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## Straight Is Better: Why Law and Society May Legitimately Prefer Heterosexuality

George W. Dent

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## STRAIGHT IS BETTER: WHY LAW AND SOCIETY MAY JUSTLY PREFER HETEROSEXUALITY

GEORGE W. DENT, JR. \*

I. INTRODUCTION.....	361
II. THE CONFLICT OVER HOMOSEXUALITY .....	361
III. THE LEGITIMACY OF VALUE JUDGMENTS IN THE LAW .....	363
IV. THE CATHOLIC NATURAL LAW PHILOSOPHY OF SEXUALITY .....	369
V. SOCIETY MAY LEGITIMATELY PREFER HETEROSEXUALITY AND TRADITIONAL MARRIAGE ...	371
A. <i>The Intrinsic Good of Human Life, the Creation of         Human Life, and the Family</i> .....	371
1. Human Life and the Biological Family ....	371
2. Homosexuals and the Rights of Children Concerning Their Biological Parents .....	375
B. <i>Heterosexual Bonding</i> .....	387
C. <i>Heteronormativity Is Not Just Socially         Constructed</i> .....	388
D. <i>Marriage</i> .....	390
E. <i>Are Homosexuality and Same-Sex “Marriage”         Equally Valuable?</i> .....	397
F. <i>Influencing Behavior and the Immutability         Debate</i> .....	406
VII. RAMIFICATIONS.....	408
A. <i>The Expressive Function of Marriage</i> .....	408
1. SSM and Respect for Marriage.....	409

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\* Schott-van den Eynden Professor of Law, Case Western Reserve University School of Law. The author thanks Doug Allen, Scott Fitz Gibbon, Maggie Gallagher, and Tom Messner for their helpful comments.

360	<i>Texas Review of Law &amp; Politics</i>	Vol. 15
	2. A Hypothetical: The Martin Luther King and Jefferson Davis Holiday.....	419
	3. The Precedent of Illegitimacy .....	420
	4. The Desegregation Analogy .....	422
	5. Polygamy, Incest, and Equality .....	425
	6. The Burden of Proof and the Dubious Benefits of SSM .....	427
	7. Legal Alternatives to Marriage .....	429
	B. <i>Education</i> .....	431
VI.	CONCLUSION .....	435

## I. INTRODUCTION

America (like many other countries) is embroiled in a culture war over homosexuality. The homosexual movement demands the end of “heteronormativity”—the social and legal preference for heterosexuality.<sup>1</sup> It insists that “Gay Is Good”—just as good as heterosexuality.<sup>2</sup> This article presents a defense of heteronormativity; it argues that straight is better. Part II summarizes the debate over the legal treatment of homosexuality. Part III discusses the legitimacy of value judgments in the law. Part IV discusses the “new natural law” philosophy of sexuality propounded by several Catholic philosophers. Part V advances the argument for a social and legal preference for heterosexuality and traditional marriage. Part VI addresses the relevance of gender relations to the debate over marriage and heteronormativity. Part VII considers the implications of an appropriate social and legal preference for heterosexuality.

## II. THE CONFLICT OVER HOMOSEXUALITY

America, like every other society in history throughout the world, has always preferred heterosexuality over homosexuality. Homosexual acts were once a capital offense in many states, and only recently did the Supreme Court overturn the few remaining state laws making homosexual acts a crime.<sup>3</sup> Many people now insist on the removal of not just all other legal disabilities of homosexuality, but of all legal preferences for heterosexuality, an attitude dubbed “heteronormativity.”

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1. The term “heteronormativity” was apparently coined in Michael Warner, *Introduction: Fear of a Queer Planet*, 29 SOCIAL TEXT 3 (1991). It does not entail suppression of alternative sexualities.

2. See Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

3. *Lawrence v. Texas*, 539 U.S. 558 (2003).

This demand covers many issues, two of which are particularly controversial. First, it insists on equal treatment of same-sex and opposite-sex couples in the law of marriage. Second, it wants a broad prohibition of discrimination against homosexuals by either government or private entities in employment, housing, services, and many other fields. Businesses, individuals, and even religious organizations would face legal pressures not to act upon, or even to express belief in, a preference for heterosexuality.<sup>4</sup> These demands are based in part on the Constitution, but to a greater extent they are simply normative. That is, the gay movement insists that, even if the Constitution does not mandate its program, justice does.

Demands for “marriage equality” provoke a reply that children fare best (and thus society benefits) when raised by their biological parents who are married to each other.<sup>5</sup> Evidence of this is so strong that the traditional family has gained support from many liberals who once considered such support discriminatory.<sup>6</sup> To encourage men and women who will have children to marry and stay married, the law extends both material benefits and an expressive (or

4. See *infra* notes 28–92 and accompanying text.

5. See Marsha Garrison, Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 324–26 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY] (citing dozens of studies and concluding that “[m]arriage is also associated with important advantages to children”); Wendy D. Manning & Kathleen A. Lamb, Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families, 65 J. MARRIAGE & FAM. 876, 885 (2003) (adolescents living with their two biological married parents “generally fare better than teenagers living in any other family type”); Kristin Anderson Moore et al., Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?, CHILD TRENDS RESEARCH BRIEF 6 (June 2002) (“the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage”); Blaine Hardin, 2-Parent Families Rise After Change in Welfare Laws, N.Y. TIMES, Aug. 12, 2001, at A1 (“a powerful consensus has emerged in recent years among social scientists . . . . From a child’s point of view, according to a growing body of social research, the most supportive household is one with two biological parents in a low-conflict marriage”).

6. Isabel V. Sawhill, *The Behavioral Aspects of Poverty*, THE PUB. INTEREST, Fall, 2003, at 79, 87–88 (“As evidence of the benefits to children of growing up in a two-parent family has strengthened, liberals have become less likely to question the value of marriage.”). See also THE OBSERVER (London), Nov. 19, 2000, at 1 (reporting that “the pro-marriage movement is gaining strength on both sides of the Atlantic”).

symbolic) preference to marriage. Recognition of same-sex marriage (“SSM”) would impair the benefits of marriage in various ways, including crippling its social prestige.<sup>7</sup> However, some claim that recognizing SSM would inflict no serious harm but would actually raise the prestige of marriage.<sup>8</sup>

In sum, many Americans are conflicted about the legal status of homosexuality. They believe homosexuals should not be treated as criminals or moral reprobates and should not generally suffer discrimination. However, they also value traditional marriage and religious freedom and are loath for the law to declare, in effect, that mainstream religious attitudes toward homosexuality are themselves immoral. Thus many Americans struggle to find a proper balance between these competing considerations.

### III. THE LEGITIMACY OF VALUE JUDGMENTS IN THE LAW

Many political thinkers argue for governmental neutrality about matters of lifestyle and the meaning of “the good life,”<sup>9</sup> a policy called “moral bracketing.”<sup>10</sup> This policy is not merely debatable but unachievable. The very Preamble to the Constitution states that its purpose is partly to “promote the general Welfare.”<sup>11</sup> This is hardly surprising. The Declaration of Independence proclaims that “all Men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness [and] That to secure these Rights, Governments are instituted among Men[.]”<sup>12</sup> Government can hardly

7. See *infra* notes Part VII-A-1.

8. See J ONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 86 (2004); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 111–12, 179 (1995) (stating that recognition of SSM would “buttress the ethic of heterosexual marriage”).

9. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 349–78 (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90–100 (1977); JOHN RAWLS, *POLITICAL LIBERALISM* 173–211 (1971); Feldblum, *supra* note 2, at 147–49; Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004).

10. CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 1(2003).

11. U.S. CONST., Preamble.

12. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

“promote the general Welfare” or secure the right to pursue happiness without having some idea of what is “the good life.”

Making moral judgments is what law is all about. The Constitution’s purpose to “promote the general Welfare” entails a moral judgment. Most governments have functioned for the benefit of a small elite, but the Framers chose a different moral principle. Criminal laws, such as bans on homicide, theft, and perjury, rest on a judgment that these acts are immoral. Likewise government makes moral judgments about what behavior deserves to be subsidized or taxed, to receive expressive (or symbolic) support or disapproval, and what values shall be promoted or discouraged in public education.

Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible. As William Galston says, “Like every other political community” the liberal state “embraces a view of the human good that favors certain ways of life and tilts against others.”<sup>13</sup> Kent Greenawalt says that “government promotes all sorts of points of view over others.”<sup>14</sup> Michael Sandel and others express similar views.<sup>15</sup> Natural law theorists, of course, agree.<sup>16</sup> Some gay advocates claim that the law not merely *may* but *should* make moral judgments about sexuality. Carlos Ball argues “in favor of the proposition that the state has positive obligations to recognize and support good and valuable intimate relationships and concomitantly against the idea that the state *only* has obligations of non-interference vis-à-vis those

13. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 3 (1991).

14. KENT GREENAWALT, *2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 9 (2008).

15. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); see also BALL, *supra* note 10, at 34 (referring to the ubiquity of evaluations of the good engaged in by even the most liberal of states); PATRICK NEAL, *LIBERALISM AND ITS DISCONTENTS*, ch. 2 (1997); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 67-69 (1988).

16. See Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 194 (2004) (“Law supports certain institutions of civil society for the sake of the common good . . . . Law supports these institutions for the sake of genuine human flourishing.”).

relationships.”<sup>17</sup> He acknowledges that these obligations “raise . . . issues that are moral at their core.”<sup>18</sup>

The inevitability of moral judgments in law-making requires resort to metaphysics, to some source of norms. Fact and reason alone cannot generate norms.<sup>19</sup> Fact and reason cannot tell that people are “created equal” and “endowed . . . with certain unalienable Rights[.]”<sup>20</sup> Indeed, they would tell us that people are *unequal* in every way in which science can measure them. Fact and reason cannot tell us what social distribution of wealth to strive for or how to weigh the interests of future generations.<sup>21</sup>

*Inter alia*, the law must decide what is intrinsically good for human beings. This is the “happiness” cited in the Declaration of Independence and called human “flourishing” by many natural law theorists. The components of flourishing are called intrinsic or basic goods.<sup>22</sup> Goods that are intrinsic are good in themselves, as opposed to instrumental goods, which are good only in that they are conducive to some other good. Medicine, for example, is instrumentally good because it promotes health, which is a good in itself. The nature—or even existence—of intrinsic goods cannot be proved by fact and logic, nor deduced or inferred from other truths. Rather, “the practical intellect

17. BALL, *supra* note 10, at 17 (emphasis in original).

18. *Id.* at 29. See also Feldblum, *supra* note 2.

19. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 194 (1987) (“Reason cannot establish values, and its belief that it can is the stupidest and most pernicious illusion.”); KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 53 (1947) (“It is impossible to derive norms or decisions from facts.”); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 421–22 n.60 (1992) (stating that government must make decisions concerning many controversial issues that cannot be decided on empirical grounds).

20. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

21. For a good, brief explanation of the inability of fact and reason to answer policy questions, see Stanley Fish, *Are There Secular Reasons?*, THE N.Y. TIMES OPINIONATOR (Feb. 22, 2010, 6:00 PM), <http://opinionator.blogs.nytimes.com/2010/02/22/are-there-secular-reasons/>.

22. Robert George refers to “basic human goods”—that are our most fundamental reasons for choice and action.” ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 3 (1999). See also BALL, *supra* note 10, at 7 (referring to “basic needs and capabilities that are indispensable for the leading of full human lives”).



may grasp them, and practical judgment can affirm them without the need for a derivation.”<sup>23</sup>

Of course, people disagree about the nature of intrinsic goods, and about the existence of human rights. Bentham scorned the idea of natural rights as “nonsense upon stilts.”<sup>24</sup> Many cultures have notions of human goods very different from those now accepted in America. Warrior cultures, for example, consider the honor and glory accorded valiant soldiers to be the highest goods.<sup>25</sup> And, of course, Americans disagree about the morality of homosexuality. Rather than trying to bracket the moral issue, some gay activists now argue that homosexuality is morally equivalent to heterosexuality.<sup>26</sup>

In free societies, government does not promote human flourishing by ordering people exactly how to live. It is an axiom for us that broad freedom to shape one’s life is a necessary condition to flourishing. That is why the Declaration of Independence lists “Liberty, and the pursuit of Happiness” among our “unalienable Rights.”<sup>27</sup> It is, however, entirely appropriate for government to encourage people to behave so as to achieve true happiness, to promote their well-being “as judged by themselves,”<sup>28</sup> because “people left to their own devices will not be in a position to lead the most valuable life available to them.”<sup>29</sup> And “[o]ften people’s preferences are unclear and ill-informed, and their choices will inevitably be influenced by default rules, framing

23. George, *supra* note 22, at 45.

24. Jeremy Bentham, *Anarchical Fallacies*, in 2 JEREMY BENTHAM, WORKS 501 (J. Bowring, ed. 1843) (“Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.”).

25. See WILLIAM J. GOODE, *THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM* (1978).

26. See BALL, *supra* note 10; Feldblum, *supra* note 2; Vincent J. Samar, *The Case for Treating Same-Sex Marriage as a Human Right and the Harm of Denying Human Dignity*, in WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 239, 239 (Lynn D. Wardle, ed. 2008) [hereinafter WHAT’S THE HARM?] (arguing that “same-sex marriage should be seen as a human right . . . under universal morality”).

27. THE DECLARATION OF INDEPENDENCE, para. 2 (1776).

28. CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 80 (2008).

29. Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1365 (1991).

effects, and starting points.”<sup>30</sup> Family law is one area where government so behaves, performing what has been called a “channeling function.”<sup>31</sup>

Law can influence people’s conduct when public opinion is ambivalent or uncertain, but it invites trouble when it opposes established norms. The classic American example of this truth is Prohibition. Most Americans did not consider consumption of alcohol immoral. As a result, in much of America Prohibition was openly flouted. Moreover, if law disdains public morality, public respect for the law in general suffers. Respect for the law waxes when citizens believe that the law in general is so reasonable that they can assume, without explanation, that each law is reasonable and should be obeyed.<sup>32</sup> If many laws offend public morality, however, people grow more skeptical and unwilling to obey the law, especially when it is against their interest to do so. Again, Prohibition offers an illustration. Not only was Prohibition itself ignored, but crime in general proliferated because more people ceased to feel a duty to abide by the law, and the general public became more tolerant of those who broke the law.

Morality can exist without religion, but most people throughout history, and most Americans today seek moral guidance in religion. Nothing in American law makes this illegal or improper so long as any resulting law or government act does not create an establishment of religion<sup>33</sup> or violate any other constitutional demand.

30. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

31. See Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

32. Seana Sugrue, *The Erosion of Marriage: A Pyrrhic Victory?*, in WHAT’S THE HARM?, *supra* note 26, at 297, 299 (“A society whose citizens are law-abiding tend to judge right and wrong conduct as being closely aligned with legal or illegal conduct. Moreover, . . . [a]s the state increasingly claims the power to define rights, it tends to set the terms of inter-institutional mediation.”).

33. See U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion . . .”). As President [then Senator] Obama has said: “[S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square . . . . [T]o say that men and women should not inject their ‘personal morality’ into policy debates is a practical absurdity. Our law is by definition a codification of morality . . . .” Barack Obama, United States Senator, Keynote Address at Call to Renewal Conference on Building a Covenant

Indeed, from America's beginnings our concept of human rights has been based on religion. The Declaration of Independence proclaims that "all men . . . are endowed by their Creator with certain unalienable Rights[.]" The founders considered virtue and religion essential to a free society because they preserve "the moral conditions of freedom."<sup>34</sup> Religion propelled the abolition and civil rights movements.<sup>35</sup> Individuals can be moral without being theists, but it is not clear that a society can agree on an effective moral framework not based on religion.<sup>36</sup> Debate over the legal treatment of homosexuality and marriage cannot be resolved without resort to morality. For many people moral norms are found in religion, and that is not unconstitutional or inappropriate.

Value judgments in the law may not deny equal protection.<sup>37</sup> Just as the law cannot avoid normative judgments, so it cannot treat everyone the same; every law discriminates in some way. In many American jurisdictions, for instance, possession of an unregistered gun is a crime even though many people do not consider it immoral. The norm of equality demands that likes be treated alike, but what circumstances or acts do we consider alike? Because possession of an unregistered gun is deemed an undesirable act in some places, punishment for that act does not violate the norm of equal protection.

Thus "equality" is more a label attached to a conclusion than an analytical tool.<sup>38</sup> The history of the Fourteenth Amendment gives some idea what kinds of status or behavior should be treated equally. The paradigm

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for a New America, June 28, 2006, available at <http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html>.

34. Thomas G. West, *Religious Liberty*, CLAREMONT INST., Jan. 1997, available at <http://www.claremont.org/writings/970101west.html>.

35. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 227-29 (1993).

36. See MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, AND COURTS* 114-29 (2006) (arguing that efforts to establish a secular ground for human rights have not succeeded).

37. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

38. For this reason, the idea of equality has been called "empty." See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

example—the issue that the Equal Protection Clause was specifically designed to address—is race, but other distinctions in the law—including distinctions based on conduct rather than status—have been held to violate that clause.<sup>39</sup> For present purposes, then, the question is whether homosexuality and SSM should be deemed just as desirable or valuable as heterosexuality and traditional marriage. Equal treatment cannot be assumed; it must be justified.

A law's value judgments need not be binary. The law avails of infinite gradations, with consequences ranging from severe criminal penalties to important material and symbolic support. So also the law might treat different kinds of intimate relationships and conduct not just as good or bad, but it can make shaded determinations of better and worse.

Americans enjoy many rights. Some are bolstered by a plethora of ancillary laws. The paradigm is racial discrimination which is prohibited in both government and private activity by innumerable federal, state, and local laws. However, even this right is not absolute. The Supreme Court has condoned some kinds of race discrimination.<sup>40</sup> And most rights receive little or no secondary support. Although the Constitution confers a right to bear arms,<sup>41</sup> for example, no law forbids discrimination by individuals or private organizations (including businesses) against people who own or bear arms.

#### IV. THE CATHOLIC NATURAL LAW PHILOSOPHY OF SEXUALITY

Several philosophers propound a natural law theory of the intrinsic good of marriage as “a two-in-one flesh communion of persons that is consummated and actualized by acts of the reproductive type”<sup>42</sup>—i.e., uncontracepted coitus.

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39. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (7th ed. 2004) (discussing application of the Equal Protection Clause to racial and other classifications).

40. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding some racial preferences in law school admissions).

41. U.S. CONST., amend II.

42. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995).

In choosing to perform nonmarital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies as *means* or *instruments* in ways that damage their personal (and interpersonal) integrity; thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other nonmarital acts.<sup>43</sup>

Although this doctrine is not overtly religious, most of its leading proponents in America are Roman Catholics, and it contains elements that most Protestants and Jews reject, such as treating sex with contraception or any sexual act other than vaginal intercourse within marriage as immoral. Most Americans agree about the intrinsic good of a man and a woman conceiving, bearing, and raising a child within marriage, and to that extent they presumably agree on the special status of marital intercourse. However, it does not necessarily follow—and most Americans would not agree—that all other sexual acts “damage [people’s] personal (and interpersonal) integrity” and are immoral.

Like any value system, the Catholic natural law doctrine of human sexuality can be neither confirmed nor refuted as can a mathematical computation.<sup>44</sup> However, it seems to fail a requirement of any theory of natural law, a requirement accepted by Catholic natural lawyers themselves,<sup>45</sup> that it be based on human nature and, therefore, comprehensible to people of all faiths.<sup>46</sup> The Catholic rejection of all sex not of

43. *Id.* at 302 (emphasis in original) (footnotes omitted). See also John Finnis, *Law, Morality, and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1064-69 (1994); Germain G. Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS.99 (1987).

44. Thus Robert George, following Germain Grisez, states that the “new” natural law posits “first principles” that “direct human action toward more-than-merely-instrumental ends or purposes—‘basic human goods’—that are our most fundamental reasons for choice and action.” GEORGE, *supra* note 22, at 3.

45. Thus Thomas Aquinas said: “[L]aw . . . is nothing other than a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated.” THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, at 145 (R. J. Henle, S.J. ed., 1993). He did not tie it to any particular religion.

46. See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 599 (Robert Audi ed., 2d ed. 1995) (referring to claims that natural law is “a doctrine of law that all civilized

the “reproductive type” has attracted very little support except among traditional Catholics. This fact alone may not invalidate their doctrine, but it raises grave doubt about it and prompts the question why non-Catholics widely disapprove it.

The doctrine seems arbitrary in allowing contraception by abstinence but not contraceptive devices or sex other than vaginal intercourse. If there is a duty to reproduce as often as possible, then abstinence or use of the rhythm method of contraception would be immoral, but that is not the Catholic position. If these are permissible, why may a couple not use contraceptive devices or engage in non-reproductive sex? In non-reproductive sex can a couple still express their love for each other and thus solidify their marriage, which can benefit not only themselves but their children, born and as yet unborn. The Catholic natural law doctrine offers a reason for law and society to favor heterosexuality, but it is not a doctrine most Americans accept.

#### V. SOCIETY MAY LEGITIMATELY PREFER HETEROSEXUALITY AND TRADITIONAL MARRIAGE

##### A. *The Intrinsic Good of Human Life, the Creation of Human Life, and the Family*

###### 1. Human Life and the Biological Family

Most people believe that human life is intrinsically good—life is generally considered a blessing, not a curse. Correlatively, the creation of human life is intrinsically good for the children created. The creation of human life is also universally regarded as an intrinsic good for parents. Birth of a child is almost always celebrated, and it is a tragedy when a child is stillborn. As Stephen Carter says, “Most people would see the value of children or the horror of murder without the need for explanation. It is not merely an

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peoples would recognize” and can “be known by reason alone, without revelation, so that the whole human race could know how to live properly”).

instinct but a part of their vision of the good.”<sup>47</sup> Sterility of a married couple is typically bewailed as a misfortune. Many couples that have difficulty in conceiving a child make heroic efforts to do so, often at great expense and enduring humiliating and painful procedures. When life is created, “most parents are intrinsically motivated to care for their children.”<sup>48</sup>

The bond with biological parents is also intrinsically good for children. Love of children for their parents is universal and is considered as natural as the love of parents for their children. Children separated from their parents often strain to find them, even if they have never known them.<sup>49</sup> Loss of a parent is universally regarded a tragedy and is typically traumatic. Through the bond with their parents children also have a bond with other members of their biological family—siblings, aunts, uncles, grandparents, cousins, etcetera—that are also universally considered important. As one scholar put it:

[C]hildren and their descendants who don’t know their genetic origin cannot sense themselves as embedded in a web of people past, present, and in the future through whom they can trace the thread of life’s passage down the generations to them . . . . Same-sex marriage puts in jeopardy the rights of children to know and experience their genetic heritage in their lives and withdraws society’s recognition of its importance to them, their wider family, and society itself . . . . There are obligations

47. Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 47 (Michael W. McConnell, et al. eds., 2001). Empirical evidence supports Carter. Asked, “If you had it to do over again, would you or would you not have children?,” 91% of American parents polled said yes; only 7% said no. Moreover, when asked, “If you had to do it over again, how many children would you have, or would you not have any at all?,” only 24% of childless adults over 40 wanted no children, and only 5% were undecided. See Bryan Caplan, *The Breeders’ Cup*, WALL ST. J., June 19-20, 2010, at W1.

48. Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1142 (2010).

49. See *infra* notes 81–82 and accompanying text (discussing adopted children’s desire to contact their biological parents).

on society not to create genetic orphans, which is what we would be doing.<sup>50</sup>

Like any intrinsic human good (such as friendship or music), bearing and raising children do not appeal to some people. These people are not immoral or demented. For reasons we don't understand very well, some people are different. If they do not harm others, we should generally tolerate their differences. In some cases we may even honor their behavior. Some who eschewed friendship and became hermits have been canonized. That does not invalidate the norm of friendship. Schools, for instance, encourage children to develop friends, and they inquire whether something is wrong with a child who has no friends. However, if after inquiry it seems that a child is a natural loner who will never value friendship, we should accept that. Similarly, we can encourage people to have children (responsibly), but accept their refusal to do so.

In many species males mate with females but play no role in raising the offspring. Humans have evolved differently. Because human infants are helpless for an unusually long time, they need more care than other infant animals. Human infants are more likely to survive if the father stays with the mother and helps raise the children. For this reason, humans have evolved a tendency to mate for long periods of time, often for life. There is also synergy between the bonding of male and female and the bearing of children: the presence of children helps to keep a male and female together.<sup>51</sup>

Adoption is recognized as valuable to the adopted children, to their adoptive parents, and to society. However, adoption is regarded as a tragic necessity when the biological parents are unable or unwilling to provide their children with adequate care, not as equal to the biological family.

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50. Margaret Somerville, Testimony to Legislative Committee on Bill C-38, 38th Parliament, Canada, June 2, 2005, *quoted in* Louis DeSerres, *Preserve Marriage—Protect Children's Rights*, in *WHAT'S THE HARM?*, *supra* note 26, at 103, 108–09. *See also* MARGARET SOMERVILLE, *THE ETHICAL IMAGINATION: JOURNEYS OF THE HUMAN SPIRIT* 154 (2006).

51. *See* RICHARD A. POSNER, *SEX AND REASON* 312 (1992).



Preference for the biological family is manifested in laws and practices so uncontroversial that we hardly think about them. Imagine a couple petitions a court for custody of a newborn child because, although the biological parents seem adequate, the petitioners are wealthier, better educated, cleaner, neater, more committed to parenting, and therefore likely to do a better job raising the child than the biological parents. No court in the country would entertain this petition, and Americans would be shocked if it were granted. Biological parents are strongly presumed to be entitled to custody of their children. This presumption is overcome only by clear proof of actual abuse or neglect.

Law and custom go even further: suppose in the preceding hypothetical the biological parents agree to hand the child to the other couple in exchange for money. The agreement would be unenforceable and quite possibly a basis for a criminal action against all four adults. The child might be seized from the biological parents, but custody would certainly not be granted to the would-be baby buyers. Again, Americans would be horrified if the law upheld such an agreement.

There is an instructive real-life experiment in severing parents from the raising of their biological children. In some Israeli kibbutzim, children were cared for in group homes. Parents and children met only at occasional visits. Conditions for the experiment were ideal; the community was sociologically and politically homogeneous; there were no ethnic, religious, or class conflicts. Nonetheless, as soon as this practice ceased to be an economic necessity parents renounced it—they wanted their children to live with them, not in a group home.<sup>52</sup> The biological family was stronger than communal ideology.

By recognizing marriage society can also acknowledge the nuclear family as an economic unit. Only the mother can become pregnant, bear children, and nurse them. For the benefit of the family and of society there must be a division

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52. See Karl Zinmeister, *Actually, Villages Are Lousy at Raising Pre-School Children*, AMERICAN ENTERPRISE, May/June 1996, at 53, 54 (stating that in nearly all kibbutzim “[i]nfant care has been shifted back to parents”).

of labor, with the father performing other functions. Society recognizes this fact by, *inter alia*, treating the family as a single taxable entity.<sup>53</sup> Homosexual couples are not an economic unit in the same way. They may *choose* a division of labor, but it is not forced on them by biology.

## 2. Homosexuals and the Rights of Children Concerning Their Biological Parents

A same-sex couple can adopt a child, but that possibility hardly compels validation of SSM. The creation of human life is a scientific fact. Marriage is tied to it. Adoption—whether by a same-sex couple or anyone else—is not. A homosexual couple can obtain children in many ways, but they cannot create children by their sexual union. Thus a same-sex union is in this sense the opposite of a reproductive unit—the parties choose a relationship that intrinsically rejects the creation of human life.

Adoption is a legal act. A child may be adopted by, or given to the legal custody or guardianship of, any person or group whom the law allows; there is no good reason to tie this process to marriage. For example, a widowed parent might want another adult (possibly a close relative, friend, or business associate) to share legal custody and care for a child while the parent travels for work, but the two adults may have no desire to marry. Also, while adoption can be a great blessing for children whose parents are unable or unwilling to care for them, even adoption by a traditional married couple is not equal to the biological family.<sup>54</sup>

53. See JOSHUA D. ROSENBERG & DOMINIC L. DAHER, *THE LAW OF FEDERAL INCOME TAXATION* §§ 1.04, 3.07, 7.04[5], 9.04[5] (2008) (discussing provisions of tax code dealing with marriage and divorce).

54. See David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 *THE FUTURE OF CHILDREN* 153, 153 (Spring, 1993) (“A selective review of the literature indicates that, although most adoptees are well within the normal range of functioning, as a group they are more vulnerable to various emotional, behavioral, and academic problems than their nonadopted peers living in intact homes with their biological parents.”); Gail Slap et al., *Adoption as a Risk Factor for Attempted Suicide During Adolescence*, 108 *PEDIATRICS* 330 (Aug. 2001) (“Attempted suicide is more common among adolescents who live with adoptive parents than among adolescents who live with biological parents.”); Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 *J. CLINICAL CHILD PSYCH.* 447 (1993) (meta-analysis of 66 published studies finding that adoptees had significantly higher levels of

Further, adoption by a same-sex couple may not be equal to adoption by a traditional married couple. It is claimed that empirical studies show children raised by same-sex couples fare just as well as other children,<sup>55</sup> but these claims are dubious. No study has compared children raised by same-sex couples to children raised by their married, biological parents.<sup>56</sup> The children in these studies are often compared with children raised by single mothers.<sup>57</sup> Clearly the latter do not do as well as children raised by their married, biological parents, so on its face the claim carries little weight. Many children in homosexual homes are the

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maladjustment, externalizing disorders, and academic problems that nonadoptees); Matthew D. Bramlett et al., *The Health and Well-Being of Adopted Children*, 119 PEDIATRICS, Supp. 2007, at S54 (“Adopted children are more likely than biological children to have special health care needs, current moderate or severe health problems, learning disability, developmental delay or physical impairment, and other mental health difficulties.”). See also SHARON VANDIVERE ET AL., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 5 (2007), which found *inter alia*:

[C]ompared to the general population of children, adopted children are more likely to have ever been diagnosed with—and to have moderate or severe symptoms of—depression, ADD/ADHD, or behavior/conduct disorder . . . . [P]arental aggravation (for example, feeling the child was difficult to care for, or feeling angry with the child) . . . is more common among parents of adopted children than among parents in the general U.S. population (11 compared with 6 percent).

55. See Gregory N. Hayek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCH. 607, 611 (2006) (stating that “[e]mpirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment”); BALL, *supra* note 10, at 168 (“The social science literature indicates that lesbians and gay men as a group meet their responsibilities toward their children as well and as completely as do heterosexual parents.”) (footnote omitted).

56. This was admitted by the Plaintiff’s expert witness in *Perry v. Schwarzenegger*, See Brief of Defendant-Intervenors-Appellants at 89, *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921 (N.D. Cal. 2010).

57. See ELIZABETH MARQUARDT, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS 22 (2006) (“[T]he biggest problem by far is that the vast majority of these studies compare single lesbian mothers to single heterosexual mothers—in other words, they compare children in one kind of fatherless family with children in another kind of fatherless family.”) [hereinafter THE REVOLUTION IN PARENTHOOD]. See also A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development*, in WHAT’S THE HARM?, *supra* note 26, at 16 (“The studies on same-sex parenting . . . are basically restricted to children who were conceived in a heterosexual relationship whose mothers later divorced and self-identified as lesbians. It is these children who were compared to divorced, heterosexual, mother-headed families.”).

biological offspring of one parent, with the other adult as a step-parent. In fables, step-parents are typically hostile to their step-children.<sup>58</sup> Whether step-parents are less salubrious than other parents is unclear, but the possibility that they are is another reason for caution about gay parenting. Homosexual couples with children often experience competition or jealousy over parenting, and the children often exhibit a preference for or “primary bond” with one parent.<sup>59</sup> If one is the child’s biological parent, it would be natural for the child to identify that adult as the real parent.<sup>60</sup>

Most studies of same-sex parenting have small, self-selected samples of children who have not been in the household very long, and who have been evaluated at one time (rather than followed for a substantial period).<sup>61</sup> This is not a result of any impropriety by the investigators. Until

58. See BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 66–73 (1975) (discussing “The Fantasy of the Wicked Stepmother”).

59. See Claudia Ciano-Boyce & Lynn Shelley-Sireci, Who Is Mommy Tonight? Lesbian Parenting Issues, 43 J. HOMOSEXUALITY No. 2, at 1, 10-11 (2002) (discussing how children raised by lesbian adoptive couples typically chose one parent as the primary caregiver, causing “pain and conflict for and between the lesbian partners”); Susanne Bennett, Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families, 20 CHILD & ADOLESCENT SOC. WORK J. No. 3, at 159, 166-69 (2003) (discussing adoptive children’s preference for one parent in adoptive lesbian couples).

60. See DeSerres, *supra* note 48, at 106 (“This biological imbalance can also be the source of numerous tensions and conflicts that are not likely to benefit the child . . .”).

61. A group of 70 prominent scholars from all relevant academic fields recently concluded: “The current research on children raised by [same-sex couples] is inconclusive and underdeveloped—we do not yet have any large, long term studies that can tell us much about how children are affected by being raised in a same-sex household.” WITHERSPOON INST., *MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES* 18 (2006) [hereinafter *MARRIAGE AND THE PUBLIC GOOD*]. See Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPAC L. REV. 541 (2004) [hereinafter Wardle, *Considering the Impacts*] (listing methodological flaws of these studies, especially use of small, self-selected samples). See also Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 [hereinafter Wardle, *Potential Impact*]. The most recent study to claim to prove the success of same-sex parenting is Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292 (2009). It has the same methodological shortcomings as the prior studies. See Douglas W. Allen, *Let’s Slow Down: Comments on Same-Sex Marriage and Negative Externalities* 3 (Dec., 2010) available at <http://ssrn.com/abstracts=1722764>.

recently few examples existed (especially for gay male homes),<sup>62</sup> so a large, longitudinal study is not yet possible. Children cannot be examined without the consent of their guardians, so a self-selected sample is inevitable.

Further, the couples in these studies are intrepid pioneers, keenly aware of the difficulties they face and determined to overcome them. In many social experiments such pioneers succeed, but less impressive people who later try the same thing are less successful.<sup>63</sup> If indeed the pioneers of same-sex parenting have been successful, that success may not be matched by later efforts. In sum, the studies invoked by the gay movement cannot support any confident conclusions.

Moreover, other studies and evidence suggest less happy results. The claim that living with a same-sex couple does not affect a child's sexuality is improbable. Experts recognize that parents' sexuality can hardly *help* but affect their children.<sup>64</sup> Even young children may sense, or be told by others, that their guardians are unusual—queer—thereby beginning their awareness of sexuality at an unusually early age. There is even some evidence that children raised by homosexuals are more likely to become

62. See Charlotte Patterson, *Lesbian and Gay Parenting and Their Children: Summary of Research Findings* 15, available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf> (reporting only two longitudinal studies of lesbian parenting and none of gay male parenting). See also Byrd, *supra* note 57, at 16 ("Studies of children raised by male couples are virtually non-existent."). The lack of large-scale studies stems largely from the small number of children living in homosexual households, a condition likely to persist, especially with respect to gay male couples. See *infra* notes 168-69 and accompanying text.

63. See DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010).

64. See A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAMILY STUD. 213, (2004) ("Children learn about male-female relationships through the modeling of their parents."); Bruce Ellis, *Of Fathers and Pheromones: Implications of Cohabitation for Daughters' Pubertal Timing*, in JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY 161 (A. Booth & A. Crouter eds., 2002); J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 AM. SOCIO. REV. 159 (2001) (study finding homosexually parented children are more likely to experience sexual confusion and to engage in homosexual and bisexual behavior); D. Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCH. 130 (1995) (*semble*); S. Golombok & F. Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Couples*, 32 DEVELOPMENTAL PSYCH. No. 1, at 3-11 (1996) (noting that children "from lesbian families were more likely to explore same-sex relationships").

homosexual, and they may experience greater confusion and anxiety about sex.<sup>65</sup>

Given the fragility of many homosexual relationships,<sup>66</sup> children in these homes are more likely to suffer the stresses of divorce and to learn that marriage is temporary, not a lasting relationship of trust. Every child raised by a homosexual couple has already lost at least one biological parent, so a divorce may cause heightened trauma. Given the apparently higher levels of infidelity in homosexual couples,<sup>67</sup> children in these homes are more likely to witness conflict over infidelity and to see it as a normal part of marriage. Given the apparently higher levels of violence in homosexual couples,<sup>68</sup> it is more likely that children in these homes will themselves be violent to others in intimate relationships. Given the high rates of child sex abuse among homosexuals and bisexuals,<sup>69</sup> children in these homes may be more likely to suffer sex abuse. More generally, children in these homes are less likely to learn the values of commitment to others and more likely to be exposed to certain unhealthy behaviors. At the least, given the uncertain effects of homosexual parenting, the children raised by homosexual couples are being treated as guinea pigs, which is troubling.

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65. See Walter R. Schumm, *Children of Homosexuals More Apt To Be Homosexuals? A Reply to Morrison and to Cameron Based on an Examination of Multiple Sources of Data*, 42 BIOSOCIAL SCI. 721 (2010) (meta-analysis finding that children raised by gay couples are much more likely than others to be gay); Traycee Hansen, *A Review and Analysis of Research Studies Which Assessed Sexual Preference of Children Raised by Homosexuals* (2009), available at [http://www.drtraycehansen.com/Pages/writings\\_sexprefprt.html](http://www.drtraycehansen.com/Pages/writings_sexprefprt.html) (concluding that studies by pro-homosexual researchers “can’t be used to make definitive statements, [but] are suggestive that homosexual parents are rearing disproportionate numbers of non-heterosexual children”).

66. See *infra* notes 161-62 and accompanying text.

67. See *infra* notes 166-69 and accompanying text.

68. See *infra* note 174 and accompanying text.

69. See R. Blanchard et al., *Pedophiles: Mental Retardation, Maternal Age, and Sexual Orientation*, 28 ARCHIVES OF SEXUAL BEHAVIOR 111 (1999); Kurt Freund & Robin J. Watson, *The Proportions of Heterosexual and Homosexual Pedophilia: An Explanatory Study*, 18 J. SEX & MARITAL THERAPY 34 (1992).

In America, public space is saturated with sex.<sup>70</sup> Despite disturbing levels of divorce and adultery, for most children in a traditional family, home and family are havens from this tawdry atmosphere. Homosexual households are less likely to give children that shelter. Given the promiscuity of many gay men and their obsession with the physical appearance of themselves and potential sexual partners,<sup>71</sup> their children are more likely to believe that these attitudes are normal and proper.

Advocates of same-sex parenting claim there is no difference between having a mother and a father and having two guardians of the same sex. This, too, is implausible. Men and women differ in significant ways.<sup>72</sup> A growing body of studies confirms: “Mothers and fathers contribute in gender specific and in gender-complementary ways to the healthy development of children.”<sup>73</sup> “Fathers tend to do things

70. See American Psychological Association, Report of the APA Task Force on the Sexualization of Girls 19 (2007) (“Many studies have suggested that the culture delivers abundant messages about the objectification and sexualization of adult women . . .”); *id.* at 34 (“The research summarized in this section offers evidence of negative consequences for girls when they are sexualized or exposed to sexualized images[.]”).

71. See *infra* notes 164-69 and accompanying text.

72. See generally STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 343-50 (2002); DAVID C. GEARY, *MALE, FEMALE: THE EVOLUTION OF HUMAN SEX DIFFERENCES* (1998); Dorion Sagan, *Gender Specifics: Why Women Aren't Men*, N.Y. TIMES, June 21, 1998, § 15, at 1 (stating that hormonal differences affect all organs of the body, abilities, behaviors, and effects of medication).

73. Byrd, *supra* note 57, at 5; Ilanit Gordon *et al.*, *Oxytocin and the Development of Parenting in Humans*, 68 BIO. PSYCH. 377 (Aug. 15, 2010) (finding that hormonal differences between men and women are associated with differing parenting behavior). Sara S. McLanahan, professor of sociology and public affairs at Princeton University, *quoted in* Laurie Tarkan, *Fathers Gain Respect from Expert (and Mothers)*, N.Y. TIMES, Nov. 3, 2009, at D5 (“In the last 20 years, everyone’s been talking about how important it is for fathers to be involved”); See also MARRIAGE AND THE PUBLIC GOOD, *supra* note 61, at 18; WADEHORN & TOM SYLVESTER, *FATHER FACTS* 153 (2002); ELEANOR E. MACCOBY, *TWO SEXES: GROWING UP APART, COMING TOGETHER* (1998); Thomas G. Powers *et al.*, *Compliance and Self-Assertion: Young Children’s Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCH. 980 (1994); A. Sarkadi *et al.*, *Father’s Involvement and Children’s Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 ACTA PAEDIATRICA 153 (2008) (review spanning 20 years of studies including over 22,000 children found that fathers reduce behavioral problems in boys and psychological problems in girls, enhance cognitive development, and decrease delinquency); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY, *supra* note 5, at 90, 106-10.

differently but not in ways that are worse for the children. Fathers do not mother, they father.”<sup>74</sup> Fidelity of the mother to one man also revealed paternity--the identity of the father--which is hidden by promiscuity in some other species, including close relatives of humans like chimpanzees.<sup>75</sup>

For lack of evidence, especially about male couples and long-term effects, uncertainty about gay parenting will persist for years. Liberalization of divorce was touted on the seemingly humane premise that some marriages are irreparably broken and that it is better to let the parties end these marriages rather than perpetuate their misery by forcing them either to stay married or to endure a long, bitter, damaging legal battle over questions of fault.<sup>76</sup> It was argued that children would not be harmed by divorce because they are “infinitely malleable.”<sup>77</sup> “[I]t was fashionable among intellectuals to contend that the best interest of adults also serve the best interests of children. This formerly conventional wisdom has proven to be gravely mistaken . . . .”<sup>78</sup>

The damage done to children by divorce became evident only many years after divorce laws were liberalized and

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In a recent study, fathers who were counseled in parenting spent more time with their children, “and the children were much less aggressive, hyperactive, depressed or socially withdrawn than children of fathers in the control group.” See Tarkan, *supra* note 72. Studies with animals have found behavioral and even neurological deficiencies in mammals raised without fathers. See Shirley S. Wang, *This Is Your Brain Without Dad*, WALL ST. J., Oct. 27, 2009, at B7.

74. Child psychologist Dr. Kyle Pruett, *quoted in* Tarkan, *supra* note 72, at D5.

75. See Nicholas Wade, *Supremacy of a Social Network*, N.Y. TIMES, Mar. 15, 2011, at D4, citing the work of primatologist Bernard Chapais (“the presence of both parents revealed the genealogical structure of the family, which is at least half hidden in chimp societies”).

76. See JANE LEWIS, *THE END OF MARRIAGE? INDIVIDUALISM AND INTIMATE RELATIONS* 5 (2001).

77. Sugrue, *supra* note 32, at 302.

78. Seana Sugrue, *Canadian Marriage Policy: A Tragedy for Children*, REPORT, INST. FOR MARRIAGE & FAMILY CANADA 2 (May 31, 2006), *quoted in* Lynne Marie Kohm, *What's the Harm to Women and Children?: A Prospective Analysis*, in *WHAT'S THE HARM?*, *supra* note 26, at 86.



divorce became more common.<sup>79</sup> The experience with liberalized divorce follows the law of unintended consequences. It should caution us against assuming that an unprecedented change in the law and meaning of marriage will have only the beneficial consequences that some people hope for.

Not surprisingly, some homosexuals are using artificial means of reproduction.<sup>80</sup> Recognition of SSM arguably requires that artificial reproduction (including cloning) be legalized. Since homosexuals cannot create children sexually, the principle of equality arguably entitles them to other means of reproducing.<sup>81</sup> This argument has already been accepted in countries that have validated SSM.<sup>82</sup>

79. See MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 174–77 (2000); ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005); JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND THE FAMILY (1998). Liberalized divorce also harms women. See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). It took almost forty years before rigorous studies were possible, and they showed the great damage wrought by liberalized divorce. Allen, *supra* note 61, at 2.

80. See BALL, *supra* note 10, at 166 (stating that “changes in reproductive technology have made it possible for lesbians and gay men to have biological children”).

81. Anthony C. Infanti, Dismembering Families 13 (Univ. Pittsburgh Legal Studies Research Working Paper Series, Paper No. 11, 2009), available at <http://www.ssrn.com/abstract=1374492> (arguing that denial of a federal tax deduction for the medical costs of artificial reproduction “contributes to the subordination of lesbian and gay families as well as many other nontraditional American families”). See also DeSerres, *supra* note 48, at 104–05. Under the Universal Declaration of Human Rights, the right to marry includes the right to found a family. UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 16.1. To complete a bootstrap line of reasoning, the possibility of artificial reproduction has also been cited to justify SSM. See Karen Struening, *Looking for Liberty and Defining Marriage in Three Same-Sex Marriage Cases*, in MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 19, 38 (Gordon A. Babst et al. eds., 2009).

82. See DeSerres, *supra* note 48, at 104 (citing a French parliamentary report); Elizabeth Marquardt, *How Redefining Marriage Redefines Parenthood*, FAMILYSCHOLARS.ORG, Dec. 1, 2010, available at, <http://familyscholars.org/2010/12/01/how-redefining-marriage-redefines-parenthood/> (stating facts indicating that use of third party sperm and egg donors to conceive children “does appears to be increasing in jurisdictions that have recognized same-sex marriage or similar arrangements”). The likelihood that recognition of SSM would “normalize” artificial reproduction also casts doubt on Dale Carpenter’s claim that recognition would reduce “the number of scenarios in

This threatens children. Artificial reproduction (such as artificial insemination of the mother) entails the separation of the resulting child from one or both of its biological parents. Children artificially conceived and raised apart from their biological fathers “hunger for an abiding paternal presence.”<sup>83</sup> Adopted children often crave knowledge of and contact with their biological parents and are challenging laws that prevent them from doing so.<sup>84</sup>

Artificial reproduction is more problematic than adoption because the former is harder for the law to monitor. Each adoption must be approved by a court charged to protect the child. Artificial reproduction gets little legal oversight. The children created are subject to the whims of adults. Artificial reproduction is also different in that it is irreversible. If an adoption goes awry it can be rescinded, but the artificial creation of a human being cannot be undone. Neither artificially created children nor adoptees have an adequate natural family to which they can return. The difference

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which you have multiple adults vying for children.” Dale Carpenter, *The Unconservative Consequences of Conservative Opposition to Gay Marriage*, in *WHAT’S THE HARM?*, *supra* note 26, at 319, 323.

83. KYLE PRUETT, *FATHERNEED* 207 (2000); *see also* DAVID POPENOE, *LIFE WITHOUT FATHER* (1996). *See also* Barbara Dafoe Whitehead, *Answered Prayers: Where Is Technological Reproduction Taking Us?*, *COMMONWEAL*, Oct. 20, 2006, at 133 (citing study finding widespread identity problems among such children resulting from artificial insemination); *THE REVOLUTION IN PARENTHOOD*, *supra* note 54, at 17 (footnotes omitted) (stating that damage to children raised by same-sex couples may be greater when “[a]dults purposefully conceive a child with the clear intention of separating that child from a biological parent.”). *See also* ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, *MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION* 5 (stating that “on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse.”) (Inst. for American Values 2010).

84. *See* Patrick F. Fagan, *Adoption Works Well: A Synthesis of the Literature*, FAMILY RESEARCH COUNCIL, Nov. 2010, at 12 (“At some stage, adopted children commonly desire to get to know their birth mother.”). “It is now being widely recognized that adopted children have the right to know who their biological parents are whenever possible, and legislation establishing that right has become the norm.” SOMERVILLE, *supra* note 50, at 147. *See also* David Crary, *Sperm-Donors’ Lids Seek More Rights, Want to End Anonymous Sperm Donation*, available at <http://www.app.com/apps/pbcs.dll/article?AID=2010100812064>; Vardit Ravitsky & Joanna E. Scheib, *Donor-Conceived Individuals’ Right to Know*, THE HASTINGS CENTER, BIOETHICS FORUM, July 20, 2010, available at <http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4811&blogid=140>.

between the two is that for the artificially created child this happens by the design of the custodial parents.

The law has paid little attention to the rights of children regarding their biological parents because in the past there was no threat to these rights. Children lived with their natural parents unless the parents died, voluntarily surrendered them or were found unfit by a court. Through artificial reproduction children may be separated from their biological parents without any of these conditions being present.

Allied to support for artificial reproduction is a movement to reduce or eliminate the social and legal significance of the biological nexus between parents and children. It is argued that “parents” should be those who really perform normal parenting functions.<sup>85</sup> This would deny biological parents of any rights in their children and deprive children of any right in their biological parents, which is even more disturbing. To plan deliberately to separate a child from one or both parents seems to be child abuse.<sup>86</sup> At least in theory, biological parents can act in their own interests; infant or unborn children cannot. Although baby selling is illegal, adults can take pay for being egg or sperm donors and take steps to prevent their biological children from having any legal rights against, or contact with, or even knowledge of the identity of their parents. In this way some men have sired hundreds of children.<sup>87</sup>

Gay activists disparage blood ties. William Eskridge says that recognizing SSM “involves the reconfiguration of the family, de-emphasizing blood, gender, and kinship ties . . . . Gay experience with ‘families we choose’ delinks family from

85. See Susan Frelich Appleton, Gender and Parentage: Family Law’s Equality Project in Our Empirical Age 6-7 (June 21, 2010), available at <http://ssrn.com/abstract=1628232>.

86. See Camille W. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375 (2005); SOMERVILLE, *supra* note 50, at 147 (drawing ethical distinction between accidental and deliberate destruction of “children’s links to their biological parents, and especially for society to be complicit in this destruction”).

87. See Rachel Lehmann-Haupt, *Mapping the God of Sperm*, NEWSWEEK, Dec. 16, 2009, available at <http://www.newsweek.com/id/227104> (discussing man who is the father of nearly 400 children by sperm donation).

gender, blood, and kinship. Gay families . . . often form no more than a shadowy connection between the larger kinship groups.”<sup>88</sup> As David Blankenhorn says, children in a homosexual household will not be treated as the victims of a tragedy; rather “it will be explained to everyone, including the children, that something wonderful has happened!”<sup>89</sup> Homosexuals may tell children conceived by artificial insemination that they do not have a mother or a father.<sup>90</sup>

As Eskridge suggests, validating SSM would affect not only children in homosexual households. By changing the meaning of parenthood it would affect all children. Traditionally biological parents have inalienable duties to their children. As the adages say, you can choose your friends but not your relatives, and home is where they can’t turn you away. “De-emphasizing blood” and validating “families we choose” imply that biological parents may choose to eschew those duties. If biology is irrelevant, parents have no more rights in or responsibility to their biological children than any other adults. The law could abandon consistency and continue to impose duties on biological parents despite “de-emphasizing blood” in favor of “families we choose,” but the new social meaning of parenthood will make it harder to enforce those duties.

In opposition some argue for a “birthright of children to be connected to their mothers and fathers.”<sup>91</sup> As a French parliamentary commission put it, “The interests of the child must outweigh the exercise the freedom by adults.”<sup>92</sup> The

88. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING APARTHEID IN THE CLOSET* 11 (1999).

89. David Blankenhorn, Editorial, Protecting Marriage to Protect Children, *L.A. TIMES*, Sept. 19, 2008, at A27.

90. See Jerry Mahoney, *Mom/Not Mom/Aunt*, *N.Y. Times*, July 16, 2010, at ST6 (reporting that the author and his homosexual partner were told by their surrogacy agency “not to use the ‘m-word.’ ‘This child will have two fathers,’ the staff member scolded, ‘He or she will have an egg donor and a surrogate, but no mother.’” See also *supra* note 53.

91. Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT* 9, 11 (Daniel Cere & Douglas Farrow eds., 2004). See also Margaret Somerville, *What About the Children?*, in *id.* at 67.

92. Report to Parliament on the Family and the Rights of Children 48, National Assembly, France (Jan. 25, 2006) (Eng. translation), *quoted in* DeSerres, *supra* note 48, at 112.

United Nations Convention on the Rights of the Child states that each child “shall have . . . as far as possible, the right to know and be cared for by his or her parents.”<sup>93</sup> David Blankenhorn argues that “children have the right, insofar as society can make it possible, to know and to be cared for by the two parents who brought them into this world.”<sup>94</sup>

The law has begun to recognize a right of offspring of artificial insemination to know who their fathers are,<sup>95</sup> but does that go far enough? They have already been denied the right to grow up with their real parents. If that happened because their guardians had bought or stolen the child from the parents, we would consider the child gravely wronged and injured. How does the voluntary consent of the biological parents render the child any less wronged or injured by artificial reproduction?

Some argue that children live in homosexual homes already and will continue to do so even if we do not recognize SSM, so we may as well recognize it and give those children the resulting benefits.<sup>96</sup> This argument assumes, however, that recognizing SSM will affect only homosexuals who marry and will not diminish the existing benefits of marriage. This article shows, however, that recognizing SSM would be the next step in profoundly changing the meaning of and respect for marriage and severely impairing its benefits.

Moreover, recognizing SSM may generate little or no benefit for children in homosexual households. The benefits of marriage to children arise mainly from binding biological parents. With SSM, this is impossible. Many gay couples have children because one of the child’s biological parents

93. UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD, Art. VII (1989).

94. See also Daniel Cere, *Toward an Integrative Account of Parenthood*, in WHAT IS PARENTHOOD? (Daniel Cere & Linda McClain, eds. forthcoming) (referring to children’s rights “to a maternal bond” and to “be connected to their genetically-related parents”).

95. See Neal Hall, *Daughter of Sperm Donor Seeks to Know Identity of Biological Father*, VANCOUVER SUN, Oct. 27, 2008, available at <http://http://www.canada.com/vancouver/sun/news/story.html?id=3146c8d6-d2a6-4d3b-a911-6eaaa3732558>.

96. See Carpenter, *supra* note 81, at 320.

left the other and now lives with another adult. I know of no evidence that children benefit if those two people are married, even if they are of different genders. It is speculative that children in a gay household will benefit if the adults are in a recognized marriage. As for artificial reproduction, we should hesitate to allow this regardless of the genders of the adults in the home.<sup>97</sup> The number of children in gay households is also small, so that any benefits to those children would likely be outweighed by damage to the much larger number of other children.<sup>98</sup>

### B. *Heterosexual Bonding*

Again, a strong bond between mother and father is instrumentally good for their children (and thus also for society) because it increases the likelihood that they will be good parents.<sup>99</sup> Enduring love is also intrinsically good for a woman and a man; all cultures have celebrated it. It unites the two halves of humanity. None of us, male or female, can live the life of the other half. The union between a woman and a man brings them as close as possible to experiencing the full range of human experience.<sup>100</sup> It affords a unique integration of intrinsic human goods—*eros*, bearing and raising children, companionship, and incorporation of the

97. See George W. Dent, Jr. *Visions of a World Without Blood Ties*, 2 INT'L J. JURISP. FAM. \_\_ (forthcoming 2011)..

98. Dale Carpenter gives some numbers that are hard to reconcile. At one point he estimates the number of such children as “at least a million.” Carpenter, *supra* note 81, at 320. However, he also recites an estimate of 777,000 same-sex couple households and says that “about 20% or all male couple households in the United States and one-third of all female couple households in the United States are raising children.” *Id.* That would mean 200,000-250,000 such households, which would have to have an average of four to five children each to bring the total of children to 1,000,000. That seems unlikely.

99. See *supra* note 49 and accompanying text.

100. Roger Scruton puts it somewhat differently: “In the heterosexual act, it might be said, I move out *from* my body towards the other, whose flesh is unknown to me; while in the homosexual act I remain locked within my body, narcissistically contemplating in the other an excitement that mirrors my own.” ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 310 (1986). Carlos Ball legitimately objects that people vary in more than just their gender, so that another person of the same sex is not an exact duplicate of one’s self. BALL, *supra* note 10, at 124. However, homosexual relationships lack the otherness, the differentness inherent in normal love. The benefits of this “otherness” are relevant to gender, not to race or religion. See *infra* note 201.

full range of humanity and of human life.<sup>101</sup> Society may fairly consider this unique holistic capacity an intrinsic good of heterosexual love that is lacking in homosexual relationships, which are necessarily more fragmented.

Romantic love need not be for life, but a permanent commitment is generally considered the highest form of love between a woman and a man. A wealth of neuroscientific evidence shows that “humans are the healthiest and the happiest when they engage in sex only with the one who is their mate for a lifetime.”<sup>102</sup> “The majority of sexually active young people say they wish they had postponed having sex . . . .”<sup>103</sup>

When a woman and a man reproduce, an exclusive, lifetime commitment between them benefits their children.<sup>104</sup> If the union is not exclusive, conflicts are likely—over the attentions of the other (as for sex, affection, or help with chores); and over attentions to their mutual children (as opposed to children that they have borne with others). Love between a woman and a man is more likely to endure and be exclusive if they are married,<sup>105</sup> so the benefits of enduring, exclusive love to them are another reason for society to encourage marriage. By contrast, it is unclear whether enduring, exclusive love between homosexuals confers the same benefits on society.<sup>106</sup>

### C. Heteronormativity Is Not Just Socially Constructed

Some call gender a “cultural invention, a social construction, and a self-presentation we enact in certain

101. See generally Cere, *supra* note 96.

102. JOE S. MCILHANEY & FREDA MCKISSIC BUSH, HOOKED: NEW SCIENCE ON HOW CASUAL SEX IS AFFECTING OUR CHILDREN 136 (2008).

103. Wendy Shalit, *Hookup Ink*, ACAD. QUESTIONS, Winter 2008-09, at 91–92.

104. See *supra* note 49 and accompanying text.

105. See *Marriage More Stable Than Cohabitation, Research Finds*, CHRISTIAN TODAY (Feb. 22, 2010), <http://www.christiantoday.com/article/marriage.more.stable.than.cohabitation.research.finds/25351.htm> (reporting a study in Britain finding, e.g., that fewer than a quarter of first cohabitations last five years).

106. See *infra* Part V-E.

settings.”<sup>107</sup> Were that true, it might be unjust to deny people equal treatment for what is “socially bestowed,”<sup>108</sup> for being what society made them. However, under that theory society must tolerate all consensual sexual conduct, including adultery or even bigamy. Also, if sexuality is whatever society dictates, arguably it is valid for society to favor heterosexuality. And if we have no free will—if all human conduct is predetermined—then the whole debate about sexuality (including its outcome) is already determined and we shouldn’t worry about it (although it is already determined that some of us will).

Of course, society does influence sexual behavior. Pederasty is more common in societies that condone it than in societies that severely punish it. However, there is considerable doubt about the strong constructionist view of sexuality, even to its meaning.<sup>109</sup> One problem is its “inherent vicious circularity” in that any statements it makes would themselves presumably be socially constructed.<sup>110</sup> Moreover, a strict constructionist explanation of sexuality seems implausible. In evolutionary theory, “mating is the single most important act of any individual of any sexually reproducing species.”<sup>111</sup> Genes must to some extent incline most people to heterosexuality.

107. RICHARD A. LIPPA, GENDER, NATURE, AND NURTURE 115 (2d ed. 2005). See also BALL, *supra* note 10, at 8-10 (discussing various forms of the claim); Janis S. Bohan, *Regarding Gender: Essentialism, Social Constructionism, and Feminist Psychology*, in TOWARD A NEW PSYCHOLOGY OF GENDER 33 (Mary M. Gergen & Sara N. Davis eds., 1997); J.D. Delameter & J.S. Hyde, *Essentialism Vs. Social Constructionism in the Study of Human Sexuality*, 35 J. SEX RESEARCH 10, 14, 16 (1998) (explaining that “sexuality is created by culture” and that “phenomena such as homosexuality are social constructions, the product of a particular culture, its language, and institutions”); EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 97 (1999).

108. VIVIEN BURR, AN INTRODUCTION TO SOCIAL CONSTRUCTIONISM 21 (1995).

109. “[T]here is as yet no genuine agreement as to the conceptual coherence or empirical viability of the entire social constructionist enterprise.” Edwin E. Gantt & Emily Reynolds, *Meaning, Morality, and Sexual Attraction: Questioning the Reductive and Deterministic Assumptions of Biologism and Social Constructionism*, in WHAT’S THE HARM?, *supra* note 26, at 169. See also E.J. CAPALDI & R.W. PROCTOR, CONTEXTUALISM IN PSYCHOLOGICAL RESEARCH: A CRITICAL REVIEW (1999); I. HACKING, THE SOCIAL CONSTRUCTION OF WHAT? (1999).

110. Gantt & Reynolds, *supra* note 110, at 169-70.

111. H. Fisher, *The Nature of Romantic Love*, in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL PSYCHOLOGICAL ISSUES 86 (12th ed., Brent D. Slife ed., 2002).



The social constructionist explanation of sexuality also clashes with the homosexuality movement's opposition to purported "psychotherapy" to enable homosexuals to function heterosexually. That opposition is predicated on the argument that sexual orientation is firmly fixed early in life, if not at birth, and that efforts to change sexual behavior often inflict serious emotional damage.<sup>112</sup> If sexual orientation is as socially constructed as, say, our tastes in clothing, then that orientation should not be so difficult and traumatic to change.

#### D. Marriage

Love between a woman and a man and the creation of human life are both intrinsically good,<sup>113</sup> but love and reproduction can occur without marriage. The special legal and social treatment of marriage has been attacked on several grounds<sup>114</sup> and alternatives have been proposed. Some would "abolish marriage as a legal category."<sup>115</sup> Instead, the law would apply "the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law."<sup>116</sup> Similarly, Martha Ertman advocates commercializing

112. See American Psychiatric Association, *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, 157 AM. J. PSYCH. 1719 (2000) (advising against such efforts).

113. See *supra* notes 46, 102-03 and accompanying text.

114. For example, many feminists consider marriage sexist, patriarchal, oppressive to women. See *infra* note 197 and accompanying text.

115. MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228 (1995). See also Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 672 (2010) (proposing that government "withdr[a]w from the marrying business" and instead "offer . . . civil unions to both same- and opposite-sex couples"); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283 (1997); Claudia Card, *Against Marriage and Motherhood*, 1 HYPATIA 1, 11 (Summer 1996) (suggesting that it is impossible for any woman to achieve true mutuality in a heterosexual marriage); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 164 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); Michael Warner, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE*, ch. 3 (1999); Anemona Hartcollis, *For Some Gays, a Right They Can Forsake*, N.Y. TIMES, July 30, 2008, at 12.

116. *Id.* at 229. See also Tamar Lewin, *Untying the Knot, For Better or Worse: Marriage's Stormy Future*, N.Y. TIMES, Nov. 23, 2003, at WK1 ("The most radical structural change being discussed these days in taking the state out of the marriage business.").

marriage and contractualizing intimate affiliation.<sup>117</sup> Others would extend the legal status of marriage to a variety of personal relationships so that people could choose their form of family from several options, which could include separating sex, residence, emotional intimacy, financial partnership, child-bearing and child-raising.<sup>118</sup> Should traditional marriage continue to enjoy special treatment?

Marriage binds children to their parents, which is both intrinsically and instrumentally good for them all. “[T]he institution of marriage is designed to help heterosexual couples remain together and connected to their children in a loving relationship . . . .”<sup>119</sup> Children generally fare best when they both live with their biological parents and the parents are married. Indeed, to bear and nurture children is usually a major (or the dominant) reason to marry.<sup>120</sup> “The marital alliance is fundamentally a reproductive alliance.”<sup>121</sup> Children get not only health and educational benefits from marriage; they also learn important norms and crucial habits in the family, including the norms and practices of kinship, including “love, sacrifice, and altruism.”<sup>122</sup> In the

117. Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C.L. REV. 1 (2003).

118. See Feldblum, *supra* note 2, at 179-82 (advocating state support for two other forms of personal relationships as well as marriage); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 101 (2009) (arguing that the law should not favor marriage); Robert Epstein, *Same-Sex Marriage Is Too Limiting*, L.A. TIMES, Dec. 4, 2008 (“The real challenge is to have the state begin to recognize the full range of healthy, non-exploitative, romantic partnerships that actually exist among human beings.”); Laura Rosenbury, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010) (arguing that sex should be decoupled in the legal sphere from both domestic relations and other traditional forms of emotional intimacy, thus rejecting the dominant understanding that the most important relationships between adults should always be both sexually and emotionally intimate).

119. Douglas W. Allen, *Who Should Be Allowed Into the Marriage?*, 58 DRAKE L. REV. 1043, 1071 (2010).

120. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, chap. VII, § 78, at 43 (referring to marriage’s “chief end, procreation”).

121. Margo Wilson & Martin Daly, *Marital Cooperation and Conflict*, in *EVOLUTIONARY PSYCHOLOGY, PUBLIC POLICY AND PERSONAL DECISIONS* 197, 203 (Charles Crawford & Catherine Salmon, eds., 2004).

122. Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in *WHAT'S THE HARM?*, *supra* note 26, at 209, 212. See also Sugrue, *supra* note 32, at 300 (“primary socialization . . . typically occurs within the family”).

family children also learn the values of democracy and of citizenship.<sup>123</sup>

Children are society's future, so we all share the benefits of marriage. "[A]ll societies that survive are built on marriage. Marriage is a society's cultural infrastructure . . . . The history of human society shows that when people stop marrying, their continuity as a culture is in jeopardy."<sup>124</sup> In a recent science fiction film, *Children of Men*, people can no longer reproduce so that extinction of humanity looms. Most people would consider that a disaster, not a neutral or welcome event. The natural or "nuclear" family is not a recent mutation; it has been dominant for centuries, at least in Western cultures.<sup>125</sup> Some refer (disparagingly) to "the state's interest in encouraging procreation."<sup>126</sup> This is misleading. "Marriage is not a factory for childbearing. Marriage exist[s] to encourage men and women to create the next generation in the right contexts and simultaneously to discourage the creation of children in other context—out of

123. See George W. Dent, Jr., "How Does Same-Sex-Marriage Threaten You?," 59 RUTGERS L. REV. 233, 240 (2007); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003). The founders recognized that the (traditional) family nurtured the virtues of citizenship necessary to a republic. See David F. Forte, *The Framers' Idea of Marriage and the Family*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS 103 (Robert P. George & Jean Bethke Elshtain eds., 2006). See generally SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, & CITIZENSHIP (Mary Ann Glendon & David Blankenhorn eds., 1995).

124. David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, POLICY REV., Spring 1994, at 9.

125. Joan Acocella, *Little People*, NEW YORKER, Aug. 18 & 25, 2003, at 138, 139.

126. Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 367 (2006) (citing *Adams v. Howerton*, 486 F. Supp. 1119, 1123-25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982)).

wedlock in fatherless homes.”<sup>127</sup> At any rate, prolonged low reproductive rates threaten social and political stability.<sup>128</sup>

Is traditional marriage obsolete, “an archaic institution”?<sup>129</sup> Not at all. Children’s need for the careful nurturing that a traditional family does best is greater now than ever before and is likely to grow in the future. Not long ago it sufficed for children to learn the basic skills of farming and not to avoid causing too much trouble. To flourish in a modern economy, however, children need bourgeois habits and higher education.<sup>130</sup> As a result, raising children now is much more expensive,<sup>131</sup> and children have greater need for the higher income that a traditional marriage is more likely to generate.<sup>132</sup> Moreover, “our nation’s contemporary political and economic institutions depend even more than before on citizens who embrace the values and virtues fostered by the nuclear family.”<sup>133</sup>

127. Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 44 (2004). See also INST. FOR AMERICAN VALUES, CAN GOVERNMENT STRENGTHEN MARRIAGE?: EVIDENCE FROM THE SOCIAL SCIENCES 9 (2004) [hereinafter CAN GOVERNMENT STRENGTHEN MARRIAGE?] (“The goal of marriage law . . . is to increase the proportion of children who are raised by their own two married parents in low-conflict marriages.”); *id.* at 7 (referring to marriage as society’s “way of linking the rights and responsibilities of mothers and fathers to each other and to the children they share . . . .”); Allen, *supra* note 123, at 1048–49 (“the essential purpose of marriage has been to encourage successful procreation and child-rearing.”).

128. See, e.g., Ilan Berman, *Russia’s Real Threat? Failure: Decline Breeds New and Perplexing Dangers*, WASH. TIMES, Feb. 1, 2010, at B01 (explaining the economic, political, and geopolitical consequences of Russia’s so-called “demographic death spiral”).

129. Michaelangelo Signorile, *Bridal Wave*, OUT, Dec.–Jan., 1994, at 68, 161.

130. See James Surowiecki, *Leave No Parent Behind*, THE NEW YORKER, Aug. 18, 2003, at 48 (asserting that 30 years ago a high school diploma was sufficient for middle class children and “decent jobs for unskilled and semi-skilled labor were readily available. Today, such jobs are much harder to find, and college is considered a necessity.”).

131. *Id.* (“[T]he cost of having children has risen much faster than the cost of being childless.”).

132. See *infra* note 146 and accompanying text (showing that married men make more money than unmarried men).

133. W. Bradford Wilcox, *Family Ties*, PUB. INTEREST, Fall 2003, at 115, 118 (summarizing a theme from BRIGITTE BERGER, THE FAMILY IN THE MODERN AGE: MORE THAN A LIFESTYLE CHOICE (2002)). See also Sugrue, *supra* note 32, at 306–08 (arguing that habits acquired in the family are essential to the successful functioning of a market economy); *Id.* at 308 (speculating that China may be managing the transition to a market economy better than Russia and most of post-

Many industrialized nations are now losing population.<sup>134</sup> This is not yet so in America, but we should not be complacent about the possibility. There are two main reasons why we have so far avoided depopulation. One is that we absorb many more immigrants than do other countries. However, the high number of immigrants with low education and job skills creates economic problems, and the need to assimilate many people from cultures very different from our own also creates social problems. A high rate of immigration may not be the best way to maintain our population. A second reason for our growing population is that Americans still value the family, so the fertility rate is higher here than in many other countries. However, various trends, including the campaign for SSM, are eroding respect for the family. “As marriage becomes a matter of putting adult[s] . . . first, fewer and fewer children are had.”<sup>135</sup>

Even if our population is not falling, the percentage of Americans who are older and receive Social Security, Medicare, and other benefits for the elderly, is rising in proportion to the working age population who must pay for these benefits. One way to mitigate this problem is to encourage fertility by supporting the family.

On the other hand, marriage is the most intimate human relationship and, therefore, arguably is uniquely *inappropriate* for regulation by uniform, state-dictated rules. Why not let adults make their own rules?<sup>136</sup> The answer is that marriage is more than an arrangement between two people. It also involves children the couple may create. Typically these children do not even exist when the marriage is created and, even if they do exist then, they cannot negotiate contract to protect their interests; society must protect them. Bertrand Russell, no fan of bourgeois morality, said that “it is through children alone that sexual

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colonial Africa because respect for the family has remained stronger in China than in those other nations).

134. See generally BEN J. WATTENBERG, FEWER: HOW THE NEW DEMOGRAPHY OF DEPOPULATION WILL SHAPE OUR FUTURE (2004).

135. Sugrue, *supra* note 32, at 310.

136. This is exactly what some feminists propose. See *supra* notes 116-18 and accompanying text.

relations become of importance to society, and worthy to be taken cognizance of by a legal institution.”<sup>137</sup> “Societies have found marriage necessary because husbands and wives often have private interests that are not compatible with the interests of their spouses, children, other family members, or communities in general.”<sup>138</sup> Renown anthropologist Bronislaw Malinowski said that “the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents.”<sup>139</sup> And sociologist James Q. Wilson: “Marriage is socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.”<sup>140</sup>

Marriage is also a collective event. In a sense, it makes the whole community and all of civilization parties to the couple’s commitment to each other and to their children.<sup>141</sup> By a public wedding, a couple joins others as celebrants of one of humanity’s most cherished and ancient rituals and thereby confirms society’s norms.<sup>142</sup> In turn, the community supports the marriage. As Joseph Raz says, marriage “requires a culture which recognizes it, and which supports it through the public’s attitude and through its formal institutions.”<sup>143</sup>

Many people refer to the “sanctity of marriage.” This persuades others that marriage is a religious institution and should be deprived of legal significance. Marriage does have religious significance in America, but that alone hardly justifies abolishing marriage as a legal status. Murder, theft,

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137. BERTRAND RUSSELL, *MARRIAGE AND MORALS* 156 (Liveright ed. 1970).

138. Allen, *supra* note 123, at 1048.

139. BRONISLAW MALINOWSKI, *SEX, CULTURE AND MYTH* 11 (1962).

140. JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 41 (2002).

141. See John Witte, Jr. & Joel A. Nichols, *Marriage, Religion, and the Role of the Civil State: More Than a Mere Contract: Marriage as Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595, 600 (2008) (“Marriage is an institution that is both private and public, individual and social, and temporal and transcendent in quality. Its origin, nature, and purpose lie beyond and beneath the terms of the marriage contract itself.”).

142. See SCRUTON, *supra* note 102, at 357-58.

143. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 162 (1986).

and perjury also have religious significance,<sup>144</sup> but we do not ignore them in law and relegate them to religion.

The religious concern with marriage, unlike many other matters, is common and nonsectarian. “Among the founders of religions over the last two thousand years, many opposed property and the family. *But the only religions that have survived are those which support property and the family.*”<sup>145</sup> In other words, marriage is valued by all surviving religions because it is essential to the survival of any sect and of the society of which it is a part. For the same reason, marriage is also a matter of legitimate and, indeed, vital concern to the law.

Marriage is instrumentally good for the parties. Married people live longer, make more money, enjoy better health (both physical and mental), and report greater satisfaction with sex and with life generally than do unmarried people.<sup>146</sup> Some of these advantages may exist simply because healthier, more industrious and more law-abiding people are more likely to marry, but “some . . . fraction of the marital ‘premium’ stems from marriage itself.”<sup>147</sup>

A striking effect of marriage is that it civilizes men. Married men work longer hours, make more money, commit less crime, and abuse drugs less than do single men.<sup>148</sup> They

144. The Ten Commandments state, *inter alia*, “Thou shalt not kill . . . Thou shalt not steal. Thou shalt not bear false witness against thy neighbor.” *Exodus* 20:13, 15-16.

145. 1 THE COLLECTED WORKS OF F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 137 (W.W. Bartley III, ed. 1988) (emphasis in original).

146. See generally LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY (2000); Byrd, *supra* note 54, at 3-7; W. Bradford Wilcox, Linda Waite & Alex Roberts, Marriage and Mental Health in Adults and Children 1, Inst. For American Values, Center for Marriage and Families, Research Brief No. 4, Feb. 1, 2007), available at [http://heartland.org/custom/semod\\_policybot/pdf/21121.pdf](http://heartland.org/custom/semod_policybot/pdf/21121.pdf) (“Married Americans were more than twice as likely as divorced or separated Americans to say they were very happy with life in general.”).

147. Garrison, *supra* note 5, at 324; see also W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 19-22 (2d ed. 2005).

148. “Communities of unmarried young men are prone to engage in violence and predatory sex. Compared with the married, young unmarried men tend to be lazy and unfocused . . . Marriage compels men to grow up.” STEVEN RHOADS, TAKING SEX DIFFERENCES SERIOUSLY 252-53 (1994). The rate of imprisonment for single young men is six times that for married young men. See George A. Akerlof,

also stabilize the neighborhoods where they live, including deterring crime by others. The social value of having men marry is especially obvious from the collapse of order when marriage ceases to be normative, as has happened in many American inner city neighborhoods.<sup>149</sup> The civilizing effects of marriage seem to benefit men more than women, probably because unmarried men are less civilized to begin with and more inclined to be destructive and self-destructive than are unmarried women.<sup>150</sup>

### E. Are Homosexuality and Same-Sex “Marriage” Equally Valuable?

Gay activists proclaim the equal goodness of homosexuality and of SSM.<sup>151</sup> They say, it would benefit some and harm no one.<sup>152</sup> This claim is dubious.

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*Men Without Children*, 108 ECON. J. 287, 296 (1998). Married men engage in less aggressive and illegal behavior than single men. S. Alexandra Burt et al., *Does Marriage Inhibit Antisocial Behavior?: An Examination of Selection v. Causation via a Longitudinal Twin Study*, 67 ARCHIVES GEN. PSYCH. 1309 (2010). Married men are less likely to be sexually promiscuous, to be unfaithful to a longtime partner, or to abuse alcohol. *See id.* at 287; Steven L. Nock, *The Consequences of Premarital Fatherhood*, 63 AM. SOC. REV. 250 (1998). Married men work longer hours and make more money. *See WILCOX ET AL.*, *supra* note 145, at 19-22.

149. *See* Akerlof, *supra* note 146; Nock, *supra* note 146.

150. “[M]en are less attracted to and less well equipped for marriage than women.” RHOADS, *supra* note 146, at 252. *See also* Terrence O. Moore, *Heather’s Compromise: How Young Women Make Their Way in a World of Wimps and Barbarians*, CLAREMONT REV. BKS., Spring 2004 available at [http://www.claremont.org/publications/crb/id.947/article\\_detail.asp](http://www.claremont.org/publications/crb/id.947/article_detail.asp). (“Clearly men will not be properly civilized in our day unless the traditional standards for courtship and marriage return in some form.”).

151. *See* BALL, *supra* note 10, at 4 (“lesbians and gay men by the thousands are . . . stepping forward and insisting that their relationships and families merit social recognition and support.”). Some actually seem to claim moral *superiority* for homosexuality. *See* BALL, *supra* note 10, at 112 (claiming that homosexual relationships are superior because they “are more egalitarian and less role driven than heterosexual relationships”); Feldblum *supra* note 2, at 178 (referring to “lessons about the normative good of marriage that will be easier to perceive in” SSM); & 181 (stating that “the gay community has pioneered in developing [“intimate forms of *nonsexual* partnership”] and non-gay individuals could learn and benefit from developing similar relationships”) (emphasis in original).

152. *See* Samar, *supra* note 26, at 248: “Does anybody really expect that their opposite-sex spouse will leave him or her if the same-sex couple down the street gets married?” *See also* Linda McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998) (“The requirements of public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture.”); Lynn D. Wardle, “*What’s the*



First, homosexuality cannot create human life or the biological family. This point can be stated algebraically. Designate a committed, loving relationship between any two adults as “A.” Assume for the moment that homosexuals are just as likely to create such a relationship as are heterosexuals.<sup>153</sup> Now designate the ability of two people to create human life—an ability possessed only by a male-female couple—as “B.” If we say that the homosexual “married” couple is just as good as the traditional married couple, then

$$A = A + B$$

If this statement is true, then “B”—the capacity to create human life—is worth zero; it is worthless, of no value. No gay activists deny the intrinsic value of human life—they hardly could do so without disparaging their own lives. Some gay activists acknowledge that the capacity of a woman and a man to create human life is a good that homosexual couples do not have.<sup>154</sup> They nonetheless argue for equal treatment of homosexuality, but their reasoning is hazy.<sup>155</sup> As we have noted, all known societies have valued and celebrated the ability of a woman and a man to create human life.

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*Harm?* and *Why It Matters*, in *WHAT’S THE HARM?*, *supra* note 26, at vii, vii (“Perhaps the most decisive question in the debate about whether same-sex marriage should be legalized is—‘what’s the harm?’”). See LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* (2009) (arguing that there have been no negative effects where SSM has been recognized).

154. See SULLIVAN, *supra* note 8, at 196 (“The timeless, necessary, procreative unity of a man and a woman is inherently denied to homosexuals, and the way in which . . . parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.”).

154. See SULLIVAN, *supra* note 8, at 196 (“The timeless, necessary, procreative unity of a man and a woman is inherently denied to homosexuals, and the way in which . . . parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.”).

155. Carlos Ball, for example, does not expressly deny the value of human life, but seems to argue that the ability of a woman and a man to create human life is morally irrelevant. BALL, *supra* note 10, at 121-23. Ball does this while disagreeing with the “new natural lawyers,” but rejecting their position does not mean that homosexual relationships are equally valuable. Ball also seems to belittle the reproductive capacity of a woman and a man on the ground that homosexuals can conceive artificially. See *id.* at 121. First, most people do not consider this possibility equal to natural conception, and there are dangers in artificial reproduction. See Dent, *supra* note 97.

Although some homosexuals favor recognition of SSM,<sup>156</sup> others fear it would bring unwelcome pressure on them to marry.<sup>157</sup> Still others consider marriage unsuited for gays. Nancy Polikoff, for example, says, “the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”<sup>158</sup> Some lesbians and feminists oppose legal recognition of marriage altogether.<sup>159</sup>

Non-recognition of SSM because homosexuality is sterile has been called hypocritical because many different-sex couples cannot or choose not to bear children.<sup>160</sup> The argument is flimsy. Couples who choose to be childless may change their minds or accidentally conceive. As for infertile couples, unless they are very old their infertility could be determined only by a physical examination that would grossly intrude on human privacy and dignity.<sup>161</sup>

Barring legal marriage to older couples would be irrational because couples already married can stay married in old age. There would also be gender equality issues. Older

156. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996).

157. See BALL, *supra* note 10, at 112 (referring to those who believe that “attempts to privilege distinct forms of intimate relationships . . . inevitably lead . . . to the coercion and stigmatization of those who remain outside the socially privileged relationships”). Some believe pressure to marry would occur, and would be a good thing for gay people. See KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 78 (2006); RAUCH, *supra* note 8; Claudia Card, *Against Marriage*, in *SAME-SEX MARRIAGE: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY* 317, 321 (John Corvino ed., 1997).

158. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not ‘Dismantle the Legal Structure of Marriage in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993). See also Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women’s Equality and Nationality in International Law*, 22 MICH. J. INT’L L. 523, 555 (2001) (claiming that “not all lesbian women would favor legal changes that require them to identify their relationships as family”).

159. See *supra* notes 119-22 and accompanying text.

160. See *Hernandez v. Robles*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting) (“the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry . . .”).

161. See *Hernandez v. Robles*, 855 N.E.2d 1, 11–12 (“limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary unreliable line-drawing”).

men can still father children, so they could marry young women but not old women, and older women (who cannot bear children) could not marry at all. It is hard to imagine any benefit from such rules. Most important, infertile couples do not reproduce because they are physically unable to do so. Homosexual couples, however, have chosen a sterile relationship. Most people perceive the former as trying to uphold the norm of marriage, whereas a homosexual couple obviously flouts that norm.

Except for reproduction, are homosexual relationships equally valuable? Heterosexual relationships have at least one inherently durable element. Again, the bond between woman and man is rooted in the biological need to nurture human infants for a long time.<sup>162</sup> For either the mother or the father to have sex outside the marriage could disrupt their bond by creating competing demands from other children and the other parent(s).

It would be astonishing if this natural bond, a billion years of evolution, were just coincidentally equaled by the bond between same-sex couples, which has no biological basis. The animal kingdom is instructive. In some species male and female mate for life; in many they do not. But in no species do members of the same sex mate for life. Homosexuals have less reason to bond as couples and, when they do, less reason for the bond to be enduring and exclusive. Not surprisingly, then, many homosexuals are less inclined than heterosexuals to marry<sup>163</sup> or to have enduring relationships.<sup>164</sup>

162. See *supra* note 49 and accompanying text.

163. See Harry R. Jackson, Jr., *What's the Vex of Same-Sex*, TownHall.com, Oct. 12, 2009, available at Harry R. Jackson, Jr., *What's the Vex of Same Sex*, TownHall.com, Oct. 12, 2009, available at <http://townhall.com/Common/PrintPage.aspx?g=c9bc9aad-468e-49e2-9e1c-03225fd7ba2> (reporting that in the Netherlands, where SSM is recognized, only 12% of gay people have chosen to marry). Paul Ames, *Dutch Gays Don't Take Advantage of Opportunity to Marry* (Apr. 20, 2011), available at <http://www.globalpost.com> (report that since Neetherlands recognized SSM in 2001, "just 20 percent of gay Dutch couples are married, compared to 80 percent of heterosexual coules). See also Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, 3 IMAPP POLICY BRIEF No. 1, 1, 6 (Apr. 26, 2006), available at <http://www.marriedebate.com/pdf/imapp.demandforssm.pdf>. In 2006 the New Jersey Supreme Court found that there were "16,000 same-sex couples living in committed relationships" among a state population of 8,500,000. Lewis v.

Where homosexuals (especially gay men) do marry or otherwise enter into a committed relationship, it generally seems to happen later in life than it generally does for traditional couples.<sup>165</sup> This is not surprising. A usual motive for a traditional marriage is to start a family, so it generally

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Harris. 908 A.2d 196, 218 (N.J. 2006). Those 32,000 people are less than 0.4% of the population.

In Oregon 2,600 same-sex couples [thus 5,200 people], comprising about 20% of the of Oregon's same-sex couples, registered in the first year after Oregon instituted domestic partnerships, even though this offered most of the legal protections and benefits of marriage. Bill Graves, *Only One-Fifth of Oregon's Same-Sex Couples Opt for Union*, THE OREGONIAN, Feb. 2, 2009, available at [http://blog.oregonlive.com/news\\_impact/2009/02/domestic\\_partnerships.html](http://blog.oregonlive.com/news_impact/2009/02/domestic_partnerships.html). 70% were female. Oregon's population was estimated at 3,790,060 in 2008. See <http://quickfacts.census.gov/gfd/states/41000.html>. Thus those 5,200 people are less than 0.0014% of the population.

In three years only 6,500 couples registered under Vermont's civil union law. See Pam Belluck, *Gays Respond: 'I do,' 'I Might' and 'I Won't'*, N.Y. TIMES, Nov. 26, 2003, at A1. One reason for the low number is that "couples who came of age in the 1960's and 1970's [tended] to see marriage as a heterosexual institution symbolizing a system that they could not, or would not, want to be part of." *Id.* Only 166 of General Motors' 1,300,000 employees claimed the same-sex benefits it offered. See Maggie Gallagher, *What Is Marriage For?*, WKLY. STANDARD, Aug. 4/Aug. 11, 2003. In short, very few same-sex couples have sought legal recognition when it is available, and most (especially the males couples) had no interest in establishing legal recognition.

164. See Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006) ("divorce-risk levels are considerably higher in same-sex marriages"); DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 187 (1982) ("[A]mong gay men a long-lasting monogamous relationship is almost unknown."); Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection in America*, 17 AIDS 1029, 1031 (2003) (finding that among a sample of Amsterdam men that gay male partnerships lasted on average 1.5 years and that men in these partnerships had an average of eight casual partners per year); Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden*, IMAPP POLICY BRIEF, May 3, 2004 (study of registered partnerships in Sweden finding that gay male couples were 50% more likely to divorce, and lesbian couples were over 167% more likely to divorce than heterosexual couples); C.C. Hoff et al., *Serostatus Differences and Agreements About Outside Sex Partners Among Gay Couples*, 21 AIDS EDUC. & PREVENTION x (2009) (study finding that half of gay couples in committed relationships had explicit agreements allowing sex with others); Walter Schumm, *Comparative Relationship Stability of Lesbian Mother and Heterosexual Mother Families: A Review of the Evidence*, 46 MARRIAGE & FAM. REV. 499, 504 (2010) (finding that after about ten years in a couple relationship "37.8% of lesbian couples separated compared with 15.7% of heterosexual couples").

165. See Gary J. Gates, M.V. Lee Badgett & Deborah Ho, *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.* 9 (July 2008), available at <http://www.ssrn.com/abstract=1264106> (study finding that same-sex couples who married in Massachusetts were considerably older than opposite-sex couples who married).

occurs when the couple is young enough to bear children and handle the physical rigors of raising them. Gay couples do not bear children.

Some gay men are promiscuous to an extent incompatible with marriage.<sup>166</sup> Some gay men disdain monogamy as proper only for heterosexuals because they bear children, not a model gays should emulate.<sup>167</sup> One says: “Gay liberation was founded . . . on a sexual brotherhood of promiscuity and any abandonment of that promiscuity would amount to a communal betrayal of gargantuan proportions.”<sup>168</sup>

Due in part to promiscuity, homosexuals have high rates of disease and mental illness. Gay men became more cautious about sex after the onset of AIDs, but infection rates soon rebounded to their former levels.<sup>169</sup> Gay men also

166. In one study 43% of white male homosexuals reported having sex with 500 or more partners, with 28% having 1,000 or more sex partners. MARTIN S. BELL & ALAN P. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-09 (1978). See also Paul Van den Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. SEX RESEARCH 354 (1997) (finding similar figures). Homosexual promiscuity is acknowledged by many homosexuals. See MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL* 280-347 (1990). Even gay men with a “steady partner” tend to be promiscuous. See Jackson, *supra* note 166 (reporting that “in the Netherlands . . . homosexual men who have a steady partner have had an average of eight other sexual partners per year; lesbians were found to have more male partners over their lifetime than heterosexual women.”).

167. See DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 53 (1982); Michael Bronski, *Behind the SexPanic! Debate*, HARV. GAY & LESBIAN REV. 29 (Spring 1998); Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, LINGUA FRANCA 27 (Oct. 1997); Sheryl Gay Stolberg, *Gay Culture Weighs Sense and Sexuality*, N.Y. TIMES, Nov. 23, 1997, § 4, at 1.

168. GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 112 (1997).

169. See Centers for Disease Control and Prevention, *CDC Analysis Provides New Look at Disproportionate Impact of HIV and Syphilis Among U.S. Gay and Bisexual Men* (Mar. 10, 2010), available at <http://www.cdc.gov/nchstp/Newsroom/msmpressrelease.html> (report finding that “the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and more than 40 times that of women,” and even greater discrepancies for syphilis) [hereafter CDC Analysis]. This report stated that one reason for the high rate of HIV infection among gay men is “complacency about HIV risk.” See also Centers for Disease Control, *Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex with Men—King County, Washington, 1997-99*, MORBIDITY & MORTALITY WKLY. REPT., Sept. 10, 1999, at 773; see also Byrd, *supra* note 57, at 14 (summarizing several studies).

suffer disproportionately from many other diseases.<sup>170</sup> Homosexuals also have higher rates of suicide and mental illness and drug and substance abuse.<sup>171</sup> And, although many homosexuals brag about the absence of gender discrimination in their relationships, high levels of relationship violence exist.<sup>172</sup>

Some gays blame the pathology of promiscuity and disease on their social oppression. William Eskridge argues that

170. See Byrd, *supra* note 57, at 13-14 (summarizing several studies); Anne Tompalo & H. Hunter Handsfield, *Overview of Sexually Transmitted Diseases in Homosexual Men*, in AIDS AND INFECTIONS OF HOMOSEXUAL MEN 3 (Pearl M. & Donald Armstrong eds., 2d ed. 1989) ("homosexual men were known to be at high risk of acquiring sexually transmitted diseases"); Centers for Disease Control, Sexually Transmitted Disease Surveillance 2009, at 33 (Nov. 2010) (finding high and growing rates of syphilis infection among homosexual men).

171. See D.M. Ferguson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES GEN. PSYCH. 876 (1999) (study concluding: "Gay, lesbian and bisexual young people were at increased risks of major depression . . . generalized anxiety disorder . . . conduct disorder . . . [and] suicide attempts."); Richard-Herrelet al., *Sexual Orientation and Suicidality*, 56 ARCHIVES OF GEN. PSYCH. 867 (1999) (study finding that "same gender sexual orientation is significantly associated with each of the suicidality measures"); Christine E. Grella et al., *Influence of Gender, Sexual Orientation, and Need on Treatment Utilization for Substance Use and Mental Disorders: Findings from the California Quality of Life Survey*, 19 BMC PSYCH. 52 (2009), available at <http://www.biomedcentral.com/1471-244X/9/52> (empirical study finding that homosexuals were twice as likely to seek mental health, and substance abuse treatment); Yue Zhao et al., *Suicidal Ideation and Attempt Among Adolescents Reporting "Unsure" Sexual Identity or Heterosexual Identity Plus Same-Sex Attraction or Behavior: Forgotten Groups?*, 49 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCH. 89 (2010) (study finding homosexual and bisexual youths have higher suicide risk than others). Many gay men also suffer from eating disorders. Stacey, *supra* note 169.

172. See Byrd, *supra* note 57, at 12-13 (summarizing several studies); Lisa K. Waldner-Haugrud et al., *Victimization and Perpetration Rates of Violence in Gay and Lesbian Relationships: Gender Issues Explored*, 12 VIOLENCE & VICTIMS 173 (1997) (reporting that "47.5% of lesbians and 29.7% of gay people have been victimized by a same sex partner"); P.A. Brand & A.H. Kidd, *Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads*, 59 PSYCH. REPTS. 1307 (1986) (finding reports of abuse in 30% of lesbian relationships); C.K. Waterman et al., *Sexual Coercion in Gay Male and Lesbian Relationships: Predictors and Implications and Support Services*, 26 J. SEX RESEARCH 118 (1989); S. Owen & T.W. Burke, *An Exploration of the Prevalence of Domestic Violence in Same-Sex Relationships*, 95 PSYCH. REPTS. 129 (2004); U.S. Dep't of Justice, Office of Justice Programs, Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey 30 (July, 2000), available at <http://www.ncjrs.gov/txtfiles1/nij/181867.txt> ("Same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants—39% of lesbians reported being raped, physically assaulted, and/or stalked by a cohabiting partner at some time in their lifetimes, compared to 21% of heterosexual women. Among men, the comparable figures are 23.1% and 7.4%.").

validating SSM would “civilize gay men by making them more like lesbians.”<sup>173</sup> Both claims are weak. Society condemns promiscuity in homosexuals more than their fidelity or abstinence. One study found HIV infection of gay men in American cities to be highest in San Francisco, a famously gay friendly city. Its rate was 150% higher than in Pittsburgh, not a particularly gay-friendly city, which had the lowest rate.<sup>174</sup> Similarly, high levels of mental illness among gays are also found in the Netherlands, perhaps the most gay-friendly country in the world.<sup>175</sup>

As for marriage civilizing gay men,<sup>176</sup> probably few gay men (especially the young) will marry,<sup>177</sup> and marriages that are entered into are likely to be short-lived.<sup>178</sup> Further, if the threat of deadly diseases posed by promiscuity, including AIDS, did not reduced gay men’s promiscuity in the long term, it is unclear that a wedding ring will. Men are not domesticated by a wedding ceremony and a ring, but by a wife and children.

Gay couples are also more prone to adultery.<sup>179</sup> This is hardly surprising since, unlike traditional couples, adultery

173. ESKRIDGE, *supra* note 159, at 84. *See also* RAUCH, *supra* note 8, at 19-21.

174. “The estimated level of [HIV] infection among homosexual men ranges from 20% in a Pittsburgh study to 50% in a San Francisco study.” THOMAS E. SCHMIDT, STRAIGHT & NARROW 27 (1995) (citing many studies).

175. T.G. Sandfort et al., *Same-Sex Behavior and Psychiatric Disorder*, 58 ARCHIVES GEN. PSYCH. 87 (2001).

176. *See* GEORGE GILDER, MEN AND MARRIAGE 12-18 (5th ed. 1993); POSNER, *supra* note 51, at 312 (stating that the presence of children helps to keep married couples together).

177. *See* Gates et al. *supra* note 169, at 8 (finding that two-thirds of same-sex couples that entered into a legally recognized relationship were female).

178. *See supra* note 167 and accompanying text (finding gay male partnerships in Amsterdam last an average of 1.5 years).

179. One study of 156 male couples found that for them “fidelity is not defined in terms of sexual behavior, but rather by their emotional commitment to one another.” All the couples who had been together over five years made allowance for outside sexual activity. DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984). Andrew Sullivan exhorts heterosexuals to develop a greater “understanding of the need for extramarital outlets between two men than between a man and a woman . . . . The truth is, homosexuals are not entirely normal; and to flatten their varied and complicated lives into a single, moralistic model is to miss what is essential and exhilarating about their otherness.” SULLIVAN, *supra* note 8, at 202-204. *See also* KIRK & MADSEN, *supra* note 171, at 330 (study finding that “the cheating ratio of ‘married’ gay males, given enough time, approaches 100%”).

in gays does not threaten to create new children who would compete for resources and care with the couple's own biological children. Gay couples who marry have a high divorce rate.<sup>180</sup> They may have different expectations or preferences than do traditional married couples about adultery<sup>181</sup> as well as other matters, like the sharing of finances.<sup>182</sup>

Because of problems like these, "the American College of Pediatricians believes it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or by reproductive manipulation."<sup>183</sup>

The law could handle these different attitudes of homosexuals about marriage in one of three ways. First, it could apply the standards for traditional couples to SSM. Second, it could apply the standards appropriate for SSMs to traditional couples as well. However, both of these approaches would entail applying standards appropriate for one group to another group with very different needs.<sup>184</sup> The wiser choice, then, would be to apply to each group the distinct standards appropriate for it.<sup>185</sup> To do that, however,

180. See Andersson et al., *supra* note 167; see also Lawrence Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. FAMILY & MARRIAGE 880, 893 (2004) (finding that the dissolution rate of homosexual couples was more than three times that of heterosexual married couples, and the dissolution rate of lesbian couples was more than four times that of heterosexual married couples).

181. See Craig Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1726 (1998) (questioning if marriage may not have "the same meaning—entailing commitment to the same values—for gay people as for their heterosexual counterparts"). See also *supra* notes 171, 181 (discussing understandings and practices concerning fidelity among gay couples).

182. See Dent, *supra* note 127, at 250 & n.94.

183. American College of Pediatricians, *Homosexual Parenting: Is It Time for Change?* (rev'd Mar. 26, 2009), available at <http://www.acped.org/?CONTEXT=art&cat=22&art=50&BISKIT=2920801063>.

184. See Allen, *supra* note 123, at 1051 (stating that "[t]here is no escaping this dilemma.").

185. Some gay advocates agree. See Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 832-62 (2010) (arguing for a separate legal system for same-sex unions).



would show the error in having placed them under the same regime to begin with.

The problems of homosexuality do not mean that society should condemn it. However, they do strongly suggest that SSM is not as valuable as traditional marriage.

#### F. *Influencing Behavior and the Immutability Debate*

Some claim that sexual orientation is innate and immutable.<sup>186</sup> Therefore, heteronormativity serves no purpose but to gratuitously disadvantage and stigmatize homosexuals. There are several problems with this argument. First, not all agree that homosexuality is immutable.<sup>187</sup> Some people are bisexual, and others change their behavior.<sup>188</sup> Many same-sex households with children were created when the mother in a traditional marriage left it and entered into a lesbian relationship.<sup>189</sup> On the other hand, some women have abandoned long-term lesbian relationships and entered into heterosexual relationships.<sup>190</sup>

Further, the main purpose of privileging traditional marriage is to influence heterosexuals, not homosexuals. By celebrating traditional marriage society encourages couples who create children to do so within marriage.<sup>191</sup> Celebrating heterosexual marriage also encourages heterosexuals who

186. See Dean Hamer & Michael Rosbash, *Genetics and Proposition 8: Human Sexual Orientation Has Deep Biological Roots*, L.A. TIMES, Feb. 23, 2010, at 13 (stating that “the empirical evidence for the role of genetics in human sexual orientation has been quietly but steadily mounting over the last 15 years.”).

187. See EDWARD O. LAUMAN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 308-09 (1994) (finding evidence implying that one plausible interpretation of the pattern is that “the environment in which people grow up affects their sexuality in very basic ways” and homosexuality is more common where it is tolerated or condoned); Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 DEVELOPMENTAL PSYCH. 5 (2008) (finding the link between sexual preferences and self-identification somewhat fluid).

188. See LAUMAN ET AL., *supra* note 194; K.K. Kinnish *et al.*, *Sexual Differences in the Flexibility of Sexual Orientation: A Multidimensional Retrospective Assessment*, 34 ARCHIVES OF SEXUAL BEHAV. 173 (2005).

189. See *supra* note 57.

190. See E. Schechter, *Labels May Oversimplify Women’s Sexual Identity, Experiences*, 35 MONITOR ON PSYCH. 28 (2004).

191. This is especially important for the less well-off, who most need the stability that marriage provides. See KAY HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA* 85-86 (2006).

might otherwise not marry *or* procreate to do both. This is appropriate because of the benefits of marriage and of bearing and raising children to the couple, as well as to society.

Moreover, society can influence sexuality. Homosexual activity is more common in societies that condone it than in societies that condemn it.<sup>192</sup> Even if sexual *orientation* is immutable, sexual *conduct* is “an issue of choice.”<sup>193</sup> Children subjected to homosexual experiences may be more likely in adulthood to identify as homosexual.<sup>194</sup> There has been some success in altering homosexual behavior in adults.<sup>195</sup> Though by no means conclusive, and still the subject of heated debate, these findings suggest that sexual preference and conduct are not strictly immutable or purely genetic.

Admittedly, any change may be tenuous. Although a former homosexual may be heterosexually active, s/he may still have homosexual urges. That does not mean there was not a change. The individual’s behavior has changed. We all have temptations we resist because we believe that succumbing to them is wrong or would have undesirable consequences.

Carlos Ball considers the immutability debate irrelevant, though: “If same-gender sexual conduct, relationships, and families, however, are good . . . then whether one ‘chooses’ to be a lesbian or a gay man would become as irrelevant a question as whether one chooses to be a heterosexual.”<sup>196</sup> As this article shows, however, society has many good reasons to prefer heterosexuality.

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192. See LAUMAN ET AL., *supra* note 194, at 308-09.

193. BALL, *supra* note 10, at 101.

194. See William R. Lenderking, et al., *Childhood Sexual Abuse Among Homosexual Men: Prevalence and Association with Unsafe Sex*, 12 J. GEN. INTERNAL MED. 250 (1997); Elisa Romano & Rayleen V. De Luca, *Male Sexual Abuse: A Review of Effects, Abuse Characteristics, and Links with Later Psychological Functioning*, 6 AGGRESSION AND VIOLENT BEHAVIOR 64, 65; M.E. Tomeo et al., *Comparative Data of Childhood and Adolescence Molestation in Heterosexual and Homosexual Persons*, 30 ARCHIVES OF SEXUAL BEHAV. 535 (2001).

195. See Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES OF SEXUAL BEHAV. 403 (2003).

196. BALL, *supra* note 10, at 101.

In a group conversation, a former academic colleague of mine once referred to “gay rabbis.” When another in the group voiced surprise at “gay rabbis,” my colleague replied: “Sure. Lots of rabbis are gay—they just don’t know it.” I later wondered whether this condition should be accounted a misfortune, or a blessing. Imagine a rabbi at his 90th birthday party, surrounded by his wife and loving children, grandchildren, and great-grandchildren, and admiring colleagues and congregants. A supernatural stranger takes the rabbi aside and says: “You are a homosexual but didn’t know it. Had you known and acted on that fact, you could have had a much lustier sex life.”

The rabbi might admit the stranger’s claim. He might agree he was less attracted to women (including his wife) than most men seemed to be, and that he felt an attraction to men that most men did not seem to share. He might nonetheless say that his wife’s love and their marriage, the joys of raising their children and of having grandchildren and great-grandchildren, and the respect of his colleagues and congregation far outweighed any drawbacks of a mediocre sex life. And might we not agree?

## VII. RAMIFICATIONS

### A. *The Expressive Function of Marriage*

The law affects marriage primarily through its expressive function; i.e., “in expressing social values and in encouraging social norms to move in particular directions.”<sup>197</sup> “Because societies care about family obligations they make them part of their systems of honor[.]”<sup>198</sup> The law bolsters the honor society confers on marriage by giving it official recognition.<sup>199</sup> Advocates of SSM acknowledge that this

197. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953 (1996).

198. Scott FitzGibbon, *A City without Duty, Fault, or Shame*, in RECONCEIVING THE FAMILY, *supra* note 5, at 28, 42.

199. See generally Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989). See also MARRIAGE AND THE PUBLIC GOOD, *supra* note 61, at 2 (“Creating a marriage culture is not a job for the government . . . . But

expressive function of legal recognition of marriage—the honor and symbolic approval it confers—is the main reason for seeking legal validation of SSM.<sup>200</sup>

### 1. SSM and Respect for Marriage

In general, traditional marriage is good for the married couple, their children and society.<sup>201</sup> Not all marriages prove beneficial to the couple or their children, and some people may not be suited for marriage, but most things society promotes are not beneficial or suitable for everyone. Society promotes college attendance, for example, even though some students will drop out and not graduate and college is simply unsuitable for some people.

Many people seize the benefits of marriage on their own but, as with all goods, some do not.<sup>202</sup> So it is wise for society to promote traditional marriage by making it seem normal and attractive, especially to those who may not see its benefits on their own. Would legal recognition of SSM aid this effort? Some argue that the sight of homosexual couples marrying despite their inability to reproduce would inspire greater social respect for marriage.<sup>203</sup> At the least, it is argued, recognition of SSM would be a “free lunch”—it would benefit homosexuals by giving them the legal benefits of marriage and the social benefits of greater respect, without diminishing respect for the institution of marriage.<sup>204</sup>

The claim is implausible. Economists have taught us to doubt claims of a free lunch. “Law cannot by itself create or

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*law and public policy will either reinforce and support these goals, or undermine them.”* (emphasis in original).

200. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580 (1994-95) (referring to “marriage’s central symbolic importance in our society and culture” and the “transformative potential of [homosexuals’] right to marry”); E.J. Graff, *Retying the Knot*, The Nation, Jun. 24, 1996, at 12 (“Marriage is an institution that towers on our social horizon, defining how we think about one another.”).

201. See *supra* notes 5, 47-50, 123-33 and accompanying text.

202. See *supra* notes 29-30 and accompanying text.

203. See RAUCH, *supra* note 8, at 94-95.

204. See *supra* notes 8 & 155 and accompanying text.

define social institutions; they arise out of and are sustained by social attitudes and practices. Law can only operate at the margin . . . to affirm, to assist, to adjust institutions.”<sup>205</sup> The law’s definition of marriage has always coincided with the mainstream religious definition so that the two reinforced each other with the respect that society affords to the law and religion.<sup>206</sup> Recognition of SSM would reverse this relationship and provoke a war between the two.

SSM would not win this war quickly, or perhaps ever. Many Americans consider homosexual marriage a “mocking burlesque”<sup>207</sup> or “mere parody”<sup>208</sup> of the real thing. Thirty-one states have voted on initiatives to recognize traditional marriage only, and in all thirty-one the initiative prevailed. These states include some of the most liberal (California, Oregon, Washington, New Jersey, Hawaii, and Maine), and in most states the vote was not even close. Moreover, some who voted against these initiatives surely did so because they thought SSM deserves recognition even though they themselves do not approve of it.<sup>209</sup> Given the widespread opposition to SSM and the 31 state constitutions barring its recognition, only a Supreme Court decision could impose SSM nationwide. Such a decision would certainly provoke a

205. Carl E. Schneider, *Afterword: Elite Principle: The ALI Proposals and the Politics of Law Reform*, in RECONCEIVING THE FAMILY, *supra* note 5, at 489, 502.

206. See W. Bradford Wilcox & Steven L. Nock, *What’s Love Got To Do With It? Equality, Equity, Gender, and Women’s Marital Happiness*, 84 SOC. FORCES 1321 (2006); Vaughn R.A. Call & Tim B. Heaton, *Religious Influences on Marital Stability*, 36 J. SCIENTIFIC STUDY OF RELIGION 382 (1997). [AE: Does this cite support the statement? If not, how to rephrase?]

207. Hadley Arkes, *The Closet Straight*, NAT’L REV., July 5, 1993, at 43, 35.

208. James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, Mar. 1996, at 34, 36 (quoting Kenneth Minogue, Book Review, *A Politics of Homosexuality*, NAT’L REV., Nov. 27, 1995, at 62, 64).

209. See, e.g., Tamara Audi, Tustin Scheck & Christopher Lawton, *California Votes for Prop 8*, Wall Street J., Nov. 5, 2008, available at <http://online.wsj.com/article/SB122586056759900673.html> (mentioning a voter opposing the measure because it would not affect his marriage). In addition, Iowa voters ousted the three state Supreme Court justices who had found traditional marriage unconstitutional and had to stand for confirmation elections. See A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010.

movement to amend the Constitution, an effort that would either succeed or persist for many years.<sup>210</sup>

Dislike of homosexual marriage seems especially strong in groups in which rates of marriage have fallen the farthest, notably blacks and lower-income whites. Indeed, America is dividing into two societies, separate but unequal—the married and the unmarried.<sup>211</sup> Marriage remains strong, and divorce rates have actually fallen among the well-to-do, and their children have benefitted.<sup>212</sup> Among the less well-off, however, marriage has declined and divorce has increased—and their children suffer the consequences.<sup>213</sup> Jonathan Rauch evidently thinks these people will be inspired by the pitch: “Wouldn’t you like to get married and be just like a couple of homosexuals?”<sup>214</sup> I find that hard to believe.

210. See generally William C. Duncan, *The Case for a Federal Marriage Amendment to the Constitution, Civil Rights, Religion & Same-Sex Marriage: Where Are We Going?*, 30 T. MARSHALL L. REV. 145 (2005).

211. “[T]he United States is devolving into a separate-and-unequal family regime, where the highly educated and affluent enjoy strong and stable households and everyone else is consigned to increasingly unstable, unhappy, and unworkable ones.” Inst. for American Values, *When Marriage Disappears: The Retreat from Marriage in Middle America* 53 (Dec., 2010), available at <http://www.stateofourunions.org/2010/SOOU2010.pdf>.

212. See *id.* at 19 (finding falling divorce rate for the highly educated).

213. See HYMOWITZ, *supra* note 198, at 105-106 (arguing that it is the less well-off who most need the stability that successful marriages provide). In 2008 the poverty rate for single parents with children was 36.5%; for married couples with children it was 6.4%. Robert Rector, *Marriage: America’s Greatest Weapon Against Child Poverty* 1 (Sept. 16, 2010), available at <http://www.heritage.org/Research/Reports/2010/09/Marriage-America-s-Greatest-Weapon-Against-Child-Poverty>. One study concludes that the decline in two-parent families accounted for “almost half the increase in child income inequality and more than the entire rise in child poverty rates” between 1971 and 1989. Robert I. Lerman, *The Impact of the Changing US Family Structure on Child Poverty and Income Inequality*, 63 *ECONOMICA* 119, 137 (1996). See also Richard Fry & D’Vera Cohn, *Women, Men and the Economics of Marriage* 3 (Pew Research Center, Jan. 19, 2010), available at <http://pewsocialtrends.org/2010/01/19/women-men-and-the-new-economics-of-marriage/> (finding that “[o]verall, married adults have made greater economic gains over the past four decades than unmarried adults”); *id.* at 5-6 (finding that marriage rates have fallen for those without a college degree). In 2008, “more than two-thirds of births to women who were high school dropouts occurred outside of marriage.” Rector, *supra*, at 4.

214. See RAUCH, *supra* note 8.

For many Americans, validating SSM would distort the meaning of marriage.<sup>215</sup> “When the state does not uphold marriage’s constitutive norms, it does serious damage to marriage’s vitality and long-term viability.”<sup>216</sup> At the least, validating SSM would shift the child-centered social meaning of marriage toward an understanding of marriage as intended primarily to gratify adults.<sup>217</sup> It would be another major step in what one scholar has called “the turn toward the self in the law of marriage and family.”<sup>218</sup> And this is happening as debate is “focused almost entirely on adults and their right not to be discriminated against on the basis of their sexual orientation. The conflicting claims, rights, and needs of children were barely mentioned.”<sup>219</sup> In that case, “marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense.”<sup>220</sup> Of course, if the primary purpose of marriage is to gratify adults, it is hard to see why the law should favor marriage over other arrangements that people choose.<sup>221</sup>

215. See Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 26 (2006) (“The very act of legal redefinition will radically transform the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative.”).

216. See Sugrue, *supra* note 32, at 299.

217. Seana Sugrue calls this effect “antinomian hedonism,” which reflects “the belief that unions exist to fulfill the desires and emotional needs of those who wish to enter into them.” Sugrue, *supra* note 32, at 300. See also Amy Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 400-01 (2007) (arguing that with recognition of SSM “procreation might become less central to marriage” and that “homosexual couples might place less emphasis on sexual fidelity” which “might affect how heterosexuals view their own commitments”). See also WHITEHEAD, *supra* note 78 at 54 (presenting the traditionalist argument that the liberalization of divorce had this effect). E.J. Graff says (approvingly) that recognizing SSM would make marriage “ever after stand for sexual choice, for cutting the link between sex and diapers.” Graff, *supra* note 261, at 12.

218. Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL’Y REV. 135 (2005).

219. SOMERVILLE, *supra* note 50, at 150.

220. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 276 (2010). “Public institutions shape our ideas, and ideas have consequences; so removing the rational basis for a norm will erode adherence to that norm—if not immediately, then over time.” *Id.*

221. See *supra* note 141 and accompanying text.

Some gay people admit that recognizing SSM would erode respect for marriage—and they welcome that prospect. Nan Hunter says that validating same-sex marriages could “destabilize the gendered definition of marriage.”<sup>222</sup> Michael Warner sees the fight for recognition of SSM as an interim tactic, “a transitional moment toward the eventual abolition of marriage.”<sup>223</sup> Janet Halley predicts similar consequences:

[R]ecognition of same-sex marriage might lend momentum to the long-running erosion of the specialness of marriage. No longer privileged by restriction to *some* unions and deprived of its power to send the message that those unions are particularly good, marriage might become less, not more, meaningful. Cross-sex couples could lose interest in marriage as a result, opting to co-habit rather than to marry. Pro-marriage voting strength could erode; the social consensus that it is worthwhile to devote public and private resources to “support marriage” could break up. If this happens, rather than a convergence of same-sex with cross-sex couples in maintaining the centrality and thus the normalizing power of marriage, “mere” recognition will have contributed to the end of marriage’s centrality as a mode of social ordering.<sup>224</sup>

Such an effect seems to be occurring in the Netherlands, which began recognizing SSM in 2001. Since then, more

222. Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1TUL. J. L. & SEXUALITY 9, 12 (1991). See also SULLIVAN, *supra* note 8, at 179 (“Even those tolerant of homosexuals may find this institution [marriage] so wedded to the notion of heterosexual commitment that to extend it would be to undo its very essence.”). “[C]onferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its heart.” Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION, July 5, 2004, at 16, 16.

223. WARNER, *supra* note 119, at 88-89. Michelangelo Signorile urges homosexuals to “demand the right to marry not as a way of adhering to society’s moral codes but rather to debunk a myth and radically alter an archaic institution.” They should “fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely.” Signorile, *supra* note 132, at 161.

224. Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 101 (Robert Wintemute & Mads Andenaes, eds., 2001). “[Former President George W.] Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been.” Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers? In I DO/I DON’T: QUEERS ON MARRIAGE* 53, 58-59 (Greg Wharton & Ian Philips eds., 2004).



heterosexual couples have opted for domestic partnerships and cohabitation and fewer have married.<sup>225</sup> Some have even suggested that disparagement of the biological family might facilitate a government takeover of the traditional functions of the family.<sup>226</sup>

Some liken homosexuality to bestiality. Homosexuals understandably take great umbrage at this comparison. But in so doing they tacitly answer the question: What's the harm in recognizing SSM?<sup>227</sup> The comparative societal framework does matter in the context of engendering respect. To equate homosexuality with bestiality is reasonably seen by homosexuals as an insult.<sup>228</sup> Similarly, to equate heterosexuality and traditional marriage with homosexuality and SSM is reasonably perceived by heterosexuals as an insult to them.

Recognizing SSM and forcing Americans to honor SSM and homosexuality as "just as good as" traditional marriage and heterosexuality will diminish respect for government and the law in general and accelerate social disintegration. "[A] social order based on laws can be maintained without massive coercion only if most people most of the time abide, as a result of supportive social norms, by the social tenets embedded in the law . . . ." <sup>229</sup> People are more likely to cooperate if encouraged to do so by respected authority.<sup>230</sup> "[M]arriage's constitutive norms also serve to uphold other

225. See M. Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands*(working paper, Univ. of Sherbrooke) (2009).

226. See generally Allan Carlson, *Equality Or Ideology? Same-Sex Unions in Scandinavia*, in *WHAT'S THE HARM?*, *supra* note 26, at 263.

227. See McClain, *supra* note 155 at 1251; see also *supra* note 8 and accompanying text.

228. However, before long it may be possible to gestate a human being inside an animal. See SOMERVILLE, *supra* note 50, at 128. If an animal is to some extent the biological parent of a child, does marriage with animals become defensible?

229. AMITAI ETZIONI, *THE MONOCHROME SOCIETY* 171 (2001). See also PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); see also HARRY M. CLOR, *PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW AND PORNOGRAPHY* (1996); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1995).

230. See Lynn Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003).

forms of social order, including state order, especially republican order. Hence, the demise of marriage can be expected to weaken the norms of other institutions, including the state.”<sup>231</sup> Recognizing SSM and normalizing homosexuality will also weaken our commitment to others. Traditional marriage is a model for that commitment, and the family is the school in which children learn to care about others. Homosexual relationships are less enduring and faithful than traditional marriages and thus less a model for commitment to others, and homosexual households are less likely to teach that value.<sup>232</sup>

In liberal societies like America, social solidarity, or communitarianism, competes with individual freedom, or autonomy. Our Constitution is intended to “secure the Blessings of Liberty,” but also to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare.”<sup>233</sup> Solidarity has waned in America in recent decades.<sup>234</sup> The reasons for the decline are complex and hazy, but surely one reason is the belief of many that our traditional values have been not merely abandoned but dishonored by our government.

Again, our commitment to rights in America stems from religion.<sup>235</sup> So also does our sense of duty to people outside our families and circle of friends. For most Americans, the norm of doing unto others as we would have done unto us and of helping those in need even if they are strangers, come from Christianity and Judaism. As our government and law have deprecated the faith of most Americans, these tenets too have suffered, and may decline further in the future. Many parents who dislike the contempt for religion and traditional values that is common in public schools remove

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231. Sugrue, *supra* note 32, at 299.

232. See *supra* notes 165-88 and accompanying text.

233. U.S. CONST. pmb1.

234. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

235. See *supra* note 34 and accompanying text.

their children to private schooling.<sup>236</sup> They may also withdraw their support for public schools, thereby further eroding social solidarity.

A further effect of this conflict will be increasing geographic segregation of America into areas that honor traditional values and areas that do not. This has already occurred as a few states have recognized SSM, domestic partnerships, or civil unions while most prefer traditional marriage. Some jurisdictions outlaw discrimination against homosexuals; others do not. Some public schools teach approval of homosexuality;<sup>237</sup> others do not. Many traditional families flee left-leaning, pro-homosexual urban areas for areas with more conventional values. America has always had social differences between regions and between urban, suburban, and rural areas, but these differences seem to be deepening, and attitudes toward the family are an important part of the division. This trend will further erode the social unity needed to address problems that are best handled at the national level.

The alienation of traditional religionists is aggravated by the further insistence that private service providers aid and abet such homosexual practices as same-sex weddings<sup>238</sup> and artificial insemination of women in lesbian partnerships.<sup>239</sup> The law sometimes silences those who oppose the homosexual movement<sup>240</sup> and has denounced passages from the Bible as “hate speech.”<sup>241</sup> Some in the homosexual

236. Enrollment in Christian schools has been growing and is expected to continue to grow. See National Center for Education Statistics, *The Condition of Education 2006*, Indicator 3, Trends in Private School Enrollment (2006), available at <http://nces.ed.gov/pubs2006/2006072.pdf>; National Center for Education Statistics, *Projections of Education Statistics to 2014*, Appendix A: A Projection Methodology: Enrollment (2006).

237. See *infra* Part VI-B.

238. See *Wilkock v. Clane Photography, L.L.C.*, HRD No. 06-12-20-0685, Human Rights Comm’n of New Mexico, available at <http://volokh.com/files/willockopinion.pdf> (visited May 18, 2009).

239. See *N. Coast Women’s Care Med. Group, Inc. v. San Diego Superior Court*, 189 P.3d 959 (Cal. 2008).

240. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (upholding punishment of public school student who wore at school a t-shirt expressing opposition to the school’s official program condoning homosexuality).

241. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 605 (9th Cir. 2004) (referring to passages from the Bible posted by Peterson in his work cubicle as

movement make no secret of their desire to drive their opponents out of the public square.<sup>242</sup> The effort is succeeding.<sup>243</sup> They try to deny the Boy Scouts use of public facilities<sup>244</sup> and to exclude traditionalist religious organizations from college campuses.<sup>245</sup> They have forced the closure of Catholic welfare agencies because they would not extend spousal benefits to SSMs<sup>246</sup> or offer adoption services to homosexual couples.<sup>247</sup> They demand that public schools teach young children that homosexuality is normal and acceptable.<sup>248</sup>

Protection of unborn children is another traditional value with strong connections to religion, so the legal war over abortion offers an instructive comparison. Many Americans

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“hurtful,” “hostile and intolerant,” and “demeaning and degrading”). [AE: This cite doesn’t support “hate speech.” At a minimum, “hate speech” needs to be taken out of quotes above the line. That phrase is never used.]

242. See MARSHALL K. KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE ‘90S*, at 189 (1989) (advocating depicting traditionalists as “[h]ysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged,” thereby rendering them “so discreditable that even Intransigents will eventually be silenced in public . . .”).

243. See Matthew J. Franck, *In the Gay Marriage Debate, Stop Playing the Hate Card*, WASH. POST, Dec. 17, 2010 available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR201012170528.html> (reporting incidents of intimidation of supporters of traditional marriage); Michael Foust, *Pollster: Most “Gay Marriage” Polls Skewed* (Aug. 16, 2010), available at <http://www.bpnnews.net/bpnnews.asp?id=33524> (reporting that most Americans responding to automated polls oppose recognition of SSM, but that, when contacted by a live caller, most favored it).

244. The effort has succeeded in some cases and not in others. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the Boy Scouts is an expressive association that has a First Amendment right to exclude as officers those who do not conform to its standards of conduct); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (holding that city could not favor Boy Scouts in leasing public park land because it is a religious organization); *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (holding that city could bar Sea Scouts from use of municipal marina).

245. See *Christian Legal Soc’y v. Martinez*, 130 S.Ct. 2971 (June 28, 2010) (upholding public law school’s refusal to accredit Christian organization that did not accept committed homosexuals as officers).

246. See Michelle Boorstein, *Citing Same-Sex Marriage Bill, Washington Archdiocese Ends Foster-Care Program*, WASH. POST, Feb. 17, 2010, at B1.

247. See Patricia Wen, *They Cared for the Children: Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Year of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1.

248. See *infra* notes 380-82 and accompanying text.

(perhaps a majority)<sup>249</sup> still resist the Supreme Court's invention of a constitutional right to abortion.<sup>250</sup> In nearly forty years public opinion about abortion has changed very little. The reason for the differences is clear. Desegregation eradicated a local religious heresy and brought American law back into line with traditional Judeo-Christian principles and with the attitudes of the rest of the world.<sup>251</sup> The Supreme Court's abortion decisions flouted most mainstream American religion and the beliefs of most of the rest of the world.

The homosexual movement faces much greater opposition than the pro-abortion movement. It violates Jewish and Christian tenets that until recently were unquestioned for nearly 3,000 years. It also offends most of the rest of the world. Clearly this opposition will not vanish in this century. Further, legal abortion rarely poses dilemmas of individual conscience. With a few exceptions (such as a nurse ordered to participate in an abortion), citizens are not expected to aid, abet, or condone abortions; they simply may not disrupt them. As noted, the demands of the homosexual movement for active cooperation from private parties have already caused many disputes, and these will proliferate if the movement continues to advance. Sometimes innocent bystanders are injured in these clashes. The cases where Catholic agencies terminated valuable social services are just two examples.<sup>252</sup>

Marital customs have varied greatly from place to place and from time to time. However, one constant is that marriage has always served to attach mothers and fathers to

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249. Gauging public opinion about abortion is tricky. Obviously many Americans are conflicted about it, and their responses to poll questions often vary considerably depending on the phrasing of questions. See Dalia Sussman, *A Question of What to Ask*, N.Y. TIMES, Feb. 28, 2010, Week in Review, at 5 (stating that "in evaluating results [of public opinion polls], the way a question is worded can be significant[.]" and discussing abortion as one issue on which this is true).

250. See *Roe v. Wade*, 410 U.S. 113 (1973).

251. See *infra* Part VI-A-4.

252. See *infra* notes 307-8- and accompanying text.

their children and to each other.<sup>253</sup> “Marriage (and only marriage) unites the three core dimensions of parenthood—biological, social and legal—into one pro-child form: the married couple.”<sup>254</sup> Correlatively, marriage has always been exclusively heterosexual.<sup>255</sup> Marriage, in other words, has always served as regulation of breeders. As David Blankenhorn puts it: “marriage is not primarily a license to have sex. Nor is it primarily a license to receive benefits or social recognition. It is primarily a license to have children.”<sup>256</sup>

The universality of this norm suggests that there is a good reason for it: if a practice helps human communities to survive and flourish, it “will be routinely rediscovered by every culture, without need of either genetic descent or cultural transmission of the particulars.”<sup>257</sup> Perhaps, then, it would be unwise to transmogrify the social nature and function of marriage. As Seana Sugrue puts it, “the erosion of marriage has a tendency to erode other institutions.”<sup>258</sup>

## 2. A Hypothetical: The Martin Luther King and Jefferson Davis Holiday

A hypothetical may help. Imagine a proposal to change the Martin Luther King holiday to the Martin Luther King **and Jefferson Davis** holiday. How could anyone oppose this change? Its material cost would be virtually zero, and it would extend equality to fans of the Confederacy who now

253. “In all societies, marriage shapes the rights and obligations of parenthood.” Blankenhorn, *supra* note 93. *See also supra* notes 140, 142-43 and accompanying text.

254. Blankenhorn, *supra* note 93, at 23.

255. “Recognized marriage has invariably been restricted to heterosexual couples . . . .” Wilson & Daly, *supra* note 125, at 203. “Culture and religions throughout history have recognized various forms of marriage. Same-sex marriage has not been one of them.” STEVEN F. NOLL, TWO SEXES, ONE FLESH: WHY THE CHURCH CANNOT BLESS SAME-SEX MARRIAGE 41 (1997). *See also* George W. Dent, Jr., *The Defense of Traditional Marriage*, 4 VA. J.L. & POL. 581, 584 n.9 (1999).

256. Blankenhorn, *supra* note 93. “People wed primarily to reproduce.” *Id.* (quoting anthropologist Helen Fisher).

257. DANIEL C. DENNETT, DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 487 (1995). *See also* Allen, *supra* note 123, at 1048 (“several features [of marriage] are remarkably constant across times, cultures, and religions and must therefore reflect a universal human condition”).

258. Sugrue, *supra* note 32, at 310.

feel like second class citizens because of their affectional preference. More generally, it would promote equality by affording equal legal and social respect to all choices rather than privileging one preference simply because it is held by the majority.

However, I suspect (and hope) that most Americans would reject this change because of its expressive effect. It would, in the view of most Americans, change the meaning of the holiday from one that honors racial equality to one that equally expresses indifference between racial harmony and racism. Some might contest this characterization, claiming that the change would only honor the courage and solidarity of the Confederates. However, the majority would be justified in attaching the meaning they see. If this makes fans of the Confederacy feel bad, that is unfortunate—the purpose of the Martin Luther King holiday is not to harm anyone. But it can't be helped—society has a right (within the limits of the Constitution) to champion some values and not others. Society is just as warranted in preferring heterosexuality and traditional marriage as it is in preferring civil rights and racial equality. No valid moral principle dictates otherwise.

### 3. The Precedent of Illegitimacy

An instructive precedent is the destruction of the law's ancient preference for legitimate children.<sup>259</sup> This preference, it was argued, unfairly punished and stigmatized bastards for the sins of their parents. The Supreme Court overturned most legal discrimination against illegitimates as a violation of Equal Protection.<sup>260</sup> The sentiment underlying the Court's rulings was not controversial. No one favored the stigmatizing of bastards for its own sake. The legal and social stigmas were intended to deter adults from conceiving children outside of marriage

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259. The legal and social ostracism of illegitimate children dates at least to the Old Testament. *See Deuteronomy* 23:2 ("A bastard shall not enter into the congregation of the LORD; even to his tenth generation shall he not enter into the congregation of the LORD.") (KJV).

260. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (disapproving of laws "imposing disabilities on the illegitimate child").

because children do best when raised by their biological parents who are married and because illegitimacy threatens social disruption from conflicting claims of children with different parents.

However appealing the motives for acceptance of illegitimate children, it was followed by a sharp drop in the normativity of marriage and a steep rise in the rate of illegitimacy.<sup>261</sup> Despite the legal acceptance of illegitimacy, it is still generally damaging to children.<sup>262</sup> In some areas illegitimacy reached levels so high as to damage entire communities. Marriage is a social as well as a legal institution. If illegitimate children are few, even they perceive marriage as the norm that everyone (themselves included) is expected to follow. The behavioral problems (like crime, drug abuse and poor academic performance) to which illegitimate children are prone are also confined by the influence of the vast majority of children who are legitimate. When illegitimacy spreads, though, these behavioral problems are no longer seen as pathological aberrations but as normal—an example of “defining deviancy down.”<sup>263</sup> Schools cease to function effectively. Crime and drug abuse thrive, driving out community residents who can leave and victimizing residents who cannot leave.

The Supreme Court mandated formal legal equality for illegitimate children. Unfortunately, illegitimate children

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261. Between 1960 and 2004 the percentage of children born out of wedlock rose from 5.3 to 35.7 percent. BARBARA DAFOE WHITEHEAD & DAVID POPENOE, *THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 37 (2006). The rate reached 37 percent in 2005. *Babies Born to Singles Are at Record: Nearly 4 in 10*, N.Y. TIMES, Nov. 22, 2006, at A19. Of course, the legal acceptance of illegitimacy was not the only factor causing this epidemic. Many other changes that wracked American society in this period may have contributed to it. The liberalization of divorce law, for example, and the ensuing explosion of divorce rates, sullied the prestige of marriage.

262. See AMY L. WAX, *RACE, WRONGS, AND REMEDIES* 58 (2009), stating:

A growing body of research shows that children who grow up with single or unmarried parents are less well-off on many measures. In addition to having lower educational achievement and completing fewer years of schooling, they experience more behavioral and psychological problems throughout life and have less stable adult relationships.

See also WHITEHEAD & POPENOE, *supra* note 322, at 33-34.

263. This term was coined by Daniel Patrick Moynihan. See Daniel Patrick Moynihan, *Defining Deviancy Down*, AM. SCHOLAR, Winter 1993, at 17.



were not hurt primarily by their legal status, but by the absence of a mother or father in their lives. Children in general probably suffered more injury from the epidemic of illegitimacy than they benefitted from its legal acceptance. Moreover, the change is difficult to reverse. When a social institution is suddenly stripped of the respect it accumulated over many centuries, how can it be quickly restored? We have no quick fixes, and even long-term solutions are elusive.<sup>264</sup>

Recognition of SSM would probably produce similar effects. It would make the minority of the small minority of homosexuals who wed feel better about themselves and enhance their respect somewhat. However, it would also further diminish respect for and the normativity of marriage, with concomitant detriment for individual adults, society as a whole, and, especially, for children.

#### 4. The Desegregation Analogy

Although Americans have rejected SSM every time they could vote on it, gay activists argue that public attitudes would soon change dramatically if gay rights and SSM were foisted onto the public. They invoke the precedent of racial integration and, in particular, the eradication of anti-miscegenation laws by the Supreme Court in *Loving v. Virginia*.<sup>265</sup> As America accepted desegregation and interracial marriage, it is said, so it will quickly and calmly accept SSM.

The analogy is most instructive—but it argues strongly against recognizing SSM. First, the relationship of religion to racial oppression is completely different from its relationship to the homosexual movement. Christianity triumphed in the Roman Empire due in part to its ethnic universality. As St. Paul said, in Christianity “there is neither Greek nor Jew . . . Barbarian, Scythian, bond nor

264. See WAX, *supra* note 234, at 84 (stating that “no social program has yet been devised that can arrest these trends”).

265. 388 U.S. 1 (1967). See R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008) (comparing interracial and same-sex marriage).

free: but Christ is all, and in all.”<sup>266</sup> There is no history of racial caste systems or of anti-miscegenation laws in Western culture.

In the American South the religious justification for racial oppression and segregation did not gel until the early 19th Century.<sup>267</sup> Until then slavery needed no justification; it was an ancient and widespread institution.<sup>268</sup> Only when the charge that slavery offended Christianity gained wide acceptance was it necessary to contrive a religious justification for slavery. This doctrine never took hold outside the American South, however. Thus, when the Supreme Court held segregation unconstitutional, it was simply rejecting a local heresy<sup>269</sup> and returning America to orthodox Christian views.

Race holds a unique place in American history—it was the principal issue over which America fought its only civil war. Race also holds a unique place in American law. It was the basis for three amendments to the Constitution,<sup>270</sup> and is the subject of innumerable anti-discrimination laws.<sup>271</sup>

Western legal tradition and Judeo-Christian theology on SSM and homosexuality are almost exactly the opposite of what they were (and are) on slavery and racism. In Judaism and Christianity homosexual acts have long been denounced as a grave sin, and Western law has generally treated homosexual acts as crimes, often as capital offenses.<sup>272</sup> For the Supreme Court to mandate equality for SSM and

266. *Colossians* 3:11 (KJV).

267. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* 539 (2009) (describing the beginning of racist ideology and its inconsistency with traditional Christianity and the Christian beliefs of the founders).

268. The Popes condemned slavery at least from 1435. See Loel S. Panzer, *The Popes and Slavery*, *HOMILETIC & PASTORAL REV.*, Dec. 1996, at 1, available at [www.churchinhistory.org/pages/booklets/slavery.htm](http://www.churchinhistory.org/pages/booklets/slavery.htm). However, slavery long continued to be tolerated in many areas of Christianity.

269. At the time of the decision in *Loving* only sixteen states had anti-miscegenation laws. See *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

270. U.S. CONST. amends. XIII-XV.

271. See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (2010) (federal law barring racial and other forms of discrimination in many contexts).

272. See *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (“Homosexual sodomy was a capital crime under Roman law.”).

homosexuality, then, would not snuff out a local heresy and return the law to Western and Judeo-Christian orthodoxy, but would trample on Western and Judeo-Christian norms and enshrine heresy.

The religious differences between the two cases are reflected in the ecclesiastic and international responses they provoked. Desegregation and the eradication of anti-miscegenation laws provoked some religious opposition in the American South, but not in most of the nation or anywhere else in the world. Indeed, it has been argued that the national push for desegregation was motivated in part by concern that the subordination of blacks had become an embarrassment for America in the Cold War with the Soviet Union.<sup>273</sup> Desegregation brought us into line with the beliefs of the rest of the world.

By contrast, homosexual activity is widely disapproved by the world's major religions and by most other nations. The experience of the Anglican Communion is instructive. The Episcopal Church, the American arm of the Anglican Communion, condoned the ordination of a homosexual bishop. The international hierarchy, led by the Archbishop of Canterbury, showed signs of accepting this action. However, members of the Communion in Africa, where the most Anglicans now live, made clear that they opposed ordination of homosexuals and would, if necessary, split from the mother church over the issue. The Catholic Church continues to condemn homosexual activity and is unlikely to change its attitude in this century, if ever. Among Muslims, Western approval of homosexuality is often cited as a prime example of the West's immorality.<sup>274</sup> Even the European

273. See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 182-84 (2004).

274 Muslim nations have consistently blocked efforts to adopt, or even discuss, an international accord condemning discrimination against homosexuality. See James Tillman, *UN General Assembly Eliminates Reference to "Sexual Orientation," Gender Identity*, LIFESITENEWS (Dec. 21, 2009, 12:15 PM), available at <http://www.lifesitenews.com/ldn/2009/dec/09122102.html>; Andrew Osborn, *Muslim Alliance Derails UN's Gay Rights Resolution*, GUARDIAN, Apr. 25, 2003, at 17, available at <http://www.guardian.co.uk/world/2003/apr/25/gayrights.andrewosborn>.

Court of Human Rights and the French Constitutional Council have denied there is a right to recognition of SSM.<sup>275</sup>

America's political reaction to the abolition of anti-miscegenation laws is also instructive. Before the Supreme Court's ruling in *Loving* many state anti-miscegenation laws had already been rescinded by legislative or judicial action. In no state was a referendum passed to restore the old law. By contrast, the push for SSM provoked broad opposition, and referenda to restore traditional marriage succeeded in all 31 states where the issue reached the ballot.<sup>276</sup> Further, most African-Americans reject the comparison; most oppose recognition of SSM.<sup>277</sup> Thus in every salient respect the circumstances of the homosexual movement are almost the exact opposite of the desegregation movement.

### 5. Polygamy, Incest, and Equality

Granting normative equality to SSM will make it logically difficult or impossible to deny like treatment to some other marital practices currently disapproved, like polygamy and incest,<sup>278</sup> and some other sexual activities that are now illegal in many places, like prostitution and pornography. Carlos Ball characterizes such claims as "the typical essay

275. See *European Court Rules Gay Marriage Not Universal Human Right, Says Countries Can Make Own Rules*, available at <http://www.foxnews.com/world/2010/06/25/european-court-rules-gay-marriage-universal-human-right/>. The French Constitutional Council—the highest French court on constitutional issues—recently rejected a constitutional demand for recognition of SSM. See Lauren Funk, *French High Court Affirms Traditional Marriage* (Feb. 3, 2011), available at [http://www.c-fam.org/publications/id.1782/pub\\_detail.asp](http://www.c-fam.org/publications/id.1782/pub_detail.asp).

276. See *supra* note 270 and accompanying text. See also Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153 (2009) (discussing the radically different political responses to the two judicial phenomena).

277. See Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks are Divided on Prop. 8*, L.A. TIMES, Nov. 8, 2008, at A1 (reporting that nearly two-thirds of black voters voted for Prop. 8).

278. See, e.g., David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 491 (1996). Marriage between close relatives is now forbidden in all states. See Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 778-86 (2001).

that discusses the parade of horrors.”<sup>279</sup> Significantly, he does not refute that vision and he seems to condone it for homosexual relationships.<sup>280</sup> As recognition of SSM has gained credence, polygamy has also ceased to be unthinkable in America. A recent manifesto signed by hundreds of scholars and political activists called for legal validation of “committed, loving households in which there is more than one conjugal partner.”<sup>281</sup>

Incest is also garnering more respect.<sup>282</sup> If two persons of the same-sex can marry, it is hard to see why two brothers or three sisters cannot marry. Even for heterosexual couples who bear children, the scientific argument against incest based on the threat of birth defects is weak.<sup>283</sup> Moreover, the ban on incest discriminates against close relatives who want to marry without having a sexual relationship.<sup>284</sup>

This is not surprising because the primary argument for recognizing SSM is the principle of autonomy; the idea that people should be free to do as they wish so long as they do not cause some fairly clear, direct harm to others.<sup>285</sup> The Supreme Court invoked autonomy in nullifying criminal sodomy laws.<sup>286</sup> The same principle argues for polygamy.<sup>287</sup>

279. See BALL, *supra* note 10, at 243 n.131; Raphael Lewis, *Opponents Warn Lawmakers that Polygamy Will Be Next*, BOSTON GLOBE, Feb. 10, 2004 (“Advocates of same-sex marriage . . . dismissed the argument by their opponents [that SSM leads to polygamy] as ‘an old myth’ that has little to do with fundamental rights of people.”).

280. Ball says that “polygamous *heterosexual* relationships . . . , at least in this country, have been built around traditional gender roles and a pronounced disparity of power between the partners . . . .” BALL, *supra* note 10, at 114 (emphasis added).

281. BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS 2 (July 26, 2006).

282. See Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337, 359 (2004) (“I find something unseemly about the efforts of many gay advocates to deny the analogy [between anti-sodomy and anti-incest laws]. They are a group of people who have gained their own liberty paying scant heed to the liberty of others.”).

283. See Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, April 4, 2002. Most incest and endogamy laws are also overly broad in that they forbid many relationships with no close blood tie. See *id.*

284. See MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Byrd, *supra* note 57, at 9.

285. See *Lewis v. Harris*, 908 A.2d 196, 228 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (stating that the relevant principle is the “liberty to choose, as a matter of personal autonomy,” whom to marry); BALL, *supra* note 10, at 34-35.

286. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

Indeed, the autonomy argument seems more powerful for polygamy and incest than for SSM because the former have been and still are common to many societies,<sup>288</sup> while the latter has almost never been tolerated anywhere.

Arguments for SSM, polygamy, and incest also inevitably raise the question whether government should prefer *any* sort of marriage over non-marital living relationships. Chai Feldblum describes her own arrangement with four other women who share expenses and chores (including child care), but whose relationships are not sexual and who do not considered themselves married.<sup>289</sup>

## 6. The Burden of Proof and the Dubious Benefits of SSM

Gay activists claim there is little empirical evidence that condoning homosexuality and SSM would harm society. True, but the reason is that these steps have never been tried except in a few experiments too new to produce clear results. It also follows, of course, that gay advocates cannot prove that they will *not* harm society. Given this uncertainty, who should bear the burden of proof? Some believe it rests with the defenders of traditional norms. As one gay activist put it: “We ought to pull the pin and see what happens.”<sup>290</sup>

It is astonishing that so many educated people are willing (even eager) to take this approach. In other areas, such as climate change, most educated people more prudently advocate the precautionary principle, which advises: “Avoid

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287. See Andrew F. March, *Is there a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, J. MORAL PHIL. (forthcoming), available

at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1346900](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346900) (arguing that “the four most plausible arguments compatible with public reason for an outright ban on all forms of polygamy are unvictorious”).

288. In non-Western societies polygamy is the norm. See POSNER, *supra* note 51, at 69. In Europe endogamy was only slowly suppressed after Christianity was established. See JACK GOODY, *THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE* 31-33 (1983).

289. See also Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302 (2010) (referring to “care networks”).

290. Christine Pierce, *Gay Marriage*, 26 J. SOC. PHIL. 2, 10 (1995).

steps that will create a risk of harm . . . . In a catchphrase: Better safe than sorry.”<sup>291</sup>

Compared with the risks of recognizing SSM, the potential benefits are meager.<sup>292</sup> The material benefits of legally valid marriage are small,<sup>293</sup> the number of homosexuals is small,<sup>294</sup> and not all of them would marry anyway. Thus, as many fans of SSM concede, the main benefit would be symbolic.<sup>295</sup>

Much of the argument for validating SSM focuses on the supposed benefits to children living with same-sex couples.<sup>296</sup> The claim is dubious. The number of children affected is now small and likely to remain so.<sup>297</sup> Giving same-sex relationships the label “marriage” will not change the underlying reality or many people’s opinion of the arrangement. Many people already have shared custody of children without feeling a need to have the arrangements

291. Cass R. Sunstein, *Beyond the Precautionary Principle* 2 (John M. Olin Law & Economics Working Paper No. 149, 2003), available at <http://ssrn.com/abstract=307098>. See also SOMERVILLE, *supra* note 50, at 96, 106-07 (highlighting the dangers of rejecting the concept of the natural).

292. See generally Allen, *supra* note 123.

293. For many married couples the most significant legal consequence of marriage is the “marriage penalty” in the federal income tax. See George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU. J. PUB. L. 419, 423 n.21 (2004).

294. A recent report by the Centers for Disease Control found that “the proportion of men who reported engaging in same-sex behavior within the past five years” was 2% of the overall U.S. population, or 4% of the U.S. male population. CDC Analysis, *supra* note 175. Since these figures include some men who rarely (perhaps only once in their lives) engaged in gay sex, the number of men who are predominantly homosexual is presumably substantially smaller. One extensive study estimated the number of exclusively homosexual males as 2.5%. D. Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Resources*, 37 DEMOGRAPHY 139, 144 (2000).

295. See *supra* note 261 and accompanying text.

296. See *supra* note 100 and accompanying text.

297. Quite a few gay men have never lived with a same-sex partner. See Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 143 (2000) (about 32 percent of gay men have never lived with a same-sex partner). The number of lesbian couples that have children in the home is low, and for gay male couples the number is even lower. See *id.* at 150 (about 21.7 percent of lesbian couples and 5.2 percent of gay male couples have children in the home). The figures jibe with the low rates of registration of same-sex marriages and homosexual domestic partnerships where such arrangements are legally recognized. See *infra* note 166.

labeled “marriage.”<sup>298</sup> There’s no reason why children raised by same-sex couples should need it. The possible benefits of legal recognition of SSM are so paltry that many gays do not consider legal recognition of SSM and important or even a desirable goal.<sup>299</sup>

A few countries now recognize SSM. In 20 years or so we will have some idea of its social effects. If, contrary to my expectations, SSM is shown to cause no harm, we can then follow suit. If, however, we recognize SSM now and it then causes harm, it will be difficult to stop further damage, much less to repair the damage already done. California briefly recognized SSM between the time when the state supreme court imposed it on the state and the re-establishment of traditional marriage by Proposition 8. A major issue then was the status of SSMs that had been recognized in the interim period. Would these marriages remain valid; or as having once been valid but now invalid; or as having never been valid? Whatever the decision, it would precipitate a host of legal difficulties. Any broader, more sustained recognition of SSM would be much harder to undo.

## 7. Legal Alternatives to Marriage

Some propose a compromise by creating a new legal status—often called domestic partnership or civil union—that would offer the legal features of marriage to homosexuals while preserving the traditional, heterosexual definition of the term “marriage.” The usual argument for this compromise is that the word “marriage” has powerful religious and historical significance independent of its legal

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298. For example, some single mothers have their own mothers help raise their children. It may be desirable for the grandmother to be given legal authority in order to handle the child’s affairs. However, there would seem to be no benefit in labeling the relationship between the mother and the grandmother “marriage.”

299. See ANDREW J. CHERLIN, *THE MARRIAGE GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 122 (2009) (stating that only in America are gay people campaigning so determinedly for recognition of SSM, and that most gay men and lesbians in Europe view marriage as an oppressive heterosexual institution).



incidents.<sup>300</sup> Thus, offering homosexual couples the legal incidents without the name “marriage” would make everyone happy.

There are several problems with this proposal. First, it might not satisfy anyone. If the legal incidents of the new status are the same as for marriage, those who consider same-sex relationships less valuable than traditional marriage would be upset despite the use of a different word. Most who favor SSM would also be unhappy because they realize that the primary benefit of marriage is precisely the expressive effect of having SSM treated identically to conventional marriage.<sup>301</sup> Using a different name would forfeit much of that effect.<sup>302</sup> In sum, creating a new category with the same legal features as marriage but without the name might do the damage that defenders of traditional marriage fear from SSM without giving proponents of SSM the benefits they seek.

A further problem is that some courts have held the compromise position unconstitutional because they saw no rational basis for offering homosexuals the legal incidents of marriage but not the name.<sup>303</sup> Another is whether the new category would also be available to different-sex couples who want to avoid the term “marriage.”<sup>304</sup> It would be hard to justify denying them that option, but giving them the option

300. See *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) (stating that “the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties”).

301. See *supra* notes 165–88 and accompanying text. See also CAN GOVERNMENT STRENGTHEN MARRIAGE?, *supra* note 131, at 9 (arguing against the creation of new categories that would “blur the distinction between marriage and non-marriage.”).

302. See Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL’Y & L. 291, 338 (2001) (stating that a separate structure for homosexuals would convey “a message that these unions were in some way second class units unworthy of the term ‘marriage’ . . . that these are less important family relationships”); see also *Lewis v. Harris*, 908 A.2d 196, 227 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (quoting the foregoing passage).

303. See, e.g., *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010).

304. See *Haldeman v. Dep’t of Revenue*, TC-MD070773C (Or. Tax Ct. Sept. 24, 2008), available at [http://www.ojd.state.or.us/tax/TaxDocs.nsf/%28\\$All%29/1C672AA03BF8EB22882574EF00821974/\\$File/070773CDECHaldeman.pdf](http://www.ojd.state.or.us/tax/TaxDocs.nsf/%28$All%29/1C672AA03BF8EB22882574EF00821974/$File/070773CDECHaldeman.pdf) (rejecting constitutional challenge to state law limiting domestic partnerships to same-sex couples).

would end the unique status of marriage for different-sex couples.

Some argue for a panoply of legal choices, including (but not limited to) domestic partnerships and civil unions. Even some homosexuals criticize this idea as “marriage-lite” and argue that it would “represent a challenge to the primacy of marriage itself.”<sup>305</sup> It would certainly facilitate the argument that the law should ignore such status altogether and look solely to the actual relationships between people:<sup>306</sup> once marriage ceases to be unique, it’s hard to see why the law should pay much attention to the label people choose.

Homosexuals point to some legal problems they face because they cannot legally marry. In this regard homosexual relationships are not unique. There are many situations where people want to share some legal capacity (such as custody of a child) or expenses. These problems can be handled case-by-case. For example, if hospital visitation by homosexual partners is a problem, a law can be passed to address that problem. However, there may be enough issues warranting legal attention to merit a new legal category (perhaps called “personal associations”) with a list of legal features. However, this category would not be intended for the bearing of children so its legal features would be quite different from those of marriage. It would probably not be perceived as “marriage-lite” and therefore would not diminish the prestige of the real thing.

### B. Education

Public schools are one vehicle by which society transmits its norms to the young. A goal of the homosexual movement is to mandate that children in public schools be taught that homosexuality is normal and just as good as heterosexuality. This goal has been attained in many places.<sup>307</sup> In one case in

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305. Carpenter, *supra* note 81, at 321.

306. *See supra* note 118-21 and accompanying text.

307. The federal Department of Health and Human Services now calls for applicants for federal funding for sex education programs “to consider the needs of lesbian, gay, bisexual, transgender, and questioning youth and how their programs will be inclusive of and non-stigmatizing toward such participants.” DEPARTMENT OF HEALTH & HUMAN SERVICES, HHS-2010-ACF-ACYF-AEGP-0123, TITLE V STATE

Massachusetts, an eighth grade teacher described and discussed with her class the uses of dildoes.<sup>308</sup> In another the AIDS Action Committee of Massachusetts, with the help of the Massachusetts Department of Public Health, produced and distributed a booklet entitled *The Little Black Book: Queer in the 21st Century*.<sup>309</sup> *Inter alia*, the booklet gave tips to boys on how to perform oral sex on and masturbate other males, and how to safely have someone urinate on you for sexual pleasure, and included a directory of bars in Boston where young men meet for anonymous sex.<sup>310</sup> The booklet was offered to students attending a conference on gay and lesbian issues held at a public high school.<sup>311</sup>

Although the Committee later apologized for giving the booklet to high school students,<sup>312</sup> it did not apologize for its content. Thus it seems that, but for a few extreme details, such pedagogy could become routine. Homosexuals are on average more promiscuous than heterosexuals,<sup>313</sup> and education and publicity will at least reflect that fact, as did this booklet. Obviously the message will not be the importance of marriage to responsible procreation. Once SSM is validated, it may be dangerous for a public school teacher to suggest that heterosexuality or traditional marriage may in any way be superior to homosexuality or

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ABSTINENCE EDUCATION GRANT PROGRAM9 (July 30, 2010), *available at* <http://www.acf.hhs.gov/grants/open/foa/view/HHS-2010-ACF-ACYF-AEGP-0123/0/pdf>; DEPARTMENT OF HEALTH & HUMAN SERVICES, HHS-2010-ACF-ACYF-PREP-0125, STATE PERSONAL RESPONSIBILITY EDUCATION PROGRAM 5 (Aug. 2, 2010), *available at* <http://www.acf.hhs.gov/grants/open/foa/view/HHS-2010-ACF-ACYF-PREP-0125/0/pdf>.

308. National Public Radio, *All Things Considered*, Sept. 13, 2004, *quoted in* Scott FitzGibbon, *The Principles of Justice in Procreative Affiliations*, in *WHAT'S THE HARM?*, *supra* note 26, at 125, 139. *See generally* VALERIE RICHES, *SEX EDUCATION OR INDOCTRINATION: HOW IDEOLOGY HAS TRIUMPHED OVER FACT* (2004).

309. *See* Joanna Weiss, *Explicit Pamphlets Displayed at School*, *BOSTON GLOBE*, May 19, 2005. [AE: Looks like this is available online, but is behind a pay wall. How to note that?].

310. *See* Brian Camenker, *What Same-Sex "Marriage" Has Done to Massachusetts* (Oct. 20, 2008), *available at* [http://www.massresistance.org/docs/marriage/effects\\_of\\_ssm.html](http://www.massresistance.org/docs/marriage/effects_of_ssm.html).

311. *See* Weiss, *supra* note 372.

312. *See id.*

313. *See supra* notes 171-174 and accompanying text.

SSM.<sup>314</sup> Any student making such a suggestion, including a statement of belief in traditional Jewish or Christian morality, could also be punished.<sup>315</sup>

Parents have been denied the right to remove their children from classes condoning homosexuality, or even to be notified when such classes will be taught.<sup>316</sup> These classes won't turn heterosexual children into homosexual children, but they may heighten children's confusion and anxiety about sex, which is already a fraught issue for young people. The American College of Pediatricians has recommended that schools not encourage non-heterosexual attractions among students who may merely be experimenting or experiencing temporary sexual confusion.<sup>317</sup> Teaching approval of homosexuality will also create a religious conflict for many children who will be told, in effect, that a religion

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314. For example, after SSM was imposed by the Supreme Judicial Court in Massachusetts, the Boston Superintendent of Schools issued a memorandum forbidding, *inter alia*, discrimination or any act "that may create a climate of intolerance" on the basis of sexual orientation. Memorandum (May 13, 2004), *quoted in* FitzGibbon, *supra* note 371, at 138. Any statement suggesting the superiority of traditional marriage or of heterosexuality might be deemed to violate this policy.

315. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (upholding dismissal of public high school student on two days when he wore t-shirts reciting the Biblical condemnation of homosexual acts). In another case a college instructor called a student a "fascist bastard" and refused to give him a grade for saying in class that, according to his Christian beliefs, marriage is between a man and a woman. See Gail Holland, *Student Sues L.A. College District Over Gay-Marriage Speech*, L.A. TIMES, Feb. 16, 2009. A federal district court held unconstitutional the school speech code with which the instructor sought to justify his actions. *Lopez v. Candaele*, 630 F.3d 775 (S.D. Cal. July 13, 2009). In a third case a federal court enjoined use of a public school curriculum that taught children that "[r]eligion has often been used to justify hatred and oppression . . . . Early Christians were not hostile to homosexuals. Intolerance became the dominant attitude only after the Twelfth Century." *Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs.*, No. Civ. A. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005). The passage from the school policy statement is quoted in David French, *Expelling God from the University*, ACAD. QUESTIONS, Summer 2006, at 75, 82.

316. See *Parker v. Hurley*, 514 F.3d 87 (1st Cir. Jan. 31, 2008), *cert. denied*, 129 S.Ct. 56 (2008). See also Tracy Jan, *Parents Rip School over Gay Storybook: Lesson Reignites Clash in Lexington*, BOSTON GLOBE, Apr. 20, 2006, available at [http://www.boston.com/news/local/articles/2006/04/20/parents\\_rip\\_school-over\\_gay\\_storybook/](http://www.boston.com/news/local/articles/2006/04/20/parents_rip_school-over_gay_storybook/).

317. See Letter to School Officials (March 31, 2010), available at <http://www.factsaboutyouth.com/posts/letter-to-school-officials/>.

that preaches that homosexual acts are wrongful is itself wrong.

Courts often uphold suppression of religious expression in public schools on the ground that being exposed to, or even offered the choice to hear such expression, could do children great damage. It seems anomalous that playing an instrumental version of *Ave Maria*<sup>318</sup> at a voluntary public high school ceremony is so offensive that it can be forbidden, but that positive descriptions and demonstrations of homosexual acts are considered so benign that parents may not withdraw their children from or even demand advance notice of these sessions so that they can advise their children about them.<sup>319</sup>

Instruction condoning homosexuality will also create tensions and divisions within families and religious congregations.<sup>320</sup> Children will be taught that anyone (including their parents and their church) who calls homosexual acts undesirable is wrong. More generally, if schools preach that parents and the church are wrong about homosexuality, children will reasonably infer that they may be wrong on other matters as well. The lesson for children will be to doubt all authority except that of the omniscient, omnipotent, and infallible state.

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318. An ensemble was forbidden to play an instrumental version of *Ave Maria* at a high school graduation ceremony. School officials said it was sufficient that the title alone would offend some attendees, even though no one had to attend this part or any of the ceremony. Lower courts upheld the prohibition against a First Amendment challenge, and the Supreme Court denied certiorari. *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1937 (2010). For other cases upholding the banishment of references to religion from public schools see Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Reflections on Preserving the Rights of Parents to Direct the Education of Their Children*, in *WHAT'S THE HARM?*, *supra* note 26, at 355, 359, 362.

319. See generally Russo, *supra* note 26, at 359:

If courts are truly concerned about the potential for unduly influencing children [by references to religion], then one can only wonder why school officials should be regarded as any less capable of shaping the attitudes of students when providing unchallenged gay-friendly instruction on same-sex marriage to impressionable young minds which may not even grasp the import, or impact, of what they are being taught.

320. See Russo, *supra* note 26, at 361 (stating that such instruction “may tear at the fabric of society by causing inter-generational rifts as children are indoctrinated on points-of-view that are not consonant with the values of their parents”).

It is appropriate—indeed wise—for government to use education to promote traditional marriage because it produces great benefits for husbands, wives, their children and all society.<sup>321</sup> These facts can be taught as part of sex education in public schools.<sup>322</sup> Unfortunately, even college textbooks on the family tend to play down or deny these facts.<sup>323</sup> They also tend to be “adult-centered” and to give “insufficient attention to child-related topics.”<sup>324</sup>

In sum, many in the gay movement want public schools to teach that homosexuality is just as normal and desirable as heterosexuality, and many public schools already do so. This instruction may mislead or deceive students about what behavior is conducive to their own happiness and beneficial to the family and society; increase their confusion and anxiety about sex; interfere with relations between parents and children; and serve as a government declaration of the falsity of our mainstream religions. Public schools should instead provide sex education that gives students accurate, helpful information without impairing parental control establishing religious orthodoxy.

## VIII. CONCLUSION

Society has valid reasons to prefer heterosexuality and traditional marriage over other options, including homosexuality and “same-sex marriage.” Heterosexuality is a normal part of human nature. It is conducive to the happiness of most people to treat it as such. Traditional marriage and the biological family are not inherently sexist and are now beneficial to both sexes. They also benefit society by making adults better and more productive citizens and by providing the best upbringing for children. When a husband and wife bear and raise children they are not

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321. *See supra* Part IV-D.

322. *See* CAN GOVERNMENT STRENGTHEN MARRIAGE?, *supra* note 131, at 13 (proposing to “[a]dd a marriage message to teen-pregnancy prevention”).

323. *See* Norval D. Glenn, *Family Textbooks Twelve Years Later*, ACAD. QUESTIONS, Winter 2008-09, at 79, 82 (reporting that most textbooks devote little or no attention to how marriage affects adults).

324. *Id.* at 80-81.

merely effecting their personal lifestyle preference; they are helping to ensure the future of our society.

Homosexuals—and all people—should be treated with decency and civility, but not all behavior merits equal respect. Societies make innumerable value judgments about what is good for individuals and for the community, as when they promote education or favor certain kinds of art over others. The benefits of heterosexuality and traditional marriage easily justify a social and legal preference for them.

Society's preference for heterosexuality and traditional marriage is manifested mostly through education and the expressive function of law, and secondarily through material benefits. These efforts would be substantially hindered if homosexuality and "same-sex marriage" were treated as equal. The message then would not be that traditional marriage and the biological family are particularly desirable, but that they are just one lifestyle choice, no better than many others. Society need not choose this message. It may choose the message that promotes the wellbeing of most people and of society as a whole.