>
> . . . .
>
> . . . We have consistently given compelling consideration to the best interests of the minor child in custody matters. Our long standing jurisprudence recognizes the fundamental right of a parent to the companionship, care, custody and management of the child as guaranteed by the United States Constitution and the Oklahoma Constitution.
>
> We have held that when persons assume the status and obligations of a parent without formal adoption they stand in loco parentis to the child and, as such, may be awarded custody even against the biological parent. Other jurisdictions have relied on this doctrine in finding a former same sex partner had standing to bring a child custody action where the biological parent consented and encouraged her partner to assume the status of parent and acquiesced to the partner's performance of parental duties. One court noted that although the biological mother enjoys many rights as a parent, it does not include the right to erase a relationship that she voluntarily created and fostered with their child.[48]

Like the two de facto parent decisions, the Massachusetts Supreme Judicial Court case that relied on the holding out presumption to establish the legal parentage of the second member of a lesbian couple raising children together also recognized the parental rights of the biological mother. However, the court said, protecting the children's interest in preserving the actual family relationship with the other mother took precedence.[49]

In contrast, the New York Court of Appeals refused to recognize a broad, de facto parentage doctrine because of *Troxel*. However, like the Maryland and Oklahoma courts, it said that the changing legal position of same-sex couples required rejection of a twenty-five-year-old precedent that denied all rights to the nonbiological parent when a same-sex couple breaks up. In *Brooke S.B*. the court wrote:

> [The overruled case's] foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in Obergefell v. Hodges (576 U.S. ——, 135 S. Ct. 2584 [2015]), which noted that the right to marry

48. 362 P.3d at 218, 221 (footnotes omitted).
49. Partanen, 59 N.E.3d at 1141.

> provides benefits not only for same-sex couples, but also the children being raised by those couples.
>
> The Supreme Court has emphasized the stigma suffered by the "hundreds of thousands of children [who] are presently being raised by [same-sex] couples" (Obergefell, 135 S Ct at 2600–2608). By "fixing biology as the key to visitation rights, the [overruled case] inflicted disproportionate hardship on the growing number of nontraditional families across our State . . . .
>
> . . . .
>
> . . . We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children. For certainly, "the interest of parents in the care, custody and control of their children [ ] is perhaps the oldest of the fundamental liberty interests," and any infringement on that right "comes with an obvious cost" (Troxel, 530 U.S. at 64–65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a "parent" with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical . . . .
>
> . . . We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered . . . .
>
> . . . .
>
> . . . Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as coparents. We hold that these allegations, if proven by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.[50]

In sharp contrast to the cases from Maryland, Massachusetts, Oklahoma and New York, the Wyoming Supreme Court in 2014 refused to provide any relief to a functional parent when the biological parent sought to deny him visitation. Unlike the other three cases, the Wyoming case, *L.P. v. L.F.,* involved an opposite-sex couple.[51] The mother and the man were living together when the child was born, and he was listed as the father on the birth certificate, though he was not the biological father. They lived

50. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).
51. 338 P.3d 908, 908 (Wyo. 2014).

together for the first eighteen to twenty-one months of the child's life, separated, and then lived together again briefly. After a separation, they lived near each other for five more years, though they did not live together. The man helped support the child and saw him regularly, and the child regarded him as his father. For undisclosed reasons, the mother then filed a petition to disprove the father-child relationship.[52] The man argued that even if he was not the child's biological father, the court should adopt the de facto parent doctrine and grant him parental rights. The court refused, finding that the legislature intended the state parentage statutes—which are based on the Uniform Parentage Act (UPA)—to cover all theories upon which a nonparent might claim a right to a relationship with a child.[53]

In sum, while the de facto parent doctrine and related theories protect functional parent-child relationships where they are recognized, they have not been adopted in almost half the states. In some states, such as Oklahoma, there is a question about the applicability of the doctrine where parents could marry but choose not to.[54] The next two sections examine traditional principles of the law of paternity that fill this gap in some places and to some extent.

III. THE MARITAL PRESUMPTION – PARENTAGE BASED ON MARRIAGE TO A CHILD'S LEGAL PARENT AT BIRTH

As discussed in the introduction to this article, all states presume the husband of a married woman to be the father of her children born during the marriage. *Obergefell* raises the question of whether the marital presumption applies if the married couple is same-sex. A related question is whether state laws providing that a child born to a married woman via artificial insemination with her husband's consent is the legal child of the husband apply to married same-sex couples. While this rule is not on its face the same as the marital presumption, it is rooted in the same principles, and advances the same policies as the marital presumption. This section first examines whether these rules apply to married lesbian couples, including whether application of the rules is constitutionally required after *Oberge-*

52. If the man had lived with the child for the first two years of his life, he would have been presumed to be the child's father, and the statute of limitations on legal actions to challenge that presumption would have run. *Id.* at 911. The court rejected the man's argument that he had substantially complied with the statute creating the presumption and said that even if the presumption applied, it was rebutted by genetic evidence showing that he was not the biological father. *Id.* at 914-15. For a discussion of the presumption of legal paternity based on living with a child and holding out the child as one's own, *see infra* text accompanying notes 113–35.

53. L.P. v. L.F., 338 P.3d 908, 919 (Wyo. 2014).

54. *See Ramey*, 362 P.3d at 221, quoted at text accompanying *supra* note 48.

fell. It then considers the applicability of these principles when the partners are men. It concludes with a discussion of what happens when the marital presumption is challenged on the basis that the mother's spouse is not the child's biological parent.

A. Applicability of the Marital Presumption to Lesbian Couples[55]

The marital presumption, which has very old, common-law roots, applies to married opposite-sex couples in all states.[56] While some scholars have argued that the primary purpose and effect of the presumption is to allow married couples an easy way to establish the legal parent-child relationship based on biology,[57]since. most husbands are in fact the biological fathers of their wives' children,[58] the rule does more than this. In the great majority of cases, the presumption also protects the functional parent-child relationship and the integrity of the marriage, since no effort is made to rebut the presumption.

Whether the marital presumption applies to lesbian couples depends in the first instance on whether the court treats the presumption as pertaining

55. For an early discussion of these issues, *see generally* Susan F. Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

56. On the marital presumption generally, *see* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1304–08 (2005) [hereinafter Carbone, *The Legal Definition of Parenthood*]; Jana Singer, *Marriage, Biology and Paternity, The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248–55 (2006); Melanie Jacobs, *Overcoming the Marital Presumption,* 50 FAM. CT. REV. 289, 290 (2012).

57. *See, e.g.*, June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1021–22 (2003). *But see* Carbone, *The Legal Definition of Parenthood*, *supra* note 56, at 1305.

58. Empirical studies show that almost always men who believe themselves to be the fathers of children are in fact the fathers. A study published in 2013 reconstructing large family genealogies back four centuries in Belgium found a cuckoldry rate of less than 1%. M.H.D. Larmuseau et al., *Low historical rates of cuckoldry in a Western European human population traced by Y-chromosome and genealogical data*, 280 PROC. R. SOC. B 280:20132400 (2013), http://dx.doi.org/10/1098/rspb.2013.2400. Similar studies have found similar rates in Spain, Italy, Germany and agricultural villages in Mali. Carl Zimmer, *Fathered by the Mailman? It's Mostly an Urban Legend*, N.Y. TIMES, Apr. 9, 2016, at *A1. The most comprehensive analysis of U.S. data concluded that 98% of the men raising children they believe to be their biological children are correct. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Results from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 511, 516 (2006),

https://www.researchgate.net/publication/237633127_How_Well_Does_Paternity_Confidence_Match_Actual_Paternity_Evidence_from_Worldwide_Nonpaternity_Rates.

The rate of non-paternity is much higher for men who seek genetic tests to determine their paternity. A study conducted in the mid-2000s found that, for any man who was tested for paternity in a child support office, there was a 72% probability that the test would show that he is the father. The rate varied little across racial or ethnic lines. The differences among racial and ethnic groups were not statistically significant. David Bishai, *A National Sample of US Paternity Tests: Do Demographics Predict Test Outcomes?* 46 TRANSFUSION 849, 852–53 (May 2006). *See also* Anderson, *supra* note 58, at 5 (30% of the men who seek blood tests to confirm paternity are not the biological father).

only to biological parenthood. Relatively few states with laws addressing civil unions, comprehensive domestic partnerships, or same-sex marriages addressed this question before *Obergefell* was decided; of those that did, most held that lesbian couples are entitled to the benefit of the presumption as one of the benefits of marriage. In an early decision, following the holding in *Goodridge v. Department of Public Health* that same-sex marriage must be recognized under the state constitution,[59] the Massachusetts Supreme Judicial Court recognized a California domestic partnership as equivalent to marriage, and then applied the marital presumption.[60] Within a few years, courts in Connecticut[61] and Iowa[62] reached the same conclusion under their own statutes and case law. The Arizona Court of Appeals held that, in light of *Obergefell*, the marital presumption applies to a married lesbian couple,[63] and in dicta, an intermediate Missouri Appellate Court indicated that it would reach the same conclusion.[64]

However, strong dicta in a 2009 Oregon Court of Appeals decision said that the marital presumption could not apply to a same-sex couple because it is based on biology,[65] a position that it reaffirmed in 2015.[66] Similarly, dicta in a 2015 Florida case suggested strongly that the marital presumption would not apply to a same-sex couple, relying on a 1993 case holding that a husband who was living with the mother when her child was born and raised the child did not have standing to seek visitation when the parties divorced.[67] Both of these cases were decided before *Obergefell,*

59. 798 N.E.2d 941, 968–70 (Mass. 2003).

60. Hunter v. Rose, 975 N.E.2d 857, 857 (Mass. 2012).

61. *See Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973 (Conn. Sup. Ct. 2015) (civil union).

62. Gartner v. Iowa Dept. Pub. Health, 830 N.W.2d 335, 351 (Iowa 2013). In contrast, in 2015 the Iowa Supreme Court held that a husband who was married to the mother at the child's birth and who had raised the child, but who was clearly not a child's biological father, had no rights in a juvenile court dependency case because the statute speaks of biological and adoptive parents. *In re* J.C., 857 N.W.2d 495, 508 (Iowa 2014). Whether the legislature intended to use the statute to exclude the husband is far from certain, though. On the treatment of fathers in dependency cases generally, *see* Leslie J. Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions,* 9 J. L. & FAM. STUD. 281, 282 (2007).

63. McLaughlin v. Jones, 2016 WL 5929205 (Az. App. 2016).

64. McGaw v. McGaw, 468 S.W.3d 435, 447 (Mo. Ct. App. 2015).

65. Shineovich v. Shineovich, 214 P.3d 29, 36 (Or. Ct. App. 2009) ("By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child.").

66. *In re* Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015). Both *Madrone* and *Shineovich* involved lesbian couples who were not married or in a domestic partnership when their children were born because the laws at the time did not allow them to be. The women who were not the biological mothers successfully argued that a statute concerning a husband who consents to his wife's artificial insemination applied to them so as to make them legal parents of their mates' children.

67. Russell v. Pasik, 178 So. 3d 55, 59 (Fl. Dist. Ct. App. 2015) (discussing O'Dell v. O'Dell, 629 So. 2d 891, 891 (Fla. Dist. Ct. App. 1993)).

however, and so they do not address whether the constitution requires extending the presumption to same-sex couples.[68] The lower courts in New York are divided about whether the marital presumption applies to same-sex couples,[69] although the New York Court of Appeals decision in *Brooke S.B. v. Elizabeth A.C.C.*[70] better comports with the decisions applying the presumption. This is so because most of the time when a child is born to a same-sex couple, they will have agreed to raise the child together, which gives the biological mother's partner parental status under *Brooke S.B.*[71]

B. Applicability of Artificial Insemination Statutes to Lesbian Couples

If a married woman conceives by artificial insemination by donor, and the marital presumption in her state is rebuttable by evidence that her husband is not the biological father, his legal paternity would be vulnerable. In fact, in some early cases, courts held that the children were not the husband's legal issue, even though he had consented to the procedure.[72] To avoid this outcome, a number of states have enacted statutes providing that when a husband consents to his wife's artificial insemination, he is the legal father.[73] Before *Obergefell,* courts in some states applied these statutes to lesbians who were married, in civil unions, or in domestic partnerships,[74] although other courts did not.[75] In 2015, a Michigan appellate court applied *Obergefell* to reach the same result,[76] and in 2016 the Indiana Court of Appeals applied to a lesbian couple its case law rule that a child con-

68. For a discussion of this issue, *see infra* Part III.C.

69. *Compare* Wendy G-M. v. Erin G-M, 985 N.Y.S.2d 845, 850 (N.Y. Sup. Ct. 2014) (extending marital presumption to same-sex couples) *with* Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (N.Y. App. Div. 2015) (finding non-biological parent lacked standing to challenge custody absent extraordinary circumstances) *and* Q.M. v. B.C., 995 N.Y.S.2d 470, 473–74 (N.Y. Fam. Ct. 2014) (holding marital presumption did not establish that biological mother's wife was child's second mother).

70. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

71. *See id.*

72. Gursky v. Gursky, 242 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1973), *superseded by statute* NY DOM. REL. LAW § 24 (McKinney 2008); *see also* Wellborn v. Doe, 394 S.E.2d 732, 734 (Va. Ct. App. 1990).

73. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 46 § 4B (West, Westlaw through ch. 260 (excluding ch. 218, 2016 2d Ann. Sess.)); OR. REV. STAT. § 109.243, *invalidated by* Shineovich v. Shineovich, 214 P.3d 29, 37 (Or. Ct. App. 2009).

74. Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012); *Wendy G-M.*, 985 N.Y.S.2d at 845.

75. Dubose v. North, 332 P.3d 311, 312 (Okla. Civ. App. 2014), *overruled by* Ramey v. Sutton, 362 P.3d 217, 221 (Okla. 2015).

76. Stankevich v. Milliron, 882 N.W.2d 194, 195 (Mich. Ct. App. 2015); *see also In re* Kelly S. v. Farah M., 28 N.Y.S.3d 714, 715 (N.Y. App. Div. 2016); Counihan v. Bishop, 974 N.Y.S.2d 137, 138 (N.Y. App. Div. 2013) (recognizing domestic partnership and marriage from other states as matter of comity).

ceived during marriage with the consent of both spouses is the child of both of them, though it did not invoke *Obergefell*.[77]

C. Does the Constitution Require Applying the Parentage Rules to Same-sex Couples?

Since *Obergefell*, two federal district courts have held that states' refusals to extend the marital presumption to a woman whose wife gives birth during the marriage violates equal protection, due process, or both. In *Henderson v. Adams*, the Indiana department of vital statistics refused to allow both women's names to be on the child's birth certificate on the basis that the wives of the biological mothers were not legal parents under state law.[78] The women sued, alleging that the state law violated equal protection and due process because they created a presumption of parenthood for husbands, but not wives, of birth mothers. The court granted their motion for summary judgment. On similar facts, the Utah federal district court in *Roe v. Patton* also ruled in favor of the biological mother and her wife.[79]

In *Henderson*, the more extensive of the two opinions, the court ruled that the state's action was subject to heightened scrutiny because the state was applying the marital presumption differently based on gender and sex classifications. The state argued that its position was supported by its interests in protecting the rights of biological fathers and maintaining accurate records of children's biological parentage. The court rejected this argument, saying:

> The Court is not convinced that the challenged Parenthood Statutes are substantially related or narrowly tailored to meet the stated interests of preserving the rights of biological fathers and maintaining accurate records of biological parentage . . . .
>
> . . . .
>
> . . . During oral argument, the State Defendant asserted that the birth mother should not name her husband as the father of the child when a third-party sperm donor is involved. However, as noted above, common sense says that she will name her husband as the father. Whether she names her husband as the father or states that she is not married to the father, the biological father's parental rights are not preserved and accurate

77. Gardenour v. Bondelie, No. 32A01-1601-DR-82, 2016 Ind. App. LEXIS 290, at *19–22 (Ind. Ct. App. Aug. 15, 2016). *See also* Matter of L., 2016 N.Y. Misc. LEXIS 3674 (N.Y. Fam. Ct.) (applying artificial insemination statute to married same-sex couples but also allowing the nonbiological mother to adopt the children because her legal relationship to the children based on the statute is not recognized in some countries).

78. Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *1–2 (S.D. Ind. June 30, 2016).

79. No. 2:15-CV-00253-DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015).

> records of biological parentage are not maintained. If the mother names her husband, the third-party sperm donor who is the biological father is not listed on the birth certificate. If the mother says she is not married to the father, the third-party sperm donor who is the biological father still is not listed on the birth certificate. In either event, the State's interests in preserving the rights of biological fathers and maintaining accurate records of biological parentage are not served.[80]

Obergefell, the court said, "stands for the proposition that any benefit of marriage must now be extended to same-sex married couples on an equal basis with opposite-sex married couples. But this is exactly what the Plaintiffs seek—the extension of a benefit of marriage on an equal basis."[81] Turning to the plaintiff's due process claim, the court said:

> The Supreme Court long ago recognized a fundamental liberty interest "to marry, establish a home and bring up children . . . ."
>
> . . . .
>
> . . . The Parenthood Statutes and the State Defendant's implementation of the statutes . . . significantly interferes (*sic*) with the Plaintiffs' exercise of the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples. What Plaintiffs seek is for their families to be respected in their dignity and treated with consideration . . . . As previously stated, the Parenthood Statutes are not narrowly tailored to meet a compelling governmental interest. By refusing to grant the presumption of parenthood to same-sex married women, the State Defendant violates the Plaintiffs' fundamental right to parenthood under the Due Process Clause.[82]

D. What About Married Gay Men?

As Susan Appleton has written, on policy grounds there seems to be no principled reason that the marital presumption would not apply to two married men, one of whom is the biological father of a child who was born to a "surrogate" with the assistance of reproductive technology.[83] However, for practical reasons, the marital presumption is not important for establishing the legal paternity of a biological father's male spouse.

In some states, statutes determine the parentage of a child born through assisted reproductive technology, though they vary considerably.[84]

80. *Henderson*, 2016 WL 3548645, *12–13.

81. *Id.* at *13.

82. *Id.* at *14–15.

83. Appleton, *supra* note 55, at 260–61.

84. *See* COURTNEY JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3 (Westlaw, Thomson Reuters, 2016). For a summary of the states' approaches to this situation, *see* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 671–73 (2016).

If the statutes allow the sperm donor/intended father to become the legal father, they will probably allow for his spouse to become a parent as well.

If there are no special statutes, generally applicable family law rules are applied, and some kind of legal process for establishing paternity of the man who provided the sperm to conceive the child will be required.[85] If the biological mother of the child, the "surrogate," is not married, she and the biological father could establish his legal parentage by signing and filing with the state a voluntary acknowledgment of paternity.[86] On the other hand, if the mother is married, the presumption of her husband's legal paternity must first be rebutted through some kind of legal proceeding.[87] In either case, however, absent a special reproductive technology statute, the mother remains a legal parent, and ordinarily the parties will want to eliminate that legal relationship. This would require a legal proceeding, such as an adoption or an action for termination of parental rights. During that legal proceeding, the legal parentage of the biological father's husband could be established as well.[88] Thus, there is rarely, if ever, a practical occasion for invoking the marital presumption when the married couple is male.[89]

E. Obergefell*'s Implications for Rebutting the Marital Presumption*

Although at common-law the marital presumption for opposite-sex married couples was conclusive unless the husband had literally been out of the country when the child could have been conceived,[90] in most states

85. On the legal position of unmarried fathers generally, *see* Part IV.A. *infra*.

86. For a discussion of voluntary acknowledgments of paternity, *see infra* text accompanying notes 100–14.

87. Under the Uniform Parentage Act, the husband can sign a document disclaiming paternity at the same time the biological father signs the acknowledgment of paternity, and both can be filed. UNIF. PARENTAGE ACT §§ 301–305 (2002). These provisions of the act have been adopted in Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. DEL. CODE ANN. tit. 13, §§ 8-301 to -305 (2016); 750 ILL. COMP. STAT. 46/301 to -305 (2015); ME. REV. STAT. ANN. tit. 19-A, §§ 1861–1865 (2015); N.M. STAT. ANN. §§ 40-11a-301 to -305 (West 2009); N.D. CENT. CODE §§ 14-20-11 to -15 (2016); OKLA. STAT. ANN. tit. 10, §§ 7700-301 to -305 (West 2016); TEX. FAM. CODE ANN. §§ 160.301–305 (West 2016); UTAH CODE ANN. §§ 78b-15-301 to -305; (West 2016); WASH. REV. CODE §§ 26.26.300–320 (2016); WYO. STAT. ANN. §§ 14-2-601 to -605 (2016). Alabama, however, omitted these sections when it adopted its Parentage Act. ALA. CODE. § 26-17-302 (2008).

88. In 2016, a Mississippi federal district held that a Mississippi statute that barred couples of the same gender from adopting children was unconstitutional under *Obergefell*. The statute was the last remaining express statutory ban in the country. Campaign for S. Equal. v. Mississippi Dep't of Human Serv., 175 F. Supp. 3d 691 (S. D. Miss. Mar. 31, 2016).

89. Thanks to Professor Richard Storrow for helping me think this through.

90. At common law the marital presumption could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months. 1 WILLIAM BLACKSTONE, COMMENTARIES, *287. *See generally* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 207–15 (1985) on developments in the American colonies. This rule was complemented by Lord Mansfield's rule, which prevented either spouse from giving

today, when the spouses are opposite-sex, the presumption may be rebutted with genetic evidence.[91] But when the marital presumption is invoked in the context of a same-sex marriage, it would be nonsensical for this rebuttal rule to apply, since the spouse of the woman who bore the child will by definition not be related to the child (except in the case where she provided the egg that became the child). To recognize the marital presumption for same-sex couples is equivalent to recognizing that the spouse of the person who bore the child is a legal parent because she is the intended parent, the functional parent, or both. If the Constitution does indeed compel the conclusion that the marital presumption is a benefit of marriage to which same-sex couples are entitled, the Constitution compels recognition that at least sometimes legal parenthood must be based on function or intention. The question courts will have to confront is how this development affects the law governing rebuttal of the marital presumption for opposite-sex couples.

In many circumstances, state law precludes rebuttal of the marital presumption because the challenger lacks standing, a statute of limitations has run, the challenger is estopped from rebutting the presumption, or rebuttal is contrary to the child's interests. For example, the Uniform Parentage Act ("UPA") of 2002 grants standing to rebut the presumption to the child, the mother, a man whose paternity is to be adjudicated (including a legal father and an alleged father), the state child support enforcement agency, and adoption agencies.[92] Under the UPA, an action must be brought within two years of the child's birth,[93] and courts have discretion to deny a motion for genetic testing based on findings that a party is estopped from denying paternity or that allowing testing or disestablishing paternity would be contrary to the child's best interests.[94] Even without a statute, a number of

testimony that cast doubt on the husband's biological paternity. Goodright v. Moss, 98 Eng. Rep. 1257, 1257 (KB 1777). Together these rules kept out of court highly reliable evidence that a child was not in fact the husband's biological child.

91. A few states still recognize a conclusive presumption of paternity in limited circumstances. For example, in California and Oregon, third parties cannot challenge the presumption if the marriage is intact and the spouses object to the third party challenge. CAL. FAM. CODE §§ 7540–7541 (West 2004); OR. REV. STAT. § 109.070(2) (2015). The constitutionality of an earlier version of the California conclusive presumption was upheld against a biological father's due process challenge in *Michael H. v. Gerald D.*, 491 U.S. 110, 118–30 (1988).

92. UNIF. PARENTAGE ACT § 602 (2002).

93. *Id.* § 607(a). If the presumed father and the mother did not cohabit or engage in sex at the probable time of conception, and if the presumed father never held out the child as his, the action may be maintained at any time. *Id.* § 607(b).

94. *Id.* § 608. For a detailed discussion of similar provisions in current state statutes, *see* Harris, *Reforming Paternity Law, supra* note 13 at 1308–13. At least six states statutes deny standing to men to challenge the marital presumption based on a claim to have fathered the child of a woman married to someone else. And a number have short statutes of limitations on challenges, grant courts authority to reject challenges to serve the child's best interests, or both.

courts have held that genetic evidence offered to rebut the presumption can be excluded to protect the child's best interests.[95] Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped from denying parentage because of the detrimental reliance of the other party or, sometimes, the child.[96]

Obergefell does not directly require that any of these rules apply when the couple is opposite-sex, since it does not address the rights of opposite-sex couples. On the other hand, the key assumption underlying the *Obergefell* discussion of marriage and parenthood is that when a same-sex couple is raising a child together by mutual agreement, they *are* both parents. As a matter of equal protection, members of opposite-sex couples should have the same protection when they are raising a child together, regardless of whether the husband is the biological father. At a minimum, outsiders to the marriage should not be able to challenge the husband's legal parentage based on biology. Further, since neither spouse in a same-sex marriage should be able to rebut the marital presumption based on lack of biological relationship, the same should be true for spouses in an opposite-sex marriage.[97] Whether the courts will agree with this position is, however, uncertain, of course.

While *Obergefell* very likely requires that same-sex couples have the benefit of the marital presumption, and while it provides support for pro-

95. *See* Ban v. Quigley, 812 P.2d 1014, 1018–19 (Ariz. Ct. App. 1990) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); Williamson v. Williamson, 690 S.E.2d 257, 258–59 (Ga. Ct. App. 2010); *In re* Marriage of Ross, 783 P.2d 331, 338–39 (Kan. 1989) (remanding for determination of whether allowing mother's attempt to require blood tests would be in best interests of child); Turner v. Whisted, 607 A.2d 935, 940 (Md. 1992) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); B.H. v. K.D., 506 N.W.2d 368, 378 (N.D. 1993) (refusing putative father's attempt to require blood test to determine paternity); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872–73 (W. Va. 1989) (remanding for determination whether admission of blood tests showing husband was not father, at husband's request in divorce action, was in best interests of child); *In re* Paternity of C.A.S., 468 N.W.2d 719, 729 (Wis. 1991) (applying statute and refusing putative father's attempt to require blood test to determine paternity); *In re* Adoption of R.S.C., 837 P.2d 1089, 1092–94 (Wyo. 1992) (holding that presumptive but not biological father's status could not be challenged later by mother in effort to have child adopted by another man). For a discussion of this kind of case, as well as other judicial strategies to prevent challenges to the marital presumption to protect the child's interests, see Harris, *Reforming Paternity Law, supra* note 13, at 1314–17.

96. *See In re* Marriage of K.E.V., 883 P.2d 1246, 1252–53 (Mont. 1994) (mother's actions estopped her from challenging husband's paternity); M.H.B. v. H.T.B., 498 A.2d 775, 779–81 (N.J. 1985) (father's actions estopped him from challenging his paternity); K.E.M. v. P.C.S., 38 A.2d 798, 810 (Pa. 2012) (mother's actions may estop her from challenging husband's paternity); Pettinato v. Pettinato, 582 A.2d 909, 912–13 (R.I. 1990) (mother's actions estopped her from challenging husband's paternity); *In re* Adoption of R.S.C., 837 P.2d at 1093–95 (same). For further discussion, *see Reforming Paternity Law, supra* note 13, at 1315–18.

97. For other perspectives on this issue, *see* Carbone & Cahn, *Marriage and the Marital Presumption Post*-Obergefell, *supra* note 84, at 667; Paula A. Monopoli, *Inheritance law and the Marital Presumption After* Obergefell, 8 EST. PLAN. & COMMUNITY PROP. L.J. 437 (2016).

tecting the parentage of spouses against challenges based on biology, the extent of that support is far from clear. Further, the opinion does not directly address the parentage of the many children who are born to unmarried couples, either same-sex or opposite-sex. The next section turns to this topic.

IV. THE LEGAL PARENTAGE OF NON-MARITAL CHILDREN

The routes to legal paternity for unmarried men are, for the most part, rooted in the biological relationship. However, several doctrines expressly or in effect allow men who are not biological fathers to attain legal parenthood (without adopting). In most states, though, a legal finding that an unmarried man is a child's legal father is vulnerable to challenge on the basis that he is not the biological father.

On its face, *Obergefell* has nothing to say about the extension of these legal principles to same-sex couples because of its focus on marriage. Nevertheless, its implicit premise that functional parent-child relationships should be protected could support a refusal to allow challenges to legal parentage based on lack of biological connection. Whether courts will be willing to take those steps is far from certain, and, at least in some states, seems unlikely.

A. Unmarried Fathers' Routes to Legal Paternity

The only legal parent of a non-marital child at the time of birth is the mother. Nothing like the marital presumption exists to identify anyone else as a possible parent. Indeed, well into the twentieth century, many non-marital children simply did not have legal fathers who could claim custodial rights, though if the biological father could be identified, his paternity might be established through a legal proceeding for the purpose of imposing a child support obligation on him.[98] However, under the law of most states today, once a man's paternity is established, he has the same rights and duties as a married father, at least in theory.[99] But still, his paternity must be legally established first.

98. At common law, non-marital children were bastards—the children of no one. 1 BLACKSTONE, *supra* note 90, at *454, *458–59. By the early nineteenth century, they were recognized as the legal children of their mothers in most American states. GROSSBERG, *supra* note 90, at 207–15.

99. Supreme Court decisions in the 1970s held that discrimination against non-marital children violated equal protection, and called into doubt laws denying custodial rights to unmarried fathers. *See e.g.*, Levy v. Louisiana, 391 U.S. 68, (1968); Labine v. Vincent, 401 U.S. 532 (1971); Stanley v. Illinois, 405 U.S. 645 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973); Trimble v. Gordon, 430 U.S. 762 (1977). In response, the 1973 Uniform Parentage Act provided that once the parent-child relationship is established between an unmarried man and his

While all states have statutes that create legal proceedings to establish paternity (sometimes called filiation actions), the paternity of the great majority of children born outside marriage today is established by a voluntary acknowledgment of paternity (VAP). A VAP is a document signed by a child's mother and the putative father that identifies the man as the father.[100] There is no requirement that genetic testing precede signing the documents, and most VAPs are signed at the time of birth at the hospital or other birthing facility, usually without genetic testing having been done.[101] When the document is filed with the state office of vital statistics, it establishes legal paternity and has the effect of a judgment of paternity.[102] In 2015, 1.07 million of the 1.49 million cases in which paternity was established were done by a VAP.[103]

Federal and state laws provide that a VAP may be revoked at-will by either signatory for 60 days; after that, it can be set aside only on the basis of fraud, duress or material mistake of fact.[104] The UPA provisions regarding challenges to VAPs after the first sixty days limit standing to the child, the mother, and a man whose paternity is to be adjudicated (the legal father or an alleged father), subject to a two-year statute of limitations running from the date of the VAP.[105] Court-ordered genetic testing is the only basis for setting aside a VAP,[106] and—as is the case with children born to married women—courts have authority to deny requests for genetic testing based on findings that the challenger is estopped from denying paternity and that allowing testing or disestablishing paternity would be contrary to

child, the rights and duties attendant to that relationship should be the same as for all other parents and children. UNIF. PARENTAGE ACT §§ 1–2 (1973).

100. 42 U.S.C. § 666(a)(5)(C).

101. MICH. OFF. OF CHILD SUPPORT, STATE OF MICHIGAN, *One Year Pilot Summary, in* 100% PATERNITY ESTABLISHMENT PROGRAM 8 (2001). In study of 1,660 unwed births at hospitals, paternity was voluntarily established in 78.5% of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed.

102. Federal law requires states to have legislation authorizing VAPS as a condition of the states' participation in the federal public welfare and child welfare programs. 42 U.S.C. § 666(a)(5)(C)–(D) (2012). The federal child support program and its state law requirements are described in Leslie J. Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L. Q. 157, 167–68 (2011). Article 3 of the Uniform Parentage Act is a model statute for state law establishing VAPs. UNIF. PARENTAGE ACT (2002).

103. OFF. OF CHILD SUPPORT ENF'T, FY 2015 PRELIMINARY REPORT, 7 tbl.P-2, http://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_preliminary.pdf.

104. More specifically, either party must be able to rescind the acknowledgment within sixty days of the signing or the date of any judicial or administrative proceeding relating to the child, whichever occurs first. 42 U.S.C. § 666(a)(5)(D)(ii). Because the federal laws are so specific on these points, state laws are fundamentally similar. For examples, *see* UNIF. PARENTAGE ACT §§ 307, 308 (2002).

105. *Id.* §§ 602, 609, 307, 308.

106. *Id.* § 631(1).

the child's best interests.[107] Actual state law on challenges to VAPS is highly variable.[108] While eight states have statutes substantially similar to the UPA, more than half say that in some circumstances genetic evidence alone may be sufficient to set aside a VAP.[109] Eighteen of these states, like the UPA, give courts discretion to refuse to set aside a VAP based on estoppel or the best interests of the child.[110] In states without governing statutes, case law is also mixed, often allowing a VAP to be set aside based on genetic evidence (unless the facts support an estoppel claim).[111]

The 1973 and 2002 UPAs also provide a second, informal way for a man to become a legal father. They provide that a man who takes a child into his home and holds out the child as his is rebuttably presumed to be the father.[112] Nineteen states have statutes modeled on the uniform acts.[113] The Uniform Act places the same limits on rebutting this presumption as those that apply to the marital presumption.[114] Just as state law about rebutting the marital presumption varies, so does state law about rebutting this pre-

107. *Id.* §§ 608, 609.

108. With the dramatic increase in voluntary paternity establishments early in a child's life (and the great improvements in genetic testing) has come an increase in the occasions for legal fathers to question their paternity. Another driver of the increase in paternity disestablishment efforts is the aggressive efforts by state governments to establish paternity of non-marital children as a step toward collecting child support from nonresident fathers. Such suits are usually brought against poor people (where both mother and child are receiving public assistance), and state laws, in compliance with federal laws, allow the suits to be settled without genetic test or resolved by default against the alleged father. *See Reforming Paternity Law, supra* note 13, at 1319–20.

109. *See Reforming Paternity Law, supra* note 13, at 1321–27.

110. *Id.*

111. *Id.* at 1327–35.

112. UNIF. PARENTAGE ACT § 4 (1973). The 2002 Act's requirements are stricter than those of the 1973 Act; most importantly, the man must have lived with the child for two years, starting at birth. UNIF. PARENTAGE ACT §§ 201(b)(1), 204(5) (amended 2002).

113. The states with "holding-out" statutes are Alabama, California, Colorado, Delaware, Hawaii, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Texas, Washington, and Wyoming. Seven of the states with holding out statutes follow the 2002 UPA by requiring that the man live with the child during the first two years of the child's life, and the other twelve impose no time limit. ALA. CODE. § 26-17-204(a)(5) (2008); CAL. FAM. CODE § 7611(d) (West 2004); COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2016); DEL. CODE ANN. tit. 13, § 8-204(b) (2016); HAW. REV. STAT. ANN. § 584-4(a)(4) (West, Westlaw through Act 1 (End), 2016 2d Spec. Sess.); IND. CODE ANN. § 31-14-7-2 (West 2016); MASS. GEN. LAWS ANN. ch. 209C § 6(a)(4) (West, Westlaw through ch. 260 (excluding ch. 218, 2016 2d Sess.) (man and mother must have received child into their home and held out child as theirs); MINN. STAT. § 257.55 (2015); MONT. CODE ANN. § 40-6-105(1)(d) (2015); N.H. REV. STAT. ANN. § 168-B:3(1)(d) (2014); N.J. STAT. ANN. § 9:17-43(5) (West 2016); N. M. STAT. ANN. § 40-11A-204 (2010); NEV. REV. STAT. ANN. § 126.051(1)(d) (West 2015); N.D. CENT. CODE § 14-20-10(1)(e) (2016); OKLA. STAT. ANN. § tit. 10, § 7700-204(5) (West 2016); 23 PA. STAT. AND CONS. STAT. ANN. § 5102(b)(2) (West 2016); TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2016); WASH. REV. CODE § 26.26.116(2) (2016); WYO. STAT. ANN. § 14-2-504(v) (2016).

114. *See supra* notes 92–94 and accompanying text. The UPA provisions regarding rebuttal of parentage presumptions are the same, regardless of the presumption. UNIF. PARENTAGE ACT §§ 602-608.

sumption. In most states, unless a statute of limitations has run, a court has held that a challenger is estopped to deny the man's paternity, or a court has held that rebutting the presumption is contrary to the child's interest, genetic evidence will be admitted to rebut the "holding-out" presumption.[115]

The leading exception to the principle that biology rebuts the holding-out presumption is developed in a line of California cases. The first case was *In re Nicholas H.*, where the California Supreme Court held that the presumption is not necessarily rebutted by such evidence when the result would be to leave a child "fatherless and homeless."[116] In that case, the man had lived with the mother for some time during her pregnancy, and his name was on the child's birth certificate, but everyone agreed that he was not the biological father. The biological father was known, but he had never had contact with the child, and his location was unknown. When the child came before the juvenile court on allegations that he was dependent because of his mother's inability to care for him, the man came forward and claimed paternity, invoking the holding-out presumption. The juvenile court refused to rebut the presumption, and the California Supreme Court affirmed, citing supporting decisions from the intermediate California appellate courts.[117] The effect was to provide a legal parent to a child who otherwise would have gone into the foster care system, perhaps never to be reunited with his mother or his absent biological father.

In a second juvenile court dependency case, *In re Jesusa V.*, the California Supreme Court held that a husband who relied on the marital presumption as well as the holding-out presumption prevailed over the biological father, who was incarcerated for raping the mother and who also claimed the benefit of the holding-out presumption.[118] The husband had been separated from the mother for three years, but she visited with him and supported his claim that he had held out as the father. In upholding the husband's argument not to rebut the presumptions of paternity in his favor, the court said, "the Legislature did not envision an automatic preference for biological fathers, even if the biological father has come forward to assert his rights."[119] *Inter alia*, it cited a statute providing that when paternity presumptions favor two different men, the court should favor the one

115. A recent case reaching this result is *L.P. v. L.F.*, 338 P.3d 908, 908 (Wyo. 2014).
116. 46 P.3d 932, 934 (Cal. 2002).
117. *Id.* at 937–41.
118. 85 P.3d 2, 14 (Cal. 2004).
119. *Id*. at 11.

founded on weightier considerations of policy and logic.[120] Instead, the court said, a court must consider whether rebutting a presumption would be "appropriate" under the circumstances. On these facts, ruling for the husband was appropriate because of his substantial relationship with the child and the biological father's relative lack of involvement (not to mention his inability to care for the child because of his incarceration).[121]

While both the VAP and the holding-out presumption typically identify a child's biological father, both can also serve to give legal protection to relationships between children and men who are raising them, even though the men and the children are not biologically related. Genetic testing is not a prerequisite to signing a VAP or a condition that must be satisfied before the presumption arises. If neither a VAP nor the presumption is challenged, no question is raised about the biological relationship, and a non-biological functional father can be recognized as a legal father. Further, in some states, a court may reject a challenge to a VAP or the holding-out presumption based on estoppel or the child's interests.

B. Applying Unmarried Fathers' Law to Same-Sex Partners

In six states, the holding-out presumption has been deployed to protect the relationship between a lesbian who raised a child with the child's biological mother, but who was not married to the mother and who did not

120. *In re* Jesusa V., 85 P.3d at 11–12 (citing CAL. FAM. CODE § 7612 (West 2004)). In all states, two or even three different men may benefit from a presumption of paternity: the husband from the marital presumption, another from the holding-out presumption, and a third man from a presumption based on positive results of genetic testing. Federal child support law requires state law to create a rebuttable presumption, or—at the option of the state—a conclusive presumption of paternity when genetic test results indicate a threshold probability that the alleged father is the father of the child. 42 U.S.C. § 666(a)(5)(G) (West, Westlaw through Pub. L. No. 114-229). Of course, two presumptions (or even all three) can also benefit the same man. When the presumptions clash, in most states, the presumption that prevails is the one that advances the child's best interests, which often results in preserving the husband's functional relationship with the child rather than establishing the legal paternity of the biological father. For another example, *see* N.A.H. v. S.L.S., 9 P.3d 354, 354–55 (Colo. 2000), for another example; *see also* Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Doe v. Doe, 52 P.3d 255 (Haw. 2002); G.D.K. v. State, 92 P.3d 834 (Wyo. 2004); Dept. of Revenue *ex rel*. Garcia v. Iglesias, 77 So.3d 878 (Fla. Dist. Ct. App. 2012); *In re* Paternity of B.J.H., 573 N.W.2d 99, 101–02 (Minn. Ct. App. 1998) (best interests is a factor but is not controlling in choosing between competing presumptions of paternity). In contrast, *Courtney v. Roggy* interpreted Missouri's statute on clashing presumptions as favoring the presumption based on biological paternity. 302 S.W.3d 141, 146 (Mo. Ct. App. 2009). The 2002 Uniform Parentage Act does not address clashing presumptions explicitly, relying instead on the court's authority to use estoppel to protect a child's relationship to a presumed father. UNIF. PARENTAGE ACT § 204 cmt. background (2002).

121. The court also cited decisions from other states holding that, on the right facts, the marital presumption of paternity is not rebutted by genetic evidence. *In re Jesusa V.*, 85 P.3d at 14.

adopt the child.[122] The effect is to give the women the status of legal parents.

California cases relying on *Nicholas H.* and *Jesusa V.* were the first to extend the holding-out presumption to women partners of biological mothers. In *Elisa B. v. Superior Court*, the court held that a lesbian who had planned for the birth of two children with her partner and who had lived as their mother since birth had held them out as her children and was obliged, as a parent, to support them when the mothers split up.[123] State supreme courts in Kansas,[124] Massachusetts,[125] New Hampshire,[126] and New Mexico,[127] and a Colorado appellate court[128] subsequently held that unmarried women could be legal parents under the "holding-out" provision. A Nevada court also indicated in dicta that it would reach the same conclusion.[129] The same outcome might have been reached had the courts adopted robust de facto parent rules, but that is not the route the courts took.

Functional parenthood is legally protected to a limited extent for children born outside marriage. At least in some states, courts have discretion to refuse challenges to paternity findings based on lack of biological relationship, either because the challenger is estopped from bringing the challenge or to protect the child's best interests. Further, one paternity law doctrine—the presumption of parentage from holding out—has been extended in a few states to same-sex couples. For the most part, however, the

122. *See* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples,* 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 471–72 (2012) [hereinafter Harris, *Voluntary Acknowledgements*], on second-parent adoptions for lesbian-couple-headed families. As the title of this article indicates, it makes an argument for extending VAPs to same-sex couples, including a sketch of the constitutional argument supporting this extension. *Id.* at 475–88. In *Partanen v. Gallagher* the Massachusetts Supreme Judicial Court assumed that a same-sex couple could sign a VAP and so could establish the partner who was not the biological parent as a legal parent. 59 N.E.3d 1133, 1139 (Mass. 2016).

123. Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005). In one companion case, *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005), the court held that a woman who donated her eggs to her partner—who conceived through in vitro fertilization—was also a legal mother, and that a statute providing that a sperm donor is not the legal father should not apply to her. In the second companion case, *Kristine H. v. Lisa R.*, 117 P.3d 690, 690 (Cal. 2005), the court held that a biological mother who had stipulated to a judgment declaring that her lesbian partner was a legal parent was estopped from challenging that judgment.

124. Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013). This case holds that a woman who has held out a child as hers may have standing to bring an action to determine parentage; the woman prevailed not only because of the presumption, but also because of a co-parenting agreement signed by the biological mother. *Id.* at 553, 557.

125. Partanen v. Gallagher, 59 N.E.2d 1133 (Mass. 2016).

126. *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014).

127. *See* Chatterjee v. King, 280 P.3d 283, 288 (N.M. 2012).

128. *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 581–82 (Colo. App. 2013).

129. St. Mary v. Damon, 309 P.3d 1027, 1032 (Nev. 2013) (holding that when one lesbian partner provides the egg for the other to bear a child, both may be legal mothers under the state parentage act).

law bases legal parentage of non-marital children on biology unless the de facto parent doctrine or a similar rule, discussed in Part II above, applies.

V. THE IMPACT OF *OBERGEFELL,* THE INADEQUACY OF CURRENT LAW, AND A PROPOSAL

The promise that *Obergefell* would encourage states to recognize the legal parenthood of both partners to same-sex marriages is bearing fruit in the extension of the marital presumption to same-sex married couples. In some states, *Obergefell* may be encouraging the development of legal principles that protect functional parent-child relationships more broadly, but this development is very uneven. In some states, the protection for children raised by same-sex couples exists only if the couple is married, and in other states, the law does not apply equally to same-sex and opposite-sex couples and their children. Difficulties for same-sex families is exacerbated because most of the doctrines discussed in this paper require litigation to determine whether an adult will be recognized as a parent and the extent of that protection, since the doctrines do not provide an a priori way of establishing a parent-child relationship. For these reasons, new statutes to protect functional parent-child relationships more fully are needed.

A. The Uneven Protection from State to State

As this paper has shown, some jurisdictions have case law and statutes that provide broad protection to functional families across a range of situations, including recognizing de facto parent claims or their equivalent, protecting parenthood of both same-sex partners who raise a child together, and limiting efforts to rebut the marital presumption or disestablish the paternity of unmarried fathers. Examples include California,[130] Colorado,[131] D.C.,[132] Iowa,[133] Massachusetts,[134] Michigan,[135] and New Mexico.[136] In most states, however, protection, if it is available, is more limited.

130. *See supra* notes 120–125 and accompanying text (limitations on rebutting holding out doctrine); *supra* note 123 and accompanying text (extending holding out doctrine to same-sex couples); Harris, *Reforming Paternity Law*, *supra* note 13, at 1311 n.105–08 and accompanying text (limits on rebutting marital presumption), and 1326 n.192 (limits on disestablishing paternity).

131. COLO. REV. STAT. ANN. § 14-10-123(1)(c) (2016); *In re* Parental Responsibilities of A.R.L., 318 P.3d at 581 (Colo. App. 2013) (parental status of unmarried same-sex partners); Harris, *Reforming Paternity Law*, *supra* note 13, at 1310 n.82 (limits on rebutting marital presumption), and 1326 n.194 (limits on disestablishing paternity).

132. D.C. CODE § 16-831.01(1) (2016) (protecting functional parents and same-sex parents); M.M. v. T-M.M., 995 A.2d 164, 164 (D.C. 2010) (per curium) (limit on disestablishing paternity).

133. Gartner v. Iowa Dept. Pub. Health, 830 N.W.2d 335, 351 (Iowa 2013) (parental status of married same-sex couples); Harris, *Reforming Paternity Law*, *supra* note 13, at 1310 n.99 (limits on rebutting marital presumption), and 1326 n.192 (limits on disestablishing paternity).

For example, some cases extend protection for functional parents only to adults in same-sex relationships. They include recent decisions from Oklahoma and New York. In *Ramey v. Sutton*, the Oklahoma court said, "[t]oday we . . . acknowledge[] the rights of a non-biological parent in a same sex relationship who has acted in loco parentis."[137] In *Brooke S.B.*, the New York Court of Appeals said that a person who is not biologically related to a child has standing to seek functional parent protection only where the person "proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents."[138] While on its face this language is gender-neutral, as a practical matter, it is likely to apply almost always to same-sex couples, since the state has a statute providing that a husband is the legal father of a child born to his wife by artificial insemination with his consent.[139]

A number of states protect functional parent-child relationships of opposite-sex couples, but do not signal protection for same-sex parent-child relationships outside marriage. These states include North Dakota,[140] Delaware,[141] and Texas.[142] Some states, such as Florida[143] and Illinois,[144] have

134. Hunter v. Rose, 975 N.E.2d 857, 857 (Mass. 2012) (parental status of married same-sex couples); Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) (applying holding out presumption to lesbian couple); *In re* Paternity of Cheryl, 746 N.E.2d 488, 488 (Mass. 2001) (limits on disestablishing paternity); Della Corte v. Ramirez, 961 N.E.2d 601, 602 (Mass. App. Ct. 2012) (same).

135. *See* Stankevich v. Milliron, 882 N.W.2d 194, 196 (Mich. Ct. App. 2015) (married same-sex couples' parentage); Harris, *Reforming Paternity Law*, *supra* note 13, at 1312 n.113–16 and accompanying text (limits on rebutting marital presumption), and 1322 n.168 (limits on disestablishing paternity).

136. *See* Chatterjee v. King, 280 P.3d 283, 290–91 (N.M. 2012) (discussing the parental status of same-sex unmarried partners); *see also* Harris, *Reforming Paternity Law*, *supra* note 13, at 1309 n.83 (limits on rebutting marital presumption), and 1322 n.162 (limits on disestablishing paternity).

137. 362 P.3d 217, 219 (Okla 2015). Oklahoma also limits efforts to rebut the marital presumption and to disestablish paternity. *See also* Harris, *Reforming Paternity Law*, *supra* note 13, at 1309 n.85 (limits on rebutting marital presumption), and 1322 n.164 (limits on disestablishing paternity).

138. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

139. N.Y. DOM. REL. LAW § 73 (McKinney 2016). An intermediate New York appellate court has held that the artificial insemination statute applied to the mother's domestic partner. *In re* Kelly S. v. Farah M., 28 N.Y.S.3d 714, 720 (N.Y. App. Div. 2016).

140. Harris, *Reforming Paternity Law*, *supra* note 13, at 1309 n.84 (limits on rebutting marital presumption), and 1322 n.163 (limits on disestablishing paternity).

141. *Id.* at 1309 n.82 (limits on rebutting marital presumption), and 1322 n.161 (limits on disestablishing paternity)

142. *Id.* at 1309 n.86 (limits on rebutting marital presumption), and 1322 n.165 (limits on disestablishing paternity); *In re* J.M.C., No. 04-06-00431-CV, 2007 WL 460691, at *3 (Tex. Ct. App. Feb. 14, 2007) (judgment based on admission of paternity without genetic testing cannot be set aside since mother's alleged lie is intrinsic, not extrinsic, fraud).

143. D.M.T. v. T.M.H., 129 So. 3d 320, 345–46 (Fla. 2013) (recognizing parental rights of both parties in lesbian relationship but only because one provided the egg and the other one gestated child); Russell v. Pasik, 178 So. 3d 55, 61 (Fl. Dist. Ct. App. 2015) (refusing to recognize de facto parent doctrine, dicta saying marital presumption would not apply to same-sex couple because based on biology). *See also* FLA. STAT. § 742.18 (2016) (setting aside paternity determinations).

laws that strongly tend to base legal parentage on biology when the parents are opposite-sex, even if they are married, and that do not recognize functional parenthood for same-sex parents outside marriage. Utah protects functional parenthood within heterosexual marriage but does not have laws that protect functional parenthood claims outside marriage or for same-sex couples.[145]

Finally, some cases that protect the parentage of unmarried same-sex couples suggest that this protection may evaporate now that these couples can legally marry. For example, *Ramey v. Sutton*, the Oklahoma Supreme Court decision recognizing the de facto parent doctrine, says that one of the elements that must be proven is that the parties were legally unable to marry.[146] Similarly, in 2015 the Oregon Court of Appeals reaffirmed a 2009 decision holding that a person who consents to the artificial insemination of her unmarried same-sex partner must be regarded as a legal parent of the child.[147] At the time of the 2009 opinion, same-sex couples could not marry or enter domestic partnerships in Oregon. The court reasoned that the state's artificial insemination statute, which by its terms applies only to married opposite-sex couples,[148] violated the state constitution by creating a privilege, i.e., legal parentage by operation of law, that was not granted to all citizens on equal terms without adequate justification.[149] By 2015, when the second case was decided, same-sex couples could marry, and the court held that the statute would not apply to children born to same-sex couples who could but chose not to marry. It said,

> If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, "lived together as a couple, intended to remain together,

144. In re Scarlett Z.-D, 11 N.E.3d 360, 371 (Ill. App. Ct. 2014) (refusing to recognize de facto parent doctrine); 750 ILL. COMP. STAT. 45/7(b-5) (2013) (allowing a man who signed a VAP to seek an order for genetic testing) *repealed by* 750 ILL. COMP. STAT. ANN. 45/7 P.A. 99-85, § 977 (eff. Jan. 1, 2016).

145. UTAH CODE ANN. § 78B-15-607 (West 2016) (limiting rebuttal of marital presumption), and § 78B-15-307 (allowing genetic evidence to set aside VAP); Jones v. Barlow, 154 P.3d 808, 808 (Utah 2007) (refusing to recognize de facto parent doctrine); Roe v. Patton, No. 2:15-CV-00253-DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015) (ordering state office of vital statistics to issue birth certificate recognizing non-biological mother as parent on basis of *Obergefell*).

146. 362 P.3d 217, 219 (Okla. 2015).

147. *In re* Madrone, 350 P.3d 495 (Or. Ct. App. 2015), *modifying* Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009).

148. OR. REV. STAT. § 109.243 (2015), *invalidated by Shineovich*, 214 P.3d at 40.

149. *Shineovich*, 214 P.3d at 37–40. *Shineovich* also held that the constitution does not require that the marital presumption apply to same-sex couples because of its presumption about biological paternity. *Id.* at 36.

> and intended to have a child and to co-parent the child." Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role . . . . Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice—commitment without marriage. Because ORS 109.243 would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice.[150]

B. The Limitations of After-the-Fact Remedies

The marital presumption, the voluntary acknowledgment of paternity, artificial insemination, and other assisted reproduction statutes can be applied to determine a child's legal parent without litigation. However, many of the legal rules discussed in this paper that may be used to find that a functional but non-biological parent is a legal parent can be invoked only when the parental status of that person is challenged and litigation follows. The de facto parent and related rules require a court to examine in hindsight the relationships and actions of the legal parent and the claimed de facto parent to determine whether the doctrine's elements are proven. Similarly, only a court can determine whether the conditions for invoking the holding-out statute were satisfied and, if so, whether the presumption of parentage has been rebutted, based on the specifics of the case. And if the marital presumption may be rebutted or a VAP set aside because the man is not the biological father, litigation is again required to determine if the challenge should be barred because of estoppel or the child's best interests.[151]

This characteristic of these rules means that they cannot provide certainty about a child's legal parentage unless and until litigation occurs. Relationships remain vulnerable to disruption, and the expense and difficulty of litigation almost surely deters some functional parents from making claims that they could theoretically win.

C. Toward a Statutory Solution

To remedy the problems with existing legal avenues for protecting functional parent-child relationships, statutory solutions are needed.[152] These statutes should create simple, inexpensive procedures for legal par-

150. *In re Madrone*, 350 P.3d at 501.

151. *See* Harris, *Reforming Paternity Law*, *supra* note 13, at 1336–38.

152. For another approach to a solution, *see* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 92 CHI.-KENT L. REV. (forthcoming 2016).

ents and their partners who are or will become functional parents, to register the partners as legal parents, much as a VAP allows an unmarried mother and a man to register his legal paternity.[153] Where an adult other than the man may have a claim to be the child's legal parent (assuming for purposes of discussion that state law permits a child to have only two parents[154]), the law should at least create a simple, inexpensive procedure for that other person to relinquish his or her claim, as the Uniform Parentage Act permits.[155]

If parentage of a child is disputed, so that litigation is necessary, the law should clearly provide that a de facto parent is a legal parent, on an equal footing with other legal parents. Several states have statutory provisions to this effect; the District of Columbia statutes are particularly complete.[156]

These proposals probably would probably be rejected in states that are generally unfriendly to legally recognized functional parenthood or to same-sex families. However, in the many states that are amenable to recognizing same-sex families and functional parenthood, these changes should be received more favorably, since they facilitate the clarification of parent-child relationships at a time when parties are not hostile to each other. This would provide greater stability and certainty to families as well as reduce family law litigation.

153. For a more extended development of this proposal specifically for same-sex partners, *see* Harris, *Voluntary Acknowledgments*, *supra* note 122, at 487–88.

154. *See* June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. (forthcoming 2016).

155. Under the Uniform Parentage Act, a person can sign a document disclaiming paternity at the same time another man signs a VAP, and both can be filed at the same time. UNIF. PARENTAGE ACT §§ 301–305 (2002).

156. D.C. CODE §§ 16-831.01 to -831.13 (2016).

ASSISTED REPRODUCTION INEQUALITY AND MARRIAGE EQUALITY

SEEMA MOHAPATRA, JD, MPH *

"'The first bond of society is marriage; next, children; and then the family."[1]

-Justice Kennedy, *Obergefell v. Hodges*.

I. INTRODUCTION

Marianne and Erin Krupa, a married lesbian couple, have been trying to have a baby via in vitro fertilization for three years.[2] Between the two of them, they have suffered six miscarriages.[3] They have spent over $50,000 on infertility treatments.[4] Although New Jersey is one of fifteen states that requires health insurance companies to offer or cover infertility coverage, the Krupas do not meet New Jersey's definition of infertility.[5] The Krupas, along with another lesbian couple, have brought suit against the New Jersey Department of Banking and Insurance, based on the claim that the insurance mandate discriminates against their sexual orientation.[6] This Article considers this timely case study in light of the much-heralded *Obergefell v. Hodges* decision and the Affordable Care Act's nondiscrimi-

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1. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (quoting CICERO, DE OFFICIIS 57 (W. Miller transl. 1913)).

2. Megan Jula, *4 Lesbians Sue Over New Jersey Rules on Fertility Treatment*, N.Y. TIMES, Aug. 8, 2016, http://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html.

3. *Lesbian Couple Sues New Jersey Over Infertility Treatment Law*, CBS NEWS, (Aug. 29, 2016, 6:51 AM), http://www.cbsnews.com/news/lesbian-couple-sues-new-jersey-over-infertility-treatment-law/.

4. Jula, *supra* note 2.

5. N.J. STAT. ANN., §17B:27–46.1x (West 2016). New Jersey law's definition of infertility only anticipates opposite-sex couples. In New Jersey's statute infertility "means the disease or condition that results in the abnormal function of the reproductive system such that a person is not able to: impregnate another person; conceive after two years of unprotected intercourse if the female partner is under thirty-five years of age, or one year of unprotected intercourse if the female partner is thirty-five years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to live birth." *Id.*

6. *Lesbian Couple Sues New Jersey Over Infertility Treatment Law*, *supra* note 3.

nation protections. In *Obergefell,* Justice Kennedy declared that "marriage is fundamental under the Constitution" and should "apply with equal force to same-sex couples."[7] This article examines how the advent of marriage equality may impact the rights of same-sex couples to have biological children via assisted reproduction and surrogacy. Specifically, this article points out the ways that the *Obergefell* decision affects the law of infertility. By the law of infertility, I mean the laws that require insurance coverage of infertility treatments and other assisted reproductive technologies ("ART"). Because same-sex couples are not able to have biological children with each other without ART, they are functionally infertile. However, insurance companies and state statutes use a medical definition of infertility. I suggest that this conception must change in order for same-sex couples to enjoy the same ART benefits that heterosexual couples enjoy.

Part II of this Article examines the *Obergefell* decision as a backdrop for the impetus for legal change in the realm of increased access to ART. Part III paints a landscape of how infertility treatment is provided in the United States, and the potential roadblocks for same-sex couples. In this section, I discuss access to infertility and ART services for same-sex couples. Part IV provides an overview of the opportunities and challenges for biological parenthood via surrogacy for same-sex couples.[8] Part V suggests reform efforts that may be needed for the law to be updated to accommodate for same-sex access to these services. Part V also suggests that equality may not be enough, as ART access in the United States is often more a matter of one's bank account than their sexual orientation. I suggest efforts for activism in this realm to open up ART beyond its typically white, upper-middle-class patrons to all those who wish to have a biological child.

II. *OBERGEFELL* AND OPPORTUNITIES FOR INCREASED ART ACCEPTANCE

Although scholars and activists have long noted the lack of access to assisted reproduction in gay and lesbian couples,[9] *Obergefell v. Hodges* and

7. *Obergefell*, 135 S. Ct. at 2589.

8. This article will focus on ART services such as IVF and surrogacy. In a few years, it may be possible for LGBT individuals to have uterine transplants. This may be most appealing to a transwoman who wishes to carry a pregnancy. At this current time, uterine transplantation is experimental. However, the state of technology is so rapid, and that this may actually be a possibility as a potential of biological parenthood. *See* Kavita Shah Arora & Valarie Blake, *Uterus Transplantation: Ethical and Regulatory Challenges*, J. MED. ETHICS 396, 396 (2013).

9. John Robertson has been one of the earliest and most renown scholars advocating for procreative liberty for LGBTQ couples. *See* John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 331 (2005).

the ACA's nondiscrimination provision provide an impetus for legal equality. ART is "an important tool for leveling the procreative playing field for lesbian, gay, bisexual, and transgender individuals ("LGBT") who seek to procreate in familial units that do not have the potential for coital reproduction."[10] Professor Kimberly Mutcherson rightly notes that ART allows LGBT individuals to build biologically-related families.[11] Equal access to ART can be culled from *Obergefell v. Hodges'* focus on the parenthood rights of LGBT individuals.

A. Obergefell v. Hodges and ART Access for LGBT Couples

In justifying the decision to grant marriage rights to gay couples, Justice Kennedy, in the majority opinion in *Obergefell*, notes that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[12] Kennedy also states that marriage affords "the permanency and stability important to children's best interests."[13] Kennedy specifically acknowledges that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[14] These excerpts demonstrate the Supreme Court's contemplation of same-sex couples participating in all the same activities and institutions as opposite-sex couples, principally childrearing.

By mentioning biological parenthood in the context of marriage equality, the Supreme Court accepts that same-sex couples can and do have biologically related children via ART. Thus, the *Obergefell* decision acknowledges the reality of gay parenthood, including gay "biological" parenthood, and dispels false stereotypes about gay parents as somehow deviant.[15] Although *Obergefell* does not create a right to biological parenthood, Justice Kennedy mentions the right of gay and lesbian couples to "marry, establish a home and bring up children."[16] For many people, the right to marry is incomplete without the right to have children.[17] An estimated 30% of married same-sex couples have children, and are raising

10. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 41 (2015).

11. *Id.*

12. *Obergefell*, 135 S. Ct. at 2600.

13. *Id.* at 2600.

14. *Id.*

15. Courtney Megan Cahill, *Obergefell and the "New" Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016).

16. *Obergefell*, 135 S. Ct. at 2600. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

17. Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples,* L.A. LAW., Jul.–Aug. 2016, at 12.

nearly 200,000 children.[18] Many married same-sex couples turn to surrogacy or adoption to grow their families.[19] Although some fear that marriage equality will not mean equality in parenthood,[20] optimistically the *Obergefell* decision may lead to broader acceptance of assisted reproduction, such as surrogacy.[21]

Professor Courtney Cahill notes *Obergefell* suggests that procreation is a constitutionally protected liberty right by acknowledging the interconnectedness of marriage and procreation by calling them "related rights" that compose a "unified whole."[22] *Obergefell* may bring constitutional parity between sexual and assisted reproduction.[23] Professor Douglas NeJaime deems family-based LGBT equality as "particularly significant to the status of assisted reproduction, which is central to same-sex family formation."[24] He suggests that marriage equality has the potential to normalize numerous types of ART for all families, including surrogacy.[25]

I agree with the scholars who suggest that the *Obergefell* ruling "extends constitutional shelter to choices concerning. . .family relationships, procreation, and childrearing."[26] It also establishes a constitutional norm of sexual orientation equality in marriage as the "related rights" of childrearing and procreation.[27] *Obergefell* now leads to the notion that parenthood should accommodate same-sex couples.[28] This article argues that, with this backdrop of marriage equality, there is a push towards assisted reproduction equality. Couples like the Krupas are desperate to have children who are biologically related to them.[29] Their state recognizes their marriage, but there is a question about whether it affords them the same opportunity for ART as it does to opposite-sex infertile couples.

18. June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 663 (2016).

19. Jeang, *supra* note 17, at 12.

20. Carbone & Cahn, *supra* note 18, at 663.

21. *Id.*

22. Cahill, *supra* note 16.

23. *Id.* at 8–10.

24. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1252–1253 (2016).

25. *Id.*

26. Cahill, *supra* note 15.

27. *Id.*

28. NeJaime, *supra* note 24, at 1190.

29. I have written elsewhere about how different forms of ART have made biological parenthood the normative ideal at the expense of adoption, whether justified or not. *See* Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice,* 30 HARV. J. RACIAL & ETHNIC JUST. 193, 218–19 (2014).

III. ASSISTED REPRODUCTION FOR ALL?

ART services are costly, and as a result—unless one has access to insurance coverage—primarily the wealthy have access to this avenue of reproduction.[30] Part III provides an overview of how assisted reproduction is provided in the United States and the potential roadblocks for same-sex couples. In this section, I discuss access to ART for same-sex couples.

A. Access to ART Services

In light of the increased acceptance of gay and lesbian parenthood, there should be an effort to be more equitable for such couples in terms of access to biological parenthood. I am not making a value statement here about the preference of biological parenthood over other types of parenthood, such as adoption. Instead, out of fairness, LGBT couples, such as the Krupas discussed above, should have the same access to ART as their heterosexual counterparts.

Medical infertility is quite common. According to data from the Centers for Disease Control, 12% of women who are of reproductive age are infertile and 7.5% of all sexually experienced men younger than age 45 reported seeing a fertility doctor during their lifetime.[31] Many health insurance companies do not view having a child as medically necessary, and thus do not cover infertility treatment. Instead, it is considered an elective procedure.[32] Many hoped that the Affordable Care Act would add infertility treatment to its essential health benefits.[33] Access to ART is linked to household income, marital status, education level, race, ethnicity, and age.[34] "A dichotomy exists between the 'haves,' those with the financial means to undergo infertility treatment, and the 'have-nots,' those who lack such means."[35]

30. Anne Fidler & Judith Bernstein, *Infertility: From a Personal Public Health*, 114 PUB. HEALTH REP. 494, 497 (1999).

31. Kimberly Leonard, *Who Has the Right to Build a Family? The Focus on LGBT Rights Could Lead to More Options for Those Seeking to Have Biological Children*, U.S. NEWS (Aug. 15, 2016, 12:01 AM), http://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment?src=usn_tw.

32. *Id.*

33. *Id.*

34. Marissa A. Mastroianni, *Bridging the Gap Between the "Have" and the "Have-Nots": The ACA Prohibits Insurance Coverage Discrimination Based Upon Infertility Status*, 79 ALB. L. REV. 151, 151 (2016); Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J.L. SCI. & TECH. 41, 49–50 (2009).

35. Mastroianni, *supra* note 34, at 151.

The lack of coverage has forced many couples to go into debt or mortgage their homes in order to access ART. "Among employers with 500 or more workers, last year only 54% covered an evaluation provided by a specialist, 32% covered drug therapy and 24% covered in vitro fertilization, according to Mercer consulting group."[36] This is a decrease since 2013 when coverage reached its peak.

ART can be very expensive, and even when covered, unlimited cycles are not covered.[37] In fact, there is only about a 25%–30% success rate for IVF.[38] Therefore, multiple cycles are often performed. Costs could range for up to $3,000 per cycle for hormone therapy to between $10,000 and $15,000 per cycle for ART that involves tubal surgery.[39] On average, one IVF cycle in the United States can cost between $10,000 and $15,000 with only a 25–30% live birth success rate.[40] Therefore, many couples will need to undergo several IVF cycles to achieve their desired outcome. The cost to conceive a child through IVF ranged from $44,000 to $211,940 in 1992 dollars.[41] Thus, ART services are usually utilized for the wealthy that can afford to pay out of pocket for the services. However, access to insurance does increase access to ART. One study noted in states requiring that insurance cover IVF, the rate of utilization was 277% of the rate when there was no coverage.[42] Thus, insurance coverage of ART allows greater access to it.[43] It follows that in the states that require insurance companies to offer or cover ART, we should ensure that gay and lesbian couples have the same access as straight couples.[44]

36. Leonard, *supra* note 31.

37. Barton H. Hamilton & Brian McManus, *The Effects of Insurance Mandates on Choices and Outcomes in Infertility Treatment Markets*, 21 HEALTH ECON. 994, 994–95 (2012).

38. *Id.* at 994.

39. Mastroianni, *supra* note 34, at 158.

40. *Id.* at 157–58.

41. Marianne P. Bitler & Lucie Schmidt, *Utilization of Infertility Treatments: the Effects of Insurance Mandates*, 8 (Nat'l Bureau of Econ. Research, Working Paper No. 17668, 2011), http://www.nber.org/papers/w17668.pdf.

42. Tarun Jain et al., *Insurance Coverage and Outcomes of In Vitro Fertilization*, 347 NEW ENG. J. MED. 661, 664–65 (2002).

43. Hamilton & McManus, *supra* note 37, at 1009.

44. Of course, there is the risk that these states may stop offering ART coverage if the population who is eligible to utilize ART increases. Because there is no requirement that ART is covered under the ACA, that is always a risk.

B. Insurance Coverage of Infertility Services

Currently, fifteen states require insurers in their state to either offer or cover ART services.[45] However, according to the American Society of Reproductive Medicine, Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Rhode Island are the only ones that mandate coverage; the rest require only that insurers offer plans that include it, a loophole that leaves it up to employers to decide whether to offer those plans to their employees.[46] Of the fifteen states, two of them—California and Texas—only require an insurer to let employers know that coverage is available.[47] They do not require insurers to cover or employers to actually purchase such policies. In the public sector, the Department of Defense covers in vitro fertilization for active duty members, but the Department of Veterans Affairs bans it even for former service members who sustained injuries during battle that rendered them infertile.[48] Further, states do not offer such coverage to low-income people in their Medicaid programs. Advocates of expanding access maintain that it is unfair to same-sex couples to force them to biologically demonstrate infertility, and it is critical that we deliver family building under insurance contracts to people who need different things.[49]

Because these are state by state issues, these laws are often inconsistent in terms of what type of infertility services are covered, whether marital status is an issue, and whether there is a maximum age of coverage.[50] Of these states, only Connecticut, Illinois, Maryland, Massachusetts, Montana, New Jersey, Ohio, and West Virginia actually require insurers to cover IVF.[51]

45. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (June 1, 2014), http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx; *See also* ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West 2016); CAL. HEALTH & SAFETY CODE § 1374.55 (West 2016); CAL. INS. CODE § 10119.6 (West 2016); CONN. GEN. STAT. § 38a-536 (West 2016); HAW. REV. STAT. §431:10A-116.5(a) (West 2016); MD. CODE ANN., INS. §15-810 (West 2016); MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2016), 176A § 8K (West 2016), 176B § 4J (West 2016), 176G § 4 (West 2016); MONT. CODE ANN. § 33-31-102 (West 2016); N.J. STAT. ANN. § 17B:27-46.1x (West 2016); N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (McKinney 2016); OHIO REV. CODE ANN. § 1751.01 (West 2016); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (West 2016); TEX. INS. CODE ANN. art. 1366.005 (West 2016); W. VA. CODE §33-25A-2 (West 2016).

46. Leonard, *supra* note 31.

47. Jillian Casey et al., *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 113 (2016).

48. Leonard, *supra* note 31.

49. *Id.*

50. Mohapatra, *Fertility Preservation*, *supra* note 29, at 206.

51. *Id.* at 207.

Many of these state statutes do not actually define infertility. In those that do—California, Connecticut, Illinois, Massachusetts, New Jersey, New York, and Rhode Island—all of the definitions include the inability to conceive after a year or more of sexual relations.[52] This does not apply in terms of same-sex couples, because they cannot conceive without ART. Some states' definitions include requirements that the individual be married, and the *Obergefell* decision at least allows same-sex married couples to fit into this category now. Additionally, some states require specific diagnosis by a physician of a condition as the cause of the infertility.[53] In each of these scenarios, gay and lesbian couples would have a more difficult time proving infertility than heterosexual couples. Thus, even in those few states where insurance companies have to cover ART, the definitions of infertility often anticipate medical infertility—not infertility due to being in a same-sex relationship. Arguably, this inequity discriminates against same-sex couples.

C. The ACA and Nondiscrimination

This is a problem because the Affordable Care Act requires nondiscrimination in the provision of health care services.[54] Under the ACA, discrimination exists if insurers differentiate among individuals in designing and implementing private health insurance coverage.[55] Of course, the ACA does not actually require ART coverage.[56] The ACA's statutory language does not mention infertility treatment coverage or its effect upon the fifteen states that have enacted state insurance mandates.[57] Additionally, the Department of Health and Human Services ("DHHS") has not included infertility coverage as an essential health benefit in any subsequent regulation.[58] Each state has the authority to create its own essential benefits under the ACA. DHHS gave states the authority to create their own essential health

52. *Id.* For example, Massachusetts law defines infertility as "the condition of an individual who is unable to conceive or produce conception during a period of one year if the female is age 35 or younger or during a period of six months if the female is over the age of 35." 211 MASS. CODE REGS. 37.03 (LexisNexis 2016).

53. *Id.* Mohapatra, *Fertility Preservation*, *supra* note 29, at 207.

54. 45 C.F.R. § 156.125(b) (2016); 45 C.F.R. § 156.200(e) (2016).

55. Mastroianni, *supra* note 34, at 176–77.

56. *See* Kenan Omurtag & G. David Adamson, *The Affordable Care Act's Impact on Fertility Care*, 99 FERTILITY & STERILITY 654 (2013) (minimum insurance coverage required under the ACA does not cover infertility services).

57. Paul R. Brezina et al., *How Obamacare Will Impact Reproductive Health*, 31 SEMINARS REPROD. MED. 189, 194 (2013).

58. Kate Devine et al., *The Affordable Care Act: Early Implications for Fertility Medicine*, 101 FERTILITY & STERILITY 1224, 1225 (2014).

benefit standards based upon typical insurance coverage plans within the state.[59] Therefore, the states with insurance mandates regarding infertility treatments have adopted essential benefit standards that incorporated such laws.[60] Thus, this is seen by many as a lost opportunity. Instead of increasing access to ART, the ACA just maintained the same level of access that existed prior to the ACA. That said, even if infertility was covered, it would not necessarily apply to gay or lesbian couples without an explicit statement to that effect. Health insurance covers medical ailments, and insurers could continue to define infertility in ways that do not apply to LGBT individuals.

Even well-meaning efforts to even the playing field in states such as a California and Maryland do not completely solve the problem of ART inequity.

The Krupas are making the argument that, as a same-sex couple, they are requesting the same access to ART services as heterosexual couples receive.[61] This example highlights the ways that a gay married couple may be treated differently than a heterosexual married couple under state insurance laws. Two states recently made amendments to their insurance laws to prevent discrimination; California defines infertility as "either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception."[62] In order to be clear that infertility coverage must be provided to same-sex couples, California amended this law to include an antidiscrimination provision. It states that coverage for the treatment of infertility

> shall be offered and, if purchased, provided without discrimination on the basis of age, ancestry, color, disability, domestic partner status, gender, gender expression, gender identity, genetic information, marital status, national origin, race, religion, sex, or sexual orientation. Nothing in this subdivision shall be construed to interfere with the clinical judgment of a physician and surgeon.[63]

59. *See* CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, *Essential Health Benefits: List of The Largest Three Small Group Products by State* 3 (2015), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/largest-smgroup-products-4-8-15-508d-pdf-Adobe-Acrobat-Pro.pdf.; *see generally* 45 C.F.R. § 156.100 (2015) (granting States the ability to select their own benchmark plan).

60. Mastroianni, *supra* note 34, at 153–54.

61. *Lesbians Challenge New Jersey's Infertility Definition*, 26 WESTLAW J. INS. COVERAGE (2016) (citing Krupa et al. v. Badolato, No. 16-cv-4637 2016 WL 4250861, at *1 (D.N.J. Aug. 1, 2016)).

62. CAL. HEALTH & SAFETY CODE §1374.55 (b) (West 2014).

63. *Id.*§1374.55 (g).

Although this is a well-meaning change, it still appears that a licensed physician must recognize that being part of a same-sex couple is the "condition" that is the cause of the infertility. It would have been far more explicit to add a provision noting that same-sex couples are, by definition, per se infertile and would thus have access to infertility coverage.

Like California, Maryland amended its state law requiring ART and IVF coverage to accommodate same-sex lesbian couples.[64] The Maryland provision is more explicit than California's. It specifies that "insurers, nonprofit health service plans, and health maintenance organizations [are prevented] from requiring specified conditions of coverage for specified infertility benefits for a patient who is married to an individual of the same-sex."[65]

D. Definitions of Infertility in Private Insurance Contracts

It is not just a matter of state insurance coverage mandates where there is an equality concern. Private insurers also have definitions of infertility that do not allow lesbian or gay couples to gain access to ART Services. For example, Jill Soller-Mihlek sued UnitedHealthcare because she could not meet its definition of infertility because she was a lesbian.[66] Her UnitedHealthcare insurance policy defined infertility as an "inability to achieve pregnancy after 12 months of unprotected heterosexual intercourse."[67] The policy actually tacitly acknowledged lesbian couples and deemed that they must use sperm donors, and must pay for expensive donor insemination for 12 months before they meet the definition of infertility.[68] UnitedHealthcare stated that its policy was based on ASRM's clinical disease definition of infertility.[69] It does not seem fair to use the clinical definition of infertility in the case of same-sex couples. Julien Murphy uses the term "relational infertility" to describe lesbian relationships "because there is no biological

64. Eli Y. Adashi, *JAMA Forum: A Same-Sex Infertility Health Insurance Mandate in Maryland?*, NEWS AT JAMA (May 20, 2015), https://newsatjama.jama.com/2015/05/20/jama-forum-a-same-sex-infertility-health-insurance-mandate-in-maryland/.

65. *Id.* At the same time, it also amended its outdated statute to ensure that male medical infertility was acknowledged. MD. CODE ANN., INS. §15-810 (West 2016).

66. Stephanie Fairyington, *Should Same-Sex Couples Receive Fertility Benefits?*, N.Y. TIMES, Nov. 2, 2015, http://well.blogs.nytimes.com/2015/11/02/should-same-sex-couples-receive-fertility-benefits/?_r=0.

67. *Id.*

68. *Id.*

69. *Id.*

way for two women to conceive together without the advantage of medical intervention."[70]

The Krupa case is a narrow one. It involves a lesbian couple who actually is medically infertile. They are correct in their assertion that they are being treated differently from other infertile individuals because the definition of infertility in New Jersey does not include women like them—women in lesbian relationships who are medically infertile.[71] It is important to change the language in state insurance statutes to ensure that medically infertile individuals receive access to ART regardless of sexual preference. The language of the statute should be amended the way Maryland's was—and all states requiring ART coverage should ensure that they remove language that differentiates based on sexual orientation.

This change, however, still does not go far enough in putting LGBT couples on equal footing with heterosexual couples. The reality remains that access to ART will remain mostly out of pocket. This does harm gay couples because it is impossible for them to reproduce "naturally." With the acceptance of gay marriage, there will be great acceptance of biological parenthood for gay couples, via ART and surrogacy. It would be ideal if the grassroots efforts that got the marriage equality effort success would coalesce around the effort to have greater access to ART for all people.

IV. ACCESS TO SURROGACY SERVICES FOR SAME-SEX COUPLES

I have written extensively about surrogacy, both domestic and internationally.[72] In this short Part IV, I aim to provide a snapshot of what access to surrogacy looks like for a gay married couple in the United States. Currently, gay couples wishing to have a biological child must use a surrogate, since neither male partner can carry a child.[73] Commercial gestational sur-

70. Julien S. Murphy, *Should Lesbians Count as Infertile Couples?: Antilesbian Discrimination in Assisted Reproduction*, *in* EMBODYING BIOETHICS: RECENT FEMINIST ADVANCES (NEW FEMINIST PERSPECTIVES) 103, 111–12 (Anne Donchin & Laura M. Purdy, eds., 1999).

71. N.J. STAT. ANN. § 17B:27-46.1x(a) (West 2016).

72. *See generally* Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012); Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, (2012); Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012); Seema Mohapatra, *A Race to the Bottom? The Need for International Regulation of the Rapidly Growing Global Surrogacy Market?*, *in* GESTATIONAL SURROGACY AND THE WOMB FOR RENT INDUSTRY IN INDIA (Sayantani DasGupta & Shamita Das Dasgupta eds., 2013).

73. Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U. J. GENDER SOC. POL'Y & L. 781, 788 (2014). In the future, artificial wombs may change this.

rogacy is the most common method of surrogacy.[74] In such arrangements, there is a contractual relationship between the surrogate and the intended parents, where the surrogate is paid to carry the child with whom she has no genetic relationship.[75] A gay couple can use a donor egg and sperm from one of the partners outside the body to form an embryo via IVF which will then be implanted into the non-genetically related surrogate.[76]

Although surrogacy arrangements can cost up to $100,000 in the United States, the cost has risen 89% from 2004 to 2008.[77] Surrogacy laws vary widely from state-to-state.[78] Some states outright ban surrogacy and criminalize those entering into agreements.[79] Others view surrogacy as a form of adoption, rather than allowing the intended parents to be on the birth certificate immediately.[80] New Hampshire and Maine had passed comprehensive surrogacy legislation even before *Obergefell,* and their laws made no distinction between same-sex and heterosexual couples. Some commentators have noted that "married same-sex couples building families through gestational surrogacy can now obtain a parentage order and have both parents' names on the birth certificate in 32 green-light states."[81] Although this is a majority of U.S. states, there is a long way to go to have true parity between same-sex and heterosexual couples.

Surrogacy statutes in some states specifically only apply to married couples.[82] Post-*Obergefell,* some claim that these states ignore the statutes' language referring to the infertility of the intended mother.[83] However, this is not real assurance that surrogacy is allowed.

There are only nine surrogacy-friendly states in the United States for gay married couples.[84] These are California, Connecticut, Delaware,

74. Seema Mohapatra, *Adopting an International Convention on Surrogacy–A Lesson from Intercountry Adoption*, 13 LOY. U. CHI. INT'L L. REV. 25, 32 (2015).

75. *Id.*

76. Paulk, *supra* note 73, at 788.

77. Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples*, L.A. LAW, July–Aug. 2016, at 12.

78. *Id.*

79. *Id.*

80. *Id.*

81. Diane S. Hinson, *Parentage Rights for Same-Sex Couples: State-by-State Gestational Surrogacy Laws*, 38 SPG FAM. ADVOC. 42, 43–45 (2016) (green-light states are states where surrogacy is permitted, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate).

82. Seema Mohapatra, *States of Confusion: Regulation of Surrogacy in the United States*, *in* COMMODIFICATION OF THE HUMAN BODY: A CANNIBAL MARKET (J.D. Rainhorn & S. El Boudamoussi eds., 2015).

83. Diane S. Hinson, *Ask The Expert*, 38 SPG FAM. ADVOC. 42, 42 (2016).

84. *Gestational Surrogacy Law Across The United States*, CREATIVE FAMILY SOLUTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/married-same-sex-couples (last

Maine, New Hampshire, Nevada, Oregon, Rhode Island, and Texas.[85] In these states, surrogacy is permitted, and pre-birth orders are granted throughout the state.[86] Additionally, in these states, both same-sex parents will be named on the birth certificate.[87] There are twenty-three states where surrogacy is permitted but where it is not clear that pre-birth orders are allowed.[88] There are nineteen "hostile jurisdictions" to surrogacy generally, with Mississippi specifically discriminating against the sexual orientation of the intended parents.[89] Michigan law not only prohibits surrogacy contracts, but criminalizes attempts at making such contracts.[90]

For gay couples who wish to seek biological parenthood, their only current option is surrogacy. Similarly, if neither woman in a lesbian couple can successfully carry a child, surrogacy may be an option for them. Citizens living in one of the many states where commercial surrogacy is not available will have to travel to a more surrogacy-friendly state for such an arrangement. This is not only inconvenient, but also expensive. Surrogacy is really only available to those gay and lesbian couples who are upper class. This means that poorer and middle-class gay and lesbian couples will either have to seek the uncertain and inconvenient prospect of international surrogacy, or not be a parent to a biological child at all.

A. Surrogacy Acceptance Post-Obergefell

Many expect the law of surrogacy to continue to become more open post-*Obergefell.* In New York, an openly gay state senator—who along with his partner had a baby via surrogacy in California—unsuccessfully attempted to lift New York State's commercial-surrogacy ban.[91] The bill would have allowed "compensated gestational surrogacy and would have furnished mechanisms by which 'intended parents' could secure parentage judgments."[92] Additionally, intended parents could include same-sex

visited Sept. 4, 2016) (Creative Family Solutions, LLC is a surrogacy law firm that publishes an online "surrogacy map" which uses color coding to visually demonstrate the relative stance towards surrogacy taken by different states).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (these include Alabama, Arkansas, Colorado, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Missouri, North Carolina, North Dakota, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Wisconsin, and West Virginia).

89. Hinson, *Ask The Expert*, *supra* note 84, at 45.

90. Connor Cory, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. POVERTY L. & POL'Y 133, 143–44 (2015).

91. NeJaime, *supra* note 24, at 1253.

92. *Id.*

spouses, unmarried intimate partners, and single individuals.[93] Professor Douglas NeJaime notes that, had this effort passed, male same-sex couples, single parents, and heterosexual couples who also engage in assisted reproduction, including surrogacy, "would have benefited from wider availability and recognition.[94] Although this bill did not pass, we can expect similar efforts to continue in New York and other states that do not recognize gestational surrogacy.

B. International vs. Domestic Surrogacy

Gay married couples in the United States often prefer entering into a surrogacy arrangement within the United States because many foreign countries still prohibit same-sex marriage.[95] Therefore, same-sex couples must pay a higher price for the same arrangement that would cost less than half of the price abroad.[96] I have argued elsewhere that the hodgepodge of surrogacy laws in the United States poses a real problem for potential intended parents.[97] In light of changes occurring post-*Obergefell*, it may not be long before a federal surrogacy law is enacted. The issue of cost is an issue that still must be addressed. Can we see a future where one can purchase literal fertility insurance, including access to surrogacy or a surrogacy employment benefit? We are not at that point right now, but with the growing acceptance of surrogacy, this may be coming.

V. "INFERTILITY" EQUALITY

With the overview provided thus far about the push towards ART equality for same-sex couples, this section revisits the Krupa case to consider what legal changes would ensure equality. New Jersey's statute mandates that insurance plans operating in the state cover medically necessary expenses incurred in the diagnosis and treatment of infertility.[98] New Jersey's insurance mandate defines infertility to include a

> disease or condition that results in the abnormal function of the reproductive system such that a person is not able to . . . conceive after two years of unprotected intercourse if the female partner is under 35 years of

93. *Id.*
94. *Id.*
95. Jeang, *supra* note 17, at 12.
96. *Id*.
97. Mohapatra, *States of Confusion*, *supra* note 83.
98. N.J. STAT. ANN. § 17B:27-46.1x(a) (West 2016)

age, or one year of unprotected intercourse if the female partner is 35 years of age or older.[99]

The Krupas' complaint—filed in the U.S. District Court for the District of New Jersey—says the requirement denies lesbians due process and equal protection under the law "by mandating that the infertility care of heterosexual women be covered by their insurance carriers but failing to mandate that the same infertility care be covered for women in same-sex relationships."[100] The Krupas claim that relief from the mandate definition is necessary because, given the high cost of infertility, women in same-sex relationships have to "choose between starting a family and their financial security."[101]

Compared with opposite-sex couples, a lesbian couple would have to pay for one to two years of artificial insemination out-of-pocket before it qualifies as medically "infertile." Additionally, because the statute requires that the inability to conceive after the period of unprotected intercourse be caused by a disease or condition that results in the abnormal function of the reproductive system, it is not clear that a gay couple could actually qualify as infertile.[102] New Jersey mandates insurance coverage for infertility treatments; however, wording in its law asks couples to demonstrate they have tried to conceive naturally by having unprotected sex for a year or two, depending on their age.[103] The Krupas have argued that the language is discriminatory, as unprotected sex does not lead naturally to conception for same-sex couples.[104]

It does not make sense for insurance companies to only cover so-called medical infertility. Just as lesbian couples cannot have a baby without ART, nor can medically infertile persons. Professor John Robertson points out that if one rejects the argument that infertile individuals should not be helped because "nature has not equipped people to reproduce," the same logic causes us the reject the exceptionalism for LGBT individuals.[105]

The American Society for Reproductive Medicine ("ASRM") defines infertility as "a disease, defined by the failure to achieve a successful pregnancy after 12 months or more of appropriate, timed unprotected inter-

99. *Lesbians Challenge New Jersey's Infertility Definition*, *supra* note 61.

100. *Id.*

101. *Id.*

102. Valarie Blake, *It's an Art Not A Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J.L. SCI. & TECH. 651, 667 (2011).

103. Leonard, *supra* note 31.

104. *Id.*

105. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 331 (2005).

course or therapeutic donor insemination."[106] Even the World Health Organization ("WHO"), defines infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[107]

Many insurance companies use the ASRM's definition.[108] The ASRM and the WHO, the international public health advisory group, should consider adding a statement that same-sex couples are deemed per se infertile as they cannot produce a child without ART. This would ensure clarity and access and comport with ASRM other public statements about the rights of LGBT individuals to access ART.[109]

VI. CONCLUSION

The scientific advances of assisted reproduction, and the public embrace of it, have made the use of in vitro fertilization relatively commonplace in the United States today. Gone are the days of Louisa Brown being labeled as a "test tube baby." In many social circles (often white, and upper middle class), the use of IVF is not unusual, even when one lives in one of the thirty-five states that do not have required insurance coverage of infertility services.[110]

Access to biological parenthood for LGBT individuals is a matter of reproductive justice. Reproductive justice occurs "when [all people] have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities."[111] The reality is that access is assisted reproduction in the United States is enjoyed by the privileged few, with many medically infertile not seeking ART due to the high costs of such treatment.[112] With compelling stories like the Krupas, LGBT groups should

106. Practice Committee of the American Society for Reproductive Medicine, *Definitions of Infertility and Recurrent Pregnancy Loss: A Committee Opinion*, 99 FERTILITY & STERILITY 1, 63 (Sept. 13, 2012), https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/Definitions_of_infertility.pdf.

107. WORLD HEALTH ORG., *Infertility Definitions and Terminology*, http://www.who.int/reproductivehealth/topics/infertility/definitions/en/ (last visited Sept. 26, 2016).

108. For example, in the earlier example of UnitedHealth, the definition in the policy was based on the ASRM definition. Fairyington, *supra* note 66.

109. *See* Practice Committee of the American Society for Reproductive Medicine, *supra* note 107.

110. *See* Dorothy E. Roberts, Race and the New Reproduction, 47 HASTINGS L.J. 935, 938 (1996) ("Most couples who use IVF services are white, highly educated, and affluent.").

111. *See* Asian Communities for Reprod. Just., *A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice* 1, 2 (2005), http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf.

112. Mastroianni, *supra* note 34, at 162.

band together with infertility advocates such as RESOLVE to build a coalition to increase access and decrease cost of ART. This Article began by describing how the *Obergefell* decision emphasized parenthood by LGBT couples and how some couples are now demanding equal rights in ART. Then, I highlighted state differences in coverage for ART and varying state legal stances on surrogacy. This shows how difficult it is for a LGBT couple to navigate their eligibility for ART or surrogacy services. Of course, as I noted, the biggest determination of who accesses ART is the size of one's bank account. I have outlined some suggestions about how to increase access to ART for LGBT couples by changing definitions to allow LGBT couples to have the same privileges as heterosexual couples. However, this is not enough. ART coverage in the United States is still far too limited. It is not true equity when only the rich can access these services. All insurance companies should have to cover ART services. I realize that this is a tough sell, when insurance coverage in general with the ACA is such a political hot button issue. However, the road to marriage equality was tough and full of early setbacks.[113] With the dogged determination of LGBT community groups, marriage equity was achieved.

If there is a desire for ART equity, LGBT activists could similar push for increased, not just equal, coverage. Insurance coverage greatly increases who will actually have a chance to be a biological parent, if they are medically infertile (such as someone that has a biological cause for infertility) or per se infertile (such as in the case of an LGBT individual). One way to increase access to ART is to push for lower costs for ART. This would allow a more diverse group of people to use it. The Economist recently published a story entitled "An Arm and a Leg for a Fertilised Egg," which outlines current efforts to make IVF cheaper.[114] Cheaper IVF would reduce the cost of surrogacy, so it would help same-sex couples of both genders, as well as heterosexual couples.

It is important to recognize that all individuals, whether LGBT or not, should have access to biological parenthood, not just the ones who can afford it.[115] Blacks access ART at levels much lower than whites, although

113. Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 472 (2012).

114. *An Arm and a Leg for a Fertilised Egg*, ECONOMIST (Aug. 27, 2016), http://www.economist.com/news/briefing/21705676-doctors-have-spent-decades-trying-make-ivf-more-effective-now-they-are-trying-make-it.

115. Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 82 (2013).

they face higher rates of infertility.[116] Being Black[117] and gay or lesbian is a double whammy, and makes one even more vulnerable in society.[118] We need to be sensitive that there is no true ART equality if ART is mainly accessed by wealthy white LGBT couples.

This article suggests that access to ART should be equivalent regardless of your sexual orientation. However, I acknowledge that this does not go far enough. The legal landscape for coverage of ART and surrogacy services is bleak in many states. For example, if the Krupas were unsuccessful with IVF and wished to use the services of a surrogate, they would not be able to do so in New Jersey. New Jersey bans surrogacy arrangements for all, regardless of sexual orientation, after their much maligned Baby M case. Instead, infertility advocates, such as RESOLVE, would do well to partner with the lesbian gay bisexual and transgender ("LGBT"), to fight for better access to ART services for all.

116. June Carbone & Jody Lyneé Madeira, *Buyers in the Baby Market: Toward A Transparent Consumerism*, 91 WASH. L. REV. 71, 76 n.21 (2016); *see* Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 BERKELEY J. GENDER L. & JUST. 18, 39 (2008) ("Hispanic women, non-Hispanic black women, and other women of color are significantly more likely to be infertile than white women."); *see also* Kimberly M. Mutcherson, *Transformative Reproduction,* 16 J. GENDER RACE & JUST. 187, 222 (2013) ("[A] disproportionate number of infertile women in this country are Black.").

117. I capitalize Black when referring to the racial group. *See* Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun").

118. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991).

ROMANTIC DISCRIMINATION AND CHILDREN

SOLANGEL MALDONADO*

In recent years, social scientists have used online dating sites to study the role of race in the dating and marriage market. Their research has revealed a racialized and gendered hierarchy that disproportionately excludes African-American men and women and Asian-American men. For decades, other researchers have studied the risks and outcomes for children who grow up in single-parent homes as compared to children raised by married parents. This Essay explores how racial preferences in the dating market potentially affect the children of *middle-class* African-American mothers who lack or reject opportunities to marry.[1] What is the relationship between racial preferences in the dating and marriage market and children's access to resources and opportunities? Do racial preferences in the dating and marriage market increase the likelihood that children of *middle-class* African-American mothers will be raised in homes with fewer resources and limited access to opportunities available to other children with similarly educated parents? If so, what, if anything, should the law do to minimize racial preferences' effects on children?

I. RACIAL PREFERENCES IN THE DATING AND MARRIAGE MARKET

Americans' acceptance of interracial intimacy has increased dramatically in just one generation. In 1987, less than 50% of Americans approved of African-Americans and Whites dating. By 2013, 87% of all Americans, and 96% of 18-29 year olds, approved of marriages (not just dating) between African-Americans and Whites.[2] Yet, despite our approval of inter-

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1. Legal scholars have examined how racial preferences in the foster care and adoption system harm children. *See e.g.*, Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415 (2006); Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (Beacon Press, 1999).

2. Jeffrey Passel et al., *Marrying Out: One-in-Seven New Marriages is Interracial or Interethnic*, PEW RES. CTR. (June 4, 2010), http://www.pewsocialtrends.org/files/2010/10/755-marrying-out.pdf; Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013).

racial relationships, most Americans marry individuals of their same race.[3] One reason might be opportunity. We tend to date people we meet at school, work, or in our neighborhood, but residential and educational segregation and the lower positions racial and ethnic minorities occupy in most workplaces limit opportunities for members of different groups to interact socially as equals.

Racial preferences are another reason why the majority of cohabitating and married couples are of the same race. Just because a person approves of interracial relationships does not mean that she herself is willing to marry across the color line.[4] A wealth of data from surveys, online dating, and speed dating studies show that when seeking an intimate partner, many individuals prefer someone of their same race. Racial preferences might also explain why some groups have higher intermarriage rates than others. Individuals who are open to dating interracially often have preferences for members of certain races to the exclusion of others. These preferences reveal a racial hierarchy in which Whites, including multiracial individuals who are part White (but not part Black), are deemed most desirable, African-Americans significantly less so, and other racial or ethnic minorities (specifically Asian-Americans, Latinos, and Native Americans) somewhere in the middle. This racial hierarchy is gendered with Asian-American men and African-American women least preferred in the interracial dating and marriage market.

About half of all Americans report that they have dated a person of a different race or ethnicity.[5] Younger generations and racial and ethnic minorities are even more likely to have dated interracially.[6] Yet, even among the younger generation we find racial differences in dating patterns. White college students are more likely to date Asian-Americans and Latinos than

3. Debra Blackwell & Daniel Lichter, *Homogamy Among Dating, Cohabiting and Married Couples*, 45 SOC. Q. 719, 732 (2004); Passel et al., *supra* note 2.

4. Melissa R. Herman & Mary E. Campbell, *I Wouldn't But You Can: Attitudes Toward Interracial Relationships*, 41 SOC. SCI. RES. 343, 356 (2012).

5. Jeffrey Jones, *Most Americans Approve of Interracial Dating*, GALLUP, Oct. 7, 2005, http://www.gallup.com/poll/19033/most-americans-approve-interracial-dating.aspx.

6. *See generally* Kara Joyner & Grace Kao, *Interracial Relationships and the Transition to Adulthood*, 70 AM. SOC. REV. 563 (2005). Sixty percent of eighteen to twenty-nine year-olds who participated in a Gallup poll reported that they had dated interracially, as did 53% of individuals aged thirty to forty-nine, 46% of individuals aged fifty to sixty-four, and 28% of individuals sixty-five and older. 69% of Latinos, 52% of African-Americans, and 45% of Whites reported the same. Jones, *supra* note 5.

to date African-Americans. African-American college students are also less likely than other racial or ethnic minorities to date interracially.[7]

While the majority of individuals who date or cohabitate interracially ultimately do not marry a person of a different race,[8] the rate of intermarriage has increased significantly since the Supreme Court declared in 1967 that laws prohibiting interracial marriage were unconstitutional.[9] In 1960, just 2% of marriages in the United States were interracial. Fifty years later, in 2010, 15% of marriages celebrated that year were between spouses of different races or between Latinos and non-Latinos.[10] Yet, race continues to influence our romantic choices. In a society where race did not play a role in intimate relationships, 44%, not just 15%, of recent marriages would be interracial.[11]

Intermarriage patterns vary widely by race, color, and gender. The majority of American Indians (58%) marry out, primarily with Whites,[12] as do

7. Elizabeth McClintock, *When Does Race Matter? Race, Sex, and Dating at an Elite University*, 72 J. MARRIAGE & FAM. 45, 48 (2010); Shana Levin et al., *Interethnic and Interracial Dating in College: A Longitudinal Study*, 24 J. SOC. & PERS. RELATIONSHIPS 323, 340 (2007).

8. Herman & Campbell, *supra* note 4, at 346; George Yancey, *Who Interracially Dates: An Examination of the Characteristics of Those Who Have Interracially Dated*, 33 J. COMP. FAM. STUD. 179, 180 (2002); Blackwell & Lichter, *supra* note 3, at 720–21. Americans are twice as likely to cohabit with a partner of a different race as to marry across race. *See also* Zhenchao Qian & Daniel Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 72 J. MARRIAGE & FAM. 1065, 1077–79 (2011). For example, in 2010, 18.3% of cohabitating different-sex couples were interracial or had a Latino and a non-Latino partner as compared to 9.5% of different-sex married couples. Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU, Apr. 2012, at 18–19. Interracial cohabiting couples are more likely than same-race couples to break-up and thus are only 60% as likely as same-race cohabiting couples to marry. Joyner & Kao, *supra* note 6, at 574.

9. Loving v. Virginia, 388 U.S. 1, 12 (1967).

10. Wendy Wang, *The Rise of Intermarriage*, PEW RES. CTR. 1–3 (Feb. 16, 2012), http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/. Latinos are an ethnic group and can be of any race. *Id.* (noting that the term "Latino" or Hispanic refers to persons of Latino/Hispanic origin regardless of race). However, researchers treat them as a racial group when comparing differences in wealth, education, income, fertility patterns, and life expectancy of racial groups. *See* Jose A. Cobas et al., *Racializing Latinos: Historical Backgrounds and Current Forms*, *in* HOW THE UNITED STATES RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES 1 (Jose A. Cobas et al. eds. 2009). Many Latinos believe that "Latino" is a race and reject U.S. definitions of race. *See* Ana Gonzalez Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity, or Both?*, PEW RES. CTR. (June 15, 2015), http://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/ (reporting that two-thirds of Hispanic say that Hispanic is part of their race. Consequently, this Essay follows the approach of the majority of researchers who treat marriages between Latinos and non-Latinos as intermarriage and different from marriages between other ethnic groups such as Irish-Americans and Italian-Americans.

11. Raymond Fisman et al., *Racial Preferences in Dating*, 75 REV. ECON. STUD. 117, 117 (2008).

12. Wendy Wang, *Interracial Marriage: Who Is Marrying Out*?, PEW RES. CTR., June 12, 2015, http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/. Approximately 70% of all interracial marriages involve a White partner. *Id.* Marriages between minorities of different races are significantly rarer. *Id.*

more than one-third of U.S.-born[13] Asian-Americans and Latinos, and 17% of African-Americans.[14] Multiracial individuals who are part White are significantly more likely than their mono-racial co-ethnics to have a White partner but here too marriage patterns vary by race.[15] The majority of Asian/White and about half of Latino/White multiracial individuals have a White spouse or cohabitating partner.[16] In contrast, the majority of African-American/White multiracial individuals partner with African-Americans.

Intermarriage patterns also vary by skin color. Lighter-skinned minorities are more likely than their darker-skinned counterparts to intermarry with Whites. For example, U.S.-born Latinos who identify as racially white on the U.S. Census are significantly more likely than their darker counterparts to be married to non-Latino Whites.[17] Skin tone plays a similar role in the intermarriage patterns of U.S.-born Asian-Americans.[18] Dark-skinned minorities who intermarry with Whites are more likely than their lighter-skinned counterparts to be married to Whites who have attained less formal education than themselves—in other words, to marry "down" in terms of education.[19]

The marriage patterns of some groups are not only influenced by race, but also by gender. U.S.-born Asian-American women are almost *five times* more likely to intermarry than African-American women.[20] African-American men are more than twice as likely as African-American women

13. Immigrants are significantly less likely than their U.S.-born co-ethnics to intermarry. *See* Passel et al., *supra* note 2 (reporting that 39% of U.S.-born Latinos and 46% of U.S.-born Asian-Americans who married in 2008 married out as compared to 12% of Latino immigrants and 26% of Asian immigrants). *See* Qian & Lichter, *supra* note 8, at 1076 (noting that there is no significant difference between the intermarriage rate of U.S.-born and foreign-born Blacks).

14. Wang, *supra* note 12 (discussing that 9% of Whites who married in 2010 married out.); Wang, *supra* note 10, at 1.9.

15. Qian & Lichter, *supra* note 8, at 1070.

16. *Id.* at 1071; KIM PARKER ET AL., PEW RES. CTR, MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS, 80–81 (2015), http://www.pewsocialtrends.org/files/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf.

17. Zhenchao Qian, *Race and Social Distance: Intermarriage with Non-Latino Whites*, 5 RACE & SOC'Y 33, 33 (2002). Darker-skinned Latinos tend to identify as racially "other" on the U.S. Census. *Id.* at 40. Latinos who identify as racially White are twice as likely as Latinos who identify as racially Black to be married to non-Latino Whites. *See* HaeYoun Park, *Who Is Marrying Whom*, N.Y. TIMES, Jan. 29, 2011, http://www.nytimes.com/interactive/2011/01/29/us/20110130mixedrace.html. Latinos with American Indian ancestry are also more likely than Latinos with Black ancestors to be married to non-Latino Whites. *Id.*

18. Intermarriage rates with Whites are lowest for African-Americans, slightly higher for dark-skinned Latinos, higher for lighter-skinned Asian-Americans, and highest for the lightest-skinned Latinos. *See* Qian, *supra* note 17, at 45.

19. Zhenchao Qian, *Breaking the Last Taboo: Interracial Marriage in America*, 4 CONTEXTS, Fall 2005, at 35.

20. Wang, *supra* note 10, at 9–10 (reporting that 9% of African-American women married out in 2010 as compared to 43% of U.S. born Asian-American women).

to marry out. The opposite is true for Asian-American men who are half as likely as their female counterparts to intermarry.[21]

Gays and lesbians are more likely than their heterosexual counterparts to have an intimate partner of a different race.[22] Yet, the same racial patterns observed in different-sex relationships are apparent in same-sex relationships. Asian-Americans and Latinos in same- or different-sex relationships are significantly more likely than African-Americans to have a partner of a different race or ethnicity.[23]

A. What Drives Interracial Marriage Patterns?

Most married couples do not randomly end up together but rather are the result of assortative mating—the tendency of people to date and marry individuals like themselves.[24] We generally partner with people who are similar to us in terms of race, education, and socioeconomic status in part because we spend a lot of time with people with similar levels of education at school or at work. [25] Our family members, friends, and neighbors also tend to be of the same race and similar socioeconomic status. Online dating studies suggest, however, that even when the pool of potential mates is not limited by whom we meet at school, work, the gym, or local bar, we still prefer to date people like ourselves. As one aptly-titled article noted, "*In the End, People May Really Just Want to Date Themselves*."[26]

21. *Id.* (reporting that the gender disparity is even greater between foreign-born Asian men and women. Foreign-born Asian-American women are three times as likely as their male counterparts to marry out (34% v. 11%)).

22. ANGELIKI KASTANIS & BIANCA D.M. WILSON, THE WILLIAMS INSTITUTE, RACE/ETHNICITY, GENDER, AND SOCIOECONOMIC WELLBEING OF INDIVIDUALS IN SAME-SEX COUPLES 1 (2014). The 2010 U.S. Census shows that 20% of same-sex households (unmarried) are interracial or interethnic as compared to 9.5% of different-sex married couples. Lofquist et al., *supra* note 8, at 20; GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES IN CENSUS 2010: RACE & ETHNICITY 4 (2012). Because few states recognized marriages between persons of the same-sex in 2010, the U.S. Census made no distinction between same-sex households in which couples were married and those in which they were not. *Id.* at 1.

23. For example, 67% of Asian-Americans and Pacific Islanders and 55% of Latinos as compared to 33% of African-Americans in same-sex relationships had a White partner. KASTANIS & WILSON, *supra* note 22, at 2.

24. Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 813 (1973); MARTIN BROWNING ET AL., ECONOMICS OF THE FAMILY 36–37 (2014); Matthis Kalmijn, *Intermarriage and Homogamy: Causes, Patterns, Trends*, 24 ANN. REV. SOC. 395 (1998); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 62 (2014).

25. Kalmijn, *supra* note 24, at 398. We also tend to marry partners with similar physical traits such as attractiveness, height, and weight. *Id.* at 416–17.

26. Emma Pierson, *In the End, People May Really Just Want to Date Themselves*, FIVETHIRTYEIGHT, Apr. 28, 2014, http://fivethirtyeight.com/features/in-the-end-people-may-really-just-want-to-date-themselves/. I am grateful to Professor Naomi Schoenbaum at George Washington University School of Law for this source.

Dating and marriage *outcomes* are the result of both preferences and opportunities and thus cannot explain whether opportunity, preferences (and if so, whose preferences), or both, drive the different rates of interracial coupling. Researchers have addressed the limitations of dating and marriage outcomes by directly examining the preferences of individuals seeking a romantic partner. Studies that focus on *stated* preferences—what people say they want in a partner—generally ask date-seekers to identify the traits they seek in a romantic partner or examine the traits date-seekers have identified in a personal ad or online dating profile.[27] Not surprisingly, individuals may not be completely truthful when describing the traits they seek in a partner because they fear they will be judged as superficial, elitist, or even racist. Moreover, even when we are completely honest, our *stated* preferences may not reflect our true preferences. As evolutionary psychologists have discovered, we often do not know what we really want in a mate.[28]

To address the limitations of *stated* preferences, researchers have examined the *revealed* preferences of online date-seekers by observing how they respond when contacted by daters with certain traits.[29] For example, Günter Hitsch and his colleagues examined the search behaviors of almost 22,000 heterosexual online daters.[30] The date-seekers, who did not know that their behaviors would be observed by researchers, provided detailed profiles noting their age, gender, race, education, income, height, weight, marital status,[31] political and religious affiliations, interest in dating some-

27. *See* Gerald Mendelsohn et al., *Black/White Online Dating: Interracial Courtship in the 21st Century*, 3 PSYCHOL. POPULAR MEDIA CULTURE 2, 5 (2014); Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 SOC. FORCES 807, 810–11 (2011); Günter J. Hitsch et al., *What Makes You Click—Mate Preferences in Online Dating*, 8 QUANT. MARKETING & ECON. 393, 397 (2010) [hereinafter Hitsch et al., *What Makes You Click*].

28. *See* Paul W. Eastwick & Eli J. Finkel, *Sex Differences in Mate Preferences Revisited: Do People Know What They Initially Desire in a Romantic Partner?*, 94 J. PERSONALITY & SOC. PSYCHOL. 245, 245 (2008).

29. *See*, *e.g.*, Ken-Hou Lin & Jennifer Lundquist, *Mate Selection in Cyberspace: The Intersection of Race, Gender, and Education*, 119 AM. J. SOC. 183, 183 (2013); CHRISTIAN RUDDER, DATACLYSM: LOVE, SEX, RACE, AND IDENTITY—WHAT OUR ONLINE LIVES TELL US ABOUT OUR OFFLINE SELVES 109–16 (2014) (discussing that almost 75% of Internet users who are seeking romantic partners have used the Internet to meet potential dates); Lin & Lundquist, *supra* at 203; *see also* DAN SLATER, LOVE IN THE TIME OF ALGORITHMS: WHAT TECHNOLOGY DOES TO MEETING AND MATING 103 (2013); Michael J. Rosenfeld & Reuben J. Thomas, *Searching for a Mate: The Rise of the Internet as a Social Intermediary*, 77 AM. SOC. REV. 523 (2012).

30. Hitsch et al., *What Makes You Click, supra* note 27, at 398.

31. Some married individuals who are separated or in the process of divorcing search for their next relationship online while still legally married. A small percentage of married individuals who have no intention of divorcing their spouse also use these sites even though there are sites devoted exclusively to individuals seeking a partner for an affair such as Ashley Madison, which markets itself as the world's leading married dating service for *discreet* encounters. *See* ASHLEY MADISON, https://www.ashleymadison.com (last visited Sept. 28, 2016).

one of a different ethnic background, and whether they were seeking a casual or long-term relationship. Many users also provided a photo which the researchers rated for physical attractiveness based on the opinions of objective observers.[32] Date-seekers browsed other users' profiles and sent emails to individuals they might want to date.

Not surprisingly, online daters' search behaviors revealed a universal preference for physically attractive individuals with high incomes. However, women valued a man's income more highly than his physical appearance, and men ranked a woman's physical attractiveness above her income.[33] Online daters' search behaviors also revealed strong racial preferences even when they did not state those preferences. For example, 55% of the women expressed no racial preferences in their profiles, but their *revealed* preferences—who they contacted and who they responded to when contacted—showed equally strong preferences as the women who had expressed a racial preference.[34] In other words, 95% of female online daters in Hitsch's study had racial preferences even though only 41% stated those preferences in their profiles.

Other online dating studies have revealed racial preferences.[35] They also reveal a *racial hierarchy* of preferences. For example, the majority of straight White men in an online dating study conducted by Cynthia Feliciano and her colleagues stated a racial preference. The majority also ex-

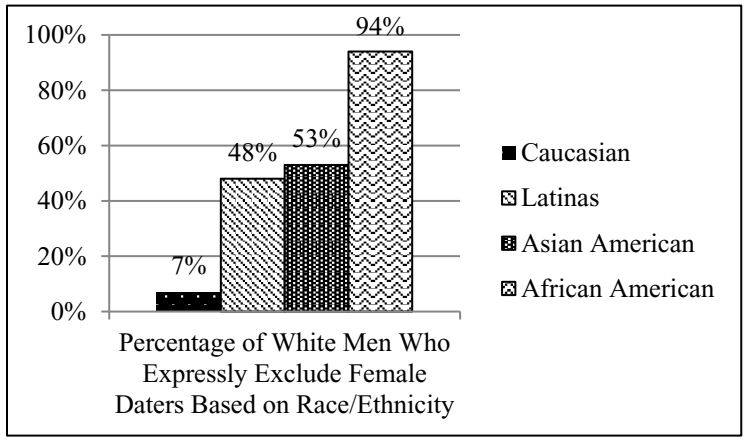
32. The researchers hired college students who rated photos of 400 male faces and 400 female faces on a scale of one to ten. The researchers used each picture approximately twelve times. "Consistent with findings in a large literature in cognitive psychology, attractiveness ratings by independent observers appear to be positively correlated." Hitsch et al., *What Makes You Click*, *supra* note 27, at 401.

33. *Id*. Other studies have similarly found that date-seekers prefer attractive partners. *See* Eastwick & Finkel, *supra* note 28, at 245; Raymond Fisman et al., *Gender Differences in Mate Selection: Evidence from a Speed Dating Experiment*, 2 Q.J. ECON. 673, 673 (2006); Regan et al., *Partner Preferences: What Characteristics do Men and Women Desire in Their Short Term Sexual and Long Run Romantic Partners*, 12 J. PSYCH. & HUM. SEXUALITY 1 (2008). Other studies have similarly found that men care more about looks and women care more about income and status. For example, one speed dating study of graduate and professional students found that women preferred men who had been raised in affluent neighborhoods while men had no such preferences. *See* Fisman et al., *Gender Differences*, *supra* note 11; *see also* Günter J. Hitsch et al., *Matching and Sorting in Online Dating*, 100 AM. ECON. REV. 130, 147–148 (2010) [hereinafter Hitsch et al., *Matching and Sorting*]. Older studies have similarly found that men value a woman's physical appearance over her intelligence and ambition but women (at least when seeking a partner for a long-term relationship) care more about a man's earning potential, intelligence, and social status. *See* David Buss, *The Strategies of Human Mating,* 82 AM. SCIENTIST 238, 240 (1994); Pamela Regan, *Minimum Mate Selection Standards as a Function of Perceived Mate Value, Relationship Context, and Gender*, 10 J. PSYCH. & HUM. SEXUALITY 53, 68 (1998). However, some studies have found that both genders value physical attractiveness above other traits. *See, e.g.*, Eastwick & Finkel, *supra* note 28, at 245; Robert Kurzban & Jason Weeden, *Do Advertised Preferences Predict the Behavior of Speed Daters?*, 14 PERS. RELATIONSHIPS 623, 631–32 (2007).

34. Hitsch et al., *What Makes You Click*, *supra* note 27, at 424. Another study found similar results. *See* Fisman et al., *Racial Preferences*, *supra* note 11, at 118–19.

35. *See infra* notes 41, 44–52 and accompanying text.

pressed interest or willingness to date interracially.[36] However, they were quite specific about which groups they were willing to date. About 50% of White men who stated a racial preference expressly excluded Asian-American women and similar numbers excluded Latina women. Yet, more than 90% refused to consider African-American women. The chart below illustrates this hierarchy.



Source: Cynthia Feliciano et al., *Gendered Racial Exclusion among White Internet Daters*, 38 Social Science Research 39 (2009)

It is no longer socially acceptable to express racial preferences in most contexts[37] and it is illegal to act upon such preferences in settings such as education, employment, and housing. In fact, 84% of online daters in one study stated that they would not date someone "who has vocalized a strong negative bias toward a certain race of people."[38] Despite this strong anti-discrimination norm, studies have found a racial hierarchy in which White men rank African-American women significantly below Asian-American, Latina, or White women.[39] This hierarchy is also reflected in straight White men's response rates when contacted by female online date-seekers. White men are most likely to respond to messages from White women and from multiracial Asian-American and Latina women who

36. Cynthia Feliciano et al., *Gendered Racial Exclusion Among White Internet Daters*, 38 SOC. SCI. RES. 39, 45, 49 (2009). About one-third of White men who expressed a racial preference preferred to date White women only. *Id.*

37. Bonilla-Silva & Baiocchi, *Any But Racism: How Sociologists Limit the Significance of Racism*, 4 RACE & SOC'Y 117, 119 (2001); Charles Gallagher, *The End of Racism as the New Doxa: New Strategies for Researching Race*, *in* WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 163 (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008).

38. Rudder, *supra* note 29, at 112–13.

39. George Yancey, *Crossracial Differences in the Racial Preferences of Potential Dating Partners: A Test of the Alienation of African-Americans and Social Dominance Orientation*, 50 THE SOC. Q. 121, 130 (2009); Glenn Tsunokai et al., *Racial Preferences in Internet Dating: A Comparison of Four Birth Cohorts*, 33 WESTERN J. BLACK STUD. 1, 12 (2009); RUDDER, *supra* note 29, at 115.

are part White.[40] They are less likely to respond to multiracial African-American/White women, and almost never respond to messages from African-American women.[41]

White women's preferences also reveal a racial hierarchy. Almost 75% of straight White women in Feliciano's study expressed racial preferences and a majority of those (64%) preferred to date White men only. [42] Although most White women excluded all non-White men, they were more than twice as likely to exclude African-American and Asian-American men as compared to Latino men.[43]

Data from millions of online daters on Match (the most popular dating site in the U.S for the last 20 years), OkCupid, and Date Hookup confirm the racial hierarchy in the online dating market.[44] Straight White women on these sites rated Asian-American and African-American men as significantly less attractive than the average man.[45] This hierarchy is also reflected in White women's response rates when contacted by online date-seekers. Several studies conducted by Curington, Lin, and Lundquist revealed that White women respond mainly to White men and ignore messages from men of other races with one exception—multiracial men who are part White.[46] While more than 90% of White women rejected Asian men as potential dates, they responded to messages from multiracial Asian/White men at similar rates as they did to messages from mono-racial White men.[47] They also responded to Latino/White men and African-American/White men at higher rates than their mono-racial counterparts.[48]

Online date-seekers have many preferences, including age, body type, education, income, and religion. But race ranks particularly high on their preferences. For example, while 59% of straight White men in Feliciano's study stated a racial preference, only 23% expressed a religious preference.[49] For these men, a woman's race was more important than her education, religion, employment, marital status, or whether she smoked. Straight White date-seekers on the online dating site OkCupid revealed similarly strong preferences for Whites even when the system's algorithm determined that their best "match," based on their responses to approximately 300 questions about their beliefs, needs, wants, and activities they enjoy, was a person of a different race.[50]

College-educated minorities and Latinos/as are more likely to intermarry

40. Celeste Vaughn Curington et al., *Positioning Multiraciality in Cyberspace: Treatment of Multiracial Daters in an Online Dating Website*, 80 AM. SOC. REV. 1, 10 (2015); RUDDER, *supra* note 29, at 116–17.

41. Curington, *supra* note 40, at 10; RUDDER, *supra* note 29.

42. Feliciano et al., *supra* note 36, at 47.

43. 77% of White women with a stated racial preference excluded Latino men but 91% excluded African-American men and 93% excluded Asian men. Only 4% excluded White men. *Id.*

44. RUDDER, *supra* note 29, at 114–15.

45. *Id.*

46. Curington et al., *supra* note 40; Lin & Lundquist, *supra* note 29, at 203–04.

47. Curington et al., *supra* note 40, at 18.

48. *Id.* at 10.

49. Feliciano et al., *supra* note 36, at 45.

50. Christian Rudder, *Race and Attraction, 2009-2014*, OKTRENDS (Sept. 10, 2014), http://blog.okcupid.com/index.php/race-attraction-2009-2014/; RUDDER, *supra* note 29, at 109–10.

than their less-educated counterparts,[51] so one might assume that college-educated Americans as a group have weaker racial preferences. However, online dating studies suggest otherwise. Hitsch's study of heterosexual online daters discussed above found that the vast majority of White women, regardless of their level of education or income, have strong preferences for White men.[52] Feliciano and her colleagues found that college-educated Whites are *more* likely than Whites with only a high school education to exclude African-Americans as romantic partners.[53] And Lin and Lundquist found that racial preferences trumped educational preferences.[54] College-educated Whites are more likely to contact and respond to messages from Whites *without* a college degree than to messages from African-Americans *with* a college degree.[55] White men *without* a college degree received more messages than college-educated African-American and Asian-American men.[56] College-educated African-American women received significantly fewer messages than women of other races with lower levels of educational attainment.[57]

Racial minorities and Latinos are generally more willing than Whites to date interracially,[58] yet their preferences reflect a similar racial hierarchy. For example, 70% of straight Asian-American and Latina women in an online dating study conducted by Belinda Robnett and Cynthia Feliciano expressed a racial preference and

51. Wang, *supra* note 10, at 20–21 (reporting that college-educated second generation (U.S.-born children of immigrants) Latinos/as are almost three times as likely to marry out as their counterparts with only a high school degree (43% v. 16%)); *See* PAUL TAYLOR ET AL., PEW RES. CTR., SECOND GENERATION AMERICANS: A PORTRAIT OF THE ADULT CHILDREN OF IMMIGRANTS 58 (2013); *See* Wang, *The Rise of Intermarriage*, *supra* note 10, at 20, 24 (reporting that 60% of Asian-Americans who intermarried with Whites in 2010 had a college degree as compared to 49% of all Asian-American adults in the U.S.); PAUL TAYLOR ET AL., PEW RES. CTR., THE RISE OF ASIAN AMERICANS 25 (2013), http://www.pewsocialtrends.org/files/2013/04/Asian-Americans-new-full-report-04-2013.pdf; Qian & Lichter, *supra* note 8, at 1077 (finding that "educational attainment among Blacks in 2008 was significantly associated with marriages to Whites. When both partners had at least a college education the odds of marrying out were more than twice as high than when both partners had only a high school diploma or less."). The majority of recently married couples (interracial or same-race) share similar levels of formal education. But when African-Americans and Latinos marry a White partner whose level of education differs from theirs, the White spouse tends to be the less-educated partner. *See* Qian, *supra* note 19. Some research suggests that less-educated Whites trade their higher racial status for minority partners with higher educational and economic status while high-achieving minorities trade their class status for White spouses with higher racial status. *See* Aaron Gullickson & Vincent Kang Fu, Comment, *An Endorsement of Exchange Theory in Mate Selection*, 115 AM. J. SOC. 1243, 1243 (2010); Vincent Kang Fu, *Racial Intermarriage Pairings*, 38 DEMOGRAPHY 147, 147 (2001).

52. Hitsch et al., *What Makes You Click*, *supra* note 27, at 425.

53. Feliciano et al., *supra* note 36, at 49; *see also* Tsunokai et al., *supra* note 39, at 10.

54. Lin & Lundquist, *supra* note 29, at 183.

55. *Id.*

56. *Id.* at 209.

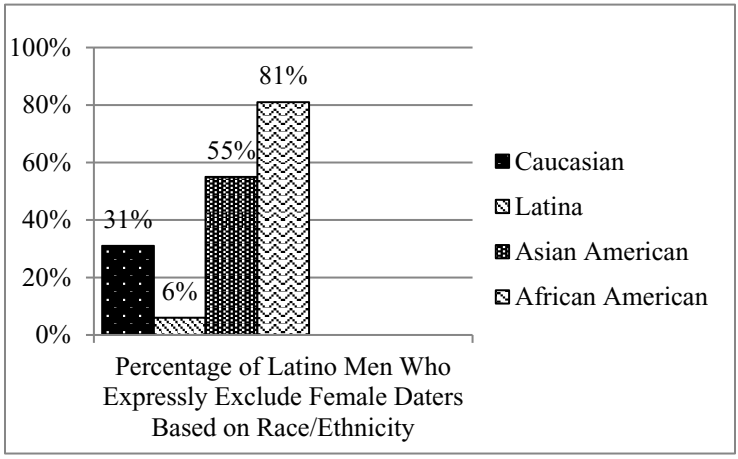
57. *Id.*

58. For example, one study found that while a majority of straight White women stated that they preferred to date only White men, only 6% of Asian-American women and 16% of Latina women preferred to date only men of their same race. *See* Feliciano, *supra* note 36, at 46–48. Minorities are also more willing to date Whites than Whites are to dating them. *Id.* at 51; Mendelsohn et al., *supra* note 27, at 11.

overwhelmingly excluded minority men other than their co-ethics.[59] The vast majority, however, were willing to date White men. [60]

This racial hierarchy is also reflected in Asian-American and Latina women's response rates when contacted by online daters.[61] They are most likely to respond to emails from White men and their multiracial co-ethnics who are part White (Asian-American/White men and Latino/White men) than to messages from their mono-racial co-ethnics.[62] Surveys of college students' dating preferences have also found that many Latinos and Asian-Americans prefer Whites to other groups, including their own co-ethnics.[63]

The preferences of straight Asian-American and Latino men also reflect a racial hierarchy. For example, Robnett and Feliciano found that over 60% of Asian-American and Latino men who expressed a racial preference were willing to date White women, but less than 20% were willing to date African-American women.[64] Approximately 50% of Asian-American men were willing to date Latina women and similar numbers of Latino men were willing to date Asian-American women.[65] The graphs below illustrate the preferences of straight Asian-American and Latino men.



59. Feliciano et al., *supra* note 36, at 46–48.

60. *Id.*; *see generally* Glenn T. Tsunokai, Allison R. McGrath, & Jillian K. Kavanagh, *Online Dating Preferences of Asian Americans*, 31 J. SOC. & PERS. RELATIONSHIPS 796 (2014).

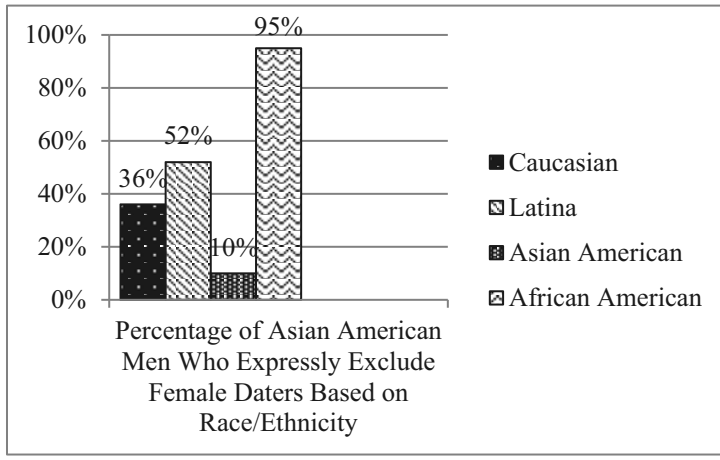
61. Curington et al., *supra* note 40, at 12.

62. Lin & Lundquist, *supra* note 29, at 207; Rudder, *supra* note 50.

63. Liu et al., *Ethnocentrism in Dating Preferences for an American Sample: The Ingroup Bias in Social Context*, 25 EURO. J. OF SOC. PSYCH. 95, 95 (1995).

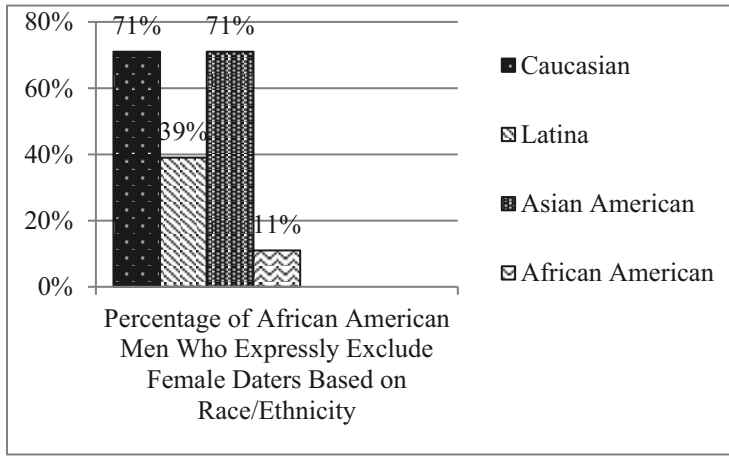
64. Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 SOC. FORCES 807, 816 (2011).

65. *Id.*



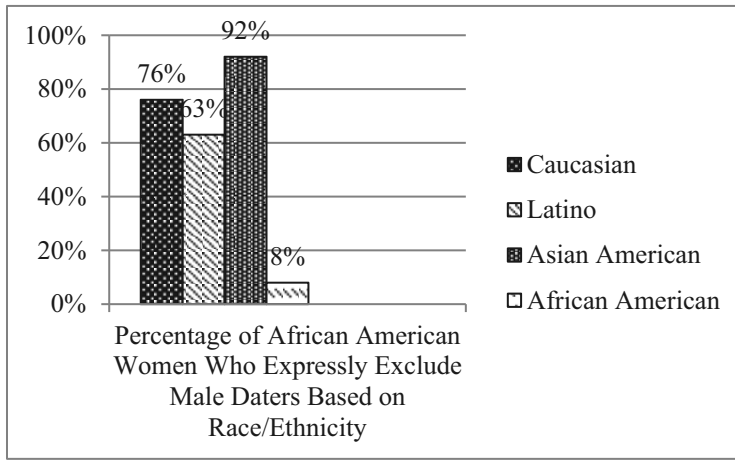
Source: Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 Soc. Forces 807 (2011).

While the preferences of Asian-Americans, Latinos/as, and Whites reflect a similar racial hierarchy, the stated preferences of African-American men and women do not follow this pattern. For example, African-Americans express stronger same-race preferences than Asian-Americans and Latinos and are three times as likely to expressly refuse to date individuals of other races.[66] The majority also expressly exclude Whites as potential dates.[67] The graph below illustrates the stated preferences of African-American online date-seekers.



66. Yancey, *supra* note 39, at 135; Robnett & Feliciano, *supra* note 64, at 815–16. *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 Soc. Forces 807, 815 (2011); Feliciano et al., *supra* note 36, at 46–48.

67. Yancey, *supra* note 39, at 135; Robnett & Feliciano, *supra* note 64, at 815; Feliciano et al., *supra* note 36, at 46–48.



Source: Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 Soc. Forces 807 (2011).

Yet, in contrast to their *stated* preferences, the *revealed* preferences of straight African-American men and women suggest that they may be more willing to date Whites than indicated by their *stated* preferences. One online dating study conducted by Mendelsohn and his colleagues found that African-Americans were *ten times* more likely to contact Whites than Whites were to contact them.[68] That study and others have also found that African-Americans are *more* likely to respond to messages from Whites and from multiracial African-American/White individuals than messages from African-Americans.[69]

These studies demonstrate an undeniable racial hierarchy in the dating market.[70] Daters' preferences for multiracial persons who are part White over mono-racial minorities further reveal a hierarchy that values light skin and European appearance. These studies also suggest that while partial Whiteness can elevate Asian-Americans and Latina women to White status, it does not have the same power for African-American women. For example, Asian-American, Latino, and White men rated online profiles and photographs of multiracial African-

68. Mendelsohn et al., *supra* note 27, at 8.

69. *Id.* at 12; Curington et al., *supra* note 40, at 12; Lin & Lundquist, *supra* note 29, at 203–04.

70. Although the preferences of online date-seekers might not be representative of the entire population, over 75% of Americans between the ages of eighteen and sixty-four, including racial minorities and individuals with less than a high school diploma, are online and 38% of Americans who are "single and looking" have used online dating sites or apps. *See Internet User Demographics: Internet Users in 2014*, PEW RES. CTR., http://www.pewinternet.org/data-trend/internet-use/latest-stats/ (last visited Oct. 6, 2016); AARON SMITH & MAEVE DUGGAN, PEW RES. CTR., ONLINE DATING & RELATIONSHIPS (2013), http://www.pewinternet.org/2013/10/21/online-dating-relationships/ ("66% of online daters have gone on a date with someone they met through a dating site or app, and 23% of online daters say they have met a spouse or long term relationship through these site.").

American/White women as significantly more attractive than mono-racial African-American women but as less attractive than women of other races.[71]

The preferences revealed by these studies are consistent across daters of different ages, incomes, education, geographic location (including urban v. rural dwellers), and self-identification as liberal or conservative.[72] Speed dating studies and surveys of college students' preferences have found a similar racial hierarchy.[73] For example, 381 college students at a public university in California completed an anonymous questionnaire that asked them to describe the traits they desire in a romantic partner, whether they were willing to date someone of a different race, and if so, to rank their preferred racial or ethnic groups and explain their reasons for their rankings.[74] All of the non-Black male students who expressed racial preferences ranked African-American women last[75] but White students were significantly less likely than Asian-American or Latino students to report any racial preferences or to expressly exclude African-Americans.[76] However, students' explanations for their preferences reveal a racialized and gendered hierarchy fueled by Western notions of beauty, stereotypes, and family and societal disapproval. Students' most commonly stated reasons for excluding African-Americans or ranking them last included lack of physical attraction, cultural differences, perceived aggressive personality or behavior, and social disapproval.[77] Rates of exclusion varied by gender. Heterosexual White male students were more than twice as likely as their female counterparts (67% v. 30%) to exclude African-Americans as potential dates.[78] Asian-American males were also more likely than females to exclude African-Americans as potential dates.[79] Men were more than twice as likely as women to cite lack of physical attraction (such as skin tone, hair texture, and body type) as reasons for excluding African-Americans as potential dates.[80]

As noted earlier, all daters prefer physically attractive partners.[81] Beauty may be in the eye of the beholder but throughout most of the Western world, a light complexion and phenotypically European features, such as straight hair and a

71. RUDDER, *supra* note 29, at 117.

72. *Id.*

73. *See* Fisman et al., *supra* note 11, at 126; Fisman et al., *supra* note 33, at 674; James A. Bany et al., *Gendered Black Exclusion: The Persistence of Racial Stereotypes Among Daters*, 6 RACE & SOC. PROB. 201, 202 (2014).

74. Bany et al., *supra* note 73, at 201.

75. *Id.* at 209.

76. Approximately 80% of Asian-American, African-American, and Latino students as compared to 49% of White students reported a racial preference. While 80% of Asian American and 66% of Latino students excluded African-Americans as potential dates, approximately half of White students (49%) did the same. *Id.* at 206.

77. *Id.* at 209.

78. *Id.* at 206.

79. *Id.*

80. Bany et al., *supra* note 73 at 208. For example, some non-Black men wrote: "Too dark," "I generally don't like curly hair or dark skin." "Because African-American women are usually bigger broader physically type people." "I just don't like to date anyone who has really dark skin . . . anyone but Black." *Id.*

81. *See* Hitsch, *supra* note 33, and accompanying text.

narrow nose, are perceived as most attractive, especially for women.[82] These physical features are deemed desirable not only by Whites but also by African-Americans and other minority groups.[83] As scholars have asserted, light "skin tone is also a form of social capital that grants access to . . . marriage to higher status men."[84] One need only name a few African-American female celebrities considered universally beautiful (such as Beyoncé Knowles, Halle Berry, and Alicia Keys) to conclude that women with lighter skin and more Eurocentric features are perceived as most attractive.[85]

Gendered and racialized stereotypes affect how individuals are perceived in the dating market. For example, one study found that White men who expressed a body type preference were more likely to exclude African-American women as dates, presumably because they associated African-American women with a particular body type.[86] Another study found that the more highly a man valued femininity, the higher the likelihood that he would express interest in dating Asian-American women but not African-American woman.[87] Several studies have found

82. KIMBERLY JADE NORWOOD, COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA 123 (2013); PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN-AMERICANS, GENDER, AND THE NEW RACISM 123 (2005); Verna Keith, *A Colorstruck World: Skin Tone, Achievement, and Self-Esteem Among African-American Women, in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 25 (Evelyn Nakano Glenn, ed. 2009).

83. Keith, *supra* note 82 at 25; JOANNE L. RONDILLA & PAUL SPICKARD, IS LIGHTER BETTER?: SKIN-TONE DISCRIMINATION AMONG ASIAN AMERICANS 1–2 (2007); *see generally* Andrés Villarreal, *Stratification by Skin Color in Contemporary Mexico*, 75 AM. SOCIOLOGICAL REV. 652 (2010). For example, African-Americans (male and female) rate lighter-complexioned African-American women, but not men, as more attractive than those with darker complexions. Mark Hill, *Skin Color and the Perception of Attractiveness Among African- American: Does Gender Make a Difference*?, 65 SOC. PSYCH. Q. 77 (2002). As scholars have noted, some African-Americans have internalized the majority's preference for light skin. *See* Bond & Cash, *Black Beauty: Skin Color and Body Images Among African-American College Women,* 22 J. APPLIED SOC. PSYCH. 874 (1992); Ronald E. Hall, *Bias Among African-Americans Regarding Skin Color: Implications for Social Work Practice*, 2 RES. SOC. WORK PRAC. 479, (1992); Ronald E. Hall, *Skin Color Bias: A New Perspective on an Old Problem*, 132 J. PSYCH. 238 (1998); *See* EVELYN NAKANO GLENN, *Consuming Lightness: Segmented Markets and Global Capital in the Skin-Whitening Trade, in* SHADES OF DIFFERENCE 168 (Evelyn Nakano Glenn, ed. 2009) (Asian-American and Latina women (in the U.S. and abroad) have similarly internalized the preference for lighter skin as shown by their expenditure of billions of dollars on skin lightening products each year); Charles Blow, *A Bias More Than Skin Deep*, N.Y. Times (July 13, 2015), http://www.nytimes.com/2015/07/13/opinion/charles-blow-a-bias-more-than-skin-deep.html?_r=0; Monisha Rajesh, *India's Unfair Obsession With Lighter Skin*, THE GUARDIAN, Aug. 14, 2013, 12:32 PM, https://www.theguardian.com/world/shortcuts/2013/aug/14/indias-dark-obsession-fair-skin; G.P. Abuja, *Beauty in Nigeria: Lighter Shades of Skin*, THE ECONOMIST, Sept. 28, 2012, http://www.economist.com/blogs/baobab/2012/09/beauty-nigeria.

84. Keith, *supra* note 82, at 26.

85. As the African-American Emmy award winning actress Viola Davis retorted when a New York Times journalist referred to her as "darker-skinned and less classically beautiful" than lighter-skinned Black actresses, this is simply "a fancy term of saying ugly." Yesha Callahan, *Viola Davis Responds to Being Called "Less Classically Beautiful*," THE ROOT, Sept. 26, 2014, http://www.theroot.com/blog/the-grapevine/viola_davis_responds_to_being_called_less_classically_beautiful_you_define/.

86. Feliciano et al., *supra* note 36, at 49.

87. Adam D. Galinsky et al., *Gendered Races: Implications for Interracial Marriage, Leadership Selection, and Athletic Participation*, 24 PSYCH. SCI. 498, 502 (2013). Straight women tend to prefer men with masculine traits and straight men tend to prefer women with feminine traits. *Id.* at 501; *see also* DAVID BUSS, THE DANGEROUS PASSION 87 (2000).

that Americans perceive Asian-Americans to be more feminine than other groups, and African-Americans to be more masculine.[88] They also associate dark skin with masculinity.[89] Given the importance that men place on a partner's physical appearance, and the value all races place on light skin on women, it is not surprising that lighter-skinned women are higher in the racial hierarchy of the dating market.

Societal notions of masculinity and femininity are reflected in stereotypes and media portrayals of minority groups. Asian-American women are depicted as hyper-feminine, Asian-American men are portrayed as effeminate and asexual, and African-American men are depicted as hyper-masculine.[90] Although the media is beginning to portray African-American women as desirable partners,[91] historically, cultural depictions of Black women have generally been limited to images of matronly caregivers, sexually immoral, or emasculating, angry women.[92]

Gender differences in the racial hierarchy are also apparent when one examines stereotypes about different groups' personalities and behaviors. Although straight women (and gay men) reject African-American men at high rates, African-American women are excluded at even higher rates. Studies show that while both men and women rely on stereotypes about African-Americans' "aggressive personality" as a reason for excluding them as dates, straight men are significantly more likely than straight women to do so.[93] Their stated reasons reflect cultural assumptions about African-American women as emasculating, domineering, and angry and African-American men as dangerous.[94] While the stereotype of African-American men as hyper-masculine and sexually aggressive fuels the perception

88. Johnson et al., *Race is Gendered: How Covarying Phenotypes and Stereotypes Bias Sex Categorization*, 102 J. PERSONALITY & SOC. PSYCH. 116 (2012); Galinsky et al., *supra* note 87, at 502.

89. Hill, *supra* note 83, at 77–78. For example, on study found that when White college students looked at facial photos of African-American women, they sometimes mistook them for male faces. *See* Phillip Atiba Goff at al., *Ain't I a Woman: Towards and Intersectional Approach to Person Perceptions and Group-Based Harms*, 59 SEX ROLES 392 (2008); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1321 n. 52 (2009); Johnson et al., *supra* note 88, at 127.

90. *See generally* COLLINS, *supra* note 82; KASTANIS & WILSON, *supra* note 22, at 1.

91. For example, Kerry Washington, the lead character in the television drama, *Scandal*. It is worth noting that Shonda Rhimes, the creator of *Scandal*, is an African-American woman.

92. *See generally* COLLINS, *supra* note 82. These images continue to predominate. For example, as recently as 2014, the New York Times referred to the producer of programs with African-American characters as "an angry Black woman." Alessandra Stanley, *Wrought in Rhimes' Image*, N.Y. TIMES, Sept. 18, 2014, http://www.nytimes.com/2014/09/21/arts/television/viola-davis-plays-shonda-rhimess-latest-tough-heroine.html.

93. For example, 50% of Latino college students in the California study as compared to 10% of Latina students and 29% of White males as compared to 9% of White females cited aggressive personality and behavior when describing their reasons for excluding African-Americans. Male students wrote that African-American women are "abrasive" and have "attitude problems" and "large chips on their shoulders." Bany et al., *supra* note 73, at 208. Some female students similarly reported that they would not date African-American men because they have aggressive personalities. One woman cited African-American men's "gangster style" and another wrote that some African-American men "tend to be violent." *See also* Rose Weitz & Leonard Gordon, *Images of Black Women Among Anglo College Students*, 28 SEX ROLES 19, 19 (1993) (studying White college students' perceptions of African-American women).

94. COLLINS, *supra* note 82; Wilson et al., *supra* note 22 (stereotype of African-American men as "thugs").

that they are threatening and dangerous, these are also traits that some straight women (and gay men) find appealing.[95]

Many college students in the California public university study expressed concern that family members and society in general would not approve if they dated African-Americans.[96] Another study of White college students' racial attitudes similarly found that they feared family and societal disapproval if they married interracially.[97] Interestingly, Asian-Americans and Latinos/as were significantly more likely than Whites to cite social disapproval as a reason to exclude African-Americans as romantic partners.[98] The frequency of these concerns varied by gender. Asian-American and Latina students were significantly more likely than their male counterparts to express concern that parents, friends, and strangers would disapprove and they feared they would be discriminated against if they dated African-American men.[99] These concerns are not unfounded. Interracial couples face greater opposition and disapproval from family members and society than same-race couples.[100]

Parents' objections to their children's interracial relationships confirm the racial hierarchy apparent in the dating market. Asian-American, Latino, and White parents all express greater objections to their children intermarrying with African-Americans as compared to other groups.[101] They express fear that society will discriminate against their adult children and mixed-race grandchildren, and also express concern about the racial identity and psychological well-being of mixed-race grandchildren.[102] Although not always expressly stated or acknowledged, parents also fear their own potential loss of status. One study found that Latino parents express disapproval of intimacy with African-Americans even before their

95. Bany et al., *supra* note 73, at 209 (reporting female student's comment on African-American men's "attractive skin color and body type."). Small percentages of White women, specifically women who prefer very tall and masculine men, have strong preferences for African-American men. *See* Feliciano et al., *supra* note 36, at 49. Pornography sites are filled with images of interracial sexual activity between dark-skinned Black men and White women, reflecting and reinforcing the stereotype of Black men as well-endowed and sexually gifted. *See* Gail Dines, *The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J. L. & FEMINISM 283, 285 (2006). *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2004).

96. Bany et al., *supra* note 73, at 207

97. Eduardo Bonilla-Silva & Tyrone A. Forman, *"I Am Not a Racist But . . .": Mapping White College Students' Racial Ideology in the USA*, Discourse & SOC'Y, 50, 60–62 (2000).

98. Fifty-five percent of Asian-Americans, 39% of Latinos, but only 10% of White students with expressed racial preferences listed social disapproval as a reason for excluding African-Americans. Bany et al., *supra* note 73.

99. Bany et al., *supra* note 73, at 207.

100. Family members express concern that the interracial couple will face societal disapproval and that neighbors, teachers, and strangers will treat them and their offspring differently. *See* Erica Morales, *Parental Messages Concerning Latino/Black Interracial Dating: An Exploratory Study Among Latina/o Young Adults*, *in* 10:3 LATINO STUDIES 316 (Lourdes Torres, ed., (2012)); Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 225 (2004).

101. GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NON-BLACK DIVIDE 70 (2003); Wang, *The Rise of Intermarriage, supra* note 10, at 39; Morales, *supra* note 100, at 320; EILEEN O'BRIEN, THE RACIAL MIDDLE: LATINOS AND ASIAN AMERICANS LIVING BEYOND THE RACIAL DIVIDE 96 (2008); Feliciano et al., *supra* note 36, at 46–48.

102. *See* Morales, *supra* note 100, at 316.

children start dating because they fear jeopardizing the family's status in the racial hierarchy.[103] Other studies have found that White parents are similarly concerned about the loss of status for the family, especially when the child marries an African-American partner.[104]

Parents' objections to children's interracial relationships reflect not only a racialized hierarchy, but also a gendered one. Their reactions to the relationship depend not only on the race of the child's partner but also the gender. Families are much more likely to express strong disapproval when daughters (as compared to sons) date or marry out.[105] For example, White women in interracial relationships experience greater disapproval than White men dating minority women or minority men dating White women.[106] Latino parents are similarly more likely to express opposition when daughters (as compared to sons) date African-Americans.[107]

Societal disapproval of interracial relationships also depends on the race and gender of the minority spouse. Numerous commentators have noted greater objections from both African-Americans and Whites to relationships between African-American men and White women as compared to relationships between African-American women and White men.[108] In fact, a 2005 Gallup poll found that while 72% of Whites approve of a White man dating an African-American woman, only 65% approve of an African-American man dating a White woman.[109] White women married to Asian-American men also experience greater objections from

103. *Id.* at 327–28. Latinos, including immigrants with African ancestry, are aware of African-Americans' stigmatized status in the U.S., *see* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 78 N.Y.U. L. REV. 803, 803 (2004); SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES (1995); TATCHO MINDIOLA ET AL., BLACK-BROWN RELATIONS AND STEREOTYPES 71–2 (2002); Arnold K. Ho et al., *Evidence for Hypodescent and Racial Hierarchy in the Categorization and Perception of Biracial Individuals*, 100 J. PERSONALITY & SOC. PSYCH. 492, 492 (2011) (noting that Whites and minorities agree that "Whites have the highest social status, followed by Asians, Latinos, and Blacks."); *See generally* Kimberly Kahn et al., *The Space between Us and Them: Perceptions of Status Differences,* 12 GROUP PROCESSES & INTERGROUP REL. 591 (2009), and fear that a child's relationship with an African-American partner will jeopardize the higher racial status Latinos enjoy (or believe they enjoy). Morales, *supra* note 100, at 325. They also assume they must distance themselves from African-Americans to achieve social mobility. *Id.* at 328; *see* O'BRIEN, *supra* note 101, at 54 (some Latino adults refuse to date African-Americans for the same reasons).

104. MARIA ROOT, LOVE'S REVOLUTION: INTERRACIAL MARRIAGE 60 (2001).

105. M. Belinda Tucker & Claudia Mitchell-Kernan, *Social Structural and Psychological Correlates of Interethnic Dating*, 12 J. SOC. & PERS. RELATIONSHIPS 341–346, 353 (1995); Morales, *supra* note 100, at 328; Erica Chito Childs, *Families on the Color-Line: Patrolling Borders and Crossing Boundaries*, 5 RACE & SOC'Y 139, 156 (2002); HEATHER DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 58 (2000); ERICA CHITO CHILDS, NAVIGATING INTERRACIAL BORDERS: BLACK/WHITE COUPLES AND THEIR SOCIAL WORLDS 69 (2005).

106. ROOT, *supra* note 104, at 60 (Root concluded that women's status is influenced by her male partner's status so family members are concerned when they partner with men of lower racial status. In contrast, men's status is not tied to their female partner's status); *see also* Suzanne C. Miller et al., *Perceived Reactions to Interracial Romantic Relationships: When Race Is Used as a Cue to Status*, 7 GROUP PROCESSES AND INTERGROUP REL 354, 355 (2004).

107. Morales, *supra* note 100, at 328.

108. ROOT, *supra* note 104, at 60; ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 141–43 (2013).

109. Jones, *supra* note 5.

both the White and Asian-American communities than Asian-American women married to White men.[110]

Racial preferences are problematic for many reasons. They undermine our commitment to anti-discrimination and perpetuate social distance between groups. They also affect marriage outcomes. The two groups least preferred by online daters—African-American women and Asian-American men—are also the groups with the lowest rates of intermarriage. For African-American women, racial preferences affect not only their rate of intermarriage, but their likelihood of marrying at all and raising a child without a co-parent.

Marriage rates and non-marital birth rates vary significantly by education. College-educated women are more likely to marry than women with lower levels of formal education.[111] They are also significantly less likely to have children outside of marriage.[112] However, African-American women are much less likely to marry than women of other races[113] and are also more likely than women of other races to have non-marital children and to raise them in single-parent households.[114] While two-parent households are not superior to single-parent households, in the United States children raised by single parents are less advantaged in myriad ways, even when the single-parent has financial resources. The next section will briefly describe these relative disadvantages.

II. ROMANTIC PREFERENCES' EFFECTS ON CHILDREN

For most of U.S. history, non-marital children suffered significant legal and societal discrimination. Most, although not all, of the legal disabilities have been eliminated as a result of U.S. Supreme Court decisions striking down laws denying non-marital children the same rights enjoyed by marital children.[115] Societal disapproval of non-marital families has also decreased as children are increasingly raised by cohabitating or single parents. Despite these changes, non-marital chil-

110. KUMIKO NEMOTO, RACING ROMANCE: LOVE, POWER, AND DESIRE AMONG ASIAN AMERICAN/WHITE COUPLES 6 (2009) (One ethnographic study found that White men married to Asian women could not recall any instances of public discrimination against them because of their relationship. In contrast, White women married to Asian-American men reported negative comments from friends and neighbors about their choice of mate.).

111. PEW RES. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 4 (2010), http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/.

112. *See* Rachel M. Shattuck & Rose M. Kreider, *Social and Economic Characteristics of Currently Unmarried Women with a Recent Birth: 2011*, U.S. CENSUS BUREAU 4 (May 2013), http://www.census.gov/prod/2013pubs/acs-21.pdf (finding that non-marital birth rate for college-educated women was less than 9% as compared to 57% for women with less than a high school diploma).

113. 14% of White women ages thirty-five to forty-nine have never been married as compared to 43.6% of African-American women of the same age. *Id.*

114. Although the non-marital birth rate has been declining since 2008, approximately 70% of children born to African-American mothers are non-marital. *See* Brady Hamilton et al., Births: Preliminary Data for 2015, in 65.3 NAT'L VITAL STAT. REP. 10 (2016), http://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_03.pdf. 29% of children born to White mothers and 53% of children born to Latina mothers in 2015 were non-marital. *Id.* Asian-Americans have the lowest rate (16%) of non-marital births. *Id. See also* Shattuck & Krieder, *supra* note 112, at 4.

115. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) (discussing cases).

dren are disadvantaged relative to their marital counterparts in many ways. First, as I have described in prior work, the law continues to places heavier burdens on non-marital children in a number of areas, including parental support for college, intestate succession, and paternal transmission of U.S. citizenship.[116] Second, non-marital children continue to experience societal disapproval. The majority of Americans, including African-Americans and Latinos, believe that non-marital childbearing is a significant social problem and that unmarried women should not have children[117] Although the majority of non-marital children do not receive government benefits, society presumes that they will rely on public assistance for their support which contributes to their stigmatization.[118] Non-marital African-American children face greater disapproval than White children, especially when they are poor.[119]

Non-marital children are disadvantaged in virtually every measure, with consequences that extend into adulthood.[120] Numerous studies have shown that children who grow up in a single-parent home or with cohabitating parents[121] are more likely than children raised by married parents to be poor,[122] underachieve

116. *Id.* at 349.

117. PEW RES. CENTER, GENERATION GAP IN VALUES, BEHAVIORS: AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT 3 (2007), http://www.pewsocialtrends.org/2007/07/01/as-marriage-and-parenthood-drift-apart-public-is-concerned-about-social-impact/ (71% of participants stated that the increase in non-marital births is a "big problem" for society); *Id.* at 5 (59% believe that unmarried women having children is wrong and 66% believe that "[s]ingle women having children" is bad for society). Although Latinos and African-Americans have high non-marital birth rates than whites, they are almost as likely as whites to believe that non-marital childbearing is wrong. *Id.* at 8–9. More men (73%) than women (60%) believe that single women having children is bad for society. *Id.* at 50. Interestingly, most participants (67%) thought that children are better off when unhappy parents divorce rather staying together. *Id.* at 6. They were more accepting of divorce than non-marital childbearing. *See also* PEW RES. CTR., *supra* note 111, at 2 (finding that 69% of study participants "say the trend toward more single women having children is bad for society, and 61% say that a child needs both a mother and father to grow up happily.").

118. Maldonado, *supra* note 115, at 367–71.

119. Jane D. Bock, *Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER & SOC'Y 62, 65 (2000) (noting that "[t]he levels of stigma . . . vary according to the class, race, and age of the mother."); *see also* Kimberly Seals Allers, *There is a Single Mother Hierarchy, and It Needs to Stop*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/news/parenting/wp/2016/06/10/the-single-mother-hierarchy/.

120. *See* Jane Waldfogel et al., *Fragile Families and Child Well-Being*, 20 FUTURE OF CHILDREN 87, 91 (2010); Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 111 (2009).

121. Although half of non-marital children are born to cohabiting parents, the majority of non-marital parents are not romantically involved by the time the child is five years old. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILDREN 17 (2010) (cohabiting parents are more likely than married parents to be poor, have less formal education, and to experience family instability (breakups and multi-partner fertility) which is strongly associated with poorer outcomes for children). *See* Wendy Manning, *Cohabitation and Child Well-Being*, 25 FUTURE OF CHILDREN 51, 51 (2015). However, studies show that "stable cohabiting families with two biological parents seem to offer many of the same health, cognitive, and behavioral benefits that stable married biological parent families provide." *Id.* African-American mothers are less likely than women of other races to be living with the child's father at birth and are less likely than other groups to ever marry the father.

122. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL34756, NONMARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 15–16 (2008) (reporting that

academically, become teen parents, abuse drugs, engage in delinquent behavior, experience behavioral problems, and earn lower wages as adults.[123] They are also less likely to attend college or receive financial support as children[124] or as adults.[125] Researchers cannot completely explain the reasons for these poorer outcomes, but many argue that fewer resources—rather than growing up in a home with two married parents—are the source of these disadvantages.[126] Indeed, the law's preference for marital childbearing and the legal benefits it grants to married couples may explain the differences in outcomes.[127] With the possible exception of academic achievement,[128] these outcomes disproportionately affect African-American and Latino children who are more likely to be raised in single-parent families.[129] While a close relationship with both parents may reduce these risks, divorced and non-marital fathers disengage from their children at alarmingly high rates.[130]

in 2007, 41% of women with non-marital children had incomes below the poverty level but only 19% had incomes above $50,000).

123. Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY 116, 120–21 (Daniel Patrick Moynihan et al., eds., 2004); Maldonado, *supra* note 115, at 372, n.167. Of course, the majority of children raised in single-parent homes do not experience these negative outcomes but, as a group, they are more likely than children raised by married parents to experience poor outcomes. *Id.* at 373–74.

124. *See* Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2007*, U.S. CENSUS BUREAU 6–8 (Nov. 2009), http://www.census.gov/prod/2009pubs/p60-237.pdf (reporting that 62.8% of divorced parents had a child support order as compared to only 43.5% of never married parents and 51.2% of divorced parents with a child support order received the full amount owed as compared to less than 40% of never married parents); *See also Minority Families and Child Support: Data Analysis*, OFF. OF CHILD SUPPORT ENF'T. 35, 63 (2007), http://www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-43a.pdf (finding the "child support process is most responsive to divorced parents and least responsive to never-married parents").

125. For example, they are less likely to receive help with the down payment for a house, or to receive an inheritance from the father or paternal grandparents.

126. Maldonado, *supra* note 115, at 372–73 (discussing studies).

127. Vivian Hamilton, *Family Structure, Children and the Law*, 24 WASH. U. J. L. POL'Y 9, 10 (2007); *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252 (2010) (noting that the "law channel[s] individuals . . . into marriage, and from marriage into coupled parenthood."); *see also* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 956–57 (Mass. 2003) (describing the numerous federal and state benefits available to married couples).

128. One study found that while whites and Latinos raised in single-parent families tend to have lower levels of educational attainment than children raised by married parents, African-American children in single parent homes may acquire more education than African-American children living with both parents. *See* JEFF GROGGER & NICK RONAN, U.S. DEP'T LABOR, THE INTERGENERATIONAL EFFECTS OF FATHERLESSNESS ON EDUCATIONAL ATTAINMENT AND ENTRY-LEVEL WAGES ii-iii (1995), http://www.bls.gov/osmr/pdf/nl950080.pdf; *see also* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 87–88 (1994) ("[W]ith respect to educational achievement, father absence has the most harmful effects among Hispanics and the least harmful effects among Blacks.").

129. Child Support Enforcement, *supra* note 124, at 3–4 (finding that in 2002, 66% of white mothers but only 48% of African-American mothers had child support orders); *id.* at 8 (concluding that the difference in child support rates is "largely due to racial and ethnic family formation differences.").

130. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILDREN 17 (2010) (By the time the child is five years old, only 51% of unmarried fathers visit at least once a month and one-third have no contact with their children at all). The vast majority of children in single-parent families live with their mother. *Families and Living Arrangements: America's Families and Living Arrangements: 2013: Children (C table series)*, U.S. CENSUS BUREAU tab.C3 (last

Marriage is not the solution to the potential disadvantages experienced by non-marital and disproportionately African-American and Latino children. These disadvantages are the result of social inequality, lack of resources, residential segregation, and an educational system that fails children in poor and minority neighborhoods. Yet, the advantages and opportunities available to *marital* children are increasingly significant and have created a divide of haves versus have nots along marital lines. Low-income and working class individuals (who are disproportionately African-American or Latino/a) increasingly postpone or forego marriage but not childbearing.[131] As a result, single and cohabitating parents are disproportionately poor and have few resources to invest in their children. In contrast, college-educated individuals postpone marriage and childbearing until they are financially stable. This latter group invests more resources in their children than prior generations ever have.[132] Assortative mating has magnified the inequality between marital and non-marital children as highly educated and successful individuals marry and have children with highly educated and successful partners, leaving low-income individuals to create "fragile families."[133]

While the class inequality exacerbated by assortative mating is troubling, this Essay focuses on the racial inequality created by preferences in the dating and marriage market. Consequently, it focuses on the dating market for college-educated African-American women since their children are most affected by racial preferences in the marriage market. While racial preferences may also disadvantage the children of low-income African-American mothers, their children are much more disadvantaged by poverty, family instability,[134] and lack of access to adequate schools and safe neighborhoods—problems that will not be remedied by eliminating racial preferences in the romantic marketplace.

The number of children affected by racial preferences in the dating and marriage market is small as compared to the number of African-American children in "fragile families." These children are amongst the most privileged, as their mothers are college-educated and likely to be financially stable. These children are also likely to attend quality schools and to reside in desirable neighborhoods. Given their relative privilege, one might ask whether it is worthwhile to explore how racial preferences limit their access to resources and opportunities when so many children have significantly fewer advantages. I contend that it is. When we examine opportunities for children, we should not focus only on the most disadvantaged

updated Nov. 6, 2014), http://www.census.gov/hhes/families/data/cps2013C.html (85% of children living with only one parent lived with their mother only).

131. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 109 (2005).

132. CARBONE & CAHN, *supra* note 24, at 84–89; A. LAREAU, UNEQUAL CHILDHOODS 300 (2011); as sociologist Andrew Cherlin has stated "[i]t is the privileged who are marrying and marrying helps them stay privileged." Jason DeParle, *Two Classes, Divided by "I Do*", N.Y. TIMES (July 14, 2012) (quoting Andrew Cherlin), http://www.nytimes.com/2012/07/15/us/two-classes-in-america-divided-by-i-do.html?_r=0).

133. The "Fragile Families and Child Well-Being" study tracked 5000, primarily non-marital, children born from 1998 to 2000 in large U.S. cities. *See* PRINCETON UNIVERSITY, FRAGILE FAMILIES & CHILD WELLBEING STUDY, http://www.fragilefamilies.princeton.edu (last visited Sept. 28, 2016).

134. *See* Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD 75, 82 (2005).

children but should also address barriers that prevent *all* children from taking advantage of opportunities available to a select few. For example, it is not enough for all children to attend adequate schools if some children have opportunities to attend superior schools because of their race. Similarly, it is troubling if children of college-educated Asian-Americans mothers have greater access to resources and opportunities than the children of college-educated African-American women, if those advantages are the result of racial preferences.

In the United States, marriage has historically been a mechanism for women's economic security. [135] Even today, some women rely on marriage as a tool for economic security and upward mobility.[136] Historically, marriage has not provided these economic benefits to African-American women who married African-American men, as the earnings of African-American men have always been much lower than those of White men.[137] This remains true today, as African-American women are twice as likely as their male counterparts to graduate from college and almost three times as likely to obtain a post-graduate degree.[138] However, minority women who intermarry with White men enjoy significantly higher family incomes and wealth than those who marry in. For example, in 2010, the median family income of White/Latino/a marriages was $57,900 as compared to $35,578 for Latino/Latina marriages.[139] Asian-Americans who intermarried with Whites earned higher combined incomes than all other couples—same-race or interracial.[140] Minority women who intermarry with Whites live in wealthier neighborhoods and are more likely to have access to intergenerational transfers of wealth than minority women in same-race marriages.

The children of White/non-White marriages tend to enjoy greater access to safe neighborhoods, high quality schools, economic resources, and intergenerational transfers of wealth than the children of minority couples. They also enjoy the intangible benefits of access to networks that rarely include minorities. For example, a child who resides in a wealthier neighborhood with high quality schools—

135. STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 243 (2005).

136. This Essay focuses on women's marital rates because the vast majority of children in single-parent households reside with their mothers.

137. Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African-American Women and Marriage*, *in* 621 ANNALS OF AM. ACAD. 132, 143 (2009).

138. Wendy Wang & Kim Parker, PEW RES. CTR. WOMEN SEE VALUE AND BENEFITS OF COLLEGE; MEN LAG ON BOTH FRONTS, SURVEY FINDS 13 (2011); Nat'l Center for Education Statistics https://nces.ed.gov/fastfacts/display.asp?id=72 (reporting that 71% of African Americans who earned a Master's degree in 2009-2010 were women as were 66% of those who earned a Bachelor's degree)

139. Wang, *supra* note 10, at 6; One study of the three largest Latino groups—Mexican-Americans, Cuban-Americans, and Puerto Ricans found that for all three groups, members who intermarried with Whites enjoyed higher financial resources than counterparts who married in. Xuanning Fu, *Marital Assimilation and Family Financial Resources of U.S. Born Hispanics*, 2 OPEN SOC. J. 10, 16 (2009); *see also* Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 POP. BULL. 1, 23 ("Children living in white/Asian interracial families had the highest mean family income.").

140. Wang, *supra* note 10, at 6. White/Asian newlyweds of 2008 through 2010 had median combined annual earnings of $70,952 as compared to $60,000 for White/White couples and $62,000 for Asian/Asian couples. African-Americans married to Whites had a median family income of $53,187 as compared to $47,700 for African-Americans who married in.

neighborhoods that are disproportionately White—may have greater access to coveted internships and academic opportunities not available is less privileged neighborhoods and schools. Some of these opportunities are formal—the school in the wealthier neighborhood may have more guidance counselors who search for opportunities and help students secure them. Other opportunities are informal and can only be described as networks or as one single mother described "access to power."[141] These networks help individuals obtain jobs, internships, and clients, opportunities that are not available to individuals outside the network.[142]

Racial preferences limit the pool of potential partners available to African-American women and reduce the likelihood that their children will be raised in financially secure, two-parent homes and have access to the resources and opportunities available to the children of interracial marriages. When highly educated and financially successful men—who are disproportionately White or Asian-American—exclude African-American women as potential romantic and ultimately marriage partners, African-American women may end up marrying men with lower levels of educational attainment and income. Those marriages will not only have fewer resources, but are also at higher risk of divorce.[143] Consequently, the children of those marriages may be more likely to grow up with fewer resources and to spend part of their childhood in a single parent home.

One might not be sympathetic to an African-American college-educated woman who rejects a same-race partner with an average income because she would prefer a higher income partner. But African-American women are not rejecting same-race partners with average incomes. They are rejecting partners with low incomes or no income at all. The pool of employed African-American men is so thin that African-American women may find it difficult to find a same-race partner who is employed period.[144] For example, one recent study reported that there are

141. Interview with YG (Aug. 12, 2016) (on file with author).

142. *See* Elizabeth Emens, *Intimate Discrimination: The State's Role in Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1377 (2009) and accompanying text (noting that "families are at the heart of communities and thus of social and employment networks. Who one knows has significant effects on one's opportunities.").

143. Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African-American Women and Marriage*, 621 ANNALS OF AM. ACAD. 132 (Jan. 2009); RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE: HOW THE AFRICAN-AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 112 (2011) (proposing that African-American women marry "out" instead of marrying "down"); *Id.* (women who marry less successful men (educationally or occupationally) have higher divorce rate); College educated African-Americans are significantly more likely as college educated Whites to divorce. *Id. See* Richard Fry, *The Reversal of the College Marriage Gap*, PEW RES. CTR. (Oct. 7, 2010), http://www.pewsocialtrends.org/2010/10/07/the-reversal-of-the-college-marriage-gap/.

144. The mass incarceration of African-American men and the existence of a criminal record severely limits employment opportunities. *See* Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth,* 58 SOC. PROBS. 257, 259 (2011). In some cities like Milwaukee, almost one in eight African-American men has spent time in prison. *See* John Pawasarat & Lois M. Quinn, *Wisconsin's Mass Incarceration of African-American Males: Workforce Challenges for 2013*, https://www4.uwm.edu/eti/2013/BlackImprisonment.pdf (last visited Sept. 28, 2016). According to the Sentencing Project, ten percent of African-American men in their thirties are in prison on any given day. *Trends in U.S. Corrections*,THE SENTENCING PROJECT, http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (last visited Sept. 28, 2016); *see also* U.S. DEPT. OF JUSTICE, *Jail Inmates at Midyear 2014* (June 2015),

"51 employed young black men for every 100 young black women," ages 25–34.[145] In contrast, "[a]mong never-married white, Hispanic and Asian American young adults, the ratio of employed men to women is roughly equal—100 men for every 100 women."[146] The pool is even more limited for African-American women seeking a college-educated same-race partner as African-American women graduate from college at twice the rate of their male counterparts. [147] Successful African-American men are more likely than African-American women to intermarry, thereby decreasing the pool of marriageable African-American men available to African-American women.[148]

Given the limited pool of marriageable African-American men, some middle class African-American women will not find a same-race partner. Their own racial preferences for African-American men and those of non-Black men for non-Black women, further limit African-American women's opportunities to marry. Indeed, African-American women are more than three times as likely as white women to never marry.[149] Given their limited prospects for marriage, the African-American community's greater acceptance of non-marital childbearing, and society's increased acceptance of single-parent families, it is not surprising that some

http://www.bjs.gov/content/pub/pdf/jim14.pdf (reporting that 35% of jail population is African-American); E. ANN CARSON, U.S. DEPT. OF JUSTICE, PRISONERS IN 2014 15 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf (reporting that 37% of male prison population is African-American). African-Americans comprised 13% of the U.S. population in 2015. *See Quick Facts*, U.S. BUREAU, https://www.census.gov/quickfacts/table/PST045215/00 (last visited Sept. 28, 2016).

145. Wendy Wang & Kim Parker, PEW RES. CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED 14 (2014). "In most racial and ethnic groups, men are more likely than women to have never been married. The major exception is among blacks. In 2012, roughly equal shares of black men (36%) and black women (35%) ages 25 and older had never been married." *Id.* at 11. Interestingly, African-American women express a preference for men "having primary economic responsibility . . . despite the remoteness of such a prospect." Burton & Tucker, *supra* note 143, at 142 (noting that many middle class African-Americans view "a traditional alignment of household responsibilities . . . as an achievement in the larger society's terms."); PEW RES. CTR., *supra* note 111, at 28 (finding that "[f]ully 88% of black respondents (compared with 62% of whites and 77% of Hispanics) say that in order to be ready for marriage, a man must be able to support a family financially" and concluding that "blacks are the racial group most inclined to consider financial security a prerequisite to marriage.").

146. Wang & Parker, *supra* note 145, at 14.

147. Wendy Wang & Kim Parker, PEW RES. CTR. WOMEN SEE VALUE AND BENEFITS OF COLLEGE; MEN LAG ON BOTH FRONTS, SURVEY FINDS 13 (2011) ("In 2010, only 37% of black college graduates were men and 63% were women. Among white, Hispanic and Asian college graduates, the share of men is close to the average of 45%.").

148. College-educated African-American men seeking to marry do not face the same challenges as African-American women. Although African-American men are rejected at high rates by online daters of other races, they are two to three times as likely as African-American women to intermarry. While the challenges faced by professional African-American women seeking a mate are well-documented, *see, e.g.*, BANKS, *supra* note 143, at 33; KARYN LANGHORNE FOLAN, DON'T BRING HOME A WHITE BOY: AND OTHER NOTIONS THAT KEEP BLACK WOMEN FROM DATING OUT 43 (2010), given the large pool of educated African-American women seeking a same-race partner, it is doubtful that racial preferences affect African-American men's ability to marry (someone). Similarly, Asian-American men have high rates of marriage (despite relatively low rates of intermarriage compared to Asian American women) so racial preferences do not seem to restrict their ability to find a mate either.

149. *See* Imani Perry, *Blacks, Whites, and the Wedding Gap*, N.Y. TIMES, Sept. 16, 2011, http://www.nytimes.com/2011/09/18/books/review/is-marriage-for-white-people-by-ralph-richard-banks-book-review.html.

college-educated African-American women choose to raise a child without a spouse.[150]

The children of college-educated African-American "single mothers by choice"[151] are unlikely to experience the increased risk of poor outcomes faced by children of low-income single mothers.[152] However, they are unlikely to enjoy all of the advantages of children raised by two college-educated parents. First, most families need two-incomes to maintain a home in a desirable neighborhood with high quality schools, and access to extracurricular and cultural activities that are increasingly necessary for children to compete when applying to college or summer internships.[153] Second, most families need two incomes to save for a child's college education. Single parents, even those who are financially stable, are less likely than married parents to be able to afford to pay for a child's college education. Third, single parents "have no one with whom to share the financial, logistical, or emotional burdens of being a parent."[154] As a result, single mothers, albeit privileged single mothers, will likely have fewer resources—financial, emotional, and time—to expend on their children and cultivate opportunities for their success. Finally, single parents, and by extension their children, may be excluded from networks that married parents inhabit. Given the single-mother hierarchy, African-American single mothers are more likely than White single mothers to be excluded from these networks.[155] As one divorced woman observed "as an African-American woman - even with an Ivy League education and a middle-class income – [she] was still subject to the stereotypical perception of 'the black single mother'."[156]

150. Women of other races also intentionally chose to become single parents. *See generally* SINGLE MOTHERS BY CHOICE, http://www.singlemothersbychoice.org (last visited Sept. 28, 2016).

151. *See* Tomiko Fraser Hines, *Being a Single Mother by Choice, Part 2* (Mar. 1, 2016), http://madamenoire.com/616917/being-a-single-mother-by-choice-part-2/ (noting that single motherhood by choice is not an uncommon for professional African-American); *Many Women Choosing to be Single Mothers*, ATLANTA BLACK STAR, Mar. 29, 2013, http://atlantablackstar.com/2013/03/29/being-a-single-mother-is-a-chioce/.

152. Claire Cain Miller, *Single Motherhood, in Decline Over All, Rises for Women 35 and Older*, N.Y. TIMES, May 8, 2015, http://www.nytimes.com/2015/05/09/upshot/out-of-wedlock-births-are-falling-except-among-older-women.html (discussing increase in rate of nonmarital births to women over the age of 35).

153. *See* Chris Taylor, *Single Moms by Choice: Making the Finances Work*, REUTERS, Sept. 9, 2014, http://www.reuters.com/article/us-money-singlemoms-idUSKBN0H41D220140909. As one African-American single mother by choice stated, "I make a very comfortable living . . . That said, it's still one income. And living in southern California, there are certain things that are difficult to attain on a single income. Like a larger home, or private school tuition . . . ."; Tomiko Fraser Hines, *Being a Single Mother by Choice, Part I* (Feb. 29, 2016), http://madamenoire.com/616911/being-a-single-mother-by-choice-part-1/.

154. Isabel Sawhill, *Celebrating Single Mothers by Choice* (May 8, 2015), https://www.brookings.edu/2015/05/08/celebrating-single-mothers-by-choice/.

155. *See* Allers, *supra* note 119 (stating that "society secretly categorizes single mothers in gradients of respectability depending on income, race, and most important, how you became a single mother.").

156. Allers, *supra* note 119 (noting that some college-educated African-American single mothers use hyphenated names when interacting with administrators at their child's predominantly white schools).

For many college-educated single mothers, an increased pool of marriageable men would not have altered their decision to raise a child without a partner despite the challenges discussed above.[157] However, at least some women who are raising children alone might have preferred to do so with a partner had they found the "right" partner. There are many reasons individuals do not find a marriage partner, but African-American women face greater challenges due to a limited pool of marriageable African-American men and racial preferences that decrease their likelihood of partnering with men of other races as college-educated Asian-American and Latina women often do. As a result, the children of college-educated African-American women are unlikely to have access to the benefits available to the children of similarly educated Asian-American and Latina women. What, if anything, should the law do to help children who are not disadvantaged relative to the most vulnerable African-American families, but are less advantaged than the children of two parent families? Before we attempt to answer this question, we should first explore the law's role in shaping racial preferences.

III. LAW'S ROLE IN SHAPING RACIAL PREFERENCES

"The heart [may] want[] what it wants"[158] but racial preferences are not shaped in a vacuum. They are influenced by historical and current social and legal norms. The law's explicit role in shaping romantic preferences is extensive. States prohibited marriages between African-Americans and Whites as early as the seventeenth century through the enactment of laws banishing or enslaving Whites who married Black slaves.[159] Although most states did not prohibit interracial sex, these laws signaled that African-Americans were not appropriate romantic partners.

After the Civil War, many more states enacted anti-miscegenation laws. Forty-one states prohibited marriages between Whites and African-Americans at some point.[160] Southern states segregated Whites and non-Whites in public spaces and the federal government maintained segregated offices and military units.[161] The courts enforced laws, private covenants, and practices that denied African-Americans housing and employment opportunities available to Whites.[162] These

157. *See* Katy Chatel, *I'm a Single Mother by Choice, One Parent Can Be Better Than Two*, WASH. POST, Mar. 16, 2015, https://www.washingtonpost.com/posteverything/wp/2015/03/16/im-a-single-mother-by-choice-one-parent-can-be-better-than-two/?utm_term=.cee9f5971f47.

158. RICHARD B. SEWALL, THE LIFE OF EMILY DICKINSON 493 (2000).

159. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1171–74 (1997); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 20 (2009).

160. *See* DAVID FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST 1780–1930, at 7 (1987).

161. DESMOND S. KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL GOVERNMENT 1–3 (1995); Dick Lehr, *The Racist Legacy of Woodrow Wilson*, THE ATLANTIC, Nov. 27. 2015, http://www.theatlantic.com/notes/2015/11/the-racist-legacy-of-woodrow-wilson-contd/417990. *See generally* ERIC YELLIN, RACISM IN THE NATION'S SERVICE: GOVERNMENT WORKERS AND THE COLOR LINE IN WOODROW WILSON'S AMERICA (2016).

162. RICHARD BROOKS & CAROL ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 47–48 (2013); *see generally* IRA KATZNELSON, WHEN

practices limited opportunities for interracial contact and reinforced social distance between African-Americans and Whites.

The law's explicit regulation of interracial intimacy ended in 1967 with the U.S. Supreme Court's decision in *Loving v. Virginia*.[163] The federal government also passed legislation prohibiting racial discrimination in employment and housing and attempted to enforce the Supreme Court's decision in *Brown v. Board of Education*[164] mandating desegregation of schools. [165] Despite these reforms, the legal policies that facilitated race discrimination until the 1960s continue to shape our racial preferences today. Racially restrictive covenants, redlining, and racial steering created the racially segregated neighborhoods and schools that anti-discrimination laws have failed to integrate. These practices, which continue today despite laws prohibiting them,[166] also created the disparity in wealth between African-Americans and Whites that make it impossible for most African-Americans to acquire property in these neighborhoods today.[167] These structural inequalities limit opportunities for African-Americans and Whites to interact as equals and consider members of the other group as potential romantic partners.

The law has also contributed to the dearth of marriageable African-American men. Failing schools and a racialized criminal justice system have led to the mass incarceration of African-American men and rendered them virtually employable and unmarriageable after their release,[168] leaving African-American women to raise children alone (or pursue relationships with men of other races).

The law's active role in facilitating discrimination and its failure to remedy the continuing effects of its discriminatory policies would support state intervention to ensure that African-American children's access to resources and opportunities are not limited by racial preferences that the law helped shape or reinforce. However, even if the law had not played an active role in shaping our romantic preferences, the state's interest in eradicating disadvantages deriving from racial discrimination would warrant intervention to provide children affected by racial preferences with similar opportunities as other children.

Determining how the state should support these children is no easy task given limited resources especially when these children already have greater access to resources and opportunities than significantly disadvantaged children such as those in "fragile families." At minimum, however, the recognition that despite their relative advantages, racial preferences may disadvantage the children of college educated African-American mothers suggests that the state should support all fami-

AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA (2005).

163. 388 U.S. 1 (1967).

164. 347 U.S. 483 (1954).

165. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 72 (1968).

166. For example, banks continue to engage in redlining, realtors continue to steer African-Americans towards minority neighborhoods and away from predominantly White neighborhoods, and homeowners and landlords continue to reject African-American homebuyers and renters. Further, federal law exempts owner-occupied dwellings of four or fewer units from its anti-discrimination mandate. *See* Fair Housing Act, 42 U.S.C. § 3604. This is known as the "Mrs. Murphy" exemption.

167. *See generally* KATZNELSON, *supra* note 162.

168. *See generally* MICHELLE ALEXANDRE, THE NEW JIM CROW (2012).

lies regardless of family form. This might be as simple as celebrating all families—married, divorced, blended, cohabitating, and single-parent—and eliminating the message that marital families are superior. Instead of the federal Healthy Marriage Initiative[169] which funds projects that seek to encourage marriage before childbearing,[170] and signals that marital families are superior to other family forms,[171] the federal government should fund a Healthy *Families* Initiative. A Healthy *Families* Initiative should, like the current Healthy Marriage Initiative, be part of the federal government's "strategy to enhance child well-being." [172] However, instead of funding "public advertising campaigns on the value of healthy marriages" as the federal government does now, a Healthy *Families* Initiative would fund campaigns on the value of healthy families and parent-child relationships. These reforms would redirect funds away from programs seeking to promote marriage (and which have been unsuccessful) and towards programs that support parents regardless of their family structure. The name change alone would signal that all families are valued.

IV. CONCLUSION

This Essay's focus on the relative disadvantages experienced by the children of privileged—college educated African-American single mothers—might seem trivial given the significant poverty, family instability, and risk of poor outcomes faced by the much larger number of African-American children in fragile families. However, racial inequality affecting one child is still one too many. Further, the stigmatization of single-parent families, especially if African-American, negatively impacts all children in non-marital families regardless of their parents' income and education. A Healthy *Families* Initiative would benefit the children of college-educated single mothers by signaling that their families are no less normative than marital families. It would also direct resources to the families that need them most to secure their children's well-being rather than making support dependent on marriage.

169. *Healthy Marriage*, OFFICE OF FAMILY ASSISTANCE, http://www.acf.hhs.gov/ofa/programs/healthy-marriage/healthy-marriage, (last visited Sep. 8, 2016).

170. Maldonado, *supra* note 115, at 384 (discussing project funded by the Healthy Marriage Initiative that expressly sought "to increase the number of marriages before conception . . . .").

171. OFFICE OF FAMILY ASSISTANCE, *supra* note 169 ("Children living in two-parent, married household do better in school, have fewer behavioral problems, and are more likely to have successful marriages of their own.").

172. *Id.*