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## The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage

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# THE EVOLUTION OF PLURAL PARENTAGE: APPLYING VULNERABILITY THEORY TO POLYGAMY AND SAME-SEX MARRIAGE

Stu Marvel\*

## ABSTRACT

*Much of the legal debate surrounding the challenge to “traditional” heterosexual marriage has involved questions of liberty, discrimination, and equal treatment. Similar moves have now been made by advocates for polygamous marriage, indicating that polygamous families may be on track to follow in the rainbow contrails of same-sex marriage. This Article argues that such an evolution is indeed likely, but for different reasons than commonly held. Instead, it applies the emerging paradigm of vulnerability theory to a recent suite of polygamy and same-sex marriage rulings, with particular focus on the figure of the “vulnerable” child. At the same time, this Article will also consider the legal and social consequences of the mechanics of reproduction within both same-sex and polygamous families. It will ask what the lessons of same-sex parents using assisted reproductive technology (ART) might offer in thinking through the future of polygamy. Plural forms of parentage indicate that we are in a period of marriage evolution, wherein multiple adult caregivers may have a potential claim on the right to parent a given child. These contemporary struggles are already transforming the legal landscape in other countries. The vulnerability analysis will shed light on why it is only a matter of time before they also shift the two-parent mode of caretaking in the United States, given the overlapping vulnerabilities of dependent children, the state, and the institution of marriage itself.*

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## INTRODUCTION

Much of the legal debate surrounding the challenge to “traditional” heterosexual marriage has involved questions of discrimination and equal treatment. The same-sex marriage campaign has relied heavily on such arguments in recent years, contending that the equal rights of gays and lesbians are violated when marriage is restricted only to heterosexual couples.<sup>1</sup> A push against discrimination on the basis of sexual orientation has become a central

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<sup>1</sup> While large-scale gay and lesbian political movements first emerged in the late 1960s, they were relatively diverse in terms of both goals and rhetoric. Self-identified “gay liberation” movements were oriented toward a variety of disparate aims, including the fostering of gay pride and empowerment, increased sexual freedom, the disruption of binary gender norms, and a radical challenge to patriarchal and homophobic society as a whole. The equality of LGBT people with straight individuals was certainly a part of this movement, but the language of marriage equality did not play a prominent role. In fact, the political goal of same-sex marriage was first devised in the 1970s as a boldly confrontational strategy by gay liberationist activists. It was thought to be a frankly unwinnable aim, with proponents aimed at disrupting and provoking heterosexual social norms rather than actually securing legal protections for sexual minorities. Yet even this provocation was not a strategy based on consensus, as other factions in the movement rejected marriage as an oppressive institution with no redeeming character. Feminists in particular were suspicious of marriage as any goal of a liberatory movement. For the classic exchange on whether gay marriage should be a central platform of the gay and lesbian rights movement, see Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, at 8–12, reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1098–99 (2d ed. 2004); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Autumn 1989, at 8–12, reprinted in ESKRIDGE & HUNTER, *supra*, at 1099–1101; see also Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993). Only through the mainstreaming of gay and lesbian civil rights organizations in the late 1980s and a renewed focus on incremental legal change did marriage once again emerge as a potentially viable strategy for a national LGBT platform. Indeed, as Hara Avrim and Gwendolyn Leachman describe, “It was not until the mid-1990s, when a Hawaii case [*Baehr*] brought by individual gay plaintiffs proved that same-sex marriage was within the movement’s reach, that marriage assumed its current position as a centerpiece in the mainstream LGBT movement’s agenda.” Hadar Aviram & Gwendolyn Leachman, *The Future of Polygamous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER (forthcoming 2015) (manuscript at 15), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2485853](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485853); see also PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000).

plank of the movement, buttressed by a claim to fundamental liberty interests of due process and the equal right to marry.<sup>2</sup>

The constitutional rights of gays and lesbians have also been advanced through questions of sexual privacy, which have similarly rested upon due process guarantees. In the 2003 landmark case, *Lawrence v. Texas*, the U.S. Supreme Court decriminalized same-sex sexual conduct, overturning an earlier ruling from seventeen years prior.<sup>3</sup> *Lawrence* successfully invoked fundamental liberty interest arguments in regard to same-sex couples, and specifically the right to privacy and intimate sexual conduct beyond the reach of the state.<sup>4</sup> This turn toward the language of liberty and equality has generally been seen as a critical turning point for the gay-rights movement and has in turn allowed lesbian, gay, bisexual, transgender, and two-spirit plaintiffs to make a claim for the legal recognition of same-sex marriage. Such a chronology—from the decriminalization of sodomy to the widespread

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<sup>2</sup> Yvonne Zylan traces the origin of equal protection and substantive due process claims for same-sex marriage in American courts to the early 1990s. See YVONNE ZYLAN, *STATES OF PASSION: LAW, IDENTITY, AND THE SOCIAL CONSTRUCTION OF DESIRE* (2011). For example, the *Baehr* case in Hawaii, which was launched in 1991, asked the court to determine whether the state constitution's right to privacy included a fundamental right to same-sex marriage. The plaintiffs also advanced an equal protection claim, arguing that the denial of marriage licenses to same-sex couples constituted discrimination based on sex. The court answered the first question in the negative but found for the plaintiffs in regard to the presence of discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). While this decision would later lead to the enactment of a new statute in Hawaii that defined marriage to include only different-sex couples, as well as provide impetus to pass the federal Defense of Marriage Act in 1996, the legal strategy for LGBT advocates had been set. Same-sex marriage litigation was initiated next in Vermont in 1997 with equal protection and substantive due process claims once again advanced to argue that excluding gay men and lesbians from marriage was a violation of Vermont constitutional law. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>3</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that homosexuals have a protected liberty interest to engage in private sexual activity, that homosexuals' moral and sexual choices are entitled to constitutional protection, and that moral disapproval did not provide a legitimate justification for Texas's law criminalizing sodomy). The ruling overturned a previous decision by the Court that had maintained consensual sodomy as a criminal act. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>4</sup> In *Lawrence*, the Court drew an equivalence between same-sex and opposite-sex relationships that relied upon an idealized vision of private and monogamous love, even though the two men who had been charged with acts of sodomy were virtual strangers. See Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?*, *SOC. TEXT*, Fall–Winter 2005, at 235. Nevertheless, the decriminalization of sodomy has left a profound mark on same-sex marriage cases in the wake of *Lawrence*, with courts no longer referring explicitly to same-sex sexual conduct. Rather than bald reference to the practice of “sodomy,” the language has become one of “sexual attraction” or “non-procreative sexual activities,” or even more commonly, that of “love” and “commitment.” ZYLAN, *supra* note 2, at 223 n.67; see also Katherine M. Franke, *Commentary, The Domesticated Liberty of Lawrence v. Texas*, 104 *COLUM. L. REV.* 1399 (2004).

acceptance of marriage equality—is the typical progress narrative of how gay and lesbian rights have taken hold in America.<sup>5</sup>

A similar chronology may be seen at work among advocates for polygamous marriage, who have recently invoked the same fundamental liberty interests that were at stake in *Lawrence*. For example, a complaint to challenge Utah’s criminal polygamy law was filed in 2011 by Kody Brown, a practicing polygamist who was featured in a popular reality television show along with his four wives and children.<sup>6</sup> In the case, Brown contended that the statute was unconstitutional, with a particular focus on the cohabitation clause—the provision that treats cohabitation with one person while married to another as a form of bigamy.<sup>7</sup> To make this claim, Brown relied heavily upon *Lawrence*, which he argued worked to establish “a fundamental liberty interest in intimate sexual conduct,” thus prohibiting the state “from imposing criminal sanctions for intimate sexual conduct in the home.”<sup>8</sup> The district court agreed,

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<sup>5</sup> The progress narrative is very much on display in legal advocacy organizations such as Freedom to Marry, which offers a history and timeline of same-sex marriage that effaces the complex politics of gay liberationist and feminist movements in favor of a singular progress narrative built around love: “The story of the freedom to marry has its intense ups and its devastating downs, but throughout it all, the discussion has been rooted in the desire for same-sex couples to express their love and commitment to each other in the same way that different-sex couples do: through marriage.” *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated Apr. 29, 2015). Similarly, the Lambda Legal blog offered a multiple-part series in the spring of 2013 on the significance of *Lawrence v. Texas* in the forward march of gay rights in America, with a representative entry offered by Susan Sommer, Senior Counsel and National Director of Constitutional Litigation at Lambda. As Sommer proclaims, “The day it issued *Lawrence v. Texas*, the U.S. Supreme Court swept clear legal doctrines that had blocked progress to allow lesbian, gay and bisexual individuals to serve openly in the military, to enter into civil marriage, and to be free of discrimination in many other aspects of life.” Susan Sommer, *From Sex to Marriage: Opening the Door to Legal Victories*, LAMBDA LEGAL (Mar. 22, 2013), <http://www.lambdalegal.org/blog/from-sex-to-marriage-sommer>. The bright thread of liberty thus pulls through *Lawrence* into subsequent rulings, framing the progress of LGBT rights as a rush toward formal equality with civil marriage as a primary goal. For a more complex analysis of these developments, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). For an excellent and detailed history of the variegated relationship between social movements and the law, see ELLEN ANN ANDERSON, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2008).

<sup>6</sup> The show is called *Sister Wives* and is currently airing on TLC. The first episode aired on September 26, 2010, and it continues to be a hit for the network. The series follows Kody Brown, his four wives, and the seventeen children produced through each of his marriages. *What’s New with the Sister Wives*, TLC, <http://www.tlc.com/tv-shows/sister-wives/about-the-show/about-sister-wives> (last visited May 17, 2015). While the show begins with Kody married to three wives—Meri, Janelle, and Christine—it produces much of the drama of the first season through the introduction of a potential fourth wife, Robyn. See *IN THIS ISSUE: Wives at War!*, OK! (Oct. 18, 2010, 1:54 AM), [http://okmagazine.com/get-scoop/\\*issue-wives-war](http://okmagazine.com/get-scoop/*issue-wives-war). Later seasons involve the family’s struggle with neighbors, employers, town residents, and law enforcement.

<sup>7</sup> Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>8</sup> *Id.* at 1198.

striking down the “cohabitation” clause of the Utah Code as without a rational basis and in violation of the Due Process Clause of the Constitution.<sup>9</sup> While the Court did not locate a fundamental right to polygamy, nevertheless the state could not continue to criminalize consensual sexual conduct between unmarried adults. The state of Utah filed an appeal with the Tenth Circuit in September 2014.<sup>10</sup>

For polygamy advocates who trace the genealogy of gay and lesbian rights from decriminalization to marriage equality, this is a promising development indeed. The “slippery slope” argument has long held that the recognition of polygamy lies just down the hill from the legitimization of same-sex marriage.<sup>11</sup> On the other hand, scholars like Adrienne Davis have contested the

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<sup>9</sup> *Id.* at 1202.

<sup>10</sup> Notice of Appeal, *Brown v. Buhman*, No. 14-4117 (10th Cir. Sept. 25, 2014), ECF No. 1.

<sup>11</sup> The slippery slope argument is often advanced by opponents of same-sex marriage and accompanied by concerns of moral decay and social decline. This argument reached a crystalline state in the dissent written by Justice Scalia in *Lawrence v. Texas*, 539 U.S. 558 (2003), registering his profound dismay at the majority’s decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986) (a case that, seventeen years prior, found Georgia’s anti-sodomy statute to be constitutionally valid). By Scalia’s reckoning, the decriminalization of sodomy was poised to trigger a floodgate of legal recognition for immoral offenses. As he wrote with concern,

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . .

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.

*Lawrence*, 539 U.S. at 590–91 (Scalia, J., dissenting). The relationship between polygamy and same-sex marriage has also been a topic of great scholarly concern, with scholars probing the strength of “slippery slope” arguments in regard to moral issues and social change involving same-sex marriage. *See, e.g.*, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005); Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 410–11 (2004). The question of the “slippery slope” in a strictly moral sense has been referred to by Gayle Rubin as the “domino theory of sexual peril,” where the restructuring of one moral ideal will necessarily lead to the toppling of others. *See* Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* 3, 11 (Henry Abelove, Michèle Aina Barale & David M. Halperin eds., 1993).

For scholarly pieces arguing against a necessary correlation between polygamy and same-sex marriage, see Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101 (2006); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002); James Askew, Note, *The Slippery Slope: The Vitality of Reynolds v. US After Romer and Lawrence*, 12 CARDOZO J.L. & GENDER 627 (2006); Ruth K. Khalsa, Note, *Polygamy as a Red*

validity of a direct correlation between gay marriage and polygamy, arguing that the analogy “distracts us from what is truly distinctive, and legally meaningful, about polygamy—namely, its challenges to the regulatory assumptions inherent in the two-person marital model.”<sup>12</sup> Davis is correct that polygamy offers a clear challenge to the dyadic family, and certainly, the plaintiff families in gay marriage cases have been steadfast in their commitment to the two-person marital model. However, my work argues that many LGBT families, and particularly the growing numbers being created through reproductive technology, *may also* be truly distinctive in their multiplicity and requirement for more than two adults. While not every family will involve active relations of plural parentage, of course, the mechanics of queer reproduction nevertheless open more space for challenge to the two-person marital model than has yet been credited.

This Article will take such a proposition seriously by exploring the emerging family forms of gay and lesbian reproduction and asking what the possibility of multiple *parents* might tell us about the possibility of multiple *partners*. When kinship is no longer reliant upon a two-parent frame of reproduction and sex, what might this mean for polygamous or polyamorous families, which also involve the participation of multiple adults? How might law need to adapt and transform to the material realities of these families, and what transformations are already underway? Rather than a slippery slope, however, it may be more helpful to imagine the metaphor of tectonic plates shifting on the ocean floor. As the plates crack and groan, fresh lava erupts from below, blooming through the ridges to create new geographies and spillways along old fissures. In the same way, emerging configurations of family both displace and reinforce existing sediment, flowing along deep-lined pathways and blossoming in unexpected places.

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*Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665 (2005); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065 (2006); and Michael G. Meyers, Comment, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451 (2006). For a discussion of political strategies and lessons that activists and supporters in each camp might learn from potential correlations between polygamy and same-sex marriage, see Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005); and Jaime M. Gher, *Polygamy and Same-Sex Marriage — Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008).

<sup>12</sup> Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1957 (2010).

After *Brown*, it appears that polygamous families may be on track to follow in the rainbow contrails of same-sex marriage, tracing the same arcs of fundamental liberty and equality.<sup>13</sup> This Article argues that such an evolution is indeed likely, but not for the reasons most commonly discussed. Instead, this Article uses the vulnerability paradigm being developed by Martha Fineman and the network of scholarship around the Vulnerability and the Human Condition Initiative to offer a novel lens on these developments.<sup>14</sup> Vulnerability theory sidesteps the language of discrimination and equality to focus attention on the operation of our key social institutions, allowing us to track the relations of power in helpful and productive ways.<sup>15</sup> It attends to the

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<sup>13</sup> As discussed in footnote 11, *supra*, a wide range of authors have pointed out the similarity between the same-sex marriage and polygamy movements. See also Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002). For scholars who specifically assess Kody Brown and the Utah case, see Aviram & Leachman, *supra* note 1 (manuscript at 257–59); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 6 (2014); Thomas Buck, Jr., Comment, *From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights*, 26 EMORY INT'L L. REV. 939 (2012). The *Brown* case is also reviewed in other pieces in this Issue. See Maura I. Strassberg, *Scrutinizing Polygamy: Utah's Brown v. Buhman and British Columbia's Reference re: Section 293*, 64 EMORY L.J. 1815 (2015); Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015).

<sup>14</sup> The Vulnerability and the Human Condition Initiative (VHC) was initially supported through the joint efforts of Emory University's Race and Difference Initiative and the Feminism and Legal Theory Project. Following a series of related conferences and workshops, the VHC was launched at an April 2008 roundtable discussion featuring the work of Martha Albertson Fineman, Paedar Kirby, and Bryan S. Turner. The VHC currently operates as an institutional space for the investigation of vulnerability theory and its application to models of state support and legal protection that focus on the commonalities of the human condition. A growing body of scholarship is being produced through the lens of vulnerability theory. See Margunn Bjørnholt, *Vulnerability As a Basis for Justice and Equality in the Nordic Countries. Introduction*, RETFAERD ÅRGANG 36 2013 nr. 3/142, 1 (2013) (Nor.), available at [http://web.gs.emory.edu/vulnerability/zpdfs/Retfaerd-03-142-2013\\_samlet.pdf](http://web.gs.emory.edu/vulnerability/zpdfs/Retfaerd-03-142-2013_samlet.pdf); Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275 (2013) [hereinafter Fineman, *Subject at Work*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) [hereinafter Fineman, *Anchoring*]; Rosemarie Garland-Thomson, *Misfits: A Feminist Materialist Disability Concept*, 26 HYPATIA 591 (2011); Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 98 (2014); Benjamin Reiss, *Madness After Virginia Tech: From Psychiatric Risk to Institutional Vulnerability*, SOC. TEXT, Winter 2010, at 25; Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009); Jessica Dixon Weaver, *Beyond Child Welfare—Theories on Child Homelessness*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 16 (2014).

<sup>15</sup> The utility of a vulnerability approach to issues of same-sex marriage, polygamy, and equal protection doctrine represents the main theoretical focus of this Article. For an analysis of the distinction between embodied and embedded forms of identity, see Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619 (2013); and Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307 (2014).



relationships between individuals and among the institutions we create in order to better understand the ways in which our systems of law and justice operate.

A careful reading of the recent suite of same-sex marriage rulings may have much to tell us about the future of polygamy litigation. Using the vulnerability analysis, I track the manner in which these cases have portrayed dependent children as uniquely vulnerable and in pressing need of the security provided by two legally married parents. I then pull the lens back to an institutional frame, moving beyond the figure of the child, to analyze the vulnerability of the institution of marriage, as well as the vulnerable character of the state itself. Grasping these multiple forms of overlapping institutional vulnerability will provide useful vantage upon current judicial reasoning, as well as a window into future directions for litigation. The utility of vulnerability theory in producing a fine-grained relational analysis of dependency, the marriage institution, and the welfare state represents the first primary thread of argument.

This relational analysis is then woven into the second thread of argument, which attends to the legal and social consequences of the mechanics of reproduction. (While this argument will be developed at length, in short I am referring to the basic requirement for gametes—sperm and ova—as well as gestational labor, to produce a child.) As discussed, once the LGBT rights movement had morphed into the same-sex marriage equality movement, the strategy increasingly was to put forth gay and lesbian couples as *parents* in order to secure them legal rights as married *partners*. This thread of argument will question whether LGBT parentage is always as dyadic as has been presented.

This Article will apply the emerging paradigm of vulnerability theory to a recent suite of polygamy and same-sex marriage rulings, with particular focus on the role of the child in these decisions.<sup>16</sup> Part I will track the development of

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<sup>16</sup> There is already a robust body of literature that applies vulnerability theory to investigate the well-being of children, as well as the supposed dichotomy that exists in tension between parental and children's rights. See Martha Albertson Fineman, *Taking Children's Interests Seriously*, in WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 229 (Martha Albertson Fineman & Karen Worthington eds., 2009); Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261 (2014); Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 Hous. L. Rev. 817 (2009). A VHC workshop held at Amherst College in April 2015 on the topic of "Vulnerability and Education" also included a panel highlighting the relationship between parental rights and the rights of the child, with participants investigating the role of parental rights in framing questions of school choice. Video

family law around questions of partnerships and parentage and will illustrate some examples of plural parentage that have already achieved legal recognition. Part II will overview the relationship between the welfare of children and same-sex marriage. It will then introduce vulnerability analysis and explain its utility in the project to understand plural parentage, including both same-sex and polygamous families. Part III will explore same-sex marriage litigation and recent challenges to bigamy statutes, concluding with an analysis of *United States v. Windsor*, which has exerted a powerful effect on subsequent rulings.<sup>17</sup> Part IV will begin by examining two of these rulings, applying the vulnerability analysis to track the assumptions being made by the courts. The dignity and well-being of children being raised by gays and lesbians occupy a central place in these decisions, and I will introduce the materiality of same-sex reproduction as a corrective to the narrow understanding of family currently in play. It continues with a discussion of the evolution of plural parentage and the ramifications for same-sex and polygamous families alike. Using the vulnerability paradigm, I will investigate the investment of the state in the marriage bond, ask what the rationale might be for denying multiple parents legal responsibility to a child, and explore jurisdictions that have already expanded legal parentage beyond more than two adults. I will then show how a vulnerability analysis allows us to embrace the resilience of family forms beyond merely the dyadic and more accurately account for the needs of children within all manner of households.

In conclusion, I will track some of the similarities and divergences between gay parents and polygamist parents and ask what the lens of same-sex parentage through assisted reproduction might offer in thinking through the future of polygamy. My underlying contention is that a new evolution in family law is in bloom. The complex caretaking and intimate affiliations of many LGBT households, not to mention polygamist and polyamorist families, will inevitably demand the legal recognition of plural parents and partners. These contemporary struggles, with same-sex marriage and reproductive technology at the heart, are already transforming the legal landscape in other countries. The vulnerability analysis will shed light on why it is only a matter of time before the two-parent mode of caretaking in the United States is shifted, given the overlapping vulnerabilities of dependent children, the state, and the institution of marriage itself.

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recordings of this and other VHC workshops are located in the Feminism and Legal Theory Archives hosted at the Emory University School of Law.

<sup>17</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013); see also *infra* Part III.A.

## I. FROM PARENTS TO PARTNERS AND BACK AGAIN

The story of same-sex marriage in America has long involved the well-being of children. Even as rhetoric has evolved from gay people as harmful predators to gay people as loving partners and parents, such discourse has been woven through the thread of child welfare.<sup>18</sup> Indeed, as this Article argues, the legal advances of the marriage-equality movement have been largely gained through an emphasis on parental responsibility and the best interests of children. It is through their role as *parents*, not as partners, that same-sex couples have gained primary traction as an acceptable model of family organization, and one worthy of state recognition.<sup>19</sup> As legal

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<sup>18</sup> In the contemporary era, social science literature has roundly disabused the notion of the homosexual pedophile and demonstrated that gay people are capable, loving parents on par with heterosexual couples. Judith Stacey's meta-analysis of nearly two dozen studies of gay and lesbian families is instructive of this shift. This influential article, coauthored with Timothy Biblarz in 2001, corralled a large body of quantitative evidence to demonstrate that gays and lesbians could indeed be capable parents who would not psychologically harm their children. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001). Stacey and Biblarz noted preliminary findings of some "modest and interesting" differences between children raised by heterosexual parents and children raised by lesbian and gay parents but ultimately affirmed that "parental sexual orientation has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment." *Id.* at 176.

Compare this perspective with earlier work by Paul Cameron & Kirk Cameron, *Homosexual Parents: A Comparative Forensic Study of Character and Harms to Children*, 82 PSYCHOL. REP. 1155, 1182 (1998) (using court custody records from 1956–1991 to determine that 82% of the homosexual parents in custody battles had "poor character" compared with 18% of the heterosexual parents or guardians); Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161 (2004) (arguing that children are harmed when they are deprived of a two-parent, opposite-sex household that includes a mother and a father); and Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852–57, 862 (arguing that gay parents may have significant negative effect on their children, including increased development of homosexual orientation, emotional and cognitive disadvantages caused by the absence of opposite-sex parents, and reduced economic security).

<sup>19</sup> The transition from a focus on partnership to parental responsibilities in family law has been explored by June Carbone in her 2000 book, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW*. The book tracks the paradigm shift that has occurred across both law and research over the past (now) thirty years, moving from an emphasis on partners' relationships with each other to an emphasis on parents' relationships to their children. As Carbone argues, child custody determinations have now replaced fault as the most important determination made at divorce, while parental responsibility is found less in one's marital status than within one's financial and emotional capacity to provide care. *See id.* at 132, 191–94. Carbone's primary thesis is that as divorce grew more common, ties between adult sexual affiliates grew increasingly tenuous. *Id.* at xiii. This led to a reframing of the relationship between adults in order to prioritize the fulfillment of obligations to children; as she contends, "[T]he code of family responsibility is being written in terms of the only ties left—the ones to children." *Id.* While I think this is a correct diagnosis in regard to the *heterosexual* family, this Article will argue that quite a different trajectory is at work within the same-sex family. In fact, it is precisely through the emphasis on *parental* relationships to their children that gay and lesbian adults have presented themselves as worthy of entry to the marital bond as legal *partners*. The "second revolution" that Carbone describes has offered a very different point of entry for same-sex marriage litigants,

sociologists like Yvonne Zylan have explained, “In a very real sense, same-sex couples had to have children before they could get married.”<sup>20</sup>

Yet, such plaintiffs typically represented a certain brand of parent—two adults in a loving, committed, monogamous household—with the aim of reflecting a cultural ideal of the “normal” family.<sup>21</sup> For example, this strategic positioning is powerfully at work in *Hernandez v. Robles*, the 2004 case challenging New York’s marriage law.<sup>22</sup> The five same-sex couples who sought the right to marry were represented by prominent LGBT rights

through a legal strategy that tracks in precisely the opposite direction: moving *from parents to partners*. This is a dynamic that I believe holds true for the future of polygamy litigation as well.

<sup>20</sup> ZYLAN, *supra* note 2, at 249. I am grateful to Zylan for this insight and for focusing my attention on the presence of children throughout the history of same-sex marriage litigation in the United States.

<sup>21</sup> Michael Warner has been an early and vocal critic of what he refers to as “regime[s] of the normal” as a disciplining technique on unruly desires. Michael Warner, *Introduction* to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY, at vii, xxvii (Michael Warner ed., 1993). Warner and others have been concerned with how a single type of kinship construction—romantic, monogamous, reproductive heterosexual union—has been naturalized as the ideal form of social organization within Euro-American cultures. *See, e.g., id.* at xxi–xxv. The prioritization of this one kinship form has been termed “heteronormativity” and is critiqued as aggressively locating the family as the key private institution and as the idealized site for support, care, and education. *See, e.g.,* Amy Lind & Jessica Share, *Queering Development: Institutionalized Heterosexuality in Development Theory, Practice and Politics in Latin America*, in FEMINIST FUTURES: RE-IMAGINING WOMEN, CULTURE AND DEVELOPMENT 55, 62–64 (Kum-Kum Bhavnani et al. eds., 2003). The importance of other relationships and communities are thereby minimized as “[f]amily” and “heterosexuality” merge, tightening any space for kinship to broaden its meaning.” *Id.* at 64. For further discussion, see also, for example, Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437 (1997); Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and Theories of Gender*, 12 SOC. THEORY 203 (1994).

Queer scholars have watched with some dismay as the failure to imagine new marital arrangements has collapsed back into the same-sex marriage model; Lisa Duggan has famously termed this tidy domesticity “the new homonormativity.” Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY: TOWARDS A REVITALIZED CULTURAL POLITICS 175 (Russ Castronovo & Dana D. Nelson eds., 2002). Similarly, David Eng has asked that we remain attentive to how the conditions of late capitalism allow queer subjects to inhabit certain types of conventional family and kinship formations, or what he has termed “queer liberalism.” DAVID L. ENG, *THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY* 2–10 (2010). Brenda Cossman has also written on how, by encouraging the “right” choices to become “good” citizens, the state intimately interlaces sex with belonging and sexual freedom with self-governance. BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007). This allows for members of previously disparaged sexual identity categories, such as gays and lesbians, to manage their sex lives appropriately and be included within the liberal state. *Id.* at 15, 177–85. As Cossman says, “To the extent that we conduct ourselves as ethical sexual subjects, through appropriate sexual practices, choices, and desires, we may be constituted and reconstituted as eligible for sexual citizenship.” *Id.* at 206 (citation omitted).

<sup>22</sup> 794 N.Y.S.2d 579, 583–86 (Sup. Ct. 2004) (“The partners in each couple have been devoted to one another for periods ranging from three (3) to twenty-two (22) years . . . . Several of the couples are raising children conceived during the relationship or adopted into their homes.”), *rev’d and vacated*, 805 N.Y.S.2d 354 (App. Div. 2005).

organization Lambda Legal, which argued that the law denied one set of lesbian plaintiffs the right to “the recognition . . . that heterosexuals have. They want to be able to say to their children, ‘Your parents are married.’”<sup>23</sup> Another lesbian couple was seeking “to express their love and commitment through civil marriage . . . . Their daughter, too, wants to see her mothers marry and for their loving relationship to be accorded the same respect and recognition as those of her friends’ married parents.”<sup>24</sup>

Due to the cultural dominance of heterosexuality, this vision of married two-person parentage is familiar as an ideal domestic form; yet it may not tell the whole story when placed within a reproductive frame that necessarily involves more than two adults to procreate. While an earlier generation of gays and lesbians may have had children before “coming out” or adopted the biological children of heterosexuals, this is increasingly no longer the case.<sup>25</sup> Research on assisted reproduction within LGBT communities has indicated that *multiple* parents may in fact be involved when children are created outside heterosexual norms, although they may not receive legal recognition as such. Most same-sex couples will require additional gametes, reproductive labor, or both from outside the parenting dyad, meaning that more than two people must be involved in the mechanics of reproduction. Intended parents, sperm donors, egg donors, and surrogates may all be interested in playing a role in the life of a child created through assisted reproduction, in contrast to the tidy dyadic mode of family on display in *Hernandez*.

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<sup>23</sup> First Amended Complaint at 5, *Hernandez*, 794 N.Y.S.2d 579 (No. 103434/2004), 2004 WL 5350547.

<sup>24</sup> *Id.* at 6–7.

<sup>25</sup> As gays and lesbians have received increasing civil rights and constitutional protections for their relationships, more LGBT people than ever are seeking clinical assistance to have children. While lesbians have long pursued “low-tech” solutions to reproduction through known sperm donors, the recent explosion of a high-tech fertility industry has offered new possibilities for genetic connection. LAURA MAMO, QUEERING REPRODUCTION: ACHIEVING PREGNANCY IN THE AGE OF TECHNOSCIENCE 54–57 (2007). Although data remains scarce, estimates from Toronto, Canada, suggest that LGBTQ people may represent up to thirty percent of clientele at local fertility clinics. RACHEL EPSTEIN, SHERBOURNE HEALTH CENTRE, THE *ASSISTED HUMAN REPRODUCTION ACT* AND LGBTQ COMMUNITIES: A PAPER SUBMITTED BY THE AHRA/LGBTQ WORKING GROUP 2 (2008), available at [http://www.academia.edu/7545967/The\\_Assisted\\_Human\\_Reproduction\\_Act\\_and\\_LGBTQ\\_Communities](http://www.academia.edu/7545967/The_Assisted_Human_Reproduction_Act_and_LGBTQ_Communities). Lesbians, bisexuals, and transpeople are also the largest consumers of donor sperm in Canada, as indicated by a 2010 study which estimated that same-sex couples represent 55% of demand for donor insemination. Note that these estimates came not from empirical research but by triangulating Canadian census data from 2006 with a five-year research study on donor sperm conducted in Belgium. The model used in the Canadian report assumed that the demand in Canada would follow a similar ratio of request. JAMES M. BOWEN ET AL., PROGRAMS FOR ASSESSMENT OF TECH. IN HEALTH, ALTRUISTIC SPERM DONATION IN CANADA: AN ITERATIVE POPULATION-BASED ANALYSIS 4, 14 (2010).

In fact, recent cases point very strongly to an emerging incidence of LGBT families using assisted reproductive technology (ART) to create their families, and by no means are these exclusively two-parent models of social reproduction. Within a Canadian context, the expansion into plural parentage was seen in a landmark Ontario Court of Appeal decision involving a male sperm donor, a lesbian mother who carried the child, and the woman's long-term lesbian partner.<sup>26</sup> The sperm donor and biological mother were recognized as the legal parents, and they petitioned to also allow the non-biological mother to legally adopt the child.<sup>27</sup> Ordinarily this would mean first severing the parental rights of the male sperm donor so as not to exceed a maximum of two legal parents.<sup>28</sup> However, after being persuaded by testimony, the appellate judgment decided that all *three* adults had an equal stake in raising the child. In affirming the non-biological mother's legal parentage, the Court of Appeal exercised its inherent *parens patriae* jurisdiction to remedy what it found to be a "legislative gap" in the current statute and recognize three people as legal parents.<sup>29</sup> As Judge Rosenberg noted,

The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme [when the statute was written]. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer. This is not surprising given that nothing in the Commission's report suggests that it contemplated that such relationships might even exist.<sup>30</sup>

The contemplation of plural parents is not limited to Canadian jurisdictions. Even anecdotal evidence indicates the reality of co-parenting among multiple adult caretakers. For example, a San Francisco family profiled on a gay parenting network has evolved a four-parent reproductive arrangement. Comprised of a lesbian couple, a gay couple and their two daughters, the two households are located within twenty minutes of each other, allowing each parent to provide caretaking or support to the girls when required.<sup>31</sup>

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<sup>26</sup> A.A. v. B.B., 2007 ONCA 2, para. 1 (Can.).

<sup>27</sup> *Id.* paras. 2, 4.

<sup>28</sup> *Id.* para. 13.

<sup>29</sup> *Id.* paras. 37–38.

<sup>30</sup> *Id.* para. 21.

<sup>31</sup> *Meet the Dads: Meet Bill, J.R. and Their Daughters*, HANDSOME FATHER, <https://www.thehandsomefather.org/meets/meet-bill-j-r-and-their-daughters/> (last visited May 17, 2015).

Bill Delaney's daughters spend the night with their fathers, a gay couple, and for the remainder of the week, the girls stay with their mothers, a lesbian couple. The children have four parents, and even though Mr. Delaney is the girls' biological father, he is not one of their legal parents.<sup>32</sup>

As of January 2014, however, this kind of co-parenting arrangement may now be legally recognized in California following the passage of Senate Bill 274.<sup>33</sup> The bill provides that, in certain circumstances "where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents."<sup>34</sup> This legislation addresses the complex family dynamics of a married lesbian couple and a male sexual partner of one of the women, and the need for multiple legal parents to ensure the care of a daughter born into the marriage.<sup>35</sup> Here, the family arrangements did not even involve ART but the complexity of bisexual intimacy and a married lesbian creating a child with a male lover.

At the same time as these developments are occurring, we live in an era of de facto polygamy, where models exist for multiple forms of adult sexual affiliation outside the dyadic form. Michèle Alexandre has argued, for example, that "many Americans participate in multi-party unions either

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<sup>32</sup> Ann E. Kinsey, Comment, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 296 (2014) (footnote omitted).

<sup>33</sup> Senate Bill 274 amends Sections 3040, 4057, 7601, 7612, and 8617 of the Family Code. As Section 1(a) holds,

Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.

Act of Oct. 4, 2013, ch. 564, § 1(a), 2013 Cal. Stat. 4626, 4627 (codified at CAL. FAM. CODE § 3040 (West Supp. 2015)).

<sup>34</sup> § 1(c), 2013 Cal. Stat. at 4628. Note that the bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act. *Id.*

<sup>35</sup> For a discussion of the case *In re M.C.*, which led to the passing of Senate Bill 274, see Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015 (2012). As she explains,

If I had to use the facts of *In re M.C.* to develop a final exam question for my family law course, my students would have thought I had an overactive imagination. Once again, the complicated lives of real people prove a reminder that family law must account for heterogeneity rather than pretend that there is one family form that can be neatly circumscribed.

*Id.* at 2050.

expressly or tacitly.”<sup>36</sup> These unions may include extramarital affairs with a long-term lover, the existence of extramarital children, or scenarios in which a married man (or woman) supports another household or is in a common law marriage with another spouse.<sup>37</sup> Adrien Wing and Adrienne Davis have also identified various forms of de facto polygamy in operation in the United States, most evidently within African-American communities shaped by histories of slavery and a shortage of black men due to high incarceration rates and high fatality rates at a young age.<sup>38</sup>

Similarly, the practice of de facto parentage and the rights of previous caretakers are also in flux. Gay and straight people alike routinely take serial monogamous partners, and the children produced within these relationships may recognize multiple caregivers as their parents and live within households that do not reflect a simple dyadic form. Third-party caretakers cannot presently claim child visitation rights over parental objections, a limitation confirmed by the U.S. Supreme Court in *Troxel v. Granville*.<sup>39</sup> However, a third party may pursue a claim as a de facto parent—“an adult who is not a legal parent, but has functioned as a social or psychological parent nonetheless.”<sup>40</sup> The awarding of such rights also requires that the legal parent has previously supported and encouraged such a relationship. As Joanna L. Grossman explains, “Courts in states that recognize de facto parentage justify

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<sup>36</sup> Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse so as to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1463 (2007).

<sup>37</sup> *Id.* Although a woman may also be supporting remote households or in a common law marriage with another spouse, the focus of Alexandre’s article is on the potential for a women-centric interpretation of the Qur’anic treatment of Islamic polygamy to better protect American women involved in de facto polygamous unions; hence, her emphasis is on polygyny (a man with multiple wives) rather than polyandry (a woman with multiple husbands). *Id.* at 1464. Of course, such de facto polygamous relations may also be same-sex in nature.

<sup>38</sup> Davis, *supra* note 12, at 1970 & n.41, 1971–72; Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811 (2001). Wing partially locates the history of polygamy within African-American communities as a result of the instability wrought by slavery. Wing, *supra*, at 857–58. The perception of male scarcity, as well as the fragmentation of families by slave owners, meant that African-American men (as well as women) may well have entered into more than one informal union over the course of their lives. *Id.* In the contemporary era, incarceration rates among black men and high levels of fatality at a young age have led to a similar outcome, creating a practice of “de facto” polygamy wherein one man might have several girlfriends. *Id.* at 858. As Wing explains, such men “can be either de facto polygamists or womanizers.” *Id.*

<sup>39</sup> 530 U.S. 57, 63, 72–73 (2000) (finding that a statute that allowed third parties to petition for forced visitation of a child violated the “fundamental right of parents to make child rearing decisions”).

<sup>40</sup> Joanna L. Grossman, *De Facto Parentage and the Rights of Former Stepparents*, VERDICT (Dec. 9, 2013), <https://verdict.justia.com/2013/12/10/de-facto-parentage-rights-former-stepparents>.



the intrusion into the legal mother's constitutionally-protected parental rights by pointing to her role in creating and fostering the relationship with the co-parent."<sup>41</sup>

These plural forms of parentage indicate that we are in a period of marriage evolution, wherein multiple adult caregivers may have a potential claim on the right to parent a given child. This Article contends that, in step with the increasing acceptance of same-sex marriage, such an evolution must eventually confront the materially plural character of same-sex reproduction. The dyadic nature of marriage is under pressure from plural forms of parentage and is in the process of fracturing to include de facto parents and dispersed "queer" families, as well as polygamous forms of union.<sup>42</sup> Indeed, a vulnerability analysis demonstrates that such an outcome is not only likely, but emerges in direct response to the social and institutional vulnerabilities of the individual, the family, and the state. As I will argue, within a society such as the United States, which depends heavily on the caregiving labor of the private family, the eventual recognition of same-sex marriage and polygamous unions is practically inevitable.

## II. MARRIAGE, CHILDREN, AND VULNERABILITY THEORY

It is no radical proposition to argue for the centrality of the legal institution of marriage in allocating rights and legitimating functions in American society.<sup>43</sup> Marriage remains critically important as both a symbolic and an

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<sup>41</sup> *Id.* While Grossman uses female pronouns in her description, there is no reason that de facto parentage cannot apply to gay stepparents as well.

<sup>42</sup> This is not to say that such a process will be easy. Deep social and religious tensions are evident in any contemplation of same-sex marriage and polygamy. This may be partially due to the troubled history of anti-polygamy statutes, which have often been used in the service of colonialist, racist, and sexist goals. See *infra* notes 94–98 and accompanying text.

<sup>43</sup> A tremendous amount of scholarship has been dedicated to the study of marriage and its foundational role in the social order. This work has been both historic and contemporary and has tracked the changes in the marriage institution as well as the current state of the martial family. For a small sampling of work of a more historical bent, see STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* (2005); NANCY F. COTT, *PUBLIC VOWS* (2000); Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 *IND. L. REV.* 273, 277–84 (1995); Janet E. Halley, *What is Family Law?: A Genealogy* (pts. 1 & 2), 23 *YALE J.L. & HUMAN.* 1, 189 (2011); and Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 *NW. U. L. REV.* 1038 (1979). For more contemporary analyses of marriage, see JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014); Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 *CALIF. L. REV.* 235 (2011); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum*

organizational structure. Indeed, much of the debate around whether gays and lesbians should be permitted to marry has issued from a recognition of the vital role of marriage, not only in childrearing but as a barometer for social order and “traditional” values.<sup>44</sup> While the moral disapproval of same-sex marriage is an admittedly diverting topic, this Article is more interested in a functional analysis of the marriage institution. What *work* does marriage do for the state? Why *marriage*, and why does it remain so foundational?<sup>45</sup>

The contemporary answer, I believe, has to do with the priority placed by the state on ensuring mechanisms for the care and nurturance of children. Thus, the battle over same-sex marriage is not merely about gays and lesbians but about the social institution of family and the resilience of the marital form. Can it withstand the challenges posed by same-sex marriage movements? Will it crumble if opened to even broader forms, such as polygamous unions? These contestations are matters of urgency not only for the families involved but for the larger institution of marriage itself. The resilience of the marital family is a particularly critical concern within a “weak” welfare state such as the United States, where the private family is expected to do much of the work of childcare and nurturing.<sup>46</sup> The manner in which the state channels rights, benefits, and obligations through our intimate lives thus continues to be of paramount importance.

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*Control*, 93 CALIF. L. REV. 1647 (2005); and Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003).

<sup>44</sup> See John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1062 (1994); Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449, 450 (2004); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 363, 377 (2003); John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001); see also Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review*, 87 GEO. L.J. 139, 146, 148 (1998); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 393.

<sup>45</sup> See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 247 (2001).

<sup>46</sup> For an analysis of the uniquely gendered nature of marriage, dependency, and the relationship with the welfare state, see Martha Albertson Fineman, *The Nature of Dependencies and Welfare “Reform,”* 36 SANTA CLARA L. REV. 287, 287 (1996); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 660–62 (1992); Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 POL. THEORY 591, 591(1994); Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 309–10 (1994); and Ann Orloff, *Gender in the Welfare State*, 22 ANN. REV. SOC. 51, 51–52 (1996). See generally WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES (Gøsta Esping-Andersen ed., 1996) (discussing an international and comparative analysis of welfare states including Sweden and Canada).

While the arcs of the same-sex marriage and polygamous marriage movements have been far from parallel, there are nevertheless important continuities and linkages to be found. The role and position of children in both movements, as well as the vulnerability of the state in regard to the care of dependent children, offer useful signposts toward a future of plural parents and caretakers within the family. But what does it mean to reference “the vulnerability of the state”? How can an institution, much less the state, be understood as vulnerable? The next section will introduce the vulnerability paradigm developed by Martha Fineman and explain its utility in analyzing these social concerns.

### A. *Vulnerability Theory*

The concept of vulnerability does not describe merely our susceptibility to harm or danger but represents a fundamental and universal element of the human condition.<sup>47</sup> As articulated by Fineman, this understanding challenges the manner in which vulnerability has commonly been applied, most often in reference to “vulnerable populations” as a specific and negatively stigmatized subset of society.<sup>48</sup> Rather than focusing on the vulnerability of a select few (and thereby presuming the relative *invulnerability* of others), the vulnerability paradigm asks that we open the frame to recognize our commonly held vulnerability. We are *all* vulnerable as embodied beings, and over the course of our individual lives we will *all* require the care and support of others.<sup>49</sup>

This need is most evident when we are infants and perhaps also as we age into our elder years or fall ill. These are clear relations of dependency that, “although episodic, [are] universally experienced.”<sup>50</sup> Instead of thinking of these relations of dependency as aberrations from the autonomy and independence imagined by the liberal subject of law, however, vulnerability

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<sup>47</sup> Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255 (2010).

<sup>48</sup> Martha Albertson Fineman, “Elderly” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 86 (2012) (“The designation of vulnerable (inferior) populations reinforces and valorizes the ideal liberal subject, who is positioned as the polar opposite of the vulnerable population. This liberal subject is thus constructed as invulnerable, or at least differently vulnerable, and represents the desirable and achievable ideals of autonomy, independence, and self-sufficiency.”).

<sup>49</sup> *Id.*; see also Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18 (1999).

<sup>50</sup> Martha Albertson Fineman, *Equality and Difference – The Restrained State*, 66 ALA. L. REV. 609, 614 (2015).

theory asks us to reimagine the myth of autonomy altogether.<sup>51</sup> It requires that we look not to the rational, independent, and self-sufficient liberal subject as the foundation for our legal and social order, but to the vulnerable materiality of our human embodiment.<sup>52</sup>

When we replace the liberal with the vulnerable subject, the universal relations of care upon which society depends are thrown into relief. A vulnerability approach allows us to understand our dependency, not as a liability but as the “compelling impetus for the creation of social relationships and institutions.”<sup>53</sup> Indeed, Fineman argues that it is precisely our universal vulnerability that has necessitated “the formation of families, communities, associations, and even political entities and nation-states.”<sup>54</sup> The social institutions we construct are explicitly designed to mitigate our vulnerability and to provide us with resources and support as we move across the life course.<sup>55</sup>

Take for example the social institutions of education: Schools are designed to provide us with knowledge and training and to equip young people for productive membership in society. It is through the training we receive in our youth that we may build resilience as we age, thereby mitigating some aspects of our universal vulnerability. The notion of resilience is a vital aspect of the vulnerability paradigm, as resilience offers

the critical, but incomplete remedy for vulnerability. Although nothing can completely mitigate vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect her or his life. The degree of resilience an individual has is largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command.

. . . .

. . . When individuals have resilience it allows them to take advantage of opportunities knowing that if they take a risk and the desired outcome fails to transpire, they will have the capacity to recover.<sup>56</sup>

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<sup>51</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

<sup>52</sup> Fineman, *supra* note 47.

<sup>53</sup> Fineman, *supra* note 50, at 614.

<sup>54</sup> *Id.*

<sup>55</sup> Fineman, *supra* note 48.

<sup>56</sup> Fineman, *supra* note 50, at 622–23 (footnotes omitted).

Thus, it is through societal institutions such as the family, community, and school that human beings are able to gather the resources of resilience that allow us to take advantage of future opportunities.<sup>57</sup> However—and this is a critical insight—these *societal institutions are themselves vulnerable* and may be subject to failure or capture.<sup>58</sup> Thus, we may understand our education system as vulnerable, which is why we require the actions of what Fineman calls “the responsive state” to ensure that these institutions provide resilience for all and not merely a select few.<sup>59</sup>

### B. *Institutional Vulnerability*

Through the vulnerability perspective, we may understand the family as a similarly vital social institution. Our families equip us as young people with the resilience to navigate both future challenges and future opportunities. However, the social institution of family is also vulnerable and requires state action to ensure its ongoing resilience. In America, the institutional form that has received both historic and contemporary privilege is the two-person model of heterosexual family; this intimate arrangement has long been viewed as the ideal structure for childbearing and childrearing.<sup>60</sup> It is through the legal recognition of marriage, and the channeling of associated rights, benefits, and obligations through marriage, that the state aims to manage the labor of managing human dependency. It is within the private sphere that the critical work of social reproduction is done, and the organization of the state depends upon the resilience and continued effectiveness of the marital family.

The vulnerability of the state is thus ameliorated by the social institution of family. Viewing the family through this lens clearly renders the deep political and economic stakes of marriage and the need for a stable model of two-parent cohabitation where sex and reproduction occur within the marital home. This

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<sup>57</sup> *Id.*

<sup>58</sup> The theory recognizes that institutions, including the state, are also vulnerable, although differently so. Jonathan Fineman has applied this insight into institutional vulnerability to explore the workplace, demonstrating how both employees and employers can and should be perceived as vulnerable, only differently so. As he contends, “Instead of being cast unrealistically as equals in some contractual relationship, the vulnerability approach would recognize the differences between employee and employer in positioning, context, and possible consequences to determine appropriate employment policy and regulation.” Fineman, *Subject at Work*, *supra* note 14, at 299.

<sup>59</sup> Fineman, *Anchoring*, *supra* note 14, at 19.

<sup>60</sup> Martha Albertson Fineman, *The Sexual Family*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 45 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

model ensures that children are born and remain within a structure for their rearing and socialization, divesting the state of direct economic responsibility for the daily labor of childcare.

We may therefore understand (at least) three layers of overlapping vulnerabilities. First, and the most evident, is the vulnerability of the child. Children require food, shelter, and care to thrive, and their inevitable dependency demands a caretaking response. This is the most common use of vulnerability and one that is likely familiar to the reader.

Second, is the vulnerability of the marital family as a social institution. A shift in intimate demographics is underway in the United States, referred to by some commentators as a (heterosexual) “marriage crisis.”<sup>61</sup> The age at which an average person is first married has risen by six years since 1960, with only 20% of Americans now married before the age of 30.<sup>62</sup> The overall number of new marriages each year is also declining at a slow but steady rate. Put simply, if you are an unmarried adult today, you face a lower chance of ever getting married and a longer wait and higher divorce rates if you do.<sup>63</sup> Perhaps unsurprisingly, the Pew Research Center found in 2011 that about 40% of unmarried heterosexual adults believe that marriage is becoming obsolete.<sup>64</sup> The two-parent heterosexual family is thus a vulnerable institution, one that is currently on the decline.

Third, is the vulnerability of the state. Given the vulnerability of young people and the necessity of the family in maintaining their care, the state is deeply invested in ensuring that parents care for their children. Such vulnerability has given rise to programs like the Healthy Marriage Initiative, launched by the federal government in 2003 “to help couples who choose to get married to gain greater access to marriage education services,” while enabling them “to acquire the skills and knowledge necessary to form and sustain a healthy marriage.”<sup>65</sup> Many have applauded such initiatives as a

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<sup>61</sup> See, e.g., DAVID R. SHUMWAY, *MODERN LOVE: ROMANCE, INTIMACY, AND THE MARRIAGE CRISIS* 22–23 (2003); see also ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* (2010) (linking the increased rate of divorce and remarriage in America to economic factors).

<sup>62</sup> D’vera Cohn et al., *Barely Half of U.S. Adults Are Married – A Record Low*, PEW RES. CENTER (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low>.

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

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

<sup>65</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., *HANDBOOK ON CHILD SUPPORT ENFORCEMENT* 39 (2008), available at [http://www.in.gov/ipac/files/Child\\_Support\\_Enforcement\\_Handbook.pdf](http://www.in.gov/ipac/files/Child_Support_Enforcement_Handbook.pdf).

mechanism to remove people from welfare rolls and reduce dependency upon state entitlements.<sup>66</sup> Indeed, the Heritage Foundation, a conservative think tank, has directly tied the prevalence of poverty to the failure of heterosexual marriage, stating that “the collapse of marriage is the principal cause of child poverty in the United States.”<sup>67</sup> This is not merely a partisan issue, however. As a report coauthored by William Galston, former Domestic Policy Adviser in the Clinton White House, stated, “Marriage is an important social good, associated with an impressively broad array of positive outcomes for children and adults alike. . . . [W]hether American Society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern.”<sup>68</sup>

A vulnerability analysis allows us to understand the state’s investment in the two-parent model of “healthy” marriage as a structure to ensure the stable upbringing of children. This is why, since 1996, welfare reform programs have explicitly included (heterosexual) marriage-promotion initiatives.<sup>69</sup> The government response to impoverished households thus becomes not increased social subsidies or hikes in minimum wage but a renewed emphasis on the marriage bond.<sup>70</sup> When the vulnerability of the state is read in concert with declining rates of heterosexual marriage *and* the ongoing vulnerability of dependent children, it crystallizes the importance of the two-parent family as a source of state resilience. This overlapping and relational analysis will prove very helpful in understanding the recent suite of same-sex marriage cases and the central role that children have played.

### III. SAME-SEX MARRIAGE LITIGATION AND THE “TRADITIONAL” FAMILY

Given these overlapping vulnerabilities, it should not be surprising that an interest in childrearing within the two-parent family has formed the backdrop

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<sup>66</sup> ROBERT E. RECTOR, PATRICK F. FAGAN & KIRK A. JOHNSON, HERITAGE FOUND., BACKGROUNDER NO. 1732, MARRIAGE: STILL THE SAFEST PLACE FOR WOMEN AND CHILDREN 3 (2004), *available at* <http://www.heritage.org/research/reports/2004/03/marriage-still-the-safest-place-for-women-and-children>.

<sup>67</sup> ROBERT E. RECTOR & MELISSA G. PARDUE, HERITAGE FOUND., BACKGROUNDER NO. 1741, UNDERSTANDING THE PRESIDENT’S HEALTHY MARRIAGE INITIATIVE 2 (2004), *available at* <http://www.heritage.org/research/reports/2004/03/understanding-the-presidents-healthy-marriage-initiative>.

<sup>68</sup> INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (2002), *available at* <http://americanvalues.org/catalog/pdfs/WhyMarriageMatters1.pdf> (emphasis omitted).

<sup>69</sup> Meg Yardley, *Is the Healthy Marriage Initiative Really Healthy for Families?* 3 J. STUDENT SOC. WORK 43, 44 (2005).

<sup>70</sup> Onwuachi-Willig, *supra* note 43, at 1663.

to U.S. jurisprudence around same-sex marriage.<sup>71</sup> Indeed, since the late 1880s and the ruling in *Maynard v. Hill*, the vitality of the heterosexual marriage institution as “the most important relation in life” has been expressly constructed around its site as “the foundation of the family and of society.”<sup>72</sup> It was the hallowed location of marriage as the site of childbearing and childrearing that compelled the court in *Skinner v. Oklahoma* to deem it “fundamental to the very existence and survival of the race.”<sup>73</sup> The state’s reinforcement of the heterosexual family over more than 125 years of jurisprudence indicates the depth of its commitment.<sup>74</sup> This buttressing has resulted in impressive institutional resilience, as the many rights and responsibilities channeled through marriage now touch almost every aspect of life, including state-based rights (such as state tax benefits, insurance benefits, health care and family leave, inheritance, property ownership and transfer rights, parental rights, wrongful death claims, and spousal privilege)<sup>75</sup> and

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<sup>71</sup> Importantly, as economic and gender relations have shifted over the decades, so have the institutional structures of work, family, and the state. These are not static entities but relational categories that transform over time. The vulnerability analysis is thus not merely a descriptive tool but a heuristic one, allowing us “to interrogate the core concepts and conclusions of liberal legal and political subjectivity and the structural arrangements they support.” MARTHA ALBERTSON FINEMAN & ANNA GREAR, *Introduction: Vulnerability as Heuristic—An Invitation to Future Exploration*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 1, 1 (Martha Albertson Fineman & Anna Grear eds., 2013).

<sup>72</sup> *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right “to marry, establish a home and bring up children” is recognized as a central part of liberty protected by the Due Process Clause).

<sup>73</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that marriage is “one of the basic civil rights of man” and “fundamental to the very existence and survival of the race”).

<sup>74</sup> For decisions that stress the centrality of marriage, if not as explicitly the role of childbearing, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); and *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”). For decisions which speak directly to the parenting function of marriage, see *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971))); and *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships, and child rearing and education.’” (citations omitted) (quoting *Roe v. Wade*, 410 U.S. 113, 152–53 (1973))).

<sup>75</sup> N.Y. CIVIL LIBERTIES UNION, *KNOW YOUR RIGHTS: FREQUENTLY ASKED QUESTIONS ABOUT NEW YORK’S MARRIAGE EQUALITY ACT 3* (2014), [http://www.nyclu.org/files/publications/marriage\\_fa\\_q\\_03062014.pdf](http://www.nyclu.org/files/publications/marriage_fa_q_03062014.pdf).



federal benefits (including federal tax benefits, immigration purposes, bankruptcy petitions, and social security and military benefits).<sup>76</sup> Marriage is, in a sense, too big to fail: The state has a powerful interest in mitigating its own vulnerability by ensuring that the marital home remains the stable location of family creation, maintenance, and care.

While marriage enjoys an enviable set of state protections and support, its persistent vulnerability has also been acknowledged by the Court. This conception of marriage—as a vulnerable site of heterosexual procreation that must be protected by the state—represents a central narrative within the history of U.S. same-sex marriage cases. Early jurisprudence such as *Baker v. State* made this explicit, with the State of Vermont’s argument against the sanctioning of same-sex unions resting upon the need for (heterosexual) marriage statutes “to send a public message that procreation and child rearing are intertwined.”<sup>77</sup> To do otherwise, according to the State, “would diminish society’s perception of the link between procreation and child rearing” and “advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing.”<sup>78</sup> The perceived vulnerability of this necessary “link” between heterosexual procreation, marriage, and caretaking was thus advanced by the State as legitimate grounds for excluding same-sex couples from the marriage bond.

The *Baker* court made short shrift of this biologist rationale, aided at least in part by the careful selection of plaintiffs, which included two couples in committed same-sex relationships who had raised children together.<sup>79</sup> In dismissing biological reproduction as a significantly underinclusive reason for limiting marriage to opposite-sex couples, many of whom may not intend to or may be incapable of having children, the court noted that “a significant number of children today are actually being raised by same-sex parents, and that

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<sup>76</sup> *Id.*

<sup>77</sup> 744 A.2d 864, 881 (Vt. 1999).

<sup>78</sup> *Id.* (omissions in original) (internal quotation marks omitted). As quoted in the decision, the State further argued that as “same-sex couples cannot conceive a child on their own, state-sanctioned same-sex unions could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children.” *Id.* (internal quotation marks omitted).

<sup>79</sup> *Id.* at 882. In 1996, the Vermont General Assembly enacted a law removing all prior legal barriers to the adoption of children by same-sex couples, substantially weakening the State’s argument in *Baker* that opposite-sex couples should be and were privileged as a matter of public policy. *Id.* at 884–85; *see also* VT. STAT. ANN. tit. 15A, § 1-102(b) (West 2007) (allowing partner of biological parent to adopt if in child’s best interest without reference to sex).

increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques.”<sup>80</sup>

By centering the caretaking role of the family unit—regardless of how that family came into being—the court emphasized the familiar need “to legitimize children and provide for their security” through the framework of civil marriage.<sup>81</sup> The vulnerability of the *child* thus emerged as the most urgent cause, as the same-sex family neatly absorbed the privatized responsibility for child-rearing and stepped easily into shoes “no different from opposite-sex couples.”<sup>82</sup> Dismissing Vermont’s claim for the vulnerability of heterosexual marriage, the court instead looked toward the twin objectives of mitigating childhood vulnerability (by ensuring parental legitimation and protection) and the vulnerability of the welfare state (by ensuring that caretaking labor remains within the family).

Notably, this decision is the first in U.S. jurisprudence to recognize the civil marriage rights of same-sex couples. It emerged amidst the shift away from arguments that homosexual parents are morally deficient and potentially dangerous for children<sup>83</sup> and toward the refutation of these claims through the application of social science research.<sup>84</sup> This, in turn, necessitated a transition away from morality-based arguments against same-sex marriage to a range of new objections—chief among them biological arguments that sought to privilege heterosexual marriage and highlight its status as a vulnerable institution. *Baker* is located amidst these furious debates and showcases the new marriage battleground with children at the fore.

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<sup>80</sup> *Id.* at 881 (emphasis added). The ruling further explains that

with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children. The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts.

*Id.* at 882 (citation omitted).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The reality of LGBT reproduction was successfully used to challenge the more evident holes in the State’s biological-determinist argument. While the court rejected the idea that only two-parent heterosexual reproduction is capable of resulting in children, it stopped short of recognizing that a LGBT reproductive project might well include *more* than two adults with genetic and social ties. *Id.*

<sup>83</sup> Wardle, *supra* note 18, at 897.

<sup>84</sup> Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 302–03; *see also* Stacey & Biblarz, *supra* note 18, at 162.

Various forms of vulnerability are manipulated in *Baker*, both by the State (with its focus on the vulnerable institutional link among heterosexual marriage, procreation, and childrearing), as well as the gay and lesbian plaintiffs (with their focus on the vulnerable children of unmarried same-sex parents). In this case, however, for the first time, the rhetorical power of the child is made clear. The plaintiffs succeed not by rebutting the vulnerability of the institution of heterosexual marriage but by highlighting the vulnerability of the children of same-sex parents. This affective maneuver proved so successful that from this point on it would prove a critical strategy for same-sex marriage cases launched by LGBT plaintiffs.<sup>85</sup>

#### A. *Windsor and the Vulnerability of Children*

A strategy of foregrounding the vulnerability of children has emerged even in litigation where children were distinctly unrelated to the facts of the case. The most important judicial “victory” to date for proponents of same-sex marriage, *United States v. Windsor*, made the well-being of children a central plank of analysis, despite the fact that the matter before the court involved a claim for estate tax exemption by an octogenarian widow.<sup>86</sup> Briefly, Edith Windsor and Thea Spyer were married in Ontario, Canada, in 2007, and Spyer died two years later, leaving her estate to Windsor.<sup>87</sup> When Windsor sought to claim a spousal federal estate tax exemption, she was barred from doing so by Section 3 of the Defense of Marriage Act, or DOMA, which defined “spouse”

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<sup>85</sup> For example, *Goodridge* held that the marriage ban prevents children of same-sex couples “from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (quoting *id.* at 995 (Cordy, J., dissenting)). The court went on to conclude that “[i]t cannot be rational under our laws to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.” *Id.*

<sup>86</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>87</sup> *Id.* at 2682.

as excluding same-sex partners.<sup>88</sup> Windsor filed suit, seeking a refund of the more than \$360,000 she had paid to the IRS.<sup>89</sup>

The majority ruling by Justice Kennedy begins by looking at the adult sexual affiliation and what Kennedy describes as “the intimate relationship between two people.”<sup>90</sup> Soon, however, he is reflecting at length on the “second-tier” status of same-sex couples and the harms that a barrier to legal marriage has inflicted upon children in particular.<sup>91</sup> As he explains, the failure of the federal government to recognize same-sex marriages conducted in jurisdictions that permit such unions has undermined their public and private significance:

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.<sup>92</sup>

While the facts of the case did not explicitly involve children, the ruling located same-sex couples within the marriage bond not only in relation to a comparable right to human dignity (or a comparable right to avoid estate tax) but in regard to their social role as parents. It was through the conduit of childhood and parental responsibility that same-sex marriage could fully emerge as a proper model of family organization, and one worthy of state recognition in light of these important intergenerational ties.<sup>93</sup>

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<sup>88</sup> Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996). Section 3 amended the Dictionary Act in Title 1, Section 7, of the United States Code to provide a federal definition of “marriage” and “spouse” as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

<sup>89</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>90</sup> *Id.* at 2692.

<sup>91</sup> *Id.* at 2694.

<sup>92</sup> *Id.* (emphasis added) (citation omitted).

<sup>93</sup> To be fair to Justice Kennedy, the Court did receive amicus briefs that highlighted the welfare of children being raised by gay and lesbian parents. *See, e.g.*, Brief of Amici Curiae Family and Child Welfare Law Professors Addressing the Merits and in Support of Respondents, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 785632. Indeed, some of my own students conducted research on the children of LGBT parents and

## B. *Children in Polygamy Rulings*

Polygamist communities have also long been subject to criticism from various quarters, including groups such as “family values” traditionalists, feminists wary of patriarchal control over women, watchdogs concerned with the potential for welfare abuse and tax fraud, and even romantics invested in the companionship of the marital dyad.<sup>94</sup> Perhaps the most vociferous critics, however, have been children’s rights advocates who fear that polygamy—and specifically the institutionalized forms of polygamy that exist in religious cultures—may represent a violent and abusive form of exploitation.<sup>95</sup> As Richard A. Vasquez has argued, the practice of polygamy often coincides with crimes targeting children, including incest, statutory rape, and failure to pay child support.<sup>96</sup>

Adrienne Davis notes that the claim that polygamy is intrinsically “bad” for children offers a stout parallel to the accusation that gays and lesbians are also “bad” parents, as “[f]or both, the claim is that the nature of the adult intimacy disadvantages, or in the stronger form, injures, children in some meaningful way.”<sup>97</sup> Indeed, a concern for the well-being of children is present in the very

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crafted one such brief through the Child Rights Project at Emory University. Brief of Amici Curiae Family Equality Council et al. in Support of Respondents Perry et al. Addressing the Merits and Supporting Affirmance, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 4737186. Nevertheless, *Windsor* highlights the centrality of children within rulings on same-sex marriage and provides a fascinating exercise in judicial analysis: how easily “tens of thousands of children” may slide into a judgment on the estate tax liability of an eighty-four-year-old widow.

<sup>94</sup> Davis, *supra* note 12, at 1975.

<sup>95</sup> For example, Cassiah M. Ward describes how the children of polygamous marriages suffer multiple adverse effects, as they “are often without healthcare, proper education, or social security. These children’s existences are kept as secret as the marriages that produce them. Polygamous men procreate, take money from the government, and do little to support their children.” Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 149 (2004) (footnotes omitted). Karel Kurst-Swanger and Jacqueline L. Petcosky have documented fears of child sexual abuse in polygamist communities, as well as child marriage and high levels of child poverty. KAREL KURST-SWANGER & JACQUELINE L. PETCOSKY, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 21 (2003). By the same token, Simon LeVay and Sharon McBride Valente have described the concern of law enforcement and child welfare officials for the social ills associated with Mormon polygamy in particular, including “incest, physical and sexual abuse of children, poverty, welfare and tax fraud, criminal non-support of children, and diminished educational opportunities and health care.” SIMON LEVAY & SHARON M. VALENTE, HUMAN SEXUALITY 300 (2d ed. 2006).

<sup>96</sup> Richard A. Vasquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 239–45 (2001).

<sup>97</sup> Davis, *supra* note 12, at 2026.

first Supreme Court ruling on plural marriage.<sup>98</sup> In 1879, in writing the majority opinion in *Reynolds v. United States*, Chief Justice Waite ruled that a jury may be directed to the particular harms of polygamy for children in order to consider “the consequences to the innocent victims . . . innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers.”<sup>99</sup>

Subsequent attempts to prosecute polygamists within the United States also revolved around the well-being of children. For example a 1953 raid on a Mormon enclave in Arizona removed 263 children of accused polygamists, making them temporary wards of the state.<sup>100</sup> The children were all eventually returned to their parents.<sup>101</sup> In more recent years, as with gays and lesbians, social science data has begun to interrogate the necessary equivalence between polygamy and child abuse.

For example, empirical research in Fundamentalist Latter-day Saints communities such as that in Bountiful, British Columbia, have revealed complex systems of negotiation in operation, where women and children make “choices about marriage, reproduction, residence, work, and education [that] might be characterized as active, deliberated, and in the service of their own

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<sup>98</sup> While the protection of “innocents” was certainly part of the ruling, it was by no means the only motivation. The criminalization of polygamous relations also locates its origins in a colonialist legacy of racism and sexism. For an American context of this history, see Martha Ertman, *Race Treason: The Untold Story America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010). For a Canadian analysis of the objectives underlying criminal bans, see SARAH CARTER, *THE IMPORTANCE OF BEING MONOGAMOUS: MARRIAGE AND NATIONAL BUILDING IN WESTERN CANADA TO 1915* (2008). As these and other scholars have convincingly argued, the opposition to polygamy may operate as a handy pretext for the rejection of social and cultural difference. See Margaret Denike, *The Racialization of White Man's Polygamy*, 25 HYPATIA 852 (2010); Susan G. Drummond, *Polygamy's Inscrutable Criminal Mischief*, 47 OSGOODE HALL L.J. 317 (2009); Carissima Mathen, *Reflecting Culture: Polygamy and the Charter*, 57 SUP. CT. L. REV. 2D 357 (2012). This certainly appears to be the case with Bill S-7, put forth by the Conservative government of Canada and debated in the House of Commons in March 2015. The *Zero Tolerance for Barbaric Cultural Practices Act*, or “An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts” would amend the Immigration and Refugee Protection Act to bar migrants who practice polygamy (or who are suspected may practice polygamy in the future) from entering Canada and potentially remove permanent residents already in Canada who practice polygamy. Bill S-7 is a clear rejection of certain forms of cultural difference, to be enacted by targeting racialized communities for exclusion and deportation from Canada. *Zero Tolerance for Barbaric Cultural Practices Act*, 2014-15, S. Bill [7] (Can.).

<sup>99</sup> 98 U.S. 145, 150 (1879).

<sup>100</sup> RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 199–207 (1986).

<sup>101</sup> *Id.*

interests.”<sup>102</sup> Angela Campbell describes Bountiful as “a heterogeneous and dynamic social and political space, where at least some women are able to wield considerable authority in their marriages, families, and community.”<sup>103</sup> This picture, while admittedly partial and incomplete, nevertheless offers a counterpoint to dominant narratives of the inherent exploitation and oppression of polygamy.

By the same token, Kody Brown and his family have become reality-television stars with the express goal of showing the world their “attempt to navigate life as a ‘normal’ family in a society that shuns their lifestyle.”<sup>104</sup> This process from destigmatization to decriminalization tracks the same chronology experienced by gays and lesbians in America. As discussed at the start of the Article, the *Lawrence* ruling eschewed discussion of the inherent dangers of sodomy to focus on fundamental liberty interests and the right to privacy.<sup>105</sup> The very same issues were invoked by Kody Brown’s 2011 challenge to Utah’s criminal polygamy law. Indeed, the “powerful shadow”<sup>106</sup> of *Lawrence* hung low over Brown’s case, as he relied heavily upon the case to establish “a fundamental liberty interest in intimate sexual conduct.”<sup>107</sup> Given that thousands of couples enjoyed a privacy right to unmarried cohabitation in Utah without fear of criminal penalty, Brown argued that his prosecution had arisen out of unconstitutional religious animus.<sup>108</sup> The district court agreed, concluding that the Utah cohabitation law could not survive substantive due process analysis. The case was appealed to the Tenth Circuit in late 2014.<sup>109</sup>

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<sup>102</sup> Angela Campbell, *Bountiful Voices*, 47 OSGOODE HALL L.J. 183, 227 (2009). As Campbell notes, the presence of active choice is not cause for surprise, given existing literature on the customs and choices of religious women in apparently “closed” communities. Campbell explains that such scholarship reveals how women may actually be highly valued, integrated, and regarded community members. *See id.* 188 n.8 (citing DEBRA RENEE KAUFMAN, *RACHEL’S DAUGHTERS: NEWLY ORTHODOX JEWISH WOMEN* (1991); Marc A. Olshan & Kimberly D. Schmidt, *Amish Women and the Feminist Conundrum*, in *THE AMISH STRUGGLE WITH MODERNITY* 215 (Donald B. Kraybill & Marc A. Olshan eds., 1994); Shauna Van Praagh, *The Chutzpah of Chasidism*, 11 CAN. J.L. & SOC’Y 193 (1996)).

<sup>103</sup> *Id.* at 188; *see also* Angela Campbell, *Wives’ Tales: Reflecting on Research in Bountiful*, 23 CAN. J.L. & SOC’Y 121, 126 (2008).

<sup>104</sup> *What’s New with the Sister Wives*, *supra* note 6.

<sup>105</sup> *Lawrence v. Texas*, 539 U.S. 558, 564, 574–75 (2003).

<sup>106</sup> Joanna L. Grossman & Lawrence M. Friedman, *Kody’s Big Score in the Challenge to Polygamy Law*, VERDICT (Dec. 24, 2013), <https://verdict.justia.com/2013/12/24/kodys-big-score-challenge-polygamy-laws>.

<sup>107</sup> *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1198 (D. Utah 2013) (internal quotation marks omitted).

<sup>108</sup> *Id.* at 1210.

<sup>109</sup> *See supra* notes 9–10 and accompanying text. As Ruthann Robson has argued, this appeal may be ill-advised given the breadth of the statutory proscription on “bigamy” as including cohabitation. She points out, correctly, that a “strict enforcement of the statute would mean that anyone whose divorce was not final and who cohabited with another person might be guilty of bigamy.” Ruthann Robson, *Utah District Judge*

If *Lawrence* is any guide, once a formerly abjected practice of adult sexual intimacy is decriminalized, attention shifts to an exclusive consideration of the well-being of dependent children and the dignity of the family. This is precisely the move made by a string of decisions on same-sex marriage in the post-*Windsor* era.

#### IV. FINDING PARENTS IN THE POST-*WINDSOR* ERA

Indeed, the discursive move to legitimate same-sex couples as *parents* rather than as merely sexual partners has swept through an extraordinary series of judicial decisions, and particularly since *Windsor* came down, framed largely in the language of care. Following Kennedy's affirmation of the marriage bond as the place for reproduction and childrearing, these decisions shunt attention away from the potentially collaborative, non-dyadic nature of LGBT reproduction and back onto the traditional two-parent family as the appropriate site of adult sexuality.<sup>110</sup> Judicial logics do not dwell on the fundamentally different mechanics of same-sex parenting projects, or pause to contemplate the possibility of plural parents. Instead, they focus tightly on the figure of the vulnerable child, contemplating same-sex households with children without much investigation of the reproductive arrangements that may have been involved.

This focus on children living in same-sex households played a central role in a September 2014 ruling on same-sex marriage, written by Judge Richard

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*Finalizes Judgment on Unconstitutionality of Polygamy Prohibition*, CONST. LAW PROF BLOG (Aug. 28, 2014), <http://lawprofessors.typepad.com/conlaw/2014/08/utah-district-judge-finalizes-judgment-on-unconstitutionality-of-polygamy-prohibition-.html>.

<sup>110</sup> For example, in *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1290 (N.D. Okla. 2014), the United States District Court for the Northern District of Oklahoma recognized the important function of marriage as a location for biological reproduction but saw no reason to continue limiting the legal recognition of reproduction to merely coital, as long as it remained within the frame of the traditional two-person family. As the court explained, echoing the language in *Baker v. State*,

The reality is that same-sex couples, while not able to “naturally procreate,” can and do have children by other means. As of the 2010 United States Census, there were 1,280 same-sex “households” in Oklahoma who reported as having “their own children under 18 years of age residing in their household.” If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal.

*Id.* at 1292. However, this sentiment existed even before the Supreme Court's decision in *Windsor*. See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Serv.*, 682 F.3d 1, 11, 14–15 (1st Cir. 2012) (concluding that barriers to same-sex marriage did nothing to help children of opposite-sex parents but prevented children of same-sex couples from enjoying advantages flowing from a “stable” two-parent family structure).



Posner on the United States Court of Appeals for the Seventh Circuit. As Judge Posner maintained,

Formally these cases are about discrimination against the small homosexual minority in the United States. *But at a deeper level, as we shall see, they are about the welfare of American children. . . .*

. . . .

. . . The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.<sup>111</sup>

Children play a critical role in Posner’s ruling, as they do across the post-*Windsor* landscape. This judgment in particular has been widely heralded in progressive media as a remarkably clear-eyed vision from a conservative jurist.<sup>112</sup> Certainly, Posner has no patience for the State rationale in defending a prohibition against same-sex marriage. As he wrote,

The argument that the states press hardest in defense of their prohibition of same-sex marriage is that the *only reason government encourages marriage is to induce heterosexuals to marry* so that there will be fewer “accidental births,” which when they occur outside of marriage often lead to *abandonment of the child to the mother (unaided by the father) or to foster care*. Overlooked by this argument is that *many of those abandoned children are adopted by homosexual couples*, and those children would be better off both

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<sup>111</sup> Baskin v. Bogan, 766 F.3d 648, 654, 656 (7th Cir. 2014) (first emphasis added).

<sup>112</sup> A number of left-leaning media outlets could hardly contain their glee at the ruling, heralding Posner’s ability to “brutally destroy” arguments against gay marriage and referring to him as a “hero Federal Appeals judge” who successfully “burns down the case against gay marriage.” Others exhorted readers to check out the detailed transcription of court proceedings, as Posner “said everything you want to say to the anti-gay marriage crowd, but better.” See Michelle Dean, *Hero Federal Appeals Judge Burns Down the Case Against Gay Marriage*, GAWKER (Sept. 5, 2014, 9:49 am), <http://gawker.com/hero-federal-appeals-judge-burns-down-the-case-against-1630697112>; Ben Dreyfuss, *This Judge Just Said Everything You Want to Say to the Anti-Gay Marriage Crowd, But Better*, MOTHER JONES (Sept. 5, 2014, 12:27 PM EDT), <http://www.motherjones.com/mojo/2014/09/judge-says-everything-you-want-say-anti-gay-marriage-crowd-just-smarter-and-more-sass>; Zack Ford, *Seventh Circuit Unanimously Rejects Indiana and Wisconsin’s Same-Sex Marriage Bans*, THINK PROGRESS (Sept. 4, 2014, 4:50 PM), <http://thinkprogress.org/lgbt/2014/09/04/3479064/seventh-circuit-indiana-wisconsin-marriage/>; Mark Joseph Stern, *Listen to a Conservative Judge Brutally Destroy Arguments Against Gay Marriage*, SLATE (Aug. 27, 2014, 2:53 PM), [http://www.slate.com/blogs/outward/2014/08/27/listen\\_to\\_judge\\_richard\\_posner\\_destroy\\_arguments\\_against\\_gay\\_marriage.html](http://www.slate.com/blogs/outward/2014/08/27/listen_to_judge_richard_posner_destroy_arguments_against_gay_marriage.html).

emotionally and economically if their adoptive parents were married.<sup>113</sup>

There is much happening within this statement, and it is worth pausing to unpack the series of assumptions that Posner makes. First, he highlights the States' argument—familiar from *Baker*—that the traditional marital family is a vulnerable institution that must remain resilient. Here, the necessary “link” among sex, reproduction, and childcare is threatened by “accidental births” occurring outside of the solidity of a traditional marriage bond. Yet the danger posed is less about the resilience of the marriage institution—or even the well-being of children produced—than about the potential burden on public monies. The position pressed hardest by the State may thus be read as a drive to mitigate the vulnerability of the welfare system, with the encouragement toward heterosexual marriage figured mainly as a strategy to avoid the costly outcomes of single motherhood and foster care.<sup>114</sup>

While Posner treats this argument with skepticism, it is not because he disagrees with the State's fundamental premise: that heterosexual marriage is a crucial tool to prevent unplanned reproduction. Nor does he oppose the need to mitigate the vulnerability of the welfare state, or (even!) wish to challenge marriage as a proper conduit for the privatization of dependency. Instead, Posner is able to remain unconcerned about the potential drag on state coffers posed by “accidental births” through a rather astonishing conceptual leap. While essentially agreeing with the primary argument posed by the State, he explains that it's really not a problem because “many” of the abandoned children of unmarried heterosexuals are being adopted by gay people. In this scenario, gay and lesbian parents appear to function as a kind of runoff catchment for the flow of accidental heterosexual births. (This is potentially a mighty stream, not least because of the increasing unavailability of abortion

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<sup>113</sup> *Baskin*, 766 F.3d at 654 (emphasis added).

<sup>114</sup> The current structure of foster care in the United States is deeply problematic. Dorothy Roberts has written powerfully about the racialized nature of child welfare, with African-American children heavily represented among foster systems. As she explains, “Black children make up nearly half of the foster care population, although they constitute less than one-fifth of the nation's children.” DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, at vi (2002). Nancy Dowd has catalogued the specifically gendered aspects of this racialized system and the prospects for young black boys who enter the foster network. Nancy E. Dowd, *Unfinished Equality: The Case of Black Boys*, 2 *IND. J.L. & SOC. EQUALITY* 36, 37 (2013); see also Leslie Joan Harris, *Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison*, in *JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM* 62 (Nancy E. Dowd ed., 2011).

and access to contraceptives thanks to the rollback of *Roe*-era protections.)<sup>115</sup> In a remarkable framing, gay people are figured as an outlet for crumbling social policy around sexual and reproductive health, with homosexuals “picking up the pieces” that the marriage crisis has wrought. This passage, also from the Posner ruling, makes this reframing explicit:

[G]iven that homosexual sex is non-procreative, homosexuality may, like menopause, by reducing procreation by some members of society free them to provide child-caring assistance to their procreative relatives, thus increasing the survival and hence procreative prospects of these relatives. This is called the “kin selection hypothesis” or the “helper in the nest theory.”<sup>116</sup>

This zoological vision of the “homosexual helpers in the nest,” while a far cry from the criminal sodomies of the past, is nevertheless unlikely to be the panacea for an overburdened foster care system. Such an adoption fantasy is limited in application not only in regard to the absorptive capacity of gay households,<sup>117</sup> but also because it fails to account for the increasing numbers of

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<sup>115</sup> As sexual and reproductive-health researchers Rachel Benson Gold and Elizabeth Nash have argued, this retraction has been ongoing since *Roe* was first decided:

Ever since the Supreme Court handed down *Roe v. Wade*, states seeking to reduce access to abortion services and, more broadly, create a climate hostile to abortion rights have taken a multiplicity of approaches to doing so. In some cases, they have sought to put roadblocks directly in the path of women seeking an abortion by, for example, mandating that women receive biased counseling or imposing parental involvement requirements for minors. In others, states have tried to make it harder for women to pay for the procedure, by restricting public or private insurance coverage. In addition to these “demand side” restrictions, states have also sought to make it more onerous to provide abortions, by instituting expensive physical plant requirements unrelated to public safety or restricting medically appropriate ways of providing medication abortion.

Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, GUTTMACHER POL’Y REV., Winter 2012, at 14, 14. For a discussion on barriers to abortion posed by physician training and intimidation, see Sarp Aksel et al., *Unintended Consequences: Abortion Training in the Years After Roe v Wade*, AM. J. PUB. HEALTH, Mar. 2013, at 404. For popular news coverage of reduced access to abortion, see Erik Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES, Jan. 3, 2014, at A1, available at <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html>. The article describes how “[a] three-year surge in anti-abortion measures in more than half the states has altered the landscape for abortion access, with supporters and opponents agreeing that the new restrictions are shutting some clinics, threatening others and making it far more difficult in many regions to obtain the procedure.” *Id.*

<sup>116</sup> *Baskin*, 766 F.3d at 657–58.

<sup>117</sup> In 2013, it was estimated that 402,000 children were in the U.S. foster care system, with 102,000 children waiting to be adopted. Preferred estimates from 2010 Census Data indicate the existence of 646,464 same-sex households, with 17% of these households including children under eighteen. While same-sex couples raising children are indeed far more likely than their opposite-sex counterparts to adopt (four times more likely) or to raise foster children (six times more likely), the numbers are still too marginal to impact the

LGBT people using reproductive technology.<sup>118</sup> While some gay and lesbian couples surely *will* be petitioning for adoption, many more are seeking to create their own children.<sup>119</sup> This is a burgeoning population not acknowledged by the post-*Windsor* cases. Instead, gays and lesbians are seen as a prop and support to the primary business of heterosexual reproduction, and always within the structure of the two-parent family. What rulings like Posner's do make clear, however, is that same-sex marriage is no longer about the relationship between sexual affiliates, but rather the allocation of rights and responsibilities for children.

*A. On the Slippery Slope: The "Inconvenient Question"*

The first post-*Windsor* ruling to deny plaintiffs a right to same-sex marriage, following more than twenty federal court victories, was issued by Judge Martin Feldman in the U.S. District Court for the Eastern District of Louisiana. Judge Feldman understood *Windsor* not as a pipeline to channel gay parents into the marriage bond but as an explicit endorsement of states' rights to regulate marriage. In step with other decisions, Judge Feldman does

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overall pool of waiting children. In total, only 1.4% of all adopted children under eighteen are part of a same-sex couple household, while only 1.7% of foster children are being raised by a same-sex couple household. Roughly, then, even if every same-sex couple in the United States were given full access to both marriage and adoption rights, and these numbers doubled overnight, it would still mean that only 2.8% of adopted children and 3.4% of foster children would become part of gay and lesbian families. "Helpers in the nest" perhaps, but not ones even marginally capable of addressing the underlying and systemic issues of the foster care system. See CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FFY 2002-FFY 2013 (2014), [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption2013.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2013.pdf); Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), <https://escholarship.org/uc/item/9xs6g8xx>.

<sup>118</sup> There is a great deal more research required on this topic, but the national 2011 American Community Survey indicated that 59% of the children living with same-sex couples are biologically related to the householder, with only 10% being adopted and 2% being fostered; the survey does not specify whether such children were produced through heterosexual intercourse in a former relationship or via reproductive assistance. Gates, *supra* note 117.

<sup>119</sup> One of the few studies to explore the use of reproductive assistance by same-sex households, a Canadian Institutes of Health Research-funded study entitled *Creating Our Families: A Pilot Study of the Experiences of Lesbian, Gay, Bisexual and Trans People Accessing Assisted Human Reproduction Services in Ontario* was conducted in 2010–2011 to track the incidence of LGBTQ people using reproductive technology. RESEARCHING FOR LGBTQ HEALTH, <http://www.lgbtqhealth.ca/projects/creatingourfamilies.php> (last visited May 17, 2015). For an overview of the study's findings, including the growing incidence of LGBTQ families using reproductive assistance, see Lori E. Ross et al., *Sexual and Gender Minority Peoples' Recommendations for Assisted Human Reproduction Services*, J. OBSTETRICS & GYNAECOLOGY CAN., Feb. 2014, at 146. For an overview of transgender participants' experiences in particular, see Sarah James-Abra et al., *Trans People's Experiences with Assisted Reproduction Services: A Qualitative Study*, 30 HUM. REPROD. (forthcoming 2015), available at <http://humrep.oxfordjournals.org/content/early/2015/04/22/humrep.dev087.full.pdf>; see also EPSTEIN, *supra* note 25, at 2 (describing LGBTQ clients at urban Toronto fertility clinics as representing 30% or more of all traffic).

understand *Windsor* in relation to children and the importance of the privatized care performed by the traditional family, but in his vision this is a properly heterosexual form:

Defendants rejoin that the laws serve a central state interest of linking children to an intact family formed by their biological parents. . . . This Court agrees.

Louisiana's laws and Constitution are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents.<sup>120</sup>

Judge Feldman identifies the same central concern as Justice Kennedy and Judge Posner—the role of marriage in reproduction and childrearing—but reaches a different conclusion based on his vision of the necessary “link” among biology, heterosexuality, and care.<sup>121</sup> The ruling then proceeds to discuss the potential intimate affiliations that may result when sex and reproduction are no longer contained within the two-parent household. Feldman lists the gamut of possibilities that may emerge from a more contractarian model of marriage, in which individuals would be free to enter marriages based on mutual affection and care, and imagines a series of outcomes far beyond the bounds of the procreative sexual family:

When a federal court is obliged to confront a constitutional struggle over what is marriage, a singularly pivotal issue, the consequence of outcomes, intended or otherwise, seems an equally compelling part of the equation. It seems unjust to ignore. And so, *inconvenient questions persist*. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? *Must marriage be limited to only two people*? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would undeniably be equally committed to love and caring for one another, just like the plaintiffs.<sup>122</sup>

This “inconvenient question,” while framed within a conservative judgment that seeks to maintain a traditional vision of marital intimacy, is a query that evaded the many other rulings on same-sex marriage in the wake of *Windsor*.

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<sup>120</sup> *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919–20 (E.D. La. 2014) (footnote omitted).

<sup>121</sup> *Id.* at 920 (“Louisiana’s laws and Constitution are directly related to achieving marriage’s historically preeminent purpose of linking children to their biological parents. . . . The Court is persuaded that a meaning of what is marriage that has endured in history for thousands of years, and prevails in a majority of states today, is not universally irrational on the constitutional grid.”).

<sup>122</sup> *Id.* at 926 (emphasis added).

Indeed, Judge Feldman is correct to consider the consequence of outcomes when biological reproduction and marriage are no longer tied. Given the import that reproduction and childrearing have played in such decisions and the evidently multi-party nature of LGBT procreation, it is puzzling that other rulings have *not* considered the possibility of plural parentage on the horizon. In judgments across the post-*Windsor* landscape, it appears that the traditional family, and its longstanding focus on biological reproduction, may be expanded to include same-sex couples *just so long as their procreative mechanics are not examined*. The same-sex family may be a valid place to raise children, declare these courts, but the potentially messy details of how such children were created shall not be drawn into the equation.

As discussed, a vulnerability analysis points us toward the centrality of the institution of the traditional family and the need for the state to maintain uncontested and sustained parental relationships with dependent children. The narrow focus of the Kennedy and Posner courts on marriage as the ideal site for raising children underscores this primary institutional function. The resilience of the traditional, two-parent family is strongly at work in their judgments, as both men skate over the uncomfortable mechanics of LGBT reproduction to contemplate the same-sex household and the children within. Rather than interrogate the necessarily multi-party arrangements that may have produced such children, the judgments instead move to reestablish the value and utility of the dyadic structure of parentage. The crisis of the family form is thus resolved, not by barring same-sex couples from the institution of legal marriage but by welcoming them in through its exclusively dyadic terms. Traditional marriage maintains its resilience and ability to carry out the work of privatized dependency through a judicial sleight-of-hand that negates the potentially complex lineage of the ART-conceived child.

Judge Feldman's decision is far more honest about the challenge to existing family forms that the LGBT family may present. By focusing on the potential outcomes of the legalization of same-sex marriage, Feldman registers a greater concern for the frailty of heterosexual marriage as a social institution. As he acknowledges, the "consequence of outcomes" must be a part of the equation when considering the result of constitutional struggles over marriage. Interestingly, however, Feldman's "slippery slope" reasoning focuses not on the immorality of same-sex marriage but on the relations of human care and dependency that the marriage bond is designed to foster. By asking if the states must then permit marriage between (presumably, although Feldman is not explicit on this point) nonsexual affiliates such as an aunt and niece or father

and child, he casts a remarkably sharp lens on the social function of family as the site of dependent relations. Yet for Feldman, it is precisely the vulnerability of the marriage institution that makes it susceptible to mission creep. It is because two-person marriage is a weakened structure under threat that it must be protected from rival forms of intimate affiliation. And so when Feldman poses the rhetorical question, in the wake of same-sex marriage victories across the country, as to whether marriage must still be limited to only two people, he places a finger on the challenge posed by intrinsically non-dyadic forms of parentage. These are indeed troubling forms for those committed to a strictly two-parent model of care.

*B. What the Post-Windsor Rulings Suggest About Plural Parentage*

The Supreme Court has recently decided to review a 2–1 decision by the United States Court of Appeals for the Sixth Circuit—the only federal appeals court to uphold bans on same-sex marriage following the *Windsor* decision.<sup>123</sup> While it remains to be seen whether the Court will reach a conclusive decision on the issue of same-sex marriage, such an outcome does appear likely. Whether this year or another, however, the widespread recognition of same-sex marriage is inevitable. Once this occurs, it will not be difficult to predict what happens next: The reproductive mechanics of LGBT parents and the arrangements of care within their families will *also* mandate the eventual recognition of multiple parents. As described above, both domestic and international precedent point in this direction. The vulnerability analysis also helps to make this clear.<sup>124</sup>

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<sup>123</sup> *Obergefell v. Hodges*, 135 S. Ct. 1039, 1039–40 (2015) (mem.) (granting certiorari on two questions: “Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?” and “Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?”).

<sup>124</sup> Interestingly, this was also a line of questioning raised by Justice Alito during oral arguments. Indeed, over the course of two and a half hours, his interrogations focused on little else. Justice Alito’s insistence on the possibilities for the recognition of polygamy was most evident during an exchange with Mary Bonauto, one of the attorneys arguing against state bans on same-sex marriage. In a series of increasingly stark questions, Justice Alito probed the potential outcomes of the case: “Suppose we rule in your favor in this case and then, after that, a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them?” Transcript of Oral Argument, Question 1, at 17, *Obergefell v. Hodges*, No. 14-556 (U.S. Apr. 28, 2015), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_11o2.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_11o2.pdf).

Despite Bonauto’s denial that such a scenario would be mandated by the recognition of same-sex marriage, Justice Alito pressed on, asking,

Well, what if there’s no—these are 4 people, 2 men and 2 women, it’s not—it’s not the sort of polygamous relationship, polygamous marriages that existed in other societies and still exist in

The overlapping vulnerabilities of the marriage institution (as a structure in decline), the state (which requires the systemic privatization of care), and dependent children (who require caretakers on an individual level) are mutually reinforcing. Barring a wholesale restructuring of the intimate lives of Americans, the solution for the state is to promote robust forms of marriage able to carry out the work of social reproduction. The same logic that has allowed same-sex parenting to obtain dignity and social value will also apply to households with multiple parents. The combination of the vulnerability of the state, the entrenchment of neoliberal austerity programs, and the best-interests-of-the-child doctrine will assure as much. This is why a conservative judge such as Richard Posner can look approvingly to the “gay helpers in the nest” as a solution to the overlapping vulnerabilities of human dependency. This Article suggests that such sympathies are only temporarily constricted to the two-parent family.

Indeed, once the moral panics have subsided, the logical move is for the recognition of multiple simultaneous parents in the same way that *de facto* serial polygamy has long been recognized through divorce and remarriage.

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some societies today. And let’s say they’re all consenting adults, highly educated. They’re all lawyers. (Laughter.) What would be the ground under—under the logic of the decision you would like us to hand down in this case? What would be the logic of denying them the same right?

*Id.* at 18–19. Justice Alito again raised this line of questioning with John Bursch, Special Assistant Attorney General for Lansing, Michigan, who was arguing against gay marriage:

JUSTICE ALITO: —the reason for marriage is to provide a lasting bond between people who love each other and make a commitment to take care of each other, I’m not—do you see a way in which that logic can be limited to two people who want to have sexual relations—

MR. BURSCH: It—it—can’t be.

JUSTICE ALITO: —why that would not extend to larger groups, the one I mentioned earlier, two men and two women, or why it would not extend to unmarried siblings who have the same sort of relationship?

*Id.* at 57. For popular media discussion of this interest in the “slippery slope” possibilities of same-sex marriage, see Amy Davidson, *Justice Alito’s Polygamy Perplex*, NEW YORKER (April 30, 2015), <http://www.newyorker.com/news/amy-davidson/justice-alitos-polygamy-perplex>.

Polygamy was by no means the only concern raised by the court. Substantial passages of the oral arguments were fixated on the large numbers of children being raised in same-sex households without the benefit of two married parents. As argued by Donald B. Verrilli, Jr., Solicitor General of the United States, “those hundreds of thousands of children don’t get the stabilizing structure and the many benefits of marriage.” Transcript, *supra*, at 35. Interestingly, however, these two lines of argumentation were never merged. Had the Court contemplated the possibility of LGBT families with a plural parentage form, the “four consenting lawyers” scenario that Justice Alito proposed may well have pushed the discussion in a rather different direction. The materiality of LGBT parentage through reproductive technology—or even among four consenting co-parents—offers radically new considerations in regard to the well-being of children.



Whether they are sexual affiliates, as in polygamous and polyamorous arrangements, or adult caretakers of a dependent child, as with the three-parent family of *A.A. v B.B.*, these intimate structures are able to mitigate the vulnerability of children through a *surplus* of care.<sup>125</sup> It is this recognition that will allow the state to expand the dyadic model to more formal recognitions, as is already underway in California with the legislative response to *In re M.C.*<sup>126</sup> By shoring up against the vulnerability of the marriage institution and inviting more caregivers into the fold, the state will actually be undertaking a fiscally conservative move. Instead of shouldering the burden of childcare within the public system, the recognition of multiple parents and sexual affiliates effectively reprivatizes the work of social reproduction.

The fuss over same-sex marriage and polygamy being made by some conservative commentators is therefore somewhat perplexing. It is this logic of re-privatization that underscores Judge Posner's conservative ruling from the Seventh Circuit, which views gay families as a haven for children abandoned into the public weal. Why, then, have not multi-parent modes been viewed with greater warmth by judiciaries concerned with the welfare of children? Surely a host of loving, supportive, and legally obligated parents is superior to merely two? When a child has three or more interested adults who wish to take on legal responsibility for her well-being, why would the state *not* want to grant such a request? It satisfies the respect for individual liberties, the dignity of choice for intimate lives, and the caretaking of dependent children.

The vulnerability analysis suggests that as gays and lesbians increasingly gain entitlement to same-sex marriage, and as polygamous marriages gain increasing recognition, the legal precarity experienced in the past will give way to more open caretaking and kinship structures that shall demand their own recognition. The mechanics of same-sex reproduction through ART make this unavoidable, as do decriminalized forms of the polygamous family.<sup>127</sup> However, we are not yet at this next evolution in family law.

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<sup>125</sup> *A.A. v. B.B.*, 2007 ONCA 2, para. 1 (Can.).

<sup>126</sup> Kinsey, *supra* note 32, at 296 & n.3.

<sup>127</sup> Indeed, this is also the conclusion reached by sociologist Elisabeth Sheff, who has conducted extensive research within polyamorous communities. It is by tracking the material outcomes of actual family forms that we may understand the arrangements of intimacy to which law must respond. Sheff has written on the challenge to the dyadic heterosexual form posed by plural parentage, or as she refers to them, "poly families." As she writes,

Like lesbigays who offered a new vision of chosen families in the 1970s and beyond, poly families demonstrate novel forms of kinship not necessarily dependent on conventional biological families,

## CONCLUSION: VULNERABILITY ANALYSIS AND THE FUTURE OF POLYGAMY

Vulnerability analysis allows us to look not merely at questions of *discrimination* against gays and lesbians, which is where most of the discussion on same-sex marriage has centered. Instead, it offers a tool to focus on the functioning of our key social institutions and understand how these institutions themselves are vulnerable. The vulnerability of the traditional family has emerged as a social and legal crisis, even as the family remains the site of inevitable and derivative dependency, a privatized social institution that continues to be vital for the unpaid labor of social reproduction.<sup>128</sup>

A vulnerability analysis points us toward the importance of the institution of family and the pressure on the state to ensure uncontested and sustained parental relationships with dependent children. Yet, a responsive state need not end its duties by assuring the continuation of the privatized martial family. A host of other mechanisms may also come into play to address poverty and the excess numbers of children in foster-care systems. Thus far, however, recent court decisions on same-sex marriage have addressed this need by affirming the resilience of the two-parent model and its ability to absorb other forms of adult sexual affiliation. The narrow focus of the Kennedy and Posner opinions on two married parents as the best structure for raising children is an effect of this social priority: Better the private family than the welfare state! A demand to bolster the resilience of the traditional, two-parent family animates both their judgments, steering the question inevitably toward the vulnerability of children—even when the plaintiff is an octogenarian widow.

The torrent of decisions that have come down post-*Windsor* appear to indicate greater respect for and validation of same-sex relationships and have been celebrated as victories by LGBT people and their allies. Yet, what happens when such families deviate from the two-parent norm erected by heterosexual reproductive biology? Or when Kody Brown and his four wives

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sexual connections, or even chosen kin ties as previously understood. Expanding understandings of families becomes more important as family forms themselves expand.

Finally, this examination of poly families exposes the links between polyamorous families, same-sex marriage, and the proliferation of choices outside the formerly singular family model predicated on a heterosexual, married, monogamous couple.

Elisabeth Sheff, *Polyamorous Families, Same-Sex Marriage, and the Slippery Slope*, 40 J. CONTEMP. ETHNOGRAPHY 487, 511 (2011).

<sup>128</sup> MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

and seventeen children seek legitimacy from the state? Complicated kinships are more likely to be the future for both Canada and the United States, emerging both from polygamous and polyamorous communities, as well as the use of reproductive technologies outside a two-parent model of kinship. The institution of family must endure, barring a vast reordering of our social systems of care and dependency, but the shape and contour of that institution will be shifted by the inclusion of plural forms of parentage. Not overnight, certainly, but the two-parent model, already under siege from so many other quarters, will not easily absorb the multi-party reproduction potential of the LGBT or the polygamous family. As a marker of these shifts, British Columbia has recently passed provincial family law legislation that provides for a range of multi-parent family formations, including four legal parents, sparked largely by the material outcomes of ART.<sup>129</sup> Indeed, the first child in British Columbia to be born with three legal parents on her birth certificate has already celebrated her first birthday.<sup>130</sup> Other Canadian provinces are likely to eventually follow suit in reforming their own family law legislation.

I argue that space must be provided for these tectonic shifts of family and the complex manner in which reproductive technologies and the family structures they engender both “trouble the normal” and reinforce the normalization of traditional gender, sexuality, and family constructs.<sup>131</sup> In this way, the resilience of family forms beyond merely the dyadic may be nurtured, as may the reproduction of children within all manner of households. Rather than confront the crisis of the traditional family by aiming to remake all other sexual affiliates in its form, the reasons for its vulnerability as a foundational social institution should be squarely addressed. What we require in the same-sex marriage debates is attention to the failures of the responsive state and a recognition that plural parent forms already exist in both LGBT families and polygamous communities. Gay and lesbian parents will not save the institution of marriage, but they will surely be instrumental in its evolution.

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<sup>129</sup> Family Law Act, S.B.C. 2011, c. 25 (Can.), available at [http://www.bclaws.ca/civix/document/id/complete/statreg/11025\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01).

<sup>130</sup> The little girl, named Della Wolf Kangro Wiley Richards, was registered as the legal daughter of a lesbian couple and their male friend. Despite some issues locating an appropriate form to register the birth, the three parents are among the first Canadians to achieve a legally recognized plural parentage arrangement without litigation. Abigale Subdhan, *Vancouver Baby Becomes First Person to Have Three Parents Named on Birth Certificate in B.C.*, NAT'L POST (Feb. 10, 2014), <http://news.nationalpost.com/news/canada/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c>.

<sup>131</sup> MAMO, *supra* note 25, at 6.