Case No. S147999

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES

JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4365

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE

Nos. A110449, A110450, A110451, A110463, A110651, A110652

SAN FRANCISCO SUPERIOR COURT
NOS. JCCP4365, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506

Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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TABLE OF AUTHORITIES

STATE CASES

Anderson v. King County,
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Bottoms v. Bottoms,
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Fields v. State,
132 So. 605 (Ala. 1931).....5

Green v. City of New Orleans,
88 So.2d 76 (La. 1956).....34

Green v. State of Alabama,
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Jones v. State,
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Kinney v. Commonwealth,
30 Gratt. 858, 1878 WL 5945 (Va. 1878).....8, 19

Naim v. Naim,
87 S.E.2d 749 (Va. 1955).....30

People v. Hall,
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Perez v. Sharpe,
32 Cal.2d 711 (1948)..... *passim*

Roe v. Roe,
228 Va. 722 (Va. 1985).....35

Scott v. State,
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Sharon v. Sharon,
75 Cal. 1 (1888).....13

West Chester R.R. Co. v. Miles,
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Wolfe v. Georgia Railway & Electric Co.,
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FEDERAL CASES

Lofton v. Sec'y of the Department of Children & Family Services,
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Loving v. Virginia,
388 U.S. 1 (1967) 7, 11

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Cal. Code Regs. Tit. 22, §35181 (2007) 37

D.C. Code
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§16-914(a)(1)(A) 37

15 V.S.A. §665 37

BRIEFS

Answer Brief of California Families on the Merits, *In re Marriage Cases*, No. S1477999 (Cal. June 6, 2007) ..... *passim*

Amicus Curiae Brief of Church of Jesus Christ of Latter Day Saints, *et al.* in Support of Appellants State of California, *In re Marriage Cases*, No. A110449 and related cases (Cal. Ct. App. Jan. 9, 2006) 22, 23

Brief of Amicus Curiae James Q. Wilson, *et al.*, Legal & Fam. Scholars in Support of Appellants State of California, *In re Marriage Cases*, No. A110449 and related cases (Cal. Ct. App. Jan. 9, 2006) 19

Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Opening Briefs on the Substantive Issues, *In re Marriage Cases*, No. S147999 (Cal. June 14, 2007) 12

OTHER

An Instant Cure, Time, Apr. 1, 1974, available at <http://www.time.com/time/ magazine/article/0,9171,904053,00.html>. 34

American Psychological Association, *Sexual Orientation, Parents & Children* (July 2004).....39

Ariel [Buckner H. Payne], "The Negro: What Is His Ethnological Status?" (1867), reprinted in John David Smith, *The "Ariel" Controversy: Religion and "The Negro Problem"* (Garland Publ'g, Inc., 1993) 20

Baldwin, James, *Fifth Avenue Uptown*, collected in *The Price of the Ticket* (St. Martin's-Marek Press, 1985).....42

Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 Regent U.L. Rev. 267, 270-273 (2001) 39

Ball, Carlos A. & Farrell Pea, Janice, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U. Ill. L. Rev. 253 (1998).....21

Becker, Susan J., *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 (2006)..... *passim*

Bentley, Nancy, *White Slaves in Antebellum Fiction*, 65 Am. Literature 501 (1993) 35

Blanchard, Margaret A., *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society - From Anthony Comstock to 2 Live Crew*, 33 Wm. and Mary L. Rev. 741 (1992).....33

Boodman, Sandra G., *Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call that a Prescription for Harm*, Washington Post, Aug. 16, 2005, at HE01. 30

Bost, Suzanne, *Fluidity Without Postmodernism: Michelle Cliff and the 'Tragic Mulatta' Tradition*,
32 African American Rev. 673 (1998).....35

Brown, Jr., Herbert C., *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 (2007) 15, 16, 20

Byrd, Dean, *Spitzer Study Critiqued in the Journal of Gay and Lesbian Psychotherapy*, http://www.narth.com/docs/spitzerstudy.html 30

Cahill, Courtney Megan, *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).....3

Chamberlain, J.P., *Eugenics and Limitations of Marriage*,
A.B.A. J., July 1923 at 429 26

Congregation for the Doctrine of Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Case of Homosexual Persons*, available at <http:www.dignityusa.org/1986doctrine/ratzinger.html>
(Oct. 1, 1986).....33

Cook, James Graham, *The Segregationists* (1962) 8

Coparent or Second-Parent Adoption by Same-Sex Parents,
Pediatrics, Vol. 109, No. 2 at 339-340, Feb. 2002. 39

Dantone, Gerry, *Anti-Gay Activism and the Misuse of Science: An example of how science can be perverted to supported 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> 27

Davidson, Jeanette R., *Theories about Black-White Interracial Marriage: A Clinical Perspective* 20(4)
J. Multicultural Counseling & Dev. 150 (1992).....27, 28

DeAngelis, Tori, *New Data on Lesbian, Gay and Bisexual Mental Health*, Monitor on Psychology, Feb. 2002; 34

Dobson, James C., *Eleven Arguments Against Same-Sex Marriage*, May 23, 2004, available at <http://www.citizenlink.org/FOSI/homosexuality/A000004753.cfm> 38

Dougherty, Jon, *Report: Pedophilia More Common Among "Gays"*, WorldNetDaily, April 29, 2002, available at <http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID= 27431>……..39

Dougherty, Jon, *Talking Points: Homosexuality and Child Sexual Abuse*, Family Research Council, available at <http://www.frc.org/get.cfm?i=IF02G2>; 39

Dougherty, Jon, *The Problem of Pedophilia*, <http://www.narth.com/docs/pedophNEW.html> (1998) 39

Diawara, Manthia, *Black Spectatorship: Problems of Identification and Resistance*, in Black American Cinema (Manthia Diawara, ed., 1993) 17

Dorr, Lisa Lindquist, *Arm in Arm: Gender, Eugenics, and Virginia's Racial Integrity Acts of the 1920s*, 11.1 J. Women's Hist. 143 (1999) 16

Fajer, Marc A., *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992).....23

Fleming, Walter L., *Documentary History of Reconstruction: Military, Political, Social, Religious, Educational, & Industrial: 1865 to the Present Time* (1907) 33

Focus on the Family, *Focus on the Family's Position Statement on Same-Sex "Marriage" and Civil Unions, available at* <http://www.citizenlink.org/FOSI/Marriage/A000000985.CFM>. (Jan. 16, 2004) 38

Fowler, David, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion the Middle Atlantic States of the Old Northwest, 1780-1930* (New York: Garland Publishing, 1987).....6, 9, 10

Fredrickson, George M., *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (1987) 6

Golden, Joseph, *Patterns of Negro-White Intermarriage*,
19 Am. Soc. Rev. 144 (1954).....6

Grant, Madison, *The Passing of the Great Race; or the Racial Basis of European History* (1918).....26

Haller, Mark, *Eugenics: Hereditarian Attitudes in American Thoughts* (1963) 24

Hickman, Christine B., *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*,
95 Mich. L. Rev. 1161 (1997).....22

Higgins, Chester, "Mixed Marriage Ruling Brings Mixed Reaction in Dixieland," *Jet*, June 29, 1967 6

Hohengarten, William M., *Same-Sex Marriage and the Right of Privacy*,
103 Yale L.J. 1495 (1994).....3

Kamiya, Gary, *cablinasian like me*, available at <http://www.salon.com/april97/tiger970430.html>.
Salon.com, April 30, 1997……..37

Kelley, Matt, *The Tiger Woods Effect: What is the Meaning of Race in the 21st Century? Proud of All My Roots*, The Boston Globe,
Feb. 18, 2001 at D8. 37

Kennedy, Randall, *Interracial Intimacies* (Pantheon Books, 2003) ..... *passim*

Kurtz, Stanley, *The Libertarian Question*,
Nat'l Rev. Online, April 30, 2003.....9, 12

Kurtz, Stanley, *Point of No Return*,
Nat'l Rev. Online, August 3, 2001.....9

Latham, Heather Fann, *Desperately Clinging to the Cleavers: What Family Law Courts are Doing About Homosexual Parents, and What Some Are Refusing to See*,
29 Law & Psychol. Rev. 223 (2005).....40

Lindsey, Daryl,*"Hey Faggot" to "Hey Daddy"*, Salon.com,
Oct. 1, 1999 41

Mello, Michael, *Legalizing Gay Marriage* (Temple U. Press, 2004) 4

Nokov, Julie, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*,
20 Law & Hist. Rev. 225 (2002).....24

Norwood, Thomas M., *Address on the Negro* (Savannah, GA.: Braid and Hutton, 1907).....16

Onwuachi-Willig, Angela, *Undercover Other*,
94 Cal. L. Rev. 873 (2006).....22

Pait, Jonathan, Community Relations Coordinator, Bob Jones University, <http://multiracial.com/site.content/view/1023/49
Letter to James Landrith (August 31, 1998) 22

Pascoe, Peggy, "Miscegenation Law, Court Cases, and Ideologies of Race," *Interracialism: Intermarriage in American History, Literature, and Law* (Werner Sollors, ed., 2000) 11

Pigilucci, Massimo, *Rationally Speaking: Bush, the Pope, and Gay Rights* (2002) 10

Pilgrim, David, *The Tragic Mulatto Myth*, available at <http://www.ferris.edu/jimcrow/mulatto> 25

Porterfield, Ernest, *Black-American Intermarriage in the United States*,
5 Marriage & Fam. Rev. 17 (1982).....28

Reuter, Edward Byron, *Race Mixture* (1931).....28

Robinson, Reginald Leamon, *Race, Myth and Narrative in the Social Construction of the Black Self*,
40 How. L.J. 1 (1996).....16

Robson, Ruthann, *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 (2001)……..…...41

Romano, Renee C., *Race Mixing: Black-White Marriage in Postwar America* (2003)..... *passim*

Rosenthal, Debra J., *The White Blackbird: Miscegenation, Genre, and the Tragic Mulatta in Howells, Harper, and the "Babes of Romance"*
56 Ninteenth Century Literature 495 (2002).....35

Ross, Josephine, *Riddle for Our Times: The Continued Refusal to Apply to the Miscegenation Analogy to Same-Sex Marriage,*
54 Rutgers L. Rev. 999 (2002).....29

Ross, Josephine, *Sex, Marriage, and History: Analyzing the Continued Resistance to Same-Sex Marriage,*
55 S.M.U. L. Rev. 1657 (2002).....15

Ross, Josephine, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage,*
37 Harv. C.R.-C.L. L. Rev. (2002)..... *passim*

Saks, Eva, *Representing Miscegenation Law, in Interracialism: Intermarriage in American History, Literature, and Law*
Werner Sollars, Ed. (2000)..... *passim*

Sin, Homosexuality-Crime, Mental Illness, Inborn Abnormality or Alternative Lifestyle?, Jan. 8, 2002, available at <http://www.truth-and-justice.info/homosexuality.html> 34

Schatschneider, Rebecca, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation,*
14 Temp. Pol. & Civ. Rts. L. 285 (2004).....31

Sealing, Keith E., *Blood Will Tell: Scientific Racism and Legal Prohibitions Against Miscegenation,*
5 Mich. J. Race & L. 559 (2000).....25

Smith, Lillian, *Killers of the Dream,*
(New York: W.W. Norton, 1949)……..……16

Stiers, Gretchen, *Study: From This Day Forward* (1999).....9

Trosino, James, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy,*
73 B.U. L. Rev. 93 (1993).....23, 33

Waller, Roy & Nicolosi, Linda A., *Spitzer Study Published: Evidence Found for Effectiveness of Reorientation Therapy*, available at <http://www.narth.com/docs/ evidencefound.html>.....30

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

Wardle, Lynn D., *When Dissent is Stifled; The Samex-Sex Marriage and Right-to-Treatment Debates,* available at, <http://www.narth.org/docs/wardle.html>.....26, 27

Weiss, Rick, *Limit Attempts to Convert Gays?*, Mobile Register (AL.), Aug. 14, 1997, at A1 29

Whitehead, N.E., *Homosexuality and Mental Health Problems,* available at, <http://www.narth.com/docs/whitehead.html> 29

Whyte, Martin King, *The State of Marriage in America, Marriage in America: A Communitarian Approach* 5 (Whyte, ed. 2000) 13

Williamson, Joel, *After Slavery: The Negro in South Carolina during Reconstruction, 1861-1877* (1965) 5

Wilson, Justin T., *Preservationism, Or the Elephant In The Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*
Duke J. of Gender L. & Pol'y 561 (2007).....9

APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING MARRIAGE EXCLUSION AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.250, Howard University School of Law Civil Rights Clinic (including the clinic's faculty members, supervising attorneys and student attorneys) hereby respectfully applies for leave to file an *amicus curiae* brief in support of the City and County of San Francisco and the individuals and organizations challenging the marriage exclusion.

Although Howard University is often recognized as one of our nation's historically black colleges and universities, from its founding in 1867 to the present day Howard's mission has always been to provide a quality education for blacks *and* whites, women *and* men, in an integrated setting. In pursuit of that mission, Howard University School of Law has long placed the defense of human rights, equality, and dignity at the heart of its educational practice. When more than seventy years ago Charles Hamilton Houston, a former Howard law professor and Dean, the late Justice Thurgood Marshall, a former Howard student, and the cadre of lawyers from the NAACP Legal Defense and Education Fund (many of whom were also former Howard students) developed the winning legal strategy challenging the pernicious separate but equal racial segregation doctrine of *Plessy v. Ferguson*, their fight was not only against racial subordination, but also against all forms of social apartheid that would deny human beings the full equal protection promise of the United States Constitution.

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 considering that 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. *Amicus curiae*, in

pursuit of Howard University's educational practice of defending human rights, equality, and dignity, 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. As the brief demonstrates, the 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 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 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 credence, in the context of same-sex marriage.

SUMMARY OF ARGUMENT

Until 1967, marriage between black and white partners continued to be illegal in several states. David Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion the Middle Atlantic States of the Old Northwest, 1780-1930* 339-439 (New York: Garland Publishing, 1987) (hereinafter, Fowler, *Northern Attitudes*). Throughout the nation's history, opponents of interracial marriage justified criminal prohibitions against such unions by pointing to the purported detrimental effect of mixed-race birth and parentage, the supposed destruction of society if people marry between the races, and the so-called natural law rationale for keeping the races separate. Randall Kennedy, *Interracial Intimacies* (Pantheon Books, 2003). 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 that were raised by opponents to interracial marriage. Without acknowledging that these arguments were rejected in the earlier debate over mixed-race couples' right to civil marriage, opponents of

marriage between two persons of the same sex have attacked same-sex couples as being potentially destructive of American society, same-sex marriage as devaluing of the social currency of heterosexual marriage, and same-sex parenting as posing a threat to their children and others. 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).

Throughout American history, the institution of marriage has been accepted as a stabilizing tool for building and organizing society. *See* William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1495, 1501-05 (1994) (hereinafter, Hohengarten, *Right of Privacy*). Because the benefits of state-sanctioned marriage have been traditionally extended only to opposite sex couples, marriage has been perceived as a legal means of encouraging procreation within a stable environment for raising children. Marriage in America, as elsewhere, however, is a highly complex concept; while rooted in the quasi-contractual relationship legally uniting two individuals in the eyes of the law, legal marriage also creates a unique social status. Hohengarten, *Right of Privacy*, 103 Yale L.J. at 1499. The state's recognition of two individuals' mutual commitment allows married persons the exclusive benefits of the status, including pecuniary advantages, social recognition, and an altered personal identity. *Id.* A couple must not only be acknowledged by the members of their society as being "proper" beneficiaries of the status of marriage, but also must be recognized by the government as being a part of the class of persons who may enter into a marriage contract. As such, groups like same-sex couples and interracial couples have remained on the fringes of the marriage debate, and have often been denied the right to enter into the contract of marriage altogether.

This brief addresses the historical arguments against interracial sex, marriage, and parenting, many of which arguments, are resurrected in the briefs of the State and its *amici*, while exposing the similarities and differences between

those arguments and the recent opposition to marriage between same-sex couples. Specifically this brief catalogues our country's historical portrayal of interracial unions and the various legal arguments made against recognition of marriages between the races. The brief also discusses the present-day social and political arguments against same-sex marriage, adoption, and child rearing as they parallel the earlier debate. 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.

ARGUMENT

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

> *It is through the marriage relation that the homes of a people are created . . . . These homes, in which the virtues are most cultivated and happiness most abounds, are the true officinæ gentium – the nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred*?[1]

> *"[T]wo dogs and cats do not constitute a family. A family by definition is . . . [a] husband meaning a male and a wife meaning a female . . . ."*[2]

> *Marriage is, by definition, the union of one man and one woman, not because of any animus toward homosexuals, polygamists,*

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[1] *Green v. State of Alabama***,** 58 Ala. 190, 194 (Ala. 1877).

[2] Michael Mello, *Legalizing Gay Marriage* 55 (2004) (quoting a Letter to the Editor of the Burlington (Vermont) Free Press, dated March 23, 2003).

polyandrists or any other group of people, but because it is the joining of a man and a woman that perpetuates society.[3]

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

As recently as 1967, 16 states still had miscegenation statutes on their books. Fowler, *Northern Attitudes* at 339-439. 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, among other things. Anti-miscegenationists argued that mixing races would begin a slippery slope leading to social chaos. Many white Americans disdained the prospect of interracial marriage because it threatened to "weaken" white blood, and by extension, white society. Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America* 47 (2003) (hereinafter Romano, *Black-White Marriage*). Hence, for the majority of American history, beginning as early as 1664 in Maryland, the civil contract of marriage was legally recognized only if performed between persons of the same (legally-defined) race, "to prevent 'abominable mixture and spurious issue.'" Kennedy, *Interracial Intimacies* at 219. While many states specifically enacted laws criminalizing interracial sex, anti-miscegenation laws were largely targeted at criminalizing interracial cohabitation and denying the existence of marriages between a white person and a person of another race, especially if that race was black. *Id*. at 215-18; *see Fields v. State*, 132 So. 605 (Ala. 1931): "[I]t was not enough for that state to prove that the defendants had engaged in a single act of sexual intercourse, or even occasional sexual acts; rather it had to show that they had had an ongoing *relationship*." *See also* Joel Williamson, *After Slavery: The*

[3] Answer Brief of Campaign for Cal. Families on the Merits as Amici Curiae at 12, *In Re: Marriage Cases*, No. S 147999 (Cal. June 6, 2007).

Negro in South Carolina during Reconstruction, 1861-1877 (1965). In 1913, Wyoming became the last of 42 states to enact laws making interracial marriages void, while states also made criminal the act of "living in fornication" with a person of another race.[4] "*Every* state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted antimiscegenation laws." Kennedy at 219 (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)).

Americans saw mixed-race unions as potentially detrimental to the overall existence of society. Such marriages posed a threat to the white supremacist ideology that formed the foundation of an American society built upon the institution of enslavement. As Dr. Martin Luther King, Jr., told *Jet* magazine in the wake of the *Loving* decision, "The banning of interracial marriages from the beginning grew out of racism and the doctrine of white supremacy." Chester Higgins, "Mixed Marriage Ruling Brings Mixed Reaction in Dixieland," Jet, June 29, 1967, at 24. This white supremacist ideology was evident in assertions by some white opponents of interracial marriage: that mixed race individuals threatened society by virtue of their multi-racial identity. Neither black nor white, "mulattoes" were likely to have the "audacity" and arrogance of white America coupled with the "savagery" of black America. George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914* at 277 (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").

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[4] 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* at 336.

Further, the possibility of "white negroes" – white-skinned people who were legally black – would wholly destroy the American construction of race. Eva Saks, *Representing Miscegenation Law, in Interracialism: Intermarriage in American History, Literature, and Law* 73 (Werner Sollors, ed., 2000). Because the racial hierarchy created by the institution of enslavement structured American society, any time the white race was "diluted" by black "blood" the status of all white citizens was jeopardized. Redefining race in terms other than the dichotomy of black and white promised to upset the social fabric of the nation. The fact that race was (and remains) a legal fiction was irrelevant: so long as miscegenation was not acknowledged and socially stigmatized, society viewed all children born to white mothers as white and all children born to black women as black.

Clear definition of racial identity was deemed necessary not only for social order, but also to ensure that the laws against interracial mixing were enforceable. If the state (or even individuals) were to acknowledge that mixed race people existed, miscegenation laws would be of no force. The crime of miscegenation was defined as intermarrying, cohabitating, or interbreeding of persons of *different races* (Saks, *Representing Miscegenation Law* at 62 (emphasis added)); thus, the enforcement of anti-miscegenation laws required a clear definition of racial identity and complete racial separation to be effective. Likewise, if a person could *look* white, but *be* black, miscegenation laws would be impossible to enforce. In *Representing Miscegenation Law*, Saks discusses the case of *Jones v. State*, 47 So. 100 (Ala. 1908), in which a black man was prosecuted for cohabitating with a "white woman." Saks, *Representing Miscegenation Law* at 62. The prosecution was based upon the fact that a witness testified that the wife *looked like* a white woman, and therefore was a white woman. *Jones*, 47 So. at 102. The ambiguity of race was clearly exposed: the law could not protect what could not be defined.

Throughout the country's history of slavery and segregation and up to fairly 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.* One court explained, "The 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." *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867) (citing *State v. Gibson*, 36 Ind. 389, 404 (1871)). Perhaps the most famous Christian apology for anti-miscegenation laws was articulated by the trial judge in *Loving v. 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). Similarly in *Kinney v. Commonwealth*, Judge Joseph Christian of the Supreme Court of Appeals of Virginia explained:

> The purity of public morals the moral and physical development of both races and highest advancement of our cherished southern civilization under which two distinct races are to work out and accomplish the destiny to which the almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God

> and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion.

Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).

Like anti-miscegenationists of the past, today's opponents of gay marriage assert that legalization of same-sex marriage will destroy society and the institution of marriage. This time, the argument is rooted in a baseless and invidious stereotype of gays and lesbians as non-monogamous and amoral. "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." Stanley Kurtz, *The Libertarian Question*, Nat'l Rev. Online, April 30, 2003, available at <http://www.nationalreview.com/kurtz/kurtz04302003.asp>. Based on the erroneous and wholly unsubstantiated stereotype that homosexual couples engage in more sex outside of committed relationships than heterosexual couples, anti-gay marriage activists contend that allowing same-sex couples the opportunity to marry will result in a separation between marriage and monogamy. *Id.*; *see also* Stanley Kurtz, *Point of No Return*, Nat'l Rev. Online, August 3, 2001 (*citing* Gretchen Stiers, *Study: From This Day Forward*, 1999) available at <http://article.nationalreview.com> (enter search terms "Point of No Return) (arguing that gay couples who "actually disdain traditional marriage will nonetheless get married" for the financial and legal benefits of marriage). Extended to the implausible (as it is by opponents of marriage equality), this stereotype results in pronouncements that advocates of same-sex marriage actually seek to see "marriage abolished (and multiple sexual unions legitimized)." *Id.*

So-called "traditional marriage preservationists" point to marriage and the family as the main social device used to transmit values and beliefs across generations. *See, e.g.*, Justin T. Wilson, *Preservationism, Or The Elephant In The Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, Duke J. of Gender L. & Pol'y 561, 634 (2007) ("For civilizations to

survive, they must necessarily have institutions that facilitate the intergenerational transfer of accumulated cultural knowledge, values, and beliefs."). Opponents of same-sex marriage argue that value transmission can *only* be successfully accomplished in two-parent, mixed gender households – simply because the right of marriage in America historically has only been extended to opposite-sex couples. *Id.* (*citing* Massimo Pigliucci, *Rationally Speaking: Bush, the Pope, and Gay Rights* (2002), available at <http://www.secularhumanism.org/index.php?section= columns&page=03-10-pope-vs-gays>). Underlying this circular argument, however, is the invidious stereotype of homosexuals as morally bankrupt and thus incapable of transmitting moral values.

Finally, like their anti-miscegenationist counterparts, many opponents of same-sex marriage clothe their arguments in literal and selective interpretations of the Bible. Just as Leviticus' prohibitions against the mixing of livestock breed often served as justification for slaveholders and segregationists, opponents of same-sex marriage often quote Leviticus 18:22, which states, "You shall not lie with a male as with a woman; it is an abomination," as a Biblical apology for anti-homosexual campaigns against same-sex marriage.

B. Like Modern Opponents of Same-Sex Marriage, Anti-Miscegenationists Sought to Protect Society from Interracial Marriage on the Ground that Mixing Races Would Destroy the Sanctity and Legitimacy of Marriage as a Social Institution.

In addition to the assertion that the ban on interracial relationships was necessary for the preservation of the general social order, anti-miscegenationist theory was grounded in the quest to sanctify and maintain racial "purity." Specifically, anti-miscegenation statutes were enacted in many states initially to ensure preservation of the white race and white identity as a property right. As long as children born to mixed-race couples were classified as non-white, the

threat of sexual relations between the races posed little or no threat to whiteness as a commodity. Saks, *Representing Miscegenation Law* at 66-67.

"Prohibiting interracial marriages while condoning interracial sex between white men and black women reinforced gender as well as racial hierarchies." Romano, *Black-White Marriage* at 5. Children born to black women and white men were not only relegated to their black mothers for the necessities of life, but also for their racial identity and legal status. As early as the time of enslavement, American states reversed the European tradition of children inheriting the status of their father to ensure that children born to slave women would themselves be property. *Id.* White women could not engage in interracial relationships because of the risk of black birth and because any union with a black man would result in criminal punishment and/or racial banishment. White women had the responsibility of remaining "racially pure," to ensure that blackness did not "pollute[] and overpower[] whiteness." *Id.* at 48. "[I]n short, the survival of the white race [and therefore white society] depended upon its women, who were designated the guardians of racial purity." *Id.* at 47.[5]

When slavery was abolished and the "value" of white skin decreased, states increasingly began enacting and enforcing anti-miscegenation laws in order to ensure continued racial separation. This development was closely related to the emergent concept of "biological race," or skin color, which made it easy for racists to identify those who were subject to racial oppression. *See* Peggy Pascoe,

[5] Although many white politicians and others asserted that interracial marriage would threaten "white civilization," the same groups refused to place restrictions on interracial sex. In 1895, a proposal was made to amend the South Carolina constitution to prohibit interracial marriage. Kennedy, *Interracial Intimacies* at 217. Robert Smalls, a black politician, supported such an amendment, but advocated for an additional mandate that interracial sex be strictly punished. Mr. Smalls proposed that "men convicted of having concubines of a different race be forever barred from holding any political office." *Id.* Apparently, Mr. Small's proposal was seen as audacious; the amendment passed, but only included the prohibition on interracial marriage. *Id.*

"Miscegenation Law, Court Cases, and Ideologies of Race," *Interracialism: Intermarriage in American History, Literature, and Law* 183, 199 (Werner Sollors, ed., 2000). The theory of biological race was adopted by both those who worked to enforce anti-miscegenation laws as well as those who advocated against them. Many whites were especially sympathetic to "white Negroes," those legally black persons who, by virtue of white skin were caught in a perceived state of perpetual limbo. *Id.* Likewise, however, white-skinned blacks were often seen as embodiment of why anti-miscegenation laws were needed, and a justification for the essence of the threat of miscegenation; this is likely to be the reason for the increasingly narrow definitions of whiteness over time. *Id.*

Further, because marriage was the one social institution in which sex and reproduction were not only sanctioned but encouraged, states were especially vigilant in policing and punishing interracial marriages and cohabitations. *Id.* at 66. American miscegenation jurisprudence therefore created a "genetic underclass," a class of persons who were classified as black, regardless of their physical "whiteness" and the race of their parents. *Id.* at 67.

Much like the arguments used against interracial marriage, opponents of equal marriage rights argue that legalizing same-sex marriage threatens the sanctity of marriage. For instance, Kurtz asserts that gay couples "generally" engage in non-monogamous, but otherwise "committed" relationships. Kurtz, *The Libertarian Question*, *supra*. He argues that if the law allows gay couples to marry, these couples will not adopt traditional marital roles and behavior, but will engage in extra-marital sex and relationships, and even perhaps encourage others to do so. *Id.* Similar to the many arguments made against interracial marriage, opponents of same-sex marriage base their theories on the "slippery slope": the idea that if one set of so-called "non-traditional" behaviors is permitted, it is only a matter of time before every sort of behavior becomes socially acceptable. By falsely linking gay relationships to non-monogamy, Kurtz fears that, "[o]nce we as a society no longer take it for granted that marriage means monogamy, you may

not decide to leave your wife. But you may be more likely to give in to the temptation of an affair." *Id.*

Kurtz, of course, fails to acknowledge that heterosexual couples (both married and unmarried) have engaged in pre-marital and extra-marital sexual affairs throughout recorded history. In recent years, rates of divorce and birth outside marriage have increased. Martin King Whyte, *The State of Marriage in America*, *Marriage in America: A Communitarian Approach* 5 (Whyte, ed. 2000). Nonetheless, some opponents of marriage between same-sex partners, like Kurtz, would blame even this on the breakdown of "the taboo on homosexuality [and] the broader taboo on a purely pleasure-seeking sexuality inside and outside the confines of marriage." Kurtz, *supra*.

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 ways threatens to undermine the institution of marriage. Regardless of views by individual communities 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.

II. 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."

> *The 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.*[6]
>
> *Marriage . . . is a union created and recognized by God. Homosexuality is an abomination as far as God is concerned. Marriage is a partnership, a contract if you would, between one man, one woman, and God. Any deviation from this design is unbiblical, unnatural and is not accepted by God.*[7]
>
> *The rights and obligation of marriage "are fixed by society, in accordance with the principles of natural law, and are beyond and above the parties themselves."*[8]

Perhaps 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 four primary arguments: (1) arguments characterizing such relationships as purely sexual, rather than based on mutual love and commitment; (2) theological arguments asserting that such relationships are contrary to God's plan; (3) biological arguments arguing that such relationships are unnatural; and (4) psychological arguments which pathologize interracial and intragender attraction.

A. Interracial Relationships and Same-Sex Relationships Have Both Been Framed as Purely Sexual by Opponents.

One significant commonality between the rhetoric of opponents of mixed-race marriages and same-sex marriages is the tendency to sexualize the relationship at issue. "To say that a relationship is sexualized, means it is viewed

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[6] *Kinney v. Commonwealth*, 30 Gratt. 858, 1878 WL 5945, at *7 (Va. 1878).
[7] Traditional Values Coalition, *African-American Pastors Defend Traditional Marriage*, <http://www.traditionalvalues.org/modules.php?sid=1647> (quoting Pastor Frederick K.C. Price of the Los Angeles Crenshaw Christian Center, one of 60 black pastors discussed in this article).
[8] Answer Brief of Campaign for Cal. Families on the Merits at 8, *In re Marriage Cases*, No. S 147999 (Cal. June 6, 2007) (quoting *Sharon v. Sharon*, 75 Cal. 1, 8 (1888)).

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. L. Rev. 255, 255 (2002) (hereinafter, Ross, *Sexualization*). Historically, marriage is what makes sex legitimate. Josephine Ross, *Sex, Marriage, and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 S.M.U. L. Rev. 1657, 1660-1661 (2002) (hereinafter, Ross, *Sex, Marriage and History*). Excluding same-sex and mixed-race couples from the definition of marriage results in such relationships being viewed as profane and therefore legitimately prohibited. *Id.* 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, however, that no matter how literally the sociologists employ the term intermarriage, among the bigoted, it 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 line. The statutes prohibiting fornication and adultery between whites and non-whites were not intended to be enforced, however, unless the woman involved was white. In essence, interracial marriage was symbol or code word for sexual activity between black men and white women.

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). 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).

The imagery of this "predatory sexuality" attributed to black men tapped into whites' fears for their white daughters and justified segregation in nearly every aspect of life. "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. 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). By sexualizing mixed-

race relationships, discussion of the love and commitment of the couple was stifled, replaced by assertions that such couples were perverse deviants, different from the norm.[9]

Same-sex marriage opponents adopted the tactic of sexualization in much of 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." Ross, *Sexualization*, 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-gender 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, in a process called "behavior-identity compression."

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[9] One historically pervasive use of the imagery of the oversexed "black brute" who sexually assaults white women is D.W. Griffith's 1915 film "The Birth of a Nation," where the character Flora Cameron, a young white southerner, is proposed to by a sexualized former slave named Gus, flees into a forest to escape, and is maniacally pursued by the former slave, leaping from a cliff to her death to avoid being raped. The Birth of A Nation (Epoch Film Co. 1915). Discussing this scene, Manthia Diawara, noted chair of the Africana Studies Department at New York University, suggests that "[t]he dominant reading of this sequence supports a Manichean world-view of race in which Gus represents absolute evil and Little Colonel and his sister embody absolute good. Editing, mise-en-scène, narrative content all combine to compel the spectator to regard Gus as the representation of danger and chaos; he is the alien, that which does not resemble oneself, that from which one needs protection. Whether Black or White, male or female, the spectator is supposed to identify with the Camerons and encouraged to hate Gus." Manthia Diawara, *Black Spectatorship: Problems of Identification and Resistance*, in Black American Cinema 213 (Manthia Diawara ed., 1993). This highly influential film about the history of the Ku Klux Klan was the highest grossing film of its day and had substantial impact on popular perceptions of white Americans. *See generally id.* at 211-220.

> [B]ehavior-identity compression is the process through which individuals within the heteronormative, binary sexual paradigm craft an identity for outsiders as one-dimensional sexual deviants. This socially constructed, multi-step progression encourages the compounding of erroneous assumptions and contradictory misconceptions at each stage, yielding a composite identity that reinforces derogatory stereotypes of sexual minorities and justifies legal disenfranchisement, social contempt, criminal prosecution and physical violence against them.

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 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. Because it is such a large step for gay people to go from the profane to the sacred, deprivation of marriage rights appears fair. Gay people are seen as engaging in illicit behavior that deserves neither marriage nor the economic and security benefits that accompany it. Due to sexual stereotyping, the privilege that allows only some couples to marry does not have to be understood as structured advantage; instead it is seen as deserved and fair.

Ross, *Sexualization*, at 287-88.

Rhetoric from opponents of same-gender 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)); *see*

also Brief of Amicus Curiae Am. Ctr. for Law & Justice Northeast, Inc. in Support of Plaintiff-Appellant Proposition 22 Legal Defense and Education Fund at 32-33, *In re Marriage Cases*, No. A110651, A110652 (Cal. Ct. App. Nov. 21, 2005) (referring to gay males as "promiscuous"). Other characterizations of sexual minorities refer to gay people as self-destructive, "hedonis[tic,], "lack[ing in] moral character," and compare sexual minorities to pedophiles, child molesters, and the mentally ill. *See*, *e.g.*, Becker, *Many are Chilled*, at 177 (examining common sexualization frames); Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. at 860-867 (positing that the key question regarding whether same-sex couples may adopt is whether "nurturing [is] more important than parental *sexual behavior*") (emphasis added). As Becker explained:

> In patterns that both reflect and reinforce behavior-identity compression, many Christians believe that sexual minorities are appropriately defined solely by their sexual behavior, that sexual minorities can control their sexual desires, and, by doing so, determine their sexual orientation and overcome their tendency toward sin; that sexual minorities are extremely promiscuous; and that sexual minorities are a menace to society and especially a threat to the values of the family.

Becker, *Many are Chilled,* at 220. Such opponents further 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. *See*, *e.g.*, Brief of Amicus Curiae James Q. Wilson, *et al.*, Legal & Fam. Scholars in Support of Appellants State of California at 5, *In re Marriage Cases*, No. A110449, A110450, A110451, A110463, A110651, A100652 (Cal. Ct. App. Jan. 9, 2006). Like the imagery used to discuss interracial relationships, inappropriate sexualized framing of same-sex relationships is prominent in the arguments used by marriage opponents.

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

Those opposing gay 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 of 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.

To justify reinstatement and expansion of miscegenation laws, legislators, policymakers, and judges

> insisted that interracial marriage was contrary to God's will [and] declared that marriage was somehow unnatural by stating that "the moral and physical development of both races require that they should be kept distinct and separate that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."

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. at 173-74 (quoting Peggy Pascoe, *Why the Ugly Rhetoric of Gay*

Marriage is Familiar to This Historian of Miscegenation, Hist. News Network, Apr. 19, 2004, *available at* <http://hnn.us/articles/4708.html>).

Some of the most inflammatory non-secular language opposing both interracial marriages and same-sex marriage originated in the courts. 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). In Georgia, a 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). As another court asserted:

> Why the creator made one black and the other white, we know not but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution . . . . 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 . . . . The separation of the white and black races upon the surface of the globe is a fact equally apparent . . . . It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix.

West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 213 (1867).

In 1948, this Court heard such theological arguments in *Perez v. Sharpe*, 32 Cal.2d 711 (1948), where Respondents argued that "the Bible is not silent upon the question of the mingling of races," citing Genesis, where Abraham tells his eldest servant "'that thou shalt not take a wife unto my son of the daughters of the Canaanites.'" *Perez v. Sharpe*, Resp't Supplemental Br. in Opp'n to Writ of Mandate 115-116 (quoting *Genesis* 24: 3-4).

Although such arguments may seem grossly outdated, 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% 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)). As recently as 1998, the religious institution Bob Jones University theologically supported their ban on interracial dating, suggesting that:

> God has separated people for His own purpose. He has erected barriers between the nations, not only land and sea barriers, but also ethnic, cultural, and language barriers. God has made people different from one another and intends those differences to remain. Bob Jones University is opposed to intermarriage of the races because it breaks down the barriers God has established, it mixes that which God separated and intends to keep separate . . . . Although there is no verse in the Bible that dogmatically says that races should not intermarry, the whole plan of God as He has dealt with the races down through the ages 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).

Opponents of marriage between two persons of the same sex frequently argue that such marriages "redefine" marriage (s*ee generally* Answer Brief of Campaign for Cal. Families on the Merits, *In re Marriage Cases*, No. S147999 (June 6, 2007)), just as interracial marriage opponents contended that interracial marriage would "redefine" marriage:

> Although states supported anti-miscegenation laws on public-policy grounds, the underlying assumption of such laws was that the union

> of a man and woman of different races did not fit the concept of marriage.

James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 114 (1993). Another scholar suggested that "[f]or a court to declare an anti-miscegenation law invalid, it had to first conclude, implicitly or explicitly, that an interracial union fits the conceptual framework of marriage, and second, that the restriction based on race was an impermissible impediment to that marriage." Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 544 (1992).

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." 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>. Referencing 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, opponents of same-sex marriage assert that those who engage in homosexual sexual activity are sinners, 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; *see also* Amicus Curiae Brief of Church of Jesus Christ of Latter Day Saints, *et al.* in Support of Appellants State of California at 38-39, *In re Marriage Cases*, No. A110449 (Cal. Ct. App. Jan. 9, 2006) (reciting Judeo-Christian theological arguments to suggest that "religious communities provide essential support and meaning to marriage"); 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>. 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.

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

Science has long been used to support prejudice and legal arguments based on prejudice. 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, is now seen as little more than scientific racism. 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.[10]

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[10] 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).

In the early 20th century, when eugenics was in its prime, the key element in blackness was understood to be blood, not appearance. *Id*. at 246. 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. 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 status quo of complete separation would be maintained, in which case the current bi-racial population would forever be considered black. *Id*. Eugenic support for anti-miscegenation was based on a framework, whereby:

> First, there is a natural hierarchy of all beings in the universe. Second, humans are part of this chain. Third, race is a valid concept. Fourth, the races can be ranked hierarchically: Whites are the superior race, Asians/Indians are second, and Blacks last. Fifth, this ranking of the races is immutable. Sixth, miscegenation, the crossing of races, produces crosses that are inferior to either parent. Seventh, mixed races have lower fertility. Eighth, mixing of the races brings the better down to the level of the lower, rather than improving the lower.

Keith E. Sealing, *Blood Will Tell: Scientific Racism and Legal Prohibitions Against Miscegenation*, 5 Mich. J. Race & L. 559, 565 (2000).

To maintain the purity of white blood, leaders began to wage a campaign outlining the danger of black blood. Beginning in the middle of the 19th century, popular culture began to draw a parallel between "blood" and personality and morality attributes. David Pilgrim, *The Tragic Mulatto Myth*, <http://www.ferris.edu/jimcrow/mulatto>. During this period, many white Americans believed that biracial individuals were "a degenerate race because they had 'White blood' which made them ambitious and power hungry combined with 'Black blood' which made them animalistic and savage." *Id*. Scholarly works of the day also drew a link between "blood" composition and propensity for savagery, echoing the sexualization of non-whites. *Id.*

Much like the theological arguments discussed earlier, the legal community was not above the fray and joined laypersons in denouncing interracial marriage on the basis of biology. In 1854, this Court affirmed a hierarchy among races, referring to those of Chinese descent as "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point." *People v. Hall*, 4 Cal. 399, 405 (1854). Indeed, the eugenic perspective of race continued to be held by some members of this Court, notably exemplified in Justice Shenk's dissenting opinion in *Perez v. Sharp*, where the Justice recited a variety of eugenicist research suggesting that "the crossing of distinct races is biologically undesirable and should be discouraged" and "that the free mixing of all the races in fact only lower the general level." 32 Cal.2d 711, 758 (1948) (Shenk, J., dissenting). 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).

Eugenics has been universally discredited, but the use of faulty science has endured in the debate over same-sex marriage. 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. *See*, *e.g.*, Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. at 852-857; 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*). For example, Campaign for California Families, in its answer brief, references a study by Joseph Nicolasi that has been universally rejected by the scientific

establishment. Answer Brief of Campaign for Cal. Families on the Merits at 70 n.48, *In Re Marriage Cases*, No. S147999 (June 6, 2007). Same-sex marriage opponents argue that scientific studies finding that non-heterosexuality is healthy and to some extent biologically based are products of homosexual activists, feminists, and secular humanists who somehow gained control over, or successfully lobbied, medical associations. *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*. Thus, although there is a clear scientific consensus on the natural and biological aspects of non-heterosexuality, opponents of marriage by same-sex couples continue to reference discredited studies or misrepresent the findings of such studies. *See generally* Gerry Dantone, *Anti-Gay Activism and the Misuse of Science: An example of how science can be perverted to supported 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 231-249 (examining pseudo-scientific arguments made by opponents of marriage by two persons of the same-sex). 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.

D. Opponents of Interracial and Same-Sex Relationships Have Used Pseudo-Scientific Psychological Arguments to Pathologize Such Attraction as an Illness.

Because interracial relationships run against traditional societal mores, some social scientists have suggested "that individuals who choose to marry interracially have ulterior motives that may be hidden or even unconscious in nature. Proponents of these theories try to show that (a) pathological deviance or (b) an abnormal level of rebellion are present." 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 have 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"). From this framework, those involved in interracial relationships were viewed as "sick" or as having psychological issues with their own racial background. 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 they love and are committed to each other.

Arguments suggesting that interracial attraction is a result of psychological pathology have been seen – and rejected – by this Court. In *Perez v. Lippold*, Respondent's Supplemental Brief in Opposition to Writ of Mandate quoted Edward Byron Reuter, in his book entitled "Race Mixture," where Reuter refers to a newspaper article in which a county auditor argued that he "ha[d] the right to ascertain whether the mentality of applicants for marriage licenses is sound, and I can but question the sanity of a white woman who will marry a Negro." (*Perez v. Lippold*, Resp't Supplemental Br. in Opp'n to Writ of Mandate 15 (quoting Edward Byron Reuter, *Race Mixture* 102 (1931))); s*ee also id.* at 106 ("Another excellent sociological reason for prohibiting miscegenetic marriages is the type of persons who generally enter into them.").

Opponents of marriage rights for same-sex couples similarly argue that same-sex love is a result of psychological issues, consistent with their perspective that sexual identity can be changed or "cured." Indeed, as Petitioners argue in this case, "[t]he assumption of immutability is contradicted by substantial social science evidence, not least of which is the fact that people frequently change their sexual orientation." Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Opening Briefs on the Substantive Issues at 69, *In re Marriage Cases*, No. S147999 (Cal. June 14, 2007). 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 further 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 spend much time attempting to challenge the scientific methods of certain psychological studies, ignoring contrary studies, drawing different conclusions from particular studies than that of the researchers, or referencing studies which have been discredited by much of the psychological community. *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). One regularly referenced study by Robert L. Spitzer is used to argue that so-called "reparative therapies" are effective and

thus that sexual orientation is a psychological disorder which can be "cured." *See, e.g.*, A. Dean Byrd, *Spitzer Study Critiqued in the Journal of Gay and Lesbian Psychotherapy*, http://www.narth.com/docs/spitzerstudy.html; Roy Waller & Linda A. Nicolosi, *Spitzer Study Published: Evidence Found for Effectiveness of Reorientation Therapy*, <http://www.narth.com/docs/ evidencefound.html>. However, not only has the American Psychological Association publicly disavowed and discredited the study, but Spitzer himself has suggested that his results have been misrepresented, saying that "[i]t bothers me to be [NARTH]'s knight in shining armor because . . . . I totally disagree with the Christian Right . . . . What they don't mention is that change [in sexual orientation] is pretty rare." Sandra G. Boodman, *Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call that a Prescription for Harm*, Washington Post, Aug. 16, 2005, at HE01. 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, opponents of marriage for two persons of the same sex deliberately refuse to acknowledge that same-sex relationships are based on commitment and love, thus reaffirming and entrenching sexualized stereotypes of sexual minorities.

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

> *If allowed to live with her mother [and black stepfather, the child] "will not grow up and mature as a normal white child should but rather will be rejected, shunned and avoided by children of both*

> *races and as a result her entire life could, and unavoidably would, be adversely affected*.[11]
>
> *[L]iving daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the "social condemnation" attached to such an arrangement, which will inevitably afflict the child's relationships with its "peers and with the community at large*."[12]
>
> *Marriage fosters responsible procreation and child-rearing, and therefore is fundamental to the very existence and survival of the race.*[13]

Many of the arguments against same-sex and interracial marriage concern procreation and a couple's ability to raise healthy, productive children. The argument that interracial marriage harms any 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. "Ironically, the state's objection to interracial marriage was generally that such couples might procreate**,** while its complaint about same-sex couples is that (without assistance) they cannot. In either case, the state has fretted about the moral and physical desirability of children born to such unions." Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 Temp. Pol. & Civ. Rts. L. Rev. 285, 300 (2004).

Historically, there were two strains of the "harm to children" argument with respect to interracial marriage – first, that mixed-race children would be somehow inferior to "pure blood" children and, second, that mixed-race children would be ostracized and, thus, psychologically damaged. Therefore, "[t]he state believed . .

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[11] Renee C. Romano, *Race Mixing: Black and White Marriage in Postwar America* 80 (2003).
[12] *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (internal citations omitted).
[13] Answer Brief of Campaign for California Families on the Merits, *In re Marriage Cases*, No. S147999 (June 6, 2007) at 13 (internal citations omitted).

. 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." Kennedy, *Interracial Intimacies* at 12. In recent years, these same arguments have been applied to children raised by same-sex parents. *See, e.g., Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004) (finding a ban on adoption by same-sex couples constitutional because "it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother"); *but see Anderson v. King County*, 158 Wash. 2d 1, 75-76, 138 P.3d 963, 1002 (Wash. 2006) (J.M. Johnson, J., concurring) (arguing that prohibiting marriage between same-sex couples is necessary because heterosexuals may unintentionally procreate and, therefore, need the structure of opposite-sex-only marriage to ensure that unplanned children are raised responsibly by two parents).

A. 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 Damaged.

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.

In the 1869 Georgia case *Scott v. State*, 39 Ga. 321 (1869), a black woman appealed her conviction for the crime of cohabitating with a white man. In rejecting her defense that she had married the man in another state, 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." *Id.* at 323.

Nearly 100 years later, the fear of so-called mixed-blood children was still sufficiently persuasive to permit a white man to annul his out-of-state marriage to an Asian woman under Virginia's anti-miscegenation laws. *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955). The Virginia Supreme Court upheld the annulment, explaining, "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." *Id.* at 756.

Judges were not the only members of society who held these views. For example, the Constitution for the Knights of the White Camellia, an organization similar to the Ku Klux Klan, discussed the inherent inferiority of mixed-race children: "[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." Walter L. Fleming, *Documentary History of Reconstruction: Military, Political, Social, Religious, Educational, & Industrial: 1865 to the Present Time* 327 (1907) (emphasis in original); *see also* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. and Mary L. Rev. 741, 780 (1992) (discussing the prohibition in the 1920's film industry on profanity, nudity and miscegenation).

As noted above, *supra* at II.C., the eugenics movement sought to define biological bases for distinctions between the races, and was used as a basis for anti-miscegenation laws. *See*, *e.g.*, Trosino, *American Wedding*, 73 B.U.L. Rev. at 101-102. Today, few serious scholars, politicians, or jurists would publicly ascribe to the view that children of mixed-race marriages are inferior.

In the landmark California anti-miscegenation case, *Perez v. Sharp*, 32 Cal.2d at 724, the Respondent defended the State's anti-miscegenation statute by

contending that the individuals who wished to break this law were from the "dregs of society" and that their children would be a burden to the community. This Court rejected that assertion, noting that no law forbids the "dregs of society" from marrying one another, nor is there a legally cognizable definition of such a category. *Id.*

Today's opponents of same-sex marriage make equally unsubstantiated claims that children with parents of the same sex are physically and mentally damaged. Opponents of marriage equality further claim that children of homosexual parents face the double-barreled risk of developing "homosexual interests and behaviors" and thus risk mental illness, criminal behavior and suicide. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 852-854.[14] *See also Homosexuality-Crime, Sin, Mental Illness, Inborn Abnormality or Alternative Lifestyle?*, Jan. 8, 2002, <http://www.truth-and-justice.info/homosexuality.html> (characterizing homosexuality as an addiction requiring therapy).

However, as noted above, *supra* at p.33, II.D., 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. *An Instant Cure*, Time, Apr. 1, 1974, <http://www.time.com/time/magazine/article/0,9171,904053,00.html>. Moreover, research has refuted the supposed link between homosexuality and mental illness. Tori DeAngelis, *New Data on Lesbian, Gay and Bisexual Mental Health*, Monitor on Psychology, Feb. 2002; *see also* discussion, *infra* at III.B., regarding American Psychological Association position on the development of children of same-sex parents, and

[14] Wardle describes 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, inhibition, sadness and cross-dressing. *See* Wardle, 1997 U. Ill. L. Rev. at 854.

discussion, *supra* at II.C., regarding the use of faulty science by marriage equality opponents.

B. Anti-Miscegenation 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 Developments and Societal Acceptance.

The most common expression of the psychological harm incurred by mixed-race children was in the conception of the "tragic mulatto." The archetypical "tragic mulatto" 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 American Rev. 673, 675 (1998). Often the discovery of the character's biracial identity – or, more to the point, non-white identity – led to violence, fatal illness, or suicide. Nancy Bentley, *White Slaves in Antebellum Fiction*, 65 Am. Literature 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 Literature 495, 499 (2002).[15]

Another prominent argument against children being raised by mixed-race parents was that such children would be psychologically damaged by the stigma of their parents' relationship. Thus, beyond the pseudo-scientific evidence suggesting hereditary deficiencies in mixed-race children, 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* Romano, *Race Mixing* at 136, 220.

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[15] *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 for forgiveness, and thus acknowledging her African ancestry).

These perceived risks to children of interracial marriages were compounded by the use of racial stereotypes. In literature and in the media, African-American persons were portrayed as depraved brutes and savages. The anti-miscegenation movement sought to keep the races separate so as to keep the white race pure and free from such deplorable characteristics. Parents, and society at large, strove to protect delicate white children from the clutches of black brutes who would corrupt or ravage the innocent child. *See*, *e.g.*, The Birth of a Nation (Epoch Film Co. 1915), discussed *supra* at p. 19 n.9. An example of how these stereotypes translated to legal reality and had profound impacts on children is seen in the case of a child, Jacqueline, born to a white single mother in Louisiana in 1952. Kennedy, *Interracial Intimacies* at 1-12. Jacqueline's race was presumed to be white in accordance with the race of her mother, but as she grew older, her skin began to darken. *Id.* After the death of her mother when she was four years old, Jacqueline was visibly "black." *Id.* Rather than place Jacqueline in the care of a loving black family, the majority determined it was best to keep the child in an orphanage, while preserving her legal race as white.[16] *Id.* Interestingly, the Louisiana state court did not see fit to place Jacqueline in an orphanage for racially white children; rather, the state's child welfare system seemed to determine the child's race by her skintone, rather than her legal race. *Id.* As a result, Jacqueline remained in a black orphanage and was sent to segregated schools until the state allowed her to be adopted by a black family from Chicago. *Id.*

This Court, in striking down the California anti-miscegenation statute in *Perez*, noted that where mixed-race children do face condemnation and isolation, "the fault lies *not* with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior." *Perez*, 32 Cal.2d at 726.

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[16] *Green v. City of New Orleans*, 88 So.2d 76 (La. 1956).

Since the rise of the civil rights movement, the pendulum of popular opinion has swung. In contemporary society, the notion that persons of mixed-race heritage would be ostracized is preposterous. Persons of mixed-race heritage have attained some of the highest honors in their respective professions within our society, including Halle Barry, Barak Obama and Tiger Woods. Woods' rise to stardom, in particular, sparked a flurry of analysis on the meaning of multi-culturalism and mixed-race identity. In his article, "cablinasian like me" [sic], Gary Kamiya describes the "fluid realities" of race in contemporary society. Gary Kamiya, *cablinasian like me*, Salon.com, April 30, 1997, <http://www.salon.com/april97/tiger970430.html>. Kamiya notes the change in paradigm from the legacy of white racism where one's identity was defined by the majority values of the day, and to the current globalist and individualized atmosphere where one has the power to self-define. *Id.* Kamiya goes on to describe his own experience as "Scottapanese", and how, rather than feeling "other" – ostracized and belonging to no group – he felt proud to belong to more than one group. *Id.*; *see also* Matt Kelley, *The Tiger Woods Effect: What is the Meaning of Race in the 21st Century? Proud of All My Roots*, The Boston Globe, Feb. 18, 2001 at D8.

Similarly irrational and disturbing arguments are made with respect to children with parents of the same sex. 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, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. at 854, 855 n.115 (1997) (discussing self-destructive tendencies among homosexual children and equating homosexual relationships with family-damaging extramarital affairs). Similarly, in *Roe v. Roe*, a Virginia custody case where a divorced father was engaged in a homosexual relationship, "[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.'" *Roe v. Roe*, 228 Va. 722, 726 (Va. 1985). Thus, it was the court's (improper) designation of the father's relationship as "immoral" that motivated the court to find the father "an unfit and improper custodian as a matter of law. . . ." *Id.* at 727 ("The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification."); s*ee also Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (holding that the mother's lesbian relationship and the accompanying social risks to the child were significant factors in favor of awarding custody to a third party).

Marriage rights opponents, through such institutions as Focus on the Family, the Family Research Council, and CitizenLink, also rely on arguments that it is best for children to be raised in families where their mother and father are married to each other. 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>. 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.*[17]

[17] Dobson does not cite to any specific studies to support this statement.

Even more troubling are arguments that falsely link homosexuality to pedophilia, attempting to foster fear that children of same-sex couples will be molested. For example, author Steve Baldwin describes the motivations of the GLBT-rights movement and the North American Man-Boy Love Association (NAMBLA) as one in the same, namely the reduction or elimination of age-of-consent laws. Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 Regent U.L. Rev. 267, 270-273, 277 (2001). Baldwin demonizes the entire homosexual community, arguing 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.[18]

Despite the use of such invidiously prejudiced rhetoric from some academics, the medical establishment increasingly has modified its positions to be more inclusive, and states are following suit in changing laws governing family relations. For example, 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. American Psychological Association, *Sexual Orientation, Parents & Children*, July 2004. The statement explains that the children of same-sex parents develop in much the same way as children of heterosexual parents, both psychologically and 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

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[18] Author Steve 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).

339-340, Feb. 2002. This policy recognizes the benefits to children of living in a two-parent home by arguing for the child's right to a legal tie to both parents. *Id.* A number of jurisdictions have amended their family codes to recognize the rights of parents and children in their relationships to one another.[19] These developments in the law trail the acceptance of same-sex families in popular society. Books such as *Heather Has Two Mommies* (Leslea Newman, 1989) and television shows like *Postcards from Buster* (Sugartime! PBS television broadcast, 2005) sensitize children to non-traditional family structures at an early age. Americans watch programs such as *Will and Grace* (NBC television broadcast 1998-2006) and *Brothers and Sisters* (ABC television broadcast 2006-present) avidly and regularly. Underlying the whole trend however, is the recognition that these families and individuals are healthy and happy.

Contrary to the studies cited by the opponents of same-sex marriage and parenting, a wealth of peer-reviewed research exists that same-sex parents are every bit as nurturing and supportive – if not more so – than their heterosexual counterparts. *See, e.g.*, Heather Fann Latham, *Desperately Clinging to the Cleavers: What Family Law Courts are Doing About Homosexual Parents, and What Some Are Refusing to See*, 29 Law & Psychol. Rev. 223, 235 (2005). Latham concludes that lesbian mothers often are more confident and hold leadership roles than heterosexual mothers, and that they more actively seek positive male role models for their children. *Id.* She also notes that gay fathers are more nurturing and place less emphasis on the father's role as economic provider. *Id.* Latham further notes that the children of such families are often more tolerant of diversity and less aggressive. *Id.* at 236.

[19] *See, e.g.*, Cal. Fam. Code §3040, Cal. Code Regs. Tit. 22, §35181 (2007); D.C. Code §§16-302, 16-914(a)(1)(A) (District of Columbia); 15 V.S.A. §665 (Vermont).

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.

Daryl Lindsey *From "Hey Faggot" to "Hey Daddy"*, Salon.com, Oct. 1, 1999; s*ee 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). Blaming the parents (and the children) for society's prejudice is not the answer.

Opponents of mixed-race marriages, like opponents of marriage between members of the same sex, appeal to the public's sense of the well-being of children. However, in doing so, both rely on antiquated stereotypes and mischaracterizations of science. In both cases, opponents manipulate the facts to meet their desired ends. In the case of anti-miscegenation, opponents sought to limit marriage in order to prevent procreation among the group in question. With respect to same-sex marriage, opponents limit marriage in order to promote the notion of procreation as the exclusive privilege of the heterosexual population. This Court correctly rejected these notions with respect to marriage between persons of different races in *Perez*, and the Court should do so now with regard to marriage between persons of the same sex.

CONCLUSION

In the final analysis, there is nothing new in the arguments that have been raised and continue to be raised against same-sex couples having the basic and

fundamental right to marry if they so choose. Beneath the surface politeness of many of the submissions to the Court in opposition to same-sex marriage lie the same uncivil sentiments that animated the opposition to interracial marriage; the words may be less uncharitable, the phrasing less intemperate, but the debasing and degrading ideas are at bottom the same. However much opponents of same-sex marriage may insist that"*this time it is different*," there remains an appalling familiarity to the refrain that allowing certain people the same human dignity as everyone else will threaten social order, degrade individuals, and harm children. We heard – and 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. Then, as now, we were told that if a particular group were to be accorded full human dignity, our society, our morality, and our faith would surely come to grief and ultimately lay in ruins. But, the certainty and monotony with which we sound the death knell for society, morality and faith just because two adults choose to marry cannot obscure the fact that the appeals to social order, morality and religion we used for almost 300 years to justify preventing, say, a black man from marrying a white woman are the very same appeals we now use to justify the arguments that two gay people cannot marry. When all is said and done, these appeals to good social order, morality, and religion cannot obscure the reality recognized long ago by the great African-American and gay writer, James Baldwin, that "it is a terrible, an inexorable, law that one cannot deny the humanity of another without diminishing one's own."[20]

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

Dated: September 26, 2007

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CERTIFICATE OF COMPLIANCE

I certify that this Brief Amicus Curiae in Support of Plaintiff and Appellant complies with the type-volume limitation of the California Rules of Court Rule 14(c)(1). This brief contains 12,823 words (excluding caption sheets, tables and signature block). I make this representation in reliance upon the word count program accompanying the Microsoft Word software that was used to create this brief.

Dated: September 26, 2007

/s/ Barbara J. Chisholm
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PROOF OF SERVICE

I, Sally Mendez, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, CA 94108.

On September 26, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on September 26, 2007, at San Francisco, California.

/s/ Sally Mendez
Sally Mendez

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City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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Campaign for California Families v. Newsom, et al.
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Court of Appeal Case No. A110652

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