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1999

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The Defense of Traditional Marriage

George W. Dent, Jr.*

The institution of marriage, which has been battered by decades of social and legal change, is now being buffeted by demands that marriage between persons of the same sex be legally recognized. For many, this is the paramount goal for gays: it would signify social acceptance of the moral equality of homosexuality and heterosexuality.¹ The Vermont Supreme Court recently boosted this campaign by requiring that the benefits of marriage be made available to same-sex couples.² The court left it to the legislature whether to

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¹ See RICHARD A. POSNER, SEX AND REASON 311 (1992) (noting that "permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality"); 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, 450 (1996) (legal recognition "would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted. Most proponents of same-sex marriage . . . want marriage first and foremost for this recognition.") (footnote omitted); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK 6, FALL, 1989, at 12-13 (arguing that gay marriage is "the political issue that most fully tests the dedication of people who are *not* gay to full equality of gay people"); 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, 607 (1994) (the significance of marriage lies in its "emotional, declarative, and often religious power"). Accord Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1733, 1783-84 (1998) ("[I]t is likely that the most far-reaching consequence of legalized same sex-marriage would be symbolic. . . . In one step, society would confer, perforce, the symbolic legitimation of intimacy that is always implicit in the celebration of marriage."). See also Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 321-23 (1998) (acknowledging the primacy of symbolism in the campaign for gay marriage).

² *Baker v. State*, 744 A.2d 864 (Vt. 1999). The decision was based on an unusual provision of the state constitution that reads, in pertinent part:

fulfill this command by recognizing same-sex marriages,³ or domestic partnerships, or otherwise. The demand for gay marriage deserves a rebuttal. Moreover, the arguments on both sides of this debate apply to many other relationships and activities (including polygamy, endogamy, cloning and bestiality) that have been denied recognition as marriage and often condemned as crimes. Hence, the clamor for same-sex marriage also challenges these exclusions and prohibitions.

This article reviews the possible justifications for legal recognition of marriage and finds some, such as encouraging stable, loving relationships, unpersuasive. However, other rationales—including protecting children, socializing adults, and promoting individual happiness—are valid, and these rationales apply only to traditional marriages. Accordingly, society has strong reasons to favor traditional marriage and to deny such treatment to the unmarried and to homosexual, endogamous and bestial relationships.

Part I of this article briefly reviews the relevant law. Part II discusses

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.

Vt. Const., ch. I, art. 7.

A couple of earlier rulings favoring same-sex marriage were later legislatively overruled. See *Baehr v. Lewin*, 852 P.2d 44, 75, 82 (Haw. 1993) (holding state must show compelling a reason to deny recognition of same-sex marriages); *on remand*, *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (finding no compelling reason). In 1998 Hawaii voters passed a Marriage Amendment to the state constitution providing: "The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const., art. I, § 23 (<http://www.state.hi.us/lrb/con/condoc.html> (visited June 13, 2000)). The Hawaii Supreme Court then held that the "amendment validated [the existing marriage statute] by taking statute out of the ambit of the [state] equal protection clause." *Baehr v. Miike*, Civ. No. 91-1394-05, 1999 Haw. LEXIS 391, at *3 (Haw. Dec. 9, 1999).

A similar ruling in Alaska—*Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998)—was also overruled by an amendment to the state constitution. Alaska Const., art. I, § 25 (1998).

³ Some commentators dislike the term "same-sex marriage" because it suggests a "farical construct of . . . a marriage touted to be not just for gays, but for any two persons of the same sex who wish to marry." Anthony C. Infanti, *Baehr v. Lewin: A Step in the Right Direction for Gay Rights?*, 4 LAW & SEXUALITY 1, 3 (1994). This article will use the terms same-sex, gay and homosexual marriage interchangeably.

The word "homosexual" is also problematic: "there is still no universally accepted definition of homosexuality among clinicians and behavioral scientists." William Byrne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228 (1993). Difficulty arises in part because sexual orientation is not bipolar but forms a continuum from strictly heterosexual through bisexual to strictly homosexual. See *infra* note 155. This article will not posit a precise definition although this may result in occasional vagueness.

the legitimate grounds for law-making in the liberal state. Part III analyzes some invalid justifications for legal recognition of marriage. Part IV sets forth valid arguments for legal recognition. Part V rebuts the arguments for same-sex marriage and other unconventional forms of marriage.

I. THE CURRENT STATE OF THE LAW

Traditionally, American law did not recognize same-sex marriage and courts routinely upheld this exclusion,⁴ but a few recent decisions have required their recognition.⁵ These decisions raised the question of whether other states would have to recognize gay marriages under the full faith and credit clause of the United States Constitution.⁶ Several states adopted laws to deny recognition of same-sex marriages even if validated in other states.⁷ Congress also adopted the Defense of Marriage Act providing that states need not recognize a same-sex marriage even if it is valid in another state and that in federal law marriage is heterosexual and monogamous.⁸

All legal systems recognize marriage. The criteria for a valid

⁴ See *Dean v. District of Columbia*, 653 A.2d 307, 310-31 (D.C. App. 1995); *In re Ladrach*, 513 N.E.2d 828 (Oh. Ct. C.P. 1987); *DeSanto v. Barnsley*, 476 A.2d 952, 955-56 (Pa. Super. Ct. 1984); *McConnell v. Noonan*, 547 F.2d 54, 56 (8th Cir. 1976); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *app. dismissed*, 409 U.S. 810 (1972). For other cases upholding the traditional male-female definition of marriage, see *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996); *In re Cooper*, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (App. Div. 1993); *Succession of Bacot*, 502 So.2d 1118, 1130 (La. Ct. App. 1987); *Slayton v. Texas*, 633 S.W.2d 934, 937 (Tex. App. 1982); *Adams v. Howerton*, 486 F. Supp. 1119, 1122-23 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (Sup. Ct. 1971);.

⁵ These cases are cited *supra* note 2.

⁶ U.S. Const. art. IV, § 1. See Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 236 (1995). The Constitution may not require recognition. For example, recognition of polygamous or incestuous marriages is not required of states that have a strong policy against validating such marriages. See Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 561-64 (1994). See generally F.H. Buckley & Larry E. Ribstein, *A Choice-of-Law Solution to the Marriage Debates* (forthcoming).

⁷ See Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 239 (1998) (listing statutes as of late 1998).

⁸ 28 U.S.C. § 1738C (1996).

marriage vary. Thus, some cultures permit polygamy or endogamy, and others do not, but none has ever recognized gay marriages.⁹ Some Scandinavian nations register and grant some benefits to "domestic partnerships" of gay couples, but these arrangements are still distinguished from marriage.¹⁰ The universal restriction of marriage to heterosexual relationships does not mean that the practice is instinctive, but it does show that the practice is not culturally contingent. If a custom is important to group survival, it "will be routinely rediscovered by every culture, without need of either genetic descent or cultural transmission of the particulars."¹¹

The issue here is not the permissibility but the legal recognition of same-sex marriages. Unlike polygamy and endogamy, gay marriage is not a crime, but neither is it legally valid. Two or more¹² people of the same sex may wed, treat themselves as married, and be treated as such by all who wish to do so. These ceremonies have great emotional significance for some people.¹³ Some corporations and local governments now give same-sex domestic partnerships certain employment

⁹ "Cultures 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). Historical recognition of gay marriage is at most a rare exception that proves the rule. John Boswell claimed the medieval Church treated some same-sex relationships as marriages. JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* 191 (1994). Most scholars see these relationships as fraternal, not sexual. See Brent D. Shaw, *Book Review*, *NEW REPUBLIC*, July 18, 1994, at 33 (review of Boswell); Robin Darling Young, *Gay Marriage: Reimagining Church History*, *FIRST THINGS*, Nov., 1994, at 43-48; Constance Woods, *Same-Sex Unions or Semantic Illusions?*, *COMMUNIO*, Summer, 1995, at 316-317. William Eskridge catalogs many same-sex "marriages." WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 15-50 (1996). However, most of these involve pederasty or transvestism, features that contemporary proponents of same-sex marriage disavow. In general, his examples would strike most people as repugnant, not as admirable relationships that society should endorse. See Richard F. Duncan, *From Loving to Romer: Marriage and Moral Discernment*, 12 *B.Y.U. J. PUB. L.* 239, 249-50 (1998) (criticizing Eskridge's examples on moral grounds).

¹⁰ For example, these laws exclude most child-rearing rights. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 *U. ILL. L. REV.* 833, 892. See generally Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 *FAM. L.Q.* 497, 500 (1995).

¹¹ DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 487 (1995).

¹² No state treats same-sex marriages as valid, so it seems that laws against polygamy do not apply to same-sex marriages.

¹³ See Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 *WIS. L. REV.* 1033, 1037 n. 12 (describing the author's "commitment ceremony").

and other benefits granted to married couples.¹⁴

The nonrecognition of gay marriages has been challenged as an unconstitutional denial of equal protection. One question in the constitutional debate is the level of scrutiny that this practice deserves. *Baehr* held that the stringent "compelling justification" test applies under the Hawaii constitution.¹⁵ The United States Supreme Court has applied the more lenient "rational basis" test in rejecting an equal protection claim against a criminal sodomy law; the Court refused to add homosexuality to the short list of categories that merit compelling justification review.¹⁶ Scholars have debated this issue at length.¹⁷ To rehash this argument is unnecessary since the justifications for traditional marriage easily survive even the stricter standard of review.

II. LAW AND LEGITIMACY IN THE LIBERAL STATE

Marriage and sex raise questions about the legitimate scope of the law in liberal polities. The meaning of "liberal" is vague, but the core idea is that people have certain rights—a measure of freedom from government restraint of thought and action. People disagree about the scope of these rights. In this article, I posit a degree of individual autonomy broad enough to satisfy almost everyone. First, it is agreed that individuals have a "right to moral independence."¹⁸ Government may forbid only acts that cause fairly direct, concrete harm to others.¹⁹ This principle is invoked to challenge, for example, laws against

¹⁴ See Wardle, *supra* note 10, 29 FAM. L.Q. at 509-11.

¹⁵ See *Baehr*, *supra* note 2.

¹⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁷ For arguments in favor a heightened level of judicial review, see Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RIGHTS L. REP. 263, 272-78 (1992); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1425 n.13 (1993). For contrary arguments, see Richard F. Duncan, *Who Wants To Stop The Church: Homosexual Rights Legislation, Public Policy, And Religious Freedom*, 69 NOTRE DAME L. REV. 393, 407-11 (1994); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 88-95 (1996).

¹⁸ RONALD DWORIN, *A MATTER OF PRINCIPLE* 353 (1985).

¹⁹ The classic source of the "harm" principle is Mill. See JOHN S. MILL, *THE SUBJECTION OF WOMEN* (1869); JOHN S. MILL, *ON LIBERTY* (1859). However, the principle is questioned even by many liberals who endorse the norm of moral independence. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 947-48 (1996) ("[o]bstacles to autonomy and to good lives can . . . come from bad roles, norms, and meanings" which "sometimes private groups are unable to . . . change on their own," so that government must shape norms so as to nurture autonomy).

sodomy and abortion. The Supreme Court has sustained some of these challenges,²⁰ but even a challenge that fails in court may succeed in the legislative arena. Thus, although the Supreme Court has upheld the constitutionality of criminal sodomy laws,²¹ most states have repealed these laws in the belief that homosexual acts in private between consenting adults do not harm others and should not be forbidden simply because a majority of citizens may consider the conduct unnatural, disgusting, immoral or sinful.²²

The legitimate scope of law-making is broader in what Cass Sunstein calls the "expressive" function of the law, that is, "in expressing social values and in encouraging social norms to move in particular directions."²³ Despite some reckless claims that the liberal state must be value-neutral,²⁴ thoughtful commentators recognize that government may promote certain values and discourage others.²⁵ Indeed, it could hardly do otherwise. Virtually all law-making reflects value judgments, many of which are controversial;²⁶ to concede a sphere of

²⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

²¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia criminal sodomy statute).

²² See ESKRIDGE, *supra* note 9, at 135: "Only twenty states have fully enforceable laws prohibiting consensual sodomy." Further, "sodomy laws are almost never enforced against lesbians, bisexuals, or gay men within private spaces." *Id.* at 184.

²³ Sunstein, *supra* note 18, at 953. See also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996). This function is important to family law. See Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

²⁴ See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980) ("No reason [for exercising power] is a good reason if it requires the power holder to assert . . . that his conception of the good is better than that asserted by any of his fellow citizens."); see also DWORKIN, *supra* note 17, at 191 ("[P]olitical decisions must be, so as far as is possible, independent of any particular conception of the good life, or of what gives value to life."). More considered statements by Professor Dworkin contradict these passages. See *infra* note 28.

²⁵ In *A Theory of Justice*, perhaps the most influential liberal statement on legitimacy, John Rawls accepts the need for "some notion of goodness, for we need assumptions about the parties' motives in the original position." JOHN RAWLS, *A THEORY OF JUSTICE* 396 (1971). See also Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41, 43 (1995): "[E]ven if the state cannot legitimately criminalize some particular conduct, it may nonetheless be the case that the state can legitimately judge the conduct to be immoral and, on the basis of that judgment, try to discourage the conduct or to protect others from it."

²⁶ "[G]overnments must inevitably act on the basis of some controversial conception of the human good" ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993) at 162.

individual autonomy is itself a value judgment.²⁷ The expressive function is especially important in family law, which serves "both as a mechanism for meeting the needs of family members and as a vehicle for expressing our values and aspirations about family life to ourselves and our children."²⁸ Thus the state may favor certain conduct, for instance by subsidizing education in some areas but not in others, even though some people dislike the state's choices. The state may also discourage activities (such as smoking, drinking and gambling) both by taxation and exhortation, even if the state could not forbid these activities. As these examples suggest, government may promote (or discourage) conduct because it believes that the conduct benefits (or harms) the individual, even if the individual does not agree.²⁹ The expressive function of law is important because the social norms it fosters encourage good behavior; without this effect, coercion or economic pressure might be needed to induce desirable behavior.³⁰

Legal preferences concerning material interests, like health and wealth, provoke little opposition. May government also promote (or deter) activity that it believes is spiritually enriching (or damaging)? For some libertarians, spiritual enlightenment, or happiness, is a private matter in which the state should not interfere, especially when people disagree about what increases true happiness. However, virtually all societies, including ours, accept that government may promote spiritual well-being. Thus the state promotes the arts through public schooling, tax deductions for gifts to the arts, official acclaim (such as naming a poet laureate), subsidies for artistic activity, and beautification of public works. These efforts are accepted even though they do not improve public health or increase economic output. Moreover, the scope of proper state action is broader for children than for adults because children are less able to determine and protect their own interests. Thus the state may mandate schooling and medical care for children even when it could not do so for adults.

²⁷ Seeid. at 158.

²⁸ Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994).

²⁹ Thus even Ronald Dworkin supports seat-belt laws on the ground that they give people what they really want rather than overriding their true desires. Ronald Dworkin, *Foundations of a Liberal Equality*, in 11 TANNER LECTURES ON HUMAN VALUES 77 (Grethe B. Peterson ed. 1990).

³⁰ See WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY* 185 (1996) (appeals to social emotions are less oppressive than physical force); Sunstein, *supra* note 18, at 918 & n. 51, 955.

There is some tension between the liberal principles of democracy and individual autonomy. To thrive as a free person one needs certain attributes, including the skills necessary to earn a decent income, sufficient education to participate intelligently in public affairs, and a moral character strong enough to exercise one's autonomy to fashion a satisfying life. Democracy cannot prosper unless most citizens possess these attributes. The growing complexity of modern life demands more of these attributes for both individuals and society as a whole to flourish. People do not automatically acquire these qualities, though. The problems underdeveloped countries face in building democracy and economic prosperity show both the impossibility of achieving these goals without a populace that is adequately prepared and the difficulty of developing such a populace. Thus, ironically, an active government is necessary to nurture the kind of citizenry that can flourish under limited (or liberal) government and make that government work.

Even in its expressive functions, though, the state should not embrace values arbitrarily. As Dworkin puts it: "People have the right not to suffer disadvantage in the distribution of social goods and opportunities . . . just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong."³¹ Similarly, Cass Sunstein says: "without very good reasons, social and legal structures ought not to turn differences that are irrelevant from the moral point of view into social disadvantages."³² As Sunstein implies, moral considerations are appropriate in law-making, but the majority is not right simply because it is the majority.

The most influential statement of the liberal theory of justice comes from John Rawls. Rawls says justice demands rules that are fair in that they would be acceptable to persons in the "original position"—that is, without such particular features as wealth, race, sex, sexual orientation, and family status, that can lead to support for rules that favor one's own interests over others' interests.³³ Although Rawls has many critics,³⁴ this article accepts his principle. We may even extend Sun-

³¹ DWORKIN, *supra* note 17, at 353.

³² Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 13 (1994).

³³ RAWLS, *supra* note 24, at 11-17, 136-42.

³⁴ E.g., R.M. Hare, *Rawls' Theory of Justice: Part II*, 23 PHIL. Q. (SCOT.) 241 (1973); Russell Hittinger, *John Rawls, Political Liberalism*, 47 REV. METAPHYSICS 585 (1994); Douglas B.

stein's proposition and insist that, even where there are morally relevant differences, the legal consequences of those differences should be reasonable, not excessive. Thus, even if there is a valid basis for the law to favor traditional over same-sex marriage, defenders of the law should still explain why this disparate legal treatment is not disproportionate.

This does not mean that defenders of a promotional (as opposed to a prohibitory) law bear a heavy burden of proving the practical benefits of a law or of alternatives to it, especially if the law touches matters of great social concern and the alternatives are untested. The 20th century is littered with the ruins of grandiose social schemes that were earnestly promoted by intelligent people promising great benefits but that ultimately inflicted terrible damage. Experience proves the iron law of unintended consequences—new laws may or may not achieve their intended results, but they always produce unexpected results.³⁵ Human society is too complex and too poorly understood to permit confident predictions of the effects of significant legal change. A democracy may choose to experiment on itself, but it need not do so. Defenders of traditional laws may justly demand caution and convincing evidence that change will at least not make matters worse.³⁶ Tradition should not be followed blindly, but it deserves respect and may be properly maintained in case of doubt, especially concerning acts traditionally considered repugnant.³⁷

Because marriage and the family are entwined with religion in Western (and most other) civilizations, the role of religion in law-making must be addressed. America, like many liberal states, forbids establishment of religion,³⁸ but all law rests on norms that are not

Rasmussen, *A Critique of Rawls' Theory of Justice*, 55 *PERSONALIST* 303 (1974).

³⁵ Even a liberal like Isaiah Berlin championed our "common sense beliefs, which at least have the merit of having been tested by long experience," over theories lacking empirical support. ISIAH BERLIN, *THE HEDGEHOG AND THE FOX* 32 (1953).

³⁶ See David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 *WASH. U.L.Q.* 15, 45-46 (1996) (noting many unanswered questions about homosexual marriage and arguing for "the legal system treading very carefully until some of the answers to those questions emerge from the research currently under way").

³⁷ Physician and philosopher Leon Kass argues that our feelings of repugnance should be given weight in public policy: "in this age . . . repugnance may be the only voice that speaks up to defend the central core of our humanity." Leon R. Kass, *The Wisdom of Repugnance*, *NEW REPUBLIC*, June 2, 1997, at 20.

³⁸ "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

empirically verifiable.³⁹ A law is not invalid simply because the values it expresses stem from religion if those values are accessible to conventional secular thought.⁴⁰ Indeed, the liberal notion of human rights originated from religion, as evidenced by the statement in the Declaration of Independence: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights."⁴¹ The abolition of slavery, for example, is not illegitimate just because it sprang from a belief that slavery is offensive to God. The same is true of arguments for gay rights, which are often based on religion.⁴²

Western marriage laws grew out of and still largely reflect Christian beliefs,⁴³ but these laws do not establish religion—they neither command nor promote Christian faith or practices. Moreover, as this article shows, traditional marriage laws can be justified on exclusively secular grounds.

III. FALSE JUSTIFICATIONS OF MARRIAGE

Many justifications have been offered for legal recognition of marriage, but not all of them are persuasive.

A. *To Encourage Stable, Loving Relationships*

Some argue that love is the only valid requisite for marriage.⁴⁴ This claim is both too broad and too narrow. It is too broad because many loving relationships are considered improper for marriage. Love takes

³⁹ Both religious and secular moralists ultimately found their views on faith. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

⁴⁰ Laws that do not compel or even encourage adherence to some religion can still be hard to justify on secular grounds. Thus forbidding consumption of meat on Fridays (as the Catholic Church once did) or consumption of pork (as Islam and Judaism do) would be hard to vindicate in secular terms even though those rules do not compel or encourage adherence to any religion.

⁴¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴² See Samuel A. Marcossou, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 166 (1995) ("basic religious tenets . . . support the cause of barring discrimination on the basis of sexual orientation") (emphasis in original).

⁴³ The qualification "largely" is needed because Christian beliefs vary among denominations and change within denominations over time. For example, our laws permit divorce, which most Protestant sects allow but which the Roman Catholic Church opposes.

⁴⁴ See Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOWARD L.J. 173, 222-23 (1991).

many forms. C.S. Lewis distinguished family love, affection, erotic desire, friendship, and compassion.⁴⁵ All can be good, but compassion is not deemed a basis for marriage. Close relatives often love each other but cannot marry.⁴⁶ One who is married may love a third party more than one's spouse, but one cannot marry the third party.⁴⁷ Children can love but cannot marry. Many people love pets, but they cannot marry them. Hence, homosexual love is not the only love ineligible for marriage. Indeed, many forms of sexual love, such as pederasty, adultery, bestiality and incest, are criminal even in states that permit homosexual acts.⁴⁸

This justification is also too narrow because love is not necessary for marriage. Love was long considered unimportant to marriage in the West, and still is in many non-Western societies.⁴⁹ Marriage exists in part—especially in some traditions—to provide for rearing children and for certain kinds of care and support between wife and husband.⁵⁰ Even in liberal states love is never a precondition to marriage, nor does its absence invalidate a marriage.⁵¹ Most marriages were once arranged by parents; the couple might never see each other before the wedding.⁵² Even in liberal societies many would consider a marriage successful despite the absence of romantic love if the couple treat each other with care, kindness and respect. In sum, love is neither a necessary nor a sufficient condition for a socially or legally acceptable marriage.

⁴⁵ C.S. LEWIS, *THE FOUR LOVES* (1960).

⁴⁶ See *infra* notes 253-64 and accompanying text.

⁴⁷ See *infra* notes 239-52 and accompanying text.

⁴⁸ See HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 150 (3d ed. 1995) (in half the states adultery is still a crime).

⁴⁹ 2 *ENCYCLOPEDIA OF MARRIAGE AND THE FAMILY* 471-74 (1995). See also Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 *J. LEGAL STUD.* 869, 875 (1994) ("Although affection might grow out of long and close association between the spouses, it was by no means necessary for the practical purposes of marriage."). But see 2 *ENCYCLOPEDIA OF MARRIAGE AND THE FAMILY* 431 (1995) (stating that North Americans view love as the basis for marriage and as important to its continuation).

⁵⁰ 2 *ENCYCLOPEDIA OF MARRIAGE AND THE FAMILY* 472 (1995).

⁵¹ *Id.*

⁵² See *id.* at 473 ("Arranged marriages are the norm in many parts of the world.").

B. Legal Benefits of Marriage

Some say it is unfair to deny gays the legal benefits of marriage.⁵³ If so, however, it is also wrong to withhold these benefits from unmarried people, and we should not validate gay marriages but eliminate the legal benefits of marriage, as some propose.⁵⁴ Some private and public employers now grant domestic partners (usually including but not limited to gay partners) of employees benefits which were traditionally limited to spouses.⁵⁵ Such changes do not necessitate changing the legal definition of marriage.

The tangible benefits of marriage do not interest most advocates of gay marriage.⁵⁶ This is not surprising. The law confers some material benefits on marriage, such as special tax treatment and coverage for spouses under some social welfare programs (like Social Security). These benefits are minor, though; most couples hardly consider them in deciding whether to marry. Marriage also incurs legal detriments, such as higher tax rates on two-earner couples, that often outweigh the benefits.⁵⁷ The law also sets legal rights of married people regarding child custody, division of assets, and right to support. These rights can be important after marriage, but they rarely provide an incentive to wed, primarily because they are a zero-sum game—the right of one spouse is the disability of the other. It is no surprise, then, that few gays bother to utilize laws recognizing domestic partners.⁵⁸

⁵³ See ESKRIDGE, *supra* note 9, at 66-74.

⁵⁴ See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30 (1995); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993) ("Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all.").

⁵⁵ See *supra* note 14.

⁵⁶ See Chambers, *supra* note 1, at 450 ("[F]ew advocates [of gay marriage] address at any length the legal consequences of marriage").

⁵⁷ See James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Taxes on Marriage*, 66 *ECONOMICA* 297 (1999) (marriage penalty tax reduces the marriage rate); Richard L. Elbert, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 *SETON HALL CONST. L.J.* 1171, 1174-85 (1995) (describing history and status of the penalty); Richard B. Malamud, *Allocation of the Joint Return Marriage Penalty and Bonus*, 15 *VA. TAX REV.* 489 (1996); C. Eugene Steuerle, *Valuing Marital Commitment: The Radical Restructuring of our Tax and Transfer Systems*, 9 *RESPONSIVE COMMUN.* 35 (1999) (finding an "extraordinary array of marriage [tax] penalties").

⁵⁸ By the end of 1997 fewer than 300 couples had registered, and about 25% of these were siblings or elderly parents and adult children. See Susan Essoyan, *Hawaii Finds Slow Response to Domestic Partners Law*, *DALLAS MORNING NEWS*, Dec. 28, 1997, at A5, available in 1997 WL

Proponents of gay marriage care not about the material benefits it would bring but about its social acceptance as equal to traditional marriage.⁵⁹

C. Religious Rationales

Marriage has religious significance in Western and most other cultures. Basing the legal definition of marriage on religion would not breach the Constitution's Establishment Clause because it does not endorse or compel obedience to any faith, but religion alone cannot justify law in a liberal state.⁶⁰

IV. VALID ARGUMENTS FOR TRADITIONAL MARRIAGE

All societies celebrate marriage. Weddings typically feature elaborate rituals (usually religious) and festivities.⁶¹ Marriage also has major legal consequences in all cultures.⁶² Most religions venerate marriage, but even atheists must be struck by the prestige universally conferred upon marriage. The only event generally deemed more important is the installation of a new ruler. There must be powerful global reasons for this special treatment.

A. Child Rearing

1. The Importance of Marriage to Child-Rearing

The primary social function of marriage is rearing children. Christianity has long recognized this. The medieval jurist Gratian considered offspring the purpose of marriage.⁶³ The first English

16187525.

⁵⁹ See *supra* note 1.

⁶⁰ See, e.g., Ronald Dworkin, *The Right to Death*, NEW YORK REV. BOOKS, Jan. 31, 1991, at 14, 17 ("[T]he Constitution does not allow states to justify policy on grounds of religious doctrine"). See also *supra* text accompanying notes 38-41 (values underlying law should be accessible to secular thought).

⁶¹ See Chambers, *supra* note 1, at 450 ("In our country, as in most societies throughout the world, marriage is the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity.")

⁶² See I ENCYCLOPEDIA OF MARRIAGE AND THE FAMILY 182-87 (1995) (concerning divorce); II ENCYCLOPEDIA OF MARRIAGE AND THE FAMILY 442-47, 562-65 (1995) (concerning consequences of marriage for property ownership and related issues).

⁶³ See John T. Noonan, Jr., *Contraception: A History of its Treatment by the Catholic*

Book of Common Prayer listed the rearing of children as the first reason for marriage.⁶⁴ After the decision in *Baehr* favoring gay marriage, the Hawaii legislature resolved that marriage is "intended to foster and protect the propagation of the human race."⁶⁵ Government efforts to provide comprehensive child care have never succeeded;⁶⁶ in every society today child-rearing is performed primarily by parents. Government programs can help children but can never substitute for good parents.⁶⁷

In the middle of this century America gradually forgot the importance of traditional marriage to children. Illegitimacy and divorce ("broken families") had been rare, so their effects on children were often considered minor and ascribed to causes (like poverty) other than family structure. The explosion of bastardy and divorce in the last thirty years prompted closer inquiry, which revived appreciation of the importance of marriage to children. Under every standard—educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings—children of intact marriages have fewer problems than children of broken families.⁶⁸ Other causes, like poverty, add to childhood problems, but "[c]hildren in one-parent families are much worse off than those in two-parent families even when both families have the same earnings."⁶⁹ Moreover, other causes (like poverty) are not wholly separate but stem partly from marital failure.⁷⁰

Theologians and Canonists 174, 289 (1966); *Genital Good*, 8 COMMUNIO 198, 214 (1981)

⁶⁴ The other two reasons were to avoid the sin of fornication and to encourage couples to provide "mutual society, help and comfort." Noll, *supra* note 9, at 41-42.

⁶⁵ Act of June 22, 1994, No. 217, § 1, 1994 Haw. Sess. Laws 217, *reprinted in* 20 FAM. L. REP. 2013, 2015 (1994).

⁶⁶ Even the most promising attempt—the communal raising of children in Israeli kibbutzim—has been largely abandoned. See Karl Zinmeister, *Actually, Villages Are Lousy at Raising Pre-School Children*, AMERICAN ENTERPRISE, May/June 1996, at 52, 54 (in nearly all kibbutzim "[i]nfant care has shifted back to parents").

⁶⁷ See Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, April 1993, at 47, 48 ("If we fail to come to terms with the relationship between family structure and declining child well-being, then it will be increasingly difficult to improve children's life prospects, no matter how many new programs the federal government funds.").

⁶⁸ See generally William Galston, *A Liberal-Democratic Case for the Two-Parent Family*, RESPONSIVE COMMUNITY, Winter 1990-91, 14-26.

⁶⁹ James Q. Wilson, *Human Remedies for Social Disorders*, PUB. INTEREST, Spring 1998, at 25, 27-28. See also SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1994).

⁷⁰ See *in fra* note 117 and accompanying text.

When one parent is absent, it is usually the father. The father's absence from the home is damaging to children.⁷¹ Unwed fathers can be diligent but in practice rarely are: "All available evidence suggests that the most effective pathway to involved, committed, and responsible fatherhood is marriage."⁷² Not only do children need two parents; it also seems that ideally a child should have both a mother and a father.⁷³ Some claim that same-sex couples can serve equally well as parents. Studies of children raised by gay parents are inconclusive, partly because samples have been so small.⁷⁴ Absent firmer empirical evidence, it is reasonable to assume that children with both a mother and a father will learn better how to live in a world composed of males and females.⁷⁵

Although marriage involves an agreement between two people, it is not governed by general contract law. "[M]any of the terms of the marriage are prescribed by the state, not to be varied by the parties' private agreements."⁷⁶ The special treatment of marriage is justified by the presence of children: young children and children yet unborn cannot negotiate for themselves, so the state protects them by imposing contract terms on the parents.⁷⁷ Further, one spouse (usually the wife) often makes "significant and specific investments: contributions of time and energy and money, to each other and to their children, that may not see fruition for many years and that may

⁷¹ Wade F. Horn & Andrew Bush, *Fathers and Welfare Reform*, PUB. INTEREST, Fall 1997, at 38, 39.

⁷² *Id.* at 41.

⁷³ See ELISABETH BADINTER, XY: ON MASCULINE IDENTITY 43-66 (Lydia Davis, trans., Columbia University Press 1st ed. 1995) (1992); DAVID POPENOE, LIFE WITHOUT FATHER 139-190 (1996); MARY STEWART VAN LEEUWEN, GENDER AND GRACE (1990); Mary Stewart Van Leeuwen, *Opposite Sexes Or Neighboring Sexes? The Importance of Gender in the Welfare Responsibility Debate*, in WELFARE IN AMERICA 243, 243-74 (Stanley W. Carlson-Thies & James W. Skillen eds., 1996); Mary Stewart Van Leeuwen, *To Ask a Better Question: The Heterosexuality-Homosexuality Debate Revisited*, in INTERPRETATION (forthcoming); Wardle, *Potential Impact*, *supra* note 10, at 857-64 (discussing the importance to children of having both a mother and a father).

⁷⁴ See *infra* note 104.

⁷⁵ See ELIZABETH MOBERLY, PSYCHOGENESIS: THE EARLY DEVELOPMENT OF GENDER IDENTITY 79 (1983) (ascribing homosexuality primarily to a child's inability to identify with the parental figure of the same sex). Presumably, this is more likely to happen if a child has no parent of the same sex. This proposition does not require any assumption of significant innate behavioral differences between women and men. Even if the differences are socially determined, children must learn to live with them.

⁷⁶ Brinig & Crafton, *supra* note 48, at 870.

⁷⁷ See Gary Becker & Kevin Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 3-5 (1988).

be worthless if the relationship does not endure."⁷⁸ But the marriage relationship is "so complex that any attempt to specify in detail all of its terms would be futile as well as perhaps destructive."⁷⁹

Since gay couples cannot reproduce, these considerations would not apply to gay marriages. Recognition of gay marriages would inevitably lead to efforts to relax the mandatory contract terms designed for traditional marriages with children.⁸⁰ To treat gay marriages differently would violate the notion that gay marriages are fundamentally the same as traditional marriages.⁸¹ Some compromise would be likely, but any compromise would impair the suitability of marital law for traditional couples.

Although some dismiss the traditional family as an anachronism, a vestige, a historical relic, the opposite is true—the traditional family is more essential now than ever. In order to thrive the modern, liberal, capitalist democracy needs citizens with higher job skills, education, and moral character than pre-modern or undemocratic societies. These qualities are best cultivated in the traditional family; indeed, no society has developed such a citizenry except through the traditional family. A cohesive community can compensate in part for parent's shortcomings, but in the mobile, atomized modern world tight-knit communities are rare. Thus "the family, and specifically the bourgeois family, is the necessary social context for the emergence of the autonomous individuals who are the empirical foundation of political democracy."⁸²

When people were few, procreation was encouraged to help each

⁷⁸ Brinig & Crafton, *supra* note 48, at 871.

⁷⁹ *Id.* at 870-71.

⁸⁰ Many proponents of gay marriage already advocate changing marriage laws in many ways. See *infra* notes 174-80 and accompanying text. Many also support more relaxed attitudes toward adultery and divorce. See *infra* notes 224-36 and accompanying text.

⁸¹ It would be unwise to distinguish marriages by the "neutral" criterion of whether a couple has children. One spouse often makes an investment in the marriage prior to and in anticipation of having children. For example, if a couple plans to have children and to have the wife care for them in infancy, she may work rather than expand her education, then bank her earnings and saved tuition. If this couple divorces, even before having children, the settlement should take this contribution into account. For a gay couple, though, this reasoning would not apply.

⁸² BRIGITTE & PETER BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* 172 (1984) (emphasis omitted). See also GAYLIN & JENNINGS, *supra* note 29, at 103 ("[M]arriage . . . serve[s] to bind sexual desire to reproduction and child care. By destroying the conditions that support parenting . . . we would destroy the child—and not only the child, but the society that will later be shaped by those parentless children, will suffer.").

tribe and humanity in general to survive. Underpopulation is rarely a problem today.⁸³ However, with fertility below replacement level in most developed countries, marriage with children may cease to be the norm. The concern for others that matures through bearing and raising children could then give way to hedonism and narcissism.⁸⁴ Society may properly avoid this by favoring traditional marriage.

Traditional marriage is not incompatible with contraception, as claimed by some natural law scholars.⁸⁵ Contracepted sex can tighten a marriage while delaying conception until the couple is ready to care properly for children.⁸⁶ It can also prevent the conception of more children than the couple can adequately care for. Thus contraception can assist good parenting.

2. *Marital Cohesion Affects All of Society*

Hillary Clinton reminded America of the forgotten truth that it takes a village to raise a child.⁸⁷ "[S]ociety requires a critical mass of married, two-parent families, both to raise their own children well and to serve as models for those who are being reared outside of the 'conventional' family."⁸⁸ If broken families are few, their children still have many models of intact families (among relatives and neighbors, for example) to show them that this is the norm, what is expected of them, and to teach them what it means to be part of an intact family. It is hard for a child to learn how to be a good spouse and parent when he sees few examples around him.

Similarly, when the children of broken families are few, the misconduct to which they are prone is the exception. The majority in intact families set a standard that children from broken families tend

⁸³ Low population is a problem for some groups, though. For example, the low birth rate of American Jews combined with their high rate of intermarriage with non-Jews in a growing population makes some worry that there could eventually be too few Americans with a Jewish identity to constitute a viable community. See ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW* 1-2, 24-32 (1997) (giving statistics on the declining number of American Jews).

⁸⁴ See *infra* text accompanying notes 113-15.

⁸⁵ See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 30-31 (1995).

⁸⁶ See Perry, *supra* note 24, at 50.

⁸⁷ HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (1996).

⁸⁸ Horn & Bush, *supra* note 70, at 42. See also WILLIAM A. GALSTON, *LIBERAL PURPOSES* 285 (1991) (arguing family structure is not solely a private matter because it affects the stability of families generally). See also AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 248 (1993) ("To shore up the moral foundations of our society, we start with the family").

to follow because children are even more loathe than adults to be different. If children from broken families predominate, though, they set a standard which other children tend to follow. In sum, if most children come from intact families, they pull up the behavior of other children; when most children come from broken families, they pull down the behavior of others.

More broadly, traditional marriage is inextricably tied to our concern for future generations and for the welfare of others. Concern for others is not innate—an infant cares only about itself, not others. Altruism is not learned primarily in formal schooling but by experience acquired in part in our own families—first as children of our parents, then as spouses and as parents of our children.⁸⁹ We also learn from our social milieu; we learn benevolence in a community where marrying and raising children is normal. To care for our own children—their schools, their safety, their socialization into the community—we must to some extent care for others. Moreover, although we are mortal, unaffected by events after we die, to care for our children we must care about the future world in which they will live after we die.

Altruism is often fragmentary; we may prefer ourselves to our children, our children to our neighbors, and our neighbors to strangers. But even partial altruism is an important social adhesive, and it can be augmented by more abstract concepts of benevolence, such as the Christian command to love not only those closest to us but all humanity, even our enemies. Thus the family provides both the literal nursery for our children and the metaphoric nursery of the family of man.

If the traditional family ceases to be the norm, altruism will erode.⁹⁰ In every society some people do not or cannot marry and bear and raise children. If they are viewed as unfortunate exceptions, the norm is not impaired. Recognition of gay marriages would mutilate the norm by granting, for the first time in history, equal honor to partnerships that inherently exclude the creation of life. The impact would be greater if, as seems likely, few gays elected to marry, stay

⁸⁹ See *infra* notes 113-19 and accompanying text (traditional marriage socializes adults, especially men, but same-sex marriage would not do so).

⁹⁰ See Gaylin & Jennings, *supra* note 29, at 114-19 (describing the profound influence of parents on the moral development of children). See also *infra* note 114 (marriage teaches "the acceptance of responsibilities we have not willed or chosen").

married, and adopted children.⁹¹ Like legalizing bestiality, cloning, and baby-selling,⁹² validation of gay marriage would not cause direct, proximate harm, but it would damage society by degrading the way we see and relate to others. Traditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and women who marry and stay married encourage others to do likewise, to the profit of society.

Judaism and Christianity are unusual in their reverence for the family and condemnation of polygamy and homosexuality.⁹³ The ascendancy of Western civilization in the last 500 years may stem in part from this attitude. By nurturing the institution that best instills bourgeois values, Judaism and Christianity made possible the economic and technological progress of the West. Some of the harsher aspects of this attitude, such as criminalization of sodomy, may be unnecessary, but retaining reverence for the family may be essential to preserving and extending this progress.

3. Marriage Needs Society's Support

Unfortunately, marriages do not always occur and endure without encouragement from society. Raising children is one of the most difficult and demanding jobs human beings undertake. The temptation to shirk this task is especially strong in the modern world. In the past the monetary cost of raising children was low, limited primarily to simple food and clothing. Most people were farmers for whom children earned their keep from an early age by helping with farm work. Adult children supported parents grown too old for laborious farm work. Modern societies need parents to give children much more, including expensive, long-term schooling and health care. Today, few children can help with their parents' jobs. The opportunity costs of children are also higher for modern bourgeois couples who, unlike poor farmers, can devote available time to earning money at high rates or to innumerable leisure activities. Caring for children reduces time available for these pursuits. Finally, child

⁹¹ See *supra* note 57 (few gays have used domestic partnership laws); *infra* notes 230 & 306 (instability of most gay male relationships).

⁹² See *infra* notes 265-84 and accompanying text.

⁹³ See Sheryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. Rev. 301, 308 & n.32 (1984).

rearing is often unpleasant and emotionally draining. Not surprisingly, then, parents are sometimes tempted to neglect their children's needs.

Despite the burdens of child-rearing, many people make extraordinary efforts to have and care for children. Many couples endure great expense, physical pain, emotional trauma, and humiliation in trying to conceive a baby. Others battle repeated obstacles to adopt a child. The high cost of giving children good care is paid not only by people who can easily afford it but also by many who are less wealthy and for whom the cost requires great sacrifice. Many parents absorb the unusual costs of children with disabilities, medical problems, or other special needs.

Regrettably, modern life often hinders good parenting. Market economies encourage material consumption by ubiquitous advertising and exhortations to self-gratification. The support for parenting long provided by religion is corroded by widespread secularism. Marriage and the family are denigrated by elites,⁹⁴ educators⁹⁵ and gay activists.⁹⁶ The state helps parents by providing services (like public schools) and subsidies (like tax credits and deductions) for children, and surely more could be done, but the state can never fully compensate the work good parents do. However, the state can encourage and support parents by recognizing and honoring marriage as the institution that best facilitates good parenting.⁹⁷

It is not enough for society to applaud marriage without reference to the purpose of raising children. Indiscriminate applause could suggest that marriage exists to maximize self-gratification and should, therefore, be dissolved when it no longer seems to serve that purpose,

⁹⁴ First Lady Hillary Clinton once compared marriage to slavery. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 493 (1973).

⁹⁵ See Tamar Lewin, *Study Criticizes Textbooks on Marriage as Pessimistic*, N.Y. TIMES, Sept. 17, 1997, at A5, describing a study that concludes: "College students are being taught a pessimistic and sometimes inaccurate view of marriage, with great emphasis on issues like divorce and domestic violence, and little attention to the benefits of marriage, particularly for child-rearing"

⁹⁶ See *infra* notes 173-77 and accompanying text.

⁹⁷ See FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 5 (1995):

A strong and stable family structure and durable social institutions cannot be legislated into existence. . . . A thriving civil society depends on a people's habits, customs, and ethics—attributes that can be shaped only indirectly through conscious political action and must otherwise be nourished through an increased awareness and respect for culture.

especially when the going gets rough. Child-rearing always has rough periods; that's precisely when society's help is most needed to keep parents together. What is wanted, then, is a buttress applied at this point of greatest stress; that is, an attitude that bolsters marriage as an institution for raising children. As social esteem for marriage and parenting declines, so does citizens' willingness to assume these roles.⁹⁸ Validation of same-sex marriages would accelerate this decline.

Gay couples do not conceive, so of course advocates of gay marriage tend to ignore the connection of marriage with child rearing. More telling, when they do note the connection, its significance escapes them. For example, Andrew Koppelman notes "the resentment that those with familial responsibilities that weigh heavily upon them feel toward those who seem free of such responsibilities."⁹⁹ Yet he then drops the point without considering that it might explain the need for society to celebrate traditional marriage.¹⁰⁰

4. *The Significance of Childless Heterosexual Couples*

An objection to this justification of marriage is that heterosexual couples may marry even if they cannot or choose not to have children.¹⁰¹ The argument is unpersuasive. First, society does not know which couples these are when they marry and could not even try to find out without incurring substantial government expense and unusual and offensive intrusion on their privacy.¹⁰² Second, condi-

⁹⁸ Between 1957 and 1976 the "proportion of working men who found marriage and children burdensome and restrictive more than doubled." Whitehead, *supra* note 66, at 58.

⁹⁹ ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 173 (1996).

¹⁰⁰ Andrew Sullivan acknowledges

a difference that [he thinks] is inherent between homosexual and heterosexual adults [is that] . . . [t]he latter group is committed to the procreation of a new generation. The former simply isn't. . . . 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.

ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 196 (1995). Paula Ettelbrick concedes that the "origins of marriage are deeply imbedded in procreation and the two-parent family" and homosexual "family structures will never fit the heterosexual model." Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 160 (1996).

¹⁰¹ See ESKRIDGE, *supra* note 9, at 96; Mohr, *supra* note 6, at 223; SULLIVAN, *supra* note 100, at 179 (1995); Sunstein, *supra* note 31, at 6.

¹⁰² See Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal*

tions existing at the time of marriage may later change. Couples who do not want to bear children may change their minds. Couples who think they cannot bear children may prove wrong or, by medical help, become able to bear children. By contrast, we know without intrusion that same-sex couples are sterile and will remain so. Third, sterile couples can adopt. Same-sex couples can also adopt if the law permits, but there is considerable controversy about the effect on children being raised by a homosexual couple.¹⁰³ Finally, even heterosexual couples that do not bear children reinforce the model of traditional marriage.¹⁰⁴

Exceptions do not invalidate a norm or the necessity of norms. How some individuals make use of marriage, either volitionally or as the result of some incapacity, does not determine the purpose of that institution. In that context, heterosexual sterility does not contradict the meaning of marriage in the way same-sex unions would.¹⁰⁵

Childless marriages are imperfect models, but no marriage is a Platonic ideal. By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children.

Similarly, childless marriages may discourage divorce among couples with children. Childless couples have been respected for centuries. Many medieval theologians were hostile to sex and barely tolerated marriage as an inferior but, because of human frailty, necessary alternative to chastity. In St. Paul's words, "It is better to marry than to burn with passion."¹⁰⁶ Still, they uniformly acknowledged the validity of childless marriages and of sex within those marriages.¹⁰⁷

O'Connor a "Homophobe"?, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 597 (1996) ("the state could not exclude infertile heterosexual couples from marriage without imposing onerous invasions of privacy").

¹⁰³ Studies on gay parenting lack statistical validity. See Philip A. Belcastro *et al.*, *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105 (1993); Wardle, *Potential Impact*, *supra* note 10, at 844-52. See also Wardle, *id.* at 852-57, describing some possible dangers of gay parenting.

¹⁰⁴ "Even marriages that do not give rise to children exist in accord with, rather than in opposition to, [the] heterosexual norm." *The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS, March 1994, at 15, 18. The Ramsey Colloquium "is a group of Jewish and Christian theologians, ethicists, philosophers, and scholars that meets periodically to consider questions of morality, religion, and public life." *Id.* at 15.

¹⁰⁵ *Editorial*, COMMONWEAL, May 17, 1996, at 6.

¹⁰⁶ *I Corinthians* 7:9.

¹⁰⁷ See VERN L. BULLOUGH & JAMES A. BRUNDAGE, *SEXUAL PRACTICES AND THE MEDIEVAL CHURCH* 65-66 (1982) (stating that Thomas Aquinas deemed intercourse natural and permissi-

This attitude persists today in the restrictions on divorce of childless couples.¹⁰⁸ If love and protection of children were the only reasons for social concern about marriage, the law would require only mutual consent for the divorce of childless couples. Society has an interest, though, in preserving these marriages as images (albeit imperfect) of a social ideal and in discouraging the attitude that marriages may be quickly and casually dissolved.¹⁰⁹

Homosexual couples do not reinforce the model of traditional marriage. They send conflicting signals to children who must decide how to live their lives in a confusing world.¹¹⁰ This does not mean that legitimizing gay marriages would lure otherwise heterosexual children into homosexuality, although that might happen occasionally. Rather, validation of same-sex marriages would eviscerate society's endorsement of traditional marriage¹¹¹ and thereby suggest indifference to illegitimacy, divorce, and child neglect.

B. Socializing Adults

Marriage channels potentially destructive energy into beneficial activity. As the Ramsey Colloquium says: "Marriage is a place where, in a singular manner, our waywardness begins to be healed and our fear of commitment overcome, where we may learn to place another person's needs rather than our own desires at the center of life."¹¹² As an editorial in the journal *Commonweal* stated:

Is there really any doubt that in tying sexual attraction to love and love to children and the creation of families, marriage fundamentally shapes our ideas of human dignity and the nature of society? Same-sex marriage, whatever its virtues, would narrow that frame

ble for barren couples).

¹⁰⁸ Although most states no longer require fault for divorce, they still require a delay before divorce can be granted. See Annot., 62 A.L.R.2d 1262-65 (1994) (describing state statutes requiring delay before divorce).

¹⁰⁹ See Whitehead, *supra* note 66, at 49 (asserting that liberal divorce laws undermine marriage generally by making divorce more socially acceptable).

¹¹⁰ See Elizabeth Kristol, *The Marrying Kind*, FIRST THINGS, Jan., 1996, at 45, 46 (reviewing ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995)).

¹¹¹ See *infra* notes 200-10 and accompanying text (recognition of same-sex marriage would diminish esteem for marriage).

¹¹² *The Homosexual Movement: A Response by the Ramsey Colloquium*, *supra* note 105, at 17.

and foreshorten our perspective. Marriage, at its best, tutors us as no other experience can in the given nature of human life and the acceptance of responsibilities we have not willed or chosen.¹¹³

In the mid-twentieth century Americans lost this truth. With peace and prosperity, most Americans thrived, and the interests of individual and society usually coincided. That is, most people prospered through education, work, marriage, sobriety, thrift, and obedience to law—all values that benefit society generally. Those who divorced or never married tended to suffer for it; they had greater problems with drug use, criminal activity, physical and emotional health, social adjustment and earning a living.¹¹⁴ In short, it was in the interests of individuals to marry and to stay married, and most did. Those who did not were generally regarded as either victims of unfortunate circumstances or as losers.

The breakdown of the family in the last 25 years reminded us of the importance of marriage in socializing adults. As the number of unmarried adults increased, so did the wayward conduct to which they are prone. The problem is greatest in inner cities ravaged by crime and drug abuse, mostly committed by unmarried men. Just as the breakdown of the family has a cumulative effect on children that exceeds its arithmetic growth,¹¹⁵ so it also has a cumulative effect on adults. When bachelorhood was rare, adults were pressed to marry lest they be pitied or despised. That pressure has dissipated, and in some communities marriage is now so rare as to seem odd or even bizarre. As the resulting anti-social conduct proliferates, those who would formerly have avoided such conduct because it was considered deviant or disgraceful are no longer deterred.

There is also a negative synergy between the effects on children and on adults of the breakdown of the family. Children of broken families

¹¹³ *Editorial, supra* note 106, at 6.

¹¹⁴ The pathology of bachelorhood is particularly striking for men. See GEORGE AKERLOF, *MEN WITHOUT CHILDREN* (1997). The study notes, for example, that the incarceration for young married men is 2.6 per thousand, compared with 17.6 per thousand young single men.

Some believe that men are genetically harder to socialize than women. See Natalie Angier, *Parental Origin of Chromosome May Determine Social Graces, Scientists Say*, N.Y. TIMES, June 12, 1997, at A2 (reporting a study finding that girls lacking an X chromosome from their fathers were more anti-social; this suggests that the higher frequency of anti-social behavior in males, who get a Y rather than an X chromosome from their fathers, has a genetic basis).

¹¹⁵ See *supra* text following note 66.

are less likely to marry, and unmarried adults are less likely to be good citizens if they come from broken families.¹¹⁶ With the breakdown of the traditional family there is a proliferation of people who grow up in broken families and never marry as adults; these people are especially likely to misbehave.

Some believe that recognizing same-sex marriage would help to socialize homosexuals.¹¹⁷ This seems unlikely because men are domesticated not by a wedding but by women and children.¹¹⁸ By law and by social and religious tradition fathers are supposed to provide for and instruct their children. Despite the declining importance of gender differences, an expectation (sometimes reflected in the application if not the letter of the law)¹¹⁹ lingers that husbands should be the primary breadwinners in the family. These laws, traditions and expectations, which urge men to be socially responsible, would not extend to same-sex marriages.

C. Promoting Individual Happiness

Traditional marriage enriches the individuals who enter into it as well as their children and society generally. This effect satisfies even a strict test of liberal legitimacy because many benefits of marriage are not metaphysical but empirically verifiable. Married people live longer and enjoy better physical and psychological health and greater wealth.¹²⁰

Traditional marriage also yields spiritual benefits. As Roger Scruton says: "In the heterosexual act, it might be said, I move out from

¹¹⁶ See Wardle, *Potential Impact*, *supra* note 10, at 856.

¹¹⁷ See ESKRIDGE, *supra* note 9, at 84 (same-sex marriage "civilizes gay men by making them more like lesbians").

¹¹⁸ See GEORGE GILDER, MEN AND MARRIAGE 76 (1993); Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, at 43. This also follows from evidence that men are harder to socialize than women, *see supra* note 115, and that lesbians are less promiscuous and more likely to achieve long-term relationships than gay men, *see infra* note 311 and accompanying text.

¹¹⁹ Thus, despite the demise of laws distinguishing between husbands and wives with respect to child custody and alimony in divorce, it remains much more common for wives to get custody and for husbands to be required to pay alimony. *See infra* note 145.

¹²⁰ See Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483 (1995); Hara Estroff Marano, *Debunking the Marriage Myth: It Works for Women, Too*, N.Y. TIMES, Aug. 4, 1998, at F1 (citing findings that for both men and women marriage "lengthens life, substantially boosts physical and emotional health and raises income over that of single or divorced people or those who live together"). This phenomenon is observed in other countries as well. *See* Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARR. & FAM. 527 (1998).

my body *towards* the other, whose flesh is unknown to me; while in the homosexual act I remain locked within my own body, narcissistically contemplating in the other an excitement that is a mirror of my own."¹²¹ Although this view echoes Judeo-Christian tenets, it is not a mere expression of religious opinion. The unique value of heterosexual married love has been acknowledged in so many cultures that it may be taken as a general human good, like art and music, even if that value cannot be proved empirically.

Bearing and raising children in a traditional marriage is also an intrinsic human good. The joy and fulfillment of parenthood acknowledged in all societies testify strongly to their universality. These attitudes may well have a scientific basis: According to one evolutionary hypothesis, love emerged along with the evolution of helpless offspring needing care from both parents, with consequent commitment and pairing. People cherish a spouse because that spouse is the one person on a planet of billions who has as much of an interest in the fate of their children as they do.¹²²

The persistence of homosexuality, divorce and marital strife shows that this evolved trait is not dominant in many people. A person can feel romantic, erotic love for another person of the same sex, just as one can feel such love for a pet, even though reproduction is impossible in both cases. Government should not punish people simply because a genetic trait is weak or lacking in them. If the scientific basis of enduring love is exclusively heterosexual, though, government can promote human happiness by favoring traditional marriage as the most conducive setting for love. Validating gay marriage would confuse and compromise this effect.

Adoption and illegitimate children can bring happiness, too, but are everywhere considered less desirable for both parents and children. Thus, government may validly favor traditional marriage as a human good. This does not mean the state should encourage a high

¹²¹ ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 310 (1986) (emphasis in original). Similar reasoning opposes endogamy. See *infra* notes 254-56 and accompanying text; see also Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, Or One-Flesh Union*, 1997 AM. J. JURIS. 135 (arguing that heterosexual marital sex is an intrinsic human good). Belief that traditional marriage is intrinsically good is not limited to Judaism and Christianity. See DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY* 121 (1999) (finding that of 18 characteristics checked in international study on choosing a mate, "mutual attraction or love proved to be the most highlyvalued in a potential mate by both sexes").

¹²² BUSS, *supra* note 122.

birth rate or penalize couples who cannot or choose not to bear children.¹²³ However, government may grant traditional marriage benefits, including honor, in order to promote the intrinsic good of bearing and raising children. Although homosexual acts are sterile, homosexuals can play a meaningful role in their families and have often done so. They can have important bonds with their parents, siblings, nieces and nephews. Indeed, without children of their own, they can devote greater attention to these relationships than can adults with children.

V. REFUTING THE ARGUMENTS FOR SAME-SEX MARRIAGE

A. Rights to Autonomy in Intimate Relationships

Some view legal recognition of same-sex marriages as part of a broad right to autonomy in intimate relationships, a corollary of the right of heterosexual couples to marry, to reproduce, to use contraceptives, and to obtain abortions. But there is no such right, even among consenting heterosexual adults. Thus the Supreme Court has upheld laws against polygamy¹²⁴ and has never questioned laws against incest, adultery, bestiality and necrophilia. Unlike these other activities, same-sex marriage is not a crime; it is simply denied the legal recognition afforded to traditional marriages. Government has wider latitude in promoting than in punishing behavior.¹²⁵ Sexual autonomy is often claimed to be an element of privacy.¹²⁶ Whatever force this claim has against criminal sodomy statutes does not extend to recognition of same-sex marriage, which entails abandonment of privacy and a demand for public validation. Indeed, if sexual autonomy is a right, the state should have "no authority to sanction, to reward, or even to approve one set of family relations over another," as some gay activists argue.¹²⁷

¹²³ See *supra* notes 102-10 and accompanying text.

¹²⁴ *Cleveland v. United States*, 329 U.S. 14, 20 (1946); *Reynolds v. United States*, 98 U.S. 145 (1878). See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992) (denying a general constitutional right to marry).

¹²⁵ See *supra* notes 25-32 and accompanying text.

¹²⁶ See Friedman, *supra* note 43 (making a privacy claim for same-sex marriage).

¹²⁷ FRANK BROWNING, *THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY* 154 (1993) (describing the position taken by Paula Ettelbrick during presentation opposing gay marriage, Chicago, Illinois, October 1989). See also Fenton Johnson, *Wedded to an Illusion*, HARPER'S MAG., November 1996, at 43, 49 (benefits should be granted to "couples who

The Supreme Court has forbidden states to deny recognition to some marriages, but it has never questioned the favored status of traditional marriage and has upheld not only laws against polygamy but also some restrictions on marriage of prison inmates¹²⁸ even though these strictures are much less widely established than the nonrecognition of same-sex marriages. Where the Court has sustained a constitutional right to marry, it has referred to marriage as "the relationship that is the foundation of the family in our society" and to protecting the "decision to marry and raise [a] child in a traditional family setting."¹²⁹ So stated, this right obviously does not encompass gay marriage.

As already shown, society has good reason to favor traditional marriage.¹³⁰ Accordingly, there is good reason not to embrace a right of sexual autonomy so broad as to deny that preference.

B. Equality: Sex Discrimination and the Analogy to Race Discrimination

1. Sex Discrimination

Some argue that traditional marriage is sex discrimination.¹³¹ In one sense this claim is false: traditional law treats the sexes equally in that everyone may marry a person of the other sex but not a person of the same sex. This rationale elicits two objections. The first is more formal: If a man may marry a woman, it is sex discrimination to forbid a woman to marry a woman. This argument serves primarily to remind us how elusive or empty is the idea of equality.¹³² The principle of equality insists that likes be treated alike; but since it does not tell us

demonstrate stability," whether or not they are married).

¹²⁸ See *Turner v. Safley*, 482 U.S. 78 (1987) (striking down some restrictions on the right of prison inmates to marry but upheld others). Compare *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding provisions of the Social Security Act that terminated benefits to dependent children upon marriage to a person not entitled to benefits under the Act even though the prospect of losing benefits might deter some affected people from marrying) with *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down law forbidding indigent, support-obligated fathers of children receiving public assistance to marry).

¹²⁹ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

¹³⁰ See *supra* notes 62-130 and accompanying text.

¹³¹ See *Baehr v. Lewin*, 852 P.2d 44, reconsideration granted, 875 P.2d 225 (Haw. 1993) (holding that law recognizing heterosexual but not homosexual marriages constitutes sex discrimination in violation of the state constitution's Equal Protection Clause and Equal Rights Amendment); KOPPELMAN, *supra* note 100, at 154; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

¹³² See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

which things are alike, the principle collapses into a tautology—things that should be treated alike should be treated alike. Not all distinctions based on sex are illegal. We have separate bathrooms, sports teams and singing groups for men and women, so the sex distinction in marriage law is not necessarily improper.¹³³

Discrimination against homosexual acts has been defended because they involve different conduct from heterosexual acts. Andrew Koppelman objects that some sexual acts can be performed by either homosexual or heterosexual couples.¹³⁴ Any force this objection has for criminal sodomy laws does not extend to marriage. As Koppelman concedes, only heterosexual couples can perform reproductive intercourse.¹³⁵ Since the main social function of marriage is child-rearing, society is warranted in distinguishing between homosexual and heterosexual conduct for purposes of marriage. It is irrelevant that heterosexual couples may engage in sexual acts other than vaginal intercourse. A society may (and ours usually does) treat marital sex as private. Non-reproductive sex can also strengthen a marriage and thereby make a couple better parents.¹³⁶

Koppelman and others also argue that discrimination against homosexuals oppresses women—heterosexism reinforces sexism.¹³⁷ He says sexism requires systematic sexual domination of women by men. Homosexuality is suppressed because it undermines this domination. Male homosexuality is especially threatening because society deems sexual penetration a humiliation to be borne only by women. This theory has many problems, beginning with the assumption of unrelieved male domination in our society. Many factors cited to prove the subordination of racial minorities—shorter life expectancy and higher rates of illiteracy, school failure, drug abuse, mental illness

¹³³ This is true though some women are bigger, stronger or have deeper voices than some men. Thus these facts refute Andrew Koppelman's claims that sex-based classifications are permissible only if they reflect generalizations that are "exceptionless," Andrew Koppelman, *Sexual Orientation Discrimination as Sex Discrimination: Answering the Objections* 16 (unpublished manuscript Oct. 14, 1999); and that "[a] party challenging a sex-based classification is not required to show anything about the relation between the statute and the subordination of women." *Id.* at 28.

¹³⁴ KOPPELMAN, *supra* note 100, at 157.

¹³⁵ *Id.*

¹³⁶ See *supra* note 86 and accompanying text. Nor is it relevant that some heterosexual couples conceive children by means other than vaginal intercourse or do not have children at all. See *supra* notes 102-110 and accompanying text.

¹³⁷ KOPPELMAN, *supra* note 100, at 153-76.

and incarceration—would suggest that males, not females, are disadvantaged in our society.

It is dubious that such sexual inequality as does exist is sustained by heterosexism. As Koppelman concedes, cultures that approve homosexuality also subordinate women; indeed, "it is possible for male homosexuality (at least) to be associated with male privilege and the repudiation of women."¹³⁸ Hence Koppelman retreats to the claim that "'homophobia directed by men against men is misogynistic."¹³⁹ Even this narrower claim is shaky, though. If heterosexism supports male dominance, one would expect women to view homosexuality more favorably than men do, but Koppelman recognizes that this is generally not the case.¹⁴⁰

Even if discrimination against homosexuality did bolster male dominance, it would be questionable whether traditional marriage laws contribute to this effect. One would have to argue that non-recognition of same-sex marriages makes traditional marriage (more) disadvantageous to women. This argument seems implausible; indeed, many of Koppelman's own statements seem to refute it. He recognizes that women may support traditional families for fear of "'losing traditional male support."¹⁴¹ He even concedes "it may be that traditional sex roles are the best ones for women."¹⁴² We need not go that far. We need only recognize that the financial, physical and emotional burdens of child-rearing are better borne by two parents than by one. Thus men and women who have or expect to have children benefit from laws and customs that protect the traditional family. Indeed, since in all societies a parent who leaves the family is more likely to be the father, women have a more obvious interest than men in sheltering the traditional family.

More obvious, though maybe not more important. Although tradi-

¹³⁸ *Id.* at 171. See also *infra* text accompanying note 150.

¹³⁹ *Id.*, quoting EVE KOSOFKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSEXUAL DESIRE* 20 (1985).

¹⁴⁰ KOPPELMAN, *supra* note 100, at 161 n.52, quoting Gregory M. Herek, *On Heterosexual Masculinity: Some Psychological Consequences of the Social Construction of Gender and Sexuality*, 29 AM. BEHAV. SCI. 563, 564-65 (1986): "National opinion polls typically find no significant difference between males' and females' responses to questions about homosexuality." Since this fact weakens his attempt to link heterosexism to sexism, Koppelman then quotes Herek on some "[s]maller-scale experimental and questionnaire studies," *id.*, but this rescue effort seems desperate and unsuccessful.

¹⁴¹ *Id.* at 173, quoting JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 37 (1985).

¹⁴² *Id.* at 174.

tional marriage benefits both sexes, it seems to curb the inclinations of men more than of women.¹⁴³ This is evidenced by the greater reluctance of men to marry. Moreover, in some ways traditional marriage does not cement male dominance but alleviates a male disadvantage. Children have closer biological ties to their mothers than to their fathers. Conception is the end of the father's biological tie to the child but only the beginning of the mother's tie, which extends through nine months of pregnancy and, typically, through several months of nursing.

Without traditional marriage, the rights of the father, and even his identity, would be tenuous. Many societies, including our own, grant mothers greater rights. For example, mothers get child custody in most divorces and have exclusive discretion to abort.¹⁴⁴ To some extent traditional marriage mitigates the inequality of paternal and maternal rights, though. Thus Koppelman's thesis, as applied to marriage, seems not only unproved but backwards—traditional marriage restricts the conduct of men more than of women and relieves some disadvantages of fathers.¹⁴⁵

Koppelman says homophobia is aimed particularly against men to deter them from fleeing heterosexuality,¹⁴⁶ but people do not flee from superiority. Indeed, Koppelman himself recognizes a more plausible analysis: "resentment that those with familial responsibilities that weigh heavily upon them feel toward those who seem free from such responsibilities."¹⁴⁷ In this view the role of husband/father is not a privilege of sexual domination but a responsibility so onerous that society must punish men who shirk it.

Some common sexual terms reveal scorn for women and male

¹⁴³ Despite the tangible benefits of marriage to men, see AKERLOF, *supra* note 115, "[m]en may experience the sexual exclusivity expected within marriage as more of a burden" than do women, Amy Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage*, 84 VA. L. REV. 509 (1998).

¹⁴⁴ See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 98-114 (1993) (mothers get custody 70-80% of the time); *Planned Parenthood v. Casey*, 505 U.S. 833, 893-95 (1992) (striking down law requiring consent of or even notice to father before abortion).

¹⁴⁵ Indeed, in light of arguments like Koppelman's, it is ironic that William Eskridge supports gay marriage due in part to the tendency of (gay) males to "lose their balance and succumb to private sirens if they are not socially and even legally constrained." ESKRIDGE, *supra* note 9, at 83. Thus the argument for recognition of gay marriage is also based on gender stereotypes.

¹⁴⁶ See KOPPELMAN, *supra* note 100, at 164-65, 171.

¹⁴⁷ *Id.* at 173.

homosexuals.¹⁴⁸ To be "screwed," for example, is to be mistreated. The vernacular also illuminates gender relations in marriage. Some usage treats marriage as degrading to women. More often, though, marriage is depicted as depriving men of freedom (sexual and otherwise) and saddling them with financial and other burdens. When a woman marries a man she puts a ring in his nose. By contrast, the bachelor is a playboy—footloose, carefree, sexually adventurous, with plenty of money to spend on his own pleasures. That these images are empirically false enhances rather than diminishes their psychological significance—despite the facts, men view marriage as detrimental. Gay marriage is often supported in order to promote public acceptance of homosexual conduct, but such acceptance may be "inconsistent with a proper recognition of the equality of women with men in intrinsic worth."¹⁴⁹

Some say discrimination against homosexual conduct is improper (and unconstitutional) because sexual orientation is involuntary and immutable and sexual pleasure is too central to human flourishing to be restricted by law without a compelling reason, which is lacking here.¹⁵⁰ Even if sexual orientation is immutable, it does not follow that law cannot base distinctions on it. Many laws turn on involuntary characteristics, like age.¹⁵¹ They also differentiate by sex when there is good reason to do so, as in providing separate bedrooms or bathrooms for men and women to preserve sexual privacy. This separation is not universal—many societies (at one time, all societies) deem such privacy unnecessary, even absurd. Thus, the justification for such distinctions need not be universal, but only reasonable by the standards of our own society.¹⁵²

A few people are immutably homosexual in that they cannot enjoy

¹⁴⁸ See II ENCYCLOPEDIA OF HOMOSEXUALITY (Walter R. Dynes, ed., 1990) 1200 (terms for homosexuals "tend to express in their meaning or derivation the hostility, the contempt, the hatred, and the fear that straight people have felt toward gay sex and those who practice it").

¹⁴⁹ Finnis, *supra* note 85, at 24.

¹⁵⁰ The Supreme Court has sometimes disfavored laws that discriminate on the basis of "immutable" characteristics. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973).

¹⁵¹ Thus blindness is involuntary yet is a bar to a driver's license, and a genetic predisposition to crime would not excuse criminal activity. Sunstein, *supra* note 31, at 9.

¹⁵² See Dennis Prager, *Homosexuality, the Bible and Us—a Jewish Perspective*, THE PUBLIC INTEREST, Summer, 1993, at 60, 73 (arguing that "[w]hether or not homosexuals choose homosexuality is entirely unrelated to the question of whether society ought to regard it as an equally valid way of life").

heterosexual relations,¹⁵³ but many people can enjoy both. Kinsey found that sexual orientation is not strictly bipolar but forms a continuum covering strong and weak preferences and neutrality between gay and heterosexual acts.¹⁵⁴ In societies intolerant of homosexuality more men with homosexual inclinations will enter traditional marriages.¹⁵⁵ Moreover, even if sexual orientation is immutable in some adults, it does not follow that it is fixed at birth. Some scientists believe that sexual orientation may be influenced by experience in early childhood.¹⁵⁶

Scholars disagree about the immutability of sexual orientation.¹⁵⁷ Koppelman premises his whole argument on the immutability of sexuality. Again, he claims that male "homophobia" stems from the "homophobe's" uncertainty and anxiety about his own sexuality,¹⁵⁸ but uncertainty arises only if sexuality is fluid. Law and social attitudes influence the frequency of homosexual behavior, as evidenced by the widely different rates of homosexual conduct between societies that condone and societies that condemn it.¹⁵⁹ And even those capable only of homosexual relations are, if sane, able to abstain from sex with

¹⁵³ The most extensive study to date found that in America 2.8% of adult males and 1.4% of adult females are predominantly homosexual. See ROBERT T. MICHAEL, ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 176 (1994); EDWARD O. LAUMANN, ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 297 (1994). Very few people are totally incapable of enjoying heterosexual relations. See POSNER, *supra* note 1, at 100-01.

¹⁵⁴ ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948); see also ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 53-61 (1978); RICHARD C. FRIEDMAN, *MALE HOMOSEXUALITY: A CONTEMPORARY PSYCHOANALYTIC PERSPECTIVE* 3 (1988).

¹⁵⁵ POSNER, *supra* note 1, at 117.

¹⁵⁶ See J. Maddox, *Is Homosexuality Hardwired?*, *NATURE*, Sept. 5, 1991, at 13 (stating that childhood experiences (including sexual arousal) may cause physical changes in the brain that become permanent).

¹⁵⁷ Compare POSNER, *supra* note 1, at 295 (concluding that the evidence indicates "strongly though not conclusively" that sexual orientation is more "determined" than "chosen") with Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994) (denying the claim of immutability). A recent study could not replicate the results of a study by a homosexual activist purporting to identify a "gay gene." George Rice, et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, *SCIENCE*, April 23, 1999, at 665. Some studies report substantial success with homosexuals who expressed a desire to change their sexual orientation. See, e.g., THOMAS E. SCHMIDT, *STRAIGHT AND NARROW? COMPASSION AND CLARITY IN THE HOMOSEXUALITY DEBATE* 153-58 (1995).

¹⁵⁸ KOPPELMAN, *supra* note 100, at 164-65, 171.

¹⁵⁹ See *1 ENCYCLOPEDIA OF HOMOSEXUALITY*, *supra* note 149, 578-80 (describing the impact of social attitudes on homosexual conduct).

others. Validating same-sex marriages would sow confusion: "children confronted with two equally legitimate images of adult sexual roles would be rudderless for many years, and no one knows what personal or social toll would result from this prolonged period of sexual confusion."¹⁶⁰

Because heterosexual monogamy requires equal numbers of marriageable men and women, because there is already a relative scarcity of marriageable males, and because homosexuality seems to be more common among men than women, even a small increase in the number of active homosexuals could exacerbate the imbalance between marriageable men and women.¹⁶¹ Again, liberal societies can (and often do) encourage behavior they consider socially beneficial without having to conclude that some contrary behavior, which is not so favored, is harmful. Traditional marriage is beneficial, so it is not improper, as sex discrimination or otherwise, for society to recognize it but not other kinds of marriage. Traditional marriage is encouraged by treating it as unique, which it would not be if same-sex marriages were treated equally. Therefore, the main consequence of recognizing same-sex marriage would not be a shift of some people to homosexual conduct, but the change in heterosexuals' no longer seeing traditional marriage as something special.

2. *The Analogy to Racial Discrimination*

Advocates of same-sex marriage compare it to interracial marriage.¹⁶² Defenders of anti-miscegenation laws denied that they were racially discriminatory because they treated all races alike by limiting everyone to marrying a person of the same race. In *Loving v. Virginia*¹⁶³ the Supreme Court looked beyond this formal equality and found the laws discriminatory because they were "designed to maintain White Supremacy."¹⁶⁴ The laws were intended to preserve apartheid, a

¹⁶⁰ Kristol, *supra* note 111, at 46.

¹⁶¹ See *infra* notes 237-38 and accompanying text. Further, validation of same-sex marriage would diminish esteem for marriage (see *infra* notes 202-10 and accompanying text) and thereby weaken the incentives for heterosexual men to marry.

¹⁶² See Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2474-75 (1994); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 232-33.

¹⁶³ 388 U.S. 1 (1967).

¹⁶⁴ *Id.* at 11.

racial caste system, by enforcing "racial boundaries."¹⁶⁵

Gay marriage is radically different from, and antipodal to, interracial marriage within the traditions of Western culture.¹⁶⁶ Christianity expressly condemned racism as, for example, in the parable of the Good Samaritan.¹⁶⁷ Anti-miscegenation laws were almost unheard of outside the United States, and less than one-third of the states had such laws when *Loving* was decided.¹⁶⁸ Thus in striking down these laws *Loving* did not reject but embraced Western tradition. By contrast, neither the West nor any other culture has ever recognized same-sex marriage, and Christianity, like Judaism, has always condemned homosexual acts. By embracing Western tradition *Loving* argues against recognition of same-sex marriage.

Anti-miscegenation laws prevented intimate contact between the races. Traditional marriage laws do not keep the sexes apart but bring them together.¹⁶⁹ Interracial marriages create mixed-race children; same-sex marriages do not create mixed-gender children. In the analogy between race and gender, traditional marriage resembles integration; gay marriage resembles segregation. It is not surprising, then, that most Afro-Americans reject the analogy between the civil rights and homosexual movements.¹⁷⁰ Government does not compel racial integration, but it can encourage integration by education, exhortation and subsidies. Likewise, government cannot force individuals into traditional marriages, but it can encourage traditional marriages by favoring them in various ways.

The logical inconsistency of gay marriage has already become apparent in litigation over the benefits offered by some employers to gay couples. Suits have alleged that denial of these benefits to

¹⁶⁵ Sunstein, *supra* note 31, at 18.

¹⁶⁶ Even gay activists often admit that race and homosexuality are very different with respect to discrimination. See SULLIVAN, *supra* note 101, at 151-54 (arguing that race is different because sexual orientation can be hidden and is a complex "mixture of identity and behavior;" and because "homosexuals are not subject to inherited and cumulative patterns of economic discrimination" and "[t]here was no slavery for homosexuals"); see generally Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOWARD L.J. 289 (1998).

¹⁶⁷ Luke 10:30-37. The Samaritans were a disliked minority. By helping the injured Levite the Good Samaritan ignored racial distinctions.

¹⁶⁸ See ESKRIDGE, *supra* note 9, at 120-21.

¹⁶⁹ See Sunstein, *supra* note 31, at 20 n.65.

¹⁷⁰ See Lena Williams, *Blacks Rejecting Gay Rights as a Battle Equal to Theirs*, N.Y. TIMES, June 28, 1993, at A1.

unmarried heterosexual couples is illegal discrimination. The first few claims have failed.¹⁷¹ However, the arguments for legitimizing same-sex marriage based on equality and sexual privacy and autonomy would also bar discrimination against unmarried heterosexual couples. Certainly any claim that a gay marriage is morally superior or more beneficial to society than heterosexual cohabitation without marriage would strike most Americans as ludicrous.

3. If There Is an Equality Problem, Validating Same-Sex Marriage Does Not Solve It

If marriage laws cause invidious inequality by bestowing benefits on some but not all people, the just solution is not to extend those benefits to gay marriages. That step would still leave discrimination against polygamy and endogamy and, more importantly, against those who cannot or choose not to marry. Indeed, many gay activists oppose recognition of same-sex marriages because it would deprecate unmarried gays.¹⁷² Complete equality would require eliminating any legal preference for marriage and treating all individuals alike, regardless of whether they are married. That advocates of same-sex marriage do not propose this shows that equality is not their real goal.

C. Recognizing Gay Marriages Would Damage Traditional Marriage

1. Many Advocates of Same-Sex Marriage Want to Transform Traditional Marriage

Many advocates of same-sex marriage seek not to expand traditional marriage to gays but revolutionize the institution.¹⁷³ William Eskridge hopes gay marriage will dethrone the traditional family based on blood-relationships in favor of "families we choose."¹⁷⁴ Michaelangelo

¹⁷¹ See *Foray v. Bell Atlantic*, 56 F. Supp 2d. 327 (S.D.N.Y. 1999) (denying relief under Federal statutes). The court concluded that the discrimination was not invidious because gay couples cannot marry but heterosexual couples can. *Id.* at 330. It is doubtful, however, that most Americans would find this a morally persuasive distinction.

¹⁷² Stephen Noll usefully distinguishes between "deconstructionists [who] fear that marriage may co-opt the [gay] liberation movement, while reconstructionists argue that same-sex marriage may serve as a means by which the entire institution may be redefined." Noll, *supra* note 9, at 59. See *infra* notes 310-17 and accompanying text (many gays oppose recognition of gay marriage).

¹⁷³ See Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991).

¹⁷⁴ ESKRIDGE, *supra* note 9, at 81; see also KATH WESTON, FAMILIES WE CHOOSE: LESBIANS,

Signorile urges activists "to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, . . . to debunk a myth and radically alter an archaic institution The most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."¹⁷⁵ Urvasi Vaid wants to "assimilate the straight world to the gay world."¹⁷⁶ Although the consequences of validating same-sex marriage cannot be predicted, companionate marriage fosters anti-homosexual attitudes¹⁷⁷ and could therefore be a target of gay activists.

The question of the impact of gay marriage on public attitudes raises a related question: Why do supporters of gay marriage spurn the alternative of domestic partnership laws, which could confer the same legal benefits as marriage?¹⁷⁸ The reason is that they are interested primarily in the intangible benefits—the honor, respect, the social stamp of approval—that legally recognized marriage brings.¹⁷⁹ But the corollary to recognition would be that traditional child-bearing and child-rearing marriages would no longer be legally special. They would be treated as no better than a gay partnership, which to most people would constitute not only the denial of a deserved accolade but a calculated insult.

2. *Weakening the Incentives to Marry*

Why do couples marry? A desire to make a mutual commitment, even in public, is not a reason since that can be done without marriage. The material legal benefits of marriage are mostly minor and often outweighed by the material detriments.¹⁸⁰ The main motives to marry, then, are intangible. Society honors marriage. Law confirms this honor by recognizing marriage. In Judaism, Christianity, and many other faiths, marriage is a sacrament, a union blessed by

GAYS, KINSHIP 116 (1991); Sullivan, *supra* note 101, at 202-05.

¹⁷⁵ Michelangelo Signorile, *Bridal Wave*, OUT, Dec.-Jan., 1994, at 161. See also Franklin Kameny, *Deconstructing the Traditional Family*, THE WORLD & I, Oct. 1993, at 393-95. "[T]here is no legitimate basis for limiting the freedom of the individual to structure his family in nontraditional ways that he finds satisfying. . . ." *Id.* at 385.

¹⁷⁶ URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 208 (1995).

¹⁷⁷ POSNER, *supra* note 1, at 157-58.

¹⁷⁸ See *supra* notes 13-14 and accompanying text.

¹⁷⁹ See *supra* note 1.

¹⁸⁰ See *supra* note 56.

God. The religious associations of marriage are important even to unbelievers; many who otherwise never enter a church or temple still insist on being married there. Marriage is "a public tradition that carries with it experience and wisdom beyond the reach of the lifetime of any single couple."¹⁸¹ People follow social norms because they value the opinions of others, and law helps to shape those norms.¹⁸²

Marriage is the social norm for adults; singles fit awkwardly or not at all into many social settings. Singles are often considered unfortunate ("he/she can't find a spouse") or psychologically stunted — unmarried men have been viewed as immature. However, many norms that once made bachelorhood unattractive for men have weakened.¹⁸³ Society generally treats a marriage as valid only if it is legally recognized. Thus polygamous and endogamous marriages are generally honored only in societies where such marriages are legal.

Honor, or social approval, is the main reason why legal recognition of gay marriages is so eagerly sought. Desire for honor and fear of dishonor are powerful incentives. For example, Americans pay taxes more readily than most other people, not because our penalties for tax evasion are harsher but because our social customs condemn tax evasion;¹⁸⁴ elsewhere it is downplayed as illegal but not immoral. People often endure terrible hardship, even brave certain death, to gain or maintain honor.¹⁸⁵

The honor conferred by law is fragile, however, because it depends on social attitudes as material benefits do not. A tax break can be extended from one group to others without reducing its worth to the former, but the award of honor is necessarily selective and judgmental. An honor too freely granted loses value.¹⁸⁶ If it is granted for acts

¹⁸¹ Philip Turner, *Sexual Ethics and the Attack on Traditional Morality* 19 (1988) (pamphlet on file with the author).

¹⁸² See MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 181-86 (1998); Sunstein, *supra* note 31, at 954. See also *supra* notes 25-34 and accompanying text (discussing the "expressive" function of law, including the bestowing of honor).

¹⁸³ See Wax, *supra* note 144, at 666-67 (describing the demise of these norms).

¹⁸⁴ See Editorial, *Loopholes in I.R.S. Reform*, N.Y. TIMES, May 26, 1998, at A20 (tax compliance in America "is far higher than in many other Western countries").

¹⁸⁵ See JAMES M. MCPHERSON, *FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR* 90-103 (1997) (claiming that soldiers on both sides in the American Civil War fought more for honor than for abstract causes).

¹⁸⁶ See WILLIAM J. GOODE, *THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM* 46-48 (1978) (prestige is governed by laws of supply and demand).

most people condemn, its value will decline more sharply. Thus many honors are aggressively restricted. A corpse improperly buried at Arlington National Cemetery is exhumed and expelled,¹⁸⁷ and Congress enacts a law to limit this honor.¹⁸⁸ An admiral kills himself because of charges that he wore medals he did not earn.¹⁸⁹ Only one American — Martin Luther King, Jr. — is honored with an annual national holiday. If these honors were granted liberally, they would be cheapened, and the impact of the honors on social attitudes and behavior would be diluted.

Gays themselves recognize the value of exclusion. Although gays try to force organizers of ethnic parades to include them,¹⁹⁰ organizers of gay parades sometimes exclude transvestites and pro-pederasty groups¹⁹¹ because including them would incur contempt for all gays. Recognition of gay marriage would have the same effect on attitudes toward marriage generally.

Acknowledging the psychological function of law and honor shows that those who say that nonrecognition of gay marriage is "irrational" have a point.¹⁹² Soldiers who fight for honor or for a moral cause are not behaving "rationally" in the sense that the costs of their actions far exceed the material benefits. The same is true of voting. Because one vote rarely alters the result of an election, not voting is "rational apathy."¹⁹³ A democracy, then, needs "irrational" citizens who devote more effort to studying issues, supporting candidates, and voting, than a rational weighing of material costs and benefits would warrant. Democracies encourage this irrationality by trumpeting voting as a duty and a privilege. But many people do not vote if they see that many of their fellow citizens don't bother. For soldiering, too, social

¹⁸⁷ See Stephen Barr, *Panel Vows to Tighten Rules for Arlington Burial: Politically-Connected Have Edge, Chairman Says*, WASH. POST, Jan. 29, 1998, at A17.

¹⁸⁸ 38 U.S.C. § 2402 (1994).

¹⁸⁹ See Philip Shenon, *His Medals Questioned, Top Admiral Kills Himself*, N.Y. TIMES, May 17, 1996, at A3.

¹⁹⁰ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 566 (1995) (striking down on First Amendment grounds state court order that organizers of St. Patrick's Day parade allow homosexual advocacy group to participate).

¹⁹¹ See Mark Higgins, *Gays Put Their Pride on Parade*, SEATTLE POST-INTELLIGENCER, July 1, 1996, at B1 (pro-pederasty group excluded from a Seattle "gay pride" march).

¹⁹² See ESKRIDGE, *supra* note 9, at 176-78 (arguing that sexual orientation is "an irrational classification").

¹⁹³ See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260-74 (1957).

attitudes are crucial. When society denigrates military service, as happened with Americans in Vietnam, many young men try to avoid combat.

Similarly, marrying, staying married, and bearing and raising children are in any material accounting irrational. In that sense, Eskridge is right: society's privileging of traditional marriage encourages conduct that is in a sense irrational for individuals but essential to society's well-being. Eskridge denies that legal validation of marriage confers honor: "the state is not a bit choosy about who can marry."¹⁹⁴ This misses the point, and he corrects his own error when he says: "the state gives its stamp of approval to the institution of marriage," not "to particular couples."¹⁹⁵ But what is the nature of the institution which earns social approval? Eskridge himself is "choosy;" he disapproves some polygamous and incestuous marriages.¹⁹⁶

Some support gay marriage precisely because it would change attitudes toward homosexuality generally.¹⁹⁷ They are probably right that recognition would change attitudes toward marriage just as liberalization of divorce laws did. Marriage, once a sacred bond that could be broken only with great difficulty and for compelling reasons, can now be dissolved by either party for any reason or no reason at all. Not surprisingly, respect for marriage plummeted.

It does not follow, though, that validating gay marriage would enhance regard for homosexuality without eroding respect for traditional marriage. Some claim that recognition would "buttress the ethic of heterosexual marriage, by showing how even those excluded from it can wish to model themselves on its shape and structure."¹⁹⁸ This defies belief. Most Americans oppose recognition of gay marriage,¹⁹⁹ and

¹⁹⁴ ESKRIDGE, *supra* note 9, at 106; *see also id.* at 105-09.

¹⁹⁵ *Id.* at 105.

¹⁹⁶ *Id.* at 146-51.

¹⁹⁷ *See supra* note 1.

¹⁹⁸ SULLIVAN, *supra* note 99, at 112.

¹⁹⁹ ESKRIDGE, *supra* note 9, at 244 n.53 (citing a 1992 poll). Eskridge admits recognition would provoke "vociferous, even violent resistance by homophobic heterosexuals." *Id.* at 81. Most Americans disapprove of homosexuality. *See* ALAN WOLFE, *ONE NATION, AFTER ALL* 72-76 (1998) (noting that in a survey, seventy percent of the people questioned condemned homosexuality). Wolfe found the dominant attitude to be: "[I]f what they're asking for is for me, Mr. Average American, to say yes, your life style is the moral equivalent of mine, that I'm not willing to do." Carey Goldberg, *Acceptance of Gay Men and Lesbians Is Growing, Study Says*, N.Y. TIMES, May 31, 1998, at A15. The National Gay and Lesbian Task Force found that "disapproval of homosexuality . . . was still 56 percent in 1996". *Id.*

public reaction to the decision in *Baehr v. Lewin* led to a Constitutional Amendment that allowed the Hawaii legislature to restrict marriage to opposite sex couples.²⁰⁰ Validating gay marriage would break the link of marriage to the divine, to the miracle of creation of new life, and to the rich tradition of love and commitment between husbands and wives. "[F]or our intimacies to survive they must receive public recognition and support."²⁰¹ Validating gay marriage would dilute this support and lead to demands that unmarried couples receive the same legal benefits as spouses.²⁰²

If respect for gay marriage did grow, it would do so at the expense of traditional religion: "People who reject Christian doctrine on sex . . . may reject the remainder of Christian doctrine as well" ²⁰³ Given the centrality of religion in fostering individual responsibility and concern for others and in resisting such social evils as drug abuse and crime,²⁰⁴ such abandonment could seriously harm society.

Harvey Fierstein's play, *Torch Song Trilogy*, shows the typical feelings about gay marriage. After the death of his lover the protagonist tells his mother that he is "widowing." The outraged mother says: "Are you trying to compare my marriage with you and Alan? . . . How dare you! . . . May God strike me dead! Whatever I did to my mother to deserve a child speaking to me this way."²⁰⁵ To most people, gay marriage would be a "mocking burlesque"²⁰⁶ or "mere parody" of traditional marriage.²⁰⁷ James Q. Wilson suspects legal recognition "would call even more seriously into question the role of marriage at a time when the threats to it, ranging from single-parent families to common divorces, have hit record highs."²⁰⁸ Andrew Sullivan, an advocate of same-sex marriage, admits that "[e]ven those tolerant of homosexuals may find this institution [marriage] so wedded to the notion of heterosexual

²⁰⁰ See *supra* note 2 and accompanying text.

²⁰¹ Turner, *supra* note 182, at 19.

²⁰² See *supra* text accompanying note 187.

²⁰³ POSNER, *supra* note 1, at 175.

²⁰⁴ See GUENTER LEWY, WHY AMERICA NEEDS RELIGION 117-21 (1996).

²⁰⁵ HARVEY FIERSTEIN, TORCH SONG TRILOGY 144-46 (1979).

²⁰⁶ Arkes, *supra* note 119, at 45.

²⁰⁷ James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, March, 1996, at 34, 36 (quoting Kenneth Minogue's book review of *Virtually Normal*).

²⁰⁸ *Id.*

commitment that to extend it would be to undo its very essence."²⁰⁹ Some back gay marriage despite its uncertain effects: "We ought to pull the pin and see what happens."²¹⁰ This attitude would strike many (including the author) as reckless when applied to an institution central to the condition of society.

Some commentators recall that the widespread and often bitter opposition to racial integration eroded after World War II and predict that hostility to gay marriage will also collapse if it is sanctioned.²¹¹ Unfortunately, while racism has sharply declined in recent decades, considerable racial friction persists. Moreover, as already noted, the analogy to race is faulty.²¹² Jim Crow segregation was a regional aberration, a deviation from Western tradition and from Christian and Jewish doctrine. By contrast, disapproval of homosexuality and reverence for traditional marriage are integral to Western tradition and Christianity. Thus a better comparison than racial integration would be cannibalism or commission of sex acts in public. Both have been condoned in some societies but long abhorred in Western civilization. It is doubtful that legalizing these acts would rapidly lead to their public acceptance. General approval of gay marriage would require either an official change in traditional Christian, Jewish, and Moslem doctrine, or wholesale abandonment of these faiths by Americans. Both are highly unlikely.

Revolutionizing social attitudes toward homosexuality seems especially unlikely if gay marriage were legally imposed by judges. In rulings on the death penalty, the rights of criminal defendants, racial preferences, and busing to promote school integration, the Supreme Court took positions far to the left of the American mainstream, but the people were not won over. Indeed, some decisions may have galvanized opposition and thereby reversed a gradual leftward trend in

²⁰⁹ SULLIVAN, *supra* note 101, at 179.

²¹⁰ Christine Pierce, *Gay Marriage*, 26 J. SOCIAL PHIL. no. 2, 5, 10 (1995). The Supreme Court of Vermont flirted with a similar recklessness in *Baker v. State*, 744 A.2d 864 (Vt. 1999). While ordering the legislature to extend the same benefits to gay couples as to married couples, the court did not insist that marriage be open to gays because "[a] sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences." *Id.* at 887. Given this admission, it is astonishing that the court simply leaves the whole question to the legislature.

²¹¹ See ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL, AND LEGAL ISSUES 194-96 (Robert P. Cabaj & David W. Purcell, eds., 1998).

²¹² See *supra* notes 163-71 and accompanying text.

public opinion.²¹³ Unlike the Court's dismantling of Jim Crow segregation, these decisions did not grow out of but often ran counter to Western tradition. Gay marriage is so contrary to Western tradition that the public would probably reject any judicial move to condone it.

The effect of validating gay marriage would turn in part on gays' response to it. Most advocates of gay marriage want it as an option for gays, not the norm; they do not expect that, for gays, love and marriage will go together like a horse and carriage. And why should they? The purposes of traditional marriage—to rear children, to give mothers economic support, and to yoke the energies of males to families—will not apply to gay couples. Although most lesbians already live in stable relationships, most gay men do not,²¹⁴ which suggests that sexual conduct is dictated by deep-seated attitudes toward fidelity and promiscuity rather than by a marriage certificate. The paucity of registrations under Hawaii's domestic partnership law²¹⁵ shows that the tangible legal benefits of marriage are unimportant to most gays. Despite legal recognition, few gay men would marry. The effect of recognition, then, might be less to elevate esteem for homosexuality than to diminish regard for marriage.

3. *Weakening the Incentives to Stay Married*

Recent research documents the carnage wrought by the breakdown of the traditional family. Children were supposed to profit if their parents' unhappy marriages were dissolved.²¹⁶ We now know that divorce devastates not only small children, as many expected, but older children, too, and the damage persists, often for life.²¹⁷ Most divorced

²¹³ Justice Ginsburg believes that the Court's abortion decisions may have had this effect. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1205 (1992).

²¹⁴ See *infra* note 230.

²¹⁵ See *supra* note 57.

²¹⁶ "Perhaps the most persuasive justification for unrestricted availability of divorce is the empirical assumption that if either parent is sufficiently dissatisfied with the marriage to contemplate divorce, then the child may be more harmed by the continuation of the unhappy marriage than by divorce." Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990) at 29.

²¹⁷ See generally LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES. MEN, WOMEN, AND CHILDREN: A DECADE AFTER DIVORCE* (1989); see also Scott, *supra* note 216 at 29-37 (divorce damages children unless there is "intense conflict" within the marriage); Wax, *supra* note 144, at 671 (analyzing why and how divorce is more damaging to women and children than to men).

women and their children suffer a lower standard of living.²¹⁸ The threat of divorce constrains women even during marriage. Many women hold jobs, for example, not for the needs of the intact family but for fear of divorce.²¹⁹ No-fault divorce causes an increase in abuse of wives by husbands²²⁰ and creates uncertainty that discourages couples from having children.²²¹

The impact of divorce on husbands is less clear but, given the benefits of marriage, it is likely that divorce generally leaves men worse off, too. Although marriage is generally beneficial and divorce detrimental not only to children and society as a whole but also to the parties themselves, people often fail to appreciate this fact. Accordingly, society needs to support marriage.²²²

Some supporters of gay marriage criticize those who worry more about homosexuality than about the bigger problem of divorce.²²³ The criticism is valid,²²⁴ but it undermines rather than advances the case for gay marriage because it would further weaken the disincentives to divorce. The main objection to divorce has always been its damage to children. Since gays cannot reproduce and rarely adopt, this objection would not apply to most gay marriages. A second objection is that divorce often injures wives both economically (because most women earn less than men) and socially (because it is harder for divorced women to remarry than for divorced men and because divorced women are less accepted in society than divorced men). This objection would also be invalid for gay couples.

The absence of children and instability of gay relationships will

²¹⁸ See Scott, *supra* note 216, at 33.

²¹⁹ See Gene Koretz, *Why Married Women Work*, BUS. WEEK, Sept. 22, 1997, at 26 (citing study by Allen M. Parkman).

²²⁰ Brinig & Crafton, *supra* note 48, at 887-92 (showing a positive correlation between the adoption of no-fault divorce and an increase in spouse abuse).

²²¹ *Id.* at 887 ("[T]here are fewer births per thousand population in those states that have adopted a true no-fault regime").

²²² The Ramsey Colloquium connects this need with the difficulties of rearing children: "Having and rearing children is among the most difficult of human projects. Men and women need all the support they can get to maintain stable marriages in which the next generation can flourish." *The Homosexual Movement: A Response by the Ramsey Colloquium*, *supra* note 105, at 18. It can only be added that the difficulties of marriage are not limited to child-rearing.

²²³ See Stephen A. Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 287 & n.99 (1995).

²²⁴ The same point is made by some who defend the family and criticize the homosexual movement. See *The Homosexual Movement: A Response by the Ramsey Colloquium*, *supra* note 105, at 16.

mean higher divorce rates for gay couples.²²⁵ Indeed, many of its advocates do not expect or want gay marriages to be permanent. In weddings of the Metropolitan Community Church, the largest sect dedicated to gays, couples vow to stay together "so long as there is love,"²²⁶ not "until death us do part."²²⁷ A wedding sanctifies marriage, conveys its solemnity, and calls the community to support the couple. The formality of a marriage license both underscores the gravity of marriage and protects spouses (especially the weaker party—usually the wife) by clarifying and recording their status. Given the instability of gay marriages, it is not surprising that some of its advocates criticize the very requirement of a wedding ceremony and license and the legal recognition of marriage.²²⁸

Validating gay marriage would encourage adultery. Sexual fidelity is rare among gay men.²²⁹ Andrew Sullivan cheers that gays' "need for

²²⁵ See POSNER, *supra* note 1, at 305-06 (instability of gay relationships).

²²⁶ ESKRIDGE, *supra* note 9, at 194 (quoting the vows taken in such ceremonies). This attitude belies the claim voiced by Andrew Sullivan that recognizing gay marriage would stabilize gay relationships. SULLIVAN, *supra* note 101, at 202; see also Christensen, *supra* note 1, at 1726 (conceding uncertainty whether marriage has "the same meaning—entailing commitment to the same values—for gay people as for their heterosexual counterparts").

²²⁷ THE BOOK OF COMMON PRAYER 302 (Seabury Press 1976). The difference is telling in one other respect. In Christianity and Judaism one *ought* to love one's spouse; ceasing to do so is a fault one should try to correct. The gay ceremony posits no such duty; the commitment ceases when love ends, for whatever reason.

²²⁸ See Mohr, *supra* note 6, at 229-30 (calling the requirement of a ceremony "misguided" and calling gay marriage superior because it is not automatically sanctified). Mohr says: "until recently, by far the most usual form of marriage in western civilization [was] common law marriage—in which there is no marriage license or solemnization." *Id.* at 230. Until recently, however, most people were peasants who lacked the capability, and often, the legal right to leave a small village, so informal marriages were usually stable. If they did dissolve, the law cared little because the demands of child-rearing are lower in agrarian societies and feudal societies cared little about peasant marriages. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* (1989).

²²⁹ See 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."); DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 285 (1984) (finding that "sexual exclusivity . . . was not the ongoing expectation for most" male couples); Leon McCusick *et al.*, *AIDS and Sexual Behavior Reported by Gay Men in San Francisco*, 75 AM. J. PUBLIC HEALTH 493, 493-95 (1985) (reporting that their 1985 study revealed that substantial percentages of gay men were not involved in monogamous relationship).

The renowned expert on human sexuality, Dr. David Reuben, offers this explanation for the promiscuity of gay men: "Homosexuals are trying the impossible: solving the problem with only half the pieces. They say they want gratification and love but they eliminate, right from the start, the most obvious source of love and gratification — woman." Thomas Vinciguerra,

extramarital outlets" will make adultery more acceptable for all married couples.²³⁰ He condemns the "baleful . . . attempt" to impose "a stifling model of heterosexual normality."²³¹ If same-sex marriages were made legally and socially equal, these attitudes would spread to traditional marriages.

The law could set separate divorce standards for traditional and same-sex marriages, but that would contradict the principle of gay activists that the two are equal. Since the main objections to divorce do not apply to gay marriages, a unified standard would inevitably drift toward easier divorces. Moreover, the case for gay marriage rests largely on the argument for autonomy in intimate matters.²³² In this view, society has no right to define marriage; it must only validate individuals' choices. But if the right to autonomy forbids society to limit the creation of marriage, it also forbids society to limit the termination of marriage. A right to marriage on demand also implies a right to divorce on demand.

Recognizing gay marriages would also dilute the social stigma of divorce. Divorce is discouraged not only by legal obstacles but also by the likely disapproval of relatives, neighbors, and friends at work and in church. This disapproval reflects popular belief that divorce is damaging, especially to wives and children, and that marriage is a sacred commitment not to be casually broken. These attitudes do not apply to gay marriages. Thus, treating gay and traditional marriages alike would further dilute the stigma of divorce. As Barbara Whitehead puts it: "Once the social metric shifts from child well-being to adult well-being, it is hard to see divorce and nonmarital birth in anything but a positive light."²³³

More generally, marriage loses its value as a standard form if it must cover many kinds of relationships.²³⁴ In particular, legitimizing gay

Everything You Ever Wanted to Know About Changing With the Times, N.Y. TIMES, March 21, 1999, § 4, at 7 (quoting DAVID REUBEN, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* 142 (1969)).

²³⁰ SULLIVAN, *supra* note 101, at 202. Richard Mohr also praises gay male couples for realizing that sexual fidelity is not necessary to show their love for each other and advocating that in this respect, *inter alia*, gay male couples may "provide models and materials for rethinking family life and improving family law." Mohr, *supra* note 6, at 233.

²³¹ Sullivan, *supra* note 101, at 203; see also Peter Freiberg, *Some Gays Aren't Wedded to the Idea of Same-Sex Marriage*, THE ADVOCATE 530, no. 16 (1989).

²³² See *supra* notes 125-30 and accompanying text.

²³³ Whitehead, *supra* note 66, at 52.

²³⁴ See generally Douglas Allen, *An Inquiry into the State's Role in Marriage*, 13 J. ECON. BEHAV.

marriage would damage traditional families by promoting "an ideology of 'recreational' sexuality that divorces sex from marital unity and treats marital infidelity as a relatively unimportant matter."²³⁵

D. Recognizing Same-Sex Marriage Would Harm the Vast Majority of Women Who Want Traditional Marriages

Legitimizing same-sex marriage would harm women more than men. Homosexuality is more common among men than women.²³⁶ Condoning same-sex marriage and homosexuality would remove more men than women from the market for traditional marriage. That market already has more women than men for several reasons, including higher mortality, homosexuality, incarceration, and drug addiction rates among men, and greater reluctance of suitable men to seek marriage. The disparity is widest in inner cities.²³⁷ It prevents some women who want a spouse from finding one. Further, a surplus of a commodity depresses its market value. The relative surplus of unmarried women strengthens the bargaining power of men, who can demand one-sided terms of courtship or simply forego marriage altogether because the surplus of single women enables them to obtain what they want from a woman without the burdens of marriage.

The surplus of single women also harms married women by enabling a divorced man to find a new spouse more easily than a divorced woman can. This increases the bargaining power of married men, who can more credibly threaten to divorce and re-marry than can their wives. Because there are more homosexual men than women, recognition of same-sex marriages would aggravate these problems by increasing the imbalance between men and women seeking traditional marriages, thereby undermining sexual equality.

E. Recognizing Same-Sex Marriages Would Logically Require Several Other Changes in the Law

To repeat: Same-sex marriage is not singled out for non-recognition

& ORG. 171 (1990).

²³⁵ Amitai Etzioni & Robert P. George, *Virtue and the State: A Dialogue Between a Communitarian and a Social Conservative*, RESPONSIVE COMMUNITY., Spring, 1999, at 54, 65 (statement by Robert P. George).

²³⁶ POSNER, *supra* note 1, at 99.

²³⁷ *See id.* at 136-41.

in our law; many other forms of marriage—polygamy, endogamy, and bestiality—are invalid or even forbidden. Rather, traditional marriage is singled out for endorsement. Arguments for approving gay marriage apply at least as strongly to these other forms, and arguments against the others apply at least as strongly to gay marriage. The arguments for gay marriage also support cloning, and arguments against cloning also oppose gay marriage. If we condone gay marriage, then, we must also condone the other arrangements; if we reject the others, we must also reject gay marriage.

1. Polygamy

Gay activists champion autonomy in intimate relationships²³⁸ and charge that traditionalists simply fear what is different and mindlessly mouth religious prejudice.²³⁹ On these grounds polygamy is even easier to support because, unlike gay marriage, it has been and still is condoned by many religions and societies.²⁴⁰ The Equal Protection argument for same-sex marriage also applies to polygamy. The ban on polygamy discriminates not only against religions that approve polygamy but also bisexuals, who cannot act on their sexual preference within marriage unless they can have multiple spouses. It is not surprising, then, that some commentators link the arguments for same-sex marriage and polygamy.²⁴¹ As Hadley Arkes says, "Every argument for gay marriage is an argument that would support polygamy."²⁴²

²³⁸ See *supra* notes 125-30 and accompanying text.

²³⁹ See *infra* notes 295-96 and accompanying text.

²⁴⁰ In non-Western societies polygamy is the norm. POSNER, *supra* note 1, at 69. Unlike homosexuality, polygamy is not even condemned in the Bible but was practiced by the ancient Hebrews. See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 52 (1987); Noonan, *supra* note 62, at 32. "Western Jews practiced polygamy until about A.D. 1000, Eastern Jews until well into the twentieth century." POSNER, *supra* note 1, at 49.

²⁴¹ See Chambers, *supra* note 1, at 489-91 (supporting legalization of polygamy). Leaders of the 1993 gay march on Washington drafted a platform that included a demand for "legalization of multiple partner unions." See *Texas Platform Agreement for Next Year's March*, WASH. BLADE, May 22, 1992. In 1972 the National Coalition of Gay Organizations demanded "[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit." ESKRIDGE, *supra* note 9, at 54 (quoting the National Coalition of Gay Organizations' 1972 demands for law reforms); see also PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 238-41 (1997). Richard Posner sees a positive correlation between acceptance of polygamy and rates of homosexual activity. He seems to believe that causation runs from the former to the latter. POSNER, *supra* note 1, at 136.

²⁴² *One Man, One Woman*, WASHINGTON WATCH, Jan. 26, 1998, at 1 (containing statement by Hadley Arkes). This point is conceded by some advocates of gay marriage. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85

Laws against polygamy can be defended only with reasoning that also excludes same-sex marriage. In practice, polygamy usually means polygyny, which allegedly denies equality to women. At first blush this charge seems strange. Adding women to a law partnership or a college faculty is deemed to raise women's status. Why does not adding more women to a marriage do the same? The answer is that, unlike a law firm or faculty, marriage in our society is viewed as a unique personal, emotional, and sexual commitment between a man and a woman which would be diluted and distorted by polygamy.²⁴³ This reasoning makes a normative judgment about marriage that also precludes gay marriages. If we eschew moral judgments in favor of value neutrality and individual autonomy, we can condone gay marriage but must also accept polygamy. To insist that gay marriages be monogamous would not only deny autonomy but also impose a normative judgment for which there is no basis in policy or in our society's traditions—that two men (or women) can marry, but that three men (or women) cannot marry.

Polygamy could not be limited to gays. Once the total ban on polygamy is breached, it would be inconsistent to forbid polyandry or marriages of equal numbers of men and women (such as a four-way marriage of two men and two women). Moreover, proponents of gay marriage want it treated the same as traditional marriage. That would preclude polygamy for gays only. Further, while recognizing gay marriages would aggravate the scarcity of marriageable men, polygamy would relieve this problem by reducing the numerical disparity between single men and women. Thus validating gay marriage would also increase the social need for polygamy.

Monogamy encourages a man to care for his wife (because he can have only one) and children (because he is likely to have fewer children than a polygynist).²⁴⁴ Monogamy also protects weaker men by preventing stronger men from accumulating harems. Monogamy imposes a rule of one-to-a-customer, even though polygyny might be favored not only by alpha males but also by women who would prefer sharing a strong husband to sole possession of a weak one or to having

GEO. L.J. 1871, 1878-79 (1997); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 79-82 (1997); Chai Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485, 490 (1998).

²⁴³ See Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1256 (1998).

²⁴⁴ See POSNER, *supra* note 1, at 95, 216, 258.

no husband at all.²⁴⁵

Efforts by proponents of gay marriage to distinguish polygamy are unpersuasive and sometimes laughably disingenuous. William Eskridge waxes eloquent about the threat polygamy poses to the companionship between husband and wife,²⁴⁶ but after this encomium he drops an endnote disclaiming any position on polygamy among gays.²⁴⁷ His reticence is not surprising since any discrimination between gay and heterosexual polygamy would be impossible to square with his insistence on "formal equality."²⁴⁸ He is numb to the uniqueness of the relationship between husband and wife that demands monogamy for them but not for gays or business partnerships.

Even if polygamy statistically increases certain problems, not all polygamous marriages would be troublesome. Thus a total prohibition of polygamy requires the kind of generalizing that Eskridge otherwise condemns. Consider, for example, a man who marries two wives in a country that permits polygamy and who then immigrates to America, where he must abandon the second wife or be guilty of a crime. Viewing the case alone, this result seems harsh and pointless — who is harmed by allowing this one exception? Making exceptions is tricky, though, and pushes the law onto a slippery slope. If an immigrant may keep two wives, why not three, or twenty-five? What if an American takes a second wife abroad and then returns?

Some may sincerely consider polygamy a good model for others, just as proponents see gay marriage as a positive model. Many people, however, view polygamy and gay marriage as contradicting the ideal of the traditional, companionate (*i.e.*, monogamous), heterosexual marriage. Legislation is a blunt instrument; it employs general rules covering broad categories, not individual, ad hoc decisions. Inevitably, then, it is either underinclusive or overinclusive. As America becomes more diverse, we must decide whether to retain or abandon various legal traditions not shared by new immigrants. For example, America has a rapidly growing number of Moslems,²⁴⁹ who condone and may

²⁴⁵ Some proponents of gay marriage acknowledge this as a possible argument in favor of polygyny. See Macedo, *supra* note 224, at 288 n.105; see also POSNER, *supra* note 1, at 94.

²⁴⁶ ESKRIDGE, *supra* note 9, at 148-49.

²⁴⁷ *Id.* at 253 n.56.

²⁴⁸ *Id.* at 51, 122.

²⁴⁹ See *A Crescent for a Cross: Islam Prospers in America*, CHRISTIANITY TODAY, Oct. 28, 1991, at 40.

support legalization of polygamy.²⁵⁰ We can hardly cling to a Christian, Eurocentric tradition of monogamy if we desert the universal tradition against gay marriage. This does not mean that polygamists must be rigorously hunted down and prosecuted. It may be sufficient to protect society's legitimate interest in monogamy that polygamy be tolerated but not validated; indeed, this seems to be the evolving attitude toward polygamy.²⁵¹ It is the same attitude that now prevails toward gay marriage.

2. *Endogamy*

Western law has long banned endogamy.²⁵² Again, the main arguments for endorsing gay marriage — individual autonomy in intimate affairs and validation of loving relationships — also apply to endogamy. The main objection to endogamy — that it causes genetic defects—is scientifically feeble.²⁵³ Moreover, "we do not forbid [unrelated] people who are carrying the same dangerous recessive gene to marry each other."²⁵⁴ If the physical health of offspring were society's central goal, there are many steps that could be, but are not, taken that would be more effective than laws against endogamy. Moreover, the rule bars marriage of many people who are not blood relatives — such as a parent and an adopted child. Clearly, fear of birth defects was not the original reason for the taboo, but is a post-hoc rationalization. Validating gay marriages would further eviscerate the birth-defect argument against endogamy since homosexual couples do not reproduce.

This prohibition is harder to defend than the nonrecognition of gay marriage. Homosexuality does not appeal to most people,²⁵⁵ but

²⁵⁰ See Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace, But Respect*, N.Y. TIMES, Apr. 9, 1991, at A22.

²⁵¹ See Chambers, *supra* note 243, at 71 (polygamy is now rarely prosecuted).

²⁵² See JACK GOODY, *THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE* 31-33 (1983) (describing gradual suppression of endogamy as power of Christianity grew in Europe); C. MORRIS, *THE PAPAL MONARCHY: THE WESTERN CHURCH FROM 1050 TO 1250* 331 (1989) (describing break up of close knit clans and dispersal of property caused by the church's ban on endogamy).

²⁵³ See Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 267-81 (1984) (calling the genetic case against endogamy weak). Even some courts admit that the genetic objection to endogamy is weak. See *Bucca v. State*, 128 A.2d 506, 510 (N.J. Super. Ct. Ch. Div. 1957).

²⁵⁴ POSNER, *supra* note 1, at 200.

²⁵⁵ See *supra* note 154.

incest was common in primitive societies. Indeed, Freud called the taboo on incest the greatest wound inflicted on the id by civilization.²⁵⁶

The argument that same-sex marriage is opposed only because it is different from the norm and contrary to religious prejudices applies even more forcefully to endogamy.²⁵⁷

The taboo on endogamy is good policy. It stabilizes families by avoiding the friction that would arise between husband and wife and between parents and siblings when a parent and child marry. This rationale does not apply to endogamous gay marriages since gays bear no children to marry. If endogamous gay marriages were permitted, though, the principle of equality would require acceptance of endogamous heterosexual marriages.

Bans on gay marriage and endogamy require a degree of otherness or diversity in marriage. Endogamy promotes allegiance to family, clan or tribe, not to the larger society. Christianity banned endogamy in order to weaken clan ties in favor of devotion to one God and one church.²⁵⁸ Gay activists accuse their opponents of fearing what is different, but heterosexuality and exogamy both push us from the familiar toward the different—another family, the other sex and children. In this way exogamy and heterosexuality resemble public education, by which government also encourages (and to some extent requires) exposure to the world outside ourselves.

Efforts to turn people outward may be justified on fairly mundane, pragmatic grounds—interaction with a variety of people gives citizens a better understanding of and concern for society and its challenges. Again, the Ramsey Colloquium speaks eloquently:

Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth. . . . [It] invites us to learn to accept and affirm the natural world from which we are too often alienated.

Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and

²⁵⁶ SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 41 (Joan Riviere trans., 1982).

²⁵⁷ See Bratt, *supra* note 254 (defending endogamy).

²⁵⁸ See *supra* note 253.

female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously.²⁵⁹

This complementarity can also be justified as an end in itself—that is, that interaction with others different from ourselves is good in itself, part of human flourishing.²⁶⁰

William Eskridge's ambivalent discussion of exogamy is instructive. He admits that exogamy may be desirable because it requires "reach[ing] beyond" one's own family,²⁶¹ but he does not ask whether heterosexuality may be a desirable "reaching beyond" one's own gender. Predictably then, he hedges, calling this justification "tentative" and declaring himself "open to the argument" that restrictions on endogamy are unconstitutional.²⁶² Not surprisingly, some domestic partnerships laws are open to close relatives.²⁶³

3. Artificial Reproduction and Baby-Selling

Arguments for gay marriage based on equality and reproductive freedom also apply to artificial reproduction. Not surprisingly, this is now a civil rights issue for many homosexuals.²⁶⁴ Gays can reproduce only by artificial means. If gay marriages become valid, equality and

²⁵⁹ *The Homosexual Movement: A Response by the Ramsey Colloquium*, *supra* note 105, at 17.

²⁶⁰ Friendship, mutual affection, and a desire for justice are values that involve relations with others and that many philosophers have considered intrinsically good. See CAMBRIDGE DICTIONARY OF PHILOSOPHY 830 (Robert Audi, ed., 1995).

²⁶¹ ESKRIDGE, *supra* note 9, at 151.

²⁶² *Id.*

²⁶³ See 31 HAW. REV. STAT. ANN. § 572C-4 (Michie Supp. 1999) (listing requirements for status of "reciprocal beneficiaries," which do not exclude close relatives); 31 HAW. REV. STAT. ANN. § 572C-2 (Michie Supp. 1999) (listing findings of the state legislature which include "individuals who are related to one another" as covered by the law).

²⁶⁴ See Christopher Rapp, *Gay Clones*, HETERODOXY, May, 1997, at 4 (describing efforts of the Clone Rights United Front). Laurence Tribe has recognized the connection between cloning and gay rights, including gay marriage. See Laurence H. Tribe, *Second Thoughts on Cloning*, N.Y. TIMES, Dec. 5, 1997, at 31; see also John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 960 (1986) ("[T]he couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present."). The Vermont Supreme Court cited the use of "assisted-reproductive techniques" by gay couples to justify their right to the same legal benefits as traditional married couples. *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

autonomy could require that gays be allowed to use artificial reproduction, which will then become common, with consequences that are hard to predict but may be dire.

President Clinton has forbidden the use of federal money for human cloning,²⁶⁵ and some states outlaw cloning altogether.²⁶⁶ Such laws are harder to defend than the invalidity of gay marriages, polygamy, and endogamy. There is no legal tradition against cloning. Much condemnation of cloning comes from religious figures or carries religious overtones (such as warnings against humans playing God). Thus opponents of cloning, like opponents of polygamy, endogamy, and gay marriage, can be charged with imposing their own religious beliefs on others.²⁶⁷ Unlike polygamy, cloning cannot be called degrading to women.²⁶⁸ Unlike endogamy, it cannot be said to cause birth defects.

The gender equality argument for gay marriage²⁶⁹ is at least as valid for cloning. Sexual reproduction forces humans into two rigid classes—men are fathers, women are mothers. Even with artificial insemination of a lesbian, a supposedly anonymous sperm donor might be identified and assert rights as a father. Artificial insemination is even more problematic for gay men, who must find an egg donor and a gestational (or birth) mother, who may be different people, both of whom could assert legal rights over the child. Cloning permits people to break free of these sex-based categories.

Like polygamy and endogamy, human cloning can be opposed on secular grounds, but these grounds also weigh against same-sex marriage. First, every child needs both a mother and a father, not only because two parents are better than one,²⁷⁰ but also because children need intimate contact with both halves of humanity, female and male. Even with natural reproduction, death, divorce or abandonment may

²⁶⁵ See *Remarks Announcing the Prohibition on Federal Funding for the Cloning of Human Beings and an Exchange With Reports*, 33 WEEKLY COMP. PRES. DOC. 278 (Mar. 10, 1997).

²⁶⁶ See, e.g., Cal. Health & Safety Code § 24185 (West Supp. 2000) (imposing five-year moratorium on cloning).

²⁶⁷ See Tribe, *supra* note 265 (condemning the invocation of "vague notions of what is 'natural'" to support the use of the law to outlaw cloning).

²⁶⁸ Cloning can be degrading to women if women's self-esteem and status in society depend in part on their unique ability to bear children. If they do, though, this fact also argues against legitimizing gay marriages, which are sterile.

²⁶⁹ See *supra* notes 132-52 and accompanying text.

²⁷⁰ See *supra* notes 66-74 and accompanying text.

deprive a child of one or both parents. But unlike natural reproduction, cloning and same-sex marriage guarantee that a child will not have both a mother and a father. Cloning can also be opposed as contrary to the principle of exposing people to others different from themselves.²⁷¹ However, this principle also contradicts gay marriage. Moreover, the issue on cloning is a criminal prohibition, which requires stronger justification than mere nonrecognition, as is the case with same-sex marriage.²⁷²

Most important, cloning and other artificial means of reproduction threaten to undermine human freedom and dignity.²⁷³ In the Western tradition all people are "endowed by our Creator with certain rights." Manufactured anthropoids, like Frankenstein's creature, are shunned as monsters. Some artificial reproduction is tolerated because it is used primarily when a physical defect in a spouse prevents natural reproduction. Exceptions, like artificial insemination of lesbians, have been too rare to attract much criticism. Cloning would be a radical change — reproduction where there is no defect in a spouse, or when there is no spouse at all.

Validating gay marriage would make artificial reproduction more frequent and visible and provoke more objections. For a same-sex couple to manufacture a child with no intention that it have both a mother and a father might be considered child abuse, just as polygamy has sometimes been judged inherently abusive to children.²⁷⁴ Even the time-honored practice of adoption creates emotional problems for children.²⁷⁵ Artificial reproduction by gay couples could inflict greater

²⁷¹ See *supra* notes 117 & 254 and accompanying text.

²⁷² See *supra* note 124 and accompanying text.

²⁷³ See Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469, 535-36 (1998); see also LEON R. KASS & JAMES Q. WILSON, *THE ETHICS OF HUMAN CLONING* (1998); Leon R. Kass, *Why We Should Ban the Cloning of Human Beings*, 4 TEX. REV. L. & POL. 41 (1999).

²⁷⁴ See *In re State ex rel. Black*, 283 P.2d 887 (Utah 1955) (finding child neglect solely because of parents' polygamy). Recently a woman had sperm retrieved from her husband 30 hours after he died. The sperm was frozen for 15 months, then injected into the woman, who conceived and bore a child. Alexander M. Capron, professor of law and medicine and co-director of the Pacific Center for Health Policy and Ethics at the University of Southern California, asked: "Is it appropriate to consciously bring a child into this world with a dead father?" *A Birth Spurs Debate on Using Sperm After Death*, N.Y. TIMES, March 27, 1999, at A11. The same question can be raised about bringing a child into the world with no father, living or dead. See *supra* notes 67-74 on the importance of having both a mother and a father.

²⁷⁵ See Frank C. Verhulst *et al.*, *Problem Behavior in International Adoptees: I. An Epidemiological Study*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 94 (1990) (parents report more problem behavior in adopted than in non-adopted children).

psychic harm. Further, manufactured children may not be accepted as fully human. Although manufactured people are genetically human, it would be hard for many people to treat 1,000 clones from one person as natural human beings.

Artificial reproduction could erode *agape*—the unselfish love for all humanity. In the West, *agape* stems from Judeo-Christian reverence for the miracle of life created by God through the union of a woman and a man. Philosophers have long recognized that seeing others as like ourselves is a necessary condition to altruism.²⁷⁶ If many people are churned out in laboratories, this reverence may evaporate. To "love thy neighbour as thyself"²⁷⁷ and to "do unto others as you would have them do unto you"²⁷⁸ may cease to be aspirations if many of our neighbors come from a test tube.²⁷⁹

Condoning gay marriages would also militate against laws forbidding the sale of babies since these laws discriminate against gay couples, who cannot reproduce naturally. Like gay marriage, baby-selling inflicts no direct, proximate harm and laws against it are therefore irrational from a materialist perspective. Richard Posner concedes that baby-selling would cause "commodification," but considers that desirable.²⁸⁰ Posner does not consider how humans' self-image would change if marriage were severed from procreation and children were genetically designed for marketability in laboratories and then auctioned to the highest bidder.²⁸¹

²⁷⁶ See generally DAVID HUME, A TREATISE OF HUMAN NATURE (Ernest Mossner, ed. 1969) (1888); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. Macfie, eds. 1976) (1759).

²⁷⁷ *Leviticus* 19:18 (King James); *Matthew* 19:19 (King James).

²⁷⁸ The full quote is: "whatsoever ye would that men should do to you, do ye even so to them . . ." *Matthew* 7:12 (King James).

²⁷⁹ The religious and ethical arguments against cloning are summarized in NAT'L BIOETHICS ADVISORY COMM'N, CLONING HUMAN BEINGS 39-83 (1997).

²⁸⁰ POSNER, *supra* note 1, at 409-16 (arguing that because "the 'purchasers' get no more power over the baby than natural parents have over their children," the commodity that would be sold if baby-selling was permitted "is not the baby but the natural mother's right to keep the baby").

²⁸¹ See David Frum, *Dispatches & Dialogues*, SLATE (Mar. 17, 1997), available at <<http://www.slate.msn.com/Dialogues2/97-03-11/Dialogues.asp?img=3>> ("Gay marriage is maybe not the very last step to the transformation of children into commodities. But it's close to the last.").

4. *Bestiality, etc.*

Like incest and polygamy, and unlike homosexuality, bestial relations are a crime in most states.²⁸² A materialist defense of this taboo is hard to discern. It cannot be the protection of animals, which, after all, can be killed for food or clothing.²⁸³ Bestiality poses less of a threat than does homosexuality to spread disease or to divert people from socially constructive conduct. Moreover, many people love their pets and might like to marry them even if they do not want sex with the pet.

Bestiality and homosexuality can be differentiated in conventional morality. Many cultures have accepted at least some homosexual conduct, but few have accepted bestiality. In the West homosexuality is now grudgingly tolerated in general, but bestiality is considered revolting, degrading to humans, an offense human dignity. Advocates of gay marriage, however, reject conventional morality, including any restriction of sexual freedom imposed simply because society considers an act disgusting or degrading. If one invokes this principle to support gay marriage, there is no honest basis for rejecting marriage with animals.

Arguments for gay marriage also raise questions about other forbidden sexual acts which inflict no immediate, tangible harm, such as necrophilia, nudity and performance of sex acts in public, and exposing children to pornography. Most people suspect that these acts cause harm, just as they suspect that legitimizing gay marriages would cause harm; but proving a compelling state interest would be at least as hard in the former cases as in the latter.

5. *Child Marriage*

William Eskridge defends minimum age laws for marriage,²⁸⁴ but this position, too, clashes with his arguments for gay marriage. He says "adolescents are immature decision makers" and "are prone to bad decisions."²⁸⁵ However, minimum age laws vary from state to state,²⁸⁶ though maturation does not vary by state. Given Eskridge's claim that

²⁸² See John E. Theuman, Annotation, *Validity of Statutes Making Sodomy a Criminal Offense*, 20 A.L.R. 4th 1009, 1032-41 (1983).

²⁸³ See POSNER, *supra* note 1, at 230-31.

²⁸⁴ See ESKRIDGE, *supra* note 9, at 146-47.

²⁸⁵ *Id.* at 147.

²⁸⁶ *Id.* at 146.

the right to marry is trumped only by a compelling state interest, and since states with lower age laws have experienced no catastrophe, there can be no compelling need for anything but the lowest minimum age laws.

Eskridge says adolescents "are prone to bad decisions," but he offers no proof of this claim as to marriage. Given the instability of gay male couples,²⁸⁷ it is unlikely that adolescent marriages would be less successful. Absent contrary proof, how can there be a constitutional right of marriage for gays but not for adolescents? Even if a statistical difference in favor of gay marriage could be shown, it would only be the kind of generalization that Eskridge opposes as a basis for law-making. For example, he rejects a distinction between gay and traditional marriage based on reproduction because some traditional married couples are sterile.²⁸⁸ By this reasoning, adolescent marriage cannot be denied simply because some adolescents lack maturity; clearly some adolescents are mature and some adults are immature.

Minimum age laws can be vindicated only on grounds that also apply to gay marriages. The desire of two (or more) people to marry does not always trump society's interest in marriage as an institution for child-rearing and socialization. The law may justly prefer that adolescents acquire education and job skills before they marry so that they can properly care for their children. Not all adolescents will so use this time, and some will conceive children out of wedlock, but these facts do not invalidate the general rule. Rather, given the role of marriage as an aspirational model, the law may properly require a minimum age for marriage. Since reasonable people can disagree about the proper minimum age, state laws may vary. Similarly, society may legitimately decide that its interests in child-rearing and socialization are best served by preserving the traditional model of marriage which excludes same-sex marriage.

6. Conclusion

Advocates of same-sex marriage profess to champion "families we choose," but most defend restrictions on marriage and reproduction that are in principle indistinguishable from same-sex marriage and that would, therefore, probably collapse if same-sex marriages were recognized.

²⁸⁷ See *supra* note 230 and *infra* note 305.

²⁸⁸ ESKRIDGE, *supra* note 9, at 96-98.

F. Recognition of Same-Sex Marriage Would Trigger Demands for Religious Exemptions

Legally recognized marriages are not only treated specially by government but are also required by law to be treated in certain ways by private parties. For example, employers must grant certain benefits to married employees.²⁸⁹ Obeying such laws for gay marriages would violate the religious beliefs of many citizens, who would seek exemption from these laws. Indeed, this has already happened. Recently San Francisco required municipal contractors to extend certain benefits to same-sex partners of employees.²⁹⁰ The Catholic diocese objected that its compliance would tacitly endorse homosexual acts in contradiction of the church's tenets. The dispute was resolved when the church agreed to let unmarried employees designate a loved one to receive benefits. Since the designee could be a relative or friend without being a gay partner, this policy satisfied the law without implying approval of homosexual acts.²⁹¹

Although this conflict was finessed, similar spats would not always be resolved to mutual satisfaction. Religious objectors probably have no constitutional right to relief from such laws.²⁹² However, some states have religious freedom laws that exempt citizens from laws that violate their religious faith unless the state has a compelling reason to demand compliance.²⁹³ There is no compelling reason for the state to require citizens to treat same-sex marriages as valid. Thus, laws validating same-sex marriages would be subject to a religious exception in these states and would feed demands for exemptions in states that do not already have religious freedom laws. Such demands would generate disputes that undermine the goal of encouraging tolerance

²⁸⁹ See, e.g., Family Leave Act, 29 U.S.C. § 2601-2654 (1994) (requiring certain employers to grant employees leave in some situations).

²⁹⁰ SAN FRANCISCO, CA., ORDINANCE 97-96-33.1 (1996).

²⁹¹ See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 341 (1998) (discussing the ordinance and the controversy surrounding it).

²⁹² "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .'" Employment Div., Dep't. of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)(Stevens, J., concurring)).

²⁹³ The Supreme Court held the federal Religious Freedom Restoration Act unconstitutional, at least as applied to the states. City of Boerne v. Flores, 521 U.S. 507, 534-36 (1997).

of homosexuality.

G. Validating Gay Marriages Will Fuel Hostility to Religion

Because America's largest religious denominations all condemn homosexuality, legal validation of same-sex marriages would delegitimize these sects. Many gay activists desire this consequence. They hope that, with the law's moral backing, traditional religious attitudes toward homosexuality "will ultimately be discredited and forced to the margin."²⁹⁴ Their particular target is Catholicism, and their goal is to "Stop the Church"²⁹⁵ by tactics that include desecration of the Mass. Their language is often vicious. In his award-winning book, *On Becoming a Man*, Paul Monette called opponents of gay activism "the Nazi Popes and all their brocaded minions, the rat-brain politicians, the wacko fundamentalists and their Book of Lies."²⁹⁶ As already noted,²⁹⁷ legal recognition of same-sex marriages would force religious people and institutions to seek exemptions from various laws. The very necessity of seeking such exemptions makes the petitioners appear aberrational.

Moreover, churches that disapprove same-sex marriages could lose their tax exemptions. The Supreme Court compelled the Internal Revenue Service to withdraw the tax exemption of Bob Jones University because it forbade interracial dating among students. Although the school rule broke no law, the Court held that it contravened a national policy against racial separation and therefore disqualified the school from a tax exemption.²⁹⁸ If gay marriages are legally recognized, churches that refuse to acknowledge or perform them could lose their tax exemptions on the same theory of violating national policy even if the refusal did not break any law.²⁹⁹

Traditional Jews and Christians could also suffer employment

²⁹⁴ Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 792 (1993). See generally Duncan, *supra* note 16.

²⁹⁵ This is the title of a documentary film about the disruption and desecration of a celebration of the Mass by AIDS and homosexual activists at St. Patrick's Cathedral in New York City. See Duncan, *supra* note 103, at 601-04.

²⁹⁶ PAUL MONETTE, *ON BECOMING A MAN 2* (1992).

²⁹⁷ See *supra* notes 290-93 and accompanying text.

²⁹⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

²⁹⁹ See, e.g., Judith C. Miles, *Beyond Bob Jones: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions*, 8 HARV. WOMEN'S L.J. 31, 34 (1985) (arguing for denial of tax benefits to churches that discriminate).

discrimination if employers are forbidden to discriminate against homosexual employees, customers, etc. Because traditional Jews and Christians consider homosexual acts sinful, they might be considered likely to offend homosexuals. Indeed, a mere statement that one is a Jew or Christian might offend homosexuals. Employers might, therefore, feel constrained to exclude or to limit the job opportunities of traditional Jews and Christians.

Religion is generally a positive force in America,³⁰⁰ so activity that acts to fuel hostility toward religion is harmful, even to the interests of homosexuals. Although our principal religious denominations condemn homosexual acts, they also advocate love and understanding for, and deplore violence against, homosexuals.³⁰¹ Thus hostility against traditional religious sects is likely not only to anger their adherents but also to weaken the restraints that these sects exert on violence and discrimination against gays.

H. Public Health

Same-sex marriage is sometimes touted as a means of improving the health of homosexuals. The theory is that gay promiscuity, which spreads AIDS and other diseases, results from social condemnation of homosexuality and a lack of proper models: legal recognition would encourage gay marriage and discourage promiscuity.³⁰² It is questionable how far this goal would be realized. If social disapproval caused homosexual promiscuity, lesbians would also be promiscuous, but they are not.³⁰³ Americans have grown more tolerant of homosexuality in recent decades, but this has not reduced gay men's promiscuity, and the cities most tolerant of homosexuality have the most promiscuity. Even the threat of AIDS and other diseases only slightly (and perhaps

³⁰⁰ See generally LEWY, *supra* note 205.

³⁰¹ In a pastoral letter entitled "Always Our Children" the National Conference of Catholic Bishops said: "God does not love someone any less simply because he or she is homosexual." The letter encouraged parents to love gay children. *Bishops Say Gay Children Need Support*, N.Y. TIMES, Oct. 1, 1997, at A14 (quoting the letter).

³⁰² See ESKRIDGE, *supra* note 9, at 8-10, 209 (validating gay marriages would "civilize" gays and reduce promiscuity). Andrew Sullivan considers the widespread promiscuity of gays "depraved" but says it is not "inevitable" but occurs only because gays now lack the proper "social incentives." SULLIVAN, *supra* note 101, at 107. If gay marriages were valid, most gays would marry "with as much (if not more) commitment as heterosexuals." *Id.* at 183.

³⁰³ See *infra* note 311.

temporarily) reduced promiscuity.³⁰⁴ It seems that men tend to be promiscuous.³⁰⁵

In married men promiscuity is curbed by the attitudes of wives and children and by their demands on the man's time and money. "It is not heterosexuality that contributes stability [to marriage], but the presence of a female."³⁰⁶ Society has reason to deter adultery—it disrupts families and thus injures children. Advocates of gay marriage, though, laud its greater tolerance of adultery.³⁰⁷ Further, the social endorsement conveyed by legitimizing gay marriage would facilitate - homosexual conduct and unsafe sex.³⁰⁸ The public health argument for gay marriage is at best too weak to overcome the powerful arguments against it.

I. Recognizing Same-Sex Marriages May Not Benefit Homosexuals

Validating gay marriage may not even benefit homosexuals. Few gay couples registered under Hawaii's domestic partnership law.³⁰⁹ Further, "most lesbians, who grow up facing the same stigmas and the same lack of role models as male homosexuals, live conventional lives and form long-term monogamous relationships. Why, with gay men,

³⁰⁴ See GABRIEL ROTELLO, *SEXUAL ECOLOGY* 92-95, 111 (1997) (stating that gay promiscuity thrives despite AIDS and that many gays oppose any effort to discourage promiscuity); MICHAELANGELO SIGNORILE, *LIFE OUTSIDE* 227-32, 306-07 (1997) (drawing the same conclusion); Kevin Sack, *H.I.V. Peril and Rising Drug Use*, N.Y. TIMES, Jan. 29, 1999, at A10 (reporting increase of unsafe sex among gay men). For philosophical defenses of promiscuity, see *infra* note 316. Promiscuity is the norm and lasting fidelity the exception among gay men. In one study 50% of gay white men reported having over 500 sexual partners. Bell & Weinberg, *supra* note 149, at 85. In another only 8% of gay men were "dating" only one person; 87% had multiple partners. Fifty-seven percent reported over 30 partners in the preceding year. *ADVOCATE*, Aug. 23, 1994, at 22-23. Much of the promiscuity of gay men occurs with strangers. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 295, 585-86 (1983); see also *supra* note 230.

³⁰⁵ See POSNER, *supra* note 1, at 90-92.

³⁰⁶ DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 141 (1951).

³⁰⁷ See *supra* notes 224-33 and accompanying text.

³⁰⁸ See *supra* notes 152-61 and accompanying text (levels of homosexual activity vary according to social attitudes). Married gays might be less likely to use condoms, and more likely to spread AIDS, because use of condoms implies adultery by oneself or one's spouse. See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1582 n.8 (1997).

³⁰⁹ See *supra* note 57 and accompanying text; see also Foster, *supra* note 1, at 327 (noting that few gay couples take domestic partnership benefits).

are quasi-marriages the exception to the rule?"³¹⁰ Men, it seems, are more promiscuous than women.³¹¹ Also, the presence of children helps to keep married couples together.³¹² Since homosexual couples do not procreate and gay males, at least, rarely adopt, gay marriages would be less durable.

Moreover, many homosexuals despise marriage as stifling³¹³ and fear that validating gay marriage "would further outlaw all gay and lesbian sex that is not performed in a marital context."³¹⁴ For some, promiscuity is desirable, not a fault to be corrected by pushing gays into marriage.³¹⁵ Some lesbians disdain marriage as inherently patriarchal and prefer lesbian communes or question whether lesbian lovers should even live together.³¹⁶ Further, some favor gay marriage in order to revolutionize the institution.³¹⁷ They would probably drop their support if recognition meant only extending traditional marital

³¹⁰ Kristol, *supra* note 111, at 46; see also ESKRIDGE, *supra* note 9, at 83 ("The majority of surveys taken in the last twenty years have found more lesbians than gay men in committed long-term relationships."). This fact is particularly striking because gay men are more numerous than lesbians. See *supra* note 162.

³¹¹ See POSNER, *supra* note 1, at 90-92.

³¹² See POSNER, *supra* note 1, at 305-07, 312.

³¹³ See Freiberg, *supra* note 232; Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); David W. Dunlap, *Some Gay Rights Advocates Question Drive to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12.

³¹⁴ Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall, 1989, at 9, 16, reprinted in LESBIANS, GAY MEN, AND THE LAW 401, 403 (William Rubinstein, ed., 1993); see also Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 370 (1998) ("The extension of same-sex marriage will cloak gay and lesbian couples in the traditions of patriarchy and heterosexism. Heterosexual norms will become the standards applied to lesbian and gay relationships, and the development of queer cultural constructions of intimate relationships will be stunted.") (footnote omitted).

³¹⁵ For philosophical defenses of promiscuity see DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 29-63, 87-88, 93-95 (1982); Frederick Elliston, *In Defense of Promiscuity*, in PHILOSOPHICAL PERSPECTIVES ON SEX AND LOVE 146 (Robert M. Stewart, ed. 1995); Sheryl Gay Stolberg, *Gay Culture Weighs Sense and Sexuality*, N.Y. TIMES, Nov. 23, 1997, at B6 (describing debate among gays in which some "argue that promiscuous sex is the essence of gay liberation").

³¹⁶ See RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 124-27 (1992); Ettelbrick, *supra* note 314, at 14-17; Freiberg, *supra* note 225, at 18; SARAH LUCIA HOAGLAND, LESBIAN ETHICS: TOWARD NEW VALUE (1988); CLAUDIA CARD, LESBIAN CHOICES (1995); Nancy D. Polikoff, *supra* note 53, at 1536 (calling marriage "an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism" and that "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society").

³¹⁷ See *supra* notes 174-77 and accompanying text.

norms to homosexuals.

The push for legal recognition may also be a strategic error. After the decision in *Baehr v. Lewin* opposition to gay marriage grew in Hawaii.³¹⁸ The quest for recognition also incurs opportunity costs. The energy it absorbs could, for example, be used to deter gay bashing and to reduce the spread of HIV and AIDS and help those already infected. The push for legal recognition of gay marriage may also alienate potential allies on these other issues.

David Chambers, who favors gay marriage, notes that Mormons were reviled and persecuted in the 19th Century, largely because they practiced polygamy. He says "the Mormons triumphed through surrender. After disavowing plural marriage, they were accepted into 'civilized' society and have thrived."³¹⁹ The hostility to gay marriage manifested in adoption of the Defense of Marriage Act and similar state laws³²⁰ while society simultaneously grows more tolerant of other aspects of homosexuality suggests that retreat on the issue of same-sex marriage might be a wise tactic for those who seek greater social acceptance of homosexuality.

This article will not try to resolve or even join the debate among homosexuals; it merely notes the existence of the debate and the corollary that we cannot assume that legal recognition of same-sex marriages is desired by or desirable for homosexuals.

VI. CONCLUSION

Those who have advocated legal recognition of same-sex marriage have acted in good faith belief that it would benefit homosexuals without harming others. It is now clear that this belief is false. The advocates should reconsider their position and, if they truly care about the well-being of our children and of our society, present and future, they should support traditional marriage.

³¹⁸ In a 1993 poll roughly 60% opposed gay marriage, 30% favored it, and 10% were undecided. See *Same-Sex Marriages Not So Popular*, HONOLULU STAR-BULL., June 19, 1993, at A1; Linda Hosek, *Poll: Unions for Gays Won't Hurt Isle Image*, HONOLULU STAR-BULL., Feb. 3, 1994, at A6. A 1996 poll found opposition had risen to 71%. See *Same-Sex Marriages Opposed by 71% in Poll*, HONOLULU ADVERTISER, Feb. 23, 1996, at A1.

³¹⁹ Chambers, *supra* note 243, at 77; see also Ralph Wedgwood, *What Are We Fighting For?*, HARV. GAY & LESBIAN REV., Fall 1997, at 32-33 (advocating pursuit of the rights and benefits of marriage for gays and not "'marriage' as such").

³²⁰ See *supra* notes 7-9 and accompanying text.