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George W. Dent Jr.

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Traditional Marriage: Still Worth Defending

*George W. Dent, Jr.**

A few years ago, I wrote an article entitled *The Defense of Traditional Marriage*.¹ I began with the topic of same-sex marriage but soon saw that all the arguments for gay marriage were also arguments for polygamy, endogamy (or incestuous marriage), etc., so the article became a defense of traditional marriage against all these other types. The pertinent law and jurisprudence are constantly changing, so this conference offers an excellent opportunity to reconsider my views in light of new learning and thinking. A review shows the case for traditional marriage is even stronger now than it was before. As evidence has mounted and the glib arguments for same-sex marriage have drawn closer scrutiny, support for traditional marriage has expanded from its initial base, which was heavily concentrated in religious conservatives, by attracting growing numbers of religious and political moderates and liberals.

I. A LIBERAL PERSPECTIVE

This article analyzes marriage from a liberal perspective. In liberal theory government should act only to achieve conventional social goods.² The liberal approach is not dictated by the Constitution.

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* Schott – van den Eynden Professor of Law, Case Western Reserve University School of Law. The author thanks Rick Garnett [&] for their helpful comments.

1. 15 VA. J.L. & POL. 581 (1999).

2. “One characteristic of liberal societies is a commitment to the notion that—given the law’s inherently coercive potential—individual laws must have a sound normative justification in order to be regarded as morally legitimate.” Nicholas Bamforth, *Same-Sex Partnerships and Arguments of Justice*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 31, 31 (Robert Wintemute & Mads Andenaes, eds., 2001) (hereinafter “LEGAL RECOGNITION”).

What constitutes “a sound normative justification” varies among cultures, so I refer herein to what are considered “conventional” social goods in liberal societies. This description is more accurate than the common assertion that liberalism dictates that government be morally “neutral.” See, e.g., M.C. Regan, *Reason, Tradition and Family Law: A Comment on Social Constructionism*, 79 VA. L.

Although the Constitution embraces some liberal principles, such as freedom of religion, it does not mandate the entire liberal program, although the Supreme Court sometimes imposes liberal standards to the Constitution of its own volition. *Lawrence v. Texas*,³ for example, applied a right of privacy analysis that the Court itself fabricated to strike down criminal sodomy statutes. The constitutional rationale for *Lawrence* was pure fiction, but the decision squares with liberal principles because the states had no persuasive justification for those statutes other than that homosexual acts are immoral. In liberal theory this rationale is not a legitimate basis for criminal punishment.

Nothing in the Constitution should bar a state from denying recognition to same-sex unions simply because the state considers them intrinsically immoral. However, that justification will not persuade anyone who doesn't already accept it. Accordingly, this Article makes the case for traditional marriage in terms of conventional social goods and without regard to the intrinsic morality of same-sex unions.

II. NORMS AND THE EXPRESSIVE FUNCTION OF LAW

“Legal scholars have rediscovered social norms.”⁴ People's norms (or values) are crucial to society's success.⁵ The collapse of the Soviet empire, for instance, left populations without a stable set of norms.⁶ The result was disorder and decline. Further, for economic growth a modern

REV. 1515, 1518 (1993) (stating that “neutrality liberalism” requires the state to be “neutral among different conceptions of the good life”). Liberalism is not morally neutral. See Patrick Neal, *A Liberal Theory of the Good?*, 17 CANADIAN J. PHIL. 567, 567 (1987) (“liberalism is not neutral with regard to the question of the good life”); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 ETHICS 468, 477 (1995) (“Even a suitably circumscribed political liberalism . . . will in various ways promote a way of life as a whole.”).

Indeed, moral neutrality is impossible. Government must affirm some norms and not others; it cannot support incompatible moral doctrines. Some liberals admit this. See Michael Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power*, 30 SAN DIEGO L. REV. 703, 708 (1993) (“the resolution of many of the political controversies that engage and divide us . . . requires recourse to moral beliefs that are inadmissible under the neutralist ideal”) (emphasis added); Susan H. Williams, *Religion, Politics, and Feminist Epistemology: A Comment on the Uses and Abuses of Morality in Public Discourse*, 77 IND. L.J. 267, 267 (2002) (“The use of contested moral frameworks in our political life is . . . simply inescapable . . .”).

3. 123 S.Ct. 2472 (2003).

4. AMITAI ETZIONI, *THE MONOCHROME SOCIETY* 163 (2001).

5. “[A] social order based on laws can be maintained without massive coercion only if most people most of the time abide, as a result of supportive social norms, by the social tenets embedded in the law.” *Id.* at 171.

6. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 360-61 (1995); see also John Pomfret, *In Beijing, a Scene Not Even Orwell Would Recognize*, WASH. POST, Dec. 8, 2002, at B2 (stating that when Communism lost sway in China, it was “replaced by hedonism” and “naked self-interest. Thus the abandonment of communism means . . . farewell to all values and scruples.”) (quoting Hong Kong University Professor Wang Xiaoying).

society needs people who don't just obey the law but who also practice traditional middle class virtues like work, thrift and delayed gratification.

How can society cultivate desirable norms? One tool is the expressive function of law, by which government engages "in expressing social values and in encouraging social norms to move in particular directions."⁷ This concept was just gaining purchase five years ago. People are more likely to cooperate if encouraged to do so by respected authority.⁸ One expressive use of law is to confer honor, a concept hardly acknowledged until recently. Now we even have books with titles such as *Liberalism With Honor*.⁹ By recognizing marriage the law gives it honor, thereby encouraging people to marry and stay married.¹⁰

Recent findings in behavioral psychology point to the effects of law that fall under or are closely related to its expressive function. "Often people's preferences are ill-informed, and their choices will inevitably be influenced by default rules, framing effects, and starting points."¹¹ Similarly, "in the face of uncertainty, estimates are often made from an initial value, or 'anchor,' which is then adjusted to produce a final answer."¹² For example, in setting damage awards juries are influenced by the range of numbers suggested to them.¹³ If government treats traditional marriage as the norm, citizens are also more likely to view it that way than they would if government treats traditional marriage as but one of many equally valid choices.

Although government cannot be completely morally neutral, liberal societies restrict the use of government to promote particular norms and instead leave individuals more moral autonomy than do authoritarian societies. Limiting the role of government as moral arbiter is especially appropriate when the state exerts compulsion, most notably in criminal

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

8. See Lynn Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)* 8 (Mar. 2003) (unpublished manuscript, on file with UCLA School of Law, Law & Economics Research Paper Series), at <http://ssrn.com/abstract=389407>.

9. SHARON KRAUSE, *LIBERALISM WITH HONOR* (2002).

10. See also Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994) (stating that the family 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"); see generally Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

11. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron* 1 (Apr. 3, 2003) (unpublished manuscript, on file with University of Chicago Law School) at <http://www.law.uchicago.edu/Lawecon/index.html>. See also *id.* at 3-5, 10.

12. Cass R. Sunstein, *Hazardous Heuristic* 3 (2003) (unpublished manuscript, on file with University of Chicago Law School); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in DANIEL KAHNEMAN, ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (1982).

13. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 793 (2001).

law and, to a somewhat lesser extent, in taxation. Thus, to repeat, the Supreme Court's invalidation of criminal sodomy laws was consistent with liberalism, even if it was not constitutionally justified. The legitimate scope of government action is broader in other contexts, including education and the expressive function of law. Thus, for example, the state can promote artistic activities of its choosing without having to support all artistic activity equally or all other leisure activities that some people favor. Similarly, by designating Rev. Martin Luther King's birthday a national holiday, government can promote civil rights, which Dr. King championed, although it cannot levy taxes based on people's attitudes about civil rights.

The application of the constitutional prohibition of the establishment of religion¹⁴ to the expressive function of law is imprecise. The state cannot endorse religion, even though the endorsement has no material, tangible consequences for citizens. Thus government cannot exhibit holiday displays that promote one particular religion or religion generally.¹⁵ However, state acts are not unconstitutional simply because they happen to be congruent with some religious beliefs. Thus government can aid the needy, and require citizens to pay taxes for that aid, even though that aid conforms to duties in many religions to help the poor. Indeed, aid to the poor is itself a legitimate function of the liberal state; no further consequences are required to justify it.

Perhaps, then, government can promote traditional marriage as an intrinsic good, an element of human flourishing. Certainly there is ample support for this view among philosophers and artists.¹⁶ Unlike criminal sodomy laws, legal validation of traditional marriage entails no illiberal judgment that homosexual acts or relationships are immoral any more than state support for the arts entails a judgment that those who watch commercial television are immoral. Nonetheless, some believe that same-sex marriage is just as meritorious as traditional marriage, or that marriage is not intrinsically good at all.¹⁷ Although a democratic majority can override this minority, the disagreement cannot be empirically resolved because it concerns norms, values.¹⁸ Even some who agree with

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

15. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (holding that display on public property of a nativity scene was unconstitutional but a Jewish menorah was not).

16. *See infra* notes 75-80 and accompanying text.

17. *See infra* notes 73 and 81 and accompanying text.

18. *See* KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 53 (1947) ("It is impossible to derive norms or decisions from facts."); ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 194 (1987) ("Reason cannot establish values, and its belief that it can is the stupidest and most pernicious illusion."); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be*

the majority prefer not to elevate their beliefs into law. Accordingly, in pursuit of a broader consensus, this article will focus primarily on the more conventional, less controversial human goods that traditional marriage promotes, rather than relying on the view that traditional marriage is intrinsically good.

Although by definition the expressive function of law has little or no tangible, material consequences, people of all political views appreciate its importance. Thus opposing groups battle furiously about whether the Confederate flag will fly over the South Carolina statehouse. The battle is important because, despite widespread skepticism about government, most people still have some respect for it and, by such symbolic acts, the state can influence people's attitudes. Although the impact is minimal on those who feel strongly about the relevant issue, the effect can be substantial on those who are conflicted. Further, when many people are ambivalent and the symbolic acts of government change some people's views, those people may also influence the attitudes of their friends and neighbors. Thus by its expressive function government can trigger a "norm cascade"¹⁹ or chain reaction.²⁰ In the last several decades public attitudes about race and gender have changed profoundly due largely to campaigns of public exhortation led by the expressive and educational function of government.

Many advocate recognition of same-sex marriages because of the tangible, material legal benefits it would confer. This rationale has two weaknesses. First, the tangible legal benefits of marriage are paltry. Most of the legal consequences of marriage (like inheritance of property) can be achieved by private acts (like writing a will) without great effort. Indeed, for many people the main legal incident of marriage is subjection to the "marriage penalty" in the federal income tax.²¹ The lack of tangible legal benefits to marriage undoubtedly helps to explain the small

Overruled, 59 U. CHI. L. REV. 381, 421-22 n.60 (1992) (stating that government must make decisions concerning many controversial moral issues that cannot be decided on empirical grounds).

19. See Cass R. Sunstein, *Hazardous Heuristics*, *supra* note 12, at 8.

20. See Dan M. Kahan, *Reciprocity, Trust, and Law*, in *THE MORAL SENTIMENTS: ORIGINS, EVIDENCE, AND POLICY* Chapter 12 (Herbert Gintis et al. eds., forthcoming 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=361400 (titled: *The Logic of Reciprocity: Trust, Collective Action, and Law*).

21. 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 Steurle, *Valuing Marital Commitment: The Radical Restructuring of Our Tax and Transfer Systems*, 9 *RESPONSIVE COMM.* 35 (1999) (finding an "extraordinary array of marriage [tax] penalties").

numbers of same-sex couples who have married in places where their marriages would be valid.²²

For some gay couples there would be tangible benefits that would motivate them to marry, but that is a dubious basis on which to validate same-sex marriage. Because gay couples do not bear children and do not have the traditional religious and cultural encouragements to marry, and because the majority of gays who are male tend to be promiscuous, many gay marriages would be marriages of convenience entered into primarily for the tangible benefits.²³ Indeed, the parties would not have to be homosexual or even committed to each other; “two heterosexuals of the same sex might marry as a way of obtaining financial benefits.”²⁴ Marriages of convenience can be entered into now between a man and a woman, but they cause little damage to the esteem for marriage because they are viewed as rare exceptions to an honored tradition. Gay marriages of convenience would be more harmful because they would be viewed particularly offensive examples of a noxious theme.

Further, if there are particular legal difficulties faced by gay couples that should be removed, this can be done on an ad hoc basis. This approach makes more sense because these problems are not typically restricted to gay couples, and neither should the solutions. For example, perhaps visiting privileges should be given to same-sex partners of hospital patients. However, there is no need to tie this to marital status or to restrict it to homosexual companions. Why not permit patients to designate companions for visiting privileges regardless of whether the two are married?

Some supporters of same-sex marriage candidly admit that the main prize in this contest is not the tangible, material benefits but the expressive, symbolic effect of legal recognition. Evan Wolfson, for instance, notes “marriage’s central symbolic importance in our society

22. See *infra* note 22 and accompanying text. In three years only 6,500 couples took advantage of Vermont’s civil union law. See Pam Belluck, *Gays Respond: ‘I Do,’ ‘I Might and ‘I Won’t’*, N.Y. TIMES, Nov. 26, 2003, at A1. Of 1.3 million employees of General Motors, only 166 claimed the benefits for a same-sex partner that GM offers. See Maggie Gallagher, *What Is Marriage For*, WKLY. STANDARD, Aug. 4/Aug. 11, 2003, available at LEXIS, Nexis Library, The Weekly Standard File. Interviews with about 20 gay couples shortly after the recent Massachusetts decision validating same-sex marriages revealed general ambivalence about the desirability of marriage. See Belluck, *supra*, at A1. “[C]ouples who came of age in the 1960’s and 1970’s [tended] to see marriage as a heterosexual institution, symbolizing a system that they could not, or would not, want to be part of.” *Id.*

23. See Stanley N. Kurtz, *What Is Wrong with Gay Marriage*, COMMENT., Sept., 2000, at 35, 39 (“many homosexuals who disdain the idea of conventional marriage or even ‘commitment ceremonies’ would nonetheless marry for the ‘bennies’—that is, the legal and financial benefits involved”) (citation omitted).

24. Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD, Aug. 4/Aug. 11, 2003, at 26, 32 (citation omitted) available at LEXIS, Nexis Library, The Weekly Standard File.

and culture” and the “transformational potential of gay people’s inclusion . . . in marriage.”²⁵

Some gay activists laud the institution of marriage and predict that recognition of same-sex marriages would boost its sagging prestige. Andrew Sullivan says it 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.”²⁶

It seems unlikely, though, that recognizing same-sex marriage would raise esteem for marriage in the eyes of most people. First, most Americans consider gay marriage a “mocking burlesque”²⁷ or “mere parody” of the real thing.²⁸ Despite his claim that validating gay marriage would “buttress the ethic of heterosexual marriage,” Andrew Sullivan later concedes that “[e]ven those tolerant of homosexuals may find this institution [marriage] so wedded to the notion of heterosexual commitment that to extend it would be to undo its very essence.”²⁹

Recognizing gay marriage would impair the honor conferred on the institution. Neither America nor, with a few recent exceptions, any other society in history has recognized gay marriage. Most cultures have, at best, frowned on homosexuality. Many cultures, including those influenced by Christianity, Judaism and Islam, have considered it a sin and, often, a crime. Most Americans would consider gay marriages a caricature of the real thing or even an insult to a relationship that they consider to have a sacred as well as a legal dimension.³⁰ Even if one opposes that view, it is a fact we must acknowledge, just as we would have to note the rejection of pork in formulating a food policy for Jewish or Muslim populations.

25. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580 (1994-95); see also Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION, *supra* note 2, at 97, 98 (“[T]he legal refusal of same-sex marriage, in a world in which cross-sex marriage is not only permitted but applauded, deprecates same-sex relationships—devalues them, delegitimizes them. This derogation is the target of the Recognition justification of same-sex marriage . . .”).

26. See ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 112 (1995).

27. Hadley Arkes, *The Closet Straight*, NAT’L REV., July 5, 1993, at 43, 45.

28. James Q. Wilson, *Against Homosexual Marriage*, COMMENT., March, 1996, at 34, 36 (quoting Kenneth Minogue’s book review of *Virtually Normal* in the *National Review*).

29. Sullivan, *supra* note 26, at 179.

30. Marriage is one of the traditional Christian sacraments. Further, praise (and guilt) depreciate if overused. See WILLIAM J. GOODE, *THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM* 46-48 (1978) (stating that prestige is governed by laws of supply and demand); Louis Kaplow & Steven Shavell, *Human Nature and the Best Consequentialist Moral System* 31-32 (2003) (unpublished manuscript, on file with Harvard Law School’s Center for Law Economics, and Business), at <http://ssrn.com/abstract=304384>. Thus, extending legal recognition to other forms of marriage would make traditional marriage cease to be special, something particularly honorable.

Many advocates of gay marriage acknowledge that it could lower esteem for marriage. Nan Hunter says that validating same-sex marriages could “destabilize the cultural meaning of marriage.”³¹ Janet Halley predicts similar consequences:

[R]ecognition of same-sex marriage might lend momentum to the long-running erosion of the specialness of marriage. No longer privileged by restriction to *some* unions and deprived of its power to send the message that those unions are particularly good, marriage might become less, not more, meaningful. Cross-sex couples could lose interest in marriage as a result, opting to co-habit rather than to marry. Pro-marriage voting strength could erode; the social consensus that it is worthwhile to devote public and private resources to “support marriage” could break up. If this happens, rather than a convergence of same-sex with cross-sex couples in maintaining the centrality and thus the normalising power of marriage, “mere” recognition will have contributed to the end of marriage’s centrality as a mode of social ordering.³²

Similarly, Gretchen Stiers says: “Two women or two men who marry subvert the belief that women and men take on separate but complementary roles with marriage. . . .”³³

Some predict that the overwhelming opposition to gay marriage will evaporate just as opposition to racial integration and interracial marriage has abated. These prophets grossly misconstrue the nature of attitudes about race and homosexuality. Laws banning racial integration and miscegenation were rare in Christendom and even the exception in America when the Supreme Court struck down these laws in the 1950’s and ‘60’s.³⁴ By contrast, with rare recent exceptions no society has ever recognized same-sex marriages.

Further, racial segregation and discrimination have long been condemned by Christianity. St. Paul said that in Christianity “there is

31. Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 11 (1991).

32. Halley, *supra* note 25, at 101 (emphasis in original). She adds that legal recognition of domestic partnerships,

when it is equally available to cross-sex and same-sex couples, may render marriage a little bit less paradigmatic. Under both regimes marriage no longer normalises all sexual relationships: the marriage substitute does too, and since marriage and the marriage substitute are different in other ways (the latter is easier to dissolve, less loaded with traditional expectations, free of religious jurisdiction, etc.), introduction of the latter significantly diminishes the hegemonic posture of marriage.

Id. at 103.

33. See Kurtz, *supra* note 23, at 39 (citation omitted).

34. Fewer than one-third of the states had anti-miscegenation laws when the Supreme Court struck them down in *Loving v. Virginia*, 388 U.S. 1 (1967). See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 120-21 (1996).

neither Greek nor Jew, . . . Barbarian, Scythian, bond nor free; but Christ is all, and in all.”³⁵ Ethnic friction is ubiquitous throughout history and perhaps biologically programmed in humans, so of course Christians have often discriminated by race despite church doctrine. In America, some Southern churches not only tolerated racial segregation but also sought to justify it with Christian doctrine, but this was essentially a local aberration that found little support in churches elsewhere. By contrast, Christianity and its predecessor, Judaism, have consistently condemned homosexual acts as serious sins for almost 3,000 years. Only a few branches of Christianity and Judaism now condone homosexual partnerships, and they have come to this position only recently, yet this view is firmly rejected by most Christians.

In sum, anti-miscegenation laws and all racial discrimination violate basic, long-standing Judeo-Christian principles, but non-recognition of same-sex marriage (and disapproval of all homosexual conduct) have always been integral to these principles. The attempt to equate the two within the Western cultural tradition is specious.

Validating gay marriage would probably not bring a plethora of stable marriages that would change public opinion.³⁶ Again, the tangible material benefits of marriage for most people are negligible and often outweighed by the detriments, including the marriage tax penalty. Although many lesbian relationships are durable, gay male relationships rarely are, and gay males are far more numerous than lesbians.³⁷ Gay couples do not bear children and there is no religious or social tradition discouraging divorce among gays, thus divorce is likely to be common. The example set by same-sex marriages is likely to be that getting married is not important and, for those who do marry, divorce is no big deal.

Admittedly, we cannot be completely certain of the effects of recognizing gay marriage unless we try it.³⁸ Some suggest that “We

35. *Colossians* 3:9.

36. See Symposium, *Has the Supreme Court Gone Too Far?*, COMMENT., Oct. 2003, at 25, 48 (comments of James Q. Wilson) (“In the Netherlands, which legalized same-sex marriages in 2001, fewer than 10 percent of an estimated 50,000 same-sex couples have chosen marriage. In 2002 there were 1,900 such marriages, compared with 85,500 male-female ones.”).

37. A recent study in the Netherlands, where gay marriages are legally valid, found that gay male partnerships lasted on average 1.5 years and that men in these partnerships had an average of eight casual sexual partners per year. Maria Xiridou, et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 *AIDS* 1029, 1031 (2003).

38. Even then measuring social phenomena and identifying their causes are often controversial. Validating same-sex marriages would likely lead to disputes about whether it “worked,” just as there are debates about whether other government programs “work.”

ought to pull the pin and see what happens,”³⁹ but this approach would be reckless. It may seem unfair to, in effect, place the burden of proof on advocates of gay marriage and then deny them an opportunity to sustain that burden. However, validating gay marriage could be detrimental, especially to children.⁴⁰ Until recently the validation of same-sex marriages has never been tried by any society. Some European countries are now experimenting with recognition. If their experiences show that marriage becomes more popular and more stable, supporters will have a better argument for trying it here.

III. THE BENEFITS OF TRADITIONAL MARRIAGE

A. *Inferences from the Universality of Marriage*

Very few social institutions are found in all cultures throughout history. Heterosexual marriage is one of the few. This fact alone argues that heterosexual marriage is important to the survival of a culture.⁴¹ Some aspects of marriage in modern Western cultures may not be universal. The so-called “nuclear family,” comprising a married couple and their minor children, has been called a recent development, with the implication that such a state may be a mutation that never was, or no longer is, socially beneficial. Recent learning shows, however, that the nuclear family is not a Victorian innovation but has been dominant for centuries, at least in Western cultures.⁴² During this period Western civilization has led the advance of democracy, human rights, science, and economic growth. It would be rash to tamper with traditional marriage until its role in these developments is better understood.

B. *Benefits to Children*

Traditional marriage is the best context for rearing children. Although this seems axiomatic to most people, many critics questioned the accuracy of this concept. Accordingly, social scientists set out to test the hypothesis empirically. The initial stream of studies confirming the benefits of traditional marriage to children has now swelled to a torrent. By every measure—physical and mental health, academic performance,

39. Christine Pierce, *Gay Marriage*, 26 J. SOCIAL PHIL. 2, 5, 10 (1995).

40. See *infra* Part III.

41. See David P. Schmitt et al., *Universal Sex Differences in the Desire for Sexual Variety: Tests from 52 Nations, 6 Continents, and 13 Islands*, 85 J. PERSONALITY & SOC. PSYCHOL. 85, 100 (2003) (stating that “random pancultural development, although possible, is extremely unlikely”); see also LEE CRONK, *THAT COMPLEX WHOLE: CULTURE AND THE EVOLUTION OF HUMAN BEHAVIOR* (1999).

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

social adjustment, and obedience to law—children raised by their biological parents who are married and live together fare better than other children.⁴³ The evidence is so overwhelming that the marriage movement, which seeks to shore up traditional marriage, has expanded beyond religious conservatives to include many moderates and liberals.⁴⁴

The growing appreciation of the benefits of traditional marriage to children coincides with changing attitudes about the government's treatment of children. This issue has always been a difficult one for liberal societies. Unlike normal adults, children can't care for themselves. However, Western social traditions, based on Judeo-Christian beliefs of parental control of children combined with America's particularly strong skepticism about the ability of government to intervene beneficially in personal affairs, produce an attitude that the state should interfere with families only in egregious cases of abuse or neglect. This attitude became less tenable as the breakdown of the traditional family left more and more children poorly cared for.⁴⁵

Although some belittle the traditional family as an anachronism, a relic of a simpler age, "[o]ur nation's contemporary political and economic institutions depend even more than before on citizens who embrace the values and virtues fostered by the nuclear family."⁴⁶ Children are society's future, so people in all cultures care about children for the community's sake, not just for the children's. However, in pre-modern cultures it was enough that children learn to handle a plow, or needle and thread, and not to be criminals. This no longer suffices. Now we need children to acquire advanced education and social habits. Thirty years ago a high-school education was considered adequate for middle-

43. See Blain Hardin, *2-Parent Families Rise After Change in Welfare Laws*, N.Y. TIMES, Aug. 12, 2001, at A1:

a powerful consensus has emerged in recent years among social scientists It sees single-parent families as the dismal foundries that produced decades of child poverty, delinquency, and crime. . . . From a child's point of view, according to a growing body of social research, the most supportive household is one with two biological parents in a low-conflict marriage.

44. See Isabel v. Sawhill, *The Behavioral Aspects of Poverty*, PUB. INTEREST, Fall, 2003, at 79, 87-88 ("As evidence of the benefits to children of growing up in a two-parent family has strengthened, liberals have become less likely to question the value of marriage."); David Blankenhorn, *The Marriage Problem 2* (unpublished manuscript, on file with the author). Blankenhorn cites, *inter alia*, Hardin, *supra* note 43; Maureen Freely, THE OBSERVER (London), Nov. 19, 2001, at 1 (reporting that "the pro-marriage movement is gaining strength on both sides of the Atlantic").

45. The percentage of American families with children under eighteen that were headed by married couples reached a record low in the middle to late 1990's and has started to rise in the last few years. See Blankenhorn, *supra* note 44, at 3-4 (citing various studies).

46. W. Bradford Wilcox, *Family Ties*, PUB. INTEREST, Fall, 2003, at 115, 118 (summarizing a theme from BRIGITTE BERGER, *THE FAMILY IN THE MODERN AGE: MORE THAN A LIFESTYLE CHOICE* (2003)).

class children and “decent jobs for unskilled and semi-skilled labor were readily available. Today, such jobs are much harder to find, and college is considered a necessity.”⁴⁷ Not surprisingly, then, “the cost of having children has risen much faster than the cost of being childless” and “compared with people who don’t have children, people who do are in worse economic shape than they’ve ever been in.”⁴⁸

Here recent learning is relevant. The dismal academic performance of many American children was long blamed on poor schools. Although the quality of the school is important, in recent years educators have realized that children can’t excel academically, no matter how good the school, if they don’t begin school at least receptive to a disciplined atmosphere and to reading and math as a result of their home environment, or if when school-aged they get no educational support and no stimulation, or the wrong kind of stimulation, at home. The most important place of learning is not the school but the home. Not surprisingly, the best parental support tends to be given to children who live with both their natural parents, and this scenario is most likely to exist if the parents were married when the child was conceived and born and remain married afterward.

The renewed appreciation of the importance of norms is also significant. It compels us to grapple with the fact that norms cannot be taught in school alone. Indeed, norms aren’t taught at all in the way that math and history are. Rather they are habits children acquire by practicing what they see done by the people around them.⁴⁹ Parents are crucial in this regard, not only for what they convey to their own children but also for what they contribute to their whole neighborhood. We have come to appreciate that what a child sees in her community can reinforce or undermine good norms.

We also understand better now the importance of the traditional family to child rearing. Even adoption by a traditional married couple is generally inferior to living with one’s natural parents. Single-parenting is less satisfactory.⁵⁰ Divorce does great and lasting harm to children.⁵¹ Good parenting requires hard work from two dedicated people, and those most likely to accept this difficult task are the biological parents.

47. James Surowicki, *Leave No Parent Behind*, NEW YORKER, Aug. 18 & 25, 2003, at 48.

48. *Id.*

49. *See, e.g.*, Stout, *supra* note 8, at 21 (“a predisposition to behave in an other-regarding fashion is something that is largely acquired through experience”); Kaplow & Shavell, *supra* note 30, at 8 & n.12 (“moral behavior can become a habit,” (citing Hume, Mill & Darwin)).

50. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 59-60 (2000) (cataloguing the problems stemming from illegitimacy and single-parenting).

51. *See id.* at 174-77.

Many parents will nurture their children no matter what the state does, but as many others will not do so, the state should promote good parenting and, since marriage correlates with good parenting, the state should also promote marriage. This task is not easy: “Though marriage has a number of important benefits, especially for children, it is not presently clear what can be done to encourage it.”⁵² Neither is it clear what can be done to encourage married couples to be attentive parents. One option to this end is to give parents money. New York City now pays parents of school children to get involved in their children’s education.⁵³ This program is a commendable recognition that good parenting is indispensable, yet clear obstacles impair the program’s success. It is impossible to monitor closely the parents’ compliance. Good care is so time-consuming that even a program of low hourly payments would be immensely expensive.

Further, recent learning in behavioral psychology shows that “manipulating material incentives may not only be an inefficient regulatory strategy for solving collective action problems; it may often be a self-defeating one.”⁵⁴ People tend to follow social norms if they believe that most others are doing likewise. In such cases, “reliance on costly incentive schemes becomes less necessary.”⁵⁵ But “[c]onspicuous rewards and punishments can imply that others *aren’t* inclined to cooperate voluntarily, a message that predictably weakens individuals’ commitment to contributing to public goods.”⁵⁶

In short, if we define the rational man as *homo economicus*—a wealth-maximizing individual—then having and conscientiously raising children is not rational. To encourage good parenting, society must stress non-economic motives, like honor. For similar reasons, treating marriage as a contractual relationship is inappropriate. It is better treated as a “covenant [which] implies unconditional love and permanence” because children suffer if parents separate or do not act lovingly.⁵⁷ An alternative to material incentives is the expressive function of law.⁵⁸ By conferring honor on marriage the law promotes that institution which maximizes the likelihood that parents will give their children good care. By contrast,

52. Sawhill, *supra* note 44, at 88.

53. See Elissa Gootman, *In Gamble, New York Schools Pay to Get Parents Involved*, N.Y. TIMES, Aug. 30, 2003, at A1.

54. Kahan, *supra* note 20, at 2.

55. *Id.*

56. *Id.*

57. BRINIG, *supra* note 50, at 6.

58. See *supra* notes 7-10, 19-20 and accompanying text.

recognizing same-sex marriage will sever the connection between marriage and child-rearing.⁵⁹

Some object that this emphasis on child-rearing is archaic because marriage is now properly seen primarily as an institution for the emotional fulfillment of the spouses, not for reproduction. First, note that I'm only talking about why marriage concerns the law. People find fulfillment in many human relationships, such as drinking buddies and bridge groups. However, the law generally leaves these to be handled privately. Marriage is different largely because of its importance to children, who cannot protect their own interests within the family as drinking buddies and members of bridge groups can.

Critics also argue that the emphasis on children is logically inconsistent because the law recognizes childless marriages.⁶⁰ However, even newlyweds who intend to be childless can, and often do, change their minds. As for couples incapable of having children, it is often difficult to identify them even after intrusive medical examination, which in any case would be repugnant to our legal and social traditions.⁶¹

What about the rare cases in which it is obvious, say because of age, that a marrying couple can never bear children. First, rules of eligibility for a legal status are usually not finely drawn. We set the rules for when people can vote or drive a car, for instance, based on when *most* people can handle these activities. We don't make individual determinations of maturity. Second, to be effective social norms must be fairly simple.⁶² Consider the Ten Commandments. Most ethicists and theologians agree that there are situations where it is morally permissible, even morally necessary, to lie or to steal. But the text of the Ten Commandments doesn't get into unusual exceptions, and neither should the law, at least in its expressive function. Third, if one of the couples is capable of procreating, a marriage helps to ensure that that spouse will not produce a child out of wedlock.

Further, what is the objection to recognizing marriages of people who can't have children? These marriages serve as an inspiration: Even

59. See Maggie Gallagher, *The Stakes*, NAT'L REV. ONLINE, (July 14, 2003), at <http://www.nationalreview.com> ("Marriage will no longer be a carrier of the message that children need mothers and fathers.").

60. Evan Wolfson, *Enough Marriage to Share: A Response to Maggie Gallagher*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 25, 27 (Lynn D. Wardle et al. eds., 2003).

61. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (striking down law banning sale of contraceptives in part because it was "repulsive to the notions of privacy surrounding the marriage relationship").

62. See STEVEN SHAVELL, WELFARE ECONOMICS, MORALITY, AND THE LAW (forthcoming); Kaplow & Shavell, *supra* note 30, at 11 ("moral rules must have some degree of generality"); see also Richard A. Posner, *Wedding Bell Blues*, NEW REPUBLIC, Nov. 22, 2003, at 33 ("The law frequently and unexceptionably draws crude lines.").

though they can't have children, these couples still choose to marry. The message these marriages convey is that, *a fortiori*, those who can and want to have children ought to marry. That is the exact opposite of the message created by people who shun traditional marriage and prefer a relationship that is inherently sterile.

C. Encouraging Heterosexuality

Good child rearing is the most important reason, but not the only reason for the law to care about marriage. By honoring traditional marriage the law may nudge a few people toward a heterosexual rather than a homosexual life. The number is probably small because we know that a homosexual life is not casually chosen; there are strong disincentives to that choice. On the other hand, we know that sexual orientation (much less sexual behavior) is not immutable.⁶³ Homosexual conduct is much more common in societies that condone it than in societies that condemn and punish it.⁶⁴ Also, many men who have been exclusively heterosexual will engage in homosexual acts if they can when placed in an all-male environment (like prison or the military), and then revert to exclusive heterosexuality when they leave that environment. Even if public policy grants no moral or metaphysical superiority to heterosexuality, the health risks of homosexuality alone justify the state in discouraging it.

Because there are more male than female homosexuals,⁶⁵ validating gay marriage would remove more men than women from the market for traditional marriage. Although the numerical impact would be minor, it would harm women by exacerbating the existing shortage of marriageable males. That shortage is already pronounced in some social

63. Kinsey, for example, found that sexual orientation is not bipolar, but covers a range from strong heterosexual preference through neutrality to strong homosexual preference. 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). Further, some psychiatrists believe that some homosexuals can change their sexual orientation. See Robert Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 *ARCHIVES OF SEXUAL BEHAV.* 403 (Oct. 2003).

64. See I *ENCYCLOPEDIA OF HOMOSEXUALITY* 578-80 (Walter R. Dynes ed., 1990) (describing the impact of social attitudes on homosexual conduct). See also RICHARD A. POSNER, *SEX AND REASON* 117 (1992) (stating that, in societies intolerant of homosexuality, more men with homosexual inclinations will enter traditional marriages).

65. See RICHARD A. POSNER, *SEX AND REASON* 99 (1992); ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 176 (1994) (finding that 2.8% of adult males and 1.4% of adult females are predominantly homosexual); EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 297 (1994).

groups.⁶⁶ Even where the disparity is small it places women at a disadvantage. As anyone who has played musical chairs knows, even a slight excess of demand over supply can be troublesome when demand is inflexible. Demand for marriage is inflexible; there is no substitute for it, and most people do not want to forgo having children.

With numbers in their favor, men know they need not make a commitment to one woman; the reluctance of modern men to make a commitment is now legendary. In light of the benefits of marriage to men,⁶⁷ this reluctance is foolish. However, that is not surprising; people often misconstrue and fail to act in their own best interests.⁶⁸ The shortage of marriageable males also places married women at a disadvantage by making it easier for husbands to re-marry after a divorce than it is for wives.

D. Socializing Adults

A third reason for the law to be concerned about marriage is to socialize adults. Marriage channels potentially destructive energy into beneficial activity, especially for men. Crime and drug abuse are committed more by single men than by women or married men.⁶⁹ In all cultures men are more promiscuous than women.⁷⁰ Some believe that recognizing same-sex marriage would, as William Eskridge puts it, “civilize gay men by making them more like lesbians.”⁷¹

That is unlikely: men are not domesticated by a wedding but by women and children.⁷² Indeed, some advocate recognition of gay

66. See POSNER, *supra* note 65, at 136-41 (“In America today black women significantly outnumber available black men.”).

67. See *infra* notes 69 & 76 and accompanying text.

68. See *infra* notes 96-99 and accompanying text.

69. The incarceration rate for young single men is nearly seven times that of young married men. GEORGE AKERLOF, *MEN WITHOUT CHILDREN* (1997). Men may be genetically harder to socialize than women. See Natalie Angier, *Parental Origins 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).

70. See Schmitt, *supra* note 41, at 101 (“the largest and most comprehensive test yet conducted on whether the sexes differ in the desire for sexual variety” concluded: “Men not only possess a greater desire than women do for a variety of sexual partners, men also require less time to elapse than women do before consenting to sexual intercourse, and men tend to more actively seek short-term mateships than women do.”).

71. ESKRIDGE, *supra* note 34, at 85.

72. See GEORGE GILDER, *MEN AND MARRIAGE* 76 (1993); POSNER, *supra* note 65, at 305-07, 312 (stating that the presence of children helps to keep married couples together); Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, at 32. This is consistent with evidence that lesbians are less promiscuous and more often achieve long-term relationships than gay men. See ESKRIDGE,

marriages precisely because it would undermine what they see as a stifling, repressive institution.⁷³ Some claim gay men are promiscuous and have few lasting relationships because of social oppression; if they were accepted, they would have the same rate of stable marriages as normal couples. But social acceptance of gays has been rising for many years now, yet we see no evidence of domestication. On the contrary, we now see an increase of unsafe sex and new HIV infections. “If ‘a grisly plague has not furthered the cause of homosexual monogamy,’ why would ‘a permit from the town clerk.’”⁷⁴

E. Promoting Human Flourishing

A (distant) fourth reason for the law to care about marriage is to promote individual flourishing. Many philosophers, theologians, writers and artists in various eras and corners of the globe have considered a loving (traditional) marriage to be one of the highest human goods. As Steven Carter says, “Most people . . . see the value of children or the horror of murder without the need for explanation. It is not merely an instinct but part of their vision of the good.”⁷⁵ However, one need not resort to such metaphysical judgments; more mundane factors will do. Married people live longer and enjoy better physical and psychological health and greater wealth.⁷⁶

Some acknowledge these benefits but claim that validating gay marriages will do no damage and indeed that marriage will profit from the support of homosexuals and the good example set by gay marriages. That is highly dubious. As already noted, most people view gay marriage as a travesty or an outrage.⁷⁷ At least among gay men, enduring marriage

supra note 34, at 83 (“The majority of surveys taken in the last twenty years have found more lesbians than gay men in committed long-term relationships.”).

73. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 208 (1995) (advocating gay marriage in order to “assimilate the straight world to the gay world”); Michelangelo Signorile, *Bridal Wave*, *OUT*, Dec.-Jan., 1994, at 161 (arguing for same-sex marriage in order “to debunk a myth and radically alter an archaic institution”).

74. WILLIAM J. BENNETT, *THE BROKEN HEARTH: REVERSING THE MORAL COLLAPSE OF THE AMERICAN FAMILY* 117 (2001) (quoting Mark Steyn).

75. Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 25 (Michael W. McConnell et al. eds., 2001) (hereinafter cited as “CHRISTIAN PERSPECTIVES”).

76. 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”); *Marriage Dividend*, *BUS. WK.*, Oct. 6, 2003, at 158 (citing recent study of older women showing that married women enjoyed better health than single women). These phenomena are observed in other countries, too. See Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. MARRIAGE. & FAM.* 527 (1998).

77. See *supra* notes 27-29 and accompanying text.

is likely to be rare.⁷⁸ Many gay activists admit that gay marriages are likely to be shorter.⁷⁹ The law then would encounter pressure to relax divorce standards to accommodate this. As for the example set by gay marriages, it is likely to be that marriage is usually brief, casually terminated, not to be taken too seriously. Extending valid marriage to “an often openly and even proudly promiscuous population would fatally undermine an already weak institution by breaking the bond between marriage and the principle of monogamy.”⁸⁰

F. Gender and Class Equality

Some gay activists oppose traditional marriage as a stifling, oppressive institution and yearn for its de-normalization. Many feminists believe that “the historically patriarchal function and property associations of marriage render it incapable of offering a route to liberation or equality.”⁸¹ This opposition is misguided. Although men seem to gain more from marriage than women do, women might suffer more from validation of gay marriage.

Allegations of “the historically patriarchal function and property associations of marriage” are also flawed. Christianity spread in the Roman Empire in part because it gave women better treatment than they received under prevailing customs, in which women, generally, had few rights, while married women had even fewer rights and could be casually cast off by their husbands.⁸² Most Christian denominations now affirm that “[m]en and women are equal as persons.”⁸³ Many husbands do unfairly dominate their wives, but it does not follow that institution of marriage causes this domination. As men have dominated women

78. See *supra* note 37 and accompanying text.

79. See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 *FORDHAM L. REV.* 1699, 1726 (1998) (conceding that marriage may not have “the same meaning—entailing commitment to the same values—for gay people as for their heterosexual counterparts”).

80. Kurtz, *supra* note 23, at 36 (citing William J. Bennett).

81. Davina Cooper, *Like Counting Stars?: Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage*, in *LEGAL RECOGNITION*, *supra* note 2, at 75, 75; see also CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* 146 (1984); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

82. St. Paul declared that, in Christianity, “The wife hath not power of her own body, but the husband; and likewise also the husband hath not power of his own body, but the wife.” 1 *Corinthians* 7:4. (Christianity treated women better than Romans).

83. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals To Give Legal Recognition to Unions Between Homosexual Persons* 2 (Jun 3, 2003), at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

throughout history in all societies, it would be astonishing if equality of the spouses were the rule in America today.

However, traditional marriage reduces rather than exacerbates inequality: “the intensely conjugal and domestic orientation of the nuclear family resulted in a high measure of sexual equality and child-centeredness.”⁸⁴ Women have suffered more than men from relaxed standards for divorce and are likely to suffer more from further relaxation in response to recognition of gay marriage. For example, recognition of same-sex marriage will make traditional marriage less popular by making it less special, less honored.⁸⁵ In communities where marriage rates have declined, women seem to have suffered more than men. Many unmarried women still bear children, but they usually must provide the children with personal care and financial support without much help from the fathers.

Further, recognizing gay marriage would alter attitudes about relations between spouses. Despite feminist fulminations about gender stereotypes, recent scientific findings confirm the existence of inherent differences between men and women.⁸⁶ However, with validation of same-sex marriage, marriage will cease to be a relationship that is always between a man and a woman, who are inherently different; it will then be a relationship between any two people. The differences between men and women will be downplayed if not completely ignored.

This change is likely to harm wives, especially in the context of divorce. Wives are more likely to have child custody after a divorce and lower income-earning capacity. Although marital law has often treated women unfairly, it now serves more to protect than to harm them. Further, and again contrary to the statements of some feminists, the religious roots of our marriage laws are helpful in this regard. Christianity and Judaism now generally teach that men and women have inherent differences but are equally valuable, equally worthy of respect.⁸⁷ At the least, traditional marriage should be supported until something

84. Wilcox, *supra* note 46, at 117.

85. It may also exacerbate the shortage of males interested in traditional marriage. Although the number of people whose primary sexual orientation is changed by legal validation of gay marriage would probably be small (*see supra* note 65 and accompanying text), it would probably include more males than females because homosexuality seems to appeal to more men than women. *See Dent, supra* note 1, at 612-14.

86. *See* STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 344-50 (2002).

87. *See* Teresa Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in *CHRISTIAN PERSPECTIVES*, *supra* note 75, at 178 (arguing that Christianity is quite compatible with “relational” or “difference” feminism, which recognizes inherent differences between men and women, but not with “sameness” feminism).

better is available. At the moment there is not even a plausible alternative.

Traditional marriage also promotes class equality. Economist George Akerlof ascribes the economic decline of inner cities in part to weakening social support for marriage. The resulting changes in sexual morals in the 1960s and 1970s harmed poor and working people most because they spawned our big increase in out-of-wedlock pregnancies and a decline in the “shotgun” marriages that previously protected mothers and children in such cases.⁸⁸ Recent changes in welfare programs may have reversed this trend, at least slightly.⁸⁹ “The sexual revolution was less consequential for middle- and upper-class Americans because they retained a strong economic and social stake in the conventional family.”⁹⁰

G. Bolstering Liberal Democracy

It has already been noted that traditional marriage benefits society by socializing adults and improving the raising of children, which promotes growth of the economy.⁹¹ Despite the risk of seeming repetitious it is worth noting that, notwithstanding the contempt for traditional marriage voiced by many liberals, “many of liberalism’s most cherished values—e.g., personal autonomy, equality, individual responsibility—depend upon the nuclear family for their flourishing.”⁹² Indeed, it now seems that Western civilization’s leap ahead of its competitors in the last few centuries, at least in terms of science and technology, economic growth, and cultivation of democracy and individual rights—a phenomenon historians have struggled to explain—stems in part from the evolution of the nuclear family.

The unique genius of the family as it came to be institutionalized in the West is that it fostered, and continues to foster, a particular set of values that helped give birth to liberal modernity. . . . [I]t fostered late marriage and responsible procreation, parsimony and individual responsibility, and a measure of equality between men and women, along with an unusual level of independence from the extended family. These norms, in turn, were particularly conducive to the rise of cottage-based capitalism and eventually industrial capitalism.⁹³

88. Wilcox, *supra* note 46, at 119.

89. See Sawhill, *supra* note 44, at 89 (ascribing the “small comeback” of marriage in part to “the new messages embedded in welfare reform”).

90. Wilcox, *supra* note 46, at 119.

91. See *supra* notes 43-62, 69-74 and accompanying text.

92. Wilcox, *supra* note 46, at 117.

93. *Id.* at 116-17.

To some extent these findings are new, but they are adumbrated by Max Weber's ascription of the evolution of capitalism to the Protestant ethic.⁹⁴ What is new is the appreciation of the importance of traditional marriage and the nuclear family to this development.

H. The Importance of State Support

Some, including many gay activists, believe that marriage should be treated as a private matter; it should not concern the state any more than other personal relationships do.⁹⁵ The preceding discussion shows one sufficient ground for rejecting this view: marriage affects third parties or, as economists, say, it has externalities. The most affected third parties are children, but society generally has a stake in the raising of children. The benefits of marriage to the health, wealth and socialization of the couple also affect society generally because society often bears the costs of poor health and antisocial behavior, while tax revenues suffer from lower incomes. Women generally gain greater power in bargaining with men when marriage is honored and normative.

Another reason also exists for this view: It is arguable that "people left to their own devices will not be in a position to lead the most valuable life available to them."⁹⁶ Indeed, "scholars are increasingly showing that people don't know very well what they want, how much they value it, or what makes them happy."⁹⁷ Often "people do not have clear or well-found preferences, and hence it is unclear that people have straightforward 'values' that can actually be found."⁹⁸ To the extent that they do have preferences, it is questionable how much they are integral or essential to the individual or how much they are internally generated. "[W]e might say that preferences are constructed, rather than elicited, by social institutions."⁹⁹

94. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans. 1930).

95. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing for abolition of marriage as a legal category); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (arguing for treating personal relationships through contract rules modeled on corporate law); Tamar Lewin, *For Better Or Worse: Marriage's Stormy Future*, N.Y. TIMES, Nov. 23, 2003, § 4, at 1 ("The most radical structural change being discussed these days is taking the state out of the marriage business.")

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

97. See Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioral Law and Economics* 4 (unpublished manuscript, on file at the Georgetown University Law Center) available at <http://papers.ssrn.com/abstract=452100>; see also Jon Gertner, *The Futile Pursuit of Happiness*, N.Y. TIMES MAG., Sept. 7, 2003, § 6 (Magazine) at 44.

98. Sunstein & Thaler, *supra* note 11, at 19.

99. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 38 (1997).

It might seem that traditional marriage and family are so deeply ingrained in our culture that they hardly need added government support. Unfortunately, much contemporary popular music, film, television and advertising parade a shallow hedonism that erodes respect for traditional marriage and family and divert us from true human flourishing. The financial costs of marriage and children have also increased. Society and the individual both need state support for traditional marriage to counter these forces.

IV. OTHER FORMS OF MARRIAGE

Some object that this honor is denied only to gay marriages. Not true. Polygamy, endogamy, and marriage with minors and animals are also invalid and, unlike gay marriages, often criminal. Hence, rather than casually distributing honor to everyone but gays, the law strictly confines the honor of marriage to the one form that has worked best: monogamous, exogamous, heterosexual marriage.

The other side of that coin is that validating gay marriage would logically necessitate validating these other forms of marriage. The accusation that Christian views on marriage are narrow and provincial is true—not in its rejection of gay marriage, since with rare recent exceptions that rejection is universal, but in its rejection of polygamy and endogamy, which have been common, perhaps the norm to which Christian views are an aberration. If two unrelated men can marry, why can't two brothers marry? There certainly is no concern about birth defects. And if two women can marry, is it degrading to women to let three women marry? Could we allow only same-sex endogamous and polygamous marriages? This proposition would raise an equal protection problem, especially since we'd be sure to get a case of two 80-year old brothers and an 82-year old sister who wanted to marry. If we do not treat legal recognition of marriage as a means of conferring honor on the monogamous, exogamous, heterosexual marriage as the best institution for raising children, what objection can exist to recognizing the marriage of these three siblings?

The reasoning of proponents of same-sex marriage is so broad as of November 28, 2003 to implicate other forms of marriage. Most treat same-sex marriage as falling within a broad right of privacy and autonomy in personal matters. Thus David A.J. Richards claims that sexual autonomy is central to the idea that a person is free.¹⁰⁰ Nicholas Bamforth argues: "If autonomy is to be taken seriously, . . . then each

100. DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 53 (1982).

individual's appreciation and definition of what is, for them, a valuable sexual act or sexual/emotional relationship must—within the limits of consent—be respected.”¹⁰¹

However, if there is a right to sexual autonomy, it would seem to include polygamy, endogamy, and perhaps bestiality. The few efforts to distinguish these other relationships from same-sex unions have been embarrassingly incoherent; most proponents of same-sex marriage don't even try.¹⁰² As Hadley Arkes says, “Every argument for gay marriage is an argument that would support polygamy.”¹⁰³

Such statements have usually been dismissed by gay activists as scare tactics by right wingers. Again, however, recent developments belie the arguments of advocates for same-sex marriage. Although *Lawrence v. Texas* dealt only with homosexual acts, this decision has already spawned speculation that its reasoning logically applies to many other activities. Noting the application of the “least restrictive means” standard in *Lawrence*, Cass Sunstein has recognized that if the restrictions on bestiality, polygamy, and endogamy must “be justified by showing that they are the least restrictive means of achieving a compelling state interest” then “at least some of them would be in serious trouble.”¹⁰⁴ Similarly, in the wake of *Lawrence* Professor Brett McDonnell has distributed a paper entitled “Is Incest Next?”¹⁰⁵ These authors are not religious reactionaries. Sunstein is a liberal and McDonnell is gay.¹⁰⁶

Some gays are honest and consistent enough to support polygamy.¹⁰⁷ A few years ago the New York Times reported the growing popularity of “polyluv.”¹⁰⁸ America's growing Moslem population is likely to add to

101. Bamforth, *supra* note 2, at 43. Supporters of gay marriage also decry doctrines of natural law that assert that some sexual acts and relationships are inherently better than others. *See id.* at 46-53. This article does not rely on natural law doctrines, however, so this debate need not be addressed.

102. *See* Brett H. McDonnell, *Is Incest Next?*, CARDOZO WOMEN'S L.J. (forthcoming 2004) (“I find something unseemly about the efforts of many gay advocates to deny the analogy [between anti-sodomy and anti-incest laws]—it reeks of people who have now gained their own liberty paying scant heed to the liberty of others.”); *see also id.* at xxx n.129 (“A similar dynamic is in play as gay marriage advocates frequently deny the analogy to polygamy.”).

103. *One Man, One Woman*, WASHINGTON WATCH, Jan. 26, 1998, at 1.

104. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage* 32 (Sept., 2003) (unpublished manuscript, on file with The University of Chicago Law School) at http://ssrn.com/abstract_id=450160.

105. McDonnell, *supra* note 102.

106. So I infer from his reference to “my boyfriend.” *Id.* at xxx n.133.

107. *See* 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, 490-91 (1996) (“By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more.”).

108. *They Call It Polyluv*, N.Y. TIMES, Feb. 16, 1997, §6 (Magazine) at 15.

this support. Should we care? The standard criticism of endogamy—risk of genetic defects—is weak.¹⁰⁹ Endogamy and polygamy cause concrete harm. Endogamy can lead to disputes and exploitation of the power of older family members over the younger, thereby interfering with the ability of the family to prepare the young to play a positive role in society.¹¹⁰ Endogamy also invites people to focus their attentions inward and to neglect contacts with the outside world that are crucial to their employment opportunities and their citizenship.

Polygamy also causes harm. Although the definition of polygamy includes one woman having several husbands, or marriages among several women and several men, in practice polygamy almost always means polygyny—one man having more than one wife. A man who takes an additional wife is likely to pay less attention to the wife (or wives) he already has. The very possibility of a man taking a second wife reduces the bargaining power of his first wife. Under liberal divorce laws like contemporary America's, she is vulnerable even if her consent is required before her husband can take a second wife because her husband can simply divorce her if she refuses to consent.

A man who fathers children by a new wife is also likely to pay less attention to his children from earlier wives. Relationships are often difficult even among full siblings. Adding half-siblings further strains the family. History is full of scheming and strife among polygamous wives and their respective children.

For the foregoing reasons, polygamy is usually criticized as harmful to women, but it may be even more harmful to men. In polygamous societies wealthy, powerful men accumulate wives, leaving a shortage of eligible women for poorer men. This situation is particularly detrimental to younger men, who have not yet been able to build wealth and power. Even when marriages are not arranged by parents, it is not surprising that some women would rather be the younger bride of a wealthy powerful man than the sole wife of a poor man who cannot provide as well for herself and her children. As a result, many men cannot marry until middle-age, if ever.

109. The probability of defects in children of first cousins is quite small. See Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, April 4, 2002, at A1 (reporting on a review of six studies). Moreover, most incest and endogamy statutes are overly broad in that they apply to many relationships with no close blood tie. See McDonnell, *supra* note 102.

110. See McDonnell, *supra* note 102 (“Another leading justification [of anti-incest laws] is protecting relations within the family from becoming over-sexualized.”).

A right to sexual autonomy would also seem to invalidate laws forbidding adultery.¹¹¹ Validation of same-sex marriage would strengthen the argument against these laws. One reason to forbid adultery is that it harms children by disrupting the family.¹¹² Since same-sex couples do not bear children, this justification does not apply equally to them. Further, if same-sex marriages were valid, the high rate of promiscuity among gay men would in practice make it harder to take these laws seriously.

In sum, the reasons advanced by advocates of same-sex marriage apply equally to adultery and to other forms of marriage that most people (including most advocates of same-sex marriage) consider undesirable. That same-sex marriage gets much greater support than the other forms of marriage reflects political sentiments, not principle. However, judicial approval of same-sex marriage would have to be based on some principle, such as a right to sexual autonomy, which would also require the approval of adultery and of other forms of marriage. This approval, however, would compound the social damage wreaked by recognition of same-sex marriage.

It need hardly be added that endogamy, polygamy, and adultery do not facilitate the loving, companionate marriages that most people consider ideal for human flourishing.¹¹³ However, many liberals and gay activists dismiss such beliefs as inherently religious and thus as invalid bases for law in a free society.

V. RELIGIOUS FREEDOM

Professor Destro's contribution to this Symposium shows convincingly that recognition of same-sex marriage would inexorably lead to curbs on expression of religious beliefs,¹¹⁴ so I need not discuss that issue at length. However, the point should be briefly reiterated here because it is so important to negate any inference that Professor Destro's views lack wide support.

Two recent events will serve to illustrate the problem. Recently in Minnesota state employees were required to attend diversity training on homosexuality. Some employees brought their Bibles and read them

111. See Sunstein, *supra* note 104, at 28 ("it would be possible to urge that [in adultery] a consensual relationship is involved, one with which the state may not interfere on purely moral grounds").

112. See *id.* ("The adultery laws can be seen as an effort to protect the marital relationship, involving persons and interests, including those of children, that are harmed if adultery occurs.") (footnote omitted).

113. See *supra* note 75 and accompanying text.

114. Robert Destro, "Same-Sex Marriage and Religious Freedom." (Paper presented at this symposium).

silently without disrupting the training sessions. For this they were reprimanded. The employees sued, and federal courts held that the state had violated the employees' freedoms of speech and of religion.¹¹⁵

On Staten Island a Christian minister bought space on two billboards to display the biblical verse, "Thou shalt not lie with mankind, as with womankind: it is an abomination."¹¹⁶ The borough president called the billboard company and said "This message conveys an atmosphere of intolerance which is not welcome in our borough." He added that the company "owns a number of billboards on Staten Island and derives substantial economic benefits from them." Within hours the displays were removed. The minister sued, claiming a violation of the First Amendment. A federal district court dismissed the complaint on the ground that the display had been removed by the company, a private entity, and not by the government. However, the court of appeals reversed, because the borough president's statement "could be found to contain an implicit threat of retaliation" if the display remained.

The constitutional protection afforded in these two cases may vanish if same-sex marriage becomes legally valid. Government need not, and cannot, be neutral about moral issues.¹¹⁷ The state must either favor traditional marriage or treat it as equal to gay marriage. In either case it stakes out a moral position. If it takes the latter position, the law in its expressive function disapproves beliefs that the two are not equal, including Judaism, Christianity, and Islam.

Validation of same-sex marriage will also have material consequences. Just as government benefits are denied to organizations that practice racial segregation,¹¹⁸ government benefits will be denied to organizations that refuse to recognize same-sex marriages. Public school students who proclaim that homosexual acts are sinful may be punished for hate speech.

Although compromise is not impossible, it is not morally neutral and will not be acceptable to those with a strong, principled commitment either in favor of or against equal legal treatment of same-sex marriage. Moreover, since religious belief is important to many Americans' attitudes about homosexuality, equal respect for homosexuality cannot be

115. *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199 (8th Cir. D. Minn., 2001); see also *Minnesota Officials Guilty of Religious Discrimination for Punishing Employees Who Brought Bibles to Diversity Training Sessions*, AMERICAN CENTER FOR LAW AND JUSTICE, at http://www.aclj.org/news/pressreleases/020802_diversity_training_victory.asp.

116. *Leviticus* 18:22. The story is taken from Clyde Haberman, *All the Views Unfit to Print on a Billboard*, N.Y. TIMES, Nov. 18, 2003, at A21.

117. See *supra* note 2 and accompanying text.

118. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding withdrawal of tax exempt status from school because it forbade interracial dating).

achieved without serious governmental curbs on expressions of traditional religious beliefs.

VI. DOMESTIC PARTNERSHIPS

Recognition of domestic partnerships could erode the respect for and the popularity of marriage. In France such recognition seems to have had this effect.¹¹⁹ Traditionally, one is married or single; there are no other options. Domestic partnership laws eliminate this bright-line dichotomy. These laws offer an alternative that can avoid the lingering taint of “living in sin” without marriage and of bearing illegitimate children, bastards, out of wedlock. Already employers are being pressured to drop references to an employee’s “spouse” in favor of “partner” or “significant other.”¹²⁰ Given the importance of marriage for the protection of children,¹²¹ a strong presumption should exist against steps that weaken marriage.

On the other side, no pressing need exists for the material benefits the validation of domestic partnerships would confer. As already noted, even the legal benefits of marriage are minor and can often be attained by private action.¹²² Not surprisingly, where domestic partnership laws have been enacted, few gay couples have used them.¹²³ If specific problems of gay couples exist that deserve legal attention, these problems can be addressed by specific legislation.

VII. THE NEED FOR A CONSTITUTIONAL AMENDMENT

Despite the many recent changes that impinge on the debate over same-sex marriage, until recently no American court has ordered government to give legal recognition to same-sex marriage. Further, Congress has adopted the Defense of Marriage Act (“DOMA”), which provides that (1) for purposes of federal law marriage means only a marriage of one man and one woman, and (2) states are not required to

119. See Chris Crain, Editorial, *Gays May Ruin “Traditional Marriage,”* N.Y. BLADE, Aug. 3, 2001, at 14 (“The effect on ‘traditional marriage’ has been dramatic. In France, where [domestic partnerships] first became available in 1999, some 14,000 couples signed up the first year, and almost half of them heterosexual.”).

120. See BRIAN MCNAUGHT, *GAY ISSUES IN THE WORKPLACE* 50 (1993) (recommending such a step).

121. See *supra* notes 43-62 and accompanying text.

122. See *supra* note 21 and accompanying text.

123. By the end of 1997 fewer than 300 couples had registered under Hawaii’s domestic partnership law, 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 at 1997 WL 16187525.

recognize any other kind of marriage even if it has been legally validated by a sister state.¹²⁴

These facts were recited by some advocates of same-sex marriage to prove no imminent threat to traditional marriage exists.¹²⁵ That argument was clearly exploded when the Supreme Judicial Court of Massachusetts commanded the state to honor gay marriages.¹²⁶ Some foreign countries, including Canada, now recognize same-sex marriages. Gay couples married in these jurisdictions will seek recognition of their marriages by other states and the federal government.

Some argue that if the citizens of any state are unhappy with a judicial order to recognize gay marriages, the people can simply amend the state constitution. However, in many states the procedure for amending the state constitution is so tortuous that even a substantial majority may be unable to achieve an amendment. Moreover, a state constitutional amendment will not protect a state from having to recognize same-sex marriages validated in its sister states or in foreign countries. States may not have to recognize gay marriages either because the Full Faith and Credit Clause of the United States Constitution¹²⁷ does not compel it or because DOMA overrides the residual constitutional rule.¹²⁸ However, it has been argued that the Full Faith and Credit Clause would demand recognition and that Congress cannot by legislation alter this demand.¹²⁹

Accordingly, the only reliable measure for avoiding validation of gay marriage is a federal constitutional amendment. However, many argue that marriage is an area traditionally relegated to state law; therefore, a federal constitutional amendment defining marriage would be incompatible with federalism.¹³⁰ That argument would be persuasive if states validated gay marriage by democratic means, but that is most unlikely. Rather, validation is likely to be imposed by judicial fiat over

124. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

125. Carl Hulse, *House Panel Is Told '96 Law Protects States on Marriage*, N.Y. TIMES, March 31, 2004, at A12 (former Rep. Bob Barr, an author of DOMA, testifies that DOMA "would survive court challenges.").

126. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

127. U.S. CONST. art. IV, §1.

128. *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. On the Judiciary*, 104 Cong. (1996) (statement of Professor Cass Sunstein) available at 1996 WL 387312 ("[I]t is long-standing practice for interested states to deny validity to marriages that violate their own public policy").

129. See Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage*, in LEGAL RECOGNITION, *supra* note 2, at 55, 61-63.

130. See Editorial, *Down State*, NEW REPUBLIC, March 15, 2004, at 15 ("This country has a long tradition when it comes to questions related to civil marriage: namely, that such matters are best left to the states.").

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the opposition of most citizens. In this case a federal constitutional amendment does not clash with the purposes of federalism. This article is not the place for a discussion of the desirability of the proposed Federal Marriage Amendment, but some constitutional response is needed.