

# CHAPTER 1

## DIFFERENTIATING ASSIMILATION

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### ABSTRACT

*This chapter uncovers the destabilizing and transformative dimensions of a legal process commonly described as assimilation. Lawyers working on behalf of a marginalized group often argue that the group merits inclusion in dominant institutions, and they do so by casting the group as like the majority. Scholars have criticized claims of this kind for affirming the status quo and muting significant differences of the excluded group. Yet, this chapter shows how these claims may also disrupt the status quo, transform dominant institutions, and convert distinctive features of the excluded group into more widely shared legal norms. This dynamic is observed in the context of lesbian, gay, bisexual, and transgender (LGBT) rights, and specifically through attention to three phases of LGBT advocacy: (1) claims to parental recognition of unmarried same-sex parents, (2) claims to marriage, and (3) claims regarding the consequences of marriage for same-sex parents. The analysis shows how claims that appeared assimilationist – demanding inclusion in marriage and parenthood by arguing that same-sex couples are similarly situated to their different-sex counterparts – subtly challenged and reshaped*

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*legal norms governing parenthood, including marital parenthood. While this chapter focuses on LGBT claims, it uncovers a dynamic that may exist in other settings.*

**Keywords:** assimilation; same-sex marriage; sexual orientation; parentage; parenthood; family law; LGBT rights; constitutional law; *Obergefell v. Hodges*; social movements; cause lawyering

## 1. INTRODUCTION

Assimilation entails incorporation into the mainstream. For a previously excluded or marginalized group, assimilation involves not merely integration but loss – loss of distinctive identity, loss of subculture, and loss of opposition to dominant practices and institutions. Examples of such loss abound in legal scholarship and cultural commentary; the costs of assimilation are borne by immigrants (Chamallas, 1994, pp. 2407–2408; Montoya, 1994, pp. 193–194; Perea, 1994, pp. 857–862), racial minorities (Carbado & Gulati, 2000, pp. 1279–1293; Peller, 1990, pp. 762–763), women (Finley, 1986, pp. 1142–1143; Littleton, 1981, pp. 487–488; Rhode, 1988, pp. 1202–1206), and people with disabilities (Maatman, 1996, pp. 331–337; McCluskey, 2010, pp. 148–150). Consider also lesbian, gay, bisexual, and transgender (LGBT) individuals (Yoshino, 2006). Through demands for inclusion in traditional institutions like marriage and parenthood, gays and lesbians assimilated to heterosexual norms and erased unique dimensions of queer life. Important forms of intimacy and family receded or disappeared.

Yet, as this chapter shows, assimilation entails more than loss; it entails the promise of new meanings and institutional norms. Assimilation can be a generative process in which not only is the assimilated group altered but mainstream practices are remade. This chapter focuses on the dynamics of assimilation specifically with respect to law, showing how legal claims that appear assimilationist may subtly challenge and reshape legal norms structuring dominant institutions.<sup>1</sup>

The transformative dimensions of assimilation are uncovered through a detailed study of LGBT claims to family recognition.<sup>2</sup> LGBT advocates demanded inclusion in mainstream institutions – marriage and parenthood – by arguing that same-sex couples are similarly situated to their different-sex counterparts. Yet advocates did not simply assert sameness on the terms that defined existing institutions. Rather, they marginalized key features – gender

differentiation, sexual procreation, and biological parenthood – that distinguished same-sex couples from their different-sex counterparts. Focusing elsewhere, advocates emphasized points of commonality between the families formed by same-sex and different-sex couples. They stressed adult romantic affiliation and emotional and economic interdependence as key elements of spousal relationships. Further, they drew on relatively unconventional practices of family formation – namely, the use of assisted reproductive technologies (ART) – that cut across same-sex and different-sex couples with children. In doing so, advocates articulated understandings of parenthood – specifically, intentional and functional parenthood – that could be located within emerging heterosexual practices but could also encompass practically all same-sex family formation. Through this process, advocates refashioned marriage and parenthood in ways that aligned with LGBT existence. Ultimately, assimilationist claims reconfigured the axes on which similarity was understood and transformed aspects of the very institutions in which LGBT individuals sought inclusion.<sup>3</sup>

In identifying and unpacking the unappreciated potential of assimilation, this chapter contributes to three related bodies of scholarship that focus on the meaning and implications of a social movement's turn to law. First, sociolegal scholars have explored both the moderating *and* transformative effects of legal mobilization (Brown-Nagin, 2005, pp. 1440–1441, 1443, 1510; Cummings, 2009, pp. 65–74; Leachman, 2016, p. 655; McCann & Silverstein, 1998, p. 261; Sarat & Scheingold, 2006, p. 4, 12). Scholars have analyzed, in Michael McCann's description, “the constitutive role of legal rights both as a strategic resource *and* as a constraint, as a source of empowerment and disempowerment, for struggles to transform, or to reconstitute, the terms of social relations and power” (McCann, 2004, p. 578). This work on the double-edged nature of legal strategies tends to focus on the consequences of the turn to law and litigation generally (McCann, 2004, p. 514; McCann & Silverstein, 1998, pp. 266–267), rather than on the concrete and substantive consequences of legal claims themselves.<sup>4</sup> Instead of asking whether and how legal tactics hinder or advance progressive change, this chapter asks whether and how specific legal claims affirm or transform the norms and principles that structure central legal relationships.

Next, left-progressive scholars, working in law as well as in other disciplines, have devoted much attention to the conservative implications of a social movement's turn to law. When movements translate demands into viable legal claims, they frame grievances within the bounds of legal doctrine and appeal to the logics accepted by government actors (NeJaime, 2013b, p. 877). They ask that existing practices and arrangements be reformed in

ways that meet the requirements of established legal norms. They demand that law treat them like those already regarded as insiders, and they seek inclusion in institutions that law has long protected. In other words, they willingly assimilate. Scholars have faulted this mode of claims-making for prioritizing formal over substantive equality and institutional reform over societal transformation (Joshi, 2014, pp. 207–208; Robson, 2002, pp. 709, 719). On this view, claims premised on sameness and claims seeking inclusion portend moderation, rather than transformation.<sup>5</sup>

While crediting important insights from this literature, this chapter shows how the conservative and limiting consequences of assimilation can exist alongside more transformative dimensions. Through claims premised on sameness and inclusion, features that mark the excluded group as different can be subtly integrated into law. Moreover, institutions can be reconstituted in ways that reflect the distinctive practices of those long subject to exclusion. To see this dynamic, this chapter focuses on the subtle ways in which legal claims are developed and expressed. As Martha Minow has observed in one of the most important and insightful treatments of difference and the law, those who have been marginalized can push law to accommodate difference by “challenging and transforming the unstated norm used for comparisons ... [and] disentangling equality from its attachment to a norm that has the effect of unthinking exclusion” (Minow, 1990, p. 16). Taking cues from Minow, this chapter closely examines how LGBT advocates articulated the grounds on which to compare same-sex to different-sex couples in ways that shifted the legal norms governing marital and parental relationships.

Finally, in attending to the generative dimensions of claims that appear assimilationist, this chapter contributes to a growing body of legal scholarship on law and social movements (Cummings, 2018). Through in-depth historical and doctrinal analysis, scholars have uncovered both the limits and opportunities created when particular movements, including those focused on questions of gender and sexuality, seek legal reform (Eskridge, 2001; Franklin, 2010; Mayeri, 2011; Siegel, 2006). William Eskridge has shown how a social movement’s reliance on legal claims – and specifically, constitutional claims – may privilege moderate movement demands, such as integration and inclusion within existing institutions, over more radical appeals, such as separatism and the creation of new institutions (Eskridge, 2001, pp. 487–488). Reva Siegel has shown how legal claims themselves may, over time, shift in more moderate directions as a movement seeks to persuade state actors and responds to the arguments of countermovement activists (Siegel, 2006, p. 1364). Importantly, while both Eskridge and Siegel attend

to moderating aspects of a movement's turn to law, they view the process of legal claims-making as dynamic and contingent (Eskridge, 2001, p. 487 & n.236; Siegel, 2006, pp. 1330–1331, 1357). In fact, Eskridge explicitly resists the notion that equal protection arguments necessarily lead in assimilationist directions (Eskridge, 2001, p. 487 & n.236), and Siegel elaborates how “movements for constitutional change ... make claims on the society's values ... in ways that transform their meaning” (Siegel, 2006, p. 1361).

This dynamic and contingent view informs the treatment of specific social movements. For example, legal historians have challenged the progressive critique of the women's movement as serving an agenda centered on “formal equality” and “assimilation to a male norm” (Mayeri, 2011, p. 6) and instead have recovered “a richer set of claims regarding the constitutional limits on the state's power to enforce sex-role stereotypes” (Franklin, 2010, p. 86). Serena Mayeri has shown how in the early 1970s feminist lawyers successfully argued that equal treatment between women and men included rights against pregnancy discrimination; in other words, before the U.S. Supreme Court rejected the argument that pregnancy discrimination necessarily constituted sex discrimination (*Geduldig v. Aiello*, 1974), lower courts understood sex equality guarantees to reach legal distinctions rooted in women's distinctive reproductive capacity. (Mayeri, 2011, pp. 63–68, 119).<sup>6</sup> In examining more recent jurisprudence, Cary Franklin has shown how eventually the Court came to protect women against sex stereotyping even when – and perhaps especially when – “real” differences between women and men were implicated by the law in question (Franklin, 2010, pp. 145–146). By revealing how claims seemingly premised on sameness and inclusion may force law to recognize and accommodate difference, this work finds common ground with the dynamic identified in this chapter.

In focusing on claims to LGBT equality specifically, this chapter intervenes in longstanding debates over the meaning and implications of the LGBT turn to law. These debates cut across each of the bodies of scholarship identified above. The analysis that follows draws on earlier work in which I provided detailed and extensive case studies of LGBT advocacy on behalf of same-sex couples' romantic and parental relationships (NeJaime, 2016, p. 1185). This chapter isolates and elaborates an important dynamic that emerged from those case studies.

Beginning in the late twentieth century, LGBT advocates made claims to family recognition. They demanded adult relationship recognition, first in the form of nonmarital statuses (e.g., domestic partnership, civil union), and then in the form of marriage. They also demanded parental recognition, first for same-sex parents excluded from marriage, then as an argument for inclusion

in marriage, and finally as a consequence of marriage. Throughout this work, advocates argued that gays and lesbians merited recognition in part because they mirrored relevant aspects of the romantic and parental relationships of married different-sex couples – that is, that they were like different-sex couples in ways that should be deemed salient. If same-sex couples inhabited family relationships that appeared like those of married different-sex couples, they deserved recognition on the same terms – that is, they deserved access to marriage and parenthood. In the discussion that follows, I focus on three phases of LGBT advocacy: (1) claims to parental recognition of unmarried same-sex parents, (2) claims to marriage, and (3) claims regarding the consequences of marriage for same-sex parents. My argument about the transformative dimensions of assimilation hinges on shifts specifically in the law of parental recognition, which includes but also extends beyond marriage.

In the first phase, LGBT advocates asserted claims to parental recognition on behalf of *unmarried* gays and lesbians. Even as they sought rights outside marriage, as opposed to inclusion in marriage, their arguments relied on comparisons to *married* different-sex couples. By constructing unmarried same-sex couples as sufficiently like married different-sex couples, LGBT advocates did not simply constitute gay and lesbian identity in assimilative ways. They also contributed to emergent understandings of heterosexual family life and the institution of marriage. Constitutive aspects of same-sex family formation furnished the lens through which to understand family life more generally. Advocates stressed aspects of the adult relationship, focusing on emotional and economic interdependence, as well as the parent–child relationship, focusing on intentional and functional bonds. (Parental recognition based on intent tracks the decision to have a child, often through ART, and parental recognition based on function tracks the act of raising the child.) Advocates' efforts reduced the legal importance of attributes that had long defined dominant family structures and had justified gay and lesbian exclusion from marriage and parenthood – namely, gender differentiation, sexual procreation, and biological parenthood.

In the second phase, LGBT advocates leveraged earlier claims to *nonmarital* parental recognition as they sought inclusion in *marriage*. They asserted that unmarried same-sex couples are similarly situated to married different-sex couples for purposes of a model of marriage that sees parenting as an important function. Yet, in crafting this argument, advocates emphasized some understandings of marriage and parenthood while repudiating others. They stressed same-sex parents' adherence to marital norms of adult commitment and interdependence, deliberate family formation, and parent–child bonding, in order to marginalize norms rooted in sexual procreation and

biological, dual-gender parenting. Through this work, advocates contributed to new and more inclusive views of marriage and parenthood.<sup>7</sup> Marriage, through this lens, serves as a domain for intentional and functional, rather than biological and gender-differentiated, parenting.

In the third (and ongoing) phase, in which same-sex couples enjoy access to marriage, LGBT advocates assert claims to parental recognition in virtue of marriage – that is, parentage that derives from the marital relationship. These claims seize on understandings of marriage and parenthood advocates had pressed for many years in seeking both nonmarital recognition and marriage equality. Critically, the principles on which same-sex couples' marital parentage claims rest have begun to reach not only married but also unmarried parents, and not only same-sex but also different-sex couples.

Ultimately, comparisons to different-sex couples, for the purpose of gaining inclusion in dominant institutions, helped refashion marriage and parenthood in ways that accommodated – and, indeed, mainstreamed – some of the distinctive features of LGBT family life. More specifically, principles of parental recognition that were necessary to accommodate same-sex family formation slowly became more generally applicable standards governing all families – same-sex and different-sex couples, married and unmarried couples. Different-sex couples that defied traditional assumptions of biological parenthood – especially those using ART to have children – had pressed courts and legislatures to recognize their parental bonds based on intent and function. But such forms of recognition represented exceptions – special cases to be masked or cabined rather than allowed to reshape general principles. Same-sex couples leveraged these exceptional cases in ways that dramatically broadened their reach – transforming exceptions into rules. As same-sex couples were recognized – first, as unmarried parents and, then, as married parents – principles of intent and function began to supply the general logic of the law of parental recognition.

While this chapter focuses on LGBT claims, it uncovers a dynamic that appears to exist in other social movement contexts and in different substantive domains. Those seeking legal change engage in norm contestation as they compare themselves to those already treated as insiders and claim inclusion in society's central institutions. The very ideas of sameness and inclusion may be premised on new understandings that emphasize the claimants' distinctive practices and that destabilize traditional norms that had long justified the claimants' exclusion. Ultimately, the norms governing dominant institutions may be reshaped through ongoing conflict.

To be clear, my argument is not that claims to inclusion and claims based on sameness do not in important ways affirm the status quo, shore up the

importance of dominant institutions, and mute significant differences of the excluded group.<sup>8</sup> Rather, my argument is that these effects can occur *at the same time* that the status quo is disrupted, dominant institutions are transformed, and differences that mark the excluded group become more widely understood norms. The question is not *whether* claims of this kind yield assimilation or transformation, but *when* and *how* they serve assimilative and transformative functions.

Two additional points of clarification are helpful at the outset. First, the claims addressed here may arise in various doctrinal forms, but the analysis that follows focuses on their manifestation in family law and constitutional law. In seeking recognition of family relationships, gay and lesbian claimants ask that family-law statutes that have been available in the context of heterosexual family formation be extended to same-sex family formation. As a constitutional matter, the argument that same-sex couples are similarly situated to those already granted marital and parental recognition maps onto equality doctrine. Specifically, this argument tracks the threshold requirement for an equal protection violation, and it also shapes consideration of the government's asserted interests in excluding same-sex couples. Same-sex couples' claims to inclusion also map doctrinally onto liberty and privacy, as gays and lesbians contest their exclusion from institutions – marriage and parenthood – protected as a matter of due process.

Second, it is important to distinguish between the sameness arguments to which I am referring and other sameness arguments that are part of analogical reasoning. I am not focused on arguments that gays and lesbians are like other minority groups that have been protected as a matter of equal protection or antidiscrimination law. Scholars have argued that those analogical arguments have an assimilative power (Yoshino, 1998, p. 485; *but see* Mayeri, 2011, p. 229). Rather, here I focus on arguments that same-sex couples are like the majority – different-sex couples – already included in dominant institutions governing the family.

The remainder of this chapter proceeds in four sections. Section 2 shows how the assimilationist critique of claims to sameness and inclusion has been articulated specifically in LGBT debates. Section 3 then turns to claims asserted by LGBT advocates on behalf of unmarried same-sex parents. The focus here is on legal evolution specifically in California. Section 4 turns to same-sex couples' claims to inclusion in marriage, both in California and nationwide. Section 5 then shows, through an examination of cases outside California, how the inclusion of same-sex couples in marriage continues to mainstream aspects of same-sex family formation that, for many years, had justified LGBT exclusion.



## 2. THE ASSIMILATIONIST CRITIQUE IN LGBT DEBATE

Criticism of claims emphasizing sameness and seeking inclusion in dominant institutions is not new. But, in recent years, this criticism has been especially prominent in analysis of LGBT rights (Murray, 2012a, p. 7; Polikoff, 2012, p. 722; Robson, 2002, p. 711). LGBT advocates have faced a common critique: by demanding inclusion in traditional forms of family recognition designed around heterosexual life – namely, marriage and parenthood – gays and lesbians have assimilated to heterosexual norms and have made themselves “like straights” (Spade, 2013, p. 84).<sup>9</sup> On this view, claims asserting sameness – that is, that same-sex couples are “similarly situated” to different-sex couples – and claims on existing institutions – that is, marriage and parenthood – erase the unique dimensions of LGBT life and purport to advance LGBT equality without disturbing the foundational assumptions of heteronormative institutions.<sup>10</sup>

Importantly, scholars associated with this critique support a legal regime that furnishes rights and recognition to same-sex couples and their children. But, these scholars argue, such legal advances need not, and should not, emerge from conformity to norms of heterosexual family life. More specifically, such advances should not arise through marriage (Ettelbrick, 1989, pp. 9, 14; *see also* Warner, 1999, p. 120). On this view, situating same-sex couples as like married different-sex couples both normalizes gays and lesbians (Hequembourg & Ardit, 1999, p. 664) – stressing, as Melissa Murray has argued, their “conformity with marriage’s norms of respectability and discipline” – and emphasizes “the deviance of those who could marry and do not” (Murray, 2012b, pp. 419, 423). From this perspective, the decades-long push for marriage accepted, rather than challenged, marriage’s privileged position in law and society.

Scholars who have lodged this critique of LGBT advocacy tend to view claims premised on sameness and inclusion as conservative and assimilationist. Legal entitlements, they suggest, have turned on whether same-sex couples adequately replicate heterosexual, marital norms – what Ruthann Robson describes as the “hetero-relationalizing” of gay and lesbian relationships (Robson, 1990, p. 539). Moreover, claims to inclusion in marriage have affirmed traditional understandings of the family and have undermined a progressive agenda seeking to protect and recognize less conventional family forms (Franke, 2011, pp. 1177, 1183; Murray, 2012b, p. 432; Spade & Willse, 2010, pp. 19, 20; Spade, 2013, p. 84).

The critique of claims to marriage includes treatment of not only adult but also parent–child relationships. Scholars have devoted significant attention to

how same-sex couples' parenting relationships became a central focus of same-sex couples' claims to marriage (Murray, 2012b; Polikoff, 2005). Those with children were featured prominently in litigation seeking marriage (Godsoe, 2015, p. 145), and protection of same-sex couples' children was advanced as a central justification for marriage equality.<sup>11</sup> Advocates framed marriage as a concrete route to parental recognition. Married couples, for instance, can adopt each other's children through stepparent adoption. Spouses also enjoy a marital presumption of parentage (or presumption of legitimacy), rendering the birth mother's spouse the legal parent of the child. Advocates also framed marriage as a material and expressive benefit to children – an argument dependent on continued distinctions between marital and nonmarital families as both a legal and cultural matter. From this perspective, marital children not only automatically attain benefits that remain out of reach to nonmarital children, but they also enjoy respect and recognition that derives from the societal importance of marriage and its connection to childrearing.

This child-centered framing, critics have argued, connects same-sex-couple-headed families to ideas of respectability associated with marriage and, at the same time, affirms the inferiority of families living outside marriage (Franke, 2006, pp. 236, 242). Further, in addressing lesbian couples specifically, advocates and courts focused on women's roles as mothers. In Cynthia Godsoe's description, the move to marriage equality on child-centered terms signaled acceptance of "a traditional parenthood paradigm ... [that] reflects a maternalist philosophy where a woman's perceived natural and limited role is as an all-sacrificing mother virtually inseparable from her children" (Godsoe, 2015, p. 146).

While criticism of parenting arguments in LGBT advocacy has been channeled most prominently through criticism of claims to marriage, some scholars have focused specifically on claims to parental recognition as distinct from claims to marital recognition. Well before same-sex couples enjoyed access to marriage, scholars offered powerful critiques of LGBT claims to parental recognition – focusing on claims to nonmarital parental recognition, such as second-parent adoption and de facto parenthood. By asking for acceptance of families formed by gays and lesbians to the extent they mapped onto the model of the two-parent family, these claims depended on and required assimilation to heterosexual norms.<sup>12</sup> As Robson has argued, parental recognition "very clearly rewards those lesbians who comply with prevailing norms of parenting – and relationships – and very clearly excludes those who do not" (Robson, 2002, p. 814). In cases in which lesbian co-parents are recognized as "psychological" parents, the salient features of the same-sex couple's family, in Robson's description, "mimic the most traditional of traditional families" (Robson, 2000, pp. 32–33, Robson, 2002, p. 814). Similarly, according to Julie Shapiro,

second-parent adoptions benefit “the most privileged, most assimilated, and least ‘threatening’ lesbians” (Shapiro, 1999, p. 32). In short, to qualify for parental recognition, “lesbian couples must walk, talk, and act like heterosexual parents, and must conform to the nuclear family model” (Shapiro, 1999, p. 35).

More recently, scholars have focused on post-marriage-equality claims that derive parental recognition from marital status. Married lesbian couples argue that the child’s second parent (the nonbiological co-parent) should be recognized as a legal parent *because* she is married to the birth mother. This claim, scholars contend, reiterates conventional understandings that tie parenting to marriage and denigrates unmarried parents and their children (Polikoff, 2012, pp. 721, 722–723).<sup>13</sup>

Each of these strands of argument relates to a broader critique of the LGBT movement as, in a term developed by Katherine Franke, “repronormative”<sup>14</sup> LGBT advocacy, on this view, reiterates, rather than challenges, the normative significance of reproduction and parenting. In doing so, it mutes distinctive features of LGBT life and instead affirms conventional norms.

This scholarship offers important insights regarding the LGBT turn to law and claims to marital and parental recognition specifically. By seeking inclusion in marriage and parenthood as a legal matter, gays and lesbians assimilated to heterosexual norms; forms of intimacy and family that depart from coupled relationships were marginalized. At the same time, though, this scholarship neglects the ways in which assimilation, and assimilationist legal demands specifically, can be generative. By providing a close examination of the historical trajectory and contemporary impact of LGBT claims on marriage and parenthood, the remainder of this chapter shows how claims that sound in assimilationist registers may lead law to reckon with and accommodate difference. In particular, sophisticated advocacy may appeal to sameness and inclusion in ways that subtly transform the grounds on which to understand similarity as well as the legal norms that govern dominant institutions. Again, my argument is not that claims of this kind do not exert assimilative force. Rather, my aim is to carefully attend to arguments premised on sameness and claims to inclusion in ways that resist the relatively wholesale assessments that have proliferated in the scholarly literature.

### 3. THE CASE FOR UNMARRIED SAME-SEX PARENTS

This section focuses on claims to parental recognition on behalf of unmarried same-sex parents. It shows how lawyers asserted that unmarried same-sex

couples replicated norms of married different-sex couples. But these lawyers did not simply stress LGBT conformity to mainstream norms. In fact, they worked to reduce the salience of traditional assumptions that had long justified same-sex couples' lack of legal recognition. Lawyers focused on emergent forms of different-sex parenting to connect unmarried same-sex couples to their married different-sex counterparts (NeJaime, 2016, p. 1256). Intentional and functional principles of parental recognition – which had been gaining traction in the context of married different-sex couples using ART – could be universalized in ways that would lead parentage law to accommodate unmarried same-sex parents. This dynamic comes into view by attending to the specific grounds on which same-sex couples' claims were asserted and ultimately accepted. By arguing in the register of sameness, LGBT advocates – counter-intuitively – imported difference into the law, ultimately contributing to new understandings of marriage and parenthood and reorienting the relationship between same-sex and different-sex couples.<sup>15</sup>

### *3.1. Marriage, Parenthood, and Different-Sex Couples*

LGBT advocates attempted to secure parental rights and recognition for same-sex parents well before same-sex couples enjoyed the right to marry. In doing so, they were aided by the expansion of the sphere of nonmarital parenting, as both a legal and demographic matter. As rates of nonmarital child-birth rose in the second half of the twentieth century, courts and legislatures acted to protect the rights of unmarried parents and their children. Efforts aimed at parental rights were driven primarily by the recognition of unmarried fathers.<sup>16</sup> In fact, in the wake of Supreme Court decisions recognizing the constitutional rights of unmarried fathers and repudiating the legal treatment of “illegitimacy,” many states adopted the newly drafted Uniform Parentage Act (UPA), which endeavored to provide equal treatment to nonmarital parent-child relationships and sought to attach both rights and responsibilities to unmarried fathers (UPA, 1973). This development provided important space for eventual advocacy on behalf of same-sex parents, who were excluded from marriage.

Yet a critical distinction existed between unmarried parents recognized by law and unmarried gay and lesbian parents struggling for such recognition: Same-sex couples, unlike their different-sex counterparts, featured a parent without a biological connection to the child. Accordingly, while a parentage system that credited biological ties as a basis for parental recognition could largely accommodate the families formed by unmarried different-sex couples,

unmarried same-sex couples remained outsiders. Equal treatment within a regime organized around biological connection was a hollow promise for gays and lesbians forming families with children.

To argue for legal recognition of nonbiological parents, LGBT advocates looked to marriage. Parents without a biological tie had increasingly achieved parental recognition *inside marriage*. Historically, the marital presumption allowed the husband of the child's mother to claim legal fatherhood, even if he was not in fact the biological father. In the 1960s and 1970s, courts and legislatures extended the marital presumption's nonbiological logic to married couples using donor insemination. When a married woman gives birth to a child conceived with donor sperm, her husband is recognized as the child's legal father, either by virtue of the marital presumption or by operation of more specific statutes regulating donor insemination. Through this lens, marital family formation evidences the couple's intent to co-parent, regardless of the husband's biological connection. Based on marriage to the mother, or consent to his wife's use of assisted reproduction, the husband becomes the legal father.

Whereas married men could achieve parentage without a biological tie to the child, unmarried men generally needed their biological connection as a basis for parentage. In most jurisdictions, when an unmarried woman has a child conceived with donor sperm, her unmarried partner is not initially recognized as a legal parent, even if that unmarried partner intends to raise the child (NeJaime, 2017, pp. 2370–2372). Indeed, in many jurisdictions, the sperm donor who donates sperm for use by an unmarried woman is not legally relieved of parental obligations, as he would be when the recipient of the donor sperm is a married woman. Against this legal backdrop, nonbiological parents in same-sex couples, who were excluded from marriage, struggled to achieve parental rights.<sup>17</sup>

### 3.2. *The Failure of Sameness Arguments*

The lesbian baby boom that swept parts of the country in the 1980s and 1990s featured lesbian couples turning to donor insemination to have children. When some of these couples broke up, they found themselves in a position where only the biological mother had a legal relationship to the child. While some couples in some jurisdictions were able to engage in second-parent adoptions to establish a legal relationship between the nonbiological mother and the child, for many this option simply did not exist. The nonbiological co-parent who had not engaged in adoption could not maintain her relationship with the child if her former partner sought to exclude her.

Lawyers who represented the nonbiological mother asserting parental rights to custody or visitation attempted to analogize same-sex couples to different-sex couples who also used donor sperm to have children. Yet because same-sex couples were excluded from marriage, they could not simply argue that the marital presumption, or the more specific donor-insemination statutes, should apply to them. Rather, lawyers discerned principles from the regulation of ART in the context of marital family formation and argued that these same principles should guide the treatment of same-sex couples, *even though same-sex couples were unmarried*. Here, their claims depended on assertions of sameness. Because unmarried same-sex couples engaging in donor insemination acted like married different-sex couples engaging in donor insemination, they merited the same rights and obligations even if they were not – and could not be – married.

At first, the move to compare unmarried same-sex parents to married different-sex parents failed. Gays and lesbians were not seen as legitimate parents. In fact, even gays and lesbians who were biological parents struggled to maintain custody of their children in the context of divorce from a different-sex spouse (Hunter & Polikoff, 1976, p. 691). Perhaps unsurprisingly then, when same-sex couples who had deliberately formed families together later broke up, the nonbiological parent was routinely denied parental rights. Courts viewed the nonbiological parent as analogous to a friend or babysitter, rather than to a married parent lacking a genetic connection to the child.

Consider the arguments made – and rejected – in an early same-sex parenting case from California. In *Nancy S. v. Michele G.* (1991), LGBT advocates represented Michele, the nonbiological co-parent, whose longtime partner, Nancy, deprived her of access to their children after dissolution of their relationship. Michele's lawyers depicted the women's relationship, which of course was not eligible for marriage, as marriage-like (NeJaime, 2016, pp. 1205–1206). Nancy and Michele, the lawyers claimed, acted like a married couple and in fact would have married had they been able. Like married couples, they decided to have children together. Both women were listed on the children's birth certificates, and the children's names reflected their relationship to both Nancy and Michele. The two women raised the children together until their relationship dissolved, at which point they continued to share custody. Eventually, though, Nancy denied Michele access to the children.

If Nancy and Michele had been eligible for a legal divorce, a court would have been authorized to award custody or visitation to Michele even though she was not biologically related to the children (Gil de Lamadrid, 1991,

pp. 25–26). Pursuant to the marital presumption, the husband of the woman who gives birth is presumed to be the legal father of the child. (*Michael H. v. Gerald D.*, 1989). And even a stepfather in California enjoyed a statutory right to seek visitation upon divorce. But, of course, Nancy and Michele were not married and thus could not legally divorce. Still, LGBT advocates framed Nancy and Michele as married. “The parties in this case,” Michele’s lawyers argued, “cannot petition for dissolution of *their marriage* because, under the current statutory scheme, *their marriage* cannot be sanctioned by the state” (Appellant’s Opening Brief, *Michele A. v. Nancy S.*, 1991, p. 12 (emphasis added)). On this view, Nancy and Michele were like a married different-sex couple and now needed the equivalent of a divorce.

Importantly, marriage (and divorce) provided a framework through which to conceptualize the women’s parental relationships, but not on a view traditionally associated with marital parenting. Lawyers asserted an analogy to married different-sex couples not because same-sex couples looked like the typical married couple raising children; after all, they did not include a mother and father, and they did not feature children biologically related to both parents. Same-sex couples’ similarity to different-sex couples relied on other unifying features – namely, intent and conduct.<sup>18</sup> These features had become salient in unconventional heterosexual family formation. Unmarried same-sex couples with children, like married different-sex couples *with children conceived through donor insemination*, decided to have children together, used donor gametes to facilitate the process, and then raised the children together as co-parents in a family unit.

At this early point, advocates failed in their attempts to vindicate same-sex family formation by analogy to marital family formation. In its 1991 decision, the California Court of Appeal rejected Michele’s arguments and instead tethered parental rights to the formal and traditional categories of biological and marital connections. Even though Nancy and Michele had formed a committed relationship, decided to have children together, and raised those children together, the court viewed Michele as a nonparent. “[E]xpanding the definition of a ‘parent’ in the manner advocated by [Michele],” the court worried, “could expose other natural parents to litigation brought by child-care providers of long standing ...” (*Michele A. v. Nancy S.*, 1991, p. 219). The lawyers’ attempt to depict unmarried same-sex couples in ways that conformed to understandings of married different-sex couples failed to resonate; nonbiological lesbian co-parents were not like husbands whose wives use donor sperm, but instead were like other family outsiders who supplement the caretaking work of biological parents. At this point, courts did not see same-sex couples as sufficiently marriage-like to merit parental recognition

on the same terms. In failing to see same-sex couples as like different-sex couples, courts refused to expand parental recognition in ways that destabilized dominant norms.

### 3.3. *Sameness and Success*

Throughout the 1990s and into the 2000s, LGBT advocates continued to make arguments for parental recognition of nonbiological co-parents in same-sex couples, and they did so in ways that leveraged increasing recognition of nonbiological co-parents in married different-sex couples. Husbands had long been recognized as legal fathers when their wives gave birth to children conceived with donor sperm. But determinations of motherhood remained tightly connected to the biological fact of birth. In California, that began to change as courts considered situations arising when married different-sex couples had children through gestational surrogacy.

In *Johnson v. Calvert* (1993), a landmark decision, the California Supreme Court announced principles of intentional parenthood to resolve a dispute between a gestational surrogate and a married couple who were the intended parents. The gestational surrogate had carried a child conceived with the husband's sperm and the wife's egg. In determining that the genetic mother, rather than the gestational surrogate, was the legal mother, the court turned to the concept of intent; since each woman could make a claim to maternity, the court reasoned that the woman who intended to be the mother was the legal mother (*Johnson v. Calvert*, 1993). In the court's view, because the genetic mother decided to have the child with her husband, she – and not the gestational surrogate – should be recognized as the sole legal mother.

Five years later, in *Marriage of Buzzanca*, the California Court of Appeal extended *Johnson's* intentional parenthood doctrine to a situation in which the intended mother had neither a gestational nor genetic connection to the child. The Buzzancas, who were married at the time of conception, had used donor egg and sperm and engaged a gestational surrogate. The court found that both the husband and wife were the child's legal parents (In re *Marriage of Buzzanca*, 1998). The principle of intent announced in *Johnson* now came unhooked from biological connection. According to the court's reasoning, because the couple decided to have a child together within the context of a marital relationship and then put into motion the procedures that would produce the child, they should be recognized by law as the child's parents. Even without a biological connection for either the husband or the wife,



marriage provided a sufficient family relationship from which to derive legal parent–child relationships.

Inside marriage, both men and women had achieved parental recognition in the absence of a biological connection to the child. The concept of intent animated both legislative regulation of married couples' use of donor insemination and judicial regulation of married couples' use of gestational surrogacy. LGBT advocates soon attempted to leverage these developments on behalf of unmarried same-sex parents. Again, advocates seized on concepts articulated in the context of unconventional heterosexual family formation and sought to make such concepts more widely applicable.

To attain parental recognition that mirrored the recognition extended to married couples like those in *Johnson* and *Buzzanca*, LGBT advocates stressed same-sex couples' adherence to marital norms. Same-sex couples, advocates suggested, formed committed adult relationships characterized by emotional and economic interdependence. From inside these committed relationships, the couples decided to have and raise children together. The marriage-like relationships of same-sex couples served as a way to understand the parental bonds gays and lesbians formed outside marriage.<sup>19</sup>

Yet advocates emphasized same-sex couples' commonality with married different-sex couples in ways that drew comparison with modes of family formation and recognition that represented the margins, rather than the mainstream. While married women and men typically parented their own biological children, LGBT advocates drew analogies to married parents who turned to ART and created nonbiological parent–child relationships. Just as those individuals could derive parentage from intentional and functional, rather than biological, relationships, nonbiological mothers in same-sex couples asked that they too attain parental rights based on intent and conduct.

Urging the courts to abandon *Nancy S.* and similar precedents from the 1990s, LGBT advocates pressed claims to parental recognition in the California courts (NeJaime, 2016, pp. 1223–1225). By the time the California Supreme Court considered whether unmarried same-sex parents merited parental recognition in the absence of adoption, courts in the state had extended recognition not only to nonbiological mothers and fathers in married different-sex couples, but also to unmarried nonbiological mothers and fathers. In *In re Nicholas H.* (2002), the California Supreme Court found that a man who holds a child out as his own, even if he admits he is not the child's biological father, may nonetheless be adjudicated the child's legal father. (From behind the scenes, LGBT advocates had shaped that litigation, assisting the nonbiological father's lawyer and ghostwriting briefs

in the case.) Soon, the *Nicholas H.* decision extended to a woman who purported to be a child's mother but was not in fact the biological mother (In re *Karen C.*, 2002; In re *Salvador M.*, 2003).

These cases, though, arose outside the context of same-sex parenting. For same-sex couples to benefit from newly expanded parentage principles both inside and outside marriage, they needed to be seen as legitimate families. More specifically, the nonbiological co-parent needed to be viewed not like a nanny or babysitter – the perspective from the early 1990s – but like a parent.

In a trio of decisions issued the same day in 2005, the California Supreme Court repudiated the views of courts in the 1990s and instead embraced same-sex parenting as a legal matter. The court recognized unmarried lesbian parents in ways that emphasized similarities between unmarried same-sex couples and married different-sex couples. Yet, strikingly, the court focused on principles of parental recognition that had defined unconventional heterosexual family formation. Examination of two of the cases decided by the court illustrates this dynamic.

In *K.M. v. E.G.* (2005), K.M. and E.G. used K.M.'s eggs and donor sperm to conceive children that E.G. would carry and birth.<sup>20</sup> After the couple broke up, E.G., the birth mother, sought to deny K.M., the genetic mother, access to the children they had been co-parenting. Since the mother-child relationship may be established by proof of giving birth, E.G. asserted her superior position as she attempted to exclude K.M. In response, K.M. asserted claims to parental recognition under the California parentage code.

K.M.'s lawyers sought to leverage the court's earlier decision in *Johnson* by connecting intentional parenthood to marriage-like family formation. In *Johnson*, K.M.'s attorneys argued, "the intent of the genetic parents was *presumed* from the fact that they were a married couple living together in a committed relationship" (Appellant's Opening Brief on the Merits, *K.M. v. E.G.*, 2005, p. 44). If the court in that case derived intention from the genetic mother's marriage to the biological father, then the court here, the lawyers urged, should also derive intention from the genetic mother's marriage-like relationship to the birth mother (Appellant's Opening Brief on the Merits, *K.M. v. E.G.*, 2005, p. 44). Indeed, "[i]f these same facts arose between a husband and wife during a divorce proceeding in which both parties were the genetic and gestational parents of these children, there would not be any valid dispute over parentage" (Appellant's Opening Brief on the Merits, *K.M. v. E.G.*, 2005, p. 11). Marriage furnished a lens through which to view K.M. and E.G.'s relationship, and yet at the same time seemed an arbitrary dividing line for parental recognition.

K.M.'s attorneys mapped the facts of their client's relationship onto the norms of marriage. The women's relationship, K.M.'s lead counsel asserted, was "marked by repeated acts of love and commitment to each other that included a 'marriage' ceremony after the children were born where they exchanged rings, the celebration of their anniversaries, and [municipal] registration as domestic partners for six and a half years" (Appellant's Reply Brief, *K.M. v. E.G.*, 2005, p. 11). The "evidence creates a very overwhelming picture of a two-parent, two-child family who operated and functioned in every way familiar to us" (Trial Transcript, *K.M. v. E.G.*, 2005, p. 811). Indeed, reminiscent of the framing device deployed more than a decade earlier in *Nancy S.*, K.M.'s attorney characterized the nonmarital relationship between K.M. and E.G. as a marriage, claiming that, in her effort to undermine K.M.'s parental claim, E.G. denied "the intimacy and the deep love they shared for each other and *their marriage*" (Trial Transcript, *K.M. v. E.G.*, 2005, p. 812 (emphasis added)).

Critically, K.M.'s attorneys did not argue that the women's marriage-like relationship itself produced legal parentage but instead that the relationship simply evidenced intent to parent:

[T]he parties were living together in a committed relationship that antedated the children's conception; the parties were registered as domestic partners with the City and County of San Francisco; the parties *intended* "to remain together as a couple" after the birth of the children; the parties *intended* to provide together a stable and nurturing home for the children[.] (Appellant's Petition for Review, *K.M. v. E.G.*, 2005, pp. 19–20) (emphasis added)

Indeed, the lawyers asserted that the "legal standard" for parental recognition should turn in part on "[t]he intent of the parties implied by the type of relationship they have to each other." (Appellant's Reply Brief, *K.M. v. E.G.*, 2005, p. 4). Through this lens, K.M. and E.G.'s marriage-like relationship, just like the marriages in *Johnson* and *Buzzanca*, evidenced parental intent and function. Yet marriage itself constituted an arbitrary line for legal parentage, since married different-sex couples and unmarried same-sex couples were similarly situated with respect to principles of intentional and functional parenthood.

Advocates channeled arguments that same-sex couples functioned like different-sex couples primarily through family-law doctrine. But constitutional equal protection arguments supported family-law arguments that women and men, and same-sex and different-sex couples, were similarly situated with respect to parenthood. As K.M.'s lawyers claimed, "Because the only distinction between K.M. and similarly situated males (in whose favor the ['holding out'] presumption has been applied) is her gender, she has been denied equal protection based upon an impermissible classification" (Appellant's Opening Brief on the Merits, *K.M. v. E.G.*, 2005, p. 30). As *amicus curiae*, the National

Center for Lesbian Rights (NCLR) asserted that “[f]ailure to apply [intentional and functional parenthood] equally would ... discriminate against parents on the basis of their gender and sexual orientation, in violation of the equal protection guarantees of the state and federal Constitutions” (Letter of *amici curiae* in support of petition for review, *K.M. v. E.G.*, 2005, p. 6).

Without reaching the constitutional claims, the court recognized K.M. as the children’s legal mother under state parentage law. Gender differentiation no longer constituted a barrier to parental recognition. More than a decade earlier, in *Johnson*, the court had developed the doctrine of intentional parenthood but explained that “a child can have only one natural mother” (*Johnson v. Calvert*, 1993, p. 781). Now, the court repudiated that limitation. Deriving parental recognition from K.M.’s genetic connection, the court held that two women could be recognized as the “natural” mothers of a child (*K.M. v. E.G.*, 2005, p. 681). While its determination did not technically turn on conclusions about intent or function, the court nonetheless emphasized that (notwithstanding E.G.’s contrary contentions) both women appear to have intended that K.M. be the children’s mother, and K.M. in fact functioned as the children’s mother.

Still, *K.M.* constituted only one step toward same-sex parental recognition. After all, K.M. was a genetic mother, not a nonbiological co-parent. Her claim to parentage bridged different-sex and same-sex family formation by maintaining the salience of biological connection. For judicial intervention to have more far-reaching effects, the court would need to recognize a *nonbiological* mother in a same-sex couple as a legal parent.

In *Elisa B. v. Superior Court* (2005), Elisa and Emily, an unmarried same-sex couple, had three children together with the same donor sperm. Emily gave birth to two of the children, and Elisa gave birth to the other child. When the couple broke up, Elisa claimed not to have parental obligations to the two children to whom she was not biologically related. After county officials pursued Elisa for child support, attorneys at NCLR represented Emily, who asserted that Elisa was in fact the legal parent of those children (NeJaime, 2016, pp. 1227–1229).

The attorneys focused on the marriage-like relationship of the unmarried same-sex couple. Emily and Elisa, they explained, “were in a committed relationship for more than six years[,] ... had a commitment ceremony, exchanged rings, and pooled their finances” (Opening Brief of Real Party in Interest Emily B., *Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 7) (internal citations omitted). Like other couples who solidify their commitment in this way, Emily and Elisa eventually “decided to have children together” (Opening Brief of Real Party in Interest Emily B., *Elisa B. v. El Dorado Cty. Super. Ct.*,

2005, p. 7). In this respect, Emily and Elisa represented the growing number of same-sex couples who, like their different-sex counterparts, deliberately form families together.

Indeed, in a separate *amicus curiae* brief filed in the consolidated cases before the court, NCLR and Lambda Legal stressed the marriage-like relationships of the couples in the three cases. Each had “maintained a committed, cohabiting relationship of at least six years” (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H. v. Lisa R.*, 2005, pp. 8–9). “[A]ll three were financially interdependent. Each bought their home together. All three presented themselves publicly as intact families during the time the couples lived together” (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H. v. Lisa R.*, 2005, p. 9). The marriage-like adult relationships were the foundation for subsequent parent–child relationships, as “[e]ach couple planned together for pregnancy” (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H. v. Lisa R.*, 2005, p. 9). In this way, attorneys stressed intent and function, not biological connection or gender differentiation, as unifying themes. While LGBT advocates presented the unmarried couples as embodying the norms of marital domesticity, they did so in ways that unsettled parenting norms that excluded gays and lesbians.

Once again, constitutional principles bolstered family-law arguments for parental recognition. NCLR attorneys asserted that the failure to legally recognize Elisa, the nonbiological co-parent, would run against “equal protection guarantees of the California and federal constitutions” (Opening Brief of Real Party in Interest, Emily B., *Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 14). This claim depended on the increasing legal recognition of intended and functional parents in the context of heterosexual family formation:

[U]nder any form of equal protection analysis, ... [i]t is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her husband, as in *Johnson*; (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca*; (3) a man who holds himself out as a child’s father, but is neither married to the child’s mother nor biologically related to the child, as in *Nicholas H.*; and (4) a woman who holds herself out as a child’s mother, but is neither married to the child’s father nor biologically related to the child, as in *Karen C.*, but to deny legal parentage to a lesbian who consented to her partner’s artificial insemination with the *intention* of parenting the resulting children and who subsequently assumed parental responsibility for the children and *held herself out* as their parent to the world. (Opening Brief of Real Party in Interest, Emily B., *Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, 38) (emphasis added)

Lesbian parents, advocates asserted, were similarly situated to the presumptively heterosexual parents recognized in these leading cases. Accordingly, refusal to recognize the nonbiological co-parent now before the court would run afoul of equal protection guarantees.

As in *K.M.*, the court did not reach the constitutional issues. Instead, it found that Elisa qualified as a legal parent under the state parentage code. Because Elisa held the children out as her own, she satisfied a presumption of paternity traditionally applied to unmarried biological fathers.<sup>21</sup> Even as the court relied on a parentage presumption for unmarried parents, Emily and Elisa's proximity to marriage helped the court understand the parental unit before it (*Elisa B. v. El Dorado Cty. Super. Ct.*, 2005).<sup>22</sup> Critically, the court compared the nonbiological mother to a married man who turns to ART, observing that Emily was like "a husband who consented to the artificial insemination of his wife using an anonymous sperm donor" (*Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 670). Repudiating *Nancy S.* and other similar decisions from the 1990s (*Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 672), the court reasoned that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family" (*Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 668). Parental intent and conduct, rather than biological connection or gender differentiation, had become guiding principles.

LGBT advocates' claims to parental recognition on behalf of unmarried same-sex parents relied on assimilationist arguments. Advocates emphasized how same-sex couples, even outside marriage, replicated norms associated with marriage (and therefore with different-sex couples). Yet same-sex couples' adherence to some marital norms allowed advocates to simultaneously emphasize other, less mainstream features that connected same-sex to different-sex couples. Marginal forms of heterosexual family formation provided the lens through which to view family formation more generally. Through this process, central aspects of same-sex family formation influenced understandings of parenthood and shaped the family-law principles governing parental recognition.

#### 4. THE CASE FOR MARRIAGE

LGBT advocates continued to urge courts to recognize the parental rights and obligations of same-sex parents. By the mid-2000s, they were also organizing around marriage as an LGBT priority. Same-sex couples' claims to marriage were not divorced from claims to parental recognition on behalf of

unmarried gays and lesbians. When working on behalf of unmarried same-sex couples, LGBT advocates had appealed to marriage-like relationships in ways that led courts to appreciate the parent-child relationships at stake. With claims to marriage, advocates once again appealed to their constituents' marriage-like relationships, and they included parenting as a key aspect of these relationships (NeJaime, 2016, p. 1231). They asserted that same-sex couples were like different-sex couples with respect to both adult and parent-child relationships.

Scholars have shown how same-sex couples' claims to marriage buttressed a traditional model of family formation and recognition. But they largely have neglected the possibility that marriage claims did this, *and yet also* contributed to new and more progressive understandings of the family (*but see* Joslin, 2017). Fully appreciating the implications of marriage equality claims requires examining how exactly same-sex couples are understood as similarly situated to different-sex couples for purposes of marriage and parenthood. If they are similarly situated in ways that emphasize principles of family formation and recognition historically seen as unconventional, these principles may contribute to new understandings of both marriage and parenthood (NeJaime, 2016, p. 1238). As the discussion below shows, same-sex couples' marriage claims relied on comparisons that destabilized traditional markers of parental recognition. A marital parentage regime that includes same-sex couples must rest on features other than biological connection and gender differentiation. Instead, the common ground between different-sex and same-sex couples rests on concepts of parental intent and function. Pushed by LGBT advocates, courts came to understand parenthood within marriage through the lens of these emerging concepts.

#### 4.1. Seeking Inclusion in Marriage

Those defending same-sex couples' exclusion from marriage attempted to frame marriage as a child-centered institution in which traditional understandings continued to govern (NeJaime, 2016, p. 1236). Inside marriage, they suggested, couples raised their biological children (Joslin, 2013), and women and men brought to parenting different and complementary qualities (NeJaime, 2013a). On this view, marriage channeled procreative sex into stable households, and these households supplied "optimal childrearing," which meant childrearing by a biological mother and father.<sup>23</sup> For example, as the Alabama governor argued at the Supreme Court in support of states opposing same-sex marriage, states have "compelling interests" in "securing the rights

of children to be connected to their biological parents [and] preserving distinct offices for mothers and fathers” (Brief of Robert J. Bentley, Governor of Alabama, as *Amicus Curiae* in Support of Respondents, *Obergefell v. Hodges*, 2015, p.5). Biological connection and gender differentiation were each key to this understanding. The governor celebrated “the unique importance and fundamental rights and duties of the biological parent–child relationship,” while also claiming that allowing same-sex marriage would “obscure the non-fungible value of mother and father” (Brief of Robert J. Bentley, Governor of Alabama, as *Amicus Curiae* in Support of Respondents, *Obergefell v. Hodges*, 2015, pp. 9–10).

LGBT advocates responded by framing marriage in both *adult-centered* and *child-centered* terms. In an attempt to render irrelevant the procreative rationale advanced by those defending same-sex couples’ exclusion from marriage, lawyers stressed the adult-centered dimensions of marriage’s contemporary meaning. For instance, as lawyers representing same-sex couples from Michigan argued at the Supreme Court in one of the cases consolidated with *Obergefell*, “[t]he State’s account of marriage bears little resemblance to actual marriage law in Michigan or other states, which focuses on the spousal bond, not the capacity to bear children” (Reply Brief for Petitioners, *DeBoer v. Snyder*, 2015, p.13). Marriage, on this view, neither required procreation nor demanded childrearing. Instead, marriage allowed individuals to form committed relationships characterized by mutual emotional support and economic interdependence, regardless of whether those individuals desired to have and raise children. In the words of the Michigan lawyers, “marriage establishes a legally enforceable commitment from one spouse to another” (Reply Brief for Petitioners, *DeBoer v. Snyder*, 2015, p. 13).

Yet, somewhat paradoxically, LGBT advocates also responded to opponents of same-sex marriage by reclaiming marriage as a child-centered institution. Same-sex couples, the Michigan lawyers asserted, are “similarly situated to many different-sex couples with respect to the goal of raising children in a family” (Reply Brief for Petitioners, *DeBoer v. Snyder*, 2015, p. 25). On this view, an approach to marriage that prioritizes children should seek to include, rather than exclude, same-sex couples.

As left-progressive scholars critical of the LGBT push for marriage have explained, LGBT advocates seeking marriage depicted same-sex couples as model citizens. Parenting formed an important basis of this depiction (Murray, 2012b, p. 423). Indeed, *unmarried* same-sex couples’ lives appeared more ideal – and marriage-like – than their married different-sex counterparts (Murray, 2012a, pp. 1 and 59). As those who have lodged the assimilationist critique of LGBT advocacy have noted, advocates’ efforts to connect



marriage to parenting in same-sex marriage litigation rested on a relatively traditional model (Murray, 2012b, pp. 419–423; Polikoff, 2005, pp. 573, 590). Parent–child relationships, on this view, travel with marital relationships and are properly cabined inside the intimate, committed relationships of co-parents.

Scholars, though, largely have neglected the ways in which this conventional approach to marriage and parenthood existed alongside – and, in fact, facilitated – a more expansive and egalitarian approach. Advocates emphasized child-centered dimensions that, on key points, departed from their opponents’ characterization of parenting and instead resonated with the lives of same-sex couples.<sup>24</sup> The commonality between same-sex and different-sex couples arose not from biological connection or gender differentiation, but rather from intentional and functional relationships (NeJaime, 2016, p. 1237).

Consider again the arguments that lawyers for Michigan same-sex couples made at the Supreme Court. They began by explaining that “[s]tates confirm different-sex couples’ parentage of children conceived through assisted reproduction, and allow married couples ... to establish legal parentage in ways aside from biology” (Reply Brief for Petitioners, *DeBoer v. Snyder*, 2015, p.16). Same-sex couples, like their different-sex counterparts, together decide to have and raise children, often through assisted reproduction and without regard to biological connection. Yet same-sex couples, the lawyers asserted, were excluded from marriage even though they are “similarly situated to different-sex couples in how and whether they bring children into a marriage” (Reply Brief for Petitioners, *DeBoer v. Snyder*, 2015, p. 16). Of course, this argument required an appeal to unconventional practices of heterosexual family formation.

#### 4.2. Ordering Inclusion

In adjudicating claims to marriage, courts confronted two competing views of (marital) parenthood – a biological, gender-differentiated view advanced by opponents of same-sex marriage, and an intentional and functional view advanced by same-sex couples and their supporters. As courts began overwhelmingly to accept same-sex couples’ claims (and thus order that same-sex couples have access to marriage), they routinely cited same-sex parenting as a justification for their decisions. In positioning same-sex parenting as a reason to credit claims to marriage, courts set aside conventional norms of marriage and parenting that traditionally animated same-sex couples’ exclusion.

Instead, they accepted principles of family formation and recognition – namely, parental intent and conduct – that characterized nontraditional, marginal family configurations and that mapped onto same-sex family formation (NeJaime, 2016, pp. 1236–1237). Marriage related to parenthood in ways that extended the very model of parenting that had been forged by LGBT advocates in earlier efforts to achieve parental recognition on behalf of unmarried parents.

The reasoning of courts involved in the same-sex marriage conflict in California illustrates this dynamic. In 2008, before voters enacted a state constitutional ban on same-sex marriage, the California Supreme Court struck down the state’s statutory ban. In doing so, the court found immaterial the difference between same-sex and different-sex couples highlighted by opponents of marriage equality. Rather than allow its decision to turn on the fact that “only a man and a woman can produce children biologically with one another” (In re *Marriage Cases*, 2008, p. 430), the court focused on the “stable two-parent family relationship[s]” formed by both same-sex and different-sex couples (In re *Marriage Cases*, 2008, p. 433). Support for those relationships, the court explained, “is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples” (In re *Marriage Cases*, 2008, p. 433). Commonality between same-sex and different-sex couples emerged with respect to parenting, and that commonality was reflected in the court’s approach to marriage.

The California Supreme Court did not have the last word on marriage in the state. Eventually, after voters passed Proposition 8, which amended the state constitution to ban same-sex marriage, federal courts considered whether that measure violated federal constitutional guarantees. In striking down Proposition 8, the U.S. Court of Appeals for the Ninth Circuit, in a decision ultimately vacated by the U.S. Supreme Court, found support in the history of parental recognition under California state law. As earlier litigation involving married different-sex couples as well as unmarried same-sex couples demonstrated, “in California, the parentage statutes place a premium on the ‘social relationship,’ not the ‘biological relationship,’ between a parent and a child” (*Perry v. Brown*, 2012, p. 1087, vacated by *Hollingsworth v. Perry*, 2013). On this view, a model of marriage that vindicates parenting prioritizes not the biological dimensions of the parent–child relationship but rather the social dimensions. Importantly, an approach grounded in social dimensions can value the relationships of both biological and nonbiological parents, and can include both different-sex and same-sex couples.

When the U.S. Supreme Court in 2013 determined that the proponents of Proposition 8 lacked standing to appeal the district court's adverse ruling and thus vacated the Ninth Circuit's decision, that earlier district court ruling became the governing decision in the case. (*Hollingsworth v. Perry*, 2013). In striking down Proposition 8 in 2010, the district court had found unpersuasive child-centered arguments for same-sex couples' exclusion from marriage. "California law," the court observed, "permits and encourages gays and lesbians to become parents through adoption ... or assistive reproductive technology" (*Perry v. Schwarzenegger*, 2010, p. 968). The state's recognition of same-sex parents outside of marriage – recognition earned through years of litigation and legislative advocacy on behalf of unmarried same-sex parents – both rendered same-sex parenting legitimate and made parenting arguments for bans on same-sex marriage appear illogical. If the state embraced same-sex parenting, including the nonbiological parental bonds such parenting necessarily entailed, then it seemed unreasonable to exclude same-sex couples from a mode of family formation (marriage) that valued parent–child relationships.

The reasoning of the various courts involved in California's conflict over same-sex marriage illustrates an important dynamic: Same-sex couples' inclusion in a child-centered model of marriage followed from comparisons between same-sex and different-sex couples along lines that had for many years been understood as unconventional. This dynamic is evident not only in the numerous state and federal decisions leading up to the Supreme Court's resolution of the marriage issue but also in *Obergefell v. Hodges* (2015) itself. There the Court ruled that the exclusion of same-sex couples from marriage violated both the due process and equal protection rights of gays and lesbians (*Obergefell v. Hodges*, 2015, p. 2604).

In its reasoning, the Court embraced an adult-centered, nonprocreative view of marriage – one that could accommodate same-sex couples. But, tracking advocates' appeal to both adult-centered and child-centered views of marriage, the Court also asserted that, for many, childrearing remains "a central premise" of marriage (*Obergefell v. Hodges*, 2015, p. 2600). Of course, in earlier stages of conflict, courts had rejected same-sex couples' claims to marriage by finding that for purposes of this "central premise," same-sex and different-sex couples were not similarly situated.<sup>25</sup> But in *Obergefell*, the Court conceptualized same-sex and different-sex couples as similarly situated with respect to childrearing, focusing on actual parent–child relationships rather than on modes of reproduction or gender-differentiated parenting.

Indeed, it was the dissenting justices who articulated a model of marriage and childrearing that differentiated – and thus justified the exclusion

of – same-sex couples. In dissent, Chief Justice Roberts argued that because “[p]rocreation occurs through sexual relationships between a man and a woman,” the government has reason to channel different-sex, but not same-sex, relationships into marriage “for the good of children and society” (*Obergefell v. Hodges*, 2015, p. 2613) (Roberts, C.J., dissenting)). The *Obergefell* Court, though, rejected this “traditional, biologically rooted” understanding of marriage (*Obergefell v. Hodges*, 2015, p. 2613) (Roberts, C. J., dissenting) and instead connected an understanding of marriage that included same-sex couples to marriage’s childrearing function.

Through this lens, we see that LGBT claims to parenthood and marriage were motivated by both assimilative and transformative instincts. Comparisons to married, different-sex couples not only affirmed but also challenged dominant norms of marriage and parenthood. Same-sex couples mapped onto a relatively conventional model of parental recognition in which parenthood followed from intimate, coupled relationships. Yet same-sex couples also advanced more inclusive and capacious principles of parental recognition. The model of parenthood forged by LGBT advocates made traditional markers such as biological connection, gender, and even marital status less determinative of parental recognition. Instead, same-sex couples emphasized intentional and functional models of parenthood (NeJaime, 2016, pp. 1188–1190). In this sense, claims that at first appear conventional may contain within them the seeds of change.

## 5. PARENTAL RECOGNITION AFTER MARRIAGE

This section explores how same-sex couples’ inclusion in marriage affects approaches to parental recognition, primarily inside but also outside marriage. Of course, in significant ways same-sex couples assimilate to dominant understandings of parenthood. Yet, as the following discussion shows, distinctive aspects of same-sex family formation also structure aspects of contemporary parentage law in ways that displace conventional norms. Features that, in earlier conflict, had been sufficiently different to justify same-sex couples’ exclusion from marriage now provide principles through which to understand marital family formation and marital parental recognition. Indeed, these principles even bleed outside the boundaries of marriage and contribute to new understandings of parenthood generally.

More specifically, same-sex couples’ inclusion in marriage renders intentional and functional concepts of parenthood more influential and comprehensive. At the same time, same-sex couples’ inclusion reduces the salience of

both biological connection and gender differentiation in the law of parental recognition. Put differently, the incorporation of same-sex couples into marriage and parenthood – which brings with it an understanding of same-sex couples as like different-sex couples for purposes of marriage and parenthood – mainstreams modes of family formation and parenting that had long been marginal.

### 5.1. Parentage inside Marriage

Same-sex couples' claims on marital parentage expand notions of parental recognition along some dimensions, even as they affirm traditional understandings along other dimensions. That is, while same-sex parentage claims inside marriage tether parental recognition to intimate, coupled adult relationships, they also displace biological and gender-differentiated approaches to parenthood in favor of intentional and functional approaches. In this sense, the reasoning that facilitated recognition of nonbiological lesbian co-parents *outside marriage* now structures recognition of nonbiological lesbian co-parents *inside marriage* (NeJaime, 2016, pp. 1241–1242).

Consider the marital presumption. Traditionally, the man married to the woman giving birth was presumed to be the biological, and thus, legal father of the child. Of course, the marital presumption traditionally could hide biological facts and thereby allow social understandings of parenthood to prevail (*Michael H. v. Gerald D.*, 1989). The mother's husband could pretend he was the biological father. Nonetheless, courts and legislatures generally obscured the marital presumption's capacity to defy biological facts (Kording, 2004, pp. 811 and 818).

Now, with same-sex couples, the marital presumption runs against biological facts in open, obvious, and comprehensive ways (Appleton, 2006, pp. 227 and 230). The presumption, therefore, can no longer be justified as a proxy for biological paternity – as merely a reflection of a biological, gender-differentiated understanding of parenthood. Instead, it must transparently own its function as a mode of recognition of intentional and functional parent–child relationships. As Susan Appleton has explained, with lesbian couples, the marital presumption rests not on assumptions of biological paternity but rather on the couple's agreement with respect to their parental project (Appleton, 2006, p. 286). The key principle of marital parentage now openly reflects the very concepts pressed by advocates in their earlier work seeking both nonmarital parental recognition and marriage equality.

Conflict over application of the marital presumption to same-sex couples illustrates how the rules of marital parentage now raise questions about the reach of intentional and functional principles of parental recognition. Consider the Iowa Supreme Court's decision in *Gartner v. Iowa Department of Public Health* (2013). After a same-sex couple had a child through donor insemination, Iowa officials refused to name the biological mother's spouse as the second parent on the child's birth certificate. They relied on the marital presumption embedded in the birth certificate regulations: "If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child[.]" (IOWA CODE § 144.13(2) (2011)).<sup>26</sup> Situating the regulations within a biological, gender-differentiated model of parenthood, officials asserted that Iowa law "recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father" (*Gartner v. Iowa Department of Public Health*, 2013, p. 342). Same-sex marriage, they contended, does not alter that approach to parental recognition.

The Iowa Supreme Court disagreed, extending the logic of marriage equality to questions of parental recognition (*Gartner v. Iowa Department of Public Health*, 2013, pp. 351–353).<sup>27</sup> The court focused on the commonality between same-sex and different-sex couples with respect to marital parenting. Given "the government's purpose [in its regulation of birth certificates] of identifying a child as part of [the couple's] family ... married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage" (*Gartner v. Iowa Department of Public Health*, 2013, p. 351). Of course, lesbian couples were not similarly situated to different-sex couples with respect to sexual procreation, biological connection, and gender differentiation. But those aspects of family formation were sidelined by the court; instead, same-sex couples were similarly situated to their different-sex counterparts with respect to intentional and functional parent–child relationships.

A traditionally marginal form of family formation – donor insemination – furnished the grounds on which to conceptualize both the state's purpose in issuing birth certificates and the commonality between same-sex and different-sex couples. Iowa handles donor insemination through its general approach to marital parentage; a husband is recognized as the legal father of a child his wife conceives with donor sperm simply in virtue of the marital presumption. In this sense, the state regulated marital parentage in ways that reflected intentional and functional approaches to parenthood.

The state, though, treated "married lesbian couples who conceive through artificial insemination using an anonymous donor differently than married

opposite-sex couples who conceive a child in the same manner” (*Gartner v. Iowa Department of Public Health*, 2013, p. 352). This differentiation reflected resistance to the principles of same-sex family formation – principles that overtly disrupt traditional norms rooted in biological procreation and dual-gender parenting (*Gartner v. Iowa Department of Public Health*, 2013, p. 353). As the court observed, for a different-sex couple, the state “is not aware the couple conceived the child by an anonymous donor”; that couple can pretend they are the biological parents of the child, and the “birth certificate reflects the male spouse as the father” (*Gartner v. Iowa Department of Public Health*, 2013, p. 353). In contrast, the same-sex couple disrupts biological assumptions in clear and open ways. With same-sex couples, conception through donor insemination – a marginal mode of family formation – could no longer be masked or obscured. Instead, the principles that justify nonbiological parenthood needed to be explicitly recognized. Vindicating parental norms that could accommodate both same-sex and different-sex couples who rely on donor insemination, the court ordered the state to apply the birth certificate regulations, and the marital presumption on which they rest, to married lesbian couples (*Gartner v. Iowa Department of Public Health*, 2013, p. 354).

Conflict over the marital presumption has continued in the wake of *Obergefell*. Most courts and legislatures that have considered the issue have extended the marital presumption to same-sex couples. Courts have determined that, just like a man, a woman should attain parental recognition in virtue of her marriage to the birth mother.<sup>28</sup> Some legislatures have revised their marital presumption of parentage to provide that the “person” married to the birth mother is the legal “parent” of the child.<sup>29</sup>

Most significantly, in June 2017, in *Pavan v. Smith*, the U.S. Supreme Court issued a *per curiam* order requiring Arkansas officials to issue birth certificates that include nonbiological mothers in married same-sex couples. In rejecting the claims of same-sex couples, the Arkansas Supreme Court had narrowed the reach of *Obergefell* and tethered parentage to biological connection (*Smith v. Pavan*, 2016).<sup>30</sup> Sympathizing with the state court’s view, Justice Gorsuch dissented in *Pavan*. “[N]othing in *Obergefell*,” he reasoned, “indicates that a birth registration regime based on biology ... offends the Constitution” (*Pavan v. Smith*, 2017, p. 2079). But in reversing the Arkansas decision, the Court viewed *Obergefell* – and the equal recognition of same-sex couples it endorsed – as necessarily connected to the recognition of nonbiological same-sex parents.

Critically, unconventional heterosexual family formation became key to understanding the logic of the state’s approach to birth registration. As the Court observed, “when an opposite-sex couple conceives a child by way of anonymous sperm donation,” Arkansas places the mother’s husband on the

birth certificate (*Pavan v. Smith*, 2017, p. 2078). Accordingly, the birth certificate is “more than a mere marker of biological relationships” (*Pavan v. Smith*, 2017, p. 2078). Given that the state issues birth certificates that recognize the formation of parent–child relationships in married different-sex couples who conceive with donor sperm, it cannot refuse to issue birth certificates that recognize the formation of parent–child relationships in married same-sex couples who conceive with donor sperm. “*Obergefell*,” the Court concluded, “proscribes such disparate treatment” (*Pavan v. Smith*, 2017, p. 2078).

### 5.2. Parentage Outside Marriage

This section’s discussion up to this point has focused on how understandings of parenthood pressed by same-sex couples shape the regulation of marital parentage. But, as I have argued elsewhere, the transformative implications of including same-sex parents in marriage bleed outside marriage. (NeJaime, 2016, p. 1262). The law’s embrace of same-sex parenting as a justification for the inclusion of same-sex couples in marriage – an enduring and privileged institution of family formation – mainstreams principles of parental recognition that accommodate same-sex couples’ families. Moreover, *Obergefell*’s equality mandate can be read to reach same-sex parenting, and equality for same-sex parents requires the recognition of nonbiological parental bonds (NeJaime, 2017, p. 2333). Through both marriage equality and sexual orientation equality, the premises of same-sex parenting become more generalizable and far reaching. Intent- and conduct-based principles shape the regulation of both married and unmarried parents, and both same-sex and different-sex couples.

Consider *Brooke S.B. v. Elizabeth A.C.C.* (2016), a post-*Obergefell* decision in which the New York high court overturned a damaging precedent dating back to the time of *Nancy S.* In *Alison D. v. Virginia M.* (1991), the New York Court of Appeals had refused to recognize an unmarried, nonbiological lesbian co-parent as a legal parent. Instead, the court had maintained parentage as a status rooted in the marital or biological family. Almost two decades later, with the increasing acceptance of same-sex family formation, the court nonetheless affirmed *Alison D.*, even as it pulled back on the decision’s implications for some same-sex parents (*Debra H. v. Janice R.*, 2010).<sup>31</sup>

But after marriage equality in New York and after *Obergefell*, the New York high court repudiated *Alison D.* and its treatment of same-sex couples’ families. The court viewed marriage equality – and *Obergefell* specifically – as an endorsement of family-based equality for same-sex couples. For the court, equality did not simply mean equal treatment under existing principles



of parental recognition. Rather, equality required changes to parentage law to accommodate the distinctive aspects of same-sex couples' family formation. Specifying the meaning of equality with respect to same-sex couples, the court observed that untethering parental recognition from biological connection is necessary to "ensure[] equality for same-sex parents and provide[] the opportunity for their children to have the love and support of two committed parents" (*Brooke S.B. v. Elizabeth A.C.C.*, 2016, pp. 498–499).

Through this lens, equality extends not only to married same-sex couples – those exercising rights protected by *Obergefell* – but also to unmarried same-sex couples – those seeking recognition in *Brooke S.B.* On this view, *Obergefell*'s equality mandate, while oriented specifically toward marriage, includes same-sex couples more generally. Nonbiological forms of parental recognition are necessary to treat same-sex couples' families as fully belonging, not only inside but also outside marriage. The understanding of parenthood on which *Obergefell* was premised shapes the regulation of parentage for both marital and nonmarital families.

Moreover, this understanding affects not only same-sex but also different-sex couples. With the New York court's decision, unmarried individuals who engage in ART with a different-sex partner can claim parentage without a biological connection; instead, they may derive parentage by appeal to pre-conception intent. In New York, the principles that underwrite the recognition of same-sex parents, long available to different-sex couples inside marriage, are now available to different-sex couples outside marriage.

The New York case is illustrative of broader trends. Across the country, legislatures are expanding laws regulating ART in ways that reach unmarried couples. For instance, Maine's parentage code now provides that "a person who consents to assisted reproduction by a woman ... with the intent to be the parent of a resulting child is a parent of the resulting child" (ME. STAT. tit. 19-A, § 1923 (2016).) Moreover, the UPA was revised in 2017 in ways that extend intent-based recognition without regard to sexual orientation or marital status (UPA, 2017). The new UPA embraces nonbiological parenthood not only across forms of ART – from donor insemination to gestational surrogacy – but also in more general provisions. For example, the UPA replaces the voluntary acknowledgment of paternity – the most common way that unmarried fathers are identified in the United States – with the gender-neutral voluntary acknowledgement of parentage (UPA, 2017, § 301). The voluntary acknowledgement of paternity was premised on biological fatherhood; yet even without a biological tie to the child, a man could falsely claim he was the biological father and, with the consent of the mother, establish paternity through this process. The new voluntary acknowledgement of parentage, in contrast, includes same-sex

couples and transparently accepts its nonbiological capacity; indeed, it explicitly applies to “intended parent[s]” (UPA, 2017, § 301). As these examples illustrate, the principles necessary to recognize gays and lesbians as parents – principles rooted not in biological connection or gender differentiation but instead in intent and function – are reshaping parentage law generally.

## 6. CONCLUSION – TRANSFORMATION THROUGH ASSIMILATION

In this chapter, I observed a dynamic that might be described as *transformation through assimilation*.<sup>32</sup> This dynamic likely arises in other settings. One can see aspects of it in contestation over the family outside the LGBT context. Consider earlier cases involving unmarried fathers and nonmarital children. Those cases show how sameness arguments (that unmarried couples and unmarried fathers were like married couples and married fathers) and arguments for inclusion (that unmarried fathers be included in legal parenthood) shifted parental norms. Courts protected nonmarital parents and children, even while shoring up some aspects of the status quo (*Stanley v. Illinois*, 1972; *Caban v. Mohammed*, 1979, p. 391). The extent to which the parents’ adult relationship looked marriage-like – the extent to which they acted like a husband and wife – shaped whether the Court understood the parent–child relationship as deserving of constitutional protection (Dolgin, 1994, p. 650; Murray, 2012b, p. 402). As with efforts on behalf of same-sex couples, efforts to expand parenthood in ways that made marital status less salient were shaped by unmarried parents’ conformity to marital norms. Yet conformity on some measures facilitated shifts in norms governing parental recognition. Nonmarital bonds of care and commitment were protected in ways that made marriage less central to parenthood.

The dynamic of transformation through assimilation may also exist outside the domains of marriage and parenthood. Future research might address whether other movements have argued in the register of sameness and inclusion in ways that nonetheless import difference into law, reconfiguring the grounds on which similarity is understood and reshaping the institutions at issue. Areas for potential investigation might appear across a variety of movements – from feminist mobilization regarding pregnancy and employment (Franklin, 2010; Mayeri, 2011), to immigration debates over language policies (Rodriguez, 2006, pp. 1714–1716), to disability rights work aimed at access and accommodation (Conway, 2018).<sup>33</sup>

Future research might focus specifically on the conditions under which the type of transformation identified in this chapter is likely to emerge. For instance, in the context explored here, those already included in the relevant institutions were engaging in new practices that challenged the norms governing those institutions. Within marriage, different-sex couples used ART in ways that led them to seek parental recognition in the absence of biological ties. Courts and legislatures accommodated these new family forms by treating them as narrow exceptions to be tolerated but limited or masked. Same-sex couples seized on these exceptional cases to reimagine the logic of parental recognition generally, eventually extending and mainstreaming principles of intent and function. Accordingly, in exploring other contexts, scholars might attend to the extent to which insiders are engaged in norm contestation in ways that aid outsiders making claims on the relevant institution.

## NOTES

1. Nonetheless, the analysis finds common ground with work in other disciplines. As writer and scholar Thomas Ferraro has shown in his treatment of immigrant narratives, the dominant culture can be criticized and remade through the very process of assimilation. Ethnic writers, Ferraro argues, discover in their own communities shifting practices and norms, and they also participate in the transformation of an American culture responding to the practices of new members (Ferraro, 1993, pp. 10–11, 192–193).
2. This dynamic resonates with William Eskridge's concept of "transformative equality," in which "equality ... offers opportunities for the modern state to rethink past practices and reconfigure institutions in ways that are better for society as a whole, and not just for the previously marginalized group" (see Eskridge, 2003, p. 176).
3. There are traces of this argument in Amy Hequembourg and Jorge Ardití's political, as opposed to legal, analysis (Hequembourg & Ardití, 1999). As they argue, "what is commonly termed 'assimilationism' does not involve a simple embrace of dominant structures but ... in its own way, it helps to change, or at least has the potential to change, the practices of categorization of mainstream society fundamentally" (664).
4. This is not to suggest that sociolegal scholars have not focused on the doctrinal and constitutive effects of substantive legal arguments. See, e.g., Cummings (2014, pp. 944–945) and McCann and Silverstein (1998, pp. 273–274).
5. See Robson (2002), "Inclusion requires conformity" (p. 725). See, for instance, Robson's (2002) characterization of women's rights advocacy. She asserts that "litigating the exclusion of women from all male institutions necessarily implicates the question of women's assimilability," as "the notion of the dominant and idealized group [i.e., men] ... becomes the group to which outsiders such as women are to be assimilated" (pp. 716–717).

6. For a contemporary critique of the “sameness theory” embedded in Title VII’s prohibition on sex discrimination, specifically with respect to addressing pregnancy and work-family conflict, see [Suk \(2010, p. 16\)](#). Suk questions the power of a legal anti-stereotyping principle in light of the social reality of women’s differential family burdens ([Suk, 2010, p. 60](#)).
7. This resonates with the argument made by Hequembourg and Arditì outside the context of legal mobilization. They explain how assimilationist strategies can “change the categories through which the mainstream constructs itself and therefore [have] the potential of changing the very terms of the foundational plane on which the oppression of gays and lesbians rests” ([Hequembourg & Arditì, 1999, pp. 663, 676](#)).
8. Clearly, an antidiscrimination regime designed around an assimilationist logic can require conformity to dominant norms and punish those who refuse to mute salient aspects of identity. See [Yoshino \(2006\)](#).
9. See also [Chang \(2016\)](#), describing “a strategy of assimilation,” (5) in which “the goal of marriage equality venerates marriage as an ideal to be emulated and achieved by gay couples, which in turn promotes further homogeneity with normative family structures” (23); [Shapiro \(2005, pp. 657, 661\)](#) (“Marriage was ... identified as essentially assimilation. It was and is a tool of inclusion and exclusion ... [that] subjects individuals and couples to coercive pressure to conform to the degree needed to gain inclusion.”).
10. See [Barker \(2012, pp. 109–110\)](#) (“Formal equality arguments do not engage with the institution of marriage in a critical way, instead seeking access to it for same-sex relationships on the basis that they are the same as heterosexual relationships and thus deserving of the same legal provisions and recognition.”); [Joshi \(2014, p. 235\)](#), (“[T]he legal and social movement for recognizing same-sex marriage has emphasized gay and lesbian couples’ *sameness* to heterosexuals, while downplaying their differences ... in order to establish couples’ ... heteronormativity.”); [Robson \(2002, p. 710\)](#) (asserting that “a legal reform movement ... is insufficient” because activists should “seek restructuring rather than mere inclusion”).
11. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges* (2015); Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners, *Obergefell v. Hodges* (2015); Brief of Amici Curiae Family Equality Council, Colage, and Kinsey Morrison in Support of Petitioners, Addressing the Merits and Supporting Reversal, *Obergefell v. Hodges* (2015).
12. See [Shapiro \(1999, pp. 17, 35\)](#). See also [Ghaziani \(2011, pp. 99–100\)](#) (describing the phenomenon of assimilation of gays and lesbians into mainstream society); [Murphy \(2013, pp. 1104, 1105, 1115\)](#) (discussing pressure to parent in ways that conform to heteronormative models of family).
13. See also [Grossman \(2012, p. 671\)](#).
14. Franke developed this concept in her work on feminist legal theory. See [Franke \(2001, pp. 181, 184\)](#). See also [Quinn \(2002, pp. 447, 477–478\)](#) (criticizing reproductivity and heteronormativity as negative normalizing regimes).
15. Importantly, seeing claims to sameness in this light not only pushes against the assimilationist critique but also challenges the views of proponents of same-sex marriage who assume that the inclusion of same-sex couples does little to shift the underlying norms that govern dominant institutions. Indeed, from their perspective, assimilation is a feature, not a bug.

16. For a brief summary, see [NeJaime \(2016, p. 1230\)](#).
17. For an important argument against the marriage-specific regulation of family formation through ART, see [Joslin \(2010\)](#).
18. An NCLR attorney asserted, "If there were marriage (for homosexuals), we would not be before the court" ([Hendrix, 1990, p. A1](#)).
19. This dynamic resonates with Ariela Dubler's "shadow of marriage" concept. See [Dubler \(2003, p. 1641\)](#).
20. As the appellate courts did, I use the women's initials, rather than their names.
21. A man enjoyed a presumption of paternity if he "receives the child into his home and openly holds out the child as his natural child." Cal. Fam. Code § 7611(d). In *Nicholas H.* (2002), the court had applied this presumption to an unmarried man who lacked a biological connection to the child.
22. "They introduced each other to friends as their 'partner,' exchanged rings, opened a joint bank account, and believed they were in a committed relationship. Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily 'would be the stay-at-home mother' and Elisa 'would be the primary breadwinner for the family.' At a sperm bank, they chose a donor they both would use so the children would 'be biological brothers and sisters'" (*Elisa B. v. El Dorado Cty. Super. Ct.*, 2005, p. 663).
23. See, e.g., Amici Curiae Brief of Robert P. George, et al. in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal, *Hollingsworth v. Perry*, and *United States v. Windsor*, (2012).
24. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief, *Baskin v. Bogan*, (2014) ("[T]he State denies the child Plaintiffs and other children of same-sex couples equal access to dignity, legitimacy, protections, benefits, support, and security conferred on children of married parents under state and federal law.").
25. See *Morrison v. Sadler* (2005); *Standhardt v. Super. Ct. ex rel. County of Maricopa* (2003).
26. A birth certificate is merely evidence of parentage. For the statutory marital presumption, see Iowa Code § 252A.3.
27. Relying on *Varnum v. Brien* (2009).
28. See, e.g., *Henderson v. Adams* (2016) and *McLaughlin v. Jones* (2016).
29. See, e.g., Cal. Fam. Code § 7611 (West Supp. 2016); Me. Stat. tit. 19-A, § 1881 (2016).
30. For a similar result, see *In re A.E.*, 2017.
31. In *Debra H.*, the court extended parental recognition to a nonbiological lesbian co-parent based on her civil union (authorized by Vermont) to the child's biological mother.
32. In some ways, this is an inverse dynamic of what Reva Siegel has identified as "preservation through transformation." See [Siegel \(1996, p. 2119, 1997, p. 1113\)](#). On this point, see [Cahill \(2016\)](#) ("NeJaime's analysis of marriage equality's evolution and, in his words, its 'transformative aspects' represents an intriguing example of the inverse of Reva Siegel's theory of 'preservation through transformation.'").
33. Of course, important differences might exist across domains. For instance, as David Engel and Frank Munger argued in their seminal treatment of disability rights, under the Americans with Disabilities Act, "attaining the right to inclusion in mainstream settings and activities is accompanied by a demonstration that one is marked indelibly by one's disability" ([Engel & Munger, 2003, p. 89](#)).

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