ESSAYS

"MULTIPLY AND REPLENISH": CONSIDERING SAME-SEX MARRIAGE IN LIGHT OF STATE INTERESTS IN MARITAL PROCREATION

BY LYNN D. WARDLE*

* Professor of Law, Brigham Young University School of Law. Thanks to Julie Bancroft, William Duncan, Evan James, Christopher Lewis, and Troy Smith, who provided valuable research assistance. Helpful criticism and comments on various drafts were provided by Kif Augustine Adams, David Coolidge, Ray Jay Davis, George Dent, Robert Destro, Richard Duncan, Fred Gedicks, Alan Hawkins, Tom Lee, Constance Lundberg, Jim Rasband, Brett Scharffs, David Thomas, Richard Wilkins, and Camille Williams. I have presented some material used herein in presentations at conferences of the International Society of Family Laws, of the Association of American Law Schools, of the Alliance Defense Fund, and in testimony before legislative committees in Alaska, California, Colorado, Hawaii, and Vermont.

[I]t seems to me at this time we need education in the obvious more than investigation of the obscure.

—Oliver Wendell Holmes, Jr.[1]

I. INTRODUCTION

The definition, exclusive status, and legal benefits of marriage may become one of this decade's most important domestic policy issues in the United States. Many articulate and influential scholars, lawmakers, and commentators are asking why the preferred legal status and benefits of marriage should not be extended to unions other than traditional marriages (that is, exclusive, presumably lifelong, state

1. OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 292-93 (1920).

approved consensual unions of a man and a not-closely-related woman).[2] Why should marriage be the *only* preferred and specially recognized connubial relationship in our laws while other forms of intimate personal relationships are denied the same or similar legal status? Why shouldn't same-sex marriage be legalized, or an equivalent marriage-like status be created (such as "civil union" or "domestic partnership") for same-sex couples?[3]

A. Can the Proposed Legalization of Same-Sex Marriage Be Justified in Terms of the Compelling Social Interests That Justify the Legalization of Traditional Marriage?

The movement to legalize same-sex marriage asks defenders of exclusive legal protection for heterosexual marriage to explain why our laws should permit heterosexual marriage but should not allow same-sex marriage or some marriage-like alternative status for same-sex couples. That question, however, gets the burden of proof backwards; the burden should rest on those who argue for a substantial change in the arrangement of a fundamental social institution to show justification for the proposed change.[4] Accordingly, a

---

2. *See generally* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997); ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON (1997); *see also* RICHARD A. POSNER, SEX AND REASON (1992); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 97-100 [hereinafter *Constitutional Claims*] (listing nearly seventy law review publications since 1990 supporting or sympathetic to legalization of same-sex marriage).

3. While the exclusive use of the term "marriage" to define traditional unions has no small social significance, efforts to extend marriage-like status to gay couples under another label, such as "civil unions" or "domestic partnerships," implicate most of the policy concerns relating to the legalization of same-sex marriage. For clarity's sake this Essay focuses on same-sex marriage, but most of the policy arguments discussed herein apply just as well to claims to create marriage-equivalent alternative statuses such as "civil unions" or "domestic partnerships."

4. The legal burden of producing proof might be shifted if the advocates of same-sex marriage could show that exclusive traditional marriage laws infringed upon a "fundamental right." Washington v. Glucksberg, 521 U.S. 702, 726 (1997). However, in more than a dozen cases state and federal courts have rejected such claims, and only one surviving state court decision has ruled otherwise. *See infra* Part V.B. Even if the burden of producing proof were shifted, laws restricting marriage to male-female couples would be upheld if narrowly tailored and necessary to effectuate a compelling state interest. *See id.* As this Essay demonstrates, such compelling state interests do exist and are best effectuated by exclusive, traditional marriage laws.

significant change in the definition or structure of a basic social institution like marriage should be considered seriously only if advocates of the proposed change first show by convincing evidence that the proposed change is likely to improve the institution of marriage or otherwise improve society. The burden is on advocates of same-sex marriage to show that legalizing same-sex marriage would comparably fulfill the public policies and social interests that underlie legal marriage, or fulfill other, equally compelling public policies and social interests. However, despite an outpouring of literature advocating same-sex marriage, the evidence that legalizing same-sex marriage or some equivalent domestic status would effect an overall improvement in the institution of marriage or in society is lacking.[5] Indeed, there are substantial indications that legalizing same-sex marriage would undermine some of the important social purposes for marriage and would ultimately harm society.

I have argued elsewhere that claims that the United States Constitution mandates legalization of same-sex marriage are unsupported by the text, history, or precedents interpreting the Constitution, or any viable interpretation of constitutional doctrine.[6] Of course, just because the Constitution does not mandate legalization of same-sex marriage does not end the discussion; lawmakers may adopt laws that are not constitutionally mandated if they are not constitutionally forbidden, and it has not yet been suggested that the U.S. Constitution forbids the legalization of same-sex marriage.[7]

---

5. To date, few advocates of same-sex marriage have attempted any "comparable contributions" analysis. *See* ESKRIDGE, *supra* note 2; STRASSER, *supra* note 2; SULLIVAN, *supra* note 2.

6. *See Constitutional Claims*, *supra* note 2.

7. The constitutions of more than 40 countries and several international conventions contain provisions protecting marriage, the family, or family life that might be interpreted to forbid same-sex marriage. *See* WILLIAM C. DUNCAN, MARRIAGE AND FAMILY IN NATIONAL CONSTITUTIONS 1-7 (1999) (copy on file with author). *See generally* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 112 (1995) (citing German, French, Dutch, and European Court of Human Rights decisions upholding under such provisions discrimination between marriage and same-sex couples). The United States Constitution does not have any such provision, but six American states have constitutional provisions that refer to marriage. *See* ALASKA CONST. art I, § 25; ARIZ. CONST. art. XX, para. 2; GA. CONST. preamble; HAW. CONST. art. I, § 23; N.M. CONST. art. XXI, § 1; UTAH CONST. art. III. Based on those state constitution provisions or upon U.S. Supreme Court cases interpreting the term "liberty" in the Fourteenth Amendment to protect various aspects of family "privacy," an argument might be made that the

Moreover, constitutional claims for same-sex marriage may turn on an assessment of the comparative contribution of traditional heterosexual marriages and of same-sex unions to the social interests that underlie marriage laws, and how important those interests are to society.[8]

If the legalization of same-sex marriage were clearly shown to contribute to the social interests and policy purposes that underlie traditional marriage, then, of course, lawmakers could rationally choose to legalize same-sex marriage; but if not, that choice would be arbitrary and suspect. Moreover, if same-sex unions do not contribute to the essential social purposes of traditional marriage, a state that confers the legal status of *marriage* upon same-sex unions commits fraud when it presents a false image of same-sex unions as comparable to traditional marriage.[9] This undermines the institution of marriage by implicitly denying and devaluing the unique strengths and unequaled contributions of heterosexual marriage to the critical social interests it serves, and it impairs the integrity of the law.

This Essay demonstrates that advocates of same-sex marriage are unlikely to be able to establish that committed same-sex unions are capable of matching the potential and actual contributions made by heterosexual unions (traditional marriages), and for that reason same-sex marriage should not be legalized. Part I.B distinguishes the social interests (or groups of interests) in marriage from individual interests in marriage and identifies eight profound social interests in the fundamental purposes of marriage, towards which traditional

---

heterosexual aspect of marriage is an essential element of constitutionally protected marriage. However, that is beyond the scope of this Essay, and I do not intend to develop such an argument here.

8. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court ruled that Colorado Constitutional Amendment Two, which attempted to bar the enactment of state or local legislation that would extend specific protection to gays and lesbians, was not "directed to any identifiable legitimate purpose or discrete objective," and that the law did not "bear a rational relationship to a legitimate governmental purpose." *Id.* at 635. While Amendment Two is clearly distinguishable from exclusive traditional marriage laws, *Romer* underscored the importance of identifying the legitimate purposes of laws that deny legal status or benefits on the basis of homosexual relations, and the necessity of explaining the relationship such laws have to those purposes.

9. *See* POSNER, *supra* note 2, at 312 ("[I]t would be misleading to suggest that homosexual marriage are likely to be a stable or rewarding as heterosexual marriages . . . . [P]ermitting homosexual marriage would place government in a dishonest position of propagating a false picture of the reality of homosexual's lives.").

male-female unions historically have contributed much more than same-sex unions conceivably could. The remainder of the Essay compares traditional heterosexual unions with same-sex unions with an emphasis on the social interests promoted and the purposes achieved. Parts II and III present some of the evidence of the unparalleled contributions of heterosexual marriage to achieving social interests relating to responsible procreation. Part IV reviews some of the arguments why same-sex unions are incapable of making comparable contributions. Part V reviews and responds to criticisms of marital procreation policy arguments for exclusively heterosexual marriage, including the Vermont Supreme Court's analysis of this issue in *Baker v. State*.[10]

The focus of this discussion is exclusively upon extending marital or marriage-like status and benefits to same-sex couples. This Essay does not dispute that two men or two women may share a deep, meaningful, personal relationship with each other, support each other, develop and pursue mutually fulfilling, socially beneficial, common interests, make strong commitments to each other, and in many ways be as good partners and as good citizens as persons in heterosexual marriages. Those same-sex relationships traditionally have been referred to by such terms as "friendship," "brotherhood," "sisterhood," "companionship," "fellowship," and "camaraderie," which do not necessarily connote any sexual relations. Throughout history there have been sterling examples of wonderful, socially useful, deep, non-sexual friendships between persons of the same sex. Such meaningful friendships undeniably merit social approval and encouragement. However, those relationships are not the same as marriage, nor have they ever before needed to be labeled *marriages* to be socially beneficial. This Essay maintains that giving marital status to same-sex couples is not necessary for such socially beneficial same-sex relationships to flourish, is not justified in terms of the purposes of marriage, and would further undermine the institution of marriage at a time when it is in great need of revitalization and support.

10. 744 A.2d 864 (Vt. 1999).

B. The Social Purposes of Marriage and the Unique Contributions of Heterosexual Marriage

The interests of society in marriage and the family justify some substantial regulation of intimate interpersonal relations. Aristotle taught that it was the *first* duty of legislators to establish rules regulating entrance into marriage.[11] Historically, societies have given unique and special preference to heterosexual marriage because of the benefits the institution provides for society in general and for individual women, men, and children in particular. Society's profound social interests in promoting this particular form of companionate relationship endure, even though we may choose to tolerate many other kinds of relationships.

1. Distinguishing Social Interests in Marriage from Individual Interests in Marriage

There is a significant difference between the private or individual interests in marriage and the social or public interests in marriage.[12] The difference lies in the perspective from which marriage is viewed; the former focuses on an individual's or small group's personal benefits and burdens while the latter views marriage from the perspective of the benefits and burdens flowing from the marital relationship to members of society as a whole. The social interest also secures individual interests, but focuses on the interests which the individual members of society share in common with each other. Private individual interests are the highly personalized desires and preferences that particular individuals or small groups of individuals pursue.

Marriage laws are enacted to secure public, not private, interests.[13] This is true because legal marriage is a public institution, created by law to promote public policy and to further social interests. Thus, marriage law is not (at least,

11. *See* Aristotle, *Politica*, *in* THE WORKS OF ARISTOTLE 1334-1335 (W.D. Ross ed., Oxford Univ. Press 1921).

12. *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916) ("It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions.").

13. *See id.* ("This social interest [in marriage] must play an important part in determining what individual interests in such relations are to be secured, how far they are to be secured and how they are to be secured.").

should not be) enacted simply to promote private or personal interests. Rather, marriage law should protect and promote only those individual interests that are shared in common with society as a whole, i.e., social interests.

Throughout history, the interests of society in marriage and the family have justified substantial regulation of intimate interpersonal relations. Dean Pound suggested that "[f]rom the beginning the social interest in general security has required that the law secure adequately" marriage to protect basic social interests in economic equity and in preventing interpersonal violence in society.[14] Likewise, other scholars, philosophers, and legal and social commentators have emphasized throughout the ages the social purposes of marriage, including procreation, child rearing, channeling sexual behavior, and economic stability, for example.[15] The critical point for the present discussion is that the justifications for and the purposes of legal regulation of marriage have consistently been to protect and promote general social interests, not private interests.

Contemporary legal literature contains surprisingly little serious scholarship discussing the social interests underlying laws regulating marriage. Perhaps this is because the overwhelming trend of developments in American family law during the past thirty years has emphasized the autonomous individual's interest in family relations.[16] For example, the paradigmatic statement of the individualistic view of marriage is Justice Brennan's oft quoted dictum from *Eisenstadt v. Baird*, that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[17] While even this statement can be read with reference to the interests of husband and wife that are mutual, reciprocal, and shared with society in general, most

14. *Id.* at 178.

15. *See infra* Parts II and III.

16. *See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); *see also* Bruce C. Hafen, *The Family As an Entity*, 22 U.C. DAVIS L. REV. 865, 866-868, 905-909 (1989).

17. 405 U.S. 438, 453 (1972). In *Eisenstadt*, the Court struck down a restriction upon the sale of contraceptives to unmarried persons.

commentators read it to emphasize the centrifugal and separate private interests. Prolonged excessive accentuation of individualism in marriage can be cancerous, and can destroy not only a marriage but also the sense of community and respect for the institution of marriage that is essential to the survival of our society.[18]

Reflecting our culture's predominant concern with protecting and promoting individual autonomy, most arguments for same-sex marriage emphasize the individual interest in marriage and argue from *that* perspective that there is no difference between heterosexual marriage and same-sex marriage.[19] The social interests in marriage and in the proposed legalization of same-sex marriage have been largely neglected. That is a major flaw in most arguments for legalizing same-sex marriage because the primary purpose of marriage laws has been and should be to regulate marriage in the public interest, not to promote any individual's or any particular class's private interests. Thus, the assertion of various arguments that legalizing same-sex marriage will enhance the lives or lifestyles of gay or lesbian individuals, or of gays and lesbians as a special class, simply misses the target. What must be demonstrated, rather, is whether (and, if so, how) legalizing same-sex marriage will contribute to promoting the *public* interests in marriage, and to achieving the social policy purposes for which laws establishing marriage have been enacted.

2. Overview of the Social Interests in and Public Purposes of Legal Marriage

There are several important public interests in and social purposes for traditional marriage. At least eight social interests (or groups of interests, since all of these interests are multifaceted) for marriage can be identified that relate to proposals for legalizing same-sex marriage or domestic partnership. These include (1) safe sexual relations;

18. *See generally* ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART vii (1985), *quoted in* Hafen, *supra* note 16, at 866-868; *see also* MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); JACUES MARITAIN, THE PERSON AND THE COMMON GOOD 15, 43 (1972).

19. *See, e.g.*, ESKRIDGE, *supra* note 2, at 91.

(2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating interjurisdictional compatibility.

On the basis of history and common experience across cultures, advocates of preserving marriage exclusively for male-female couples may reasonably assert that committed heterosexual unions we call marriages make unique and important contributions to achieving the public and social purposes of marriage. Committed heterosexual unions of marriage seem to provide the best setting for the safest and most beneficial expression of sexual intimacy. Heterosexual marriage also appears to provide the best environment into which children can be born.[20] Heterosexual marriage reasonably may be assumed to provide the most advantageous environment in which children can be reared, providing profound benefits of dual gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender. Heterosexual marriage has been believed to provide the most enriching and liberating relationship to facilitate human adults to personally develop and achieve their fullest potential. Historically, it has long been believed that heterosexual marriage provides the best security for those who take the greatest risks and invest the greatest personal effort in establishing and maintaining families, especially wives and mothers. Heterosexual marriage appears to provide the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills, and reflects the understanding of marriage that has been constant across cultures and throughout history.

Marriage is of such profound importance to society that there is great danger if its meaning and definition become ambiguous. Heterosexual marriage arguably provides the best seedground for democracy, the most important schoolroom for self government, the most important wellspring of (and testing

20. *See infra* Part III.C.

ground for) civic virtue, and the most valuable unit of social organization. Heterosexual marriage facilitates inter-jurisdictional comity and intercultural understanding in many ways that would be threatened by legalizing same-sex marriage.[21] Thus, defenders of traditional marriage laws assert that heterosexual marriages contribute much more to the social interests in legalized marriage than do same-sex unions, and overall the benefits and value of heterosexual marriages to society far exceed those of same-sex unions. Thus, from the perspective of the social interests and public purposes that underlie the legal status of marriage, the claim that same-sex unions are equivalent to heterosexual marriage fails.

II. SOCIETY HAS PROFOUND INTERESTS IN RESPONSIBLE PROCREATION

The first three public purposes of marriage—the social interests in safe sex, responsible procreation, and optimal child rearing—are closely linked in our laws and social policies, just as they are closely linked in life. They are linked by human nature—"the ties of nature" as Blackstone put it.[22] Human nature, however, is imperfect, and those ties are imperfect ties, which is why the law attempts to reinforce them.

In this Essay, there is room only to consider one of these interests: procreation. The balance of this Essay presents some of the evidence and analysis showing the importance of the contributions of traditional male-female marriage to the social interests in procreation, to suggest why it is very unlikely that advocates of legalizing same-sex marriage can show that same-sex unions make comparable contributions to achieving social interests in procreation. While the following discussion is neither exhaustive nor comprehensive, it illustrates the wealth of material, generally overlooked in the current same-sex marriage debate, that supports the policy of exclusively heterosexual marriage.

Society has a compelling interest in preserving the institution that best advances the social interests in responsible

21. *See generally* Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L. Q. 497 (1995); Lynn D. Wardle, *International Marriage Recognition: A World Dilemma*, *in* FAMILIES ACROSS FRONTIERS 75 (Nigel Lowe & Gillian Douglas eds., 1996).

22. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *457.

procreation, and that institution is traditional male-female marriage.[23] The elements of this social interest (each a social interest in itself) can be quickly identified and summarized. The social interests in procreation that are furthered by laws defining marriage as exclusively male-female unions include (1) perpetuation and survival of the species, (2) public health and child welfare, (3) linking procreation with child rearing and connecting parents to offspring, and (4) protecting the social order and social institution that best fosters responsible procreation.

The first social interest in responsible procreation is the perpetuation of human society: survival through reproduction. New generations must be procreated if any society is to continue, and human procreation requires the union of male and female.[24] Neglect of this social interest risks a demographic implosion.[25] Irresponsible procreative behavior could have devastating consequences. The Supreme Court has long recognized that procreation for social survival is a compelling social interest deserving of special recognition, calling it "fundamental to the very existence and survival of the race" closely linked with "one of the basic civil rights of man."[26]

The interest in procreation also extends to concern for the public health and particularly for the welfare of coming generations. Irresponsible procreative behavior by persons afflicted with some serious diseases or genetic conditions may result in the birth of children afflicted with severe health problems, including deadly diseases[27] and blindness.[28] Concern

23. "Responsible procreation" is procreation by parents who share a clear, firm, permanent commitment to each other and to the protection and care of children who are the offspring of their procreative union.

24. Even the most advanced techniques require the biological union of male and female. Asexual human cloning is not yet possible, nor is it on the likely to be in the foreseeable future.

25. *See generally* BEN J. WATTENBERG, THE BIRTH DEARTH 6-8 (1987); *see also* Thomas Molnar, Causes of Demographic Implosion in Late Twentieth Century, World Congress of Families, http://www.worldcongress.org/WCF1/speakers/thomas_molnar.htm (last visited Apr. 17, 2001).

26. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *cf.* Zablocki v. Redhail, 434 U.S. 374, 383, 385 (1978); Maynard v. Hill, 125 U.S. 190, 210 (1888).

27. *See* Bob Sisson, *Numbers Tell Story: AIDS Isn't Going Away*, THE COLUMBIAN, Feb. 13, 1997, at B1 (15-20% of babies born to HIV-infected mothers are also infected); Leslie Sowers, *Babies Who May Never Grow Up: At least 100 Houston Babies Carry the Threat of AIDS*, HOUSTON CHRONICLE, Apr. 23, 1989 (estimates of 10,000-20,000 babies born with AIDS in 1992); *see also* Ilene Barth, *Answering the Cries of Babies with AIDS*, NEWSDAY, Feb. 21, 1988.

about healthy procreation has been a public concern throughout the past century, from the days of coercive sterilization to the latest Supreme Court abortion decisions.[29] While some of the means adopted to further this state interest have been dubious, even unjustified, there can be no doubt that there is a strong and well established social interest in protecting the physical health of future generations.

Society also has an interest in linking procreation to child rearing. Because human childhood dependency is long lasting (legally presumed to last eighteen years) and labor intensive, the social consequences of procreation are substantial. Children must be properly fed, clothed, emotionally nurtured, educated, and socialized. Irresponsible procreation by persons who are not prepared for and/or not committed to fulfilling the long term obligations of parenthood risks the imposition of severely restrictive life impediments upon children, and significant burdens upon society. Addressing one of those burdens, Congress requires the states to enact strict laws for identification, imposition and collection of child support obligations upon men who are mere biological sires, who have engaged in recreational sex without intending to become fathers.[30] Thus, the third important social interest in procreation is to ensure that persons whose sexual behavior has resulted in the procreation of human children accept and fulfill the responsibility of parenting the children they have generated.

Social order is a fourth social interest in responsible procreation. Human procreation generally involves the powerful passions of sexual and biological relationships.[31]

---

28. *See* Laura T. Gutman & Catherine M. Wilfert, *Gonococcal Diseases in Infants and Children, in* SEXUALLY TRANSMITTED DISEASES 803-810 (King K. Holmes et al., eds. 1990) (reporting on effects of "worldwide epidemic" of certain gonococcal diseases in infants and children which cause, *inter alia*, blindness); Rachelle Kanigel, *Gonorrhea, Syphilis on Rise in N.C.: Experts Concerned that Increase Presages a Surge in AIDS Cases*, NEWS & OBSERVER, Nov. 6, 1991 (noting that syphilis can cause blindness, hearing problems and death); Joann Schulte, *Venereal Disease's Innocent Victims: Number of Kids Infected by Their Mothers Rising*, DALLAS MORNING NEWS, Dec. 9, 1985, at C1 ("Chlamydia, currently the No. 1 sexually transmitted disease, causes eye infections and pneumonia in more than 100,000 infants each year.").

29. *See generally* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 1-6, 23-24 (1996).

30. *See* 42 U.S.C. §§ 666-67 (2000).

31. *See generally* WILL DURANT & ARIEL DURANT, THE LESSONS OF HISTORY 35-

Uncertainty about or interference with a relationship involving a heterosexual partner or offspring have historically generated much conflict and violence.[32] Plato referred to the social need for "sacred marriages" as a bulwark against the evil of promiscuity.[33] In the absence of clear, unambiguous social rules concerning procreation, there will be irresponsibility, conflict, moral confusion, and violence. Society has an interest in preserving marriage as the institution which has best fostered the social ends of responsible procreation.

III. TRADITIONAL MALE-FEMALE MARRIAGE BEST PROTECTS AND SIGNIFICANTLY FURTHERS THE STATE'S INTERESTS IN RESPONSIBLE PROCREATION

Traditional male-female marriage is the institution that has functioned most consistently to facilitate, support and protect responsible human procreation. Deep historic and cultural linkage connects marriage with procreation. Society has compelling interests in protecting the social institution that has best furthered social interests in procreation, in maintaining the clear social identity of that institution, and in preserving the linkage that institution forges among sex, procreation, and child rearing.

The social connection linking marriage and procreation is as old as marriage itself.[34] Indeed, implicit in the very word

36 (1968) ("[S]ex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group."); Planned Parenthood v. Danforth, 428 U.S. 52, 93 (1976) (White, J., dissenting) ("A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.").

32. For a modern variation of this, see Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741 ("[T]he continued existence of pervasive serious violence associated with divorce-related litigation a quarter of a century after the adoption of no-fault divorce laws defies the claims and expectations of no-fault divorce reformers.").

33. PLATO, THE REPUBLIC, *in* COMPLETE WORKS 1086 (John M. Cooper ed., G.M.A. Grube trans., Hackett Publishing Co. 1997). Plato also referred to the human need to "partake of the eternal coming-into-being of nature by always leaving behind children of children," PLATO, THE LAWS OF PLATO 161 (Thomas L. Pangle trans., University of Chicago Press 1980), and recommended penalties for *not* procreating. *See id.* at 108-109.

34. *See* WILLIAM J. GOODE, READINGS ON THE FAMILY AND SOCIETY 32 (1964) ("[C[ross-culturally it can be seen that illegitimacy is disapproved even when young people are given much sexual freedom. Obviously, most societies view the consequences of illegitimacy as greater than those of premarital sexual freedom."); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 542 (1983); IV MAX RHEINSTEIN & RENE KONIG, INTERNATIONAL ENCYCLOPEDIA OF

matrimony is the idea that a man and a woman unite in legal marriage, *in matrimonium ducere*, so that they may have children.[35] Plato proposed that "marriage laws [be] first laid down" and that "a penalty of fines and dishonor" be imposed upon all who did not marry by certain ages because "intercourse and partnership between married spouses [is] the original cause of childbirths."[36] Likewise, Aristotle recommended that marriage regulations would be the first type of legislation "[s]ince the legislator should begin by considering how the frames of the children whom he is rearing may be as good as possible . . . ."[37] Similarly, concern about the linkage between marriage and responsible procreation was one of the major purposes for marriage regulation in Roman law.[38] During the centuries following the Roman era, the primary intellectual justification for marriage and marriage regulations has remained the fostering responsible human reproduction.[39] Procreation is the social interest underlying Rousseau's declaration that: "Marriage . . . being a civil contract, has civil consequences without which it would be impossible for society itself to subsist."[40] Locke agreed, and linked "the increase of Mankind, and the continuation of the Species in the highest perfection," with "the security of the Marriage Bed, as necessary thereunto."[41] In the law, as in human tradition, marriage and procreation have been strongly linked. Indeed, the history of marriage regulation itself could be viewed primarily as the history of the regulation of sex, procreation, and child rearing, for those concerns have long outweighed

---

COMPARATIVE LAW 38 (1973).

35. SUSAN TREGGIARI, ROMAN MARRIAGE: *IUSTI CONIUGES* FROM THE TIME OF CICERO TO THE TIME OF ULPIAN 5 (1991).

36. PLATO, THE LAWS OF PLATO, *supra* note 33, at 108.

37. ARISTOTLE, *supra* note 11.

38. *See* TREGGIARI, *supra* note 35, at 5-11.

39. *See, e.g.*, CALVIN'S WISDOM 204 (J. Graham Miller ed., 1992) ("Marriage is the preservation of the human race."); ST. AUGUSTINE, SEVENTEEN SHORT TREATISES OF ST. AUGUSTINE, BISHOP OF HIPPO 278 (Oxford, Parker & Rivington eds., 1848) ("Marriages have this good also, that carnal or youthful incontinence, although it be faulty, is brought unto honest use in the begetting of children, in order that out of the evil of lust the marriage union may bring to pass some good."); MARTIN LUTHER'S BASIC THEOLOGICAL WRITINGS 635 (Timothy F. Lull ed., 1989) ("[M]arriage produces offspring, for that is the end and chief purpose of marriage.").

40. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 187 (Penguin Books 1968) (1762).

41. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 183 (Cambridge Univ. Press 1988) (1690).

such modern (and postmodern) interests as romantic love, companionate equality, interspousal intimacy, and economic maximization as the core societal concerns regarding marriage.[42]

Our courts have long recognized that the state's interest in responsible procreation is closely linked to marriage and merits special constitutional recognition. The Supreme Court noted more than a century ago:

> [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[43]

In *Skinner v. Oklahoma,* the Court reiterated the linkage between marriage and procreation when, in invalidating a law authorizing the sterilization of habitual criminals, it declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[44] Justice Harlan suggested the constitutional importance of the link between marriage and procreation when he noted,

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . [and] confin[e] sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.[45]

---

42. *See generally* WILL DURANT, THE REFORMATION: A HISTORY OF EUROPEAN CIVILIZATION FROM WYCLIF TO CALVIN: 1300-1564 at 303 (1957) ("Love was considered a normal result, not a reasonable cause, of marriage."); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); WILLIAM J. GOODE, WORLD REVOLUTION AND FAMILY PATTERNS 38 (1963); LAWRENCE STONE & JEANNE STONE, AN OPEN ELITE? ENGLAND 1540-1880 at 122 (1984); *see also* Lawrence Stone, *Sex in the West,* THE NEW REPUBLIC, July 8, 1985, at 25, 32. *But see* Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life,* 1994 UTAH L. REV. 587, 590-92.

43. Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

44. 316 U.S. 535, 541 (1942).

45. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (referring to McGowan v. Maryland, 366 U.S. 420 (1961)).

In its landmark decision addressing the right to marry, the Supreme Court reiterated this linkage between marriage and procreation when it repeated in *Loving v. Virginia* that marriage is "fundamental to our very existence and survival."[46] Later, in *Zablocki v. Redhail,* the Court reiterated the marriage-procreation link, noting that marriage is linked to "procreation, childbirth, [and] child rearing."[47] Marriage and procreation also have been linked in several other Supreme Court cases involving fundamental constitutional rights (e.g., privacy)[48] and liberties.[49] Procreation is also still recognized by state courts and legislatures to be one of the principal purposes of marriage.[50]

Of course, not all methods of protecting the state interests in marital procreation are permissible.[51] Nevertheless, the Court has never repudiated the linkage noted in its declaration that "if [the] right to procreate means anything at all, it must imply some right to enter the only relationship [marriage] in which the State . . . allows sexual relations legally to take place."[52]

A. Marriage Furthers Social Interests in Procreation for Survival

Our courts have long recognized that marriage is closely linked with the specific social interest in procreation for survival. More than a century ago, in *Maynard v. Hill,* the Court noted that marriage "is the foundation of the family and of

46. 388 U.S. 1, 12 (1967).

47. 434 U.S. 374, 386 (1978).

48. Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

49. *See, e.g.,* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

50. *See, e.g.,* HAW. REV. STAT. § 572-7 (1993); Constant A. v. Paul C.A., 496 A.2d 1, 6 (Pa. Super. Ct. 1985); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974); Baker v. Nelson, 191 N.W. 2d 185, 186 (Minn. 1971).

51. *See, e.g.,* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating law forbidding distribution of contraceptives to persons sixteen years old or younger); Trimble v. Gordon, 430 U.S. 762, 769 (1977) (states may not "attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."); Levy v. Louisiana, 391 U.S. 68 (1968) (holding same); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating law forbidding distribution of contraceptives to unmarried persons).

52. Zablocki, 434 U.S. at 385.

society, without which there could be neither civilization nor progress."[53] In *Skinner*, the Court emphasized the link between procreative survival and marriage when it observed that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[54] The Supreme Court reiterated this linkage when it declared in *Loving* that marriage is "fundamental to our very existence and survival."[55] Further, the *Zablocki* Court subsequently reiterated the maxims of *Maynard*, *Skinner*, and *Loving*.[56]

B. Marriage Enhances Social Interests in Procreative Health and Children

American lawmakers have long regulated marriage in the interest of procreative health. Indeed, marriage regulation has been the principal tool to prevent dysgenic reproduction. For example, marriage laws have forbidden marriage of persons who are closely related (because, *inter alia*, the risk of hereditary birth defects is deemed unacceptable).[57] Medical testing for "loathsome diseases" (historically so called) has often been required for marriage licenses, in order to protect the health future generations as well as of spouses.[58] Likewise, restrictions on marriage by persons deemed "unfit" for other eugenic reasons, ranging from perceived mental deficiency to alleged racial inferiority to presumed moral inadequacy, have a long history.[59] While that history has not always been noble, and many abuses have been inflicted upon unpopular minorities because of the misguided zeal of eugenicists,[60] even the history of the tolerance of those abuses attests to societal recognition of the importance of the social interest in

53. 125 U.S. 190, 211 (1888).

54. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

55. Loving v. Virginia, 388 U.S. 1, 12 (1967).

56. *Zablocki*, 434 U.S. at 384.

57. 1 CONTEMPORARY FAMILY LAW §§ 2:04-2:10 (Lynn D. Wardle, Christopher L. Blakesley & Jacqueline Y. Parker eds., 1988) [hereinafter CONTEMPORARY FAMILY LAW]; *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 314 (6th ed. 1881); 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 38 (1931).

58. CONTEMPORARY FAMILY LAW, *supra* note 57, at § 2:47.

59. *See id.* at §§ 2:22-2:26 (mental incapacity); *id.* at § 2:49 (miscegenation laws and laws restricting prisoners from marrying). *See generally* Lombardo, *supra* note 29, at 2, 19-23.

60. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927); Lombardo, *supra* note 29, at 6-12.

procreative health.

Social interests in healthful procreation are furthered in other ways by marriage. While procreation is physically possible outside of marriage (indeed, without any relationship or sexual intimacy), the survival and health of children born and raised outside of marriage is at greater risk than the health of children born and raised in marriage.[61] Children born out of marriage are at high risk of being raised out of marriage, where the risks of child abuse, sexual abuse, and life threatening violence are much greater.[62] The natural commitments, restraints, complementarity, and shared responsibilities of traditional marriage create the best environment into which offspring may be born.

Ironically, America at the end of the twentieth century seems to be experiencing simultaneously both demographic implosion and explosion dilemmas. On one hand, birth rates in this country and in many others have fallen to below replacement levels,[63] raising the specter of a future ratio of dependent aged (mostly retired) persons to working aged Americans that portends burdens upon the national economy.[64]

---

61. Procreation outside of marriage is strongly associated with poverty, *see infra* note 70 and accompanying text, and poverty is directly linked to poor health for children. *See generally* Laura E. Montgomery, John L. Kiely & Gregory Pappas, *The Effects of Poverty, Race, and Family Structure on U.S. Children's Health: Data from the NHIS, 1978 through 1980 and 1989 through 1991*, 86 AM. J. PUB. HEALTH 1401, 1403 (1996) ("Overall, in 1989 through 1991, children in single-mother families were 2.6 times as likely to have fair/poor health as children in two-parent families.").

62. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 39-42 (1995) (children without fathers are more likely to be victims of child physical and sexual abuse); Catherine M. Malkin & Michael E. Lamb, *Child Maltreatment: A Test of the Sociobiological Theory*, 25 J. COMP. FAM. STUDIES 121, 129 (1994) (nearly 70% of children live with two parents, but those children account for only 28% of the child abuse; 25% live with single mothers, and those children account for 44% of the abused children population); Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 545 (1992) (mothers' boyfriends perform less than 2% of child care, but are "responsible for about half the child abuse committed by nonparents in caregiving roles"); *see also* BLANKENHORN, *supra*, at 26-32 (children without fathers are also more likely to be involved in youth violence than children with fathers in the home).

63. *See* Bernard Guyer, Donna M. Strobino, Stephanie J. Ventura, Marian MacDorman & Joyce A. Martin, *Annual Summary of Vital Statistics—1995-98*, PEDIATRICS, Dec. 1, 1996 (birth rate per 1000 women fifteen to forty-four declined for tenth year in a row in 1995); Boyce Rensberger & Philip J. Hilts, *Birthrate in U.S. Remains Below Replacement Level*, WASH. POST, Oct. 27, 1986 (US birth rate fell below replacement level in 1970s and had not recovered); *see also infra* note 108 and accompanying text.

64. *See* Martin Lyon Levine, *Introduction: The Frame of Nature, Gerontology, and*

On the other hand, the rate of children born out of wedlock in this country has reached unprecedented levels (over 30% of all children born in the U.S., exceeding two-thirds of all births in some population subgroups),[65] with associated increases in juvenile delinquency, crime, educational failures, poverty, and welfare distress.[66]

It is undeniable that children born out of wedlock are born to disadvantaged lives, so disadvantaged that their very existence for centuries was deemed *illegitimate*—contrary to the policy of the law and society. The history of the legal status and regulation of illegitimacy undeniably demonstrates the long and profound concern of the state in the circumstances of procreation.[67] No longer does the law stigmatize these children with the burden of the label or discriminatory status of illegitimacy, but the formal "abolition of illegitimacy" in American law does not mean that society no longer is concerned about or willing to regulate procreation to encourage birth within marriage—rather, only that the historical practice of inflicting upon the children the social stigma and legal disabilities resulting from their parents' irresponsible procreative behavior is no longer deemed acceptable.[68]

Law, 56 S. CAL. L. REV. 261 (1982); Erin E. Lynch, *Late-Life Crisis: A Comparative Analysis of the Social Insurance Schemes for Retirees of Japan, Germany, and the United States*, 14 COMP. LAB. L.J. 339, 340, 366-67 (1993) (significant increase in retired-to-worker populations may create social pressures); Lynn D. Wardle, *Suicide Among the Elderly: A Family Perspective, in* AN AGING WORLD 683, 684, 686 (1989). *But see* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 692-694 (1991) (noting but questioning the assumption that growing numbers of aged will mean financial dependency burdens for the rest of society); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (increase in elderly dependency ratio may be offset be decrease in youth-dependency ratio).

65. *See* U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 74, tbl. 91 (in 1993, 31% of all births were out of wedlock, including 68.7% of all births to African-American women); *cf. id.* at 79, tbl. 98 (in 1970, 10.7% of all births were out of wedlock, including 37.6% of those to African-American women).

66. *See infra* notes 70-72; *see also* William J. Clinton, Remarks by the President to Officials of Missouri and Participants of the Future Now Program (June 14, 1994), *available at* 1994 WL 258369 at *4.

67. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *454 ("The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong . . . ."); *see also* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 149-203 (2d ed. 1988) (history of illegitimacy in Anglo-American law).

68. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) ("[W]e have invalidated

The continuing reality of the profound disadvantages for children born out of wedlock in our day has been repeatedly demonstrated. "[M]ost scholars and professionals who have looked at the data agree that childhood problems are disproportionately present in children in one parent, never married families . . . . Children in these families are worse off, on the average, on practically every indicator of social and psychological well being, and their future economic and educational prospects are dimmer."[69] Thus, many anti-poverty welfare statutes manifest preference for procreation within marriage for the sake of the children.[70] Both conservative

---

classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents"); Trimble v. Gordon, 430 U.S. 762, 769-770 (1977) ("No one disputes the appropriateness of . . . concern with the family unit, perhaps the most fundamental social institution of our society. . . . [but while] parents have the ability to conform their conduct to societal norms . . . their illegitimate children can affect neither their parents' conduct nor their own status."); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.").

69. William J. Doherty, *The Best of Times and the Worst of Times: Fathering as a Contested Arena of Academic Discourse, in* GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES 217, 218 (Alan J. Hawkins & David C. Dollahite eds., 1997); *see also* DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY *passim* (1996).

70. *See* Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 488-89 (1995).

> Welfare reform proposals tackle the problem of poverty by attempting to control personal decisions of welfare recipients. Welfare reform proposals currently under consideration at both the federal and state levels include provisions limiting the living arrangements of minors receiving AFDC cash grants, increasing paternity requirements, and denying AFDC for children born out of wedlock to mothers under the age of eighteen unless they legally marry the biological father or someone who legally adopts the child. Virtually every proposal imposes some new constraints on the life choices of AFDC recipients. Many proposals limit the reproductive choices of these women.

Id. (citations omitted); *see also* Linda M. Merritt, *Birth Control Incentives for Welfare Mothers*, 3 KAN. J.L. & PUB. POL'Y 171, 174 (1994) (discussing experimental use of Norplant to reduce births to single welfare mothers); Robert Rector, *Fighting Behavioral Poverty*, 1 GEO. J. ON FIGHTING POVERTY 69, 69-70 (1993) (discussing relationship between "behavioral poverty" and welfare programs, and noting: "High welfare benefits to single mothers directly contributed to the rise in illegitimate births. Research . . . found that one-half of the increase in black illegitimacy in recent decades could be attributed to the effects of welfare." (citation omitted)). The linkage among marriage, procreation, and public poverty is hardly new. *See* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 516 (1937) (noting social concern about "reduction in the number of marriages, deterioration of family life, decline in the birth rate, [and] increase in illegitimate births" justified Alabama's unemployment compensation law); 1 WILLIAM BLACKSTONE,

governmental programs aimed at teaching "abstinence" from sexual relations until marriage,[71] and liberal governmental programs designed to encourage use of contraception (and even abortion) by unmarried teens[72] also manifest the public policy linking marriage and procreation. Thus, the connections among marriage, procreative health and child welfare are clear.

C. Marriage Strengthens the Prospective Parent-Child Bond Connecting Parents to Procreative Offspring

Traditional marriage facilitates procreation by increasing the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation.[73] The power of marriage to strengthen the connection and commitment of prospective parents to their offspring has long been acknowledged by social science in the case of men, for in our culture "men's relations with their children are dependent to a significant extent on their relations with the child's mother. . . . the prevailing cultural assumption in the United States is that fatherhood and marriage are . . . a 'package deal.'"[74] Men in contemporary society tend to relate to their children through their wives, and when that tie to their wives is severed or nonexistent, their commitment to their children is weakened. There also is some evidence that this is true for mothers.[75] The

---

COMMENTARIES ON THE LAWS OF ENGLAND *454-59 (linking legal doctrine of illegitimacy and concern for the welfare of the poor).

71. *See, e.g.*, Kendrick v. Bowen, 657 F. Supp. 1547, 1558 (D.D.C. 1987), *rev'd on other grounds*, 487 U.S. 589 (1988); Louis W. Sullivan, *The Doctor's Rx for America's Troubled Children . . . Strengthen the American Family*, 2 KAN. J.L. & PUB. POL'Y 5, 9 (1992).

72. *See, e.g.*, Clinton, *supra* note 66; *see also* Joseph A. Olsen & Stan E. Weed, *Effects of Family-Planning Programs for Teenagers on Adolescent Birth and Pregnancy Rates*, 20 FAM. PERSPECTIVE 153 (1986) (describing federal programs that emphasize contraception in order to teen births out of wedlock); Stan E. Weed, *Curbing Births, Not Pregnancies*, WALL ST. J., Oct. 14, 1986, *available at* 1986 WL-WSJ 250870. *See generally* Larry Cata Backer, *Welfare Reform At the Limit: The Futility of "Ending Welfare As We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339, 342 n.17 (1995) ("Both liberals and conservatives speak in moral terms about the 'crisis' of welfare. President Clinton, for example, speaks about 'the fact that we have a big welfare problem because the rate of children born out of wedlock, where there was no marriage, is going up dramatically.' . . . The underlying theme of the [Congressional Republicans' Personal Responsibility Act] is the same." (citations omitted)).

73. *See* PITIRIM A. SOROKIN, THE AMERICAN SEX REVOLUTION 77-105 (1956).

74. Doherty, *supra* note 69, at 222-223 (citation omitted); *see also* Joan Frigole Reixach, *Procreation and Its Implications for Gender, Marriage, and Family in European Rural Ethnography*, 71 ANTHROPOLOGICAL Q. 32, 35-38 (1998).

75. *See* Doherty, *supra* note 69, at 222.

loosening of marriage ties has been a (if not *the*) major cause of the deterioration of childhood quality of life in America.

Family relationships do not begin with birth. The bond between mother and child develops in profound ways during pregnancy, both physically and emotionally.[76] The mother learns to accommodate herself to the special demands that maternity entails (and that increase upon childbirth). She learns to nurture the child, develops an emotional bond with the child, and begins to learn how to respond to the special dependence of the child on her. Her acceptance of the burdens and responsibilities of pre and postnatal maternity are eased if the father of the child is fully bound and committed to her and the child. Her assurance of his financial, legal and emotional support are greatly enhanced by marriage. So also the bond between father and child may develop powerfully during pregnancy, especially if the father is bonded to the mother of his child. The father begins to support the child by supporting the mother (his wife), steps forward to assist and encourage his wife in her (new) role as the mother of the child, and begins to learn to accommodate the special responsibilities which motherhood involves. By putting his ear to the pregnant mother's abdomen to "hear" the child, by putting his hand on her abdomen to "feel" the child kick, and by communicating his love for the child by his acts and expressions of appreciation for the mother, the father begins to develop an emotional bond with the unborn child that lays the foundation for the postnatal paternal relationship. Thus, for the sake of the child's bonds with its parents, procreation is best when it occurs within an existing, committed, permanent, complementary relationship between the child's father and mother—that is, within marriage.

D. Marriage Provides a Powerful, Natural Social Ordering Mechanism

Traditional marriage strengthens the social interest in channeling and limiting procreative sexual behavior to responsible relationships of parental commitment and

76. *See, e.g.*, REVA RUBIN, MATERNAL IDENTITY AND THE MATERNAL EXPERIENCE 38-39 (1984); *see also* Albert W. Liley, *The Fetus in Control of His Environment*, *in* ABORTION AND SOCIAL JUSTICE 27-36 (Thomas W. Hilgers & Dennis J. Horan eds., 1972).

complementarity. More clearly than any other institution, traditional male-female marriage clearly links sexual behavior with child rearing through procreation. It provides a bright line for relationships of intimacy. It provides a clear, well established, universally respected standard for allocating parental responsibility.

Traditional marriage, moreover, conforms to powerful (indeed intuitive) social mores linking marriage and the expectation of procreative fidelity. Laws restricting marriage to heterosexual couples reinforces these mores—long established in nature and in legal culture—and keeps bright and clear the boundaries of social order that protect responsible procreation.

While infertility was not a marriage defect in Anglo-American common law, concealment of procreative misbehavior or deception could render marriages invalid under the doctrine of "fraud going to the essentials of the marriage relation."[77] Thus, concealment of a pregnancy by a stranger traditionally has constituted grounds for annulment because of fraud going to the essentials of the marriage relation (procreative integrity).[78] Concealment of an intent not to have children also could render a marriage voidable.[79] Adultery has long established grounds for terminating marriage in Anglo-American law, even in the strictest periods of divorce regulation.[80] Marriage also has long been a primary means of identifying parents. The presumption that the husband of a

77. CONTEMPORARY FAMILY LAW, *supra* note 57, §§ 2:32-35. As the Connecticut Supreme Court declared, "the misrepresentations claimed by the party seeking an annulment [on grounds of such fraud must] be related to the sexual obligations of the marriage, that is, the ability or willingness to have sexual relations and the ability to bear children." Fattibene v. Fattibene, 441 A.2d 3, 6 (Conn. 1981).

78. *See, e.g.*, Symonds v. Symonds, 432 N.E.2d 700 (Mass. 1982); Milliken v. Milliken, 390 A.2d 934 (R.I. 1978). By the same token, concealment of an intent to have sex or father children out of wedlock (as where the groom has an ongoing affair with another woman and has made arrangements to continue the affair after marriage) should render the marriage voidable for the same reason as concealment of pregnancy out of wedlock.

79. *See, e.g*, Handley v. Handley, 3 Cal. Rptr. 910 (Cal. Ct. App. 1960). As a New York court wrote, "[w]here nothing is said prior to the marriage by a spouse on the subject of children, it is presumed that he or she intends to enter the marriage contract with all the implications, including a willingness to have children." Gerwitz v. Gerwitz, 66 N.Y.S.2d 327, 329 (1945); *see also* 3 WILLIAM T. NELSON, NELSON ON DIVORCE AND ANNULMENT § 31:06 (1945).

80. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 65 (1987); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 4 (1988); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 52 (1972).

married woman who bears a child is the father of the child is one of the oldest still surviving (though modified) parentage presumptions in Anglo-American law.[81]

Public policy regarding procreative expectations within marriage undoubtedly is changing as social values change.[82] Contemporary married couples appear to expect more mutual control of the planning, spacing, and number of children (i.e., they want fewer children, spaced more distantly, at convenient, controlled times) than couples in previous generations.[83] However, that the procreative expectations and attitudes of many modern married couples are *changing*, does not mean that the link between procreation and marriage is *disappearing*. It is still the common sentiment that having children is an important part of marriage,[84] and most Americans still want to have children and marriage.[85] Likewise, it seems that most marrying persons still have the legally supported expectation

---

81. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777); FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 398-99 (2d ed. 1968); *see also In re* Findlay, 170 N.E. 471 (N.Y. 1930) (recognizing that presumption of child's legitimacy falls only when outweighed by reason).

82. *See, e.g.*, Zagarow v. Zagarow, 430 N.Y.S.2d 247, 250, 251 (1980) (holding that in absence or misrepresentation of a desire to have children, intent to not have children does not render a marriage voidable).

83. *See supra* note 63; THE GALLUP POLL, PUBLIC OPINION 1972-1977 at 999; THE GALLUP POLL, PUBLIC OPINION 1990 at 57-58; THE GALLUP POLL, PUBLIC OPINION 1997 at 209 (showing trend away from larger families).

84. A Gallup Poll of Americans in 1990 revealed that only 2% thought the ideal number of children in a family was "none" and only 6% thought only one child was "the ideal" number of children; 47% listed two children, 23% listed three children, 13% listed four children, 3% listed five children, and a total of 2% listed six or more children. Public Opinion Online, June 16, 1995 (available in Lexis/Nexis NEWS Library, RPOLL File, Gallup Organization, Accession Number 0237347, Question number 183). A CBS News Poll in 1995 reported that most respondents stated that "having children" is "very important" (40%) or "somewhat important" (35%) to "a good marriage," while only 15% thought that was "not very important." CBS News Poll, May 25, 1995 (available in Lexis/Nexis Market Library, RPOLL File, Accession Number 0236700, Question Number 019). Internationally, the results are even stronger. A 1990 survey mostly involving typical samples of more than 1,000 respondents in each of 42 countries revealed that 64% of the respondents rated children as "very important" for a successful marriage, and another 25% rated them as "rather important"; only 11% responded that children were "not very important." World Values Survey, 1990-1993 (available in Lexis/Nexis Market Library, RPOLL File, Accession Number 0237345, Question number 173).

85. A Roper Poll reported that 79% of all respondents considered a happy marriage, and 69% considered having one or more children, as "part of that good life." Public Opinion Online, Dec. 1981 (available in Lexis/Nexis Market Library, RPOLL File, Accession Number 0121428, Question Number 051).

that their prospective spouses will use their procreative capacities *exclusively* with the marriage partner during the marriage.[86] Thus, procreation is still linked with marriage in the public mind.

IV. SAME-SEX UNIONS DO NOT COMPARABLY FURTHER THE SOCIAL INTERESTS IN RESPONSIBLE PROCREATION

A. There Is No Credible Evidence That Legalizing Same-Sex Marriage Would Advance the Social Interests in Responsible Procreation

Families can exist without society, but no society can exist without the family.[87] The same cannot be said of same-sex unions.

Where is the convincing evidence that homosexual unions contribute to the social interest in procreation comparable to the traditional male-female marriages? What are their contributions to procreative interests of survival, health, parental connection to offspring, and social order? How will legalizing same-sex marriage enhance the institution which has best facilitated responsible human procreation, protected the social identity of that institution, and strengthened the linkage that institution forges among sex, procreation, and child rearing?

It is surprising that proponents of such a radical social reordering as redefining marriage to include same-sex couples have offered virtually no evidence of the social benefits of that proposed social reform. Since so much has been written in support of legalizing same-sex marriage, the absence of substantial credible evidence of social benefit stands out in stark contrast to the abundance of passion and intensity offered. Because advocates of same-sex marriage should carry

86. Three-quarters of Americans consistently say adultery is always morally wrong, according to polls conducted by the National Opinion Research Center. *See* David Briggs, *Tradition, Culture Collide in Adultery Debate*, LAS VEGAS REV. J., June 3, 1992, at 2C; *see also* ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 105 (1994) (national survey of adult sexual behavior find more than 80% of women of all ages report fidelity in marriage, and 65%-85% of men of all ages do also; *Sex in America*, U.S. NEWS & WORLD REP., Oct. 17, 1994, at 74, 77 (survey reports that only 15% of wives have ever had an affair, and 24.5% of husbands; 94% of married people were faithful in the past year).

87. *See* WILL DURANT, 1 THE STORY OF CIVILIZATION 30 (1938).

the burden of proof to justify the proposed legal reform, the paucity of evidence is a serious failing in their campaign to persuade men and women of reason.

B. Legalizing Same-Sex Marriage Would Undermine the Social Interests in Responsible Procreation and the Institution That Has Best Protected Those Interests

The most fundamental difference between heterosexual unions and same-sex unions with regard to procreation is that *most* heterosexual couples can *for many years* procreate as a couple (unless age, illness, infirmity, or intervention has deprived one or both parties of fertility), but *no* same-sex couple can *ever* procreate. Same-sex human couples are categorically unable to procreate as unions.[88] This difference relates directly to the social interests in procreation that justify the exclusive legal preference for heterosexual marriage. The individual members of both heterosexual and homosexual unions may be capable of procreating outside of the couple union (e.g., a gay man or lesbian in a same-sex relationship may procreate with someone of the opposite sex who, by definition, is not his or her relationship partner), but those extra-relational procreations generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been able to further the social interests in responsible procreation.

Homosexual unions are also less likely to fulfill reproductive social interests than heterosexual unions. For example, one study comparing lesbian mothers with non-cohabiting heterosexual single mothers noted a significant difference between the women in their desire for second generation children. All fifteen of the heterosexual mothers (100%) hoped their children would marry and have children, but only nine of

88. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066 n.46 (1994).

> Anal or oral intercourse, whether between spouses or between males, is no more a biological union 'open to procreation' than is intercourse with a goat by a shepherd who fantasizes about breeding a faun; each 'would' yield the desired mutant 'were conditions different'. . . . Biological union between [male and female] humans in most circumstances . . . does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.

Id.

thirteen lesbian mothers (69%) wanted their children to have children.[89] None of the 28 children being raised by heterosexual single mothers expressed a desire to not have children, while four of the 26 children being raised by lesbian mothers stated that they did not want to have any children.[90]

Legalizing same-sex marriage would weaken the nexus between procreation and parenting. The already ambiguous role and meaning of parenthood would be made even more ambiguous. The paternal role, which historically and culturally has been linked with same-sex marriage, would be loosed from its social and moral moorings. That is especially dangerous for absent biological fathers, whose parental position after three decades of easy divorce has been severely eroded. The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents.[91] Legalizing same-sex marriage would foster the creation of a new class of disadvantaged children, produced by medically assisted procreative techniques and intended to be born as part or full orphans and reared without both a mom and dad. Legalizing same-sex marriage would sanction—and therefore increase—lesbians' rearing of children without fathers, and gay men's rearing of children without mothers. On the basis of what we know about the tremendous disadvantages of children who grow up without both a mom and dad in the home, it would not be wise public policy to encourage the deliberate procreation of intentionally semi-orphaned, parentally deprived children. To endorse and thus encourage the rearing of children in an environment in which there is the deliberate rejection of not "just" the other procreative parent, but all parents of that gender, does not seem very wise or prudent. The potential for increased social disorder if same-sex marriage is legalized is profound.

89. *See* Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY & HUM. DEV. 235, 238-41 (1993).

90. *See id.*

91. *See generally* Doherty, *supra* note 69, at 222-25.

Legalizing same-sex marriage would undoubtedly increase litigation and conflict over child rearing. Procreative and parental rights claims by gay and lesbian partners of biological parents would mushroom, and they could only be satisfied at the expense of the parental rights of the actual biological parents. Legalizing same-sex marriage would swell the ranks of new classes of litigants who would assert new legal standing and new parental rights claims to contest custody. Divorced women would find that their custody rights were opposed not only by their ex-husbands but by their ex-husbands' new gay spouses. Divorced men would find that their legal relationship with their children undermined, and opposed not only by their ex-wives, but also by the new lesbian spouses of their ex-wives. There is already too much of this kind of thing when divorced spouses remarry persons of the opposite sex; imagine the explosive situation that would result if gay and lesbian spouses were added to the mix.

Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of "anything goes" in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility. Weakened would be the complementary, synergistic joinder of cross gender marriage and procreation that provides the greatest benefits for children, their parents, and society. The bill for the exciting adult adventure of opening new frontiers of sexual liberation and experiencing the thrill of social endorsement of new relations would be paid by the next generation. Advocates of same-sex marriage would balance the accounts on the backs of children—not just those who would grow up in same-sex homes, but all children who would grow up in a society in which social support for responsible procreation, dual gender parenting, and the linkage between procreation and child rearing had diminished.

V. CONSIDERING THE RESPONSES BY SAME-SEX MARRIAGE ADVOCATES TO PROCREATIVE JUSTIFICATIONS OF EXCLUSIVE MALE-FEMALE MARRIAGE

A. General Responses and Analysis of Them

Advocates of same-sex marriage respond to assertion of society's marital interests in responsible procreation by citing six facts of life which allegedly undermine them: (1) marital infertility; (2) extramarital procreation; (3) use of assisted reproduction technologies by same-sex couples; (4) child rearing by same-sex couples; (5) overpopulation; and (6) modern expectations about marriage and child rearing.

First, it has been asserted that the present marriage law is underinclusive with respect to the procreation justification; the failure of the state to screen heterosexual couples who marry for their ability or willingness to procreate and the granting of marriage licenses to elderly couples (in their post procreative years) allegedly shows that procreation is not really a legitimate justification for traditional marriage laws.[92] However, this response mischaracterizes the nature of the social interest in procreation. Certainly it is true that neither all

92. *See* ESKRIDGE, *supra* note 2, at 96 ("If procreation is the essential goal of marriage, why should postmenopausal women be allowed to marry? . . . If elderly, sterile, or impotent couples cannot be denied the right to marry . . . neither can lesbian or gay couples . . . ."); STRASSER, *supra* note 2, at 47 ("the ability to procreate is not a requirement in opposite-sex marriages"); *id.* at 53 ("there is no requirement that married couples be able or willing to have children"); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61, 87 (1999) ("an ability or willingness to procreate has never been, nor can it constitutionally be, a condition of marriage . . . many heterosexual couples cannot or choose not to have children"); Mary Coombs, *Sexual Dis-orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 246 (1998) ("no state has ever required proof of capacity to procreate before issuing a marriage license"); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173, 206 (1992) (laws lack "exceptions for those individuals who are physically incapable of producing offspring."); Heather Hodges, Dean v. The District of Columbia*: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER & L. 93, 134 ("Neither social mores nor the courts have ever imposed such limitation on heterosexual couples."); *see also* Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Same-Sex Marriages* 47 STAN. L. REV. 499, 517 (1995); Jonathan Deitrich, Comment, *The Lessons of the Law: Same Sex Marriage and* Baehr v. Lewin, 78 MARQ. L. REV. 121, 136 (1994); Kevin Aloysius Zambrowicz, Note, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same Sex Marriage?*, 43 CATH. U. L. REV. 907, 922 (1994); Jonathan Rauch, *For Better or Worse, The Case for Gay (and Straight) Marriage*, THE NEW REPUBLIC, May 6, 1996 at 18, 22.

married couples procreate nor do any states require marriage applicants to show ability to procreate. Nevertheless, the social interest is not that every married couple produce offspring.

Allowing heterosexual couples to marry who physically cannot procreate because of age or infertility, or who have chosen not to procreate, while disallowing same-sex couples to marry makes substantial sense from the perspective of the state's interest in procreation, for several reasons. First, same-sex couples are categorically incapable of procreating with each other, but male-female couples are categorically capable of procreating with each other. Male-female married couples are clearly linked to procreation because they have the categorical *potential* to procreate. Moreover, male-female married couples who are voluntarily non-procreative may (and often do) change their minds. Those who are infertile may become fertile, as science continues to discover cures for those who are aged or have other procreative infirmities.[93] Same-sex couples, in contradistinction, are permanently incapable of human reproduction. Changing their mind will not make them procreative couples. Allowing infertile heterosexual couples to marry but not same-sex couples conveys a very clear message of public policy—that responsible procreation *is* an important purpose of marriage, and that procreation should take place only *within* marriage. That is important because it encourages couples to restrict their procreative activity to marriage, and gently encourages married couples to assume the responsibilities of procreation, for the benefit of society in the future, so that when the current parenting age population retires, enough of their children will be around to support them (pay into Social Security, etc.), and do the work of society (including protecting the elderly, stopping criminals, defending the nation, etc.). The procreative incapacity of any particular male-female couples due to sterilization, contraception, age, or infirmity has not—in five thousand years of recorded human history—confused or impaired the ubiquitous understanding that male-female marriage is a potentially procreative union. On the other hand, to allow same-sex couples to marry would seriously impair, confuse, and destroy the common

93. John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1195-96 (1999). For example, Viagra reportedly is a "wonder drug" for some impotent elderly men.

understanding of the institution of marriage as a procreative union. Marriage between a man and a woman, "because it is not merely instrumental, can exist and fulfill the spouses even if procreation happens to be impossible for them."[94] It is legal realism in its best form, matching the socio-legal structure with the unique biological and psychological complementarity of the cross gender union. Finally, as a matter of legal analysis, the fact that some male-female married couples cannot or will not procreate is not a legal problem because the law does not require a "perfect" fit between social interest and legislation, and there is at least a "rational" relationship (even a "necessary" nexus to a "compelling" social interest) between social interest in procreation and marriage laws limiting marriage to male-female couples.[95]

Second, same-sex marriage advocates sometimes assert that since procreation can and does occur outside of marriage, this shows that the state's interest in procreation is hardly a prime purpose of marriage.[96] The fact that many children in America are born out of wedlock is undeniable. However, if anything, that only underscores the importance of reinforcing the marriage-procreation link.[97] The last thing that a rational society should do when there is a significant amount of extramarital procreation is legalize same-sex marriage. To do so

---

94. Finnis, *supra* note 88, at 1065.

95. *See* Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 160 (1997). Likewise, the argument that limiting marriage to male-female couples is not the least restrictive means of promoting social interests in procreation simply begs the question. *See* Friedman, *supra* note 92, at 224. In the first place, the "least restrictive" standard does not apply unless same-sex marriage is a fundamental right, or the laws otherwise infringe upon another fundamental right or suspect classification. Second, even if strict scrutiny did apply, the "fit" depends in part on how the state interest is defined, and for any of the interests discussed here, the "fit" or nexus is necessary and tight. *See infra* Part V.B.

96. *See* STRASSER, *supra*, note 2, at 52; Andrew Koppelmann, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 927 (1998).

97. As Richard Duncan put it:

> Procreation can and (all too frequently) does take place outside of marriage; but isn't that precisely the point? Surely it is not irrational to think that procreation within marriage is preferable to procreation outside marriage. The privileges and benefits of civil marriage serve the legitimate—some would say compelling—goal of encouraging heterosexual unions (and therefore sexual acts of the procreative type) to take place within a stable and protective institution.

Duncan, *supra* note 95, at 159-60.

endangers further undermining the marriage-procreation link that is so beneficial for children.[98]

Third, proponents of same-sex marriage sometimes argue that the procreation justification for male-female marriage is underinclusive because gay and lesbian individuals can and do procreate, either by sexual intercourse with someone of the opposite sex, or by means of artificial reproductive technologies.[99] This is undoubtedly true, but it misses the point. In many jurisdictions same-sex and other couples may obtain children by means of medically assisted reproduction techniques such as artificial insemination, or by adoption.[100] However, even in assisted procreation and adoption, the same-sex *couple* are not procreating (with each other), nor can they ever produce offspring. Moreover, both heterosexual and homosexual couples are theoretically capable of obtaining children through assisted procreation and adoption. The technology and legal process is inherently neutral, and does not favor same-sex marriage.[101] Since individuals in same-sex unions can procreate only by leaving the union to couple (intimately or by utilizing assisted reproduction technology) with someone of the opposite sex, such technology does not show that same-sex unions contribute anything to the social interest in procreation. The use of assisted reproduction to bring into the world children who will be born as orphans or half orphans, deliberately conceived to be raised in a unisex parenting environment, deprived of parenting by both a father and a mother, raises very serious concerns about the welfare of

98. *See infra* Part V.B.

99. *See* ESKRIDGE, *supra* note 2, at 110; STRASSER, *supra* note 2, at 59-61; Coombs, *supra* note 92, at 246-47; *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1648-51 (1989); Friedman, *supra* note 92, at 207; *see also* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 933 (1996).

100. However, some countries and states forbid adoption by same-sex couples, and in some nations they may not use artificial reproductive technologies. *See, e.g., Constitutional Claims*, supra note 2, at 7 n.8 (listing Scandanavian countries that forbid adoption by gays); UTAH CODE § 78-30-1(3) (Supp. 2001) (barring adoption by unmarried cohabitants which includes same-sex couples. *See generally* Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 347 (most countries restrict use of artificial reproduction technologies to married heterosexual couples).

101. Further, assisted reproductive techniques account for only a tiny fraction of all human reproduction, and are not likely to replace male-female sexual procreation as the primary method of human reproduction. So most of the social interest in procreation is unaffected by new assisted reproduction technologies.

children.[102]

Fourth, it is asserted that many children are being raised by same-sex couples already.[103] These statements are undoubtedly true, but they miss the point. The evidence of how that affects children is, at best, highly dubious and far from clearly positive.[104] Deliberately denying a child, from the time of conception, the benefit of being raised by both his or her mother and father is not an enlightened social policy that should be encouraged. Rather, the incentives of marital status should be used to encourage commitment of both mother and father to procreation and childrearing.[105] Moreover, legalizing same-sex marriage would not strengthen in any way the social interest in procreation or preservation of the link between procreation and child rearing because same-sex couples cannot procreate.

Fifth, some advocates of same-sex marriage deny that the "survival" procreation argument is still a valid social interest, arguing that the threat of overpopulation has made this argument obsolete.[106] Of course, the social interest in procreation is much more complex than gay rights advocates' *reductio ad absurdum* caricature.[107] The public interest in

---

102. *See infra* Part V.B.

103. *See* ESKRIDGE, *supra* note 2, at 110; Culhane, *supra* note 93, at 1198; *Developments in the Law*, *supra* note 99, at 1648-49.

104. Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 739-744 (expressing policy preference for dual-parenting); Report of the Committee of Inquiry Into Human Fertilisation and Embryology, First Report, 1984, CMND 9314, at 4, 23, 32-33, 36-37, 40, 46-47, 75 [hereinafter Warnock Report] (same).

105. Experimentation in human cloning has generated such grave concerns that a federal moratorium was proposed soon after the first cloning of a mammal. *Federal Funding Banned for Human-Cloning Trials*, WALL ST. J., Mar. 5, 1997, at B6 (reporting President Clinton's ban on federal funding for human-cloning experiments and call for a moratorium on private research into human cloning). While cloning only implicates reproduction, same-sex marriage implicates a social institution (marriage) that is as old as human memory and that serves as the very foundation of our social order. *See infra* Part V.B.

106. *See* ESKRIDGE, *supra* note 2, at 98 ("[A]n earth that struggles to feed an existing population is not an earth that should overemphasize procreation."); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L. J. 139, 151 (1998) ("population control has become a practical and moral imperative . . . ."); Friedman, *supra* note 92, at 205 ("No longer can underpopulation be seen as a problem for this country or the world. Overpopulation is a much more real threat."); Katz, *supra* note 92, at 100 ("It is questionable whether the state interest in encouraging procreation still exists.").

107. The same-sex marriage advocates' argument also is somewhat self-contradictory because, by raising concerns about overpopulation, they themselves

procreation for survival does not mean procreation for maximum population at subsistence level; the social interest is in *responsible* procreation. Factually, these well meaning advocates of same-sex marriage seem oblivious to the growing warnings of demographers that a population implosion is occurring around the world that will have revolutionary effects in many countries. The United Nations reports that populations will decrease in Japan and virtually all of Europe by 2050; for example, Italy's population is projected to decrease by 28 percent to 41 million, the median age will rise from 41 to 52 years, and the percentage of Italians over age 65 will increase from 18% to 35%.[108] Outdated overpopulation arguments trivialize global crises both of implosion and explosion of human population.

Sixth, some advocates of same-sex marriage argue that even if furthering social interests in procreation was once a valid purpose of marriage, it has been replaced by partner intimacy.[109] While the ideal of companionate marriage undoubtedly is very popular these days, the identification of social interests furthered by marriage is not a zero sum choice. Defenders of exclusively male-female traditional marriage do not assert that procreation is the *only* social interest in and public purpose for marriage laws. Approximately four million children are born each year in America,[110] and the circumstances of their conception and birth have profound social and individual significance. Social concerns from education to crime, from poverty to employment, from teenage childbearing to intergenerational patterns of abuse, from citizenship to economic productivity are implicated by procreation patterns.[111] Thus, agreeing that companionship-

---

assert the very social interest ("survival") that they claim no longer exists.

108. POPULATION DIV., U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND AGEING POPULATIONS? (2000), *available at* http://www.un.org./esa/population/migration.htm. The consequences for European nations may be dramatic; the President of the European Commission issued a warning in May 2000 that by 2025 nearly a third of Europeans will be collecting pensions. *See* Society for the Protection of Unborn Children, *News Digest*, *available at* http://www.spuc.org.uk/news/20000511.htm (May 11, 2000).

109. *See* ESKRIDGE, *supra* note 2, at 91; STRASSER, *supra* note 2, at 63-65; Culhane, *supra* note 93, at 1196.

110. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 74 (1997).

111. *See, e.g.*, Ruth Ben Israel, *Social Security in the Year 2000: Potentialities and*

intimacy is a social interest furthered by marriage in no way implies that procreation is not also.

Responses by advocates of same-sex marriage are surprisingly superficial. It is very unlikely that they can show that legalizing same-sex unions will further social interests in procreation relating to survival, health, linkages between procreation to child rearing and between parent to offspring, and social order. Rather, legalizing same-sex marriage is likely to undermine the institution which has best facilitated and protected responsible human procreation, to pose substantial risk of confusing the social identity of that institution, and to weaken the linkage that institution forges among sex, procreation, and child rearing, to the disadvantage of all of society, especially children.

B. Analysis of the Procreation Interest in Baker v. State

Two of the three American courts that have reached decisions favorable to same-sex marriage have discussed the validity of state interests in marital procreation as a justification for disallowing same-sex marriage.[112] The fullest discussion of the procreation justification for traditional marriage laws is contained in the Supreme Court of Vermont's decision in *Baker v. State*.[113]

In *Baker*, the court ruled that under the "Common Benefits Clause" of the Vermont Constitution,[114] same-sex couples "may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry," and that under that provision of the state constitution "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[115] In reaching that conclusion, the court

Problems, 116 COMP. LAB. L.J. 139, 156-157 (1995) (noting connection between birth rate and education, medical, and child-rearing expenses for society).

112. *See id.*; Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1999). After extensive analysis of evidence and testimony submitted by expert witnesses in child development, the Hawaii court added nothing of significance to the Vermont court's analysis discussed herein, and the ruling was rendered moot after the people of Hawaii amended their constitution amendment to protect traditional marriage on November 3, 1998. The only pro-same-sex marriage decision that does not discuss this policy is *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

113. 744 A.2d 864 (Vt. 1999).

114. VT. CONST., ch. I, art. 7.

115. *Baker*, 744 A.2d at 867.

considered "[t]he principal purpose the State advance[d] in support of . . . excluding same-sex couples from the legal benefits of marriage" which was "the government's interest in furthering the link between procreation and child rearing."[116] However, the court rejected this argument, citing four counter-factors: infertile male-female marriages, artificial reproduction technology and practices, legalized adoption by gay couples, and child rearing by same-sex couples. However, these reasons largely evade rather than address the social interest in procreation that the State propounded.

First, the court noted that "some of these [heterosexual] couples [who marry] never intend to have children, and . . . others are incapable of having children."[117] Vermont's statutory definition of marriage as being between one man and one woman, claimed the court, was therefore "significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal."[118]

Unfortunately, after clearly identifying the State's main claim regarding marital procreation (that it furthers the state's interest in linking procreation with child rearing), the court *never analyzed that interest* but spent its time attacking a "straw man" version of the State's asserted interests. This reflects the court's fundamental misunderstanding of the procreative interests behind the marriage law. A clear signal of this elementary mistake is that the court confused the "underinclusive" and "overinclusive" labels. The court called the State's marriage law allowing infertile male-female couples but not same-sex couples to marry "underinclusive" vis-à-vis the policy linking procreation to child rearing, but if it understood that policy, it would have said that the law was "overinclusive." That is, if the purpose of the marriage law is to "'further[] the link between procreation and child rearing'" (as the court correctly noted initially, quoting the State's brief), then the law allowing some male-female couples to marry who cannot procreate is possibly overinclusive—it arguably includes more couples than those who fulfill the purpose of the

116. *Id.* at 881 (internal quotation marks omitted).
117. *Id.*
118. *Id.*

law—not "underinclusive." Calling the law "underinclusive" reveals that the court believed the goal of the law was to *exclude from marriage all those who cannot procreate.* The failure of the Vermont law to exclude some infertile male-female couples make the law underinclusive as to that exclusionary purpose. However, the State never said that the purpose of its law was to exclude non-procreative couples; rather its purpose was inclusive, to "'further[] the link between procreation and child rearing'" by extending the benefits and status of marriage to those who are capable or may be capable of procreation and child rearing. Of course, same-sex couples are not capable of procreating—period—so including them in marriage could not further the link between procreation and child rearing.

Allowing male-female couples who cannot or will not procreate to marry does make the law *overinclusive* (not underinclusive) vis-à-vis the purpose of linking procreation and child rearing, *if* the purpose of the law is that every married couple procreates. Again, the court reveals its misperception (or perhaps deliberate mischaracterization) of the state policy, for the State did not say that this was the goal of its marriage law; rather, the purpose of the law restricting marriage to male-female couples was to *further the linkage* between procreation and child rearing. It does that by restricting marriage to couples in categories capable of doing both.

The court's perception of a defective relationship between this linkage purpose and the law defining marriage as an opposite sex union might also be accurate if that linkage could only be furthered if every single couple that marries also procreates. Allowing male-female couples to marry, even those who cannot or will not procreate, conveys a message that links marriage with procreation because, as a category of unions, male-female unions are capable of human procreation (and most do procreate). The message of linkage is conveyed not by the act of procreation by the couple, but by the act of entering a marital union (which is generally a procreative union) by a couple which is of a kind (male-female) that is capable of procreation. But even from this "indirect" or category of couples perspective, allowing same-sex couples to marry would not further the state's interests in linking procreation and child rearing because same-sex couples are categorically

incapable of procreation as couples.

Second, the court noted "the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted reproductive techniques to conceive and raise children."[119] However, this misstates the point and the mistake is more than semantic. While same-sex couples may *rear* a child as a couple, they may not as couples *conceive* a child. They may contract with a person of the opposite sex, and with that person one of the same-sex couple may procreate for the purpose of producing a child that both partners plan to raise together; but the same-sex couple cannot *as a couple* procreate—with or without assisted reproduction technology (hereinafter "ART"). Some ART may help married couples to procreate (artificial insemination using the husband's sperm, in vitro fertilization using the wife's egg and husband's sperm, etc.). In those cases, ART furthers the linkage between procreation and child rearing. Whether the law should allow procreation via ART by singles, same-sex couples, or married couples is a policy question of reproductive health, not marriage. Currently, the law in most or all American states (contrary to most or all other developed countries' laws) allows the use of ART by married and unmarried couples.[120] That does not further but arguably defies the State's interest in linking procreation and child rearing. However, the fact that such an exception exists tells us nothing about marriage law or whether an exception should be made to marriage laws that historically have furthered that state interest; it only tells us that in the context of dealing with childlessness and infertility, lawmakers have determined that the state interest in linking child rearing and procreation is subordinate (or partially subordinate) to other important interests (e.g., allowing responsible persons to bear and rear children who are at least partially related genetically to them or their spouse or partner). It provides no guidance regarding whether, in the marriage context, the State's possible interest in promoting or favoring same-sex unions outweighs the state's interest in preserving marriage as an institution that fosters the linkage between procreation and child rearing.

Similarly, a couple of paragraphs later, the court rejected the

119. *Id.* at 882.

120. *See* Knoppers & LeBris, *supra* note 100, at 346-47.

State's concern that discarding this linkage would render a "'mere surplusage'" the idea that mothers and fathers are both necessary to both procreation and child rearing, because most couples who use assisted procreation (presumably involving non-couple procreative contributions such as donor sperm, donor eggs, and gestational surrogate mothers) are married, and there is no indication that their use of those technologies has "undermine[d] a married couple's sense of parental responsibility, or foster[ed] the perception that they are 'mere surplusage' . . . ."[121] From that the court leapt to the conclusion that "there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood, or society's perception of parenthood."[122]

The court came close here, but ultimately lost the point. The issue before it was not whether allowing same-sex couples to use *assisted reproduction technology* undermines the bonds of parenthood, or society's perception of parenthood,[123] but whether allowing same-sex couples to marry undermines the linkage between procreation and child rearing. However, in addressing what the court meant to say and should have said, it is worth noting that ART generally is used by married couples to produce a child that is at least partially related to at least one of the prospective child rearers, and to that extent ART furthers (at least in part) the state's interest in fostering the linkage between procreation and child rearing. (That may be why the use of ART by unmarried persons, including same-sex couples, is not genetically forbidden.) Moreover, the fact that state lawmakers may have chosen to subordinate (or partially subordinate) the state interest in linking child rearing and procreation in order to promote another state interest (allowing the procreation of children who are partially related to the parents) hardly compels the conclusion that that interest outweighs the state's interest in preserving marriage as the institution which best fosters the linkage between procreation and child rearing. The contexts are different (as marriage differs from ART) and the strength of this and the competing

121. *Baker*, 744 A.2d at 882

122. *Id.*

123. They already can and do use ART; whether as a matter of policy that should be allowed or may be prohibited is an issue for another case and another day.

policies differ.

Third, the court noted that the Vermont legislature had legalized adoption by same-sex couples and extended family court jurisdiction to cover parental rights and child support disputes between unmarried same-sex partners concerning adopted children.[124] This is a relevant point because allowing same-sex couples to adopt shows that inclusion of same-sex couples in child rearing does not necessarily damage irreparably the state interest in promoting the connection between procreation and child rearing. Moreover, the fact that for over a hundred years Vermont has permitted adoption to occur and that it has not irreparably damaged the linkage between procreation and child rearing—many people still procreate to produce the children they rear, and there is no evidence that substantial numbers of fertile couples forego procreation because they can adopt instead—shows that some exception to the policy linking procreation and child rearing is possible that doesn't significantly undermine the policy. Unfortunately, it does not help us discern whether legalizing same-sex marriage would, similarly, fail to undermine the policy. That same-sex couples may adopt tells us something about adoption but very little about marriage. Adoption is for the benefit of children for whom the linkage of procreation to child rearing has already failed, so it makes no sense to evaluate any adoption laws in terms of the state interest in fostering that linkage. All adoptions (regardless of the sexual preferences of the adopter) defy this linkage by allowing adults who did not procreate a child to formalize a child rearing relationship and legal parental status. Thus, it is senseless to use adoption law—which operates when the linkage has failed—as a tool to evaluate whether to revise marriage law—which operates to support the linkage—to permit marriage by same-sex couples who are categorically incapable of procreation. Perhaps one reason that adoption (even by gay couples) has not eroded the linkage is that the law limiting marriage to male-female couples still reinforces that link by preserving a powerful cultural and social institution that perpetuates the linkage. The fact that adoption laws may allow same-sex couples to adopt in order to assist some children who

124. *Baker*, 744 A.2d at 882.

are in need of adoption tells us very little about marriage or marriage policy, which exists to further different state purposes (at least one of which, the linkage of procreation to child rearing, *no* adoption can further).

Fourth, the court returned to the "reality" of child rearing by same-sex couples when it asserted that "the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."[125] That point is certainly relevant and worth considering with respect to *another* state interest—the interest in optimal child rearing or, as the State put it, "'promoting child rearing in a setting that provides both male and female role models.'"[126] However, the court does not even mention *that* separate State justification. The Court again showed that it really did not comprehend that state interest, or that it was unable or unwilling to stay focused on the state interest it purported to be examining.

In this same paragraph, the court declared that "same-sex couples [] are no different from opposite-sex couples with respect to these objectives [of legitimizing children and providing for their security]," and that married male-female couples and same-sex couples are "similarly situated for purposes of the law."[127] Again, the purpose of the law as to which the court sees male-female and same-sex couples having no difference is not the purpose or state interest the court purports to be discussing (the state's interest in furthering the linkage between procreation and child rearing) but another interest (child welfare). Even if same-sex couples satisfied the state's interest in child rearing and child welfare just as well as did male-female couples (a separate and very dubious proposition),[128] on the issue of furthering the state's interest in establishing linkage between procreation and child rearing, that point is irrelevant, because same-sex couples cannot procreate at all, and because they cannot procreate, permitting them to marry will not establish significant linkage between

125. *Id.*

126. *Id.* at 884 (citing the State's brief).

127. *Id.* at 882 (italicization omitted).

128. That basis for the court's "no difference" conclusion with respect to the separate interest of providing for the welfare of children is also very feeble, but that is a topic for another article.

procreation and childrearing.[129]

The main problem with the court's "analysis" of the interest in linking procreation and child rearing is that it contains virtually no analysis of that state interest (though it does confuse redundancy with analysis). The court dutifully lists some of the State's arguments, but then consistently refuses to engage those arguments, subtly recasting the state interests in order to avoid confronting the importance of them. The court seems fundamentally confused about what the state's procreation marriage policy is, and because of that, does not sustain any analysis of it. Perhaps, however, the problem was not an inability to comprehend but an intent to evade. If the court really understood the state's interest in linking procreation with child rearing, but realized that it could not repudiate the validity of restricting marriage to male-female couples to further that state interest, it would make sense for the court to constantly change the subject, as it did.[130]

VI. CONCLUSION

The companionate union of a man and a woman in marriage is unequaled in its value and contribution to society. In terms of providing a responsible union for procreation, there are many other relationships which are possible, and certainly other companionate arrangements and relational structures provide some values and benefits to individuals and to society. But in terms of the social purposes and public policy justifications for the legal relationship of marriage, the committed relationship of a man and woman to each other and

129. It can be argued that allowing same-sex couples to marry would partially foster this linkage because, for example, some lesbians might never undertake to bear and rear a child by themselves, but with a same-sex marriage partner they would; so, same-sex marriage would foster the partial linkage because it would encourage such a lesbian to procreate and rear a child who is related to her. However, this approach also undermines the state interest in linking procreation and child-rearing partially, because it involves the deliberate exclusion of the other biological parent from the marriage. Thus, the degree to which it furthers the linkage is significantly less than that of male-female marriage. The resulting child-rearing is distinguishable because the child is reared in a relationship from which the other procreative parent has been deliberately excluded, denying the child the benefit of dual-gender child-rearing.

130. As a Duke University Law School graduate, this evasion reminds me of that of my fellow Duke alumni whenever talk turns to college football. Duke University graduates invariably bring up what a great *basketball* coach Krzyzewski is, or how many Rhodes Scholars Duke has produced, and so forth.

to the family they create is unparalleled.

In particular, same-sex unions do not make the same contribution to society. This Essay has demonstrated that advocates of same-sex marriage have not produced and are unlikely to be able to produce evidence that same-sex unions have potential comparable to that of traditional male-female marriage to contribute toward fulfilling the social interest in procreation. Traditional male-female marriage furthers social interests in procreation including (1) physical survival and perpetuation of the species; (2) public health and child welfare; (3) linking procreation with child rearing and connecting parents to offspring; and (4) protecting the social order and social institution that best fosters responsible procreation. Society has a compelling interest in preserving the clear social identity of the institution that historically has best advanced the social interests in responsible procreation, that best links procreation and child rearing, and that best bonds parents with their offspring. Not only do same-sex unions not make comparable contributions to achieving the social interests in responsible procreation, but legalizing same-sex marriage would weaken the institution best able to achieve those social interests. Claims for legalization of same-sex marriage are, therefore, unjustified in terms of overall contributions to compelling social interests in, or any rational public policies relating to, responsible procreation, and should be rejected.