

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

ELIZABETH KERRIGAN, ET AL.

PLAINTIFF-APPELLANTS

v.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

DEFENDANT-APPELLEES

**BRIEF AMICI CURIAE OF JAMES Q. WILSON ET AL., LEGAL AND FAMILY
SCHOLARS IN SUPPORT OF DEFENDANT-APPELLEES**

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STATEMENT OF ISSUES

1. Did the trial court correctly conclude that the plaintiffs have not suffered a legally cognizable harm because they have been granted all the rights and benefits of marriage?
2. Do Connecticut's state laws, which define "marriage" as the union of one man and one woman, but permit same-sex couples to enter into "civil unions" with all the rights and benefits of marriage, violate the equal protection provisions of the Connecticut Constitution set forth in Article First, §§ 1 and 20?

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3. Do Connecticut's state laws, which define "marriage" as the union of one man and one woman, but permit same-sex couples to enter into "civil unions" with all the rights and benefits of marriage, violate the due process provisions of the Connecticut Constitution set forth in Article First, §§ 8 and 10?

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INTEREST OF AMICI

Amici Curiae are a group of legal and family scholars who offer expertise on the rationality of Connecticut's legal traditions of marriage, as promoting child well-being.

James Q. Wilson, formerly Shattuck Professor of Government at Harvard University (1961-1987), is Professor Emeritus at UCLA and a professor of Public Policy at Pepperdine University. He is the recent author of The Marriage Problem: How our Culture has Weakened Families (New York: Harper Collins, 2002), and is one of the nation's leading experts on crime and family structure.

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STATEMENT OF FACTS AND PROCEEDINGS

Amici adopt the Counter-Statement of Facts and Proceedings in the Brief of Defendant-Appellees.

SUMMARY OF ARGUMENT

Marriage is not merely a creature of statute, dreamed up by the Connecticut legislature: it is also a social institution, recognized at law, but sustained in meaningful ways by civil society. The common law, U.S. legal history and the cross-cultural tradition of marriage all point to two overarching reasons why this state, and the United States, like virtually every known human society, has understood marriage as the union of husband and wife: only this kind of sexual union can both make the next generation and connect those children to their own mother and father.

In separating the legal benefits conferred by marriage from the cultural institution (or tradition) of marriage itself, the state of Connecticut is not demonstrating irrational animus but exercising legislative judgment: seeking to maximize the legal benefits for gay couples while minimizing the threat to those aspects of the public understanding of marriage most related to child well-being and the common good.

ARGUMENT

I. MARRIAGE HAS ALWAYS BEEN VIEWED IN OUR LAWS AND CULTURE AS INTIMATELY RELATED TO PROCREATION AND PATERNITY.

Same-sex marriage raises a good question: Why has marriage in our tradition been viewed as exclusively a union of husband and wife? Why is marriage viewed in this way not only in our own tradition, but in virtually every known human society? Plaintiffs argue that this traditional understanding of marriage is rooted only in irrational animus and bigotry

towards gay people. We offer an alternate explanation: the most important public purpose of marriage has always been acknowledged to be regulating the procreative consequences of opposite-sex relations.

State and federal courts across the country have repeatedly articulated this understanding of marriage, in cases having nothing to do with gay people (and so far removed from any possible animus). A tiny sampling: “[T]he first purpose of matrimony, by the laws of nature and society, is procreation.” *Baker v. Baker*, 13 Cal. 87, 103 (1859). “[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.” *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974). “One of the primary purposes of matrimony is procreation.” *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. App. 1960). The Supreme Court also noted the connection in *Skinner v. Oklahoma*, stating, “Marriage and procreation are fundamental to the very existence and survival of the race.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Loving v. Virginia*, the Court cited *Skinner*, again noting the link between marriage and procreation in referring to marriage as a right that is “fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Courts are reflecting here not the peculiar legal developments within their own state but the broad understanding of marriage in our legal tradition. What do these courts mean by asserting that one key purpose of marriage is procreation? Surely not that *only* a husband and wife can make a baby. Human beings (and American courts) have long known that marriage is not technically required for procreation, that sexual acts outside of marriage can and frequently do produce children.

Instead, courts and society have seen marriage to be about two related things: procreation and paternity, or creating children who are raised by their own mothers and fathers in the same family union. As one commentator notes, “This concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation.” Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1114-15 (2002).

The fact that men and women can and do procreate outside of marriage is not evidence that marriage is not really about procreation. To the contrary, this is the very problem that, in this and every known human society, marriage as a social and legal institution attempts to ameliorate. American jurists were drawing on an older common law tradition with deep roots in philosophical discourse that understood the word “procreation” to refer to more than the mere physical generation of children’s bodies.

Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.

John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1035 (2001).

Despite the weakening of marriage in recent years, this historic cultural synthesis, which views marriage as a loving sexual union that has as a core purpose encouraging men and women to make and rear the next generation together, continues to hold cultural power. A 2005 poll asked Americans whether the most important good of marriage was

“the happiness and well-being of the married individuals” or “children who are well-adjusted and who will become good citizens.” Only 13 percent of Americans said the happiness of adults was the most important purpose of marriage; 74 percent insisted that both are equally important. Norval T. Glenn, *With this Ring: A National Survey on Marriage in America* 30 (National Fatherhood Initiative: Gaithersburg, MD) (2005).

II. VIRTUALLY EVERY KNOWN HUMAN SOCIETY ALSO LINKS MARRIAGE WITH PROCREATION AND PATERNITY.

Marriage is a virtually universal human institution. Although marriage customs vary greatly, marriage is everywhere recognizably related to furthering the goals of procreation and paternity. “The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple’s engaging in sexual intercourse and bearing and rearing offspring.” Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 5 (New York: Russell Sage Foundation, 1985).

Professors Margo Wilson and Martin Daly write:

Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple’s children. The marital alliance is fundamentally a reproductive alliance.

Margo Wilson & Martin Daly, “Marital Cooperation and Conflict,” in *Evolutionary Psychology, Public Policy and Personal Decisions* 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc., 2004).¹

¹ See also Helen Fisher, *Anatomy of Love: A Natural History of Mating, Marriage and Why We Stray* 65-66 (1992); George P. Murdock, *Social Structure* (1949).

Even societies that institutionalized same-sex relations in some contexts did not typically define these relations as marriages.² Even these societies recognized the need for a distinct social institution dedicated to managing sexual relationships between men and women in the interests of securing procreation and paternity, precisely because that task is so critical and important to social and child well-being. In this sense, and as a matter of historical record, our marriage tradition is clearly not rooted in animus. It has its own historic dignity and purpose, rooted in real and enduring human realities.

Moreover, the *Goodridge* decision finding no rational relation between marriage and procreation is a notable exception in American law. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003). At least seven other state and federal courts within the last ten years have ruled there is a rational relation between the definition of marriage and responsible procreation, most recently in New York and Washington.³ As the New York court clearly articulated:

[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.

² For example, “After leaving his mother’s hut at age twelve to thirteen to take up residence in the men’s house, Marind-Anim boy enters into a homosexual relationship with his mother’s brother, who belongs to a different lineage from his own. The relationship endures for roughly seven years, until the boy marries.” David F. Greenberg, *The Construction of Homosexuality* 27-28 (University of Chicago Press, 1988).

³ See *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. Div. 1, 2003).

Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

If these diverse, disinterested judges in other states can still see a potentially rational relation between procreation and the state's definition of marriage as the union of husband and wife, *then so too could the people of Connecticut*. The spirit if not the letter of comity forbids attributing irrationality or malice to so many sister jurisdictions.

III. SCIENTIFIC EVIDENCE SUPPORTS THE IDEA THAT MARRIAGE IS IMPORTANT FOR CHILD WELL-BEING

Social science evidence also supports the idea that the family structure created by marriage protects child well-being, at least for the vast majority of children produced by acts of sexual passion between men and women. Child Trends (a leading and respected child research organization) sums up the current social science consensus on common family structures:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.⁴

The risks to children when mothers and fathers do not get and stay married include increased rates of poverty, suicide, mental and physical illness, infant mortality, less education, juvenile delinquency and conduct disorder, adult criminality, teen pregnancy, lower life expectancy, and less warm and close relations with both mothers and fathers.

⁴ Kristin Anderson Moore, et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?" *Child Trends Research Brief*, June 2002, at 1. This research brief on family structure does not compare outcomes for children raised by same-sex couples to children in other types of families.

Meanwhile, relatively little is known about how the average child raised from birth by a same-sex couple fares. A recent review of social science evidence on same-sex parenting in the *The Future of Children*, a peer-reviewed journal published jointly by Princeton University and the Brookings Institution, notes:

What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children.

William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America's Children*, 15(2) *Future of Children* 97, 104 (Fall 2005).

It is important to note: The benefits of marriage for children described by this social science literature are not direct legal incidents of marriage, of the kind that the state can therefore transfer at will to other family forms. Children living with remarried parents for example, appear to do no better than children with single mothers, on average.⁵ Existing scientific data indicates that the law of marriage protects children primarily to the extent it increases the likelihood that children created by sexual acts will be born to and raised by their own mother and father in a reasonably harmonious union.

Scientific evidence also supports the idea that, despite contraception, sexual unions between men and women continue to have unique social consequences. Numerous studies have shown that unintended pregnancy remains a common, not rare, consequence of opposite-sex unions. Nationally, three-fourths of births to unmarried couples were

⁵ See Marilyn Coleman, et al., *Reinvestigating Remarriage: Another Decade of Progress*, 62 *J. Marriage & Fam.* 1288, 1292 (2000) (“[M]ost researchers reported that stepchildren were similar to children living with single mothers on the preponderance of outcome measures and that stepchildren generally were at greater risk for problems than were children living with both of their parents.”).

unintended by at least one of the parents.⁶ By their late thirties, 60 percent of American women have had at least one unintended pregnancy.⁷ Almost 4 in 10 women aged 40-44 have had at least one unplanned birth.⁸

The vast majority of children born to a married couple will have a mother and father already committed to their care. Most children conceived in other sexual unions will not. Only by first committing to an exclusive, enduring sexual, financial and emotional union can men and women attracted to the opposite sex ensure that their children will be protected by both their mother and father. Moreover, every man and woman in a faithful marriage, whether they have children or not, will at least not be contributing to the epidemic of fatherless children. Every marital union of male and female serves a substantial public interest that same-sex unions do not promote.

As the Plaintiffs note, same-sex couples do adopt children in Connecticut. Brief of Plaintiff-Appellants at 58. Adoption and foster care, however, are legal institutions that arise to cope with the consequences of family fragmentation: Children available for adoption or foster care typically do not have even one natural parent able and willing to care for them. The state's decision that gay people make good foster or adoptive parents simply has no bearing on the question of the rationale for marriage here described: committing a child's natural mother and father to his or her care. Adoption and foster care exist to provide the

⁶ J. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth*, 23(19) *Vital Health Stat.* 28 (Table 17) (National Center for Health Statistics) (1997).

⁷ *Id.* at 28 (Table 3).

⁸ *Id.* at 28 (Table 3).

best available care to children from the most broken of families, not to affirm adults' rights to form families of choice.

IV. THE LEGISLATURE'S DECISION TO PROVIDE CIVIL UNIONS, INSTEAD OF MARRIAGE, FOR SAME-SEX COUPLES IS RATIONALLY RELATED TO PROTECTING THE STATE'S MARRIAGE TRADITIONS

How would same-sex marriage hurt marriage? Not (or not only) we suggest, by offering new legal protections to gay couples. A particularly grave danger comes from legally redefining the public meaning of marriage for *all* couples, such that the state of Connecticut affirmatively repudiates the importance of procreation and family structure to marriage. Plaintiffs are asking this Court to so declare and in the process to stigmatize this older conjugal marriage tradition as rooted in irrational animus and bigotry.

It is important to note that it is not just opponents of gay marriage who believe that same-sex marriage is predicated on disconnecting marriage and procreation; many *advocates* of gay marriage in addition to the plaintiffs also do so. For example, same-sex marriage activist E.J. Graff argues that “[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.” E.J. Graff, “Retying the Knot,” in *Same-Sex Marriage: Pro and Con: A Reader* 134, 136 (Andrew Sullivan ed., 1st ed., Vintage Books 1997). Judith Stacey, sociology professor at New York University argues:

Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States . . . [P]eople might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to “marry” without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that “The Two-Parent Family is Better” than a single-parent family, as

family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?

Judith Stacey, "Gay and Lesbian Families: Queer Like Us," in *All Our Families: New Policies for a New Century* 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., Oxford U. Press 1998).

In separating the legal benefits conferred by marriage from the cultural institution (or tradition) of marriage itself, the state of Connecticut is acting rationally to pursue twin goals: to maximize new legal benefits for gay couples while minimizing a potentially quite serious threat to those aspects of the public understanding of marriage most related to child and community well-being. In so doing, the legislature is not demonstrating irrational animus, but exercising legislative judgment, which often requires balancing competing and conflicting interests and goods in our society.

CONCLUSION

For the above-stated reasons, this Court should affirm the judgment below.

DATED: April 24, 2007

Respectfully submitted,

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CERTIFICATION

This is to certify that the foregoing brief of amici curiae in support of defendant-appellees complies with the formatting requirements set forth in Practice Book § 67-2, and that a copy of the foregoing was mailed via first class mail, postage prepaid, this 24th day of April, 2007, to:

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