

# RESTRUCTURING THE FRAMEWORK FOR LEGAL ANALYSES OF GAY PARENTING

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*[N]either the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.*

—*Goodridge v. Dep't Public Health*, 798 N.E.2d 941, 973  
(Mass. 2003) (Greaney, J., concurring).

## INTRODUCTION

The American legal system currently provides inadequate protections for children of homosexual parents, whose familial relationships remain unrecognized and stigmatized in the eyes of the law. By not formally recognizing these parental relationships, the law denies children of homosexual parents many of the privileges currently provided to children of married, heterosexual parents, such as: health coverage pursuant to a parent's insurance policy; economic security in the form of child-support payments in the event of the parents' separation; access to social security in the event of one parent's death; and, emotional security in the form of visitation and custody. The law presently offers such protections to children of heterosexual parents by supplying avenues through which a parent may establish and receive legal recognition of her or his parental relationship with a child.<sup>1</sup> In circumstances where a non-biological parent wishes to establish a legal parental relationship with a child, she or he may do so through adoption proceedings.<sup>2</sup>

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1. Both heterosexual and homosexual parents may be precluded from establishing legal parental rights over a child if the child already has two legal parents, neither of whom plans to give up their legal rights to the child. Such a scenario (in which a child is effectively being denied a legal relationship with a third parent) is worthy of investigation, but beyond the scope of this Article.
2. Adoption proceedings in this Article refer to stranger adoptions—where an adult petitions to adopt a child through an adoption agency or through the state—and to stepparent or second-parent adoptions—where an adult who is present in the child's life petitions to adopt the child without requiring the child's legal parent to give up her or his legal rights over the child. Since many of the adults at issue in this Article

When a prospective legal parent petitions the court to legally adopt a child, courts evaluate whether or not the adoption would be in the best interests of the child. Current family laws of every state emphasize the best interests of the child as the most important factor to be considered in an adoption proceeding;<sup>3</sup> hence, the “best interests of the child” inquiry ultimately determines the success or failure of an adoption petition. At this point in the legal process, however, prospective homosexual parents may be denied legal recognition of their parenthood due to their sexual orientation. Since the determination of the best interests of the child plays a vital role in the adoption process, it should be examined in light of its potential adverse and unfounded mistreatment of homosexuals<sup>4</sup>—or more specifically, gay parenting.

If the “best interests of the child” standard is emblematic of society’s belief that the welfare of the child should take precedence over all other matters, courts should be prepared to confront the possibility that legal recognition of gay parents is in the best interests of the child. Explicit prohibitions<sup>5</sup> or presumptions<sup>6</sup> against gay parenting effectively nullify the “best interests of the child” inquiry. The debate over gay parenting, as it appears in judicial adoption determinations,<sup>7</sup> is embedded in a larger dis-

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have already established some kind of parent-like relationship with their respective child prior to petitioning for adoption, the term “parent” will refer to legally recognized and non-legally recognized persons who act as parents to the child at issue.

3. William Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 788 (2003). See, e.g., ALASKA STAT. § 25.23.005 (2004) (adoption laws “shall be liberally construed to the end that the best interests of adopted children are promoted”); 750 ILL. COMP. STAT. 50/20a (1980) (the best interests of the adopted child “shall be of paramount consideration”); MONT. CODE ANN. § 36-1-101(d) (Supp. 1995) (“In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved in favor of the rights and best interests of the child . . . this part shall be liberally construed.”).
4. Whether or not one’s homosexuality will impede legal adoption depends frequently upon the jurisdiction and the personality of the judge hearing the case.
5. See FLA. STAT. § 63.042(3) (2004) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). See also MISS. CODE ANN. § 93-17-3 (2004) (“Adoption by couples of the same gender is prohibited.”). It is worth noting that the Florida and Mississippi statutes may be held unconstitutional in light of the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas’ criminal sodomy statute as unconstitutional); but see *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (affirming the constitutionality of FLA. STAT. § 63.042(3)).
6. See *In re Appeal in Pima County Juvenile Action*, 727 P.2d 830, 834 (Ariz. Ct. App. 1986) (holding that sexual orientation of the adopting parent was an appropriate factor to consider); *In re Adoption of J.M.G.*, 736 P.2d 967, 970 (Mont. 1987) (homosexual relationships of the biological father were legitimate evidence of his emotional and mental health).
7. See *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (court noted the following: (1) the homosexual parent’s “exposure of the child to his immoral and illicit relationship” (*id.* at 694), (2) the homosexual father “impose[s] an intolerable burden upon [the child] by reason of . . . social condemnation” (*id.*), and (3) statement by lower court that “this [homosexual] relationship . . . flies in the face of society’s mores” (*id.* at 693) (emphasis added); but see *Bottoms v. Bottoms*, 444 S.E.2d 276, 283 (Va. Ct. App. 1994) (court noted “[T]he social science evidence showed that a person’s sexual orientation does not strongly correlate with that person’s fitness as a parent. No evidence was presented to refute these studies . . .”); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980) (reversing the trial court’s finding that mother’s homosexual household would

course about the use of morality arguments and scientific research to evaluate parental fitness and the best interests of the child. This paper suggests that morality arguments, scientific research and normative family arguments—as they are currently constructed—provide an inherently flawed and inadequate framework for examining gay parenting. The traditional family law framework sets gay parents up for inevitable failure by centering the parenting discourse around the heterosexual marital-unit and requiring gay parents to conform. I argue that using the analytical tool of shared humanity would provide a more comprehensive and effective look at family structures without setting non-heterosexual-marital families up for failure. “Shared humanity” theory fosters connections across differences while still honoring diversity among families, thereby enabling a more honest examination of the best interests of the child.

Part I discusses how morality arguments devalue gay parenting by relying on unfounded assumptions about homosexuality, which galvanizes group fears of disrupted heterosexual privilege and authority. Part II reveals how proponents of gay parenting have used scientific research on gay parenting successfully, since the overwhelming body of research indicates no specific harm attributable to gay parenting. The second part of Part II discusses how current research methodology and analysis maintains heterosexual authority by denying gay parenting inherent value independent of heterosexual parenting. The conclusion discusses the law’s unwillingness to reflect the variety of modern family forms and to respect non-marital family formations. The conclusion also explains and offers the theory of shared humanity as a tool for judicial inquiries into the best interests of the child. While “shared humanity” cannot completely resolve the many legal, social and emotional obstacles standing in the way of un-stigmatized gay parenting, it should serve as a model for critical and progressive thought in other arenas where non-traditional families seek acceptance and protection from the law.

## I. MORALITY

Morality arguments within the context of gay parenting discourse have misled the “best interests of the child” investigation. Instead of addressing the valued skills related to parenting, morality arguments focus on the valued status of the parent. Morality arguments rely on unfounded assumptions about homosexuality and serve primarily to denigrate homosexual identity. Proponents of morality arguments effectively maintain and promote status hierarchy in society; they portray heterosexuality as central and marginalize non-conformists beyond the point of legal recognition. By instilling fear about homosexuality, opponents of gay parenting call for stronger reinforcement of heterosexual norms. They imply that social acceptance of homosexuality will threaten the very framework upon which society has been built, and that current status structures will shift, removing power and authority from those who currently define the acceptable worldview (i.e., heterosexuals). Essentially, proponents of moral-

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create instability that would adversely affect the children’s welfare, where no evidence of such harm was presented).

ity arguments seem less concerned with protecting the best interests of children than with protecting the authority of those in power.

Opponents of gay parenting rely on morality arguments to support their claim that homosexual parents, by virtue of their sexual orientation, cannot serve the best interests of the child.<sup>8</sup> The following Part will deconstruct a few of the more frequently cited morality claims, revealing how reliance on moral arguments ignores the best interests of the child through obsessive emphasis on homosexuality's deviant status. Morality arguments will also be examined in terms of their social and political force in the popular construction of deviant homosexual identity.

One of the more popular morality arguments lodged against gay parenting is that gays are unnatural. The assumption underlying this argument is that human beings have "natural" tendencies to do certain things, such as to engage in procreative heterosexual sex.<sup>9</sup> The unnatural argument implies that parenting is:

the natural consequence of "biology," invoking a concept of the family as a naturally occurring unit of "man and wife" and their biological children . . . . [Gay parenting is unnatural] because it represents a challenge to and, an attempt to disrupt, this "natural" order.<sup>10</sup>

The unnatural argument glosses over the subjective moral claims inherent in defining "natural" or "unnatural." The "unnatural" argument "reinforces common sense beliefs about the universality and 'naturalness' of social constructs such as the nuclear family."<sup>11</sup> This argument fails to articulate or to reveal any harm or causal connection between such harm and the "unnatural" behavior of the parent. It merely serves to articulate homosexuality's deviant status.

Another common morality argument used against gay parenting is that homosexuals are not adequate role models. This argument assumes that children need both male and female role models.<sup>12</sup> Concerns over gender role development stem from a recognition, however reluctant, that appropriate gender roles are learned and enforced through family makeup.<sup>13</sup> In-

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8. See *Roe*, 324 S.E.2d at 693-94; *Lundin v. Lundin*, 563 So. 2d 1273, 1275 (La. Ct. App. 1990) (noting trial testimony that "[i]t is preferable that [children] . . . have good roll [sic] models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected."); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (One issue for the court was "whether or not the fact that the custodial parent is homosexual or bisexual will result in an increased likelihood that the children will become homosexual or bisexual.").

9. Victoria Clarke, *What About the Children?: Arguments Against Lesbian and Gay Parenting*, 24 WOMEN'S STUD. INT'L FORUM 555, 560 (2001).

10. *Id.*

11. *Id.* at 561.

12. This argument assumes that heterosexual parents do in fact provide their children with both male and female role models, regardless of whether single heterosexual parents marry or couple with a member of the opposite sex.

13. Another perceived consequence of the "lack of role modeling" argument is gay parents' inability to relate to the child's "difficult transition to heterosexual adulthood." *State Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993), quoted in Mark Strasser, *Legislative Presumptions and Judicial Assump-*

terestingly, the role-model argument tends to target lesbians primarily, as the discourse regarding the role of fathers in the family has intensified in reaction to increased numbers of single mothers.<sup>14</sup> A male presence in the household seems to be connected to the notion of learned gender roles. Lesbian parenting stands as a double-threat to heterosexual authority since it not only suggests that same-sex parents are as legitimate as opposite-sex parents, but that a parenting structure without *men* is just as legitimate. Lesbian parenting therefore threatens both heterosexual and male authority.

An additional perceived consequence of homosexual parenting is that children of homosexuals will suffer from social stigma. While children may in fact be taunted or suffer other adverse reactions from those who disapprove of their parents' sexual orientation, the argument that gays should cease parenting does little to ameliorate the lives of children who are bullied because of their family characteristics. The Supreme Court already rejected this kind of argument in a custody dispute between two biological parents where the biological mother had married a member of a different race and the child suffered harassment.<sup>15</sup> The Court stated: "The Constitution cannot control these prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect . . ." <sup>16</sup> Social stigma arguments should similarly fail in the case of homosexual parents since stigma arguments give legal effect to social prejudices.<sup>17</sup> Society—as it is currently constructed—supports and accepts such institutionalized stigmatization—facilitating the eradication of deviancy by those who have the authority to define "deviancy" in the first place. Essentially, this argument

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*tions: On Parenting, Adoption, and the Best Interest of the Child*, 45 KAN. L. REV. 49, 75 (1996). This assumes not only that gay parents cannot relate to issues of developing sexuality among children, but also that all children grow up to identify as heterosexual or that those who do not are simply not entitled to situationally reflective role-modeling because heterosexual parents are, in fact, able to relate to their homosexual child's difficult transition into adulthood.

14. Such emphasis on the role of a male figure "seems to suggest that any model of maleness is preferable to none and that the presence of a male is more important than the caliber of their parenting." *Cox*, 627 So. 2d at 1220.
15. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).
16. See *id.* at 433 (reversing state court's divesting a natural mother of custody over her child because of her remarriage to a person of a different race).
17. Another aspect of the social stigma argument is the assumption that homosexuals spread HIV/AIDS to their children. See *In re Adoption of Charles B.*, 552 N.E.2d 884, 891 (Ohio 1990) (Alice Robie Resnick, J., dissenting), noting that possible exposure to HIV is evidence of potential harm to child, even though the gay parent tested negative for the virus. She noted that the petitioning parent "falls within a high-risk population for AIDS." She also states, "I am aware of research on this issue which shows that homosexuals can be effective parents." *Id.*) Notice how this assumption associates, labels, and limits HIV/AIDS to a particular group, just like the molestation argument. The HIV/AIDS argument would hardly survive judicial scrutiny if applied explicitly to a racial group, even though members of that group might be at higher risk for contracting HIV/AIDS than any other group. For an in-depth discussion of the argument that homosexuals spread HIV/AIDS, see Lauren Schwartzreich, *Redefining the Discourse on Homosexual Parenting: Status, Privilege and the Heterosexual-Marital Unit* (2004) (on file with author).

signifies that as long as one group has the authority to define what is acceptable, that group may require others to comport with the status quo.

One final morality argument used against homosexual parenting is that children of homosexuals will grow up gay. This argument plays off of the role-modeling argument in its assumption that all children normally grow up to be heterosexual. The “homosexuals’ children will grow up gay” argument expands the role model argument by insisting that homosexuality is a learned trait stemming from contact with other homosexuals.<sup>18</sup> Although most gays come from heterosexual households, opponents of gay parenting contend that gay parents will influence their children in such a way so as to encourage them to be gay, or that gay parents will inevitably “confuse the child.”<sup>19</sup> This argument assumes that all people are “‘naturally’ heterosexual unless corrupted by some outside force.”<sup>20</sup> The argument does not—however—indicate general harm to a child, other than the stigma associated with being homosexual. Therefore, proponents of this argument conjure up a fictional harm to children: the “tolerance and acceptance toward homosexuality that the parent evinces.”<sup>21</sup> Arguments that children will grow up gay because they have gay parents reveal a deep concern and fear that tolerance of homosexuality will inevitably lead to disruption of the status quo. If society or the law demonstrates indifference toward—or possibly support for—homosexuality, heterosexuality will no longer have the same kind of privilege over homosexuality.

While the aforementioned morality arguments appear to have little merit, they inevitably creep into the judicial decision making process in adoption cases. Moral conclusions are implicit in the fact-specific case-by-case analysis family law requires from individual judges. Consequently,

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18. Another aspect of this role model argument is that homosexuals are inclined to molest children. See *In re Appeal in Pima County*, 727 P.2d at 838 (Howard, J., dissenting) (“There is no evidence to support the court’s comments regarding sexual interest in children or the conclusion that a bisexual or homosexual person is more likely to harbor such abnormal intent than a heterosexual . . . [T]he majority of . . . sexual acts committed upon children are committed by adult heterosexual males.”); see also *J.L.P.(H.). v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (the court refused to award a homosexual father custody and dismissed his expert’s testimony, noting: “[e]very trial judge . . . knows that molestation of minor boys by adult males is not as uncommon as the psychological experts’ testimony indicated.”) See also Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J. L. & FAM. STUD. 59 (2004) (arguing that the homosexuality of a parent creates a heightened risk of molestation to the child). If protecting children were the ultimate goal of this argument, however, one would logically conclude that the group of adults committing the lowest number of reported molestations (lesbians) would be encouraged to parent, and the group committing the highest number of reported molestations (heterosexual men) would be prohibited from parenting. See Jodi Bell, *Prohibiting Adoption by Same-Sex Couples*, 49 *DRAKE L. REV.* 345, 359 n.123 (2001); for an in-depth discussion of the molestation argument, see Lauren Schwartzreich, *Reframing the Discourse on Homosexual Parenting: Status, Privilege and the Heterosexual-Marital Unit* (2004) (on file with author).

19. Clarke, *supra* note 9, at 564.

20. *Id.* at 565.

21. Carlos Ball & Janice Farrell Pea, *Warring with Wardle: Morality Social Science, and Gay and Lesbian Parents*, 1998 *U. ILL. L. REV.* 253, 288 (1998).

it is somewhat unrealistic to argue that issues of morality must be excluded from the adjudicative process involving families and children when morality . . . is at the very core of a judicial determination that seeks to evaluate whether a particular household . . . is in the best interest of the children involved.<sup>22</sup>

Recognizing that morality can be a relatively invisible part of judicial determinations, depending on whether the judge articulates her moral concerns, courts should actively examine the ways in which, by whom and for what purpose morality arguments have been framed. Frequently, morality arguments have been defined and promulgated by members of dominant groups who seek to maintain the status quo for their own personal benefit.

Kenneth Karst, in *Law, Cultural Conflict, and the Socialization of Children*, reveals the exploitive nature of current morality debates. He argues that politicians evoke fears regarding socialization of children in order to motivate constituency bases.<sup>23</sup> Karst's work reveals how political and religious leaders have established gay parenting as a highly emotional topic, galvanizing strong reactions at a grassroots level. An examination of Karst's work should be helpful since judges may be influenced by popular opinion—which has itself been formed by political rhetoric.<sup>24</sup>

Exploring the political forces that orchestrate the network of fear surrounding children reveals the motivation behind those who wield morality arguments against gay parenting. In considering the morality arguments traditionally set forth by opponents of gay parenting,<sup>25</sup> Karst argues that three consistent strands run through the cultural conflict over gay parenting: morality, authority and group status.<sup>26</sup> The morality strand serves as a tool to justify maintenance of the status quo:<sup>27</sup> as long as homosexuality is labeled immoral, any efforts to suppress homosexuality are justified. Whether or not gay parenting is immoral remains ultimately irrelevant since the label of "morality" can be applied at the whim of those who have the power to define morality in the first place. Those who have authority or power also have the privilege of framing and defining the morality debate. Those who fear homosexuality's undermining of traditionally authoritative meanings of gender are "not just concerned about morality, but also . . . about preserving the authority of a culturally defined world view."<sup>28</sup> Those who define the worldview are also beneficiaries of the

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22. *Id.* at 268.

23. Kenneth Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 971 (2003).

24. Judges are often elected by popular vote or are appointed by elected officials; their stance on gay parenting therefore may be heavily influenced by popular sentiment.

25. Karst, *supra* note 23, 973–82 (such as the child developing homosexual interests and behaviors).

26. *Id.*

27. For a similar discussion of morality arguments being used to bolster the dominance of a particular group, see JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1st ed. 1963). This book focuses on the Temperance movement and contends that "[i]ssues of moral reform are analyzed as one way through which a cultural group acts to preserve, defend, or enhance the dominance and prestige of its own style of living within the total society." *Id.* at 3.

28. Karst, *supra* note 23, at 976.

dominant worldview. This group includes “politicians and politically-oriented ministers who want to mobilize religious conservatives as a constituency and keep them mobilized.”<sup>29</sup> These social leaders draw upon the authority of religion to establish *political* authority (the legitimate exercise of power), and *cultural* authority (the authoritative definition of meanings).<sup>30</sup> Political authority can be seen in the passing of legislation to prohibit or limit certain activities, such as homosexual sodomy or same-sex marriage. Cultural authority therefore provides the groundwork for concrete expressions of political authority.

Political and cultural authority buoy the political rhetoric against gay parenting by expressing support for the current power hierarchy and warning of the disruptive threat homosexuality poses to the current power structure. For this reason, the symbolic acceptance of homosexuality frightens the powerful elite.<sup>31</sup> If it were to legally recognize gay parents, the law would symbolically legitimize homosexuality and open the door to a host of criticisms that question the ordered status of social groups in American society. Those in power fear that once the symbolic shift occurs, status will be reshuffled and those who currently have the authority to define the worldview will no longer have such authority. By nurturing fears about the socialization of children, these social leaders galvanize group status anxieties and mobilize those seeking to preserve current forms of “acceptable” socialization of children, which they mistakenly believe reflects their personal lifestyles.

As political leaders fan the flames of group anxiety,<sup>32</sup> they present their constituency with the ideal image of power: law. For these politicians, “law, as the classic popular symbol of authority and power, is easily portrayed as a threat of punishment that will force the unorthodox to abide by conventional understandings of authority and morality . . . law’s command can express the dominance of Our group over Them.”<sup>33</sup> By electing the politician who panders to this view, the powerful group expresses its desire to reinforce the current status structure. In the context of gay parenting, courts should be wary of morality arguments that merely serve to reinforce status structures. These value judgments are simply products of political and social power struggles. They do not further the best interests of the child.

## II. SCIENCE

Scientific research has had a tremendous impact on gay parenting litigation. Since gay parenting is a relatively new area of law, many judges

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29. *Id.* at 977.

30. *Id.*

31. See Karst, *supra* note 23, at 977 (“the symbolism of group status that is mainly at stake in this dispute over adoption law”).

32. Alison Mitchell, *Controversy Over Lott’s Views of Homosexuals*, N.Y. TIMES, June 17, 1998, at 24 (Senator Lott compares homosexuality to alcoholism, “sex addiction,” and kleptomania); David Greene, *President Opposes the Legalization of Same-Sex Marriages; Bush Supports Efforts to Write Law Limiting Union to a Man and a Woman*, BALT. SUN, July 31, 2003, Telegraph, at 8a. (Bush states, in response to a question regarding homosexuality, that he is “mindful we are all sinners.”)

33. *Id.*



accept expert testimony and other scientific evidence related to gay parenting in making their decisions.<sup>34</sup> The majority of scientific research currently available indicates no difference in parenting skills or style among homosexual and heterosexual parents and no difference in personal development among children of homosexual and heterosexual parents;<sup>35</sup> this has proved helpful for gay parents in the litigation process. However, scientific research has recently come under fire by both opponents and proponents of gay parenting.

Opponents of gay parenting criticize the individual scientific studies as methodologically flawed because they rely on small or self-selected samples.<sup>36</sup> The methodological critiques are not persuasive, however, given the context in which scientists must perform their research. Proponents of gay parenting—who also criticize scientific studies of gay parenting—emphasize that the structure and analytical framework of these studies are flawed. They argue that the majority of studies on gay parenting set gay parents up for inevitable failure by using heterosexuality as the control group and endeavoring to prove that homosexual parents are either similar to or different from heterosexual parents. This sameness-difference discourse devalues gay parenting, overlooks its unique benefits to the child and to society, and denies gay parenting its own inherent value. Furthermore, the sameness-difference discourse does little to change the hierarchical status structure that places heterosexuality at the center of our value system and turns the “best interests of the child” inquiry into a static, rigid, and purely heterosexual framework. In other words, sameness-difference discourse assumes that heterosexual parenting is *always* in the best interests of the child.

Courts in family law cases frequently express concern over the psychological well-being of children raised by homosexual parents.<sup>37</sup> Scientific studies relating to children’s mental health are therefore helpful to courts. Since many courts question how a parent’s *homosexuality* influences a child’s emotional development, judges look primarily at studies comparing children and parenting styles of homosexual parents in contrast to children and parenting styles of heterosexual parents. They never explic-

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34. See Sonja Larsen, *Adoption of Child By Same-Sex Partners*, 27 A.L.R. 5th 54, 61 (2004).

35. See Charlotte Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 197 n.33 (1995) (citing six studies which conclude that children of homosexuals develop no differently from children of heterosexuals); but see Paul Cameron & Kirk Cameron, *Children of Homosexual Parents Report Childhood Difficulties*, in 90 PSYCHOL. REP., 71–82 (Feb. 2002); Lowell Brubaker, *Comment on Cameron and Cameron (2002): “Children of Homosexual Parents Report Childhood Difficulties,”* in 91 PSYCHOL. REP., 331–32 (Aug. 2002) (examining the findings of the Cameron and Cameron study, and concluding that the consequences documented should not be considered psychological trauma, since they are more in the nature of the teasing and bullying that accompanies being perceived as having an atypical family).

36. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

37. See *In re Marriage of Williams*, 563 N.E.2d 1195, 1197 (Ill. App. Ct. 1990) (granting custody to heterosexual parent, noting his desire to provide a “moral upbringing, self-esteem, and the traditional type of family setting” for the child); *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 840 (N.Y. Fam. Ct. 1994) (one issue was whether gay parenting would cause “psychiatric disturbances,” or “behavioral and emotional problems”).

itly question how a parent's *heterosexuality* might shape a child's emotional development.

Nevertheless, researchers have found that gay parents exhibit many of the same parenting skills as heterosexual parents. For example, an analysis of several studies on gay parenting found that gay fathers exhibited few differences in parenting styles and attitudes from heterosexual fathers and that lesbian mothers were indistinguishable from heterosexual mothers in terms of psychological well-being.<sup>38</sup> Charlotte Patterson, a professor of psychology, looked at the major childhood development concerns raised by judges in custody and adoption proceedings, analyzed several studies accordingly and found that children of gay parents develop gender identity no differently than children of heterosexual parents,<sup>39</sup> report feelings of attraction toward members of the same sex in similar proportions as children of heterosexual parents, and experience personal development in ways similar to children of heterosexual parents.<sup>40</sup> Some differences between children of homosexual and heterosexual parents have been found as well; however, the differences appear negligible and frequently indicate unique benefits to children of gay parents.<sup>41</sup>

The most common critiques of these studies refer to flaws in methodology, such as small sample sizes, samples of convenience, lack of control groups, etc.<sup>42</sup> In response to these critiques, some researchers took the entire body of available research on gay parenting, accounted for small sample sizes, analyzed the findings, and published a meta-analysis of the completed works.<sup>43</sup> The researchers providing the meta-analysis found that even though it offered no *conclusive* proof for any particular claim, "the data support[s] those arguing for a lack of impact on the basis of sexual preference of the parent when making custody/visitation decisions."<sup>44</sup> Science supports the notion that a parent's *homosexuality* does not harm a child.

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38. See Ellen C. Perrin, The Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002) (finding greater concern evinced by lesbian mothers than divorced heterosexual mothers in providing male role models for their children).

39. *Id.* at 341–44.

40. *Id.*

41. *Id.* The authors also noted that children of lesbian mothers were slightly more likely to consider having a same-sex partner, and more of them had been involved in a same-sex relationship, "but in each group similar proportions of adult men and woman identified themselves as homosexual." *Id.* at 342.

42. See R. E. Redding, *Sociopolitical Diversity in Psychology: The Case for Pluralism*, in 56 AM. PSYCHOLOGIST 205 (Mar. 2001) (arguing that research supporting gay and lesbian parenting is problematic due to small sample sizes, self-selected sample, subjective self-reporting and lack of longitudinal data).

43. See Charlotte Patterson, *Lesbian and Gay Parenting*, available at <http://www.apa.org/pi/parent.html> (Mar. 21, 2004). Since forty-three empirical studies exist in this area, "the strength in the interpretation of results of each of these studies is in considering the findings as a whole." S. Craig Rooney, *Examining Redding's (2001) Claims About Lesbian and Gay Parenting*, 57(4) AM. PSYCHOLOGIST, 298–99 (Apr. 2002).

44. Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 J. HOMOSEXUALITY 19, 29–30 (1996).

The law should be precluded from denying parental rights to a group of people without sufficient evidence of harm to a child. In other words, the burden of proof should fall upon the party seeking to prevent an adoption by reason of the petitioning party's membership in a particular group.<sup>45</sup> A blanket prohibition against a particular group<sup>46</sup> should not be permissible as a default standard because it competes with and sometimes works against the "best interests of the child" standard. It seems only reasonable that the "best interests of the child" standard trump any blanket prohibition against a particular group of potential and actual parents.

Concerns regarding small sample size or self-selecting samples arise in part because of the stigma suffered by homosexuals. One author notes, "it is difficult to obtain large, representative samples because many subjects are not willing to identify themselves as homosexual."<sup>47</sup> Critics who argue that scientific research on gay parenting has been tainted by bias attempt to raise the bar for scientific studies so high that it would effectively eliminate most—if not all—empirical research and studies, including those that do not even address gay parenting.<sup>48</sup> Furthermore, "the view that totally value-free work will actually be achieved has been criticized as scientifically naïve for some time."<sup>49</sup> Therefore, critics who argue that bias taints scientific results in support of gay parenting provide no reasonable ground upon which to justify dismissal of these studies.

Interestingly, opponents of gay parenting "require that more lesbian and gay households be studied before the law sanctions 'homosexual parenting' while at the same time suggesting that the law make it as difficult as possible [for homosexuals] . . . to adopt."<sup>50</sup> One author argues somewhat similarly—in an article on same-sex marriages—that granting rights to "same-sex practices and marriages . . . precipitously, without full democratic ventilation and experimentation, will only exacerbate the current turmoil . . ."<sup>51</sup> The social and legal reluctance to accept homosexual

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45. Considering that in many of the gay parent adoption cases—particularly the second-parent adoption cases—the gay parent will continue to serve as the child's parent irrespective of whether the law recognizes their parent-child relationship, it is reasonable to demand that the burden of proof shift to the party seeking to prevent the adoption. Shifting the burden of proof to the non-petitioning party serves the best interests of the child by requiring affirmative evidence of harm.

46. See statutes cited *supra* note 5.

47. Ball & Pea, *supra* note 21, at 274; see also Rooney, *supra* note 43, at 298–99 ("[F]ears of being too openly public about their parenting statuses because of custody concerns . . . can make lesbian and gay parents a more difficult sample for researchers to obtain. Such difficulties may result in the need for self-selected samples."); Perrin, *supra* note 38, at 341–44.

48. See Rooney, *supra* note 43, at 298–99 ("By suggesting that the entire body of research examining outcomes of children raised by gay and lesbian parents is questionable for these reasons, he [Redding] raised the bar for psychological research to unrealistic levels. If all of psychological research were held to this standard, much of it would be discounted.")

49. Ball & Pea, *supra* note 21, at 274.

50. See *id.*

51. John Witte, Jr., *Response: Reply to Professor Mark Strasser*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 43–46 (Lynn D. Wardle, Mark Strasser, William C. Duncan & David Orgon Coolidge eds., 2003); see also Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 980 (Mass. 2003) (Sosman, J., dissenting) ("The Legislature can rationally

parenting parallels the social and legal reluctance to validate homosexual marriages: we must first study gay parenting (marriage) before we make it legal in order to avoid social backlash against gay parenting (marriage). This argument, as applied to gay parenting, creates an impossible situation for gay parents: they should not become parents until there is adequate scientific evidence of their ability to parent appropriately. However, “adequate” research and “full democratic ventilation” cannot be achieved until we prevent the legal, social and political stigmatization of homosexuality. Only when gay parenting is legalized across the nation will social stigma subside enough for effective scientific research or full democratic ventilation to occur.

Interestingly, proponents of gay parenting offer a different critique of scientific research that looks beyond mere sample sizes to the construction of the scientific comparison. They argue that scientific evidence of gay parents’ ability to parent like heterosexual parents merely reinforces the expectation that gay parenting must fit into a heterosexual model in order to be considered a valued form of parenting. Debating whether gay parents parent similarly or differently from heterosexual parents requires homosexuals to fit into a heterosexual model—which by definition they can never accomplish. The sameness-difference discourse alienates the debate over gay parenting from the “best interests of the child” examination by focusing on the outsider *status* of the parents as opposed to their *value* as parents. Only by moving away from the sameness-difference model can homosexual parenting be evaluated in terms of the best interests of the child and possibly valued for its unique non-traditional parenting structure.

The body of research studying gay parents and their children *compares* gay parents and their children to straight parents and their children. By relying upon the comparison of homosexual to heterosexual these studies endeavor to prove one of the following points: homosexual parenting is no different than heterosexual parenting; it is different from heterosexual parenting and deviant; it is different from heterosexual parenting in a good way; or it is only different from heterosexual parenting because of oppression.<sup>52</sup> The labeling of homosexual parenting as either similar to or different from heterosexual parenting reveals a polarizing framework incompatible with valuing gay parents.

Focusing on similarities between gay and heterosexual parents does create some political benefits for gay parents by pulling them closer to the norm of heterosexuality. Yet focusing or relying on these similarities frames the parenting discourse with heterosexuality at its center. Sameness arguments pull homosexuality closer to the center—closer to heterosexuality—but the structures and institutional supports that reproduce and rein-

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view the state of the scientific evidence [of the effects of gay parenting on children] as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes . . . . The Legislature . . . [may] wish to see the proof before making a fundamental alteration to that institution.”)

52. See Victoria Clarke, *Sameness and Difference in Research on Lesbian Parenting*, 12 J. COMMUNITY APPL. SOC. PSYCHOL. 210 (2002).

force heterosexuality remain intact and critical to the discourse.<sup>53</sup> The more one argues that homosexuals are just like heterosexuals, the more one reinforces the notion that being heterosexual is ideal, if not required.<sup>54</sup> The sameness argument also disregards the diversity of the homosexual population by effectively ruling out certain sub-sections of homosexuals—the least heterosexual-looking homosexuals.<sup>55</sup>

In contrast to the sameness model, the “different and deviant” model argues that the differences between homosexual and heterosexual parents are “numerous, significant, and indicative of lesbians’ and gay males’ deviance and pathology.”<sup>56</sup> The different and deviant model offers no potential value for gay parenting. Heterosexual parenting preempts the field, leaving no room for other kinds of parenting.<sup>57</sup>

The “different and transformative” model moves beyond the short-sightedness of the different and deviant model by arguing that there are “inherent and unique benefits of lesbian mothering, distinct from patriarchal mothering.”<sup>58</sup> Lesbian parenting challenges the ways in which homosexual parenting has been devalued by reclaiming and embracing the concept of “different.”<sup>59</sup> While the “different and transformative” model values the diversity and radical nature of gay parenting, it has the potential to be misunderstood and misused politically. Opponents to gay parenting cite the goal of transforming patriarchal society as an indicator of gay parenting’s dangerous threat to heterosexuality’s privileged status, and of their inability to parent “appropriately,” meaning: like heterosexuals.

The final model, “different only because of oppression,” insinuates that any discernable difference is not chosen; it has been socially imposed through oppression. Consequently, gay families are ultimately the same as heterosexual families.<sup>60</sup> Implicitly, once the oppression of homosexuality ceases, gay families will no longer be different.<sup>61</sup> The “different only because of oppression” argument is essentially identical to the “sameness” argument, and it is thus subject to similar criticisms. “Different only because of oppression” appeals to mainstream society since it focuses on

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53. See *id.* at 869 (“This [‘sameness’] model has as its reference point traditional gender norms (and biases), and it makes abnormal any relationships other than heterosexual ones.”).

54. See *id.* (“Equality [‘sameness’] theory demands line-drawing, . . . embracing an ideal model and using it to draw lines to distinguish among sexual others.”)

55. Because the sameness approach attempts to “normalize” homosexuals, it requires them to quietly assimilate while silencing their intra-group difference. See Clarke, *supra* note 52, at 212.

56. *Id.* at 213.

57. Like the sameness model, the different and deviant model places heterosexuality at the center of the parenting discourse. However, the different and deviant model removes *any* indicators of sameness, thereby pushing homosexuality out of the parenting discourse altogether.

58. Clarke, *supra* note 52, at 214.

59. *Id.* at 215. In this sense, homosexual parenting is anything but similar to heterosexual parenting, since homosexual parenting suggests “utter transformation” of patriarchal society.

60. *Id.*

61. *Id.* at 216.

underlying similarities, yet it still denies the positive qualities associated with variation.<sup>62</sup>

Since the sameness-difference discourse essentializes homosexual parenting and requires assimilation into the heterosexual framework, the sameness-difference discourse is neither a sufficient nor ideal model for examining gay parenting.<sup>63</sup> The drive to discover whether or not homosexual parents are similar or different from heterosexual parents is fueled by a political climate that valorizes the nuclear family.<sup>64</sup> It says nothing about what aspects of heterosexuality indicate fitness of a parent or interests of the child. If gay families were moved from the margin to the center of the debate,<sup>65</sup> scientific research would examine the parental qualities or skills that indicate good parenting in order to answer the following questions: What is a family? What is a parent? How are gay parents oppressed?<sup>66</sup>

#### CONCLUSION: CHANGING THE PARADIGM

The law has historically structured the notion of family around a heterosexual marital unit. The law's focus on the marital unit was so strong that any child's legal status depended upon her or his parents' marital relationship.<sup>67</sup> Family law, in this sense, has been primarily concerned with adult relationships,<sup>68</sup> not with relationships between adults and their children. As society expresses heightened concern over the best interests of the child, it seems only logical that the family paradigm should shift toward emphasis upon the relationship between the adult and the child. Interestingly, while the "best interests of the child" standard is currently in use for adoption cases in every jurisdiction throughout the United States, it continues to be both implicitly and explicitly pre-empted by the traditionally recognized family form—the heterosexual marital unit.

The law currently provides many legal protections for a child's relationship with her or his parents, as long as the parents are married.<sup>69</sup> The further a child's parent deviates from this heterosexual marital norm, the

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62. *Id.*

63. *Id.*

64. *Id.*

65. For an in-depth discussion of the benefits of such a strategy, see BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (2d ed. 2000).

66. Clarke, *supra* note 52, at 216.

67. For instance, in early common law, children born to unwed mothers were considered "bastard" children, or *fillius nullius* [the son of no one], and such children were socially and economically disadvantaged, having no right of inheritance. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 79–80 (1995).

68. When the law distinguished between children who came from marital homes and those who did not, it sought to "protect the exclusivity of the marital unit and to punish adults (particularly women) who engaged in sex outside of marriage." Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1448 (1992).

69. Even though the Supreme Court has condemned the *de jure* practice of treating children differently due to their parent's marital status, the law has continued to do so, *de facto*. See FINEMAN, *supra* note 67, at 148 ("While children of unmarried parents are more apt today to be labeled 'nonmarital' [as opposed to 'illegitimate,'] the focus is still the same—the child is defined by the relationship between the parents.").

fewer her chances for legal recognition of her child-parent relationship.<sup>70</sup> The majority of American families, however, no longer fit the traditional nuclear model embodied in the legal marital unit of husband-wife.<sup>71</sup>

In response to the changing demographics of the American family, some courts have taken a more functional approach to family law in an effort to reflect the changing familial needs of society.<sup>72</sup> The functional approach emphasizes the relationships between individual household members and defines family according to the expectations these individuals have in relation to one another. While the functional approach provides a more flexible framework that courts can use to address family law issues such as gay parenting,<sup>73</sup> it does not resolve the constant tension between the idealized heterosexual marital unit and the majority of American society, which no longer reflects the traditional nuclear family model. The functional approach continues the heterosexual-marital legacy by acknowledging the sexual nature of the adult relationship as the foundation of the family.<sup>74</sup> Once again, non-traditional families—especially families with homosexual parents—are left trying to fit into a static framework wholly incapable of supporting them. The heterosexual-marital status structure remains

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70. The marital prerequisite for legitimacy has a unique impact on homosexual parents, highlighting the fact that most homosexual parents cannot legitimate their children through marriage. *But see* Pam Belluck, *Same-Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1 (discussing same-sex marriages in several U.S. states).

71. According to the 2000 Census, fewer than 24% of American homes were composed of husband, wife, and children less than eighteen years of age. Moreover, there are a significant number of homes in which unmarried couples reside. In 2000 there were 5.5 million unmarried partner households, and only 4.9 million of these were made up of heterosexual couples. While it is difficult to pinpoint the exact number of children being raised by gay parents, it is estimated that 1 to 9 million children are currently being raised by gay parents, or, put differently, 1 to 12% of American children are raised by a gay parent. Molly Cooper, Student Note, *Gay and Lesbian Families in the 21st Century: What Makes a Family?: Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 178–80 (2004).

72. *See In re Adoption of Baby Z.*, 724 A.2d 1035, 1076 (Conn. 1999) (Berdon, J., dissenting): “[T]he traditional American nuclear family of a married couple and their own children has been subsumed by a range of alternatives . . . . ‘Across the nation, state courts are reexamining the roles of biological ties and other relationships in the family. Courts consider those relationships against a background of new techniques, medical advances, and evolving life styles.’” (quoting Stewart Pollack, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 609 (1996)).

73. *See Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 54 (N.Y. 1989) (“[A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of ‘family’ and with the expectations of individuals who live in such nuclear units.”).

74. *See FINEMAN*, *supra* note 67:

To a large extent, the new visions of the family merely reformulate basic assumptions about the nature of intimacy. They reflect the dyadic nature of the old (sexual) family story, updating and modifying it to accommodate new family “alternatives” while retaining the centrality of sexual affiliation to the organization and understanding of intimacy.

*Id.* at 147.

intact and precludes effective investigation into the best interests of the child.<sup>75</sup>

In the remaining pages I propose an analytical tool—"shared humanity"—to facilitate the "best interest of the child" inquiry and bring the "best interests of the child" standard to the center of the parenting discourse. "Shared humanity" reframes the debate over gay parenting by putting the child and her family, rather than the heterosexual-marital unit, at the center of the discussion. By locating the unique, non-traditional family at the center of the debate, judges can reassess and reexamine various indicators for the best interests of the child. While "shared humanity" permits some level of moral decision making, the value judgments used in "shared humanity" theory have less to do with the social status of the parent than with valued parenting skills or qualities unrelated to sexual orientation or marital status. Scientific research—using multiple control groups, and based on factors other than sexual orientation—may be used in the "best interests of the child" determination in order to demonstrate that this particular family structure is conducive to the best interests of the child. Furthermore, the relationship between the parents of the child may or may not be of concern in the analytical process, depending upon whether the court finds a connection between the parents' relationship and the best interests of the child.

In *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, Nancy Levit reframes the debate over gay parenting through the theory of "shared humanity." Levit states that "shared humanity" "seeks to create respect for humans—their shared needs, relationships, choices, and differences . . . ."<sup>76</sup> She urges that the law move beyond a model of mere tolerance of homosexual parenting to one of incorporation. She argues:

Shared humanity theory begins from a different premise. It looks for common characteristics of individuals relative to the purpose of law . . . . In what ways do people seeking to adopt make good parents?—but it also requires an open-minded inquiry into and acceptance of individual differences and a careful examination of the way differences are turned into detriments.<sup>77</sup>

By looking at how differences are turned into detriments, "shared humanity" theory enables courts to deconstruct traditional morality arguments as well as different and deviant arguments. Since similarities among hu-

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While a great deal of emotionally charged rhetoric in family law is directed at children, the primary focus is still on maintaining the traditional heterosexual family model . . . . Attention and concern initially directed at children too often is deflected to the adults with whom they live who have failed to form or maintain a [hetero]sexual connection [with each other] . . . . The dominance of the idealized sexual family in social and legal thought has restricted real reform and doomed us to recreate patriarchy.

*Id.*

76. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 911–12 (2000).

77. *Id.* at 914.



mans are so numerous, courts should reason that “once the plaintiff shows differential treatment on the basis of group belonging [i.e., homosexual], the burden is on the entity differentiating [i.e., the party trying to prevent adoption by that parent] to justify the differences in treatment.”<sup>78</sup> When the non-petitioning party attempts to justify its position by arguing that the best interests of the child would be served by denying the adoption because the homosexual parent is not a good or fit parent, the court should inquire into those qualities that make a good parent, “good” being defined rationally, empirically and humanistically.<sup>79</sup>

According to “shared humanity,” courts may still use many of the same tools they have used for years, such as morality and scientific research, while examining the best interests of the child. Morality and scientific arguments, however, will no longer be centered around privileging heterosexuality for the sake of maintaining status.<sup>80</sup>

Levit’s “shared humanity” theory attempts to overcome the drawbacks of the sameness-difference model by respecting identity differences while paying attention to the process of cultural construction of differences, “both of which necessitate the understandings that identities are fluid, knowledge is contextual, and truths can be a matter of perspective.”<sup>81</sup> By using reason and empirical evidence from a variety of disciplines, “shared humanity” distinguishes between “appropriate and inaccurate constructions of identity differences.”<sup>82</sup> Levit concludes that the “formal equality model [“sameness”] will fail to transform the status of sexual others as long as they are perceived as ‘different’ from straights, while the outsider or antistubordination [“difference”] model tends to feed perceptions of difference.”<sup>83</sup> A family law model that moves beyond the sameness-difference discourse will enable courts to remove gay parents from the shadows of heterosexual privilege.

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78. *Id.*

79. *Id.* at 916, 926 (Levit argues that shared humanity enables rational, empiric and humanistic inquiries since it “requires initial identification with other group members. It is easier to understand the situations of others or take their perspective when one perceives others as having their own goals, interests and affects; in short . . . the reality is that we are more likely to empathize with people similar to ourselves.”) (internal citations omitted).

80. For example, courts will no longer look at studies comparing homosexual parents to heterosexual parents; instead, empirical evidence should examine indicators of good parenting, such as: “stability, constancy, nurturing ability, and other child-rearing skills.” *Id.* at 918. In terms of psychosocial development, courts should ask whether any features of a parent’s lifestyle positively promote the best interests of the child, including consideration of extended kinship communities.” *Id.* at 918–19 (noting that these extended kinship families characterize not only some homosexual familial relationships, but also some African American and Indian family relationships). Use of this kind of empirical evidence coincides with the state’s primary goal of protecting the best interests of the child—more so than making sexual orientation either a dispositive factor or a trigger for a presumption against gay parenting. *Cf. Wardle, supra* note 36, at 893–97 (calling for a codified rebuttable presumption that parenting by homosexuals, who are currently in a homosexual relationship, is not in the best interests of the child).

81. Levit, *supra* note 76, at 870.

82. *Id.*

83. *Id.* at 868–69.

Critics of “shared humanity” allege that this model may lead courts to essentialize and to assimilate homosexuality, “ignor[ing] distinctive cultural identities and valoriz[ing] the choices of the dominant culture.”<sup>84</sup> Levit addresses these concerns by suggesting a “bottom-up” political and legal strategy that would prioritize the shared humanity of those who are most marginalized: the transgendered.<sup>85</sup> This bottom-up strategy—which recenters the “best interests of the child” examination around the most-marginalized family—recognizes and gives voice to diverse family constellations, thereby increasing the potential range of legally recognizable parents. The bottom-up strategy of implementing “shared humanity” also enables courts to look beyond gender, sexual orientation, class, race and disability, in order to determine the best interests of the child.<sup>86</sup>

The heated debate over gay parenting has little to do with the best interests of the child, and everything to do with heterosexual marriage. Morality arguments against gay parenting have diluted the “best interests of the child” standard and moved children out of the courtroom spotlight, replacing them with attacks on “gay parenting.” The classical morality arguments levied against “gay parenting” have effectively disregarded the “parenting” aspect of the term. Homosexuality—rather than parenting—dominates the parenting discourse.

Legal recognition of gay parenting as an adequate form of family structure symbolizes the diminishing prowess of compulsory heterosexuality. The real concern expressed by opponents of gay parenting is not necessarily acceptance of homosexuality *per se*, but a shift in status structure. Maintaining the power and authority of one group should not be considered a legitimate justification for denying certain families legal rights.

Consider family discourse as a circle with the heterosexual-marital unit located in the middle. Non-traditional families are moved inside or outside the circle depending upon their similarities to or differences from the heterosexual-marital norm. This Article suggests that the heterosexual-marital model is too static and ultimately irrelevant to the “best interests of the child” inquiry. Shoving non-heterosexual-marital families into a heterosexual-marital model is difficult, messy, immaterial and irrationally discriminatory. Instead of forcing diverse family structures into an inflexible, rigid mold, family law should embrace a more free-form vision of family.

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84. *Id.* at 920.

85. *Id.* at 928 (“Perhaps one way to search for commonalities while focusing on difference—to keep humanist strategies from slipping into mainstreaming—is to concentrate greater attention on gender hybrids or the transgendered, who . . . are about as far outside the law as you can get in the United States today.”) (internal citations omitted).

86. Centering marginalized groups within the family discourse comports with other legal theories that endeavor to protect racial, cultural and other marginalized groups by emphasizing the experiences of those who are most marginalized. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* [1989], in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 57, 73 (Katharine T. Bartlett & Rosanne Kennedy eds., 1998) (arguing that if the law would address “the needs and problems of those who are most disadvantaged, . . . then others who are singularly disadvantaged would also benefit”).

Releasing “family” from the heterosexual-marital bind may frighten those who insist that heterosexual-marriage continue to serve as the basis for legal family construction. However, the law should acknowledge the root of these fears—the loss of status and privilege—and recognize that American families who no longer reflect the heterosexual-marital model need to be set free from its constraints.

Removing the heterosexual-marital unit from the center of family discourse will enable a more honest approach to the “best interests of the child” examination. “Shared humanity” theory allows a court to address the valid concerns regarding child welfare without permitting the heterosexual-marital model to overshadow the examination of valued parenting skills and qualities necessary to provide for the best interests of the child. Free-form family law not only serves to ameliorate the stigma associated with gay parenting, it also provides the legal groundwork for reexamination of the legally sanctioned stigmatization of single-mothering, poly-parenting, same-sex marriages and polygamous marriages. Family law should no longer be permitted to relegate modern families into second-class status. All families should be valued according to their merit without having to prove their proximity to the traditional hetero-marital norm.

