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# THE USE AND ABUSE OF SOCIAL SCIENCE IN THE SAME-SEX MARRIAGE DEBATE

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On Monday May 17, 2004, Hillary Smith Goodridge, 48, and Julie Wendrich Goodridge, 46, were married in Boston. They needed more than their mutual commitment to get to the altar. They fought for their right to wed as the lead plaintiffs in the landmark case that permitted gay marriage in Massachusetts. At the wedding, a mutual friend who first introduced them to one another remarked: "You introduce a couple of people, you maybe encourage them a bit, and what happens? A national crisis. The fault line for the presidential elections. The coming of Armageddon."[1]

The *Goodridge*[2] case unleashed, if not Armageddon, a cultural storm with political and legal ramifications that are impossible to calculate. Comparisons to *Brown v. Board of Education*[3] have been made, encouraged by the fact that the first marriage licenses authorized by the *Goodridge* decision were issued on May 17, the fiftieth anniversary, to the day, of *Brown*. Commentator Andrew Sullivan wrote in an op-ed piece in the *New York Times* on that day that "both *Brown* and this new day revolve around a single, simple and yet deeply elusive idea: integration."[4] Gay marriage, he explained, meant the integration of families with their own gay members and the partners they love; the integration of gay people into the civil status of marriage; and the integration of homosexual citizens into the mainstream institutions of American life.

The same-sex marriage issue became a part of presidential election year politics when President George W. Bush delivered a speech on February 24, 2004, declaring his support for an amendment to the constitution that would define marriage exclusively as a

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1. *Weddings/Celebrations*, N.Y. TIMES, May 23, 2004, at 15.
2. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
3. 347 U.S. 483 (1954).
4. *Integration Day*, N.Y. TIMES, May 17, 2004, at A21.

union between a man and a woman. He asserted: "Ages of experience have taught humanity that the commitment of husband and wife to love and to serve one another promotes the welfare of children and the stability of society."[5]

In court cases and in the national political debate over same-sex marriage, both proponents and opponents regularly appeal to social science to support their positions that the welfare of children is well-served or ill-served by same-sex marriage. Although each side would love to have a conclusive, scientific "silver bullet" that eliminates all doubt, no definitive answers reside in social science research. Not only judges, but voters considering ballot initiatives, legislators evaluating proposed bills, and ordinary citizens attempting to assess the material they read in their daily newspapers must know how to weigh the social science claims made by advocates on both sides.

This article will focus on the problematic use of social science to make claims about the welfare of children in the same-sex marriage debate. After showing the reasons why no definitive answers are afforded by the social science so far available, I will suggest how some conclusions can nevertheless be drawn about the well being of children if same-sex couples are permitted to marry.

Some useful perspective can be gained by first looking back at two other controversies in our history in which advocates enlisted science in the service of legal and political positions. The first is the controversy over interracial marriage; the second is the debate over eugenics and involuntary sterilization.

## I. Science in the Interracial Marriage Debate

A cautionary lesson may be drawn from the experience with the use of science in the struggle over state anti-miscegenation statutes. The first court to overturn a statutory ban on interracial mar-

5. *Bush's Remarks on Marriage Amendment*, N.Y. Times, Feb. 25, 2004, at A18 (full transcript). The version of the Amendment under active consideration in Congress at the time, introduced by Rep. Marilyn Musgrave, stated:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

riage was the Supreme Court of California, in *Perez v. Lippold*.[6] It did so over a vigorous dissent by three judges. The dissent, authored by Justice Shenk, cited numerous scientific reports to show that the legislative judgment banning interracial marriage was based upon respectable scientific opinion. The cited articles appeared in well regarded professional journals, including the Journal of the American Medical Association, Science, the American Journal of Physical Anthropology, and the Encyclopedia Americana. Justice Shenk quoted experts to support the proposition that "crossing of the primary races leads gradually to retrogression and eventual extinction of the resultant type unless it is fortified by reunion with the parent stock."[7] Professor J.W. Gregory at the University of Glasgow was quoted as finding that "the intermixtures which have been beneficial to the progress of mankind have been between nearly related peoples and that the results of a mixture of widely divergent stock serve to warn against the miscegenation of distinct races."[8] Justice Shenk further credits Professor Gregory with the notion that "where two such [widely distinct] races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny, a principle widely expressed in modern eugenic literature."[9]

Following the same line of argument, Justice Shenk described an extensive study done in Jamaica by a team of scientists who studied:

> [i]n detail and comparatively, 100 each of adults of full-blooded Negroes (Blacks), Europeans (Whites), and White-Black mixtures of all degrees (Browns). Half of the hundred were of each sex. In addition to the main project some 1200 children of school and pre-school age were observed and measured. Finally in 1929, an extensive report was published by the Carnegie Institution, in book form entitled "Race Crossing in Jamaica," by B.C. Davenport and Morris Steggerda, in collaboration with others. The results of their investigation indicated that

6. 198 P.2d 17 (Cal. 1948).

7. *Id.* at 44.

8. *Id.*, *citing* J.W. GREGORY, THE MENACE OF COLOR 227 (1925).

9. *Id.*

> the crossing of distinct races is biologically undesirable and should be discouraged.[10]

Justice Shenk offered sociological insights to bolster the biological contentions. A Harvard academic, W.E. Castle, contributed this insight:

> If all inheritance of human traits were simple Mendelian inheritance, and natural selections were unlimited in its action among human populations, then unrestricted racial crossing might be recommended. But in the light of our present knowledge, few would recommend it. For, in the first place, much that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features.[11]

From these studies Justice Shenk concluded:

> The foregoing excerpts from scientific articles and legal authorities make it clear that there is not only some but a great deal of evidence to support the legislative determination . . . that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power. There may be some who maintain that there does not exist adequate data . . . to enable a decision to be made as to the effects of the original admixture of white and Negro blood. However, legislators are not required to wait upon the completion of scientific research to determine whether the underlying facts carry sufficient weight to more fully sustain the regulation.[12]

The majority, under the leadership of Justice Roger Traynor, noted that discriminatory notions of racial superiority were long part of California legal history. He cited the 1854 decision of the California Supreme Court that justified a ban on Chinese persons testifying against white people in court. The decision referred to the Chinese "as a race of people whom nature has marked as infer-

10. *Perez*, 198 P.2d at 45.

11. *Id., quoting* W.E. Castle, *Biological and Social Consequences of Race Crossing*, 9 AM. J. OF PHYSICAL ANTHROPOLOGY 152 (1926).

12. *Id.*

ior, and who are incapable of progress or intellectual development beyond a certain point"; further, their "mendacity is proverbial."[13] Traynor rejected assertions of racial inferiority, including those based upon a supposed concern for future generations of children born of interracial marriages. He likened the arguments to those made in the oft-cited case of *Scott v. State*, which stated:

> The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.[14]

Traynor found modern experts rejected such an observation. A concurring justice, commenting on the "medico-eugenic" evidence in the case, wrote: "A great deal has been written and said about the desirability or undesirability of racial mixtures. The writers seem to be in such hopeless conflict that their lack of bias may well be questioned."[15]

The U.S. Supreme Court took another nineteen years to deal the death blow to anti-miscegenation statutes outside California. In that case, *Loving v. Virginia*,[16] the State Attorney General was still clinging to arguments of experts that the intermixing of the races would be detrimental to legitimate state interests, including the welfare of children.[17] The Virginia Attorney General, Robert Y. Button, cited the 1959 case of *State v. Brown*,[18] which expressed its solicitude for the offspring of such marriages in these words:

> A state statute which prohibits intermarriage or cohabitation between members of different races . . . falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is

13. People v. Hall, 4 Cal. 399, 405 (1854).
14. 39 Ga. 321, 323 (1869).
15. *Perez*, 198 P.2d at 33.
16. 388 U.S. 1 (1967).
17. Brief for Appellee at 35, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).
18. 108 So.2d 233 (La. 1959).

> no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[19]

The court's quotation about the children's likely feeling of inferiority is taken, incredibly enough, from the law's most important case promoting integration of the races, *Brown v. Board of Education.*[20] The segregationists deployment of arguments about the welfare of children was merely a tactical move in the ideological campaign to maintain a discriminatory legal and social system.

## II. Science in the Eugenics Era

The eugenics movement in scientific circles had a profound impact on the law in the first half of the twentieth century. Belief in the ability to improve the gene pool supported the passage of involuntary sterilization statutes in a number of states. Mentally impaired persons were the primary target of these statutes. The result was the disastrous deprivation of reproductive rights to tens of thousands of loosely defined "feeble minded" people. Some states sterilized persons who committed one of an ever growing list of offenses and conditions, which included certain specified crimes, such as alcoholism, drug addiction, and even blindness and deafness, on the theory that these conditions were inherited. The sterilization laws would prevent those conditions from being passed on to the next generation. Over thirty states had these laws, with California and Virginia leading the way in the actual performance of coerced sterilization operations.[21]

Even Justice Oliver Wendell Holmes, Jr. was taken in by the questionable science of eugenics, as evidenced by the unfortunate opinion he authored in *Buck v. Bell*,[22] which upheld the constitutionality of Virginia's involuntary sterilization law. Holmes's description of the children of the mentally impaired is so callous as

19. *Id.* at 234.

20. 347 U.S. 483 (1954).

21. For a compelling overview of the eugenics movement and the case of *Buck v. Bell*, 274 U.S. 200 (1927), see Stephen J. Gould, *Carrie Buck's Daughter*, 2 Const. Com. 331 (1985).

22. 274 U.S. 200 (1927).

to be shocking to the modern reader. "It is better for all the world," he wrote, "if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough."[23] Justice Souter's recent concurrence in *Tennessee v. Lane*,[24] includes *Buck* in a series of court decisions upholding laws discriminating against persons with mental disabilities. These laws sometimes prevented disabled children from attending public school.[25]

The *Buck* decision, based on flawed science and on accepted social prejudice, is bad enough. What made the particular case of Carrie Buck so utterly tragic was the fact, discovered many years later by scholars like Professor Paul Lombardo of the University of Virginia Law School, that Carrie Buck was not mentally handicapped at all, but rather was a poor woman of normal intelligence, sent to the "State Colony for Epileptics and Feebleminded" to have her illegitimate baby.[26] School records indicated that her daughter, Vivian Buck, the third generation cited by Holmes, was also of perfectly sound mind. Another family member, Carrie's sister Doris, had also been sterilized, but had been told that her operation was for appendicitis.[27]

Eugenic sterilization found continued favor in Nazi Germany, but its popularity in the United States eventually faded. In the 1942 case of *Skinner v. Oklahoma*,[28] the Supreme Court remarked:

> The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.[29]

23. *Id.* at 207.
24. 541 U.S. 509 (2004).
25. *Id.* at 1995 (Souter, J., concurring).
26. *See* Gould, *supra* note 21.
27. *Id.* at 335.
28. 316 U.S. 535 (1942).
29. *Id.* at 541.

## III. Scientific Expertise in the Same-Sex Marriage Debate

The experience with eugenic sterilization and with interracial marriage bans illustrates the dangerous pressure that prejudice and science, working together, can exert on the law.

In our times, opponents of same-sex marriage have called upon scientific experts to testify that same-sex marriage will harm children. Whenever social science reinforces popular prejudice, the social science must be subject to the most searching scrutiny. Because the position that same-sex marriage would damage the well being of children is aligned with the long tradition of anti-gay bias in this country, it deserves careful examination. I will also scrutinize the shortcomings of expert testimony offered in support of same-sex marriage, to fully explore the role of social science in this controversy.[30]

For illustration, I will choose some examples from two prominent same-sex marriage cases, *Baehr v. Miike*[31] and *Goodridge v. Department of Public Health*.[32]

In *Baehr*, Judge Chang of the Circuit Court of Hawaii described the expert testimony offered by the State and by the plaintiffs. The first state witness, Dr. Kyle Pruett, a psychiatrist, was an expert in child development. He discussed his study of intact families in which children were raised primarily by their fathers. He concluded that the children were "competent and robust in their development, and are not sources of clinical concern."[33] The doctor added some generalizations about the special contributions that fathers can make in childrearing and the benefits that biological parents bring to parenting. The study Pruett described consisted of only fifteen families. While the doctor's finding is unsurprising, the sample is too small to draw any reliable generalization about all families with fathers who take primary care of children. Further, when the sample is so small, one wonders how he selected the fami-

30. The need to explore the validity of social science, even when used to combat social prejudice, is highlighted by the debate over the use of social science in *Brown*. For a discussion on the *Brown* controversy, see Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and The Supreme Court's Quest for Legitimacy*, 54 Stan. L. Rev. 793 (2002).

31. 1996 WL 694235 (Haw. Cir. Ct. 1996).

32. 798 N.E.2d 941 (Mass. 2003).

33. *Baehr*, 1996 WL 694235, at *4.

lies for study. Often selection is from a group that is atypical of the whole population, with important characteristics not widely shared by the group. Finally, the study tells nothing about gay and lesbian families, except by implication (i.e., that lesbian families, lacking fathers, are deficient). Nevertheless, Dr. Pruett conceded that "in general, gay and lesbian parents are as fit and loving as non-gay persons and couples," that "single parents, gay fathers, lesbian mothers, adoptive parents, foster parents and same-sex couples can be, and do become, good parents," and that "gay and lesbian parents are 'doing a good job' and that 'the kids are turning out just fine.'"[34]

Another state witness, Dr. David Eggebeen, offered expertise in sociology and demographics. He equated children in same-sex families with children in step-families, and described the greater risks such children are at for economic poverty, conduct disorders, poor school performance, and teenage pregnancy. But Dr. Eggebeen, no doubt on cross examination, had to concede that some same-sex family situations are not at all comparable to step-families. Step-families usually are created after the birth of one of the new spouse's children, and adjustment issues can be expected to arise. Adjustment problems are avoided when the two same-sex partners are together prior to the birth of the child. Further, step-family formation often follows a painful divorce that may have traumatized the children, causing difficulty for any new family arrangement. The step-family analogy fails to take account of such significant differences in family environments.

Dr. Eggebeen also tried to characterize cohabiting same-sex couples as less stable than married couples. Judge Chang noted that the only basis for this conclusion was a chart in a book. The information in the chart was twenty years old.[35] Even with more reliable data, it is plausible to think that same-sex cohabitation might differ in stability from same-sex marriage, making data about cohabitation of little relevance to predictions about the stability of same-sex marriages.

Next, the state presented Dr. Richard Williams, a psychologist with a specialty in research methods and statistics. He offered criti-

34. *Id.* at *5.
35. *Id.* at *8.

cism of studies of gay and lesbian parenting that the state anticipated the plaintiffs would rely upon. Dr. Williams lost all credibility in the court's eyes because he expressed broad distrust of the entire field of psychology and disdained social science in general; as for the theory of evolution, he claimed there was no scientific proof it had ever occurred. Ironically, Dr. Williams accurately identified three major problems with studies of gay and lesbian families, summarized in the judge's opinion as: "(1) there was non-representative sampling of heterosexual, gay and lesbian parents; (2) inadequate sample size was employed; and (3) comparison groups used in the studies were not comparable in terms of household makeup."[36] The court found the witness's opinions about science in general so outlandish that it missed the value of the specific testimony he offered.

Finally, the state called Dr. Thomas Merrill, an expert in the psychology of human development. He said it is important for children to learn from opposite sex parents; each parent offers a model for learning. At some times in a child's development, he theorized, his relationships with the parent of his own sex is most important, and at other times the relationship with the opposite sex parent is most important. He said insufficient information existed about the effects of gay or lesbian parenting on child development. Unfortunately, Dr. Merrill seems to have made no effort to study gay and lesbian parenting. The court noted that:

> His clinical experience with families involving one or two gay or lesbian parents is limited. Dr. Merrill has not testified as an expert in Family Court cases which involved the sexual orientation of a parent or a same-sex couple and the custody of a child. He has not participated in or conducted any study which focused on the children of gay and lesbian parents.[37]

Interestingly, when asked on direct examination "in what family structure are children most likely to reach their optimal development?" Merrill replied:

36. *Id.*

37. *Id.* at *9.

> Children are most apt to reach their optimal level of development as exhibited in terms of their adjustment as adults in a family in which there is a limited amount of strife, a maximum amount of nurturing, a maximum amount of support, a maximum amount of guidance, a maximum amount of leadership, and a very strong and intimate bond between parents and child.[38]

This apt description could of course include same-sex parents. No doubt realizing this, the state's lawyer followed up with a question that reminded the expert which side he was on: "And does the presence of the mother and father improve the likelihood that there will be a strong bond?"[39] Merrill dutifully replied: "That would be a significant part of the maximum optimum environment in which to raise a child, yes."[40]

Plaintiffs' experts in *Baehr* included Dr. Charlotte Patterson, who offered expertise in child development, particularly with respect to gay and lesbian parenting. She described her "Bay Area Family Study," a research project that showed a set of children of lesbian mothers were developing "in a normal fashion." She studied thirty-seven families in one geographic area. Whatever her conclusions — which included the positive finding of normal development and a negative finding that these children expressed feelings of greater stress in their lives — no finding can be generalized from her minuscule sample to the larger population of children of lesbian mothers. The judge reported that Dr. Patterson "agreed that the sample . . . when considering ethnic background, education, income and other socioeconomic factors, is not representative of women and all mothers in America."[41] Moreover, the sample encompassed younger children only, ranging in age from four to nine. This meant that any problems that might manifest themselves in the teenage years would be invisible. Dr. Patterson, to her credit, concluded that "the particular group of children" were developing normally, and did not try to generalize from the

38. *Baher*, 1996 WL 694235, at *10.
39. *Id.*
40. *Id.*
41. *Id.* at *13.

study (although she did testify that the research literature supported gay and lesbian parenting).

Studies sometimes artfully conclude. For example, Charlotte Patterson's conclusion, cited in *In re Adoption of Caitlin*, is expressed in these terms: "In summary, concerns about difficulties in personal development among children of gay and lesbian parents are not sustained by results of existing research."[42] And: "There is no evidence to suggest that psychological development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents."[43] The emphasis is on the lack of evidence, not on the presence of proof.

In litigation, lawyers may use studies that are little more than anecdotal in nature to make momentous claims. Josephine Ross's account[44] of the *Goodridge* case in Massachusetts describes how the state Attorney General argued, in the lower courts, that gays did not legally deserve marriage licenses, in part because of the state's interest in the children of gay parents. In one section of the state's brief, Massachusetts Attorney General Thomas F. Reilly wrote:

> In particular, adolescent girls raised by lesbian parents tend to be more sexually active and adventurous than girls raised by opposite-sex parents. Given the strong state interest in limiting teenage pregnancies, this finding alone could rationally lead the Legislature to limit marriage to opposite-sex couples.[45]

Ross tracked down the one, single study the Attorney General relied on to support this statement. It turned out to be a study done of girls who grew to become teenagers in the 1990s in England. A mere handful of girls were in the study. The researchers compared sixteen daughters of lesbians with nine daughters of heterosexual mothers. The tiny sample could hardly allow reliable conclusions to be drawn about English girls brought up by lesbians or straights,

42. *In re* Adoption of Caitlin, 622 N.Y.S.2d 835, 840-41 (N.Y. Fam. Ct. 1994).

43. *Id.* at 841.

44. Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1005-06 (2002). This article was written before the *Goodridge* case was decided by Supreme Judicial Court of Massachusetts.

45. *Id.* at 1003.

much less about tens of thousands of girls in America living with lesbian parents under widely varying conditions and circumstances.

The Attorney General's misuse of the study was compounded when his brief drew a conclusion about teenage pregnancy. None of the daughters of lesbians in the study had unwanted pregnancies. The Attorney General also conveniently failed to mention the boys who were in the study; as Ross notes, "when sons were included in the statistics, there was no difference between sexual adventurousness of children from straight and gay mothers at all."[46] The Attorney General also left out the study's main conclusion, that children raised by lesbian mothers progressed well in their personal and social development in both childhood and adolescence.

Lawyers are trained not to present the whole truth, but one side's version of the truth. In their hands, social science becomes a useful tool, but not always a truthful tool.[47] Even when scientific studies themselves note the limitations to which they are subject, and caution against drawing unwarranted conclusions, lawyers can ignore such caveats, as the Attorney General apparently did in this case.[48]

## IV. Decisionmaking Guidelines

In the absence of conclusive social science that all can agree upon, society still needs to make decisions. The voters in various states face ballot measures that challenge gay marriage, the Con-

46. *Id.* at 1005.

47. For an article canvassing the many pitfalls of expert testimony, see Stephen A. Newman, *Assessing the Quality of Expert Testimony in Cases Involving Children*, 22 J. Psychiatry & Law 181 (1994). The Supreme Court's decisions in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), have added a new issue, that of the admissibility of such testimony. While this complex question is beyond the scope of this article, several articles have usefully explored the application of the judge's "gatekeeping" function to social science evidence. *See, e.g.*, Edward J. Imwinkelried, *The Meaning of "Appropriate Validation" in* Daubert v. Merrell Dow Pharmaceuticals, Inc., *Interpreted in Light of the Broader Rationalist Tradition, Not the Narrow Scientific Tradition*, 30 Fla. St. U. L. Rev. 735 (2003); Michael Risinger, *Defining the "Task at Hand": Non-Science Forensic Science After* Kumho Tire Co. v. Carmichael, 57 Wash. & Lee L. Rev. 767 (2000).

48. *See* Ross, *supra* note 44, at 1005. Reilly met with gay bar members and expressed regret about the brief's overreaching and promised the charge of promiscuity would not appear in the next appellate brief.

gress has begun hearings on the federal marriage amendment, state legislators are considering state constitutional amendments to ban gay marriage, state governors and attorneys general are issuing position statements and legal opinions, and courts across the nation are dealing with equal rights claims under their own state constitutions.

This active consideration by all three branches of government can not await a "definitive" answer from social science experts. With respect to an issue as complex as children's development, we may never get such an answer. The studies needed would have to be extensive in scope and sound in conception, with rigorous methodology and well reasoned analysis. Extensive studies are expensive, and social science rarely receives the kind of financial support that the "hard" sciences do. Even if funding were available, difficulties persist. It is not clear, for example, how to define "normal" development in children, or how to measure such variables as "self-esteem." Moreover, levels of self esteem, attachment to parents, stress, and other aspects of children's lives differ not only from child to child, but for each child over time. Longitudinal studies of a large group of children might help, but by definition these studies take years, they are expensive, and researchers tend to lose contact with the children and families over a long period of time.

Finally, the question being studied, how well children do with same-sex parenting, might be affected by the parents' marrying. As of yet, we have only a few marriages of same-sex couples, in Massachusetts, and their status is under question because of the legislature's first step toward banning such marriages by means of amendment to the Massachusetts Constitution. No study can tell us how this marriage variable will affect children, unless we allow some same-sex marriages and leave them alone for some time.

Although definitive studies are not in the offing, we can make informed decisions based on sound decision making principles and the admittedly limited information now available. I suggest four helpful principles, derived from judicial decisions in courts across the nation.

### *A. Avoid Stereotypes that Cast Doubt upon Whole Categories of People Acting in the Role of Parent*

It is not surprising that in determining the best interests of children, courts have felt it necessary to reject generalizations about parenting that tend to denigrate large categories of people. In one notable case, the Supreme Court of California reversed a custody determination in favor of a mother because it was based upon the trial court's ideas about the inability of persons with physical disabilities to carry out the responsibilities of parenting.[49] The father in the case had been raising the children after his wife left the family and failed to ever visit the children until the lawsuit, almost five years later. When the father suffered physical paralysis after an automobile accident, the mother sought a change in custody. The trial court doubted that any physically disabled man could be an adequate father. The California Supreme Court reacted emphatically to this wholesale rejection of a class of parents, stating: "It is . . . common knowledge that many persons with physical handicaps have demonstrated their ability to adequately support and control their children and to give them the benefits of stability and security through love and attention."[50] The court observed that:

> a handicapped parent is a whole person to the child who needs his affection, sympathy, and wisdom to deal with the problems of growing up. Indeed, in such matters his handicap may well be an asset: few can pass through the crucible of a severe physical disability without learning enduring lessons in patience and tolerance.[51]

In cases involving the placement of children, courts and legislatures are properly wary of broad generalizations. As the New York Court of Appeals memorably wrote in *Freiderwitzer v. Freiderwitzer*: "The only absolute in the law governing the custody of children is that there are no absolutes."[52] Sweeping statements about any group, be it handicapped persons, interracial couples, or homosexuals, often reflect little more than prevailing social prejudice and intolerance.

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49. Carney v. Carney, 598 P.2d 36 (1979).
50. *Id.* at 44, *quoting In re* Eugene W., 29 Cal. App. 3d 623, 629-30 (1972).
51. *Id.* at 44.
52. 55 N.Y.2d 89, 93 (1982).

### *B. Determine Children's Best Interests by Considering the Many Factors, Tangible and Intangible, that Affect Their Well-being*

Courts have long experience dealing with determinations of the best interests of children. Cases involving disputes over the parenting of children are characterized by individualized, in-depth investigations that look carefully at a variety of facts and circumstances. Rather than group caretakers into broad categories, courts try to determine the quality of individual caretakers.

Several key cases have examined the parenting ability of same-sex couples. In *In re Adoption of Caitlin*,[53] a New York family court approved adoptions by the partners of women in same-sex relationships. Each couple was composed of two intelligent, stable, mature women, who the court felt were, and would continue to be, excellent parents:

> The family environments presented in these adoption cases are warm, loving and supportive, well-suited for the nurturance of children. The Court is less concerned for the welfare of these adoptive children than for many of the children of heterosexual parents who find themselves before the Court. In short, these adoptions were granted because it was in the children's best interests to do so.[54]

Another adoption case involved two women in a long term relationship who were both members of the Harvard medical school faculty.[55] The women planned the birth of a child to one of them via artificial insemination by a known donor. They raised the child together. When they filed a joint petition for adoption, the court described their parenting qualifications and the extensive judicial hearing that took place, in these terms:

> Over a dozen witnesses, including mental health professionals, teachers, colleagues, neighbors, blood relatives and a priest and nun, testified to the fact that Helen and Susan participate equally in raising Tammy, that Tammy relates to both women as her parents, and that the three

53. 622 N.Y.S.2d 835.

54. *Id.*

55. *In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

> form a healthy, happy, and stable family unit. Educators familiar with Tammy testified that she is an extremely well-adjusted, bright, creative, cheerful child who interacts well with other children and adults. A priest and nun from the parties' church testified that Helen and Susan are active parishioners, that they routinely take Tammy to church and church-related activities, and that they attend to the spiritual and moral development of Tammy in an exemplary fashion. Teachers from Tammy's school testified that Helen and Susan both actively participate as volunteers in the school community and communicate frequently with school officials. Neighbors testified that they would have no hesitation in leaving their own children in the care of Helen or Susan. Susan's father, brother, and maternal aunt, and Helen's cousin testified in favor of the joint adoption. Members of both women's extended families attested to the fact that they consider Helen and Susan to be equal parents of Tammy. Both families unreservedly endorsed the adoption petition.[56]

The same-sex marriage plaintiffs in Massachusetts[57] featured couples who were in long term, stable relationships. One couple in the *Goodridge* case had been together for thirty years. The petitioners often served in positions of responsibility and authority in their careers and their communities. As described by the Massachusetts Supreme Judicial Court, the plaintiffs in the case "include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups."[58]

The cases make clear that same-sex couples can satisfy a rigorous inquiry as to their ability to be excellent parents. How would the right to marry affect the well-being of the large number of children who now live with homosexual parents? The marriage of their same-sex parents might positively affect these children's lives in various ways. First, it would confer significant economic and legal benefits on those children and on the households in which they live. State laws grant married couples numerous advantages, such

56. *Id.* at 317.
57. *Goodridge*, 798 N.E.2d 941 (2003).
58. *Id.* at 949.

as tax breaks and entitlement of family members to inherit under intestacy rules.[59] Health insurance plans cover family members, and employer benefits packages often include educational benefits for family members.

Dr. Jill G. Joseph, a pediatrician testifying in opposition to the proposed Federal Marriage Amendment before the Subcommittee on the Constitution of the House Judiciary Committee,[60] drew the legislators' attention to the difficulties faced by same-sex couples when their children are hospitalized. All parents, she noted, feel the stress of a child's illness, but special obstacles are now placed in the way of same-sex couples:

> For gay and lesbian families this situation carries additional and unnecessary stresses. Who has the assured right to take time off work to care for a now chronically ill child? If one parent must be home with the child, can the other provide insurance for the family? These pressing questions are complicated by the failure of our society to recognize the legitimacy of this family. Every medical form asks for the names of the mother and father. There is no line on the papers for the names of two loving and now frightened mothers waiting for the surgeon, two worried fathers taking turns holding the oxygen mask . . . . Each of us must ask whether the proposed constitutional amendment prohibiting the marriage of gay parents would support the welfare of all families and all American children, including those hundreds of thousands of children whose parents are gay or lesbian . . . . for me as a pediatrician, the answer is clear. The Federal Marriage Amendment will only hurt the well-being of children in this country.[61]

The benefits of marriage are not only legal and economic, but psychological and emotional as well. Marriage is an expression of commitment, made in public, that creates a recognized family unit.

59. A list of benefits is given in *State v. Baker*, 744 A.2d 864 (Vt. 1999); *see also Goodridge*, 798 N.E.2d at 981.

60. *Defense of Marriage Act; Gay Marriage Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th CONG. 2004, 2004 WL 871079 (F.D.C.H.).

61. *Id.*

It is universally regarded as a major life event by the participants, by their loved ones, and by society. Same-sex couples who married in ceremonies in San Francisco, Massachusetts, or elsewhere had waited years, sometimes decades, for the time to come when they could marry.[62]

Children can profit psychologically and emotionally from their same-sex parents' marriage. The partners' commitment fosters in children a sense of security. It brings happiness to the parents, and children, totally dependent on these adults, benefit when their parents' well-being improves. As the Illinois Supreme Court in *In re Marriage of Collingbourne*[63] recently observed:

> the best interests of the child cannot easily be severed from the interests of the custodial parent with whom the child resides, and upon whose mental and physical well-being the child primarily depends. Because the principal burden and responsibility of child rearing falls upon the custodial parent, there is a palpable nexus between the custodial parent's quality of life and the child's quality of life.[64]

Children's own joy at the marriage of their parents is sometimes quite touching. One thirteen-year old boy who witnessed his two moms' marriage (and participated as ring-bearer) was quoted as saying: "I felt thick inside with happiness. Just thick."[65] Another eleven-year-old child said: "It's something I always wanted. I've always been around people saying, 'Oh, my parents' anniversary is this week.' It's always been the sight of two parents, married, with rings. And knowing I'd probably never experience it ever."[66] He described the wedding ceremony: "The atmosphere was just springing with life. I just couldn't hold myself in. It was oh my god oh my

62. *See* Andrea Elliott, *They Held Out for Marriage: After 6 Decades of Decorum in Public, Gus and Elmer Eloped*, N.Y. TIMES, Dec. 16, 2003.

63. 791 N.E.2d 532 (2003); *see also* Burgess v. Burgess, 13 Cal. 4th 25 (1996); Tropea v. Tropea, 87 N.Y.2d 727 (1996) (holding that child's welfare tied to welfare of custodial parent).

64. 791 N.E.2d 532, 547 (2002).

65. Patricia Leigh Brown, *For Children of Gays, Marriage Brings Joy*, N.Y. TIMES, Mar. 19, 2004, at A14.

66. *Id.*

god oh my god. I felt so happy I wanted to scream."[67] Children may also find relief in the social acceptance that marriage of same-sex parents confers in the wider society.[68]

### C. *Avoid Using an Idealized Family Arrangement as the Legal Standard for Judging Today's Families*

The U.S. Supreme Court, in holding that parents have a fundamental right to raise children as they see fit, noted that parents might make decisions that were inconsistent with some prevailing vision of the "ideal" family.[69]

Whatever one's view of the ideal family, it is not an appropriate standard by which to measure families that live in the real world. Often the ideal itself is simply a rose-colored view of the past, with past imperfections conveniently expunged in the process of remembering. The ideal family is often a product of simpler times, fixed somewhere in the 1950s, when people seemed to conform to a set of societal norms that were reflected in classic television shows like "Ozzie and Harriet" and "Leave it to Beaver." That idealized family life, however, was forever changed by the power of social forces in the ensuing decades, including the civil rights and women's movements, the widespread acceptance of divorce, the advent of child daycare, and the creation of two-working parent families.

New York State Family Court Judge Anthony J. Sciolino expressed the point well in *In re Adoption of Caitlin*,[70] a decision that permitted adoption of a child by a homosexual couple:

> The reality, however, is that most children today do not live in so-called "traditional" 1950 television situation comedy type families with a stay-at-home mother and a father who works from 9:00 to 5:00. According to Bureau of the Census statistics, twenty-five per cent of children today are born out-of-wedlock to single women, mostly young, minority, and impoverished; half of all marriages end in divorce; and married couples with children now make up only twenty-six per cent of United States households. It is unrealistic to pretend that children can only

67. *Id.*
68. *See id.*
69. Troxel v. Granville, 530 U.S. 57, 72-73 (2000).
70. 622 N.Y.S.2d 835 (1994).

> be successfully reared in an idealized concept of family, the product of nostalgia for a time long past.[71]

Just how true the American family ideal ever was is also a matter of doubt. Our "discovery" of domestic violence, for example, has shaken some of the mythic foundations surrounding the family. The New Jersey Supreme Court, sampling the literature and statistics of domestic abuse in a 1984 case, *State v. Kelly*, remarked: "It is clear that the American home, once assumed to be the cornerstone of our society, is often a violent place."[72] The court noted:

> In enacting the Prevention of Domestic Violence Act, the New Jersey Legislature recognized the pervasiveness and seriousness of domestic violence: The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all societal and economic backgrounds and ethnic groups; that there is a positive correlation between spouse abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence.[73]

The spread of no-fault divorce has also challenged the prevailing wisdom about the ideal state of American marriage. If traditional marriage was working so well, why the astonishing rates of divorce, exceeding one million every year, sought after despite its substantial emotional toll on both spouses and their children? Those who speak glibly of the ideal heterosexual family — with mother, father, and their children living happily together — overlook the considerable turmoil in such families caused by high levels of serious conflict, wife beating, child abuse and neglect, substance abuse, and adultery.

71. *Id.* at 841.

72. 478 A.2d 364, 370 n.2 (1984).

73. *Id.* at 370.

New York Surrogate Court Judge Eve Preminger expressed the realities of today's world when she concluded an opinion approving an adoption by a same-sex couple with these words:

> Finally, this is not a matter which arises in a vacuum. Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.[74]

### *D. Don't Allow Community Prejudice to Dictate Decisionmaking About Children's Welfare*

Same-sex marriage does cause hostility in certain communities, and families headed by lesbians or gays may find themselves stigmatized. It would be unfair to use this reaction, however, to argue that these families should not be given legal protection. The treatment of racism in the community provides a useful analogy. In *Palmore v. Sidoti*,[75] the U.S. Supreme Court reversed a Florida custody ruling that took a child away from its natural mother, who was white, because she lived with and eventually married a black man. The Court acknowledged the likely existence of racial bias in the community, but refused to bow to it. "The Constitution cannot control such prejudices," the Court wrote, "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."[76]

The *Palmore* opinion echoes a similar sentiment expressed by the California Supreme Court thirty-six years earlier, when that

74. *In re* Adoption of Evan, 583 N.Y.S.2d 997, 1002 (1992).
75. 466 U.S. 429 (1984).
76. *Id.* at 433.

court struck down its anti-miscegenation statute.[77] To the argument that the statute served the salutary purpose of avoiding the racial animosity that interracial marriage would generate, Justice Traynor wrote: "It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension."[78] If individuals make the private choice to resist popular prejudice, the law should not penalize them for it.

Instead of providing a prop for prejudice, the law should show the way toward respect for others. A New Jersey superior court judge demonstrated this idea when, in the course of approving the adoption of a biological mother's child by her same-sex partner, he wrote:

> Indeed, if there is ever any harassment or community disapproval this court should have no role in supporting or tacitly approving such behavior. The court's recognition of this family unit through the adoption can serve as a step in the path towards the respect which strong, loving families of all varieties deserve.[79]

## V. CONCLUSION

There is no conclusive, scientific answer to the question of what children's development and well-being will be if society permits same-sex marriages. This is not surprising, in view of the limited nature of research done, and the difficulties of doing large scale, randomized, controlled studies. Indeed, virtually none of the changes that have dramatically affected the institution of marriage in recent times — including no-fault divorce and the entry of mothers of infants and young children into the full-time workforce — have been preceded by reliable scientific studies demonstrating the likely effects of such changes on children.

Claims by opponents of same-sex marriage that children will be harmed must be subject to the strictest examination. Past societal controversies, over eugenic sterilization and over interracial marriage, highlight the danger of relying on scientific opinion that re-

77. *Perez*, 198 P.2d 17.

78. *Id.* at 25.

79. *In re* Adoption of a Child by J.M.G., 632 A.2d 550, 552 (1993).

inforces societal biases. As Justice Brandeis once warned, "we must be ever on our guard, lest we erect our prejudices into legal principles."[80] Proponents of same-sex marriage may also claim too much when they draw broad conclusions from anecdotal studies making positive findings about lesbian and gay parenting.

This does not mean that we cannot make decisions about same-sex marriage; in fact it is impossible not to make some decision, either for or against it. The four guidelines suggested here for considering the welfare of children in the context of same-sex marriage give substantial support to allowing such marriages as a means to promote the welfare of children raised by these couples.

80. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).