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IS THERE A LINK BETWEEN ADOPTION AND SAME-SEX MARRIAGE?

William C. Duncan¹

Symposium on Lofton and the Future of Lesbian and Gay Adoption

Stetson University College of Law

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I. Introduction

It has been remarked that while jurisdictions in the United States have been willing to allow for adoption by same-sex couples while at the same time refusing to create legal status for same-sex couples, other Western countries have followed the opposite approach.² However, many of the recent decisions on the definition of marriage have described the allowance of same-sex adoption as relevant to the question of whether the state is required to redefine marriage as the union of any two persons. Often, this asserted relevance is as a means of rebutting the state's claim that its marriage policy promotes important state interests.

In the past, I have written about the implications of marriage for adoption.³ In this article, however, I will reverse the focus and discuss the implications of adoption law

¹Director, Marriage Law Foundation. I am grateful for the research assistance of Melanie Joy Barrett and Sara Lucas.

²See Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy* 24 ST. LOUIS U. PUB. L. REV. 169, 186 (2005).

³William C. Duncan, *Marital Status and Adoption Values* 6 J. L. & FAM. STUDIES 1 (2004).

for the law of marriage. The article will describe the discussion of the relevance of adoption policy for the law of marriage in the litigation to redefine marriage, then assess the court rulings treatment of the matter. This will lead to a description of an alternative understanding of the implications of adoption law for state marriage policy.

II. Emerging Conventional Wisdom?

Although the number of states with specific statutory or case law provisions allowing for joint adoptions by same-sex couples is still relatively small, the trend of change in adoption law is clearly favorable to such adoptions.⁴

Not surprisingly, many of the jurisdictions with court-created joint adoption for same-sex couples have also seen cases seeking a redefinition of marriage to include same-sex couples. In some of the opinions stemming from this litigation, judges have addressed the possible relevance of state recognition of

⁴See CONN. GEN. STAT. §45a-724; MASS. GEN. LAWS ANN. Ch 210, §1; VT. STAT. ANN. Tit. 15, §1-102; Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003); In re Hart, 806 A.2d 1179 (Del. Fam. Ct. 2001); In re M.M.D., 662 A.2d 837 (D.C. Ct. App. 1995); In re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004); Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super 1995); In re Christine G., 644 N.Y.S.2d 1016 (N.Y. App. Div. 2d Dept. 1996); In re Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002). There are, however, a number of states that do not allow joint adoptions by same-sex couples. FLA. STAT. §62.042(3); MISS. CODE ANN. §93-17-3; UTAH CODE ANN. §78-30-1; In re Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996); In re Adoption of Luke, 640 N.W.2d 374 (Neb. 2002); In the Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994).

joint adoption for same-sex couples for the legal definition of marriage.

So, for instance, the Vermont Supreme Court, which had created standing for same-sex couples to adopt jointly in 1993,⁵ raised the issue of joint adoption in its opinion in a case brought by seven same-sex couples to compel the state to issue them marriage licenses.⁶ The matter of adoption is discussed in the context of proffered state interests in maintaining the legal definition of marriage as the union of a man and a woman. In its opinion, the court characterized the state as arguing that it has an interest in “promoting child rearing in a setting that provides both male and female role models.”⁷ The court then countered that many same-sex couples are raising children and that the state sanctions this by allowing them to adopt children.⁸ Thus, to the court, the state’s argument “that Vermont public policy favors opposite-sex over same-sex parents . . . [is] patently without substance.”⁹

A subsequent case in Massachusetts sought the same result.¹⁰ In that case, the majority characterized the state as arguing that its marriage law was justified by interests in (1) “providing a ‘favorable setting for procreation’” and (2) ensuring the optimal

⁵In re B.L.V.B., 628 A.2d 1271 (1993).

⁶Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

⁷Id. at 884. I am not convinced that this is a fair characterization of the state’s argument but will not address that question here. See William C. Duncan, *The State Interests in Marriage* 2 AVE MARIA L. REV. 153, 164-171 (2004)

⁸Id.

⁹Id. at 884-885.

¹⁰Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

setting for child rearing.”¹¹ In responding to the first asserted interest, the majority pointed to the fact of adoption by same-sex couples to argue that procreation cannot be central to marriage.¹² The point seems to be that if the state countenances any child rearing by couples who did not bear children through natural reproduction, the state cannot assert there is any link between marriage and procreation. In regards to the second asserted interest, the court again pointed to adoption by same-sex couples, but this time to establish that the state had declared (by allowing such adoptions) that parenting by married couples and same-sex couples must be equivalent.¹³

More recently, a New Jersey appeals court rejected claims for a constitutionally-mandated redefinition of marriage.¹⁴ However, the dissent raised the question of adoption in an attempt to rebut the majority’s mention of the conventional wisdom that marriage provides “the optimal environment for child rearing.”¹⁵ The dissent argues that this “ignores the reality of present family life parenting which includes adoption.”¹⁶ Again, while not explicit, this seems to be an argument that the mere existence of adoption prevents a finding that marriage may be a normative setting for child rearing.

The focus of this symposium is on yet

¹¹Id. at 331.

¹²Id. at 332.

¹³Id. at 339.

¹⁴Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005).

¹⁵Id. at 285 (Collester, J.A.D., dissenting).

¹⁶Id.

another case that addresses adoption and marriage. In *Lofton v. Secretary of the Department of Children and Family Services*,¹⁷ the court rejected a facial challenge to Florida’s law which forbids adoption by homosexual individuals. In weighing whether Florida had a rational basis for its law, the court noted the state’s argument that “the statute is rationally related to Florida’s interest in furthering the best interests of adopted children by placing the in families with married mothers and fathers” which the state argues would “provide the stability that marriage affords and the presence of both male and female authority figures.”¹⁸ Thus, to this court, promoting marriage was, in itself, a rational reason for the state’s adoption law.

These contrasting themes set up the focus of the next section which critiques what seems to be an emerging conventional wisdom among those who favor a redefinition of marriage, that by allowing same-sex couples to adopt, the state has undercut any argument that marriage between a man and a woman could be of any benefit to children.

III. The Logic of Marriage and the Logic of Adoption

To assess the validity of this conventional wisdom requires a comparison between the internal logic of adoption and the internal logic of marriage as each relates to procreation and child rearing.

A. Adoption: Parenthood by Intent

As the *Lofton* court recognized, adoption is a positive statutory creation: “Unlike biological parentage, which precedes and transcends formal recognition by the state,

¹⁷358 F.3d 804 (11th Cir. 2004).

¹⁸*Id.* at 818.

adoption is wholly a creature of the state.”¹⁹ In contrast to ancient legal regimes which employed adoption as a way of benefitting adults (such as by providing heirs), the relatively recent creation of adoption in United States law has emphasized the needs of children.²⁰ Historically, this included policies designed “to shape the adoptive family according to the nuclear family model” and to “fashion adoption in imitation of procreation.”²¹

Importantly, for a child to be eligible for adoption, she must have had her legal relationship with at least one parent dissolved, whether through death or some kind of termination of parental rights (including a relinquishment of those rights).²² Even in joint adoptions, such as those by same-sex couples, state laws still require an analysis to determine that the adoption would be in the best interest of a child. This contrasts starkly with the legal rule that a natural parent is presumed fit, absent evidence to the contrary. When a child is born, no state agency visits the hospital to certify that it would be in the best interest of a child to stay with her parents. In the context of adoption, though, this is precisely what the state is asking before it will legally establish that a prospective adoptive parent is the legal parent of a child.

¹⁹*Id.* at 809.

²⁰See William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law* 31 CAPITAL U. L. REV. 787, 788 (2003).

²¹Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform* 66 MO. L. REV. 527, 606 (2001).

²²HOMER H. CLARK, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS 320 (7th ed., 2005).

This policy reflects the state's heightened responsibility for child well-being in the context of adoption, since the state itself will be creating the parent-child relationship rather than merely recognizing a biological fact. In some cases, the child being adopted is also a ward of the state.

Adoption is thus a way of creating intentional parentage. The state must intentionally create a legal mechanism for creating adoptive parents, a prospective parent must intend to adopt the child and the state must intentionally approve and formalize the adoption.

B. Marriage: Parenthood by Default

Marriage, rather than being a creation of the state (like adoption) is an organic social institution. As Professor F.C. DeCoste notes, the state cannot "claim ownership" over marriage:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke's Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives.²³

²³F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage* 42 ALBERTA L. REV. 4, 18 (2005) (citations

Also in contrast to adoption, marriage creates parentage without the need for a specific formalization. A child born to a married couple is assumed, without more, to be the child of the husband and wife.

If adoption is justified by the state's desire to provide for children whose relationship with their natural parents has been interrupted, what is the justification for marriage? A recent statement of family scholars points out:

Marriage exists in virtually every known human society. Exactly what family forms existed in prehistoric society is not known, and the shape of human marriage varies considerably in different cultural contexts. But at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society. While marriage systems differ (and not every person or class within a society marries), marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.²⁴

omitted).

²⁴WILLIAM J. DOHERTY, WILLIAM A. GALSTON, NORVAL GLENN, JOHN GOTTMAN ET AL., *WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9* (Institute for American Values 2002).

In a dissent from the Massachusetts Supreme Judicial Court's decision that redefining marriage was mandated by the state constitution, Justice Cordy further describes the importance of marriage as related to procreation and child-rearing:

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating

a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.²⁵

Whereas adoption presupposes a breakdown in the natural family, marriage works to prevent such a breakdown by encouraging those who engaged in potentially procreative behavior to commit to each other and the children that may result from their union. So, where adoption promotes children's welfare by providing parents where none (or only one) exist, "[t]he primary way that legal marriage protects child well-being, social science suggests, is by increasing the likelihood that the child's own mother and father will stay together in a harmonious household."²⁶

C. Implications of Differing Logic

The logic underlying adoption is that when a child does not have one or both parents,

²⁵Goodridge v. Department of Public Health, 798 N.E.2d 941, 995-996 (Mass. 2003) (Cordy, J., dissenting) (citations omitted).

²⁶Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* 2 U. ST. THOMAS L. J. 33, 50-51 (2004).

the state needs to provide the best possible substitute to ensure the well-being of the child. The logic of marriage, as it relates to parenthood, is quite different. Marriage is recognized by the state because it channels the procreative behavior of men and women into an institution which is most likely to promote child well-being. Another way to state this point is that “[t]he public legal union of a man and a woman is designed . . . to protect the children that their sexual union (and that type of sexual union alone) regularly produces.”²⁷

What does this mean, then, for the consensus among judicial opinions questioning the constitutionality of marriage (noted above) that a state’s decision to allow same-sex couples to adopt necessitates a finding that the state cannot resist a constitutional mandate to redefine marriage as the union of any two people? At the very least, that emerging consensus must be questioned in light of the very different sets of logic justifying adoption on the one hand and marriage on the other.

As Professor Lynn Wardle has noted, “[a]doption is for the benefit of children for whom the linkage of procreation to child-rearing has already failed, so it makes no sense to evaluate any adoption law in terms of the state interest in fostering that linkage.”²⁸ Justice Cordy notes that the presupposition of adoption makes it irrelevant for assessing the relevance of the state’s attempt to link marriage and procreation: “The eligibility of a child for adoption presupposes that at least one of the

²⁷Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law* 62 LA. L. REV. 773, 782 (2002).

²⁸Lynn D. Wardle, *The Curious case of the Missing Legal Analysis* 18 BYU J. PUB. L. 309, 342 (2004).

child’s biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has ‘lost’ the optimal setting in which to raise that child—it is simply not available.”²⁹

In addition, the intentional nature of adoption provides a strong contrast with the goals of marriage which include trying to manage the fact of an important potential *unintentional* result of attraction between men and women—pregnancy. Even with the wide availability of contraceptive technology, unintended pregnancies are not uncommon.³⁰ Both the mothers and children in these circumstances experience a significant degree of vulnerability if they have no legally defined tie to the biological father through marriage. As noted by a majority opinion in an Indiana Court of Appeals case rejecting a claim for redefining marriage:

Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. ‘Natural’ procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for

²⁹*Goodridge v. Department of Public Health*, 798 N.E.2d 941, 1000 (Mass. 2003) (Cordy, J., dissenting).

³⁰See Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World* 23 QUINNIPPIAC L. REV. 447, 454-456 (2004).

a woman to become pregnant.³¹

Even in the absence of unintended pregnancies, a strong social institution of marriage promotes aspirational norms of commitment of men to the women that may become the mothers of their children, and vice versa. This is true because the marital norm of faithfulness assures that the individuals comprising non-procreative marriages are not – with anyone – procreating outside of the institution of marriage and, in that way, actually furthers a social good of ensuring that adults do not create children who will be fatherless or motherless.³² This is particularly important given the conclusion of a recent Child Trends report:

Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.³³

Given that the logic of adoption and the

³¹Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. App. 2005).

³²See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788 (2002).

³³Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* CHILD TRENDS RESEARCH BRIEF (Child Trends June 2002) at <http://www.childtrends.org/PDF/MarriageRB602.pdf>.

logic of marriage are not the same, the conclusion that some judicial opinions have advanced (that allowing same-sex couples to adopt means that the state must also redefine marriage) is without basis.

D. Confounding Logic

Not only is the conclusion flawed, but conflating the differing logics of marriage and adoption would be particularly problematic.³⁴

First, the state-centered logic of adoption (with the government weighing prospective parents and doling out parental status), if applied to marriage would mark a radical shift from the United States' legal tradition which has been based on the idea that "[t]he rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious example of rights retained by the people. They are 'natural,' 'intrinsic,' or 'prior' in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property."³⁵ The doctrine of family autonomy based on a recognition of (1) the fact of biological parenthood and (2) a recognition that parents generally act in the best interests of their children has long been recognized and valued in our legal tradition.³⁶

³⁴Indeed, this is a particularly significant problem with proposals to redefine marriage since in order for marriage to apply to same and opposite-sex couples, the norms of such things as parenthood would have to be the same although the biological facts of parenthood (natural procreation for opposite sex couples and a requirement of third-party intervention for same-sex couples) are vastly different.

³⁵In re J. P., 648 P.2d 1364, 1373 (Utah 1982).

³⁶See William C. Duncan, *State, Society and the Redefinition of Marriage* 19 THE FAMILY IN AMERICA 1 (September 2005).

Second, the adoption values of intentionality and choice would not foster the values of marriage that encourage parents to care for children regardless of whether those children are intended or even wanted. Marriage promotes children's well being because it creates an obligation (both social and legal) in their parents. Adoption also creates an obligation but only once that option is chosen by parents. This model of opt-in commitments would do little to advance the channeling function of marriage or to check the adult-centered trends in our culture.

IV. Conclusion

At its best, adoption provides the best possible substitute for children's need for a loving relationship with their biological parents. Often it also allows adults to fulfill their dreams of parenting children. Perhaps in most instances, these dreams complement a child's needs. This will be more likely when adoption is designed to replicate as closely as possible the family of which a child eligible for adoption has been deprived.

It is imperative, however, to recognize that adoption is a state policy (possibly the best one) crafted to fulfill a need that ideally would be met by a robust social institution. Here, then, is a real link between marriage and adoption. Rather than justifying a retreat from marriage, the existence of adoption points to our need for marriage as a child-centered status. In a stronger marriage culture, where legal recognition joins with social support to point adults towards marriage as the normative setting for procreation and child-rearing, the need for an alternative legal arrangement would be significantly ameliorated. Perhaps most importantly, there would be fewer children in the situation of having their needs unmet

because they are not even given the option of being adopted. Adoption is needed precisely because of the powerful biological forces that marriage seeks to channel into socially productive behavior.

We properly honor adoptive parents when they selflessly provide what should have been a child's. And, we honor our obligation to children when we promote a legal recognition of that birthright-parentage by a loving mother and father who are committed to each other and to their child.