

THE RIGHTS OF THE CHILD

CATHERINE SMITH¹

In 1994, Linda and Mary fell in love. Although their state offered no legal recognition to same-sex couples, they moved in together, and proceeded to build a life as a couple. Five years later, through artificial insemination, Linda gave birth to their child, Lucy. Although Mary was prohibited from adopting Lucy in their state, the couple raised her jointly and did what they can to formalize and protect their responsibilities to one another and to their child. In 2010, Mary, Linda, and Lucy were in a car accident. Linda and Lucy, then eleven years old, escaped without injury, but Mary suffered devastating injuries and died days later.

Sexual orientation and gender identity legal scholarship and advocacy offers a broad range of theories and critiques of both successful and unsuccessful attempts to protect the rights of Linda and Mary; less has been dedicated to exploring Lucy's legal rights.² A potentially expansive area of sexual orientation and gender identity scholarship is in the realm of third-party claims – or the legal rights and remedies of those who face discrimination because of their relation to or association with LGBTs. This essay focuses on the third-party claims of one important group – children.³

Lucy will face a host of roadblocks in seeking rights, privileges and benefits that children of heterosexual parents are afforded as a matter of course because of affinity, consanguinity or adoption. Even in the eleven-year parent-child relationship before Mary's death, Lucy was denied the right to be adopted by Mary. And had Mary and Linda split up, Lucy would not be legally entitled to financial support, visitation or a custodial arrangement with Mary. Immediately after the accident, Lucy could be denied hospital visitation for the last days of Mary's life because she failed to qualify as Mary's "immediate family member." Lucy's rights after Mary's death are bleaker. She would not be entitled to Mary's social security benefits or considered an heir to Mary's estate if she died

1. Associate Dean of Institutional Diversity & Inclusiveness, Associate Professor, University of Denver, Sturm College of Law. J.D./M.P.A., University of South Carolina.

2. For contributions to this area, see generally Lewis Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411 (1999); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO L. J. 459 (1990); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999 (2008).

3. Other areas within third-party claims could include exploring the theories on behalf of parents or other family members who experience discrimination because of their familial connection to someone who is LGBT. There is also room to explore associational claims by those who face discriminatory acts by virtue of their friendship or business dealings with LGBTs.

intestate. Lucy would be precluded from bringing a wrongful death claim or seeking emotional harm recovery from potential defendants. These are simply a few of the benefits and privileges Lucy and children like her are denied.⁴

Sexual orientation and gender identity legal scholars should further explore and articulate these (and other) disparities between children of LGBTs and children of heterosexual parents and theorize the potential actionable rights and remedies of these children -- separate from those of their parents.

First, there is a dearth of legal scholarship exploring whether children of LGBT parents who raise an equal protection challenge to state and federal laws that deny them equal rights should be entitled to intermediate scrutiny, not simply rational basis extended to their parents by most courts. Denying a child of LGBT parents the same benefits of children of heterosexuals results in penalizing a child for “a characteristic determined by causes not within the control of the [] individual, and it bears no relation to the individual’s ability to participate in and contribute to society.”⁵ Under the line of cases applying intermediate scrutiny to nonmarital children, there is much to mine.

Second, courts often recognize the injuries to children for the failure to recognize LGBT parents’ relationships,⁶ yet do not analyze the claim from a child rights perspective because a child is rarely a party to the case. For example, in *Standhardt v. Superior Court of Arizona*, a gay male couple challenged Arizona’s same-sex marriage ban as violative of their fundamental right to privacy under both the federal and state Constitutions.⁷ After holding that same-sex marriage was not a fundamental liberty interest, the Arizona Supreme Court upheld the marriage provision because the state’s limitation on marriage was rationally related to its legitimate interests of “encouraging procreation and child-rearing within the stable environment traditionally associated with marriage.”⁸ The court further explained that “[]although the line drawn between couples who marry (opposite sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such

4. For a more comprehensive discussion and list of rights, benefits and privileges, see Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006).

5. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

6. *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Varnum v. Brien*, 763 N.W.2d 862, 900-901 (Iowa 2009).

7. 77 P.3d 451 (Ariz. Ct. App. 2004).

8. *Id.* at 461–463.

inequity is insufficient to negate the State's link between opposite-sex marriage, procreation, and child-rearing."⁹

With a distinct focus on the rights of gay plaintiffs, the *Standhardt* court summarily dismissed these potential "inequities" for children raised by same-sex couples. However, a child of a same-sex couple as a plaintiff in the suit would make it a more difficult case to summarily dismiss—legally and politically. The court is no longer articulating the theoretical indirect harms inflicted on the future child of a gay or lesbian claimant, but is faced with a child, like Lucy, with standing in her own right to seek recourse for a cognizable state or federal constitutional injury.

Finally, there are theories specific to children, such as the "best interest of the child" from family law, that offer compelling arguments that children of LGBT parents should have the same protections as those of heterosexual parents.

There are certainly upsides and downsides to pursuing the rights of children of LGBTs that must be thoroughly vetted. On one hand, a focus on the rights of children of gays and lesbians offers another avenue to push for equality by recognizing that discrimination extends to individuals because of their relationship to LGBTs, on the other hand, it may be viewed as bootstrapping or an end-run around lawful discrimination against LGBTs. On one hand, a child-centered approach to LGBT issues may contribute to the children's rights movement,¹⁰ however, the same principles developed to seek recourse for these children could be used to challenge the rights of LGBT parents. On one hand, LGBT advocates could be vilified for "exploiting" their kids, on the other hand, the failure to advocate for the rights of children of LGBT parents can be faulted as well.

This essay does not purport to offer any answers but simply to offer some thoughts on an area in which litigation and advocacy is bound to increase exponentially over the next twenty to thirty years, whether those of us engaged in sexual orientation and gender identity scholarship deem it worthy of attention or not.

9. *Id.* at 463. This essay does not suggest that the rights of gay and lesbian children should be limited to the context of the marriage debate. By exploring these issues from the perspective of children, there may be avenues to pursue rights and benefits of children of LGBTs in single parent, dual parent, and multiple parent households.

10. See generally Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD L. REV. 358 (1994); Barbara Barrett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994).