Comments

Mrs. Gay Meet Miss Poor: What the Gays Have Done for Poor People

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Introduction

THIS COMMENT WILL LOOK at the recent developments in constitutional jurisprudence emerging from the major gay rights decisions and consider how the developments may apply to poor people. First, this comment will examine how the attention given to the responsible procreation argument in the same-sex marriage debate has the potential to halt its continued use within the welfare context as a means of promoting marriage as a solution to poverty. Second, the comment will analyze the breakdown of gender stereotypes resulting from the rise in the acceptance of non-traditional families and how this societal change can impact perceptions of single mothers. Third, this comment will look at the invalidation of the status/conduct distinction by the United States Supreme Court as it has been applied to laws targeting homosexuals and how it should also be precluded as a defense for laws targeting the poor. Finally, this comment will examine how the expansion of the rational basis standard has the ability to provide social welfare rights with an avenue for heightened constitutional protection. These unique advancements in the gay rights movement have the potential to change the landscape of welfare rights in the United States.

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I. The Same-Sex Marriage Debate

The same-sex marriage debate has been ongoing since 1993, when Hawaii's highest court heard the case *Baehr v. Lewin*,[1] and for the first time in United States history an appellate court ordered the application of strict scrutiny to a law restricting marriage to opposite sex couples.[2] In recent years, the controversy has become more pronounced. Across the country more states are establishing a right to same-sex marriage either by legislation or case law,[3] and other states are setting dangerous precedents in the courts.[4]

The premiere argument that has emerged as a justification for limiting marriage to opposite sex couples is responsible procreation.[5] The basic premise of the argument is that marriage is an incentive to procreate within a committed relationship, and therefore marriage should only be permitted in situations where procreation is biologically possible. Thus, this necessarily only applies to heterosexual couples who can procreate accidentally. Along with the focus on accidental procreation comes an odd twist on the view of same-sex couples as parents. Same-sex parents are portrayed by those who advance this argument as responsible, not needing the hefty 1,138 marital benefits that would cause them to plan a pregnancy, as they must plan their pregnancies regardless.[6] This argument should seem counterintuitive given the stereotype of gay promiscuity and the anti-gay sentiment surrounding the ban on marriage.[7] The argument may sound familiar since it is the same argument Congress has been using

1. 852 P.2d 44 (Haw. 1993).

2. *See generally id.*

3. Those states include New Hampshire, Vermont, Connecticut, Massachusetts, New Jersey, Washington, Iowa and New York.

4. Morrison v. Sadler, 821 N.E.2d 15, 29–30 (Ind. Ct. App. 2005); Standhardt v. Super. Ct. ex rel. County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Conaway v. Deane, 932 A.2d 571 (Md. 2007).

5. Julie A Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology* 103 (University of San Francisco Law Research Paper No. 2012–09), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990554 ("[R]esponsible procreation . . . has emerged as the primary defense of the same-sex-marriage ban.").

6. *Id.* at 109 ("What is surprising on the ideological level is that the responsible-procreation defense actually contradicts a well established ideological belief that forms the underlying basis of the opposition to gay rights. . . . In defending same-sex marriage bans, however, such organizations are contradicting these historic stereotypes of gays and lesbians, arguing in effect that same-sex couples have behaved so responsibly in planning and investing in their families that they do not need the support of marriage.").

7. *Id.* ("Those mobilized around opposition to gay rights routinely have charged gay and lesbian individuals with engaging in sexually promiscuous and irresponsible behavior. For example . . . the vast majority of homosexual relationships are short-lived and transitory, homosexual couples typically engage in a shocking degree of promiscuity, and there-

to spend welfare dollars to promote marriage for welfare recipients as a solution to poverty.[8]

In 1996, extensive welfare reforms were made at the direction of President Clinton who was reelected on the promise "to end welfare as we know it."[9] President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[10] into law, resulting in the dismantling of Aid to Families with Dependent Children ("AFDC")[11] and instituting a new program called Temporary Assistance for Needy Families ("TANF").[12] TANF eliminated the federal entitlement to welfare benefits and implemented block grants that were distributed to the states with broad discretion to serve the purpose of the statute.[13] TANF did impose restrictions on the block grants including strict instructions not to use funds to provide assistance for a family for more than sixty months, also preventing benefits from being distributed to families without children, unmarried teenage parents without high school diplomas, and most immigrants.[14] In addition, TANF set forth new goals for welfare including encouraging the formation and maintenance of two parent families and ending the dependency of needy families by promoting work and marriage.[15]

The explicit new goal to promote marriage allowed for a redirection of funds away from job training and financial assistance into marriage promotion campaigns. Marriage promotion propaganda was designed to target the infamous single mothers on welfare and steer the conversation away from the root causes of poverty.[16] The cam-

fore they are unsuitable role models for children because of their lifestyle." (internal quotations omitted)).

8. *See generally* Linda C. McClain, *Irresponsible Procreation*, 47 HASTINGS L.J. 339 (1996).

9. Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST, Aug. 23, 1996, *available at* http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf082396.htm.

10. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (2d Sess. 1996).

11. *See* DONALD T. KRAMER, 3 LEGAL RIGHTS OF CHILDREN § 31:3 (2d ed., rev. 2011).

12. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

13. JULIE A. NICE & LOUISE G. TRUBECK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 94 (1st ed. 1997).

14. *Id.*

15. 42 U.S.C. § 601(a) (2012).

16. Aly Parker, *Can't Buy Me Love: Funding Marriage Promotion Versus Listening to Real Needs in Breaking the Cycle of Poverty*, 18 S. CAL. REV. L. & SOC. JUST. 493, 535 (2009) ("TANF's goal of promoting marriage is antiquated and ineffective in improving the lives of Americans. Government money is being wasted to condescendingly teach adults 'marital skills' by untested 'mentorship' and counseling programs."); Daniela Kraiem & Jennifer Reich, *Writing Wrongs in Welfare: Why Legislating Morality Will Not Solve the Crisis of Poverty*, 2

paign for marriage as a solution to poverty focuses on the social significance marriage has in our society. The campaign highlights the fairy tale version of marriage.

The largest tool marriage promotion propaganda has at its disposal is the responsible procreation argument, which is articulated as encouraging procreation only within marriage. The presumption is that, if children were only born into marriage, the state would avoid the burden of supporting single mothers and their children. However, the strategic focus on a "two is better than one" platform for having and raising children allowed the proponents of gay marriage to join the conversation. Marriage promoters steered the conversation away from poverty and onto marriage, which allowed proponents of gay marriage to argue they too believed children should be raised in stable two-parent households bonded in matrimony. In doing so, proponents of gay marriage helped perpetuate the continued demonization of single mothers by supporting the idea that single mothers are unfit to raise children on their own.

However, marriage promoters focused the dissemination of the responsible procreation argument as one that necessarily only targeted opposite sex couples because of their ability to accidentally procreate.[17] The argument was also tweaked to exclude same-sex couples by highlighting the 'necessary' gender-specific role models children needed to grow up with.[18] Instead of desiring merely two-parent households, the setting for optimal child rearing consists of one man and one woman who can teach their children 'proper' gender roles.[19] These nuances in policy allowed the responsible procreation argument seamlessly to be used as a justification to deny marriage to same-sex couples while continuing to be used in an attempt to force marriage on single mothers.

The responsible procreation argument has become the infamous justification for denying marriage to same-sex couples.[20] Although the party line is that this argument is based in a desire to protect the well-

U.C. DAVIS J. JUV. L. & POL'Y 6, 10 (1997) (Marriage does not provide a cheap solution to the complex social issues that create poverty.").

17. NICE & TRUBECK, *supra* note 13, at 103 ("To put it succinctly, the responsible-procreation defense surmises that same-sex couples already procreate responsibly and that the rights and responsibilities of marriage should be limited to furthering the goal of encouraging more responsible procreation by heterosexuals.").

18. *See, e.g.*, NC Values Coalition, *Protect Marriage*, *available at* http://ncvalues.org/wp-content/uploads/2011/08/Issue-Brief-2.pdf.

19. *Id.*

20. Edward Stein, *The Accidental Procreation Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI. KENT L. REV. 403 (2009).

being of children, the true sentiment of the argument remains a desire to reduce welfare costs.[21] The state court decisions that have upheld marriage bans in the last decade provide a clear illustration of the roots the responsible procreation argument has in welfare concerns.

In Arizona, the state court of appeals applied rational basis review to the state's statute restricting marriage to one man and one woman after determining that same-sex marriage was not a fundamental right.[22] The court held that the statute was rationally related to the legitimate government interest in encouraging responsible procreation.[23] As in most analyses considering the legitimacy of responsible procreation, the court began with the fact that only opposite sex couples have the ability to procreate within their normal sexual activity.[24] This, the court reasoned, provided the state with a justification for extending marriage to opposite sex couples as an incentive to only procreate within committed relationships.[25] It follows that this would also allow a state to decline to extend marriage to same-sex couples and because of the inability to accidentally procreate, no incentive is needed to achieve this same goal. However, in *Standhardt v. Superior Court*, the court of appeals continued by specifically detailing the concern underlying responsible procreation: children burdening the state.[26] The court stated that:

> [t]he State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming the legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term committed relationships, which society has traditionally viewed as advantageous for children.[27]

The connection between the responsible procreation argument and having parents maintain financial responsibility for their children cannot be overlooked despite the court's attempt to focus on the argument's benefits for children. Although the court attempted to demonstrate a concern for children to have the family life "tradition-

21. *See* David Blankenhorn, Op-Ed., *Protecting Marriage to Protect Children*, L.A. TIMES September 19, 2008, *available at* http://articles.latimes.com/print/2008/sep/19/opinion/oe-blankenhorn19.

22. Standhardt v. Super. Ct. *ex rel.* County of Maricopa, 77 P.3d 451, 460 (Ariz. Ct. App. 2003).

23. *Id.* at 462.

24. *Id.* at 463–64.

25. *Id.* at 462–63.

26. *Id.*

27. *Id.* at 463.

ally viewed as advantageous,"[28] in the next paragraph of the decision, the court recognized and yet dismissed the harmful effects of the ban on the children of same-sex couples.[29] The court stated that although the marriage ban "may result in some inequity for children raised by same-sex couples, such inequity is insufficient to negate the State's link between opposite-sex marriage, procreation and childrearing."[30] Therefore, it is clear that the well-being of children is not the sole rationale behind the responsible procreation argument.

In Indiana, the court of appeals stated its full agreement with the Arizona analysis and supplemented that with scholarly commentary from Canada.[31] The court cited the article at length stating that a "central and probably preeminent purpose of the civil institution of marriage (and its deep logic) is to regulate the *consequences* of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter."[32] The court supported the article's argument by stating, that those who think "marriage law does not require an intent or ability to procreate . . . miss the States' point that marriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences."[33]

These quotes demonstrate the court's reliance on the premise that marriage can prevent situations where parents cannot solely financially provide for their children. Even in the court's own words there is specific attention given to the "protection of *unintended* children."[34] The court supported its finding that responsible procreation is a legitimate interest with the idea that marriage is meant to "encourage male/female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out of wedlock births resulting from 'casual' intercourse."[35] The court added a footnote to this quote attempting to explain away the hostility to single mothers on welfare by pointing to a reliance on additional scholarly work.[36] The court cited Lynn Wardle whose work

28. *Id.*
29. *Standhardt*, 77 P.3d at 463.
30. *Id.*
31. Morrison v. Sadler, 821 N.E.2d 15, 29–30 (Ind. App. 2005); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 13, 132 (2004).
32. *Morrison*, 821 N.E.2d at 30 (emphasis in original) (citing Stewart, *supra* note 31, at 47).
33. *Id.*
34. *Id.* at 25 (emphasis in original).
35. *Id.* at 24.
36. *Id.* at n.11.

indicated that an increase in out-of-wedlock births has resulted in higher instances of physical and sexual child abuse, educational failure, and poverty.[37] The reliance on scholarly commentary throughout the opinion demonstrates that the court not only recognized, but approved of the ties that the responsible procreation argument has to the condemnation of welfare.

Further examples establishing the roots of the responsible procreation argument are found in the amicus curie briefs for the Ninth Circuit Court of Appeals decision as to the validity of California's same-sex marriage ban ("Proposition 8").[38] Many of the briefs used social science research to establish the problems associated with being raised in one-parent households (usually referred to as single mother households).[39] One brief, written by three private citizens, expanded upon the standard argument for a traditional family by specifically pointing out that "the social institution of marriage provide[s] social pressures and incentives for husbands to remain with their wives and children."[40] The brief also stated that allowing same-sex marriage would not only "erode people's adherence to marital norms" but there would also be costs to society.[41] "[F]or as absentee fatherhood and out-of-wedlock births become common, the need and extent of governmental policing and social services grows."[42] The amicus went on to cite a Brookings Institute Study which estimated $229 billon in welfare expenditures between 1970 and 1996 to "the breakdown in marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems."[43]

37. Lynn D. Wardle, "*Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 788–90 (2001).

38. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

39. Brief of States of Indiana, Virginia, Louisiana, Michigan, Alabama, Alaska, Florida, Idaho, Nebraska, Pennsylvania, South Carolina, Utah, & Wyoming as Amici Curiae in Support of Defendants-Intervenors-Appellants Dennis Hollingsworth, et al. & in Support of Reversal at 18–21, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075743, at 18–21; Brief of Amici Curiae, Robert P. George, Sherif Girgis, & Ryan T. Anderson, in Support of Reversal & the Intervening Defendants-Appellants at 9–13 Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075740, at 9–13; Brief of Amicus Curiae Catholics for the Common Good in Support of Defendant-Intervenors-Appellants at 13–16, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075754, at 13–16.

40. Brief of Amici Curiae, Robert P. George, Sherif Girgis, & Ryan T. Anderson, in Support of Reversal & the Intervening Defendants-Appellants at 17, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075740, at 17.

41. *Id.* at 19.

42. *Id.*

43. *Id.* (citing Isabel V. Sawhill, *Families at Risk, in* SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., 1999)).

The focus on social harms associated with fatherless homes continues in other briefs with a paternalistic argument from the National Organization of Marriage urging that marriage is a solution to poverty.[44] The brief argued marriage is necessary to encourage both parents to assume responsibility for raising a child so as to "mitigat[e] the gendered inequality which frequently occurs when single mothers bear the burdens of parenting alone."[45] The brief went on to explain the danger of a society that allows children to believe fathers are unnecessary for their well-being.[46] Thus, their argument appears to be that marriage needs to be based on the premise of responsible procreation, not only to ensure that the value of fathers is not lost on children, but also so that fathers don't forget that parentage is not a choice. Specifically, the brief pointed out, "[o]nce the two parent norm loses its moral sanctity, the selfish considerations that always pulled poor parents apart often become overwhelming."[47] This quote makes it clear that the National Organization of Marriage sees single mothers raising children as a greater evil than children in unhappy or unsafe two-parent marital homes.

Many of the briefs in support of Proposition 8, as well as the state marriage cases discussed above, supported the responsible procreation argument with the link between marriage and procreation, citing landmark cases *Skinner v. Oklahoma,*[48] *Loving v. Virginia,*[49] and *Zablocki v. Redhail.*[50] For example, in the Washington same-sex marriage ban decision the Court relied on the perception that "*Skinner, Loving,* and *Zablocki* indicate, marriage is traditionally linked to procreation and the survival of the human race."[51] Opponents of same-sex marriage

44. *See* Brief of Amici Curiae National Organization for Marriage, National Organization for Marriage Rhode Island, & Family Leader in Support of the Intervening Defendants-Appellants at 16, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075750, at 16.

45. *Id.* at 17.

46. *Id.* at 17–18; *see also* Brief in Support of Appellants at 20–23, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10–16696, 11–16577), 2010 WL 4075744 at 20–23. The amicus brief written by the American College of Pediatricians made similar arguments about the social harms of undermining societal efforts to persuade fathers to take responsibility for their children. *Id.*

47. *Id.* at 20 (quoting Christopher Jencks, *Deadly Neighborhoods*, NEW REPUBLIC, June 13, 1998, at 30).

48. 316 U.S. 535 (1942).

49. 388 U.S. 1 (1967).

50. 434 U.S. 374 (1978).

51. Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006).

argue that this link establishes responsible procreation as a valid argument to deny marriage.[52]

However, *Zablocki* does not stand for the link between procreation and marriage. Rather, it specifically held that a law denying marriage with the intention of providing an incentive to responsibly procreate was invalid.[53] In *Zablocki*, a Wisconsin statute required residents to obtain court ordered permission to get married if they had not paid their child support obligations.[54] In addition, the statute required proof that the out-of-custody children were not likely to become public charges in the future.[55] Mr. Redhail had not paid his support obligations for a child he fathered in high school when he filed for a marriage license in 1974 and he was subsequently rejected due to this Wisconsin statute.[56]

The Court analyzed the statute under equal protection[57] and appeared to apply strict scrutiny on the basis that the right to marry has been firmly established as fundamental.[58] The State put forth two interests to justify the statute's classification: requiring court ordered permission to marry furnished an opportunity to counsel applicants about fulfilling their support obligations and protected the welfare of out-of-custody children.[59] The Court was willing to accept the interests but found that the statute was not an appropriate way of achieving them as the statute "unnecessarily impinged" on the right to marry.[60]

First, as to the counseling objective, the Court held that the statute did not further this interest because there was no express provision for any counseling in the actual text of the statute.[61] Second, as to the welfare of out-of-custody children, the Court aptly stated that the State "does not make clear the connection between the state's interest and the statute's requirements."[62] Just as in the same-sex marriage cases discussed above, the State phrased their interest as a concern for the welfare of children, however, when articulated the interest

52. *See, e.g.*, Robert Sokolowski, *The Threat of Same Sex Marriage*, AMERICA (JUNE 7, 2004), http://www.americamagazine.org/content/article.cfm?article_id=3627.

53. *Zablocki*, 434 U.S. at 389–91.

54. *Id.* at 375.

55. *Id.*

56. *Id.* at 377–78.

57. U.S. CONST. amend. XIV.

58. *Zablocki*, 434 U.S. at 388–90. The Court undertook a "critical examination" of the state interests advanced to justify the statute.

59. *Id.* at 388.

60. *Id.*

61. *Id.* at 388–89.

62. *Id.* at 389.

emerged as one of concern for the fiscal burden on the state.[63] The State argued that the Wisconsin statute provided an incentive for people to make their child support payments and would prevent people from incurring new support obligations.[64] Thus, the State argued that the ban on marriage was justified if it encouraged people to responsibly procreate, meaning if it provided an incentive to take financial responsibility for their children.[65]

This language is strikingly similar to the language used to deny marriage to same-sex couples, where the argument is again that denying marriage to some is acceptable if it encourages responsible procreation. However, the Court in *Zablocki* held that this interest was not sufficiently furthered by the marriage ban and the statute was unconstitutional for the outright infringement on the fundamental right to marry.[66] The Court stated that "if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges" the interest can be achieved without infringing on the right to marry and instead suggested adjusting support orders.[67]

The *Zablocki* decision demonstrates that the connection between procreation and marriage is not that they are linked in a fashion that would justify limiting marriage for reasons associated with procreation but rather that they are equally protected rights.[68]

In recognizing the fundamental right to marry, the Court explicitly articulated the right as separate and distinct from the right to make decisions about procreation.[69] The Court relied on the strict

63. In his dissenting opinion, Justice Rehnquist highlighted the social welfare concerns and advocated for *Dandridge's* rational basis review. He concluded that the statute was "sufficiently rationale" despite the "possible imprecision." *Zablocki*, 434 U.S. at 407–09 (Rehnquist, J., dissenting).

64. *Id.* at 389–90.

65. *Id.* at 388.

66. *Id.* at 390–91.

67. *Id.* at 390.

68. Nice, *supra* note 5 at 22 ("The Court in *Zablocki* specifically justified marriage protection as a fundamental right on the basis that marriage should receive 'equivalent protection' as procreation receives. In short, the importance of marriage led to treating procreative decision-making as a fundamental right in *Griswold*, which could not be denied unequally in *Eisenstadt* and *Carey*, while the importance of procreative decisions led to treating marriage as a fundamental right in *Zablocki*. In other words, the Court has recognized that marriage and procreation are independent aspects of liberty and has relied on the constitutional protection of each to justify the constitutional protection of the other.").

69. *Zablocki*, 434 U.S. at 386. The Court stated that the "decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." *Id.*

protections pertaining to the right to procreate to legitimatize the strong protections the Court gave to the right to marry. Specifically, the Court stated that ". . . if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations to take place."[70] Therefore, in addition to the explicit holding, the way in which the Court addressed the right to marry and the right to procreate further demonstrates that responsible procreation is not inextricably tied to the right to marry.

The use of the responsible procreation argument within the same-sex marriage debate is demonstrably linked to views on welfare reform. It is the same argument used within the welfare context in an attempt to deflect from the causes of poverty and instead put forth marriage as the solution.[71] However, the link between marriage and procreation was called into question in *Zablocki*. The case brought together the marriage debate and the desire to hold parents responsible for their children but the Court held the right to marriage could not be limited by the responsible procreation argument.[72] Not only has *Zablocki* made the case for separating the right to marry from the ability to procreate, but current administrative choices on the state and federal level have also called the legitimacy of the responsible procreation argument into question.

On the state level, in California's fight over Proposition 8, where responsible procreation emerged as the foremost argument, high-level officials refused to defend on appeal the marriage ban enacted by voters. The Attorney General of California, Kamala Harris, as well as the Governor of the State, Jerry Brown, both declared that Proposition 8 was unconstitutional and that they would not appeal the district court decision, finding Proposition 8 unconstitutional.[73] Furthermore, on the federal level, the Obama Administration declared it would no longer defend the Defense of Marriage Act ("DOMA").[74]

70. *Id.* In 1978 the State of Wisconsin still punished fornication as a criminal offense. WIS. STAT. § 944.15 (1973).

71. *See* Standhardt v. Super. Ct. *ex rel.* County of Maricopa, 77 P.3d 451, 462–63 (Ariz. Ct. App. 2003).

72. *Zablocki*, 434 U.S. at 389–91.

73. *See* Press Release, Attorney General Kamala D. Harris, Attorney General Kamala D. Harris Issues Statement on Prop. 8 Ruling (Nov. 17, 2011), *available at* http://oag.ca.gov/news/press_release?id=2579&y=2011&m= ("I firmly believe that Proposition 8 violates the equal protection and due process clauses of the U.S. Constitution and am confident that justice will prevail.").

74. Press Release, Department of Justice Office of Public Affairs, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Department of Jus-

United States Attorney General, Eric Holder, released a memorandum stating that it was the opinion of the administration that DOMA is unconstitutional under heightened scrutiny.[75]

Both of these public denouncements as to the constitutionality of denying same-sex couples the right to marry demonstrate that there is a growing recognition of the illegitimacy of the responsible procreation argument. With the acceptance that the same-sex marriage bans are unconstitutional comes the fall of the main argument in support of limiting marriage. In the context of marriage, both *Zablocki*'s explicit holding and the refusal to defend marriage bans by high ranking officials, show that responsible procreation as an argument is on its way out. However, responsible procreation now sits as the foundation for welfare reforms that have channeled money into promoting marriage and away from giving actual help to families in need. With the advances in the same-sex marriage debate there is hope that the reliance on responsible procreation will cease in the welfare context as well, resulting in future policy choices which provide effective assistance to families.

II. The Rise of Non-Traditional Families

"In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws."[76] Since *Reed,* the Court has repeatedly recognized that equal protection prohibits laws that "den[y] to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[77] Justice Ginsberg wrote these words in *United States v. Virginia,*[78] where the Court

tice, Office of Public Affairs, (February 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html ("[T]he President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases.").

75. *Id.*

76. United States v. Virginia, 518 U.S. 515, 531 (1996) (citing Reed v. Reed, 404 U.S. 71, 73 (1971) (holding unconstitutional an Idaho Code prescription that stated males must be preferred to females in the administration of a decedent's estate when there are equally competing claims)).

77. *Id.*

78. 518 U.S. 515 (1996).

invalidated the Virginia Military Institute's ("VMI") all male admission policy.[79] Justice Ginsberg's majority opinion not only struck down the unequal admissions policy but it recognized the deeply rooted gender role stereotypes that facilitate laws that draw sex-based classifications.[80]

However, even with recognition of the problem at the highest level, stereotypes about gender roles and generalizations about one's abilities based on sex influence laws and policy.[81] The strategic policy choices made in the context of welfare highlight this phenomenon. The constant media portrayals of "welfare queens" that demonize single mothers are rooted in the perceptions of the proper roles men and women are meant to fulfill in society. The emphasis on marriage as a means to bring women out of poverty makes this abundantly clear. In addition, the structure of family law statutes also underscores the idea that laws are built upon the thinking that men are the breadwinners and women are simply not. Statutes pertaining to the determination of parentage are written as ways to determine which man will be financially responsible for the child and, until recently, these statutes were not adaptable to determining maternity.[82]

The last decade has shown a new adaptation of family law statutes to accommodate the reality of same-sex couples raising children who previously had absolutely no avenue to formalize that relationship. These changes reflect the growing acceptance of non-traditional families and it is this acceptance that is helping to break down gender roles. The advancements gained in family law by same-sex couples have the ability to further alter the perception of an acceptable family, which can benefit single mothers in the welfare context as well. The perception that the nuclear family is the only acceptable family structure is one of the strong forces behind the depiction of single mothers as the problem.[83] With the growing acceptance of non-traditional families, perceptions of strict gender roles will continue to break down and hopefully change the way society views the single mother's role in the welfare arena.

79. *Id.*

80. *Id.*

81. *But see* Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (2001) (upholding a law requiring fathers but not mothers to prove a bond with their child in order for the child to receive citizenship).

82. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

83. Sheryl L. Howell, *How Will Battered Women Fare Under the New Welfare Reform?*, 12 BERKELEY WOMEN'S L.J. 140, 141 (1997); *see also* Nadine Taub, *Welfare Reform: An Attack on Us All*, 11 BERKELEY WOMEN'S L.J. 259, 260 (1996).

One of the leading states in the recognition of non-traditional families is California. In 2005, the California Supreme Court decided three family law cases that recognized the parentage of two natural mothers for a child, each under different circumstances.[84] In *Elisa B.*, the Court determined that Elisa was the second natural mother of twin girls her partner had conceived while the two were in a committed relationship, and was thus responsible for child support.[85] In this case, Elisa and her partner were in a committed relationship when both of them used the same sperm donor to conceive children. After a break-up, Elisa refused to continue supporting the twin girls that her partner had biologically conceived although she had raised them for a year. The California Supreme Court held that "[a] person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation."[86]

In *Kristine H.*, the court ruled on estoppel grounds that Kristine was prohibited from challenging a judgment of parenthood that she and her partner had obtained before she gave birth to a daughter who they intended to raise together.[87] Kristine and her partner were in a committed relationship when they decided for Kristine to get pregnant through artificial insemination. Before their daughter was born they obtained a judgment of parentage establishing that they were both the legal mothers of the child based on their intention to procreate.[88] After raising the child for almost two years the couple broke up and Kristine brought an action to vacate the judgment and keep their daughter away from her ex-partner. Although the Court declined to rule on the validity of the actual judgment of parenthood, it prohibited Kristine from challenging the court order because she was a party to the original action.[89]

84. *See* Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

85. *Elisa B.*, 117 P.3d at 670.

86. *Id.* (internal quotations omitted). However, because the Court relies on CAL. FAM. CODE § 7611(d), which is a rebuttable presumption of parentage, this statement is limited to the context where there are no competing claims to parentage. CAL. FAM. CODE § 7611(d) (West 2012).

87. *Kristine H.*, 117 P.3d 690, 695.

88. *Id.* at 692.

89. *Id.*

Finally, the Court heard *K.M. v. E.G.*[90] and again held that a child could have two legal and natural mothers.[91] In this case, K.M. and E.G. were registered domestic partners when they decided to use artificial reproductive technology to create a child linked to both of them. E.G. was implanted with K.M.'s eggs, which were fertilized by a sperm donor, resulting in E.G. as the gestational mother and K.M. as the genetic mother of twin girls. After five years of raising the children together, the couple broke up and the lower court found that K.M. had no legal parental rights. The lower court based its decision on the fact that K.M. signed the standard ovum donation documents, which relinquished parental rights, to be able to give her eggs to E.G.[92] However, the California Supreme Court held that K.M. was the second legal mother of the twins because the couple raised the children together which showed that it was not a situation of standard egg donation or surrogacy.[93] Therefore, K.M. did not contract out of her responsibilities to her genetic children.[94]

In addition to the California Supreme Court's decision to recognize two natural mothers, there have also been cases establishing that the current family law statutes apply equally to both genders. First, *Elisa B.* demonstrates that the presumptions of parentage are gender neutral and are applicable to determining maternity as well as paternity.[95] Further, a California court of appeals recognized the limitations of meeting the standard articulated in *Elisa B.* given the realities of low social acceptance of same-sex couples in some areas of the country.[96] In *S.Y. v. S.B.*,[97] the court held that S.Y. was the second legal mother of two children her partner had adopted during their relationship, under the same presumption of parentage as *Elisa B.*[98] However, in this case, S.Y. was in the military and, because of "don't ask don't tell", she maintained a separate residence and never formalized her relationship with either her partner or the children. The court held that due to the wealth of evidence that demonstrated S.Y.'s

90. 117 P.3d 673 (2005).

91. *Id.* at 675.

92. *Id.* at 677.

93. *Id.* at 677–78.

94. *Id.*

95. *See generally* Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); CAL. FAM. CODE §§ 7611(a)–(d) (West 2012) (presumptions of parentage).

96. S.Y. v. S.B., 134 Cal. Rptr. 3d 1 (Ct. App. 2011).

97. *Id.*

98. *Id.* at 3; *Elisa B.*, 117 P.3d 660.

"blended home" with her partner and children, S.Y. was their legal mother.[99]

Second, in addition to the gender neutral reading of the parentage presumptions outlined in Family Code section 7611, California courts have also extended step-parent adoption to include gender neutral second parent adoption.[100] In *Sharon S. v. Superior Court*,[101] Sharon S. had two children through artificial reproductive technology while in a committed relationship with her partner. For the oldest child, the couple signed documents that effectuated the independent adoption of the child by the non-biological partner but attached an addendum, which indicated the intent that Sharon would retain her rights as the biological mother. While replicating this process for the second child, the couple broke up and Sharon withdrew her support for the independent adoption. Therefore, the California Supreme Court had to decide whether the intent not to terminate the biological mother's parental rights voids the adoption.[102] The Court held that termination of the birth parent's rights is not mandatory for every adoption and that second parent adoptions are allowed under the independent adoption laws.[103]

Furthermore, California courts have recognized non-traditional families by consistently recognizing the intent of parties in determining parentage in surrogacy cases.[104] In *Johnson v. Calvert*,[105] the California Supreme Court determined that when there are equally valid competing claims to parentage the court will decide based on the intent of the parties.[106] In this case the surrogate decided she wanted to keep the baby and the Court recognized her parentage claim as the gestational mother. However, the Court recognized that the baby's genetic mother was also her natural mother, and thus had a valid legal claim. Therefore, the Court looked to the intent of the parties at the time of conception and found that the genetic mother was the child's legal mother.[107] In a subsequent case, the court of appeals applied the intent test in a surrogacy case in which the legal parents had no ge-

99. *S.Y.*, 134 Cal. Rptr. 3d at 9–10.

100. CAL. FAM. CODE § 7611(a)–(d) (West 2012); Sharon S. v. Superior Court, 73 P.3d 554 (2008).

101. 73 P.3d 554 (2008).

102. *Id.* at 558.

103. *Id.* at 566–67.

104. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

105. 851 P.2d 776 (Cal. 1993).

106. *Id.* at 777–78.

107. *Id.*

netic connection to the child.[108] In *In re Marriage of Buzzanca*,[109] the court determined that because the child was conceived with the help of medical technology at the direction of the Buzzancas, their intent caused them to be the legal parents of the child born to a surrogate, despite the fact that they were not genetically related.[110]

By upholding the intent of the parties in surrogacy cases, California courts allow non-traditional families to be formed and protected. Further, all of the advancements made in the recognition of families that are not heterosexual married couples with biological children, provide an avenue to defend against societal perceptions that the optimal setting for raising children is the nuclear family. The argument for the optimal setting for child rearing has been prominent in the same-sex marriage debate alongside responsible procreation.[111] The ongoing battle for same-sex marriage provides a stage to discuss the fallacies involved with perpetuating the myth that for children to be successful they need to grow up with one father and one mother who preferably are genetically related to them. Within the same-sex marriage cases, many courts have taken judicial notice of the social science evidence that demonstrates children raised by same-sex parents are just as happy and healthy as those raised by heterosexual parents.[112] In addition, the rise of judicially sanctioned non-traditional families also provides a platform for the discussion that the sex of the parent does not determine the outcome of the child because "proper" gender roles should not be the focus of a child's well-being.

These advancements have important implications in the welfare context because it is these perceptions about gender roles that drive

108. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

109. 72 Cal. Rptr. 2d 280 (1998).

110. *Id.* at 291–92.

111. *See, e.g.*, Timothy J. Dailey, *Homosexual Parenting: Placing Children at Risk*, ORTHODOXYTODAY.ORG, http://www.orthodoxytoday.org/articles/daileygayadopt.php (last visited Oct. 16, 2011).

112. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) ("The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."); Varnum v. Brien, 763 N.W.2d 862, 899 (Iowa 2009) ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.").

the continued demonization of single mothers.[113] With contraception and marriage available as an avenue of retreat from this misrepresented category, society sees single mothers on welfare as incomprehensible.[114] The language surrounding welfare reform is laced with the intention to separate the deserving poor from the undeserving poor and it is the stereotypes associated with welfare mothers that reinforce their place on the undeserving side.[115] The media perpetuates images of single mothers on welfare as sexually deviant and lazy.[116] Emphasizing that single mothers are responsible for their poverty, the blame for social welfare is placed on single mothers alone.[117] Thus, society sees single mothers as choosing to be on welfare because they do not choose to get married.[118] The idea that a man is necessary to successfully raise a child is the foundation for promoting marriage as a solution to poverty. It is founded on the notion that men and women have separate and distinct roles to play in society and that parents are responsible for teaching their children how to align their sex with the appropriate gender behaviors. Therefore, breaking down these gender role stereotypes can help to change society's thoughts about single mothers on welfare and social welfare policy generally.

III. The Status/Conduct Distinction

The defense of targeting conduct rather than a person's status has been used to justify laws challenged as discriminatory. In recent years, the debate over what constitutes targeting conduct versus one's status has played out in sexual orientation discrimination cases.[119] Perhaps the most well known of these cases is *Lawrence v. Texas*,[120] either because of the controversial nature of the law challenged or because of the standing precedent it overturned.[121] Either way, *Lawrence* has

113. *See generally* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

114. Helen M. Alvare, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers' Search for Community,* 44 AKRON L. REV. 167, 168 (2011).

115. Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls,* 38 HOW. L.J. 473 (1995).

116. *Id.* at 484 ("Welfare reform rhetoric portrays women receiving public assistance as unwilling to work and lacking the American work ethic."); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995).

117. *See* Albiston & Nielsen, *supra* note 115.

118. Kraiem & Reich, *supra* note 16, at 10.

119. Lawrence v. Texas, 539 U.S. 558 (2003); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

120. 539 U.S. 558 (2003).

121. *Id.*

become symbolic of the change in popular opinion as to the equal rights of gays. The "emerging awareness," as Justice Kennedy wrote in the majority opinion, underscores the decision to strike down Texas' same-sex sodomy ban on substantive due process grounds.[122]

In the majority opinion, Justice Kennedy refused to decide *Lawrence* on the narrower grounds of equal protection utilized by Justice O'Connor in her concurring opinion.[123] Although the law would likely violate the Equal Protection Clause under *Romer v. Evans,*[124] to decide on those grounds alone would distinguish the case from *Bowers v. Hardwick*[125] and leave unresolved whether a sodomy ban targeting both heterosexuals and homosexuals would be invalid.[126] Therefore, Justice Kennedy focused on the liberty interest protected within the Due Process Clause, leaving most of the discussion of the status/conduct distinction to Justice O'Connor in her concurring opinion.[127] The majority opinion did however articulate that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[128] This sentiment underscores the argument Justice O'Connor made by highlighting the connection between the targeted conduct, same-sex sodomy, and the targeted class of persons—homosexuals.

In her concurring opinion, Justice O'Connor focused on the lack of a legitimate governmental interest to support the disparate treatment that the law enforces.[129] The state of Texas argued that rational basis is satisfied by its interest in the promotion of morality, but Justice O'Connor made it explicitly clear that moral disapproval was not a valid justification for a law.[130] Justice O'Connor explained that the Texas sodomy law, especially given the justification put forth, "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[131] In response, Texas asserted that the law did not discriminate against homosexual persons, only against homosexual conduct.[132] Justice O'Connor's next com-

122. *Id.* at 572; U.S. CONST. amend. XIV.
123. *Lawrence*, 539 U.S. at 575.
124. 517 U.S. 620 (1996).
125. 478 U.S. 186 (1986).
126. *Lawrence*, 539 U.S. at 575–76.
127. *Id.* at 593–96.
128. *Id.* at 575.
129. *Id.* at 582–83 (O'Connor, J., concurring).
130. *Id.*
131. *Id.* at 583 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 634 (1973)).
132. *Lawrence,* 539 U.S. at 583.

ments laid the foundation for undermining the State's argument distinguishing between targeting status and conduct as it relates to homosexuals in *Lawrence* and all future cases:

> While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[133]

Justice O'Connor's language clearly demonstrates that laws that target conduct inextricably connected to one's status are invalid.

The topic of conduct and status once again reared its head in the recent United States Supreme Court case, *Christian Legal Society v. Martinez*.[134] In this case, the Christian Legal Society ("CLS") chapter brought a challenge against the University of Hastings College of Law's non-discrimination policy that required all student groups to allow any student to join. Once again the Court made clear that the conduct/status distinction is not recognized in the context of sexual orientation discrimination.[135] Justice Ginsberg relied on both Justice Kennedy's and Justice O'Connor's words in *Lawrence* in rejecting "CLS's attempt to distinguish between discriminating against gays based on their status (which CLS denied doing) and merely excluding gays based on conduct and/or belief (which CLS defended)."[136] When the conduct defines the class there can be no meaningful distinction; therefore it is unacceptable to target homosexuals for discrimination by outlawing conduct associated with their identity.

By extension it is reasonable to argue that it is unacceptable to target poor people by outlawing conduct that is unavoidable given their status as impoverished. The status-crimes doctrine, rooted in the Eighth Amendment's[137] prohibition of cruel and unusual punishment, provides an avenue to advance this argument.[138] The status-crimes doctrine was established in *Robinson v. California*[139] in 1962

133. *Id.* (citing *Moreno*, 413 U.S. at 641 (1973)).

134. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

135. *Id.*

136. Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 647 (2011).

137. U.S. CONST. amend. VIII.

138. Rob Tier, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255, 266 (1998); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 660 (1992).

139. 370 U.S. 660 (1962).

when the Court invalidated a statute that criminalized being addicted to narcotics.[140] The California statute criminalized only the status of being an addict without requiring proof of use or even possession of narcotics.[141]

In striking this down, the Court made clear that punishment of individuals based solely on their status violated the Eighth Amendment. The Court went further by establishing that criminalizing "genuinely involuntary conduct resulting from status constitutes cruel and unusual punishment" as well.[142]

Although *Robinson* set forth this strong precedent, the Court decided not to extend the status-crimes doctrine to chronic alcoholism in the subsequent case of *Powell v. Texas*.[143] In *Powell*, the Court substantially narrowed the broad protection established in *Robinson* and upheld the conviction of a man who was charged with public intoxication despite his Eighth Amendment claim that the conviction punished him for being a chronic alcoholic.[144] In the plurality decision, the Court held that the Eighth Amendment only prohibited punishment without proof of a criminal act.[145] Thus, the Court distinguished the facts from *Robinson* by describing the public drunkenness as conduct that endangered the public as opposed to the mere status of being intoxicated while being an alcoholic.[146]

However, this narrow holding did not destroy the status-crimes doctrine for future cases. Justice White's concurring opinion demonstrated that he was willing to accept that alcoholism is a status that should not be punished.[147] He agreed with the four dissenting Justices that the defendant's intoxication was an involuntary result of his alcoholism, however he did not find that this alcoholism compelled the defendant to appear in public.[148] Therefore, Justice White agreed in the judgment to uphold the conviction of Powell on these narrow grounds only.[149] Justice White continued that he believed a showing could be made that a homeless alcoholic would have no choice but to

140. *Id.* at 666.
141. *Id.*
142. Simon, *supra* note 138, at 283, n.123.
143. 392 U.S. 514 (1968) (plurality opinion).
144. *Id.* at 531–32.
145. *Id.* at 533 ("[C]riminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.").
146. *Id.* at 532.
147. *Id.* at 548–49 (White, J., concurring).
148. *Powell*, 392 U.S. at 549–50.
149. *Id.* at 553–54.

appear intoxicated in public; therefore the statute in *Powell* as applied to them would be prohibited.[150]

This hypothetical homeless alcoholic emerged in California in 2004; however the court of appeals rejected the status argument despite Justice White's concurring opinion in *Powell*.[151] In *Kellogg*, the defendant was found intoxicated sitting in bushes on a freeway embankment when he was arrested for public drunkenness.[152] The court distinguished the statute at issue from the one in *Powell* by pointing to the specificity with which California's statute was written to address only publically intoxicated persons who pose a safety hazard or obstruct a public way.[153] The court held that "[t]he statute does not punish the mere condition of being a homeless, chronic alcoholic but rather punishes conduct posing a public safety risk."[154] Therefore, the court found that the Eighth Amendment was not violated in this case.[155] Although this case circumvented Justice White's hypothetical application of the status-crimes doctrine to homeless alcoholics, his sentiment has not been lost.[156] Justice White's concurrence stated that there is involuntary conduct associated with homelessness, which, if criminalized, may be unconstitutional for targeting the status of being homeless.[157] The idea that criminalizing conduct consequent to being homeless would be unconstitutional mirrors the sentiments expressed in invalidating the status/conduct distinction used in reference to homosexuals. Making use of *Lawrence*'s argument for homeless persons is the first step towards rightfully applying it to the status of being poor generally.

In 2006, the Ninth Circuit finally applied *Robinson* to the status of homelessness.[158] In *Jones,* a group of homeless individuals sought injunctive relief from the enforcement of a Los Angeles statute that criminalized sleeping, lying or sitting on public streets at all times.[159] The court held that the statute violated the Eighth Amendment be-

150. *Id.* at 551.

151. *See* People v. Kellogg, 14 Cal. Rptr. 3d 507 (Ct. App. 2004).

152. *Id.* at 508.

153. *Id.* at 513.

154. *Id.* at 508.

155. *Id.* at 516.

156. *See* Shirley Darby Howell, *Domestic Violence, Flawed Interpretations of 42 U.S.C. §1437d(L)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment: Making Women Homeless and Keeping Them Homeless*, 13 JONES L. REV. 1 (2008).

157. *Powell*, 392 U.S. at 551 (White, J., concurring).

158. Jones v. L.A., 444 F.3d 1118 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

159. *Id.* at 1120.

cause it criminalized the status of being homeless by punishing involuntary acts that were an integral part of the status of being homeless.[160] The court based its rationale on the evidentiary proof that Los Angeles did not have enough shelters to accommodate all of the homeless people in the county.[161] Therefore, the city was prohibited from punishing homeless persons for sleeping on public streets when they had no other choice by virtue of their status of being homeless.[162] Sleeping, lying and sitting are all involuntary acts which humans must perform to survive and homeless persons have no choice but to do so in public.[163] Therefore, it was unconstitutional for the city to enforce the ban at all times and in all places.[164]

Unfortunately, the *Jones* decision lacks precedential weight as it was vacated due to a settlement between the parties.[165] However, the sentiment expressed in *Jones* should be used in future cases to obliterate the status/conduct distinction that continues to be used to circumvent *Robinson*. Many communities are bypassing the *Robinson* mandate by focusing on criminalizing conduct attendant to the status of homelessness.[166] These statutes, like the one in *Jones*, allow the state to effectuate the criminalization of the homeless just as the status/conduct distinction did with homosexuality. In large part, the *Powell* plurality has allowed this phenomenon to happen as it impliedly consented to states punishing status if it was under the pretext of punishing conduct.[167] *Jones* established that this is a meaningless distinction in the context of the homeless and statutes banning sleeping, sitting, and lying in public.[168] Therefore, because the United States Supreme Court has made clear that this distinction is no longer recognized in relation to homosexuality, courts should follow suit and reject the use of this defense for laws targeting the homeless and laws targeting the poor more generally.[169]

160. *Id.* at 1138.

161. *Id.* at 1122–25.

162. *Id.* at 1138.

163. *Jones*, 444 F.3d at 1136.

164. *Id.* at 1138.

165. *Jones*, 505 F.3d 1118.

166. Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995).

167. *Id.* at 1619–20; *see also* Marco Masoni, *The Common Good: A Critique of How Communities Are Addressing Panhandling*, 1 GEO. J. ON FIGHTING POVERTY 322, 325 (1994); Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261, 272 (2002).

168. *Jones*, 444 F.3d 1118.

169. *See Lawrence*, 539 U.S. 558; *Martinez*, 130 S. Ct. 2971.

IV. The Expansion of the Rational Basis Standard

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[170] In 1970 these deafening words of Justice Stewart rang out in *Dandridge v. Williams*.[171] Justice Stewart wrote the majority opinion, which applied the most deferential standard of review while upholding a law establishing a family cap on welfare benefits.[172] It was this landmark decision that relegated all social welfare rights cases to the ever-deferential standard of rationality review. However, the use of a less deferential version of the rational basis test in cases advancing gay rights has perhaps opened the door for social welfare rights to make strides while continuing to be evaluated under this lowest level of scrutiny.

In *Dandridge*, the law specifically instituted a maximum grant regulation that limited the amount of money a family on welfare could receive, regardless of the size of that family. Therefore, larger families with greater need were not receiving adequate assistance.

Some of these larger families challenged the Maryland law as violating the Equal Protection Clause by discriminating against them based on family size.[173] However, the Court quickly reiterated that any law regulating social welfare need only a rational basis to survive.[174] "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[175] The State put forth multiple 'rational' bases for the law but the Court focused on two of them. First, the State argued that the maximum grant regulation encouraged gainful employment by requiring families to work to supplement the smaller grant received.[176] Second, the State argued the family cap helped strike a balance between the economic status of wage earning families and families receiving welfare.[177] The Court accepted both of these reasons as legitimate governmental interests and justified the decision with these sentiments: "We do not decide today that the Maryland regulation is

170. Dandridge v. Williams, 397 U.S. 471, 485 (1970).
171. *Id.*
172. *Id.*
173. *Id.* at 473.
174. *Id.* at 485.
175. 397 U.S. at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).
176. *Id.* at 483.
177. *Id.* at 483–84.

wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised."[178]

"But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[179] This "one step at a time" rationale upholding the Maryland maximum grant regulation has continued to plague the advancement of social welfare rights in cases applying only the rational basis test. One example where the *Dandridge* school of thought ruled the day is *Jefferson v. Hackney*.[180] In *Jefferson*, the state of Texas implemented a percentage reduction system, which gave a lower percentage of the standard of need to persons on welfare then to the aged, blind or disabled persons of other categorical assistance programs. The Plaintiffs challenged the law as violating the Equal Protection Clause because of the disproportionate effect on people of color who were the vast majority of people on welfare and who in large part were not receiving assistance from the other categorical programs.[181]

Although race-based challenges under Equal Protection normally receive strict scrutiny, here, the Plaintiffs could not prove the intent necessary for a disparate impact claim. The Court stated that "[t]he standard of judicial review is not altered because of appellants' unproved allegations of racial discrimination."[182] Therefore, the Court analyzed the law on the basis of its content, the area of social welfare, which under *Dandridge* required deferential rational basis review.[183] The Court then swiftly rejected the Plaintiffs' argument that the state must apply the same percentage to each of its assistance programs. Extensively citing *Dandridge*, Justice Rehnquist reiterated that the "legislature may address a problem 'one step at a time' . . . so long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket."[184] Thus, the Court upheld the percentage reduction system under rational basis review stating that they could not find the law to be "irrational."[185]

178. *Dandridge*, 397 U.S. at 487.
179. *Id.* at 486.
180. 406 U.S. 535 (1972).
181. *Id.* at 537–38.
182. *Id.* at 547.
183. *Id.* at 535.
184. *Id.* at 546.
185. 406 U.S. at 549.

The one caveat in the *Dandridge* decision restricting the fight for welfare rights to rational basis review was that the Court required the law to be rationally based in addition to being "free from invidious discrimination."[186] The 1973 welfare rights case, *United States Department of Agriculture v. Moreno*,[187] capitalized on this intuitive equal protection requirement. In *Moreno*, the Court determined the constitutional validity of an amendment to one section of the Food Stamp Act of 1964. The amendment excluded any household consisting of unrelated individuals from receiving food stamps.[188] The Government argued that the law should be upheld as it was rationally related to the legitimate interest of minimizing fraud within the system.[189] However, the Court found they could not overlook the legislative history, which indicated "the amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program."[190] The Court held that at a minimum the Equal Protection Clause means "that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[191] Therefore, even under rational basis review the Court struck down the amendment to the Food Stamp Act as unconstitutional.[192] In distinguishing this decision from *Dandridge*, the Court stated that "[t]raditonal equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.' But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis."[193]

This landmark decision written by Justice Brennan struck down a law within the confines of what had been known as deferential rational basis review, creating a new rational basis review with bite. This sleeper case about discrimination against hippies is the foundation for the advancements of gay rights within the Equal Protection doctrine. In 1996, *Romer v. Evans*[194] followed the logic of *Moreno* and struck down a law banning anti-discrimination protections for gays under rational basis review.[195] Gays, like the poor, are not a class that is gener-

186. *Dandridge,* 397 U.S. at 487.
187. 413 U.S. 528 (1973).
188. *Id.* at 530–31.
189. *Id.* at 535.
190. *Id.* at 534.
191. *Id.*
192. 413 U.S. at 538.
193. *Id.*
194. 517 U.S. 620 (1996).
195. *Id.*

ally granted heightened scrutiny, and as such they are both relegated to the rational basis standard of review.[196] Before *Moreno*, rational basis was a rubber stamp of a test leading to an inevitable victory for the Government. However, in *Romer*, because the Court again saw animus as the driving force of the law, it was less deferential and ultimately overturned the law.[197] Justice Kennedy aptly stated that the "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[198]

Romer's decision rested on its own for many years until 2003 when *Lawrence v. Texas* reached the United States Supreme Court and Justice Kennedy again made use of 'rational basis with bite.'[199] In *Lawrence*, the Court overturned *Bowers v. Hardwick*[200] and struck down a same-sex specific sodomy ban.[201] Unlike in *Bowers*, the Texas law at issue in *Lawrence* specifically made reference to same-sex sodomy rather than banning sodomy outright. This made the difference for Justice O'Connor, who wrote a concurring opinion in which she decided the case on equal protection grounds.[202] However, Justice Kennedy wrote the majority opinion invalidating the law under substantive due process.[203] This doctrinal difference distinguishes *Romer* and *Lawrence* but does not detract from the fact that both decisions struck down laws under what appears to be rationality review.

In *Lawrence*, the Court focused on the liberty interest in one's private life and the constitutional protection afforded to one's personal dignity and autonomy.[204] The Court furthered this argument by referencing landmark cases[205] about the constitutional right to make personal decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education."[206] However, the Court declined to explicitly declare that a fundamental right was implicated, which allowed Justice Kennedy to analyze the same-sex sod-

196. *See id.* at 653, n.1.
197. *Id.* at 644–46.
198. *Id.* at 634.
199. Lawrence v. Texas, 539 U.S. 558 (2003).
200. 478 U.S. 186 (1986).
201. *Lawrence,* 539 U.S. 558.
202. *Id.* at 582 (O'Connor, J., concurring).
203. *Lawrence,* 539 U.S. 558.
204. *Id.*
205. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).
206. *Lawrence*, 539 U.S. at 574.

omy ban under rational basis.[207] Although the Court avoided making an actual declaration of the standard applied in the case, they did state that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[208] This language referencing rational basis established *Lawrence* as another case advancing gay rights within the previously limited framework of rational basis.

With same-sex marriage being arguably the most prominent constitutional rights issue of the decade, *Romer* and *Lawrence* have become increasingly more relevant. They have emerged as the touchstones of every constitutional challenge involving gay rights, which means that this new version of rationality review is at the center of the controversy. The Proposition 8 trial in California is a perfect example of this.[209] In the Northern District of California, Judge Walker structured his opinion striking down Proposition 8 with *Romer* and *Lawrence* in mind. Although Judge Walker found that heightened scrutiny was due under both substantive due process and equal protection, he analyzed Proposition 8 under rational basis, and similarly found that it could not pass muster under even this low standard of review.[210] Using rational basis to strike down Proposition 8 was a huge victory for gay rights advocates because of the history of strict deference under that the rational basis standard. The strong statement being made in the few cases that have refused to uphold laws under rationality review demonstrates that the laws in question do not have even a legitimate government interest in support.

This sentiment was echoed in the Ninth Circuit Court of Appeals decision of *Perry*, which followed the same approach as *Romer* and declined to apply heightened scrutiny.[211] In deciding to invalidate Proposition 8, the court analogized the law to Amendment 2 from *Romer*, which also stripped gays and lesbians of previously attained rights.[212] The court stated that "[l]ike Amendment 2, Proposition 8 denies 'equal protection of the laws in the most literal sense,' because it 'carves out' an 'exception' to California's equal protection clause by

207. *Id.* at 558.

208. *Id.* at 578.

209. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

210. *Id.* Under substantive due process Judge Walker found that Proposition 8 did interfere with the fundamental right to marry, thus implicating strict scrutiny. Under equal protection Judge Walker determined that gays do in fact meet the requirements to qualify as a suspect class and again receive heightened scrutiny. *Id.* at 995.

211. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

212. *See id.* at 1080–85.

removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee."[213] Further, the court explained that the decision not to apply heightened scrutiny to invalidate Proposition 8 was made because *Romer* did not apply heightened scrutiny to invalidate Amendment 2.[214]

These cases demonstrate that the rational basis with bite standard has become a benchmark in determining whether the Constitution upholds or invalidates laws affecting gays. The breakthrough in rational basis review has had a definite impact on the momentum of the gay rights movement and the progression seems to be continuing. However, the standard is arguably becoming solely associated with gay rights' cases and *Moreno* has seemingly been forgotten along the way. *Moreno* is still frequently cited in cases employing the stronger rationality review; however, there is a suspicious lack of notice given to the facts of *Moreno*. The traction that has developed for gay rights within rationality review never began for social welfare rights, even though the premiere case for rational basis with bite was a social welfare rights case. Perhaps this is due to the fact that *Moreno* stood on its own whereas *Romer* and *Lawrence* have created a strong one-two punch that is much harder to dismiss. Further, the additional cases upholding gay rights under rationality review have strengthened the doctrine. These cases have breathed new life into the lowest level of scrutiny and this will hopefully present opportunities to make strides in defending the rights of the poor within rationality review.

Conclusion

These four areas of law demonstrate the notable advancements the gay rights movement has made in recent years. Although gays lack full protection of their equality and liberty, the history of the struggle to attain their existing rights can be utilized to help the poor reach similar heights. First, the extensive battle over same-sex marriage has led to the recognition of the fallacies associated with responsible procreation as an argument used to justify withholding marriage. This change in political and perhaps social perceptions about the legitimacy of responsible procreation can be used to disrupt its use as a response to single mothers on welfare. Second, the rise of laws protecting non-traditional families provides support for the idea that children who are not raised in traditional nuclear families with one father

213. *Id.* at 1081.
214. *Id.* at n.13.

and one mother can and do thrive. Third, the United State Supreme Court's firm decision to expel the conduct/status defense as it relates to homosexuals makes a strong argument for discontinuing its use as it relates to the homeless. Finally, the revival of *Moreno*'s rational basis with bite standard has the potential to explode the current constitutional protections of the Fourteenth Amendment for poor persons as a class. The less deferential version of rationality review has been the basis for many landmark decisions protecting the rights of gay people and can be the impetus for changing the way in which constitutional jurisprudence is approached.