

IN THE IOWA SUPREME COURT

NO. 07-1499

KATHERINE VARNUM, et. al.,

Plaintiffs-Appellees,

vs.

TIMOTHY J. BRIEN,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT
IN AND FOR POLK COUNTY
HONORABLE ROBERT B. HANSON

**Brief of *Amicus Curiae* Howard University School of Law Civil Rights Clinic
In Support of Plaintiffs-Appellees**

Charles Gribble
Matthew Oetker
Parrish, Kruidenier, Dunn, Boles,
Gribble, Cook, Parrish, Gentry
& Fisher, L.L.P. Lawyers
2910 Grand Ave.,
Des Moines, IA 50312
(515) 284-5737 (tel)
(515) 284-1704 (fax)

Professor Aderson B. Francois, *
Supervising Attorney
Caroline Boucher**
Amy E. Hatcher**
Damien G. Scott**
Civil Rights Clinic
Howard University School of Law
2900 Van Ness St. NW
Washington, DC 20008
(202) 806-8082 (tel)
(202) 806-8436 (fax)

LAWYERS FOR AMICUS CURIAE

* Application for Admission
Pro Hac Vice Pending

**Student-Attorney

Substantial contributions to this brief were also made by Eric Post and Lory Ivey Alexander as Student-Attorneys, and Professor Josephine Ross.

PROOF OF SERVICE

I hereby certify that on the ____ day of March 2008 I did serve the within *Amicus Curiae* Brief on counsel, listed below, by mailing two (2) copies thereof to the following counsel:

Dennis W. Johnson
Amy M. Bjork
801 Grand Avenue, Suite 3900
Des Moines, Iowa 50309-2790
ATTORNEYS FOR APPELLEES

Michael B. O'Meara
Roger J. Kuhle
Assistant Polk County Attorneys
111 Court Avenue, Room 340
Des Moines, Iowa 50309
ATTORNEYS FOR APPELLANTS

PARRISH KRUIDENIER DUNN BOLES
GRIBBLE COOK PARRISH GENTRY &
FISHER, L.L.P.

By: _____
Charles Gribble AT0003083
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737
(515) 284-1704 - Fax

CERTIFICATE OF FILING

I, the undersigned, hereby certify I did file the within *Amicus Curiae* Brief with the Clerk of the Supreme Court, State Capital, Des Moines, Iowa 50319 by hand-delivering eighteen (18) copies of the same on the ____ day of March 2008.

Kerri Blanchard

TABLE OF CONTENTS

Proof of Service	ii
Certificate of Filing	ii
Table of Contents	iii
Table of Authorities	iv
Statement of Interest of Amicus Curiae.....	1
Summary of Argument	2
I. ARGUMENTS IN OPPOSITION TO SAME-SEX MARRIAGE STEM FROM THE SAME DISCREDITED SOURCES AS ARGUMENTS MADE IN OPPOSITION TO MARRIAGE BY INTERRACIAL COUPLES THAT SUCH RELATIONSHIPS ARE UNNATURAL.....	2
II. OPPOSITION TO INTERRACIAL MARRIAGE, LIKE PRESENT-DAY OPPOSITION TO SAME-SEX MARRIAGE, RELIED ON BASELESS PROGNoses THAT CHILDREN OF SUCH UNIONS WOULD BE PSYCHOLOGICALLY AND PHYSICALLY DAMAGED.....	14
III. PRIOR TO <i>LOVING V. VIRGINIA</i> , INTERRACIAL MARRIAGE WAS, LIKE SAME-SEX MARRIAGE TODAY, WIDELY CONSIDERED A THREAT TO ESTABLISHED SOCIAL ORDER AND TO THE INSTITUTIONS OF AMERICAN MARRIAGE AND FAMILY.....	22
Conclusion	27

TABLE OF AUTHORITIES

Case Law:

Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).....	16
Hodson v. Moore, 464 N.W.2d 699 (Iowa 1990)	19
In re Marriage of Cupples, 531 N.W.2d 656 (Iowa 1995).....	19
In re Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990)	19
Kinney v. Commonwealth, 30 Gratt. 858, 1878 WL 5945 (Va. 1878).....	12
Lawrence v. Texas, 539 U.S. 558 (2003).....	24
Loving v. Georgia, 388 U.S. 1 (1967).....	12-13, 23
Naim v. Naim, 87 S.E.2d 749 (Va. 1955)	21
Roe v. Roe, 228 Va. 722 (1985).....	16
Scott v. State, 39 Ga. 321 (1869).....	20-21
State v. Gibson, 36 Ind. 389 (1871)	12
West Chester R.R. Co. v. Miles, 55 Pa. 209 (1867).....	12
Wolfe v. Georgia Ry. & Electric Co., 58 S.E. 899 (Ga. App. 1907)	11-12

Statutory Authority:

D.C. Code § 16-302	19
D.C. Code § 16-914(a)(1)(A).....	19
Iowa Code § 600.4.....	19
Vt. Stat. tit. 15 § 1-102, 665	19

Other Authorities:

American Psychological Association, Sexual Orientation, Parents and Children (July 2004)	18
James Baldwin, <i>Fifth Avenue Uptown</i> , collected in <i>The Price of a Ticket</i> 213 (1985)	28

Steve Baldwin, <i>Child Molestation and the Homosexual Movement</i> , Regent U. L. Rev. 267 (2001).....	17-18
Carlos A. Ball & Janice Farrell Pea, <i>Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parenting</i> , 1998 U. Ill. L. Rev. 253 (1998)	6
Susan J. Becker, <i>Many Are Chilled, But Few Are Frozen: How Transforming Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States</i> , 14 Am. U. J. Gender Soc. Pol’y & L. 177 (2006).....	5-6, 9-10, 14
Nancy Bentley, <i>White Slaves in Antebellum Fiction</i> , 65 Am. Lit. 501 (1993).....	16
David Blankenhorn, <i>The Future of Marriage</i> (2007).....	22, 26
Suzanne Bost, <i>Fluidity Without Postmodernism: Michelle Cliff and the ‘Tragic Mulatta’ Tradition</i> , 32 African Am. Rev. 673 (1998)	15
Herbert C. Brown, Jr., <i>History Doesn’t Repeat Itself, But it Does Rhyme—Same-Sex Marriage: Is the African-American Community the Oppressor This Time?</i> , 34 S.U. L. Rev. 169 (2007).....	4
Megan Cahill, <i>Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo</i> , 99 N.W. U.L. Rev. 1543 (2005).....	23
Elizabeth Cantor, <i>Gays and Lesbians as Parents and Partners: The Psychological Evidence</i> , Same Sex Marriage: The Legal and Psychological Evolution in America (2006).....	18-19, 21
J.P. Chamberlain, <i>Eugenics and Limitations on Marriage</i> , A.B.A. J., July 1923	8
Congregation for the Doctrine of Faith, <i>Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons</i> (Oct. 1, 1986), available at < http://www.dignityusa.org/1986doctrine/ratzinger.html >	14
<i>Coparent or Second-Parent Adoption by Same-Sex Parents</i> , Pediatrics, Vol. 109, No. 2 at 339-40 (Feb. 2002).....	18
James Graham Cook, <i>The Segregationists</i> (1962).....	12
Gerry Dantone, <i>Anti-Gay Activism and the Misuse of Science: An example of how science can be perverted to support ideologically motivated social activism and harm humanity; the victims in this case: homosexuals</i> , Center for Inquiry Community of Long Island (2007), available at < http://www.centerforinquiry.net/uploads/attachments/Anti-	

gayActivismandtheMisuseofScience_1.pdf>	9
Jeanette R. Davidson, <i>Theories about Black-White Interracial Marriage: A Clinical Perspective</i> , 20(4) J. Multicultural Counseling & Dev. 150 (1992)	8-9
Tori DeAngelis, <i>New Date on Lesbian, Gay and Bisexual Mental Health</i> , Monitor on Psychology (Feb. 2002).....	21
James C. Dobson, <i>Eleven Arguments Against Same-Sex Marriage</i> , May 23, 2004, available at < http://www.citizenlink.org/FOSI/homosexuality/A000004753.cfm >	17, 26
Lisa Lindquist Dorr, <i>Arm in Arm: Gender, Eugenics, and Virginia's Racial Integrity Acts of the 1920s</i> , 11.1 J. Women's Hist. 143 (1999).....	4
Jon Dougherty, <i>Report: Pedophilia More Common Among "Gays"</i> , WorldNetDaily, April 29, 2002, available at < http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27431 >	18
Family Research Council, <i>Talking Points: Homosexuality and Child Sexual Abuse</i> , available at < http://www.frc.org/get.cfm?i=IF02G2 >	18
Walter L. Fleming, <i>Documentary History of Reconstruction: Military, Political, Social, Religious, Educational, & Industrial: 1865 to Present Time</i> (1907)	21
Focus on the Family, <i>Focus on the Family's Position on Same-Sex Marriage and Civil Unions</i> (Jan. 16, 2004), available at < http://www.citizenlink.org/FOSI/marriage/A000000985.cfm >	13
David H. Fowler, <i>Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and States of the Old Northwest, 1780-1930</i> (Garland Publishers 1987).....	22-23
George M. Fredrickson, <i>The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914</i> (1987)	24
Madison Grant, <i>The Passing of the Great Race; or the Racial Basis of European History</i> (1918).....	8
David F. Greenberg, <i>The Construction of Homosexuality</i> (1988).....	25
Mark Haller, <i>Eugenics: Hereditarian Attitudes in American Thought</i> (1963)	7
Brad Harrub, et. al., "This is The Way God Made Me": A Scientific Examination of Homosexuality and the "Gay Gene," < http://www.trueorigin .	

org/gaygene01.asp>.....	9
Gregory M. Herek, <i>Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective</i> , 61 Am. Psychologist 611 (2006)	25
Gregory M. Herek, <i>The Psychology of Sexual Prejudice</i> , in <i>Sexual Perspectives on Lesbian, Gay, and Bisexual Experiences</i> (Lind D. Garnets, ed. 2002)	26
Chester Higgins, <i>Mixed Marriage Ruling Brings Mixed Reaction in Dixieland</i> , Jet (June 29, 1967).....	23
William H. Hohengarter, <i>Same-Sex Marriage and the Right of Privacy</i> , 103 Yale L.J. 1495 (1994).....	24
The Imitation of Life (Universal Pictures 1934).....	16
Kevin R. Johnson, <i>Taking Out the “Garbage” in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling</i> , 2007 Wis. L. Rev. 283 (2007)	22-23
Anne Goodwyn Jones, Ed., <i>Haunted Bodies: Gender and Southern Texts</i> 464 (1998)	16
Randall Kennedy, <i>Interracial Intimacies</i> (2003)	14-15, 23
Stanley Kurtz, <i>The Libertarian Question</i> , Nat’l Rev. Online (April 30, 2003), available at < http://www.nationalreview.com/kurtz/kurtz04302003.asp >	24
Stanley Kurtz, <i>Point of No Return</i> , Nat’l Rev. Online (Aug. 3, 2001).....	24
Daryl Lindsey, <i>From “Hey Faggot” to “Hey Daddy”</i> , Salon.com (Oct. 1, 1999)	19-20
Susie Lorden, <i>The Law of Unintended Consequences: The Far-Reaching Effects of Same-Sex Marriage Ban Amendments</i> , 25 Quinnipiac L. Rev. 211 (2006).....	26
Julie Nokov, <i>Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934</i> , 20 Law & Hist. Rev. 225 (2002)	7-8
Thomas M. Norwood, <i>Address on the Negro</i> (Savannah, Ga.: Braid and Hutton, 1907)	4
Angela Onwuachi-Willig, <i>Undercover Other</i> , 94 Cal. L. Rev. 873 (2006).....	13
Letter from Jonathan Pait, Community Relations Coordinator, Bob Jones University to	

James Landrith (Aug. 31, 1998), available at < http://multiracial.com/site/content/view/1023/49 >	13
Christine Palumbo-DeSimone, <i>Race, Womanhood, and the Tragic Mulatta</i> , Multiculturalism: Roots and Realities (2002)	15-16
Ariel [Buckner H. Payne], <i>The Negro: What is His Ethnological Status?</i> (1867), reprinted in John David Smith, <i>The "Ariel" Controversy: Religion and "The Negro Problem"</i> at 48 (Garland Publ'g, Inc. 1993)	11
Ernest Porterfield, <i>Black-American Intermarriage in the United States</i> , 5 <i>Marriage & Fam. Rev.</i> 17 (1982).....	8-9
<i>The Problem of Pedophilia</i> (1998), available at < http://www.narth.com/docs/pedophNEW.html >	18
Ruthann Robson, <i>Our Children: Kids of Queer Parents and Kids Who Are Queer: Looking at Sexual Minority Rights From a Different Perspective</i> , 64 <i>Alb. L. Rev.</i> 915 (2001).....	20
Reginald Leamon Robinson, <i>Race, Myth and Narrative in the Social Construction of the Black Self</i> , 40 <i>How. U. J.</i> 1 (1996).....	4
Renee C. Romano, <i>Race Mixing: Black and White Marriage in Postwar America</i> (2003).....	15, 23
Debra J. Rosenthal, <i>The White Blackbird: Miscegenation, Genre, and the Tragic Mullata in Howells, Harper, and the "Babes of Romance"</i> , 56 <i>Nineteenth- Century Lit.</i> 495 (2002).....	16
Josephine Ross, <i>Riddle for Our Times: The Continued Refusal to Apply to the Miscegenation Analogy to Same-Sex Marriage</i> , 54 <i>Rutgers L. Rev.</i> 999 (2002)	10
Josephine Ross, <i>Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage</i> , 55 <i>S.M.U. L. Rev.</i> 1657 (2002)	3
Josephine Ross, <i>The Sexulization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage</i> , 37 <i>Har. C.R.-C.L. Rev.</i> 255 (2002).....	3-6
Saks, <i>Representing Miscegenation Law, in Interracialism: Black-White Intermarriage in American History, Literature, and Law</i> 73 (Werner Sollors, ed., 2000).24	
Keith E. Sealing, <i>Blood Will Tell: Scientific Racism and Legal Prohibitions Against Miscegenation</i> , 5 <i>Mich. J. Race & L.</i> 559 (2000).....	7
Judith Stacey, <i>Legal Recognition of Same-Sex Couples: The Impact on Children and Families</i> , 23 <i>Quinnipiac L. Rev.</i> 529 (2004).....	24-25

Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833 (1997)6, 9, 16, 21

Lynn D. Wardle, *When Dissent is Stifled: The Same-Sex Marriage and Right-to-Treatment Debates*, <<http://www.narth.org/docs/wardle.html>>9

Rick Weiss, *Limit Attempts to Covert Gays?*, Mobile Register (Al.), Aug. 14, 1997, at A110

N.E. Whitehead, *Homosexuality and Mental Health Problems*, <<http://www.narth.com/docs/whitehead.html>>10

William D. Zabel, *Interracial Marriage and the Law*, in *Interracialism: Black-White Intermarriage in American History, Literature and Law* 56 (2000)22

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are faculty members and student attorneys of the Civil Rights Clinic at Howard University School of Law. As one of the oldest among historically black colleges and universities, Howard University School of Law has long placed the defense of human rights, equality and dignity at the heart of its educational practice. Today, this Court faces the question of whether marriage, an important expression of human dignity, should be equally available to same-sex couples as to opposite-sex couples, or whether such couples will be relegated to the separate but allegedly equal second-class status of civil unions. In seeking to answer the question, the Court will inevitably confront—directly or indirectly—the argument that the struggle for equal rights for same-sex couples does not constitutionally or morally equate with the fight against racial subordination. *Amici curiae*, respectfully submit this brief as a corrective to the flawed distinction too often drawn between equal rights for racial minorities and equal rights for all human beings. The very same arguments asserted by opponents of the right of same-sex couples to marry were also made to justify racial apartheid and the ban against interracial marriage. We are now long past the time when anyone would seriously claim that interracial marriages threaten the moral fabric of our civilization, are contrary to nature, or will be harmful to children of such a relationship. Therefore, the onus should be on opponents of same-sex marriage to demonstrate how arguments that time and experience have so thoroughly rejected in the context of interracial marriage should now be dug up, dusted off, and given any consideration, much less credibility, in the context of same-sex marriage.

SUMMARY OF ARGUMENT

Throughout the nation's history, opponents of interracial marriage justified criminal prohibitions against such unions by pointing to the purported natural law rationale for keeping the races separate: the detrimental effect of mixed-race birth and parentage, and the supposed destruction of society if people marry between the races. While public debate over interracial unions has generally died since the *Loving v. Virginia* decision in 1967, today the opposition to same-sex marriage has come to rely on arguments that are strikingly similar to those raised in opposition to interracial marriage. Opponents of marriage equality have attacked same-sex couples by using precisely the same flawed arguments, without acknowledging the past failure of those arguments in the earlier debate over mixed-race couples' right to marry.

This brief addresses the historical arguments against interracial sex, marriage, and parenting, while exposing the similarities and differences between those arguments and the recent opposition to marriage between same-sex couples, many of which are resurrected in the briefs of the State and its *amici*. The point of this brief is this: there is nothing new about the arguments marshaled in opposition to same-sex marriage; the very same arguments were assembled in opposition to interracial marriage. As a society, we have rightfully rejected these attempts to deny full human dignity to interracial couples and individuals. We should do no less for same-sex couples.

I. ARGUMENTS IN OPPOSITION TO SAME-SEX MARRIAGE STEM FROM THE SAME DISCREDITED SOURCES AS ARGUMENTS MADE IN OPPOSITION TO MARRIAGE BY INTERRACIAL COUPLES THAT SUCH RELATIONSHIP ARE UNNATURAL.

The most striking parallel between the rhetoric of interracial marriage opponents and the rhetoric of opponents of same-sex marriage is that such relationships are

unnatural, and thus may legitimately be prohibited. Opponents rely on three primary arguments: (1) that such relationships as purely sexual, rather than based on mutual love and commitment; (2) that interracial or intragender attraction is biologically and psychologically pathological and (3) that such relationships are contrary to God's plan.

A. Opponents have framed both Interracial Relationships and Same-Sex Relationships as Purely Sexual.

One significant commonality between the rhetoric of opponents of mixed-race marriages is the tendency to characterize the relationship as essentially sexual, and is not seen to be about commitment, communication or love. Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv. C.R.-C.L. Rev. 255, 255 (2002) (hereinafter, Ross, *Sexualization*). Because historically, marriage is perceived as making sex legitimate, the exclusion of same-sex and mixed-race couples from the definition of marriage has the effect of bolstering the view that such relationships are profane and therefore legitimately prohibited. Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 S.M.U. L. Rev. 1657, 1660-1661 (2002). Thus, the lack of marriage rights itself not only supports sexualized understandings, but also causes disenfranchisement of interracial and same-sex couples. *Id.* Consequently, sexualization, “[f]or both [mixed-race couples and same-sex couples], is a cause as well as a symptom of disempowerment.” Ross, *Sexualization*, at 255.

Historically, interracial couples were sexualized by the political rhetoric of anti-miscegenationists.

There is every indication . . . [that] among the bigoted [the term intermarriage] is merely a euphemism for *any* sexual activity: though they may use the term marriage, they simply mean sex. The history of opposition to interracial marriage is replete with sexual undertones. Laws that made mixed-race marriage illegal were part of a package that

also criminalized sexual relations between two unwed individuals across racial lines.

Ross, *Sexualization*, at 257-258 (emphasis in original) (internal citations omitted). To justify expansion and reinstatement of miscegenation laws, legislators, policymakers and judges “began to define and label all interracial relationships, even longstanding, deeply committed ones, as illicit sex rather than marriage.” Herbert C. Brown, Jr., *History Doesn’t Repeat Itself, But it Does Rhyme- Same-Sex Marriage: Is the African-American Community the Oppressor This Time?*, 34 S.U. L. Rev. 169, 173 (2007).

Sexualization was a common tactic to deny equality to African-Americans. Sexualization of African-Americans has a long history whereby “[b]lack men were sexualized as having large sexual libidos; black women were assumed to be promiscuous.” Ross, *Sexualization*, at 286-287 n.129 (internal citations omitted).¹ The imagery of this “predatory sexuality” attributed to black men tapped into whites’ fears for their daughters and justified segregation in nearly every aspect of life. For example, Judge Thomas N. Norwood, a prominent southern jurist and congressperson, in his speech titled “Address on the Negro,” used language that provided imagery of black men and women stalking whites in the street much like animals hunt their prey, stating, “illicit miscegenation thrives and the proof stalks abroad in breeches and petticoats along our streets and highways.” Thomas M. Norwood, *Address on the Negro* 26 (Savannah, Ga.: Braid and Hutton, 1907).

¹ Discussing segregation, one author observed that “whenever, wherever, race relations are discussed in the United States, sex moves arm in arm with the concept of segregation.” Lisa Lindquist Dorr, *Arm in Arm: Gender, Eugenics, and Virginia’s Racial Integrity Acts of the 1920s*, 11.1 J. Women’s Hist. 143, 144 (1999) (quoting Lillian Smith, *Killers of the Dream* 120 (New York: W. W. Norton, 1949)). Another scholar noted, “[t]he abolition of slavery opened a door in the mind of every Southerner: a nightmarish vision of an inevitable overthrow of sexual taboos between black and white. If the Negro were given equality, he might one day go the whole route – claim complete sexual equality – especially and specifically, marriage and sexual fraternization with white women.” Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 How. L. J. 1, 97 (1996).

“When all is said and done about the reasons for opposing racial integration, the bottom line is invariably a superstitious imagining of the pornographic nature of interracial sex.” Ross, *Sexualization*, at 260. By sexualizing mixed-race relationships, discussion of the love and commitment of the couple was stifled, and replaced by assertions that such couples were perverse deviants, different from the norm.

Same-sex marriage opponents adopted the tactic of sexualization in much the same way. “The similarity between opposition to mixed-race and same-sex couples lies not only in the laws used to discourage those relationships, but also in the arguments offered to support such laws.” *Id.* at 263. Sexualization rejects the recognition that mixed-race and same-sex couples marry for the same reason as everyone else: intimacy, romantic love, and commitment. “Sexualization of mixed-race marriages was part of a devaluation process—part of a process of denying respect, power and rights. This history teaches us that the current sexualization of same-sex love is part of the process of denying equal treatment.” *Id.* at 285.

Like the experience of interracial couples, same-sex couples are defined in terms of their behaviors, not their identities.² As Ross has noted: “[The sexualization of mixed-race couples] made the criminalization of interracial sex seem appropriate, and the related denial of marriage rights seem earned. Those in power did not have to share their rights and privileges, and could retain all the benefits of marriage for themselves.” The sexualization of gay men and lesbians accomplishes precisely the same end. Deprivation of marriage rights appears fair because gay people are seen

² Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 Am. U. J. Gender Soc. Pol’y & L. 177, 193 (2006) (hereinafter, Becker, *Many are Chilled*).

as engaging in illicit behavior that deserves neither marriage nor the economic and security benefits that accompany it. Ross, *Sexualization*, at 287-88.

Rhetoric from opponents of same-sex marriage is rife with the language of sexualization, such as references to sexual minorities as “promiscuous,” controlled by their “sexual desires,” and “more interested in their own sexual gratification than in nurturing their children.” Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U. Ill. L. Rev. 253, 266 (1998) (citing Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 882 (1997) (hereinafter Wardle, *Potential Impact*). Other characterizations of sexual minorities refer to gay people as self-destructive, “hedonis[ti]c,” “lack[ing in] moral character,” and akin to pedophiles, child molesters, and the mentally ill. See e.g., Becker, *Many are Chilled*, at 177 (examining common sexualization frames); Lynn D. Wardle, *Potential Impact* at 860-67 (positing that the key question regarding whether same-sex couples may adopt is whether “nurturing [is] more important than parental *sexual behavior*”) (emphasis added). Many opponents suggest that same-sex couples who wish to be married are succumbing to their “adult needs” and “sexual preferences,” thus attempting to avoid explicit sexualization of same-sex relationships, although the effect is the same. Like the imagery used to discuss interracial relationships, inappropriate sexualized framing of same-sex relationships is a prominent argument used by marriage opponents.

B. Pseudo-Scientific Biological and Psychological Arguments Were Used to Support Anti-miscegenation Laws and are Currently Being Used to Deny the Right for Same-Sex Couples to Marry.

Opponents of interracial marriage relied on pseudo-scientific theories to argue that certain personality traits were biologically inherited and drawn along racial lines.

Although considered to be neutral scientific inquiry at the time, this field of study, known as eugenics, was little more than scientific racism. Eugenic support for anti-miscegenation was based on a natural hierarchy of immutable races: blacks being at the bottom, whites at the top. Eugenicians asserted that any miscegenation would produce offspring inferior to either parent and bring the better down to the level of the lower. Keith E. Sealing, *Blood Will Tell: Scientific Racism and Legal Prohibitions Against Miscegenation*, 5 Mich. J. Race & L. 559, 565 (2000).

Discussions in the legal community relied on eugenics to assert the inferiority of blacks and to draw the conclusion that social and political divisions between the races were the result of inherent biological differences. Julie Nokov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 Law & Hist. Rev. 225, 241 (2002). As such, the dichotomy between the superior white, and inferior black, was so biologically entrenched that the only way to maintain a civil society was to implement rigid boundaries between black and white. Thus, the argument went, sex and marriage between the races had the potential to unravel the very thread of American society.³

In the early 20th century, when eugenics was in its prime, blood was the marker through which blackness was conveyed and was the way that any harmful and abnormal characteristic was passed from parent to child. *Id.* at 246. Within this paradigm, those living during this era saw only two scenarios for the future: either the races would become inexplicably merged, which would produce one race, or the

³ It is important to note that proponents of eugenics did not operate on the periphery of science; rather, they were some of the most well respected persons in their field. See generally Mark Haller, *Eugenics: Hereditarian Attitudes in American Thought* (1963) (discussing prominent eugenicist scientists such as Charles B. Devenport, Henry H. Goddard, Lothrop Stoddard, and Margaret Sanger).

status quo of complete separation would be maintained, in which case the current biracial population would forever be considered black. *Id.*

The legal community was not above the fray and joined laypersons in denouncing interracial marriage on the basis of biology. One legal commenter at the time wrote that “[r]ecent legislation limiting the right to marry is based not on historic rules or race feeling but on scientific facts.” J.P. Chamberlain, *Eugenics and Limitations of Marriage*, A.B.A. J., July 1923, at 429. Similarly, Madison Grant, a prominent lawyer, used eugenics to argue that interracial marriage accounted to “race suicide” and insisted that “the laws against miscegenation must be greatly extended if the higher races are to be maintained.” Madison Grant, *The Passing of the Great Race; or the Racial Basis of European History* 46, 60 (1918).

Those involved in interracial relationships were viewed as “sick” or as having psychological issues with their own racial background. Because interracial relationships ran against traditional societal mores, some social scientists suggested “that individuals who choose to marry interracially . . . [exhibit] pathological deviance or an abnormal level of rebellion.” Jeanette R. Davidson, *Theories about Black-White Interracial Marriage: A Clinical Perspective*, 20(4) J. Multicultural Counseling & Dev. 150, 150 (1992). Some scientists, psychiatrists, and psychologists asserted that people intermarry because of a “deep seated psychological sickness,” a willingness to “defy the prevalent cultural prejudice of society,” “the lure of the exotic,” as repudiation of one’s background, and because of “neurotic self-hate or self-degradation.” See generally Ernest Porterfield, *Black-American Intermarriage in the United States*, 5 Marriage & Fam. Rev. 17, 22 (1982) (surveying past theories examining motives for

black-white marriages, while noting that such theories are “unsystematic, fragmentary, and speculative”).

Additionally, other theorists “suggest more conscious ulterior motives [such as] (a) sexual curiosity, preoccupation or revenge; (b) the desire for social or economic mobility; and (c) exhibitionism.” Davidson, 20(4) *J. Multicultural Counseling & Dev.* at 150. All such studies have been scientifically rebutted. *Id.* This faulty science both supported the stigmatization of such couples and anti-miscegenation laws. Conspicuously absent from these works is any recognition that interracial couples marry because of love and commitment to each other.

Opponents of rights for same-sex couples base similar biological and psychological arguments upon faulty science. Although scientific professional organizations have discredited all notions that homosexuality is an illness, opponents of same-sex marriage continue to use pseudo-scientific arguments to deny sexual minorities the right to marry.⁴ Opponents of same-sex marriage continue to reference discredited studies or misrepresent the findings of such studies.⁵ The use of faulty science, much like the use of eugenics to support anti-miscegenation laws, has played a prominent role in arguments to deny marriage rights to same-sex couples.

⁴ See, e.g., Wardle, *Potential Impact*, at 852-57; Lynn D. Wardle, *When Dissent is Stifled: The Same-Sex Marriage and Right-to-Treatment Debates*, <<http://www.narth.org/docs/wardle.html>> (hereinafter Wardle, *Dissent*). When confronted with scientific evidence that non-heterosexuality is healthy and to some extent biologically based, same-sex marriage opponents respond with accusations that homosexual activists, feminists, and secular humanists somehow gained control over medical associations to obtain such results. See, e.g., Brad Harrub, et al., “*This is The Way God Made Me*”: *A Scientific Examination of Homosexuality and the “Gay Gene,”* <<http://www.trueorigin.org/gaygene01.asp>>; see also Wardle, *Dissent*.

⁵ See generally Gerry Dantone, *Anti-Gay Activism and the Misuse of Science: An example of how science can be perverted to support ideologically motivated social activism and harm humanity; the victims in this case: homosexuals*, Center for Inquiry Community of Long Island (2007), available at <http://www.centerforinquiry.net/uploads/attachments/Anti-gayActivismandtheMisuseofScience_1.pdf>; Becker, *Many are Chilled*, at 231-49 (examining pseudo-scientific arguments made by opponents of marriage by two persons of the same-sex).

Opponents of marriage rights for same-sex couples also argue that same-sex love is a result of psychological issues, consistent with their perspective that sexual identity can be changed or “cured.” Charles W. Socarides, the founder of the National Association for the Research and Therapy of Homosexuality (NARTH), a prominent group suggesting that homosexuality is an illness and can be changed, regularly asserts that “[h]omosexuality is a psychological and psychiatric disorder, there is no question about it.” Rick Weiss, *Limit Attempts to Convert Gays?*, Mobile Register (AL.), Aug. 14, 1997, at A1 (quoting Socarides). Same-sex marriage opponents assert that sexual minorities exhibit higher rates of “suicide, depression, bulimia, antisocial personality disorder, and substance abuse,” and are generally “mentally disturbed.” N.E. Whitehead, *Homosexuality and Mental Health Problems*, <<http://www.narth.com/docs/whitehead.html>>. Opponents of same-sex marriage devote much time to challenging the scientific methods of certain psychological studies, ignoring contrary studies, drawing different conclusions from particular studies than that of the researchers, or referencing largely discredited studies.⁶

Like the attacks on interracial couples, by using faulty science to frame homosexuality as an “illness,” opponents of marriage for same-sex couples erroneously suggest that there is a legitimate scientific justification for stigmatizing same-sex couples and denying them the right to marry. Similarly, many same-sex marriage opponents deliberately refuse to acknowledge that these relationships are

⁶ See generally Becker, *Many are Chilled*, at 233-42 (examining opponents’ psychological studies and finding social scientists and psychologists have universally rejected such studies); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply to the Miscegenation Analogy to Same-Sex Marriage*, 54 Rutgers L. Rev. 999, 1003-06 (2002) (examining a psychological study cited by the government in opposition to same-sex marriage and finding that the government misrepresented the study).

based on commitment and love, thus reaffirming and entrenching sexualized stereotypes of sexual minorities.

C. Judeo-Christian Theological Interpretations Have Often Been Used to Challenge Both Interracial and Same-Sex Marriage.

Those opposing same-sex and interracial marriages have often relied on Judeo-Christian tenets and text to support their position that such relationships are unnatural. They assert that allowing marriage between couples of the same sex detracts from the traditional meaning of marriage as defined by conventional moral and religious standards. Similar theological arguments were used to support the denial of the right for interracial couples to marry.

Religious leaders often sought to characterize African-Americans as less than human in an attempt to appeal to the biblical morality of the white population. In 1867, a white supremacist clergyman wrote “a man can not commit so great an offense against his race, against the country, against his God, in any other way, as to give his daughter in marriage to a negro—a beast—or to take one of their females for his wife.” Ariel [Buckner H. Payne], *The Negro: What Is His Ethnological Status?* 48 (1867), reprinted in John David Smith, *The “Ariel” Controversy: Religion and “The Negro Problem”* at 48 (Garland Publ’g, Inc. 1993). By deliberately placing the faceless offender in opposition to the three most influential factors in one’s life in that day and time - race, country, and God - this author sought to distinguish between normal and abnormal behavior.

Some of the most inflammatory non-secular language opposing both interracial and same-sex marriages originated in the courts. In 1907, a Georgia court declared that interracial marriages were “not only unnatural, but . . . always productive of deplorable results. They are productive of evil, and evil only, without any

corresponding good (in accordance with) the God of nature.” *Wolfe v. Georgia Ry. & Electric Co.*, 58 S.E. 899, 903 (Ga. App. 1907).⁷

Throughout the country’s history of slavery and segregation and up to recent times, interpretations of the Christian faith and teachings were commonly used to support claims that interracial sex and marriage threatened the natural social order. The Bible was used as a primary source in the debate against interracial marriage - not only was interracial marriage “unnatural” and a threat to white supremacy, but it violated basic Christian teachings. James Graham Cook, *The Segregationists* 214 (1962). Anti-miscegenationists argued that the Bible directly addressed the mixing of the races in Leviticus 19:19: “You shall not let your livestock breed with another kind. You shall not sow your field with mixed seed. Nor shall a garment of mixed linen and wool come upon you.” *Id.* An argument against miscegenation was also derived from the “opposition expressed by Moses and Ezra to the intermarriage of Jews with heathens (Deuteronomy 7:3 and Ezra 9-10).” *Id.*

Courts too have adopted this rhetoric: “[t]he natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of the races.” *State v. Gibson*, 36 Ind. 389, 404 (1871) (citation omitted). Perhaps the most famous Christian apology for anti-miscegenation laws was first articulated by the trial judge in *Loving v.*

⁷ In 1878, the Supreme Court of Virginia handed down an opinion containing perhaps the most widely cited language against allowing individuals of different races to marry. The court held that “[t]he moral and physical development of both races . . . require that they should be kept distinct and separate . . . that connections and alliance so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and subject to no evasion.” *Kinney v. Commonwealth*, 30 Gratt. 858, 1878 WL 5945, at *7 (Va. 1878); see also *West Chester R.R. Co. v. Miles*, 55 Pa. 209, 213 (1867) (“The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.”)

Virginia, Judge Leon Bazile of the Circuit Court of Caroline County, Virginia, who explained the reason for Virginia's law prohibiting interracial marriage as follows:

Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. Virginia, 388 U.S. 1, 3 (1967).

While many Americans have embraced changing notions of marriage, theological opposition to interracial relationships has endured. As recent as 16 years ago, 20 percent of white Americans still believed that interracial marriage should be illegal and only 44 percent of all white Americans approved of black-white interracial marriage. Angela Onwuachi-Willig, *Undercover Other*, 94 Cal. L. Rev. 873, 891 (2006) (citing Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*, 95 Mich. L. Rev. 1161, 1164 n.10 (1997) (referencing a 1991 Gallup poll)).⁸

Opponents of same-sex marriage also rely on theological arguments to support their position. For example, Focus on the Family, the premier organization opposing both marriage and civil unions between persons of the same sex, argues that “[m]arriage is the first institution ordained by God and served from the beginning as the foundation for the continuation of the human race.”⁹ Opponents of same-sex marriage assert that those who engage in homosexual sexual activity are sinners, that

⁸ As recently as 1998, Bob Jones University theologically supported their ban on interracial dating, stating that “God has separated people for His own purpose . . . [and] . . . the whole plan of God . . . indicates that interracial marriage is not best for man.” Letter from Jonathan Pait, Community Relations Coordinator, Bob Jones University to James Landrith (Aug. 31, 1998), available at <<http://multiracial.com/site/content/view/1023/49>> (Bob Jones University rescinded its ban on interracial dating, effective March 3, 2000).

⁹ Focus on the Family, *Focus on the Family's Position Statement on Same-Sex "Marriage" and Civil Unions* (Jan. 16, 2004), available at <<http://www.citizenlink.org/FOSI/marriage/A000000985.cfm>>.

the Bible dictates that marriage should be only between a man and a woman, and that any other framework is directly against God's will. Becker, *Many are Chilled*, at 220. Many opponents commonly reference the story of Adam and Eve, "the story of God's destruction of the city of Sodom for alleged homosexual depravity, [and the] characterization of a man lying with another man as an abomination," from Leviticus to support these propositions.¹⁰ Much like the theological arguments against interracial marriage, opponents of marriage between two persons of the same sex use (their) Biblical interpretations to suggest that homosexuality is not natural because it is against God's natural ordering.

II. OPPOSITION TO INTERRACIAL MARRIAGE, LIKE PRESENT-DAY OPPOSITION TO SAME-SEX MARRIAGE, RELIED ON BASELESS PROGNOSSES THAT CHILDREN OF SUCH UNIONS WOULD BE PSYCHOLOGICALLY AND PHYSICALLY DAMAGED.

The argument that interracial marriage harms children produced by that union—traditionally cited as a justification for anti-miscegenation statute—parallels the present-day argument that marriage between two persons of the same-sex harms any children produced during or adopted by that union.

Historically, there were two strains of the "harm to children" argument with respect to interracial marriage—first, that mixed-race children would be ostracized and, thus psychologically damaged, and second, that mixed-race children would be physically inferior to "pure blood" children. Hence, courts took astonishing pains to rationalize the removal of children from their parent of a different race.¹¹ In more

¹⁰ See also Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (Oct. 1, 1986) (discussing the Catholic perspective on homosexuality), available at <<http://www.dignityusa.org/1986doctrine/ratzinger.html>>.

¹¹ As one scholar has pointed out, "[t]he state believed . . . that it was better for a child to be reared in an institution, no matter how bad, than to be adopted into a family of a different race, no matter how good." Randall Kennedy, *Interracial Intimacies* at 12 (2003).

recent times, courts have employed similar mental gymnastics to do the same to children of gay or lesbian parents.

A. Opposition to Interracial Marriage, like Modern Opposition to Same-Sex Marriage, Subscribed to the Unfounded Fear that Individuals of Mixed-Race Heritage Faced Greater Risks in Development and Societal Acceptance.

A prominent argument against children being raised by mixed-race parents was that children would be psychologically damaged by the stigma of their parents' relationship. Thus, anti-miscegenationists focused on the psychological stress resulting from being mixed-race, from feeling isolated and confused due to the "lack" of racial identity, and from being ostracized for one's parents' choices. See Renee C. Romano, *Race Mixing: Black and White Marriage in Postwar America*, 136, 220 (2003). This logic supported the policy of "race matching," where mixed-race children were assigned a racial identity—usually black—and then raised by parents of that race. See Randall Kennedy, *Interracial Intimacies* at 367. As a result, children born out of wedlock between a white woman and a black man were often put up for adoption, sometimes when they were several years old and their true racial identity became evident. *Id.* at 368-370. In cases where the parents had been married, courts have awarded custody to the parent whose skin tone more closely resembles the child's, yet who is otherwise abusive or unfit as a parent. *Id.* at 372-375.

A common expression of the psychological harm incurred by mixed-race children was in the conception of the "tragic mulatta." The archetypical tragic mulatta was a "beautiful, Christian, near-white heroine trapped between racial worlds and locked out of domestic harmony because of [her] 'one drop' of 'black blood.'" Suzanne Bost, *Fluidity Without Postmodernism: Michelle Cliff and the 'Tragic Mulatta' Tradition*, 32 *African Am. Rev.* 673, 675 (1998). Often the discovery of the character's true,

nonwhite identity led to violence, fatal illness, or suicide.¹² Christine Palumbo-DeSimone, *Race Womanhood, and the Tragic Mulatta*, *Multiculturalism: Roots and Realities* 125, 126 (2002).¹³

Similarly irrational and disturbing arguments are made with respect to children with parents of the same sex, whereby marriage equality opponents posit that children will be confused about their own gender identity and societal gender roles. For example, opponents of marriage equality suggest that, upon realizing that they are different because they have two mothers or two fathers, children of same-sex parents will be subject to social condemnation and exclusion, and will become angry, rebellious, and perhaps suicidal. See Wardle, *Potential Impact* at 854-55. These arguments have impacted Courts' analyses to the point where Courts have, in many cases, found that one parent's sexual orientation renders them unfit to care for the child as a matter of law. In the case of *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), the Court found that the mother's homosexual relationship rendered her an unfit parent as a matter of law, and thus favored placing her child in the custody of a third party.¹⁴

Marriage equality opponents, through such institutions as Focus on the Family, the Family Research Council, and CitizenLink, also rely on arguments that it is best for

¹² See also Nancy Bentley, *White Slaves in Antebellum Fiction*, 65 *Am. Lit.* 501, 505 (1993); Debra J. Rosenthal, *The White Blackbird: Miscegenation, Genre, and the Tragic Mulatta in Howells, Harper, and the "Babes of Romance"*, 56 *Nineteenth-Century Lit.* 495, 499 (2002); Anne Goodwyn Jones, Ed., *Haunted Bodies: Gender and Southern Texts* 464, 468 (1998).

¹³ See, e.g., *The Imitation of Life* (Universal Pictures 1934) (A single white mother, Bea, hires a black nanny, Delilah, to care for her daughter, Jessie. Delilah's fair-skinned daughter, Peola, grows up with Jessie. Peola is ashamed of her African ancestry and moves away and attempts to pass as white. This breaks Delilah's heart, and she later dies. At Delilah's funeral, Peola is overcome, crying and begging forgiveness, and thus acknowledging her African ancestry).

¹⁴ See also *Roe v. Roe*, 228 Va. 722, 726-27 (Va. 1985) ("[t]he court also expressed concern as to 'what happens when the child turns twelve or thirteen, for example, when she begins dating or wants to have slumber parties, how does she explain this conduct' The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification.")

children to be raised in families by married *heterosexual* parents. James Dobson contends:

More than ten thousand studies have concluded that kids do best when they are raised by loving and committed mothers and fathers. They are less likely to be on illegal drugs, less likely to be retained in a grade, less likely to drop out of school, less likely to commit suicide, less likely to be in poverty, less likely to become juvenile delinquents, and for the girls, less likely to become teen mothers. They are healthier both emotionally and physically, even thirty years later, than those not so blessed by traditional parents.

James C. Dobson, *Eleven Arguments Against Same-Sex Marriage*, May 23, 2004, <http://www.citizenlink.org/FOSI/homosexuality/A000004753.cfm> (hereinafter Dobson, *Eleven Arguments*). Dobson goes on to describe the purportedly unique danger to children of same-sex families, which is based entirely on a prejudiced and unsubstantiated stereotype of homosexuals: “because homosexuals are rarely monogamous, often having as many as three hundred or more partners in a lifetime - some studies say it is typically more than one thousand - children in those polyamorous situations are caught in a perpetual coming and going.” *Id.* Dobson does not cite to any specific studies or data to support any of these statements.

Even more troubling are arguments that conflate homosexuality and pedophilia, attempting to foster fear that children of same-sex couples will be molested. Many marriage equality opponents employ such tactics in an attempt to scare the public away from supporting same-sex marriage. They suggest that the aim of the marriage equality movement is to erode the law and eviscerate age of consent laws. Steve Baldwin, *Child Molestation and the Homosexual Movement*, Regent U.L. Rev. 267, 270-273, 277 (2001). Baldwin demonizes the entire homosexual community, alleging that, “an unmistakable manifestation of the attack on the family unit is the homosexual

community's efforts to target children both for their own sexual pleasure and to enlarge the homosexual movement." *Id.* at 267.¹⁵

Despite the use of such invidiously prejudiced rhetoric from some academics, the medical establishment increasingly has modified its positions to favor same-sex parenting and remove the pathological stigma from homosexuality. States are following suit in changing laws governing family relations. In 2004, the American Psychological Association adopted a policy statement that stated that lesbians and gay men are not *per se* less likely to be good parents than parents who identify as heterosexual. *Sexual Orientation, Parents & Children*, American Psychological Association, July 2004. The statement explains that the children of same-sex parents develop in much the same way as children of heterosexual parents - psychologically socially, as well as sexually. *Id.* Similarly, the American Academy of Pediatrics issued a policy statement favoring second-parent adoption by same-sex parents. *Coparent or Second-Parent Adoption by Same-Sex Parents*, Pediatrics, Vol. 109, No. 2 at 339-340, Feb. 2002.

Many developmental studies have bolstered the claims that both hetero- and homosexual couples are equally good parents. No difference has been found in the development of children raised by same-sex parents in the areas of sexual and gender development, peer relationships or overall emotional adjustment. Elizabeth Cantor, *Gays and Lesbians as Parents and Partners: The Psychological Evidence*, Same Sex Marriage: The Legal and Psychological Evolution in America 47, 51 (2006)

¹⁵ Baldwin, in an article preceding the publishing of his piece in the Regent University Law Review, stated that his research concluded, "child molestation is an integral part of the homosexual movement." Jon Dougherty, *Report: Pedophilia More Common Among "Gays"*, WorldNetDaily, April 29, 2002, <http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27431>; see also *Talking Points: Homosexuality and Child Sexual Abuse*, Family Research Council, <<http://www.frc.org/get.cfm?i=IF02G2>>; *The Problem of Pedophilia*, <<http://www.narth.com/docs/pedophNEW.html>> (1998).

(hereinafter Cantor, *Parents and Partners*). Contrary to the claims of marriage equality opponents, the children who participated in the studies understood their own gender identity, played with gender-specific toys, and otherwise exhibited typical preferences and behaviors for their respective gender. *Id.* Studies focusing on the sexual orientation of older children raised by same-sex parents indicated that they did not identify as homosexual at a rate higher than other children. *Id.* at 54. Additionally, teachers, parents, and the children themselves reported normal and positive peer relationships on behalf of the children. *Id.* at 56. Accordingly, a number of jurisdictions have amended their family codes to recognize the rights of same-sex parents and children in their relationships to one another,¹⁶ and the Iowa Courts have been among the leaders in the development of case law recognizing the rights of lesbians and gay men as parents.¹⁷

This movement in the law only emphasizes that the only basis of fear with respect to the children of same-sex relationships is that they will suffer the ill effects of society's stigma, rather than any legitimate psychological or developmental problems. Author and activist, Dan Savage, and his boyfriend, Terry Miller, adopted a son in 1999. In an interview Savage responds to the supposed risks that his child faces by having two fathers, saying

Bigotry puts my child at risk, and bigotry is the problem, not that I have a family. We don't tell black people to have white children to protect them from racism. We don't tell Jews to bring up their children as Christians to shield them from anti-Semitism. We identify racism and anti-Semitism as the problem.

¹⁶ See, e.g., Iowa Code Ann. § 600.4; D.C. Code §§16-302, 16-914(a)(1)(A) (District of Columbia); 15 V.S.A. §§1-102, 665 (Vermont).

¹⁷ See, e.g., *In Re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990); *Hodson v. Moore*, 464 N.W.2d 699 (Iowa 1990), *In Re Marriage of Cupples*, 531 N.W.2d 656 (Iowa 1995) ("The district court properly saw [the mother's] sexual orientation as a nonissue and focused its decision on the relative parenting abilities of [each parent]")

Daryl Lindsey, *From “Hey Faggot” to “Hey Daddy”*, Salon.com, Oct. 1, 1999.¹⁸ Accordingly, the court should not act to legitimize the prejudices of a vocal minority, but rather to favor the interests of families and children by affirming their relationships to one another.

B. Opposition to Interracial Marriage, like Today’s Opposition to Same-Sex Marriage, Was Rooted In the Belief that Individuals of Mixed-Race Heritage Were Physically and Mentally Defective.

At the heart of anti-miscegenation laws and attitudes lay the misplaced but profound and often sincerely held fear that the children who were products of such relationships were physically and mentally inferior to children born of same-race parents. These same methods have been used to allege that the children of same-sex parents will be physically harmed because they are more likely to be homosexual themselves, and therefore susceptible to mental illness and possibly death.

From Reconstruction up until the Supreme Court’s decision in *Loving v. Virginia*, society—and by extension, the courts—firmly believed that the children of interracial marriages would suffer physical ailments as a direct result of their mixed heritage. This fear was used as a justification to uphold anti-miscegenation statutes across the country. For example, the Georgia Supreme Court reasoned: “The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.” *Scott v. State*, 39 Ga. 321,

¹⁸ See also Ruthann Robson, *Our Children: Kids of Queer Parents and Kids Who Are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 Alb. L. Rev. 915, 932 (2001) (arguing that the “best interest of the child” standard should not become a “hollow sentiment” that validates the discrimination of sexual minorities and their children).

323 (1869). Similar sentiments were found in other courts, as well as in popular society.¹⁹

Today's opponents of civil marriage make equally unsubstantiated claims that children with parents of the same sex are physically and mentally damaged. They claim that children of homosexual parents face the double-barreled risk of developing "homosexual interests and behaviors" themselves, and therefore likely developing mental illness and committing suicide. Wardle, *Potential Impact* at 852-54. Wardle links the incidence of homosexuality in young people with "suicidal behavior, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple sex partners, and premature sexual activity," as well as anxiety, decreased inhibition, depression and cross-dressing. *Id.* at 854.

However, in 1973 the American Psychiatric Association voted unanimously to remove homosexuality from among the conditions catalogued in the Diagnostic and Statistical Manual of Mental Disorders. Moreover, research has refuted the supposed link between homosexuality and mental illness, and called into question the scientific methods used to support such claims. Tori DeAngelis, *New Data on Lesbian, Gay and Bisexual Mental Health*, *Monitor on Psychology*, Feb. 2002; see also Cantor, *Parents and Partners*, at 78. Thus, contrary to the contentions of marriage equality opponents, there is no basis in science to support the allegation that children of same-

¹⁹ See also, *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) ("We are unable to read in the Fourteenth Amendment to the Constitution . . . any words or any intendment . . . which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.") Walter L. Fleming, *Documentary History of Reconstruction: Military, Political, Social, Religious, Educational, & Industrial: 1865 to the Present Time* 327 (1907) ("[T]he result of . . . *miscegenation* would be gradual amalgamation and the production of a degenerate and bastard offspring, which would soon populate these states with a degraded and ignoble population, incapable of moral and intellectual development and unfitted to support a great and powerful country.") (Emphasis in original.)

sex parents will become homosexual themselves, or that they will develop other, purportedly resultant, mental health problems.

III. PRIOR TO *LOVING V. VIRGINIA*, INTERRACIAL MARRIAGE WAS, LIKE SAME-SEX MARRIAGE TODAY, WIDELY CONSIDERED A THREAT TO ESTABLISHED SOCIAL ORDER AND TO THE INSTITUTIONS OF AMERICAN MARRIAGE AND FAMILY.

Like anti-miscegenationists of the past, today's opponents of same-sex marriage assert that legalization of such marriage will destroy society and the institution of marriage. Often the argument is rooted in a baseless and invidious stereotype of gays and lesbians as non-monogamous and amoral. Others argue that extending marriage rights to same-sex couples will deinstitutionalize marriage, thus stripping it of all intrinsic social value.²⁰ Both of these flawed arguments parallel those used by opponents of miscegenation in startling ways.

A. Interracial Sex and Marriage Were Once Considered, Like Same-Sex Marriage, a Threat to the "Natural" Social Order.

A 1661 Maryland statute first prohibited interracial marriage in the colonies, followed by a Virginia statute in 1691. Nearly all of the colonies followed suit during the following fifteen years. William D. Zabel, *Interracial Marriage and the Law, in* *Interracialism: Black-White Intermarriage in American History, Literature and Law* 56 (2000). In 1913, Wyoming became the last of 42 states to enact laws making interracial marriages void, while states also criminalized the act of "living in fornication" with a person of another race.²¹ By 1949, America's bifurcated racial caste system

²⁰ See generally David Blankenhorn, *The Future of Marriage* 167 (2007) ("Marriage can remain, and become even more, our society's most pro-child institution. Or it can be redefined as merely a private committed relationship. Gay marriage would take us decisively in the later direction, towards deinstitutionalization.") (hereinafter Blankenhorn).

²¹ While criminal laws prohibiting interracial marriage existed in most states at some point in American history, eight states and the District of Columbia never enacted such laws. Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin did not develop laws concerning marriage or sexual relations between the races. David H. Fowler, *Northern Attitudes*

could count 28 states prohibiting interracial marriage. Kevin R. Johnson, *Taking Out the “Garbage” in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling*, 2007 Wis. L. Rev. 283, 295 (citing Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 Yale L.J. 472, 472 app. (1949)) (hereinafter Johnson, *Garbage*). “Every state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted antimiscegenation laws.” Kennedy, *Interracial Intimacies* at 219 (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)). As recently as 1967, sixteen states still had anti-miscegenation statutes on their books. Fowler, *Northern Attitudes* at 339-439. Anti-miscegenationists argued that allowing the races to mix would begin a slippery slope leading to social chaos.²² Many white Americans disdained the prospect of interracial marriage because it threatened to “weaken” white blood, and by extension, white society. Romano, *Race Mixing* at 47. Until the Supreme Court’s landmark decision in *Loving v. Virginia*, 388 U.S. 1 (1967), prohibitions against interracial marriage, or the “amalgamation of the races,” were upheld on the grounds that mixed marriage was “against the natural order” and detrimental to the very foundation of American society.

Many Americans viewed mixed-race unions as detrimental to society as a whole, as they posed a threat to the ubiquitous white supremacist ideology.²³ This white supremacist ideology was evident in assertions by some white opponents of interracial marriage: a multi-racial identity threatened society’s binary definition of

Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780-1930 336 (Garland Publishers, 1987) (hereinafter Fowler, *Northern Attitudes*).

²² For a discussion of the use of such rhetoric in the debate on same-sex marriage, see Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U.L. Rev. 1543 (2005).

²³ See Chester Higgins, “Mixed Marriage Ruling Brings Mixed Reaction in Dixieland,” *Jet*, June 29, 1967, at 24 (quoting Martin Luther King, Jr.) (“The banning of interracial marriages from the beginning grew out of racism and the doctrine of white supremacy.”).

race. The possibility of “white negroes”—white-skinned people who were legally black—would wholly destroy the American construction of race. Saks, *Representing Miscegenation Law, in Interracialism: Black-White Intermarriage in American History, Literature, and Law* 73 (Werner Sollors, ed., 2000). Neither black nor white, “mulattoes” were seen as likely to have the “audacity” and arrogance of white America, coupled with the “savagery” of black America.²⁴

Since *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court has recognized a right to privacy, chipping away at the legitimacy of arguments discouraging same-sex couples from “living in fornication.”²⁵ Yet, the preference for heterosexual relationships, to the detriment of same-sex relations, nevertheless permeates the law of the land through the proscription of same-sex marriage.

Opponents of same-sex marriage often assert that marriage rights should be denied to same-sex couples because of their sexual promiscuity and actual aversion to the conception of monogamy.²⁶ Based on the erroneous and unsubstantiated stereotype that homosexual relationships are *a priori* non-monogamous, anti-gay marriage activists contend that allowing same-sex couples the opportunity to marry will result in a separation between marriage and monogamy.²⁷

²⁴ George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914* at 277 (1987) (reporting an 1899 letter to the editor of *The Independent*, in which a woman reader explained that the “negro brute” who rapes white women is “nearly always a mulatto . . . with enough white blood in him to replace native humility and cowardice with white audacity”).

²⁵ See William H. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1495, 1525 (1994) (“What the right of privacy insulates from the state is not sexual conduct, but decisions about whether or not to enter into a particular familial relationship.”).

²⁶ Stanley Kurtz, *The Libertarian Question*, Nat’l Rev. Online, April 30, 2003, available at <<http://www.nationalreview.com/kurtz/kurtz04302003.asp>> (“Gay marriage threatens monogamy because homosexual couples – particularly male homosexual couples - tend to see monogamy as nonessential, even in the most loyal and committed relationships.”).

²⁷ See also Stanley Kurtz, *Point of No Return*, Nat’l Rev. Online, August 3, 2001 (citing Gretchen Stiers, *Study: From This Day Forward*, 1999) (arguing that gay couples who “actually disdain traditional marriage will nonetheless get married” for the financial and legal benefits of marriage); *but* see Judith

Discriminatory stereotypes aside, citing a higher prevalence of sexual nonexclusivity among homosexual male couples does not justify denying the benefits of marriage to all same-sex couples. Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 *Am. Psychologist* 611 (2006). Herek cites two reasons: first, heterosexual couples that wish to marry indicate a preference to remain sexually exclusive, rather than cohabiting in a more open-form relationship. *Id.* Thus because the research points to striking similarities in the psychological composition of same-sex and heterosexual couples, a similar self-selection process would likely occur, with those same-sex couples choosing to marry exhibiting a higher rate of sexual exclusivity. *Id.* at 610-611.

Second, because demonstrated sexual promiscuity in heterosexual marriages (21-25% of men and 10-15% of women) does not serve as a rationale for denying male-female marriages, nor should such unfounded and unascertainable accusations deny same-sex couples the right to marry. *Id.* at 611. The result is an over-exclusion of the rights and associated privileges of marriage. *Id.* As with the stigmatization of miscegenation, society's weariness about accepting homosexual lifestyles allows for a justification of the denial of fundamental rights and the equal protection of the laws.²⁸

Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families* 23 *Quinnipiac L. Rev.* 529, 538 (2004) ("the primary differences in sexual behavior and attitudes toward monogamy are distributed by gender rather than sexual orientation. . . . if a greater propensity to sexual infidelity were to serve as grounds for excluding populations from marriage, a number of groups – including the more educated, people who have cohabited, and African-Americans – could find themselves barred from the altar.") (internal citations omitted).

²⁸ See, e.g., David F. Greenberg, *The Construction of Homosexuality* 2 (1988) (discussing labeling theory and the perception of homosexuality as deviant behavior).

B. As Interracial Marriage Did Not Destroy the Sanctity and Legitimacy of Marriage as a Social Institution, Nor Do Same-Sex Marriages Pose Such a Threat.

As anti-miscegenationists sought to justify their ban on interracial marriages by invoking fears that such relations would wreak havoc on society's binary understanding of race and the white-supremacist social order, same-sex marriage opponents similarly strike fear into their listeners. One such tactic is to suggest that allowing same-sex marriages will open a sort of Pandora's Box, thereby legitimizing other sexual unions, such as polygamy and bestiality.²⁹

Americans once feared that interracial marriages might effectuate an undesired transcendence of society's rigid racial lines. Though, interracial relationships still remain rare - only 0.6% of total marriages in 1998 - the perception of their threatening quality has undeniably declined. Johnson, *Garbage* at 297-98. Similarly, heterosexist fears of normalizing homosexuality legitimate the prejudicing of those relationships through denying same-sex couples the right to marry.³⁰ Susie Lorden, *The Law of Unintended Consequences: The Far-Reaching Effects of Same-Sex Marriage Ban Amendments*, 25 Quinnipiac L. Rev. 211, 223 (2006).

Describing the work of several scholars whose support of gay marriage stems from an actual disdain for the institution and a desire to see its demise, David Blankenhorn writes, "gay marriage would amount to an important (if incomplete) validation of their views." Blankenhorn at 138. Such conjectural fears should not provide cover for those who presently seek to deny marriage rights to those who

²⁹ Dobson, *Eleven Arguments* ("[T]he introduction of legalized gay marriages will lead inexorably to polygamy and other alternatives to one man/one woman unions.").

³⁰ See also Gregory M. Herek, *The Psychology of Sexual Prejudice*, in *Sexual Perspectives on Lesbian, Gay, and Bisexual Experiences* (Linda D. Garnets, ed., 2002).

legitimately warrant such protection. Nor should this Court permit such unfounded assumptions to contradict the Plaintiffs' specific pleadings in the present action.

Modern American society has recognized that banning interracial marriage is not only an ineffective means of "protecting" American society, but also that marriage between the races in no way threatens to undermine the institution of marriage. Regardless of individual communities' views on interracial marriage, it is widely acknowledged that an individual's decision to marry outside of his or her race is a personal decision entitled to civil recognition. See Romano, *Black-White Marriage* at 3 (61% of whites approve of interracial marriage, while only a small percentage of individuals engage in interracial marriage). Likewise, without repeating the now-discredited arguments used against interracial marriage, there is no credible evidence that allowing couples of the same sex to marry would threaten either American society or the institution of marriage itself.

CONCLUSION

In the final analysis, there is nothing new in the arguments against same-sex couples having the freedom to marry. However much opponents of same-sex marriage may insist "*this time it is different*," there remains an appalling familiarity to the refrain that allowing same sex couples the same human dignity as everyone else will threaten social order, degrade individuals, and harm children. We suffered through the same awful dirge when courts were asked to preserve the ban against interracial marriage as the last shameful vestige of the separate but equal doctrine. We were told that if African-Americans were to be accorded full human dignity, our society, our morality, and our faith would come to grief and lay in ruins. Sounding the death knell for society, morality and faith with certainty and monotony just because

two adults choose to marry parallels the appeals to social order, morality and religion that we used for almost three hundred years to justify preventing a black man from marrying a white woman. When all is said and done, these appeals cannot obscure the reality recognized long ago by the great African-American and gay writer, James Baldwin, that it is “an inexorable law that one cannot deny the humanity of another without diminishing one’s own.”³¹

PARRISH KRUIDENIER DUNN BOLES
GRIBBLE COOK PARRISH GENTRY &
FISHER, L.L.P.

By: _____
Charles Gribble AT0003083
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737
(515) 284-1704 - Fax

By: _____
Aderson B. Francois*
Supervising Attorney
Civil Rights Clinic
Howard University School of Law
2900 Van Ness St. N.W.
Washington, D.C. 20008
(202) 806-8082
(202) 806-8436 – Fax
ATTORNEYS FOR AMICUS CURIAE

* Application for *Pro Hac* Vice Admission Pending

³¹ James Baldwin, *Fifth Avenue Uptown*, collected in *The Price of the Ticket* 213 (1985).