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# A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “the Tragedy of the Commons”

Lynn D. Wardle<sup>\*</sup>

Ruin is the destination toward which all men rush, each pursuing his own best interest in . . . the commons.

—Garrett Hardin, *The Tragedy of the Commons*.

## I. INTRODUCTION: CONSIDERING THE CONSERVATIVE CASE FOR SAME-SEX MARRIAGE

### A. *Conservatism, Same-Sex Marriage, and the “Tragedy of the Commons”*

A number of thoughtful, conservative commentators have made arguments for legalizing same-sex marriage that draw upon principles such as tradition, institutionalism, values, communitarianism, and the social good.<sup>1</sup> These arguments are sometimes called “the conservative case” for legalizing same-sex marriage. These arguments are not only quite interesting and appealing, but they are certainly among the most coherent and persuasive arguments for same-sex marriage.

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1. *See infra* note 48. Among the most articulate and respected of these advocates of same-sex marriage is Professor Dale Carpenter of the University of Minnesota, who participated in this symposium.

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This paper will critically examine the “conservative case” for same-sex marriage. There are at least three general responses to these “conservative” arguments: negative, positive, and alternative. The *negative* response rejects those claims for same-sex marriage as flawed—factually, logically, and (most importantly for this paper) fundamentally inconsistent with the basic principle of conservative political philosophy. The *positive* response asserts that conservative principles affirmatively require one to oppose legalization of same-sex marriage. The *alternative* response is that regardless of whether the claims for same-sex marriage are conservative or not, they should be rejected on the basis of other overriding principles, such as the principles of *liberalism* that are as deeply-woven into the American social, legal and political fabric as are the principles of conservatism. This paper will attempt to present the first two responses to the conservative case for same-sex marriage.<sup>2</sup>

This paper considers and refutes some of the common conservative arguments for legalizing same-sex marriage and shows that the position most clearly consistent with the conservative political philosophy opposes legalization of same-sex marriage.<sup>3</sup> The basic principles of conservative political philosophy are reviewed in Part II of this paper. In Part III, popular “conservative” claims for same-sex marriage are reviewed and challenged; they are found wanting factually, logically, and as measured against the principles of conservatism. In Part IV, a conservative case against same-sex marriage is suggested. First, the principles of conservatism, when systematically applied to the proposal to legalize same-sex marriage, show that the most valid conservative position mandates opposition to legalization of same-sex marriage (in Part IV.A.). Some of the most seriously harmful consequences of legalizing same-sex marriage are reviewed to underscore the solid factual basis for conservative opposition to same-sex marriage (Part IV.B.). Garrett Hardin’s memorable “tragedy of the commons” environmental conservation metaphor is applied to same-sex marriage (Part IV.C.), showing that the “tragedy of the commons” occurs when private self-interest overrides responsibility for the public or common good, both in Hardin’s example of overgrazing (and other environmental neglect) and in the current movement to legalize same-sex marriage. Part V concludes

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2. I hope to describe the alternative, *liberal* case against same-sex marriage in a future paper. For an excellent example of that position, a recent book by David Blankenhorn makes a very persuasive liberal argument for rejecting same-sex marriage. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007).

3. I plan to prepare later a companion article to this one that presents a “liberal” case against same-sex marriage based on the principles that underlie that liberal political philosophy.

by emphasizing the “day of reckoning” is the inexorable and tragic conclusion of such practices as the overgrazing of the commons and the legalization of same-sex marriage. Same-sex marriage must be rejected upon conservative principles to avoid a tragedy of the commons.

First, to lay the factual foundation for discussing the movement to legalize same-sex marriage, Part I.B. presents a quick review of the status of same-sex marriage in the United States and in the world. The jurisdictions that have legalized some formal marriage-like relationship equivalent similar to same-sex marriage are also noted.

### *B. The Status of Same-Sex Marriage and Equivalent Relations in America and the World*

Same-sex marriage is now a legal reality, and the movement to legalize same-sex marriage is riding a wave of popularity that seems to be growing, especially among cultural elites in many affluent western nations. Before the dawn of the twenty-first century, no nation or state had ever legalized same-sex marriage, though starting in 1989, a few northwestern European nations had created a separate, marriage-like legal status for gay and lesbian couples. Since the year 2001, however, same-sex marriage has been fully legalized in four (almost five) nations and in one American state: The Netherlands (2000), Belgium (2003), Spain (2005), Canada (2005), South Africa (2005) (in ambiguous “civil union” legislation), and in the American state of Massachusetts (2004).<sup>4</sup>

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4. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). It also has been legalized in four (almost five) other nations. See generally Elizabeth Kukura, *Finding Family: Considering the Recognition of Same-Sex Families in Human Rights Law and the European Court of Human Rights*, 13 HUM. RTS. BR. 17, 17–18 (2006) (citing Act amending Book 1 of the Civil Code, which concerns the opening up of marriage for persons of the same sex, Stb. 2001, nr. 9 (Dec. 21, 2000) (effective 2001) (Neth.)); Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil (Feb. 28, 2003) (Belg.), [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/belgium/belgian\\_same\\_sex\\_marriage\\_law](http://www.ilga-europe.org/europe/guide/country_by_country/belgium/belgian_same_sex_marriage_law); Civil Marriage Act, S.C., ch. 33 (July 20, 2005) (Can.); Proyecto de Ley: Por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, 121/000018 (June 30, 2005) (Spain); Civil Union Bill, 2006, Bill 26B–2006, (S.Afr.), <http://www.info.gov.za/gazette/bills/2006/b26b-06.pdf>, succeeded by Civil Union Act 17 of 2006, No. 29441 (GG) (S. Afr.). Actually, South Africa adopted a Civil Union bill and did not amend or alter the existing marriage provisions of the law; however, the bill grants essentially all of the same legal rights of marriage to civil unions, and allows same-sex couples to choose to have their union solemnized using the term “marriage.” See Bradley S. Smith, *The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process*, 22 BYU J. PUB. L. (forthcoming 2008), draft available at [http://www.law2.byu.edu/organizations/marriage\\_family/nov2007/drafts/Smith%20Paper%20-%202022%20November%202007.pdf](http://www.law2.byu.edu/organizations/marriage_family/nov2007/drafts/Smith%20Paper%20-%202022%20November%202007.pdf); *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) (S. Afr.) (ruling that marriage-equivalence is required by the South African Constitution); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Issues Take Center Stage*, 39 FAM. L.Q. 879, 907 (2006) (“Same-sex marriages are now valid in South Africa, Canada, and Spain, in addition to Belgium and the

Additionally, at least twelve other nations and six American states have created new, legal domestic relations for same-sex couples with the same or nearly equivalent legal status, rights, and benefits as married couples, thus creating a form of same-sex–quasi-marriage.<sup>5</sup> While preserving the term “marriage” for male-female unions has some residual moral significance, there is no practical legal distinction between “marriage” and marriage-equivalent “civil unions” or “domestic partnerships” (however denominated). So, for the purposes of this article, the term “same-sex marriage” may be read, to include such marriage-equivalent same-sex civil unions or domestic partnerships. Additionally, about eight nations around the world, and at least five American states have extended some relationship status and less-than-full marital legal protections, essentially “marriage-like,” to same-sex (and, sometimes, other) couples, usually similar to the limited economic protections afforded heterosexual non-marital couples.<sup>6</sup> It is worth noting that all the nations that have

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Netherlands.”).

5. As of September 2007, a dozen nations (in addition to South Africa, discussed *supra* text accompanying note 4) had enacted what could be called “marriage lite,” giving preferred legal status with nearly all of the same legal rights and benefits of marriage to same-sex couples who register for a relationship called something like “domestic partnership.” See ILGA EUROPE GAY AND LESBIAN LEAGUE, SAME-SEX MARRIAGE AND PARTNERSHIP: COUNTRY BY COUNTRY, [http://www.ilga-europe.org/europe/issues/marriage\\_and\\_partnership/same\\_sex\\_marriage\\_and\\_partnership\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country) (last visited Dec. 12, 2007); see also Qualificada de les Unions Estables de Parella [Law on Stable Unions] Llei 4/2005 (2005) (Andorra); Lov om registreret partnerskab [Law on Registered Partnership], nr. 372 (1989) (Den.); Act on Registered Partnerships, 950/2001 (2001) (Fin.); Law No. 99-944 of Nov. 15, 1999, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 16, 1999, p. 16959; Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, [German Law on Ending Discrimination Against Same-Sex Communities: Life Partnerships], Feb. 16, 2001, BGBI. I at 266 (F.R.G.); Lög um stadfesta samvist [Recognized Partnership Law], nt. 87 (1996) (Ice.); Loi du 9 juillet 2004 relative aux effets legaux de certains partenariats (2004) (Lux.); Lov om registreret partnerskap [Law on Registered Partnership], nr. 40 (1993) (Nor.); Civil Union Act 2004, 2004 S.N.Z. No. 102 (N.Z.); Slovenian Law on Registered Same-Sex Partnership (2005) (Slovn.); Lag om registrerat partnerskap [Law on Registered Partnership], Svensk författningssamling [SFS] 1994:1117 (Swed.); Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare [Registered Partnership Law], June 18, 2004, 211.231 (Switz.); Civil Partnership Act, 2004, c. 33 (U.K.). See generally Kukura, *supra* note 4, at 18 (citing and discussing these and other same-sex marriage-like relationship laws). Six American states have enacted similar quasi-marital regimes for same-sex couples. See CAL. FAM. CODE § 297 (2005); CONN. GEN. STAT. §§ 46b–38pp (2006) (Connecticut Civil Union Act, Public Act No. 05-10 (approved Apr. 20, 2005)); [N.H.] H. 437, 2007 Sess. (N.H. 2007), available at <http://www.gencourt.state.nh.us/legislation/2007/HB0437.html> (New Hampshire act creating civil unions giving same-sex couples “all the rights and . . . all the obligations and responsibilities” of marriage); New Jersey Domestic Partnership Act, ch. 246, PL 2003 (approved Jan. 12, 2004) (expanded to full equivalence following *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)); 2007 Or. Laws Ch. 99 (H.B. 2007) (creating domestic partnerships and extending “any privilege, immunity, right or benefited granted . . . because the individual is or was married” to same-sex partners); Vermont Civil Union Act, Act No. 91 (Apr. 26, 2000); *Baker v. State*, 744 A.2d 864 (Vt. 1999). The civil union laws of Oregon and New Hampshire, approved in 2007, do not take effect until 2008.

6. See, e.g., Croatian Law on Same Sex Civil Unions, no. 01-081-03-2597/2 2003) (Croat.), available at <http://www.iglhr.org/site/iglhr/content.php?type=1&id=73> (last visited Dec. 12,

enacted same-sex marriage or similar laws are in Europe or are former European colonies or possessions.

On the other side, there has been a counteraction or effort to prevent the legalization of same-sex marriage by preemption in a substantially larger number of nations and states.<sup>7</sup> Same-sex marriage (or even more restrictively, same-sex sexual relations) are forbidden or prohibited by statutory law in at least forty-six states and seventy sovereign nations.<sup>8</sup> More emphatically, twenty-seven American states and thirty-two sovereign nations have included provisions in their constitutions or have adopted constitutional amendments which prohibit same-sex marriage.<sup>9</sup>

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2007); Civil Union Act 2004, 2004 S.N.Z. No. 102 (N.Z.); Lei No. 7/2001 de 11 de Maio: Adopção medidas de protecção das uniões de facto, 109 (I-A) Diário da República 2797 (2001) (Port.); see also ILGA Europe Gay and Lesbian League, Legal Details of the Czech Registered Partnership Law, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/czech\\_republic/legal\\_details\\_of\\_the\\_czech\\_registered\\_partnership\\_law](http://www.ilga-europe.org/europe/guide/country_by_country/czech_republic/legal_details_of_the_czech_registered_partnership_law) (last visited Feb. 23, 2008). For examples in the United States, see Domestic Partnership Equality Amendment Act of 2006, D.C. CODE § 16-79 (2006) (providing inheritance, probate, and guardianship rights for domestic partners); Hawaii Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 1211; An Act to Promote the Financial Security of Maine's Families and Children, LD 1579, 2004 Leg., 121st Leg., (Me. 2004); Wash. S.B. 5336, Ch. 156, 2007 Laws (effective July 22, 2007) (creating same-sex domestic partnerships with limited benefits); *State v. Alaska Civil Liberties Union*, 159 P.3d 513 (Alaska 2006) (regulations providing state employment benefits to same-sex partners of state employees that were issued by Commissioner of Administration under court order are valid); *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (denial of state employment benefits to same-sex partners of state employees violates equal protection); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Additionally, some jurisdictions provide some benefits to at least some unregistered same-sex couples. See generally Kukura, *supra* note 4, at 18; Elrod & Spector, *supra* note 4, at 905–08. These relationships are clearly distinct from marriage, with distinctive (less robust) legal consequences, and the term “marriage” used herein does not include the relationships created or recognized by these regimes. See Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1096 (2006) (some local recognition in Argentina); Marcela Valente, *Argentina: The ‘Final Battle’ for Gay and Lesbian Rights*, INTER PRESS SERVICE, Aug. 26, 2007, available at <http://ipsnews.net/news.asp?idnews=30038> (bill introduced in Argentine legislature will create same-sex civil unions, if it passes; they are already allowed in Buenos Aires); ILGA Europe, *supra* note 5 (in Austria unregistered same-sex cohabitants have same rights as unmarried heterosexual cohabitants under *Karner v. Austria* (decided by the European Court of Human Rights in 2003). In Hungary since 1996 same-sex and heterosexual cohabitants have had the same limited rights); see also POLGÁRI TÖRVÉNYKÖNYV [PTK.] [CIVIL CODE], art. 685/A (Hung.) (common law relational property interests); Family Courts Law, 1995, S.H. 393, § 1 (Isr.) (“reputed spouses”); *HCJ El Al Israel Airlines Ltd. v. Danielowitz*, [1994] IsrSC 48(5) 749 (Isr.) (employment benefits in Israel).

7. The success of the legal reaction against same-sex marriage dwarfs the success of the movement for same-sex marriage.

8. Same-sex marriage is prohibited by law in all states except Connecticut, Massachusetts, New Jersey, and New Mexico. For a list and discussion of the nations that forbid sodomy, see Sodomy Laws, Laws Around the World, last updated June 2, 2006, <http://sodomylaws.org/world/world.htm> (last visited October 2, 2006) (listing nine nations where sodomy is punishable by death); Kukura, *supra* note 4, at 17–18; National Conference of State Legislatures, *Same Sex Marriage* (Jan 2007), available at <http://www.ncsl.org/programs/cyf/samesex.htm>.

9. The nations (with relevant constitutional provision) that constitutionally prohibit same-sex marriage are: ARMENIA [Constitution] art. 35, AZERBAIJAN art. 34, BELARUS art. 32, BRAZIL art. 226, BULGARIA art. 46, BURKINA FASO art. 23, CAMBODIA art. 45, CHINA art. 49, COLUMBIA art.

It is worth noting that the American state marriage amendments have garnered overall approximately sixty-nine percent of the popular vote, representing a significant grass-roots, populist groundswell movement.<sup>10</sup> Moreover, eighteen (two-thirds) of the state marriage amendments bar not only same-sex marriage but also any equivalent kind of relationship (such as marriage-equivalent “civil unions” or “domestic partnerships”);<sup>11</sup> only eight of the twenty-seven state marriage amendments protect merely the status or institution of marriage;<sup>12</sup> while one amendment is structural (clarifying that the legislature decides the issue—and the legislature there had already legislated to allow only conjugal marriage).<sup>13</sup> Thus, to this point in time, many more American states (45:1, or 27:1, or 43:7) and sovereign nations (32:5, or 70:18) have adopted legal policies prohibiting or disallowing same-sex marriage than have endorsed or embraced same-sex marriage or unions.

Nevertheless, the legalization of same-sex marriage or equivalent unions for gay and lesbian couples in sixteen nations and in seven American states in the past eighteen years (including same-sex marriage in five nations and one state in the past seven years) represents a significant beachhead in both American and global family law. Given the strong support among elites for legalizing same-sex marriage, as well as legal breakthroughs in nearly ten percent of the sovereign nations of the world and in more than ten percent of the states in our own weather vane nation, it is not unlikely that within the next five or ten years at least a few more nations and perhaps even a few more American states will be added to the list of jurisdictions that have legalized same-sex marriage or equivalent unions.

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42, CUBA art. 36, ECUADOR art. 33, ERITREA art. 22, ETHIOPIA art. 34, HONDURAS art. 112, JAPAN art. 24, LATVIA art. 110, LITHUANIA art. 38, MOLDOVA art. 48, NICARAGUA art. 72, MONGOLIA art. 16, NAMIBIA art. 14, PARAGUAY arts. 49, 51, 52, PERU art. 5, POLAND art. 18, SOMALIA art. 2.7, SURINAME art. 35, TAJIKISTAN art. 33, TURKMENISTAN art. 25, UGANDA art. 31, UKRAINE art. 51, VENEZUELA art. 77, and VIETNAM art. 64. The American states include: ALA. CONST., amend. 774; ALASKA CONST., art. I, § 25; ARK. CONST., amend. 83; COLO. CONST., art. II, § 31; GA. CONST., art. I, § 4 par. 1; IDAHO CONST., art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST., § 233A; LA. CONST., art. XII, § 15; MICH. CONST., art. I, § 25; MISS. CONST., § 263-A; MO. CONST., art. I, § 33; MONT. CONST., art. 13, § 7; NEB. CONST., art. I, § 29; NEV. CONST., art. I, § 21; N.D. CONST., art. XI, § 28; OHIO CONST., art. XV, § 11; OKLA. CONST., art. 2, § 35; OR. CONST., art. XV, § 5a; S.C. CONST., art. XVII, § 15; S.D. CONST., XXI, § 9; TENN. CONST., art. XI, § 18; TEX. CONST., art. I, §. 32; UTAH CONST., art. I, § 29; VA. CONST., art. I, § 15-A; WIS. CONST., art. XIII, § 13.

10. See Cultural Legacy Marriage Amendment Summary, available at <http://culturallegacy.org/templates/System/details.asp?id=25220&PID=448914>, (including Arizona, the one state where a marriage amendment did not pass, the percentage of approval is about 68%).

11. The states are: AL, AR, GA, ID, KS, KY, LA, MI, NB, ND, OH, OK, SC, SD, TX, UT, VA, and WI. For citations to the provisions, see *supra* note 9.

12. AK, CO, MS, MO, MN, NV, OR, and TN. For citations to the provisions, see *supra* note 9.

13. HI. For a citation to the provision, see *supra* note 9.

The remainder of this article addresses the question of whether these recent developments, and the arguments advocating and supporting them, can properly be classified as “conservative.” That term is used deliberately to denote a specific intellectual-political tradition.

## II. BASIC PRINCIPLES OF CONSERVATISM?

To determine systematically whether a credible case for same-sex marriage can be called “conservative,” one must first describe the elements that make an argument “conservative.” *Conservatism* is a well-established political philosophy that falls midway between *revolutionary* ideologies, on the one side, and *reactionary* philosophies on the other side.<sup>14</sup> With roots deeply imbedded in the writings of ancient political philosophers and leaders, conservatism has existed as a discrete and disciplined modern political philosophy for over two centuries since it was systematically applied in and popularized by Edmund Burke’s *Reflections on the French Revolution*.<sup>15</sup> Burke catapulted to fame as a political thinker, and conservatism emerged as a highly respected, rediscovered political philosophy because his *Reflections on the Revolution in France*, published in 1790, was so prophetically accurate. He predicted correctly that the radical and abrupt destruction of the ancient institutions, customs, and habits of the French nation, society, and government would produce chaos and bloodshed that could only be quenched by force,<sup>16</sup> and he forecasted, with perfect vision, that the resulting social disruption would require the ascension of a powerful dictator-led military to control the nation.<sup>17</sup> Burke was proven right by

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14. See generally *Encyclopedia Americana*, s.v. “Conservatism,” (1999 ed.) (by Frederick M. Watkins) [hereinafter Watkins].

15. *Id.*; RUSSELL KIRK, *THE CONSERVATIVE MIND* 4 (3d ed. 1960).

16. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 53 (1790), available at [http://www.constitution.org/eb/rev\\_fran.htm](http://www.constitution.org/eb/rev_fran.htm).

The military conspiracies, which are to be remedied by civic confederacies; the rebellious municipalities, which are to be rendered obedient by furnishing them with the means of seducing the very armies of the state that are to keep them in order; all these chimeras of a monstrous and portentous policy must aggravate the confusion from which they have arisen. There must be blood. The want of common judgment manifested in the construction of all their descriptions of forces and in all their kinds of civil and judicial authorities will make it flow. Disorders may be quieted in one time and in one part. They will break out in others, because the evil is radical and intrinsic. All these schemes of mixing mutinous soldiers with seditious citizens must weaken still more and more the military connection of soldiers with their officers, as well as add military and mutinous audacity to turbulent artificers and peasants.

*Id.*

17. *Id.*

the ensuing bloody history of Post-Revolutionary France, and by the emergence of the aggressive military dictatorship of Napoleon Bonaparte who ultimately imposed order.

Today, conservatism consists of a complex mix (and daunting range and variety) of philosophical and political principles.<sup>18</sup> Seven keywords identify the core concepts of contemporary conservatism: (1) *preservation*, (2) *institutions*, (3) *caution*, (4) *experience*, (5) *distrust*, (6) *individualism*, and (7) *morality*.

First, conservatism seeks to *preserve* things from the past that are of value.<sup>19</sup> Abraham Lincoln defined preservation as the core belief of conservatism when he asked, “Is it not adherence to the old and tried, against the new and untried?”<sup>20</sup> “Conservatism by its name announces that it conserves . . . .”<sup>21</sup> A contemporary college primer on modern political philosophies identifies “reverence for tradition” as one of the key precepts of modern conservatism.<sup>22</sup>

Second, conservatism values and seeks to protect important, time-proven social (and political, and other) *institutions*.<sup>23</sup> Conservatives value order, stability, and tradition, which established institutions foster, preserve, and uphold.<sup>24</sup>

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EVERYTHING depends upon the army in such a government as yours, for you have industriously destroyed all the opinions and prejudices and, as far as in you lay, all the instincts which support government. Therefore, the moment any difference arises between your National Assembly and any part of the nation, you must have recourse to force. Nothing else is left to you, or rather you have left nothing else to yourselves. . . . You must rule by an army; and you have infused into that army by which you rule, as well as into the whole body of the nation, principles which after a time must disable you in the use you resolve to make of it.

*Id.*

18. Watkins, *supra* note 14, at 639 (noting that the “range and variety of contemporary conservative parties is too great to be described”).

19. See *Oxford English Dictionary Online*, s.v. “conservative,” [http://dictionary.oed.com/cgi/entry/50047828?single=1&query\\_type=word&queryword=conservative&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/50047828?single=1&query_type=word&queryword=conservative&first=1&max_to_show=10) (last visited Feb. 7, 2008) [hereinafter *Oxford English Dictionary*] (“1. . . . preservative.”); *Merriam-Webster Online Dictionary*, s.v. “conservative,” <http://m-w.com/dictionary/conservative> (last visited Feb. 7, 2008) (“1: preservative”); Watkins, *supra* note 14, at 638 (conservatism seeks to “maintain things as they are”).

20. KIRK, *supra* note 15, at 6–7.

21. TED HONDERICH, *CONSERVATISM 1* (Pluto Press 2005) (1989).

22. LYNN TOWER SARGENT, *CONTEMPORARY POLITICAL IDEOLOGIES*, 92 (rev. ed. 1972).

23. *Routledge Encyclopedia of Philosophy*, s.v. “conservatism,” available at <http://www.rep.routledge.com/article/S012> (last visited Oct. 18, 2007) [hereinafter *Routledge Encyclopedia*] (“For Burke, a good constitution . . . dissipates power in society through autonomous institutions independent of the state.” Furthermore, “[t]he market needs to be supplemented by the morality, the institutions and . . . authority.”); Watkins, *supra* note 14, at 638 (conservatives are generally committed to established institutions, procedures, and authorities).

24. KIRK, *supra* note 15, at 7 (“civilized society requires orders and classes”).

Third, the conservative political and judicial approach is *cautious* of major innovations, preferring gradual organic evolution instead of revolution.<sup>25</sup> They distrust revolutionary proposals and radical innovations. Russell Kirk noted conservatism's distrust of "innovation . . . [as] a devouring conflagration more often than it is a torch of progress. . . . [S]low change is the means of [social] conservation."<sup>26</sup> Conservatives are not opposed to change *qua* change, but to sudden, radical change. As F. A. Hayek wrote, "The conservative does not oppose change, but he does resist it."<sup>27</sup> As another political scientist put it, "[C]onservatism from Burke on, . . . has advocated what it will be a good idea to call *alterations*. It has made a lot of them."<sup>28</sup> The conservatives accept "a little alteration or indeed a little *transformation*."<sup>29</sup>

Fourth, conservatism relies primarily upon *experience*, common-sense, habit, and *tradition* to guide both individual conduct and public policy.<sup>30</sup> "[T]he essence of conservatism is preservation of the ancient moral traditions of humanity. Conservatives respect the wisdom of their ancestors . . ."<sup>31</sup> They believe that "tradition . . . checks . . . man's anarchic impulse."<sup>32</sup> "Reverence for tradition" is still a fundamental principle of conservatism.<sup>33</sup> The conservative is familiar "with the accumulated wisdom and experience of history, and he is not too proud to learn from the great minds of the past."<sup>34</sup> Conservatives prefer to trust tradition over mere intellectualism or reason because, as Burke put it, "[e]ven the best minds are too weak to comprehend the problems of society as a whole . . ."<sup>35</sup>

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25. See *Oxford English Dictionary*, *supra* note 19 ("3.b. Characterized by caution or moderation . . ."); *Routledge Encyclopedia*, *supra* note 23 (Conservatism's perceived complacency or caution "may be said to be more realistic than its opponents." Conservatism "mistrusts both a priori reasoning and revolution, preferring to put its trust in experience and in the gradual improvement of tried and tested arrangements."); Watkins, *supra* note 14, at 639 ("Their starting point always has been to protest dangers of excessive innovation." Conservatives are "wary" of innovations and conservatism stresses "the organic and gradual character of social evolution.").

26. KIRK, *supra* note 15, at 8.

27. SARGENT, *supra* note 22, at 98 (quoting Jay A. Sigler, *Introduction to THE CONSERVATIVE TRADITION IN AMERICAN THOUGHT* 13 (Jay A. Sigler, ed. 1969)).

28. HONDERICH, *supra* note 21, at 8.

29. *Id.* at 9 (emphasis added).

30. Watkins, *supra* note 14, at 638–39 (Conservatives stress "common sense and experience" and conservatives prefer to rely on collective experience rather than reason. Conservatives distrust reason believing as Burke put it, that "Even the best minds are too weak to comprehend the problems of society as a whole . . ." Habit, not reason, is the true basis of social order according to Burke.).

31. KIRK, *supra* note 15, at 6.

32. *Id.* at 8.

33. SARGENT, *supra* note 22, at 92.

34. BARRY M. GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 11 (1960).

35. Watkins, *supra* note 14, at 638.

Fifth, conservatism *distrusts* concentrated power and government generally. Modern conservatives especially oppose judicial invention of constitutional rights that are not clearly grounded in the constitutional text, history, or tradition.<sup>36</sup> They distrust government in general,<sup>37</sup> judicial elites and manipulable majorities in particular.<sup>38</sup> “The conservative constitutional position [is]: Governmental powers (especially those of the federal government) may be construed very strictly; limitations upon those powers . . . should be interpreted very broadly in order to protect individual (and corporate) liberties against government encroachment . . . .”<sup>39</sup>

Sixth, conservatism staunchly defends *individualism* and individual liberty against pressures for mass conformity and stifling, egalitarianism.<sup>40</sup> Thus, Russell Kirk saw collectivism and egalitarianism as the radical beliefs most dominant and threatening in the last half of the twentieth century.<sup>41</sup> Sargent identified both “anti-egalitarianism” and “preference for individual freedom” as core principles of contemporary conservatism.<sup>42</sup> Goldwater wrote that the conservative believes that each man is unique, not just a part of the mass.<sup>43</sup>

Finally, conservatism sees that mankind and life have non-material, *moral-spiritual* dimensions; it recognizes, respects, and supports *morality* and virtue.<sup>44</sup> As Barry Goldwater put it, “[t]he root difference between the Conservatives and the Liberals of today is the Conservatives

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36. GOLDWATER, *supra* note 34, at 15–24 (1960) (conservatives today recognize the perils of power and seek to limit government power).

37. SARGENT, *supra* note 22, at 98 (rejecting the use of government to improve the human condition).

38. Carlton C. Rodee, *Defenders and Critics of American Capitalism and Constitutionalism: Conservatism and Liberalism*, in TWENTIETH CENTURY POLITICAL THOUGHT 388 (Joseph S. Roucek ed., 1946).

39. *Id.* at 389.

40. GOLDWATER, *supra* note 34, at 13 (The goal of conservatives is “achieving the maximum amount of freedom for individuals that is consistent with the . . . social order.”).

41. KIRK, *supra* note 15, at 525.

42. SARGENT, *supra* note 22, at 92.

43. GOLDWATER, *supra* note 34, at 12.

44. *Routledge Encyclopedia*, *supra* note 23 (social structures such as “the market needs to be supplemented by . . . morality”); see also Harry Jaffa, *The False Prophets of American Conservatism* CLAREMONT INST. (1998) Writings, [http://www.claremont.org/publications/pubid.670/pub\\_detail.asp](http://www.claremont.org/publications/pubid.670/pub_detail.asp) (last visited Feb. 27, 2008); THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”); THE FEDERALIST NO. 55 (James Madison) (Clinton Rossiter ed., 1961) (“Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”).

take account of the *whole* man, while the Liberals tend to look only at the *material* side of man.”<sup>45</sup> Russell Kirk thought that the first principle of conservatism is “[b]elief that a divine intent rules society as well as conscience. . . . Political problems, at bottom, are religious and moral problems.”<sup>46</sup> Kirk noted that the first problem facing contemporary conservatives is “[t]he problem of spiritual and moral regeneration; the restoration of the ethical system and the religious sanction upon which any life worth living is founded.”<sup>47</sup>

These seven principles embody the basic philosophical foundations of modern conservatism. Both opponents and supporters of the legalization of same-sex marriage have claimed that conservative principles support their positions. While arguments on both sides can reflect some conservative principles, conservatism cannot ultimately support both positions.

### III. A CRITIQUE OF THE CONSERVATIVE CASE FOR LEGALIZING SAME-SEX MARRIAGE

Several prominent conservative legal and social commentators, including Professor Dale Carpenter, a distinguished participant in this symposium, have asserted what has become known as the “conservative case” for same-sex marriage.<sup>48</sup> Five specific claims that are at the core of

45. GOLDWATER, *supra* note 34, at 10.

46. KIRK, *supra* note 15, at 7.

47. *Id.* at 539; *see also id.* at 542 (“The true conservative understands that the regeneration of society cannot be an undertaking purely social; for it is a problem spiritual and moral.”).

48. *See, e.g.*, ANDREW SULLIVAN, THE CONSERVATIVE SOUL 70 (2006) (“And you have the fact that the least fundamentalist and most tolerant of states, Massachusetts, has both civil marriage rights for gay couples and the lowest divorce rates in the country.”); ANDREW SULLIVAN, SAME-SEX MARRIAGE PRO & CON: A READER 69 (2004) (“The heterosexual community needs to see and experience homosexual unions that are marked by integrity and caring and are filled with grace and beauty.”); ANDREW SULLIVAN, VIRTUALLY NORMAL 111, 185 (1995) (“Why would accepting that such people [homosexuals] exist, encouraging them to live virtuous lives, incorporating their difference into society as a whole, necessarily devalue the traditional family? It is not a zero-sum game. Because they have no choice but to be homosexual, they are not choosing that option over heterosexual marriage; and so they are not sending any social signals that heterosexual life should be denigrated. . . . Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step.”); *see also* JONATHAN RAUCH, GAY MARRIAGE, WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 85, 105 (2004) [hereinafter RAUCH, GOOD FOR AMERICA] (“To the skeptics I would say: I can’t prove you wrong. But do you really want to bet *against* marriage? Do you want to put your money on quasi-marriage or semi-marriage or nonmarriage? That would not be particularly conservative bet. Indeed, it would be a radical one. . . . America has a problem with too few marriages, not too many. One would think that encouraging a whole new population of cohabitants to tie the knot would be a step in the right direction.”); Dale Carpenter, *The Traditionalist Case for Gay Marriage*, in *State of the Family 2007* at III-B-1 (National Center for Family Law at the University of Richmond School of Law September 16–18, 2007) [hereinafter Carpenter, *The Traditionalist Case*] (CLE materials) (marriage will help stabilize gay families, will promote commitment, monogamy, will make available the most moral life, will not hurt conjugal

the conservative case for same-sex marriage can be summarized as (1) “we exist,” (2) stabilization, (3) sexual taming, (4) society gains, and (5) no harm. These arguments will be examined, and they will be compared against the seven principles of conservatism. The following analysis shows that all the so-called “conservative” arguments for same-sex marriage are flawed as a matter of logic, as a matter of fact, and, most importantly for this paper, as a matter of conservative principle as well.

First, one common argument in the conservative case for same-sex marriage is the “we exist” argument—that gay and lesbian couples exist in large numbers in society, love each other, and need the benefits of marriage for themselves and for their children.<sup>49</sup> Factually, it is undeniable that hundreds of thousands of gay and lesbian couples live in America (the 2000 census found 594,392 same-sex couples living together that year—not all of whom necessarily were homosexual couples),<sup>50</sup> and many of them are raising children.<sup>51</sup> A November 2007

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marriages, and may revive marriage); Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181 (2005) (rejecting definitional, procreational, and polygamy-slippery slope arguments); Dale Carpenter, *A Conservative Defense of Romer v. Evans*, 76 IND. L.J. 403, 404, 441 (2001) (“this Article places the [*Romer v. Evans*] decision within the foundational strain of modern conservatism. This conservatism prefers an incremental method and pace of change . . .” *Romer* is “consistent with conservatives preference for slow, incremental change in society”); Dale Carpenter, *Four Arguments Against the Federal Marriage Amendment That Even an Opponent of Gay Marriage Should Accept*, 2 ST. THOMAS L. REV. 71 (2004) (opposing Federal Marriage Amendment because it alters the constitutional structure of federalism, cuts short an ongoing national debate, and is overkill); Jonathan Rauch, *Dirge Straights*, WASHINGTON MONTHLY, April 2004, available at <http://www.washingtonmonthly.com/features/2004/0404.rauch.html> (“Why outlawing marriage for gays will undermine marriage for all.” The “social expectations” of marriage will produce benefits in the lives of gays; civil unions do not provide the same social expectations or produce the same benefits.); Jonathan Rauch, *The Marrying Kind*, ATLANTIC MONTHLY, May 2002, available at <http://www.theatlantic.com/doc/prem/200205/rauch> (“Why social conservatives should support same-sex marriage . . . [M]arriage itself brings something beneficial to the table.”); Press Release, Denison Hosts Andrew Sullivan to Discuss “Conservative Case for Gay Marriage,” (Jan. 24, 2005), [http://www.denison.edu/offices/publicaffairs/pressreleases/sullivan\\_2-05.html](http://www.denison.edu/offices/publicaffairs/pressreleases/sullivan_2-05.html); Jonathan Rauch, *Marriage for All*, NATIONAL REVIEW ONLINE, Aug. 10, 2001, <http://www.nationalreview.com/comment/comment-rauch081001.shtml> (the “social regularity” of marriage, i.e., “commitment to care for another person for life—has good effects on human populations.”); *Reference—Interview with Dale Carpenter on Same-Sex Marriage*, in Craig Westover (Jan. 1, 2005), available at <http://craigwestover.blogspot.com/2005/01/reference-interview-with-dale.html> (“My own conservatism is rooted in Edmund Burke. For Edmund Burke, ‘conservatism’ did not mean we never change anything. It meant . . . [w]e change[] things incrementally. . . . We change things in light of our actual lived experience.” Gay marriage is conservative if brought “incrementally and democratically.” Gay couples raising children exist, so we should not deny them the family benefits of marital status; gay marriage (not civil unions) carries deeply-rooted social expectations that would benefit gay couples.)

49. See, e.g., Carpenter, *The Traditionalist Case*, *supra* note 48, at III-B-1–4 (“[Same-sex] Marriage will help support and stabilize gay families, including the many such families raising children . . .”); RAUCH, *GOOD FOR AMERICA*, *supra* note 48, at 75 (“Given the reality of children in gay households, and given the many ways in which marriage supports and sustain unions, the relevant point is that children will be more secure and happy with married gay couples than with unmarried gay couples.”).

50. 2002 STATISTICAL ABSTRACT OF THE UNITED STATES 48, tbl. 49 (2002).

report by the respected gay demographer Gary Gates of the UCLA Law School's Williams Institute indicates that by 2006, Census Bureau American Community Surveys identified 780,000 same-sex couples,<sup>52</sup> while another report by Gates and others in September 2005 confirmed that as of 2000, "more than 39% of same-sex couples in the United States aged 22–55 [we]re raising . . . more than 250,000 children under age 18."<sup>53</sup> Clearly, these couples and families exist, and it is equally clear that the children being raised by gay and lesbian couples would benefit from being raised in marital homes. But those facts do not necessarily support the claim for radically *redefining* the institution of marriage, nor does the existence of these facts amount to a solid conservative argument.

Comparing this argument with the seven principles of conservatism reveals that it is not really a conservative argument. The proposal is (1) to radically redefine, not preserve, (2) the crucial social institution of conjugal marriage, (3) by sudden, dramatic change. Since it is the absence of marriage as we now know and understand it that is the cause of the deprivation of those couples and children, it hardly seems cautious or prudent or conservative to radically change the very institution—conjugal marriage—which we agree generally provides the very benefits which unmarried, cohabiting couples and their children do not enjoy. (4) It deviates from the historical form of family that has proven most beneficial to individuals, especially to children. (5) It would be imposed by government action. (6) While it may enhance the relational autonomy of gay and lesbian adults, it jeopardizes the future independence of some children by subjecting them to a grand social experiment. (7) It would radically alter the moral understanding of marriage. Thus, the "we exist" argument for legalizing same-sex marriage is not really a conservative argument.

The second conservative argument for legalizing same-sex marriage is that allowing same-sex couples to marry will bring *stability* to those gay and lesbian couples and will alleviate much of suffering and

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51. JASON FIELDS, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002 2 (2003) (Table 1, *Children by Age and Family Structure, March 2002*), <http://www.census.gov/prod/2003pubs/p20-547.pdf> (Applying the 11% same-sex ratio of all cohabiting couples to the number of children living in a home with unmarried parents or parent-and-partners (2,888,000 children) yields approximately 317,000 children being raised by same-sex couples.). See generally Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 *BYU J. PUB. L.* 309, 336–38 (2004).

52. Gary J. Gates, *Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey*, 2007 WILLIAMS INST. 1–2.

53. R. BRADLEY SEARS, GARY GATES & WILLIAM B. RUBENSTEIN, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES, DATA FROM CENSUS 2000 (2005), available at <http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf>.

disadvantage of the children they are raising.<sup>54</sup> The first, factual problem with this argument is that the hard evidence to support the claim is almost non-existent; it is a speculative, theoretical argument. In fairness, it must be noted that the legalization of same-sex marriage is such a recent innovation that it is not surprising that the evidence is sparse. On the other hand, there already is evidence that allowing gays and lesbians to marry or enter into marriage-equivalent “civil unions” has little effect upon the stability of those relationships. For example, a 2003 report on a Dutch study of gay men in the most gay-friendly city on earth (Amsterdam) found that the average duration of gay “steady partner” relations was only 1.5 years—in the most gay-affirming, gay-supportive nation on earth, when marriage-equivalent same-sex domestic partnerships were legal, and the full status of same-sex marriage was being implemented.<sup>55</sup>

In 2006, a Scandinavian study of the demographics of marriage-equivalent same-sex registered partnerships in Norway and Sweden noted significant problems with the stability of such relationships, and showed significantly higher rates of breakup.<sup>56</sup> Despite the fact that same-sex couples were considerably older than male-female couples (a factor that generally correlates with greater stability in marriage),<sup>57</sup> and the ratio of partners from higher socio-economic status was up to 50% higher for gay and lesbian couples (another factor that may be associated with greater stability),<sup>58</sup> the divorce-risk levels for registered gay men partnerships were about 50% higher than for comparable heterosexual couples; and controlling for variables, the risk of divorce was twice as high for lesbian couples as it was for gay men couples.<sup>59</sup>

Another study of Swedish registered partnerships found that gay male couples were 50% more likely to divorce than married heterosexual couples, while lesbian couples were over 150% more likely to divorce than heterosexual couples.<sup>60</sup> Controlling for variables, gay couples were

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54. See, e.g., Carpenter, *The Traditionalist Case*, *supra* note 48, at III-B-1, B-4-B-10.

55. Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029 (2003), available at <http://www.aidsonline.com/pt/re/aids/pdfhandler.00002030-200305020-00012.pdf;jsessionid=FrMF7bsJNJx6Znq8QlqzTFXPQSShnmnLTy4TG4pmbXlySXPtNy9!1057067369!-949856144!8091!-1> (The purpose of the study was to assess whether provision of certain AIDS drugs had resulted in an increase of unsafe sexual practices in the gay community in The Netherlands.)

56. Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006), available at <http://muse.jhu.edu/journals/demography/v043/43.1andersson.html#tab02>.

57. *Id.* at 85. (On the other hand, 43–45% of gay men partnerships involved a partner from a foreign country, a factor likely to be associated with less harmony in the marriage.)

58. *Id.* at 87–88.

59. *Id.* at 89–90.

60. Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from*

35% and lesbian couples 200% more likely to divorce than heterosexual couples in that very gay-supportive nation.<sup>61</sup>

These studies are from countries where same-sex formal unions have been legalized, destigmatized, dignified, encouraged, socially supported, and given full legal equality for a decade longer than anywhere in this country. The studies raise serious challenges to the claim that legalizing same-sex marriage will produce significant stability for same-sex couples.

As a matter of conservative principles, this argument is very dubious. Again, (1) it's purpose is not to preserve, nor to support (2) the basic social institution of conjugal marriage. (3) It proposes radical, not incremental social change. (4) It ignores the experience of the most experienced countries and relies upon fantastic, rose-colored speculations. (5) It relies upon the use of government manipulation to redefine a basic social institution. (6) In one sense, it promotes adult gay/lesbian individual autonomy, but does so by using a social tool (not individualism), and it promotes individualism for the purpose of achieving a new egalitarianism. (7) While it acknowledges the existing morality of marital stability and the social benefits of the institution of marriage, it endangers those very qualities of marriage in hopes that by including same-sex relations, those marital qualities might rub off on unstable and immoral homosexual relations. Yet it fails to consider that the "rub-off" may go the other way, undermining the stability and integrity of marriage. Moreover, this argument equates the stable morality of marriage with the dubious morality of same-sex sexual relationships.

Third, conservative supporters of same-sex marriage argue that legalizing same-sex marriage will *tame and civilize* the irresponsible sexual behaviors of same-sex (especially gay male) couples.<sup>62</sup> This

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Sweden, 2004 IMAPP POLICY BRIEF 1 (copy in author's possession).

61. *Id.*

62. See, e.g., Carpenter, *The Traditionalist Case*, *supra* note 48, at III-B-1, B-6, B-12-13 (advocating stabilizing effect of same-sex marriage); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 8, 104 (1996) ("My further thesis is that same-sex marriage . . . civilizes gays and it civilizes America." Furthermore, "[s]ame-sex marriage will civilize both gays and straights, teaching each something about the unitive features of marriage."); RAUCH, GOOD FOR AMERICA, *supra* note 48, at 18 (same-sex marriage will "sett[e] the young, particularly young men; and provid[e] reliable caregivers."); see also Justin T. Wilson, Note, *Preservationism, or The Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 662-63 (2007) ("According to the argument's premise, same-sex couples are more prone to contracting STIs; as such, marriage would civilize them for the betterment of *all society*: their relationships would stabilize, they would be less likely to engage in extra-relationship sexual activities, and they would benefit from increased commitment to one another. . . . If the government's public-health interest is in slowing the spread of STIs, it is irrational to prevent same-sex couples from

claim, however, is counter-factual. It does not appear that giving marital or marriage-like status to same-sex couples significantly alters their troubling behaviors. For example, a Vermont study published in 2005 examined characteristics, including sexual practices, of same-sex couples in civil unions with those not in civil unions and with heterosexual married couples.<sup>63</sup> The difference in infidelity rates between gay men in a civil union and those not in a civil union was less than 3% (2.8%).<sup>64</sup> The authors concluded that “same-sex couples [registered and unregistered] were similar to each other on demographic and relationship factors when compared with married heterosexual couples.”<sup>65</sup> In other words, formalizing gay relationships with full, formal, registered marriage-equivalent legal status has virtually no impact on the high infidelity rates of gay men.

Moreover, this *taming* argument for same-sex marriage fails the test of conservative principles. While (2) it recognizes the institution of conjugal marriage as the gold standard of sexual responsibility, (1) it would not conserve nor uphold the core understanding of marriage as a conjugal institution. (3) As for caution, one might question whether it is prudent to risk the moral meaning of an institution already buffeted by massive social changes (cohabitation, child-bearing out of wedlock, unilateral no-fault divorce, and very high divorce rates) in a social experiment designed to radically overhaul the institution of marriage to include same-sex couples. (4) This argument is built on theoretical speculation, not upon (but in blind neglect of) experience and common sense. (5) Unconservatively, it calls upon government to reshape a basic social institution. (6) While it supports sexual individualism to an extent, it does by a means that jeopardizes the independence of those who might become caught in the addicting homosexual lifestyle, and it endangers the nursery of individualism—the marital family. (7) It also disregards and endangers the morality of marriage by ignoring the transformative effect upon marriage of gay and lesbian couples who have dramatically different sexual standards regarding fidelity and promiscuity.

Fourth, some conservative advocates of same-sex marriage make a “social benefit” claim—that society as a whole will benefit from gay and lesbian couples entering into same-sex marriages.<sup>66</sup> Again, this is a claim

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marrying.”).

63. Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not In Civil Unions, and Heterosexual Married Siblings*, 52 *SEX ROLES* 561 (2005).

64. *Id.*

65. *Id.* at 562.

66. See, e.g., Carpenter, *The Traditionalist Case*, *supra* note 48, at III-B-1, B-10–12 (universal benefits of same-sex marriage espoused); ESKRIDGE, *supra* note 62, at 116 (asserting “the

built on rhetoric and pure optimism. The supporting evidence is wanting. The contrary evidence is overwhelming.

For example, gay and (to a lesser degree) lesbian sexual relations are disproportionately “unsafe” in terms of social responsibility and public health. Gay male homosexual sex still remains the primary means of transmission of AIDS disease in the United States. Overall, 55% of cumulative AIDS cases reported through 2004 (402,722 cases) involved the single mode of exposure of men who have sex with men; and the numbers continue to rise.<sup>67</sup> If the multiple modes of exposure that include male homosexual behavior are included, male homosexual behavior is the sole or a potential cause of more than 70% of all AIDS cases that have been reported in the United States from the first case through 2005.<sup>68</sup> A summary of HIV seroprevalence data from STD clinics revealed that, nationally, the median percentage of men who, since 1978, have had sex with other men who were positive for HIV was 25.5%, compared with only 7.1% of male heterosexual drug injectors.<sup>69</sup>

Internationally, the transmission pattern is the same in most of the world (except in sub-Saharan Africa). In December 2007, UNAIDS and the World Health Organization (WHO) reported that 33.2 million persons were living with HIV, including 2.5 million children aged fourteen or younger; in 2007 2.1 million people died from AIDS, and 2.5 million people were newly infected with HIV.<sup>70</sup> The “global prevalence of HIV infection (percentage of persons infected with HIV) is remaining at the same level . . . .”<sup>71</sup> Moreover, “[t]he United States of America is one of the countries with the largest number of HIV infections in the

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substantial benefits that same-sex marriage offers to society as a whole . . . .”); RAUCH, GOOD FOR AMERICA, *supra* note 48, at 5 (asserting that same-sex marriage is a “win-win-win” proposition, “good for homosexuals, good for heterosexuals, and good for the institution of marriage: good, in other words, for American society.”).

67. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T OF HEALTH AND HUMAN SERV., 16 HIV/AIDS SURVEILLANCE REPORT 32, tbl.17 (2005). The second most common method of transmission was injection drug use, which accounted for 21% of the AIDS cases. *Id.*; see also Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, *A Glance at the HIV/AIDS Epidemic 2* (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/At-A-Glance.htm> (“From 2001 through 2005, the estimated number of persons in the 50 states and D.C. living with AIDS increased from 331,482 to 421,873—an increase of 27%.” Furthermore, the number of persons with AIDS diagnoses in the USA in 2005 was 40,608; the number of such diagnoses from 1981–2005 was 952,629, of whom 530,756 have died.)

68. *Id.* at 1 (“In 2005, the largest estimated proportion of the HIV/AIDS diagnoses were for men who have sex with men (MSM) . . . .”).

69. CENTER FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T OF HEALTH AND HUMAN SERV., NATIONAL HIV SEROSURVEILLANCE SUMMARY: RESULTS THROUGH 1992, 26 tbl. 5 (1994).

70. UNAIDS AND WORLD HEALTH ORGANIZATION, AIDS EPIDEMIC UPDATE, DECEMBER 2007 1 (2007), available at [http://data.unaids.org/pub/EPISlides/2007/2007\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf).

71. *Id.* at 4 (The total estimates are down 16% from 2006 due to revision of estimates in India and five African nations, but the total rate globally is unchanged.)

world.”<sup>72</sup> In most of the world, the AIDS epidemic is “primarily concentrated among populations most at risk, such as men who have sex with men, injecting drug users, sex workers and their sexual partners.”<sup>73</sup>

Of course, AIDS is not the only disease risked by gay and lesbian couples. “The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal sex is alarming: anal cancer, chlamydia trachomatis, cryptosporidium, ciardia lambia, herpes simplex virus, human immunodeficiency virus, human papilloma virus, isospora belli, microsporidia, gonorrhea, viral hepatitis types B & C, [and] syphilis.”<sup>74</sup> One study showed that “85 percent of syphilis cases were among self-identified homosexual practitioners, [a]nd . . . syphilis among homosexual men is now at epidemic levels in San Francisco.”<sup>75</sup> Likewise, “so many [intestinal] infections [result from gay sex] that a syndrome called ‘the Gay Bowel’ is described in medical literature.”<sup>76</sup> Human herpes virus eight is a disease found exclusively in homosexual men in America, and a form of cancer, Karposi’s sarcoma, is found almost exclusively in gay men.<sup>77</sup> Thus, it is not surprising that male homosexuals’ and bisexuals’ life-spans are estimated to be approximately twenty years shorter than heterosexuals.<sup>78</sup>

Lesbian sex also involves higher risk of transmission of sexual infections than in heterosexual couples.<sup>79</sup> “Bacterial vaginosis, hepatitis B, hepatitis C, heavy cigarette smoking, alcohol abuse, intravenous drug use, and prostitution were present in much higher proportions among female homosexual practitioners. . . . In one study of women who had sex only with women in the prior twelve months, 30% had bacterial vaginosis.”<sup>80</sup>

Mental health reports are no more encouraging. Both lesbians and gay men exhibit much higher levels of “psychiatric illness, including depression, drug abuse and suicide attempts,” as many studies have confirmed.<sup>81</sup>

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72. *Id.* at 33 (Good treatment prolonging life may contribute to the rising cumulative number of infections in the United States.)

73. *Id.* at 4.

74. John R. Diggs, Jr., *The Health Risks of Gay Sex*, 2002 Corporate Resource Council at 3, available at [http://www.corporateresourcecouncil.org/white\\_papers/Health\\_Risks.pdf](http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf) (last visited Nov. 1, 2007).

75. *Id.* Gays contract syphilis at about four times the rate of heterosexual men.

76. *Id.* at 4.

77. *Id.*

78. *Id.* at 8 (citing Canadian and US studies).

79. Ironically, lesbians were 4.5 times more likely to have more than fifty lifetime male sex partners than exclusively heterosexual couples. *Id.* at 6.

80. *Id.*

81. *Id.* at 6–7.

It might be argued that this is due to the lack of legal marriage or marriage-like status, but research shows otherwise. Dutch researchers found that eighty-six percent of new HIV/AIDS infections in gay men were in men who had steady partners, and that gay men with steady partners engage in more risky sexual behaviors than gays without steady partners.<sup>82</sup>

In terms of conservative principles, this “social benefit” claim also fails to measure up. (2) It devalues and endangers the existing institution of marriage, (3) seeks its abrupt metamorphosis, (1) not its preservation. (4) It is not grounded in history or experience, but in self-interested speculations. (5) It is manipulative and positivist, seeking by means of government to artificially create a new order of marriage. (6) It is individualistic in one sense; but (7) it falsely tries to equate the virtues of conjugal marriage with those of same-sex relations.

Fifth, some presenters of the conservative case for same-sex marriage claim that *no harm* to the institution of marriage or to conjugal marriage will result from legalizing same-sex marriage.<sup>83</sup> That simply defies the reality of what is happening in Scandinavia, the Netherlands, Canada, and Massachusetts. That claim is so critical, and the factual evidence to the contrary so great, that it is examined in greater detail below in part IV.B.

This *no harm* argument also fails the test of conservative principles. (1) It claims to be preservationist, but that is simply not factual. (2) It is anti-institutional, embracing a form of de-institutionalizing “let-each-define-marriage-as-his/her-heart-chooses.” (3) It changes marriage by revolution, not evolution. (4) It discards and disregards the learning of history and human experience about the uniqueness of conjugal marriage. (5) It relies upon government to prevent or conceal the harmful consequences of its new order of marriage. (6) It promotes individual autonomy rather than the integrity of individual responsibility. (7) It devalues and disregards the moral significance of conjugal marriage.

The overall flaws of all of these ostensibly “conservative” arguments for same-sex marriage are three. First, they plead on the basis of highly speculative, imagined, theoretical benefits. The empirical evidence that

82. Xiridou et al., *supra* note 55, at 1033.

83. See, e.g., Carpenter, *The Traditionalist Case*, *supra* note 48, at III-B-1, 19–25 (no harm to heterosexual marriages); Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 519 (2006/07) (citing judicial opinions in same-sex marriage cases in Washington and California asserting that “allowing same-sex couples to marry will not only result in no harm to but will actually benefit marriage in our society . . . .”); see also Wilson, *supra* note 62, at 655 (“Same-sex marriage does no harm to [specific social interests in marriage.]”); Lisa M. Polk, Comment, *Montana’s Marriage Amendment: Unconstitutionally Denying a Fundamental Right*, 66 MONT. L. REV. 405, 442 (2005) (“Montanans face no harm whatsoever if lesbians and gays obtain marriage licenses.”).

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giving formal marital or equivalent legal status to same-sex couples will make gay and lesbian couples more responsible sexually or more stable, or will benefit their children or will benefit society is lacking. The evidence supports exactly the opposite position—against same-sex marriage.<sup>84</sup>

Second, these arguments ignore or cannot see the other side of the ledger, the harmful effects upon the institution of marriage itself from redefining it to include same-sex couples. The transformative power of inclusion cannot be ignored. The negative characteristics of same-sex couples will and already are beginning to transform the social expectations of marriage, and of the people who enter into marriage in ways that will make that institution less responsible, less stable, less monogamous, less faithful, and less committed to responsible child-rearing.<sup>85</sup> The evidence of immediate harm, admittedly, is in its infancy, as same-sex marriage is so new and exists in so few countries. Measuring these detrimental effects is also difficult for at least three reasons. First, marriages have been deteriorating and disintegrating for some time (decades) already due to other powerful social forces (including social approval for and rising incidence of cohabitation, child-bearing out of wedlock, and divorce), so separating out the impact of same-sex marriage from the impact of those other influences will be challenging.<sup>86</sup> Second, the gay-and-lesbian community is very self-protective, and obtaining information and cooperation from members of that community that might document problems and troubles and failings in that community, has in the past and will in the future not be easily or simply accomplished. Third, the most important consequences are not immediate or short-term, but most of them are expected to take a full generation to develop and to be discerned and documented clearly.

Finally, these popular conservative arguments for same-sex marriage are not really conservative at all because they contradict most of the basic conservative principles.<sup>87</sup> They do *not conserve* or preserve the *institution* of marriage that has existed for thousands of years as the basic social unit of all cultures. They are *not cautious* or prudent but seek a revolutionary redefinition (not modes, evolutionary, incremental modifications) of that essential social institution. They are *not supported*

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84. See *supra* notes 55–59, and accompanying text.

85. See *infra* notes 100–110, and accompanying text.

86. Compare Allan Carlson, *Deconstruction of Marriage: The Swedish Case*, 44 SAN DIEGO L. REV. 153 (2007) (discussing relationships between same-sex marriage and disintegration of marriage in Sweden), with WILLIAM N. ESKRIDGE, JR., & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? passim* (2006) (arguing that same-sex marriage has not weakened marriage in Scandinavia or The Netherlands).

87. See *supra* Part II; see also *infra*, Part IV.

by *experience* or history, but primarily by abstract theorizing, pure speculation, and mere rhetoric. They are positivist and statist, and *trust government* decrees and coercion to reshape a pre-governmental social institution. They do *support individualism* in the sense of individual autonomy, but at the expense of the institution that throughout history has best fostered and protected and inculcated individualism. They seek to create an artificial and unstable government-mandated equality of relations that, in truth, are not the same or equivalent. They *endanger the morality* of marriage by inviting the transformation of the moral meaning of marriage by including couples with very different moral qualities, standards and behaviors.

#### IV. A CONSERVATIVE CASE AGAINST SAME-SEX MARRIAGE

##### A. *Conservative Principles Require Rejection of Same-Sex Marriage*

Not only do the “conservative” arguments for legalizing same-sex marriage fail the test of conservative principles, but all of the basic principles of conservatism compel opposition to the legalization of same-sex marriage. The *preservation* principle opposes legalizing same-sex marriage. Marriage has always been (until just six years ago) an exclusively conjugal institution, in all the nations and societies in all the history of the world. Throughout recorded history, marriage of persons of the same sex never existed and was never known or allowed, until The Netherlands legalized same-sex marriage in 2001. Conjugal marriage still is the overwhelmingly dominant and exclusive understanding of marriage in contemporary nations and cultures. The conservative argument for preservation and conservation does not support legalizing same-sex marriage, but favors preservation and protection of the long-recognized (if now embattled) and exclusive relationship of conjugal marriage.

The *institutional* argument also opposes legalizing same-sex marriage. The social institution of conjugal marriage is one of the most ancient, long-established, institutions, and is the basic social unit in all societies. Protecting that institution is critical, for it is the foundation of government and society. Protection of so fundamental an institution manifests the very core and very best of conservatism. Because of the importance of protecting critical social institutions for conservatives, many American conservatives “define issues centering on the family . . . and religion as their issues.”<sup>88</sup> Deconstructing so basic an institution is

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88. SARGENT, *supra* note 22, at 98. They also “strongly oppose the movement for gay rights . . . . The prolife movement, which they support, includes their concerns with both family and

contrary to this essential principle of conservatism. Russell Kirk, in *The Conservative Mind*, wrote that one of the greatest problems facing conservatives today is that “men must find status and hope within society: true family, respect for the past, responsibility for the future, private property, duty as well as right, inner resources . . . . *The degeneration of the family to mere common house-tenancy menaces the very essence of recognizable human character . . . .*”<sup>89</sup>

The *cautious innovation* principle also opposes revolutionary same-sex marriage legalization. To jettison the conjugal, male-female uniting, gender-integrating, procreative-linking element of marriage is a radical change. It is not a mere, prudential alteration or cautious transformation. It is revolutionary, not evolutionary. Its potential ramification for unloosening the connections, expectations, and responsibilities of marriage, parenting, and families in general is hard to overstate. To support the legalization of same-sex marriage is contrary to this core principle of conservatism, while to oppose same-sex marriage is consistent with this mode-and-pace-of-change precept of conservatism.

The *distrust/limit government* conservative principle is especially relevant in showing where the conservative case lies today since the only state that has legalized same-sex marriage, Massachusetts, imposed that radical redefinition of marriage upon the people by judicial fiat.<sup>90</sup> Likewise, in two of the five nations of the world where same-sex marriage has been legalized, it has been accomplished, or initiated, by judicial decree.<sup>91</sup> The legislative legalization of marriage-equivalent same-sex unions in Vermont,<sup>92</sup> New Jersey,<sup>93</sup> and Oregon,<sup>94</sup> also were

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religion.” *Id.* The same could be said for their support of the marriage protection movement in the first decade of the twenty-first century.

89. KIRK, *supra* note 15, at 540 (describing what Kirk calls “the problem of the proletariat”) (emphasis added).

90. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (declaring conjugal marriage laws to be unconstitutional, but allowing the legislature 180 days to take action it deemed appropriate).

91. In *M. v. H.*, [1999] 2 S.C.R. 3 (Can.), the Supreme Court of Canada ruled that same-sex couples were entitled to receive many of the financial and legal benefits commonly associated with marriage, but did not set forth a timeline for implementation of the mandate). Subsequent decisions in the federal courts in Ontario, Quebec, and British Columbia set a two-year deadline for implementation of same-sex marriage. See *Halpern v. Canada*, [2003] 60 O.R. 3d 321 (Can.); *Hendricks v. Quebec* [2002] R.J.Q. 2506 (Can.); *Barbeau v. British Columbia*, [2003] 13 B.C.L.R. 4th 1 (Can.). The Canadian Parliament later passed legislation to authorize same-sex marriage in accord with these decisions. The Civil Marriage Act, Parliament Bill C-38 (February 1, 2005). Likewise, in South Africa, the Civil Unions Bill was enacted to implement *Minister of Home Affairs and Another v Fourie & Others* 2006 (3) BCLR 355 (CC) (S. Afr.) which held the 1961 Marriage Act in violation of the South African Constitution and giving the government until December 1, 2006 to draft new legislation.

92. Vermont Civil Unions Act, VT. STAT. ANN. tit. 15, § 1201, (2000). See *id.* at 91 § 2(a) (“The purpose of this act is to respond to the constitutional violation found by the Vermont Supreme Court in *Baker v. State*, and to provide eligible same-sex couples the opportunity to ‘obtain the same

enacted in at least partial response to or endorsement of prior judicial rulings; and litigation campaigns for same-sex marriage or unions has occupied center stage in both state and federal courts throughout America for the past decade.<sup>95</sup> The legislative radicalization of marriage by passing fad or fancy (aided by political dirty tricks and manipulations of Byzantine dimensions) has characterized the mob-of-special-influence-dominated processes in Massachusetts and California, to name just two examples. This conservative principle tends in favor of the opponents of same-sex marriage, who not only oppose judicial redefinition of marriage but who represent the true grass-roots efforts and have achieved truly super-majority social consensus in the states where marriage amendments have been allowed to come before the voters.

It might be argued that resolving the issue by majority vote is consistent with a conservative position. Structurally, that has some plausibility. However, in the long-run it would undermine core moral-normative conservatism. Just as Stephen Douglas' position of popular sovereignty (letting the people in the territories decide for themselves whether to allow slavery) was conservative in a procedural sense, in the larger sense it defied and (fortunately) was overwhelmed by the normative conservatism of Abraham Lincoln's national abolition of slavery because it was inconsistent with the basic moral principles of the Declaration of Independence. Lincoln's substantive (moral) conservatism saved not only the conservative political philosophy in America, but saved America.<sup>96</sup> Likewise, the structural popular sovereignty position

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benefits and protections afforded by Vermont law to married opposite-sex couples' as required by Chapter I, Article 7th of the Vermont Constitution.”).

93. N.J. STAT. ANN. § 37:1-28 (e) (West 2006) (“It is the intent of the Legislature to comply with the constitutional mandate set forth by the New Jersey Supreme Court in the recent landmark decision of *Lewis v. Harris* . . . wherein the Court held that the equal protection guarantee of . . . the State Constitution was violated by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts.”).

94. The Oregon Family Fairness Act, Oregon H.B. 2007, 74th Oregon Legislative Assembly (2007) (providing for domestic partnership status for same-sex couples was preceded by the ruling of the Multnomah County Circuit Court in *Li v. State*, (unreported) “that ORS chapter 106 [allowing only male-female couples to marry] violated Article I, section 20 [of the Oregon Constitution], by denying certain *benefits* to same-sex couples that otherwise were available to married opposite-sex couples by virtue of their marriages.” *Li v. State*, 110 P.3d 91, 94 (Or. 2005).). The trial court decision led to passage of a state marriage amendment barring same-sex marriage, and later the trial court decision was reversed by the state Supreme Court. After the 2006 elections changed the make-up of the state legislature, it passed the liberal act allowing same-sex unions.

95. Ever since the success of the litigants seeking same-sex marriage in *Baehr v. Lewin*, 852 P.2d 44, 48–50 (Haw. 1993) was superseded and mooted by a constitutional amendment, HAW. CONST. amend. I, § 23, American courts have been grappling with the issue. A recent Westlaw search of the term “same-sex marriage” returned 74 federal cases and almost 200 cases in state court. While this obviously includes many cases that do not directly address same-sex marriage, domestic partnerships, or civil unions, it shows the extent and prevalence of such litigation.

96. Jaffa, *supra* note 44. (Jaffa is not only a renowned Lincoln scholar but also a renowned

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on same-sex marriage has some credibility, and insofar as it is a step towards and not away from the normative conservative position of protecting the institution of conjugal marriage, it is valid. However, it is subordinate to the normative principle that values and preserves the institution of conjugal marriage. Just as the nation ultimately could not endure part-slave and part-free, so the institution of marriage, and our constitutional society based it, cannot long survive part conjugal and part same-sex in nature. Conservatism stands in support of preserving the traditional, moral institution of conjugal marriage for the sake of preserving a society that fosters individual rights.

The *protect individualism* principle also largely opposes same-sex marriage, especially if one takes a long view. Conservatives respect the complete integrity of responsible individual choice, not the hollow substitute of “do-whatever-I-want” autonomy. To protect individual liberties, one must protect the institutions that foster, nurture, and develop both individualism and liberty—and the seedbed of both is conjugal marriage. There is no doubt that most contemporary conservatives see the effort to protect the institution of marriage as critical to preserve individual freedom. The disintegration of marriage only produces greater government control over the lives of the people, because as more marriages are avoided (by cohabitation and child-bearing out of wedlock) and break up (by separation and divorce) many social control functions non-coercively resolved within the family must instead be resolved by judges, policemen, and state child protection officials, requiring more intrusion by state educational and health agencies. Conservatives see the legalization of same-sex marriage as undermining the meaning of marriage and further loosening the ties that make marriages inviting, stable, and responsible.

A plausible argument might be put forward that letting the people decide is consistent with conservative structural principles in two ways—letting private individuals define marriage for themselves and letting legislative majorities legalize same-sex marriage. But this argument would have to overcome the conservative fear of government, especially when it seeks to break with tradition and radically redefine a basic social institution. It would entail allowing the government to redefine a pre-governmental social institution—a prime example of non-conservative social engineering. It would have to answer concerns about the impact of such redefinition of marriage upon the critical institution of marriage and the resultant limiting effect of individual rights accompanying the growth of government to cope with failed marriages.

Finally, the *morality* principle resonates in the position of those who oppose legalizing same-sex marriage. Their cause is that of the moral regeneration of society by protecting and revitalizing the key morality-generating institution of society—the institution of marriage and the marital family. Conservatives agree with Burke, who wrote: “When we marry, the choice is voluntary, but the duties are not a matter of choice. . . . The instincts which give rise to this mysterious process of nature are not of our making. But out of physical causes, unknown to us, perhaps unknowable, arise moral duties, which, as we are able perfectly to comprehend, we are bound indispensably to perform.”<sup>97</sup> Conservatives oppose legalization of same-sex marriage because they see same-sex relations as immoral, and as having a de-moralizing influence upon the institution of marriage if same-sex relations are deemed marriages. They warn of this transformative effect of inclusion of same-sex relations upon the social institution of marriage. They agree with Kirk that “[c]onservatism must teach humanity once more that the germ of public affections (in Burke’s words) is ‘to love the little platoon we belong to in society.’”<sup>98</sup> That “little platoon” of which Burke wrote is marriage and the marital family that grows out of it.

*B. The Detrimental Consequences of Legalizing Same-Sex Marriage*

Including same-sex couples within the institution of marriage will transform the institution of marriage to the detriment of all. The characteristics of same-sex relationships will set a new and devastating minimum standard for marital relations. The moral and behavioral norms of marriage will be distorted by inclusion of the behavioral and moral norms of gay and lesbian lifestyles within the institution of marriage.

For example, same-sex relationships are notoriously *unstable*. Edward O. Laumann and his colleagues at the University of Chicago reported, “typical gay urban men spend most of their adults lives in ‘transactional’ relationships or short-term commitments of less than six months.”<sup>99</sup> Judith Stacey’s recent report on gay lifestyles in the Los Angeles area confirms that temporary relationships are the norm in that

97. KIRK, *supra* note 15, at 33–34 (quoting Edmund Burke, *Speech on the Petition of the Unitarians*, in 6 WORKS 115).

98. *Id.* at 525.

99. EDWARD O. LAUMANN ET AL., *THE SEXUAL ORGANIZATION OF THE CITY* 216 (2005); *see also id.* at 96 (gay cultures “sanction and celebrate a transactional orientation toward sexual partnering.”); *id.* at Chapter 1, *The Theory of Sex Markets*, available at <http://www.press.uchicago.edu/Misc/Chicago/470318.html> (last visited March 13, 2008) (“The male same-sex markets for both whites and racial/ethnic minorities are predominantly transactional . . .”).

community.<sup>100</sup> One might expect gays in committed relationships to have more stability in the Netherlands, the most gay-affirming nation on earth. The 2003 Dutch study noted above found that the average duration of gay “steady partner” relations was only 1.5 years—in the most gay-affirming, gay-supportive nation on earth, when marriage-equivalent same-sex domestic partnerships were legal, and the full status of same-sex marriage was being implemented.<sup>101</sup>

*Expectations* among gay couples is dramatically different from the expectations of married conjugal couples. Thus, Kirk and Madison in 1989 wrote that “[m]any gay lovers, bowing to the inevitable, agree to an ‘open relationship,’ for which there are as many sets of ground rules as there are couples”<sup>102</sup> Thus, it should come as no surprise that a more recent study found that nearly half of all gay men in relationships have agreements with their partners that sex outside the relationship is acceptable.<sup>103</sup> The 2005 Vermont study noted that there was a dramatic difference in the percentage of couples who had decided that extra-relationship sex was acceptable; for lesbians both in and not in civil unions it was about 50% higher than for conjugally married women, and for gay men both in civil unions and not in registered unions it was from 1250% to 1400% higher than for men in conjugal marriages.<sup>104</sup> The expectation of fidelity that came with the relationship commitment was drastically different for conjugally married men and women than for gays and lesbians in formal and non-registered same-sex relationships.

Sexual *infidelity* characterizes same-sex relationships. Kirk and Madsen acknowledged that “the cheating ratio of ‘married’ gay males, given enough time, approaches 100% . . . .”<sup>105</sup> The 2005 report on same-sex couples in Vermont reported that “over one-half of gay men in both types of couples [formal civil unions and informal relationships] had had

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100. Judith Stacey, *The Families of Man: Gay Male Intimacy and Kinship in a Global Metropolis*, 30 *Signs* 1911 (Spring 2005).

101. Xiridou et al., *supra* note 55, at 1031 tbl. 1.

102. MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL* 330 (1989). Likewise, Andrew Sullivan contrasts male-female marriages with same sex relationships and explains, “there is more likely to be a greater understanding of the need for extramarital outlets between two men than between a man and a woman.” SULLIVAN, *supra* note 48, at 202 (1996).

103. Solomon et al., *supra* note 63, at 569 (40.3% of gay men in Vermont civil unions and 49.3% of coupled gay men not in civil unions have agreements with their partners that sex outside of the relationship is alright, compared to 3.5% of heterosexual married men.).

104. *Id.* at 566 (For women the results agreeing that extra-relational relations were okay was 5.3% and 5.0 for lesbians compared to 3.5% of married women, and for gay couples it was 40.3% and 49.5% compared to 3.5% for married men.).

105. KIRK & MADSEN, *supra* note 102, at 330. Likewise, Andrew Sullivan contrasts male-female marriages with same sex relationships and explains, “there is more likely to be a greater understanding of the need for extramarital outlets between two men than between a man and a woman.” SULLIVAN, *supra* note 48, at 202 (1996).

sex outside their primary relationship, whereas only 15.2% of married heterosexual men had done so.”<sup>106</sup> Gay men both in and not in civil unions had nearly four times the rate of infidelity (approximately 60%) as married heterosexual men (15.2%), even though married relationships which have long existed logically could have been on average much longer-lasting (and with more time for infidelity) than the recent civil unions.<sup>107</sup> The 2003 AIDS journal report from the Netherlands reported that gay men with steady partners had eight other sex partners (“casual partners”) per year, on average.<sup>108</sup>

While monogamy is the standard and expectation in conjugal marriage, *promiscuity and polyamory* are the standard in gay and lesbian relationships. In their groundbreaking, sympathetic 1978 study of homosexual behaviors, Bell and Weinberg reported that 43% of white male homosexuals had sex with five hundred or more partners, with 28% having one thousand or more sex partners.<sup>109</sup> Twenty-years later, researchers studying the sexual behaviors of 2,583 older sexually active gay men reported that most gay men still have huge numbers of sex partners; “the modal range for number of sexual partners ever . . . was 101–500,” while 10.2% to 15.7% had between 501 and 1,000 partners, and another 10.2% to 15.7% reported having had more than 1,000 sexual partners in their lifetime.<sup>110</sup>

Thus, in terms of expectations of marital loyalty, stability, relational monogamy, actual infidelity, and promiscuity, the introduction of gay and lesbian relationships into the institution of marriage entails a serious risk of lowering the standards, understanding, expectations and behaviors of marriage for all members of society.

The same logic by which Burke was able to predict so stunningly the bloody descent of France into tyranny under a military dictatorship for a quarter-century leads many conservatives to wonder whether severe social disorder and the emergence of strong, authoritarian governments is not the fate of societies which embrace same-sex marriage. Burke based his predictions on the impact of the radical and abrupt destruction of critical institutions of society, the loss of the habits, and the loss of common understandings which underlay the social order in France nearly 220 years ago.<sup>111</sup> Today, the loss of the moral authority of marriage and

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106. Solomon et al., *supra* note 63, at 571.

107. *Id.*

108. *Id.*

109. MARTIN S. BELL & ALAN P. WEINBERG, *HOMOSEXUALITIES* 308–09 (1978).

110. Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 *JOURNAL OF SEX RESEARCH* 354 (1997).

111. Edmund Burke, *Reflections on the Revolution in France*, para. 362 (1790) in *Selected Works of Edmund Burke available at* <http://www.econlib.org/library/LFBooks/Burke>

of marital family in society is an awful thing to contemplate.

If one cares to see what happens to society when the stability, authority, and common understanding and expectations about marriage as an institution disintegrates, take a look at “family” life and individual welfare in the ghettos of Detroit, Michigan, or of Anacostia and southeast Washington, D.C. Washington, D.C. acquired the nickname of “Murder City,” because of the rampant violence and homicide resulting from the breakdown of the family there.<sup>112</sup> Many children in these

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They have destroyed the principle of obedience in the great, essential, critical link between the officer and the soldier, just where the chain of military subordination commences and on which the whole of that system depends. The soldier is told he is a citizen and has the rights of man and citizen. The right of a man, he is told, is to be his own governor and to be ruled only by those to whom he delegates that self-government. It is very natural he should think that he ought most of all to have his choice where he is to yield the greatest degree of obedience. He will therefore, in all probability, systematically do what he does at present occasionally; that is, he will exercise at least a negative in the choice of his officers.

*Id.* at para. 368.

Neither have they left any principle by which any of their municipalities can be bound to obedience, or even conscientiously obliged not to separate from the whole to become independent, or to connect itself with some other state. . . . Who are we, that we are not to judge what taxes we ought or ought not to pay, and are not to avail ourselves of the same powers, the validity of which you have approved in others? To this the answer is, We will send troops. The last reason of kings is always the first with your Assembly. This military aid may serve for a time, whilst the impression of the increase of pay remains, and the vanity of being umpires in all disputes is flattered. But this weapon will snap short, unfaithful to the hand that employs it.

*Id.* at para. 366.

*See also id.* at para. 376 (“You have forbidden us to treat them [landlords] with any of the old formalities of respect, and now you send troops to saber and to bayonet us into a submission to fear and force, which you did not suffer us to yield to the mild authority of opinion.”)

The National Assembly called for a voluntary benevolence: for a fourth part of the income of all the citizens, to be estimated on the honor of those who were to pay. They obtained something more than could be rationally calculated, but what was far indeed from answerable to their real necessities, and much less to their fond expectations. Rational people could have hoped for little from this their tax in the disguise of a benevolence — a tax weak, ineffective, and unequal; a tax by which luxury, avarice, and selfishness were screened, and the load thrown upon productive capital, upon integrity, generosity, and public spirit; a tax of regulation upon virtue. At length the mask is thrown off, and they are now trying means (with little success) of exacting their benevolence by force.

*Id.*

112. Lance Winslow, *Murder City; The Nation's Capital*, EZINE ARTICLES, <http://ezinearticles.com/?Murder-City;-The-Nations-Capital&id=256785> (last visited Dec. 14, 2007); *Washington D.C. Retains Title: Murder Capital of the World*, MIM NOTES 162, May 15, 1998,

ghettos have little or no association with a father or responsible father-substitute in their lives; they must learn from peers, on the street, or from dysfunctional but glamorous television models what it means to be a “man”—including what it means to be a husband and father. Many children in these areas grow up without meaningful parenting; with dismal school achievement, dismal graduation rates, and dismal prospects for life opportunities.

Now imagine *that* society spread across an entire state, or across the United States. Think of France in the 1780s and 1790s before you say, “it could not happen here.” Think of Weimar, Germany, the society groaning under the burden of families weakened and ravaged by war, struggling under post-war oppressive reparations and think of the social chaos unleashed by the followers of a new fascist party (that reportedly began in the gay bars of Munich),<sup>113</sup> and by the military dictator who arose to aggressively consolidate power, then military conquests, then the violence that was unleashed by and upon that nation and upon the world.

The abandonment of social responsibility and the pursuit of private self-interest leads downward. If such severe social disintegration is to be the result of legalizing same-sex marriage, it probably will be more gradual than the eighteenth-century French (or twentieth-century German) Revolution because we are talking now about the deconstruction of a key social institution alone rather than the destruction of institutions of both government (monarchy, established agencies, and authorities), and society, because it entails the deconstruction of different social institutions (marriage versus royalty and aristocracy), and by different means (legislation or judicial fiat, rather than the guillotine). So it will probably take a generation or two to fully unfold. The means of change will be sexual chaos and family disintegration rather than the swift transformation of the guillotine. But many conservatives believe that the destination or outcome cannot be different because the precursor is the same—the disintegration of basic social institutions, radically rewriting the script society follows, and displacing and oppressing those who resist or are slow to learn the script that replaces it.

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<http://www.etext.org/Politics/MIM/dc/DCmurder.html> (last visited Dec. 14, 2007).

113. See, e.g., WILLIAM SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 64–73, 172 (1960); Scott Lively, *Homosexuality and the Nazi Party*, LEADERSHIP U, <http://www.leaderu.com/jhs/lively.html> (last visited March 13, 2008).

*C. The Tragedy of the Commons*

In the December 1968 issue of *Science*, Garrett Hardin, a professor of biology at the University of California in Santa Barbara, published an article entitled *The Tragedy of the Commons*.<sup>114</sup> The article has become a classic; it has been cited more than a thousand times in law reviews and journals alone.<sup>115</sup> In *The Tragedy of the Commons*, Professor Hardin popularized a valuable metaphor concerning lack of personal responsibility regarding public stewardships, specifically focusing on overgrazing on public land and other environmental issues.<sup>116</sup> It is a “conservative” argument, as it seeks to “conserve” natural resources and to avoid the misuse, devaluation, and destruction of the natural environment.

Hardin’s popular metaphor can be used to evaluate the proposed (and recent) legalization of same-sex marriage. It provides an enlightening framework for examining the conflict of personal interests versus public interests, and of short-term advantages versus long-term consequences of legalizing same-sex marriage. It also has implications beyond same-sex marriage for such related policy proposals as same-sex marriage-equivalent civil unions and for adoption of children by gay and lesbian partners and couples.

Dr. Hardin presented the “tragedy of the commons” metaphor as follows:

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy. . . .

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114. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). The article was based on a presidential address delivered at the meeting of the Pacific Division of the American Association for the Advancement of Science at Utah State University in Logan, Utah, on June 25, 1968. *Id.*

115. For example, a Westlaw search (“hardin /3 ‘tragedy of the commons’” searched Oct. 8, 2007) found references to 1149 articles in law journals, law reviews, and similar legal publication in the JLR database citing Hardin’s piece, plus four federal court opinions (including one Supreme Court decision) in the Allfeds database, and two state court decisions of the Washington Supreme Court and an Arizona Court of Appeals in the Allstates database citing it.

116. Hardin gives credit to “a mathematical amateur named William Forster Lloyd (1794–1852)” for first suggesting the metaphor. Hardin, *supra* note 114, at 1244.

[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another: and another. . . . But this is the conclusion reached by each and every rational herdsman sharing the commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination . . . .<sup>117</sup>

Hardin's "commons" metaphor can be usefully applied to the current debate over whether the public institution of marriage should be redefined to include same-sex couples.<sup>118</sup> The public institution of marriage is like a public "commons," as the common pasture was generally open to all livestock owners, so the institution of marriage historically has been generally open to all conjugal couples. As self-interest motivated some members of farming communities (those with more livestock) to engage in overgrazing on the public commons, so also self-interest motivates some members of society (particularly in this instance, gays and lesbians) to seek for their particular non-marital relations the privileges, dignity, preferred public status, and legal benefits of marriage.

The same dynamic of loosening or abandoning personal responsibility for the common interest that occurred in the overgrazing of private stock in the common pasture is evident in the growing permissiveness and abandonment of the community interest in marriage that pervades current discourse about marital relations including, *inter alia*, same-sex marriage.<sup>119</sup> Common tolerance of overgrazing reflected both positive and negative self-interest of the other herdsman, as well as their prioritizing of immediate personal interests over long-term community interests.

Overgrazing on the commons by one's neighbors was justified by the attitude of "Who cares? It is not my land that is in danger of being ruined." Similarly, acceptance of same-sex marriage today is based in part on the attitude of: "Why not? Letting gays and lesbians marry will not cost me anything, and will not harm me." The benefits of not

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117. Hardin, *supra* note 114, at 1244.

118. There are limits to all metaphors and the "commons" metaphor for marriage is no exception. Thus, the use of the commons metaphor is for pedagogical purposes, to illustrate and clarify, not to suggest perfect symbolic parallelism.

119. The same predominance of various private interests and abandonment of the community/family interests has characterized other issues relating to marriage, including adoption of unilateral "no-fault" divorce rules, facilitating and de-stigmatizing child-bearing out of wedlock, discounting the negative impact of marital infidelity on children, etc. See generally Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79; Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. U. L. REV. 81 (2002); Lynn D. Wardle, *Is Marriage Obsolete*, 10 MICH. J. GENDER & L. 189 (2003); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL OF RTS J., 203 (2006).

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objecting, then and now, include self-image reinforcement, social-peer acceptance, and hostility avoidance. Then, townspeople who did not object to overgrazing on the public commons considered themselves to be accommodating “live-and-let-live” neighbors, they were not labeled a “meddler” or a “busybody,” and they avoided provoking the anger of their neighbors who were doing the overgrazing. Today, similarly, the person not objecting to the legalization of same-sex marriage can self-identify as progressive, enlightened, egalitarian, and open-minded individuals (all labels that are in fashion—in great demand, in high vogue—today), and they also avoid the risk of unpleasant accusations about “homophobic,” or “mean-spirited,” or “hate-filled,” or “bigoted” opposition to same-sex marriage.

Herdsmen with more than the average number of cattle also had a self-interest in opposing regulation of overgrazing, and those with fewer cattle who aspired to have more cattle, may also have opposed regulation to stop the overgrazing of the commons out of concern that such regulations might result in restriction that could interfere with their aspiration to someday have more stock (and to join in overgrazing the common pasture). Likewise, gay and lesbian couples have an immediate self-interest in redefining marriage to enjoy the status, dignity and benefits of that institution, while non-gays may be passive or support same-sex marriage because it reflects the permissive values of acceptance of all relationships including tolerance (live-and-let-live, no moral judgment against) of some possibly dubious relations which they (or their close friends or family) have had in the past or may have in the future.<sup>120</sup>

Thus, the core of the tragedy of the commons is that individuals tend to pursue private, short-term self-interest, whether overgrazing herdsmen and their tolerant neighbors, or gay and lesbian couples and their tolerant fellow citizens, at the expense of the seemingly distant public interest. Like the overgrazing herdsmen of yore, same-sex couples today who demand that marriage be redefined to include them cannot see the harm to everyone (including themselves and their loved-ones who will inherit the future) from the policy they want to pursue. Like the non-overgrazing fellow townsmen living around Hardin’s common pasture, non-gay fellow citizens today look for the course of least resistance that will promote their personal interests in living convenient, conflict-free lives, and in fostering a socially-applauded self-image as progressive, inclusive, tolerant individuals.

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120. Some heterosexual supporters of gay marriage undoubtedly also have a personal interest in establishing a legal rule of avoiding public scrutiny of any personal relationships of any kind, including adulterous relations, infidelities, exploitive sexual relations, sex-for-hire, etc.

V. CONCLUSION: A DAY OF RECKONING

Expanding the definition of marriage so that more special interest groups like same-sex couples may enjoy the label of “marriage,” is dangerously short-sighted. In the short-term, like unregulated grazing on the commons, other factors may protect the community from having to face the consequences. In the long run (and perhaps in the not-so-distant future), the community will have to pay the piper and cope with the devastating social consequences.

As Dr. Hardin wrote, there comes a “day of reckoning.” The cumulative effects of untempered pursuit of private interests and general neglect of responsibility for the common interests in a public asset—whether a cow pasture or the institution of marriage—cannot be deferred indefinitely. The ultimate effect of such policies is “ruin to all.”<sup>121</sup>

In Hardin’s example, the inevitable consequences of letting everyone “do their own thing” on the common pasture are pollution, ruined land, an environment that cannot sustain the people who live upon it, reduced livelihood opportunities for future generations, economic depression, reduced food productivity, and for some communities (those in which people lack the ability or option to move somewhere else), a very real risk of starvation and death.

Similarly, in our time, the inevitable, ultimate social consequences of letting everyone “do their own thing” in regard to marriage—and specifically in regard to legalizing same-sex marriage—will be at least as devastating. A weakening of the institution of marriage is certain. As that institution is the foundation of social order, a weakening of social order is inevitable.

By redefining marriage to include same-sex couples, the meaning of marriage will be changed in ways that will loosen the already-impaired link between marriage and parenting; the intergenerational connections of marriage will become attenuated. The notion that marriage is merely a private matter—a “common” that should be open to all—will grow, as the public commitments and expectations of marriage erode. The chaos of sexual irresponsibility (especially infidelity and promiscuity within marriage) will grow, and the moral expectations of the basic institution of society will fade as the sexual ethic of gay and lesbian lifestyles is embraced as marriage. Instability in marriages will increase as the pattern of transitory relationships of same-sex couples is included in the social understanding of what is marriage. Sexual segregation will increase and the historically gender-integrated public institution of

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121. Hardin, *supra* note 114, at 1244.

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marriage will be redefined to include sexual apartheid couples. Instrumentalization of marriage partners will result from the inclusion of the gay lifestyle as an accepted form of the public institution of marriage. The transformative power of including gay and lesbian relationships in the public understanding of marriage will alter the institution of marriage as never before.

As the environmental conservative Garrett Hardin wrote: “Ruin is the destination toward which all men rush” when they put freedom to pursue self-interest above the common good.<sup>122</sup> Dr. Hardin noted that the tragedy of the commons arises when the common morality accommodates liberties that external conditions do not justify and cannot support. “The . . . problem has no technical solution; it requires a fundamental extension in morality.”<sup>123</sup> Hardin suggested that individual responsibility “is the product of definite social arrangements,”<sup>124</sup> and he advocated “mutual coercion, mutually agreed upon by the majority of the people affected” to establish and implement the morality necessary to preserve the “commons” in the face of ruin threatened by unbridled pursuit of individual self-interest.<sup>125</sup> That is what marriage law defining marriage as the union of man and woman is and has been for thousands of years. The conservative recognizes the value to society of the institution of conjugal marriage as a public “commons,” and acts to preserve that institution by “mutual coercion, mutually agreed” in the form of laws that prohibit same-sex marriage.

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122. *Id.* at 1244.

123. *Id.* at 1243.

124. *Id.* at 1247 (quoting CHARLES FRANKEL, *THE CASE FOR MODERN MAN* 203 (1955)).

125. *Id.* at 1247–48.