Is Marriage Obsolete?

Lynn D. Wardle

J. Reuben Clark Law School, Brigham Young University

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IS MARRIAGE OBSOLETE?

Lynn D. Wardle*

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT. The valuable research assistance of Tanya Milligan, Brittany Howick, James Fontano, and Jon Eskelsen is gratefully acknowledged. I express thanks also to Nicole A. Haaning of the Michigan Journal of Gender & Law who kept me constantly and thoroughly informed and answered all of my questions promptly and graciously; Yarmela A. Pavlovic, Erin J. Quinn, and Stephanie L. Baker for providing transportation.
I. Introduction

A. Overview

The University of Michigan Journal of Gender & Law and its staff deserve thanks for sponsoring this stimulating and timely conference. It is an honor for me to participate in this panel, The Future of Legal Marriage: Is Marriage Law Obsolete? Or Will Law Adapt to Recognize Changing Forms of Marriage and Family?, with two of the brightest and most articulate advocates of legalizing same-sex relationships. My role on this panel reminds me of Chesterton's quip that the defense of virtue (in this case the defense of our received tradition of exclusively male-female marriage) has all the exhilaration of a vice. Is legal marriage obsolete? I think not. In order to understand why not, it is necessary first to grasp the significance of the focus of the discussion on the legal status of marriage. As this Introduction suggests, lack of legal marriage status does not prevent families and communities from treating couples as married nor does the law forbid couples from voluntarily providing each other "marital benefits." Nevertheless, whether marriage is obsolete at the beginning of the twenty-first century is an important question. This article analyzes four dimensions of that question.

1. Professor David A. Chambers and Adjunct Professor Paula Ettelbrick.
2. The American Chesterton Society, Quotations of G. K. Chesterton, at www.chesterton.org/discover/quotations.html (last visited Oct. 21, 2003) (quoting Chesterton: "[t]he act of defending any of the cardinal virtues has today all the exhilaration of a vice").
3. The panel title begs the question by implying that contemporary marriage law is obsolete if it does not adapt to recognize contemporary lifestyle phenomena.
4. The term "legal marriage" as used herein refers to the exclusive, consensual union of a man and not-closely-related woman in a state-sanctioned legal relationship for life (unless terminated by formal, state-regulated divorce or annulment), with sexual relations inter se authorized and expected, partially for the purpose of procreation if the parties are fertile. Such a union usually entails mutual, reciprocal, or other division of duties of support and other family responsibilities.
IS MARRIAGE OBSOLETE?

How obsolescence of a law or legal institution is to be determined is addressed in Part II. The significance of a gap between the law and moral order of society for the legitimacy of the law and for the institutions of law is analyzed. In addition, this section examines the relevance of Thomas Jefferson's "consent of the governed" test for political legitimacy as it pertains to the question of the obsolescence of marriage. Redefining marriage by judicial decree would fail Jefferson's "consent of the governed" test for legitimacy.

Part III considers whether, as the panel title suggests, there really is a gap between traditional marriage and the mores of our society. It reviews the evidence of significant social changes that underlie claims that marriage has become obsolete, but argues the prior existence of those social phenomena indicates that a sea-change in values has not taken place. The rejection of same-sex marriage and expansive domestic partnership throughout America, evidenced by public votes and surveys, suggests that the claims for same-sex marriage fail the "consent of the governed" test for legitimacy. Part IV continues the analysis of that question by arguing that many of the social phenomena that might suggest that marriage has become obsolete can be attributed to other causes.

Part V addresses what public policy the governed should adopt, suggests the lack of evidence of comparable contribution or value to society from alternative relationships, but notes the growing movement in academia favoring such relationships. Several reasons for opposing the redefinition of marriage to include same-sex and co-habitating nonmarital couples are suggested, including the foundational importance of marriage, the need for a "critical mass" of citizens willing to maintain the family for the sake of society, the serious if not irreversible disintegration and decline of families that is associated with going down that road, and the inappropriate promotion of special private interests at the expense of the public good.

The final question, discussed in Part VI, is whether the American people will decide that marriage is at least partially obsolete. Because of Jefferson's principle of "consent of the governed," it is likely that domestic partnership will be legalized to some extent in a minority of states.

B. The Legal Meaning of Marriage Is Just One of Many Meanings

The emphasis on legal marriage reminds us that the word "marriage" has many different meanings in different contexts. There is more to life than law and more to language than legal terminology. What is deemed a "marriage" for purposes of law may not be exactly the same as
what is deemed marriage for other purposes and in other settings—
religious doctrines, academic disciplines (e.g., anthropology, history, sociology, or psychology), or communities or sub-cultures of society (ethnic communities, faith communities, or cultural cliques, for example). Just because a union is not deemed a legal marriage does not prevent any social subgroups from considering it a marriage for their own internal (extra-legal) purposes.

For example, despite federal laws proscribing polygamy and refusing to recognize plural marriages, Mormons in the western United States from about 1850 until about 1890 treated plural marriages as bona fide religious marriages, which had great impact upon how the parties treated each other and were treated in the Mormon community (as really married). Even today, while the law may not consider couples who obtain no-fault divorces as married, that does not prevent their families or religious communities (e.g., Catholic or Orthodox Jewish) from considering them as still married under religious doctrine.

Similarly, the legal proscription of same-sex marriage clearly does not prevent gays and lesbians from enjoying the status of married within their own “community of two” or in the gay community. The law does not prevent the parties from treating each other with the love, concern, respect and dignity with which one should treat a spouse. The fact that the law does not recognize same-sex marriage does not prevent the couple from voluntarily providing for each other by private contract, will, trust, living will, durable power of attorney, medical directive, and other legal benefits which the law expects or requires married couples to provide for each other. It does not prevent their extended families from considering the couple for all family purposes as married.

Likewise, the fact that same-sex marriage is not legal does not prevent the gay community from conferring the extra-legal status of marriage for social and “community” purposes. Lastly, the law does not prevent same-sex and other non-marital couples from enjoying—within their religious community—the religious rites, status, and dignity of marriage. Denial of the legal status, rights, and benefits of marriage is certainly very significant, but the law is actually only a small part of our

5. See Adam Chase, Tax Planning for Same-Sex Couples, 72 Denv. U. L. Rev. 359, 373-400 (1995) (describing methods same-sex couples may use to mirror the legal relationships married couples enjoy); Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1623-26 (1988) (discussing a California case in which a same-sex couple's partnership provisions were upheld); see also Kitty Mak, Partners in Law: California's New Domestic Partnership Registration Act May Aid Same-Sex Partners in Providing a Legal Basis for Their Life Relationships, 24 L.A. Law. 35 (July-August 2001) (listing the types of issues that can be addressed by private arrangement).
lives. In many of the most meaningful parts of life, the parties can be deemed married even if the law does not recognize their union.

II. LEGITIMATE LAW-MAKING IS BY “CONSENT OF THE GOVERNED”

A. The “Gap” Between Law and Moral Order

The panel title’s reference to “legal marriage” and inquiry “is marriage law obsolete?” suggests that if a wide gap develops between law and the moral order of society, one or the other must change or law will become irrelevant and ineffective. That is clearly true. In some countries, most notably Scotland, statutes that fall into desuetude are effectively repealed by disuse. In the United States, when the gap becomes so large that the statutes are, as Hamlet observed, “[m]ore honored in the breach than the observance,” they are not necessarily removed but may remain like dead wood in the river of the law. Thus, the concern that marriage law may become merely an obsolete, formalistic ornament or a dangerous relic if it becomes disconnected from the actual marriage habits and customs of the people is a valid concern.

The connection between formal law and popular morality also has profound significance for the legitimacy of the law, not merely its quaintly dysfunctional obsolescence. In a democracy, law must reflect the will of the people because the power of the law ultimately depends upon the voluntary allegiance of the citizens, not upon the might of armies or the terror of the government. If a significant gap develops between the law and the moral order of society, the very legitimacy of the law and even possibly the legitimacy of the legal system and its institutions (e.g., the courts, the legislature, even the system of government) is implicated.


Of course, mere transitory social fads or experimentations do not constitute real social change; not all private lifestyle preferences are also public policy preferences. Therefore, it is essential to determine by what method one decides whether marriage has become obsolete and by what process one concludes that social changes necessitating law reform have occurred. Because we are talking about legal marriage and legal policy, the question about methodology and procedure has profound legal and political significance. If the question about marriage obsolescence or change is viewed as a question of sociology, theology, history, or philosophy, then methods and procedures appropriate for those disciplines would be applied. Since the concern of this panel is the meaning and obsolescence of marriage in the law, we must use methods that give legitimacy in that context.

Our legal system is predicated upon the primary principle of political legitimacy declared by Thomas Jefferson in the Declaration of Independence—that governments "deriv[e] their just Powers from the Consent of the Governed. . . ." That consent of the governed principle "lies at the foundation of the American republic." Jefferson reiterated the importance of consent of the governed throughout his career of service to his country.

Eight years after the Declaration of Independence, in his Notes on Virginia, Jefferson admonished:

Civil Government being the sole object of forming societies, its administration must be conducted by common consent. Every species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It is a

composition of the freest principles of the English constitution, with others derived from natural right and natural reason. To these nothing can be more opposed than the maxims of absolute monarchies.\(^\text{11}\)

Three years later, in a letter to James Madison written just months after the Constitution was drafted and while it was being debated around the country, Jefferson wrote, "[I]t is my principle that the will of the Majority should always prevail. If they approve the proposed Convention in all it's [sic] parts, I shall concur in it cheerfully [sic], in hopes that they will amend it whenever they shall find it work wrong."\(^\text{12}\)

In his first Inaugural address, Jefferson reiterated this principle:

During the contest of opinion through which we have passed, the animation of discussion and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what they think; but this being now decided by the voice of the nation, announced according to the rules of the constitution, all will, of course, arrange themselves under the will of the law, and unite in common efforts for the common good. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be righteous, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.\(^\text{13}\)

As applied to the question whether marriage law is obsolete, Jefferson's first principle suggests that efforts to significantly redefine marriage by circumventing the consent of the governed are unjust and illegitimate. In our constitutional republic, it is not for a "bevy of platonic guardians"—academic or judicial—to decide what is best for the people.\(^\text{14}\) The

\(^{11}\) Thomas Jefferson, Notes on Virginia (1784), reprinted in 2 The Writings of Thomas Jefferson 120 (Andrew A. Lipscomb, ed., 1904) (emphasis added).


\(^{14}\) For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

definition of marriage is precisely the kind of issue that Jefferson and the other Founders risked their lives and fortunes to secure for the people to decide by democratic processes. Indeed, Jefferson’s standard (the consent of the governed) may in this context help us distinguish hype from reality, special-interest mole hills from significant social mountains, and transitory intellectual tremblings from real social earthquakes. Not all social experimentations constitute real social change; not all private lifestyle preferences are also important enough to crystallize into public policy preferences. So, as the panel title reminds us, it is important to ascertain by the legitimate democratic method (back to Mr. Jefferson and the consent of the governed) whether a social phenomenon represents a real, lasting, significant change in social values making it appropriate to change the law, or whether it is merely a passing fad.

III. Has There Been a Significant Change in the Concept of Marriage in American Society?

Has there been a significant change in society’s concept of marriage that would necessitate (or even justify) a redefinition of marriage to include same-sex couples? In recent years, there have been many apparent changes in socially acceptable living arrangements and sexual morals. Some relevant changes include:

- A 72% increase in the number of unmarried partners living together between 1990 and 2000.\(^\text{15}\)
- In 2000, nonmarital cohabitation households accounted for 5% of all homes, up from 3% a decade earlier.\(^\text{16}\)
- Since 1985, approximately half of all persons who married cohabitated prior to marriage.\(^\text{17}\)
- By 2000, nearly one-third of all children born in the United States were born out of wedlock, a thirteen-fold increase in the number of nonmarital births in just over fifty years.\(^\text{18}\)


16. Id.


• The divorce rate in the United States has stabilized at an extremely high level; based on current divorce rates of 4.1 per 1,000 population in 2000,\textsuperscript{19} up from 2.5 in 1965;\textsuperscript{20} it is estimated that approximately one-half of all marriages will end in divorce.\textsuperscript{21}

• The marriage rate has fallen. In 2000, the rate of marriage was 8.7 per 1,000 population;\textsuperscript{22} it has fallen rather steadily (with a few blips) since 1982 when the marriage rate was 10.6 per 1,000 population.\textsuperscript{23}

• The median age of first marriage has risen. Data indicate that in 2000 the median age was 25.1 years for women and 26.8 years for men, up from 23.9 years for women


19. Centers for Disease Control and Prevention, Nat’l Ctr. for Health Statistics, \textit{Births, Marriages, Divorces and Deaths: Provisional Data for September 2001, National Vital Statistics Reports}, Vol. 50, No. 8, (May 24, 2002) \textit{available at} http://www.cdc.gov/nchs/data/nvss/nvss50/nvss50_08.pdf (last visited Oct. 21, 2003); \textit{see also} Lynn D. Wardle, \textit{No-Fault Divorce and the Divorce Conundrum}, 1991 BYU L. Rev. 79, 141 (reporting that in 1965 there were 479,000 divorces and the rate of divorce per 1,000 population was 2.5; in 1985 there were 1,190,000 divorces and the rate of divorce was 5.0).


The median age of marriage has risen steadily every decade since 1960 when it was 22.8 for men and 20.3 for women. Thus, young people are postponing marriage.

- Lawsuits seeking judicial decrees ordering the legalization of same-sex marriage are currently pending in Massachusetts, Indiana, and New Jersey. Similar lawsuits have been filed in Hawaii, Alaska, New York, District of Columbia, Arizona, and

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Vermont in the past decade. While no court has yet mandated the legalization of same-sex marriage, the Vermont Supreme Court ruled that the refusal to allow same-sex couples to legally marry violated the “Common Benefits” clause of the state constitution, and directed the state legislature to either legalize same-sex marriage or to create some marriage-like status with marriage-like benefits for same-sex couples. In April 2000, in response to that ruling, the Vermont legislature passed a law (subsequently signed by the Governor) creating “Civil Unions” for same-sex couples and other nonmarital couples and extending to those unions most of the legal benefits of marriage.

- In addition to these landmark American same-sex marriage cases, several state courts have ordered the extension of some marital benefits to some same-sex domestic partners.

Legislative bills to legalize same sex-marriage and for partnerships enacted in some marriage-like same-sex domestic partnership schemes have been filed in many states.

Such social phenomena and trends might be interpreted as supporting the claim that the moral image of marriage has changed,

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35. Id. at 886.
creating a gap between law and moral order, and that the existing standards of traditional legal marriage are obsolete. But on closer consideration, other explanations seem more plausible.

A. Most of these Conditions Are Not New

Certainly, these social phenomena are cause for grave concern, but most of these conditions are not unprecedented. Prior generations had children out of wedlock, engaged in nonmarital or premarital cohabitation and premarital sex. Also, the marriage rate has fallen and the rate of divorce has spiked at various times over the past few decades. Even open and socially accepted same-sex relationships are not new. Thus, the recent changes in this regard constitute only a difference in the degree, scope, or quantity of these behaviors and conditions. That difference is not unimportant, and relates to the notion of critical mass in democracy discussed below. Rather than proving that marriage is obsolete, these phenomena might simply be evidence of cyclical lapses in traditional morals or as manifestations of mere human weakness. Since similar conditions and practices have long co-existed with traditional marriage, the recent phenomena might be interpreted as not necessarily reflecting significant change in social values regarding the meaning or definition of marriage.

B. Same-Sex Marriage and Partnerships Have Failed the Jefferson Test

On the other hand, efforts to radically redefine marriage have been overwhelmingly rejected, and that indicates traditional marriage is not obsolete. Proposals to legalize same-sex marriage and to create marriage-like same-sex (or heterosexual) domestic partnerships as a new, legal,
domestic-relationship status differ from the social phenomena mentioned above. Proposals to redefine marriage or to create new marriage-like legal statuses such as domestic partnership constitute a new metaphysics, a different vision of marriage and life in this corner of our galaxy. These proposals constitute a serious threat to the institution, definition, and integrity of marriage. The extent, scope, number, and success of the movement to legalize gay or lesbian relationships and families in the past decade are unprecedented.

However, society’s response to these serious and fundamental challenges to marriage indicates that marriage is not obsolete. Measured against Jefferson’s consent of the governed standard, the movement to substantially redefine marriage had failed thus far. For example, while the effort to legalize same-sex marriage has been seriously pursued for nearly three decades and very intensely promoted for the past decade, no state legislature has yet legalized same-sex marriage. In spite of overwhelming support in academic circles, in the media, and among influential elites, the score against same-sex marriage is 51–0 in the American league.

In Hawaii same-sex marriage was rejected by a popular vote of 69% to 29%; in Alaska, it was rejected 68% to 32%. In both Nebraska and Nevada, it was rejected by 70% to 30%. In California, home of very active and well-established gay communities, especially in both Hollywood and San Francisco, voters rejected same-sex marriage overwhelmingly, 61% to 39%. Even in Vermont, several months after the state Supreme Court gave its endorsement to same-sex marriage or partnership in *Baker v. State,* “town meetings” held in Vermont yielded

43. This is not the first time such metaphysical challenges to the family have been made. See G.K. Chesterton, *Brave New Family,* G.K. Chesterton on Men & Women, Children, Sex, Divorce, Marriage and the Family 15 (Alvaro DiSilva ed., 1990).
49. 744 A.2d 864 (Vt. 1999).
unanimous votes (in fifty of fifty towns) rejecting same-sex marriage and (in forty-six of fifty towns) "civil unions."  

Additionally, Congress and two-thirds of the states have enacted laws prohibiting same-sex marriages. Even President Clinton, a strong supporter of gay rights, signed the Defense of Marriage Act that defines "marriage" for purposes of federal law as a male-female relationship only and allows each state to refuse to recognize same-sex marriage. Clearly, by Jefferson's standard of legitimacy it would be erroneous to assert that the definition of marriage as the union of a man and a woman is obsolete.

Similarly, the record concerning proposed legalization of same-sex domestic partnerships fails to support the claim that a significant social change in marriage has occurred. There has been tremendous academic encouragement for legislation supporting same-sex domestic partnerships by the usual elites, including endorsement by the American Law Institute, the Law Reform Commission of Canada, several state bar committees, hundreds of law review articles and notes, and promotion in popular media. Yet there has been insignificant acceptance of marriage-like civil unions or domestic partnerships as real marriages by legislatures or by the public at large. To date, only one state has enacted anything that approaches a Scandinavian-style marriage-equivalent same-sex domestic partnership. That, of course, is the Vermont Civil Union law. Hawaii and Vermont have also enacted more limited reciprocal beneficiary laws that are relatively narrow in scope and which are


52. See generally David O. Coolidge & William C. Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate, 32 Creighton L. Rev. 3 (1998) (citing the federal and state statutes).


56. See infra Part III.D.

rarely used. California also has enacted several domestic partnership laws with initially limited, but recently expanded, legal effects.

Moreover, even where marriage-equivalent same-sex domestic partnership has been adopted, it has been adopted with a label and definition different than marriage. The difference has been critical in obtaining passage of such legislation wherever it has been enacted, such as in Denmark, Norway, Sweden, Iceland, the Netherlands, France, and, of course, Vermont. In light of the intense promotion of domestic partnership by influential elites, the very limited acceptance of domestic partnerships is truly remarkable. Measured by the consent of the governed standard, the lack of acceptance of the new marriage-like domestic partnership proposals by the American people is strong evidence that traditional marriage is not obsolete.

C. Public Opinion Data and Marriage Revitalization

Efforts Show that Marriage Is not Obsolete

Social science evidence corroborates the notion that marriage is not obsolete. Surveys consistently find that Americans believe in the importance of marriage for society and for themselves; they support marriage; they want to marry; they expect to marry; they intend to marry; and they hope to marry. For example, a Harris poll reported that “[f]ully 96% of the Generation 2001 students hope to get married and 91%
hope to have children—three children on the average.” Likewise, in another poll, 83% of undergraduate women agreed or strongly agreed with the statement that: “being married is a very important goal to me.” More than four out of five (81%) of married respondents said they are very satisfied with marriage and only 1% said they are not satisfied with marriage. Over four out of five (82%) high school girls, and nearly three out of four (72%) high school boys believe that marriage is “very important.” Four out of five (80%) teenagers surveyed say that they will eventually choose to get married, compared to only 4% who say they will not marry. Even cohabiting couples generally distinguish their relationship from marriage; many of them hope the relationship will lead to marriage.

Moreover, there is a growing marriage revitalization movement in politics, in professions, and even (perhaps surprisingly) in some sectors of academia. Three states have enacted “covenant marriage” laws. Several states have enacted laws lowering marriage license fees for


62. The survey was done by the American Institute of Values and was accomplished by telephonically polling 1,000 undergraduate women attending four-year colleges or universities. Eighty-three percent agreed or strongly agreed that “being married is a very important goal to me.” Independent Women’s Forum, Hooking Up, Hanging Out and Hoping for Mr. Right: College Girls on Mating and Dating Today (July 26, 2001) at http://www.iwf.org/news/010727.shtml (last visited Sept. 21, 2003).


65. Id.


couples who undertake premarital training or counseling.\textsuperscript{69} Other states have enacted statutes concerning marriage preparation classes for their public schools.\textsuperscript{70} President Bush has proposed a welfare plan that includes a proposal designating about $200 million for programs to promote marriage.\textsuperscript{71} Many states already have awarded TANF grants to projects designed to prepare people for marriage, encourage unmarried couples to marry, and help couples in struggling marriages improve their marriages.\textsuperscript{72} A virtual eruption of proposed legislation in these states seeks to strengthen marriage, provide safeguards to deter hasty and avoidable divorce, and protect children against unnecessary divorces.\textsuperscript{73}

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required before divorce; and (4) fault grounds (or long separation) required for divorce.

\textsuperscript{69} Karen S. Peterson, \textit{More States Adopting Covenant Marriages}, USA Today, Apr. 10, 2001, at 1D.


\textsuperscript{72} $600,000 TANF Funding to Strengthen Marriage in Utah, \textit{SMART MARRIAGES} (Sept. 2001) at http://listarchives.his.com/smartmarriages/smartmarriages.0109/msg00004.html (last visited Oct. 21, 2003) (reporting that Utah’s Commission on Marriage received funds for the following projects: 1) to develop an informational video for couples anticipating marriage, 2) to provide counseling and mediation services for low-income, newlywed, second marriage, cohabiting or prisoner families, 3) to maintain a web site that will include marriage enrichment information, and 4) to provide events for Marriage Week in Utah); \textit{see generally} NOW Legal Defense and Education Fund, \textit{TANF Reauthorization: State Marriage Initiatives, Marriage, Fatherhood and Family Formation Initiatives} (fact sheet distributed by Jacqueline Payne at the \textit{Michigan Journal of Gender & Law Symposium}, Marriage Law: Obsolete or Cutting Edge, March 22, 2002) (listing nine states—Arizona, Arkansas, Florida, Louisiana, Michigan, Oklahoma, Utah, West Virginia and Wisconsin—with existing marriage programs under TANF, and additional legislation pending six states, including three new jurisdictions) (on file with author).

There is "widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce law." For example, public opinion surveys report that Americans believe that divorce is too easy. In one recent national survey, respondents said that divorce should be harder to obtain, outnumbering those saying it should be easier nearly three-to-one—the highest percentage to say they thought divorce is too easy since the pollsters began charting responses to that question in 1968. Another survey reported that one-half of those questioned agreed that "it should be harder than it is now for married couples to get a divorce," and 64% agreed that people "should be required to take a marriage-education course before they can get a marriage license." Yet another survey, in 1995, revealed that 31 to 55% of Americans surveyed favored

the divorce on the children") (last visited Oct. 21, 2003); Karen S. Peterson, Minnesota Law Encourages Premarital Training, USA TODAY, July 5, 2001, at D8 (describing a Minnesota bill that reduces the cost of a marriage license fee if the couple takes a premarital education course); Wendy Wendland-Bowyer, Wedding Bills are Ringing for State and National Politicians, DETROIT FREE PRESS (Feb. 5, 2002) available at http://www.freep.com/news/mich/marry5_20020205.htm (reporting that the state of Michigan has several bills pending that would promote marriage; the bills would 1) set up a Marriage and Fatherhood Commission, 2) permit a tax credit for couples who attend a qualified marriage-preservation program, 3) require couples who apply for marriage to take a premarital education or counseling course, 4) require parents to set up a "parenting plan" before a divorce, 5) limit no-fault divorce law to cases in which both parties agree to voluntarily end the marriage, 6) prohibit municipalities from ending pension payments to widows or widowers who remarry) (last visited Oct. 21, 2003); Paul Davenport, State to Teach Marriage Skills, SMART MARRIAGES (Sept. 4, 2001), at http://listarchives.his.com/smartmarriages/smartmarriages.0109/msg00005.html (reporting Arizona offering "marriage and communication skills workshops for couples who are either planning to marry or recently have married" and will be handing out a "marriage handbook" free to marriage-license applicants) (last visited Oct. 21, 2003); Marriage & Divorce Legislation—Iowa & Colorado, SMART MARRIAGES, Mar. 2002, at http://listarchives.his.com/smartmarriages/smartmarriages.0203/msg00019.html (reporting that an Iowa "bill would encourage pre-marital education by lowering the marriage license fee for those that get pre-marital education/counseling and raising the fees and lengthening the waiting period to 30 days for those that choose not to get education/counseling") (last visited Oct. 21, 2003); Virginia Resolution to Establish a Marriage Strengthening Commission, SMART MARRIAGES, Jan. 2002, at http://listarchives.his.com/smartmarriages/smartmarriages.0201/msg00029.html (Virginia established this commission "to promote marriage education in the schools, responsible fatherhood, and related family-strengthening measures") (last visited Oct. 21, 2003).


75. Time/CNN Poll: Divorce, at http://patriot.net/-crouch/wash/timetable.html (reporting that 61% agreed that it should "be harder than it is now for couples with young children to get a divorce") (last visited Oct. 21, 2003).
"divorce reform to strengthen the rights of spouses who want to save the marriage."\textsuperscript{76}

Moreover, for the past decade there has been a tremendous growth in marriage skill development study, research, theory, and clinical practice. Perhaps most interestingly, there has been increased interest in identifying and teaching skills to improve the quality of marriage and enhance the abilities of parties to resolve difficulties without ending the marriage. For example, several ecumenical movements drawing together leaders of diverse religious faiths have emphasized strengthening marriages. Marriage Savers, a lay ministry that trains clergy in marriage-building skills, reports success in reducing divorce rates in many cities and claims to save between 70 to 90\% of the troubled marriages in their ministry.\textsuperscript{77} Governors of several states have recently appointed commissions on marriage or enacted marriage policies; the U.S. Military has begun teaching marriage preparation skills on military bases around the world; and recent federal welfare reforms have emphasized promoting marriage, encouraging two-parent families, and reducing out-of-wedlock births.\textsuperscript{78} In short, not only is marriage still highly desired and strongly favored by the American people, but a significant movement to strengthen and revitalize marriage exists.\textsuperscript{79} This evidence clearly refutes claims that marriage is obsolete.

**IV. Four Alternative Theories Explain the Social Phenomena**

If the aforementioned social changes do not mean that marriage is obsolete, then what do they mean? Why is there so much nonmarital sex, cohabitation, childbearing out-of-wedlock, and alternatives to marriage if marriage is not obsolete? I suggest four possible answers.

\textsuperscript{76} Gary L. Bauer, *End No-Fault Divorce*, USA TODAY, Dec. 29, 1995, at 10A.


\textsuperscript{78} Id.; See supra notes 72–74 and accompanying text.

A. A Response to Increased Sexual Stimuli

First, premarital sex, cohabitation, and the increase in childbearing out-of-wedlock may just be the unfortunate, but normal response to increased sexual stimuli in society. These age-old vices are not new; they have long existed. What is new is the amount of sexualization that is socially acceptable and, consequently, the amount of responsive behavior. Numerous feminist authors and others have documented and criticized the sexual objectification of women in the contemporary popular culture, particularly in advertising and entertainment (especially in the current “Barbie” generations). Our society has become inundated with pornography and the sexual exploitation of women and girls (and increasingly of boys and young men) for personal pleasure. The commodification of virtual sex for recreation (via numerous forms of pornography, hard core and soft core) has become a huge and sustained growth sector of the economy.

While I believe that many young adults today have shown great moral integrity and strength to resist such cheap carnal enticements, the world they live in remains inundated with unwanted, unprecedented sexual pressures and stimuli. The increase in sexual stimuli may have caused the increase in sexual behavior and related tragic social phenomena such as out-of-wedlock childbirth and nonmarital cohabitation.


81. Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 2nd Sess. 12 (1996) (“It has been estimated that pornography, including child pornography, is an $8 to $10 billion a year business, and is said to be organized crime’s third biggest money maker, after drugs and gambling.”).

82. Some sources have claimed that the pornography industry generates as much as $10 to 14 billion in annual revenues. Frank Rich, Naked Capitalists, N.Y. TIMES MAGAZINE, May 20, 2001, at 51. A recent article rebutted those figures, stating that the industry’s annual revenues are actually between $2.6 to 3.9 billion. Dan Ackman, How Big is Porn?, FORBES.COM (May 25, 2001), at http://www.forbes.com/2001/05/25/0524porn.html (indicating that of that amount, Internet pornography earns approximately one billion dollars) (last visited Oct. 21, 2003).

About one in four regular Internet users—approximately 21 million Americans—visits one of the more than 60,000 sex sites on the Web at least once each month, far more than the number that bother to visit official, government-run Web sites. In 1998, revenues for online pornography were $1 billion, and are estimated by a Standard & Poor’s accounting report to grow to $3 billion by 2003.

Thus, these social phenomena may have little to do with changing values about marriage or marriage obsolescence. In fact, most participants in these behaviors and situations do not view either their behavior or their relationships as marital. They want to preserve the ideal of love, commitment, and generosity for marriage while temporarily sampling the pleasures of lust, exploitation, and selfishness.\textsuperscript{83}

Nevertheless, these situations indirectly undermine marriage. We cannot ignore the corrosive effects on character, expectations, and relationships that result from significant involvement with pornography or sexual activity out of marriage. These behaviors corrupt relationships, individual expectations, and personal integrity. So, they are a threat to the integrity of the institution of marriage but do not necessarily indicate marriage obsolescence.

\textbf{B. Increased Anxiety about Marriage in the Children of No-Fault Divorce}

Second, to some extent these social phenomena (e.g., cohabitation and childbearing out-of-wedlock) may suggest increased anxiety about marriage. It has been more than a full generation since divorce "American style"—unilateral, no-fault divorce on demand—became the standard in this country.\textsuperscript{84} The legal change was associated with an immediate doubling of the rate of divorce and an even greater increase in the effect and presence of divorce in everyday life.\textsuperscript{85} The first generation of the children of divorce have now come of age and many of them have been so stung by the failure of their parents' marriage, the breakup of marriages of other persons close to them, or the apparent and increasing instability of marriages in their communities, that they have misgivings about their own ability to succeed in marriage.\textsuperscript{86} They fear inflicting upon themselves, their loved ones, and especially their children, the pains and disadvantages of divorce that they experienced as children or

\textsuperscript{83} Some couples cohabit with the intent to later marry, as a "trial marriage." Sadly, it appears that cohabitation has a transformative effect on parties, reducing the prospects for lasting, satisfying marriage. See Popenoe & Whitehead, \textit{Should We Live Together?} supra note 66, at 3–4.

\textsuperscript{84} \textsc{Barbara Dafoe Whitehead}, \textit{The Divorce Culture} 3–8, 45–65 (1996) (describing the creation of a divorce culture and the acceptance of "expressive divorce").

\textsuperscript{85} Lynn D. Wardle, \textit{No-Fault Divorce and the Divorce Conundrum}, 1991 BYU L. Rev. 79 (reviewing the history and consequences of the move to no-fault divorce).

saw family or friends suffer. Their fears are certainly not irrational. However, what these people seek is not so much a change in the definition or composition of marriage as an assurance that they can succeed in marriage and make their marriages happy and lasting. Many of them experiment with what they consider trial marriages. Unfortunately, these so-called trial marriage decrease, rather than increase, the likelihood that a resulting marriage will last. Clearly cohabitation represents at least a temporary retreat from marriage. It may indicate—not that marriage has been tried and found wanting by young adults—but that marriage has been found difficult, so not tried. Rather than a belief that marriage is obsolete, there may be a belief that marriage is difficult or frightening.

These fears are as exaggerated as they are understandable. There is encouraging evidence that skills for successful marriage can be learned. Evidence suggests that couples who have experienced unhappy periods of marriage, but endure and try to work out their problems, subsequently report significant improvement in the quality of their marriage relationships. One recent study reported that more than four out of every five “very unhappy” married couples that did not divorce were able to turn their marriages around, and 86% of those surveyed reported five years later that their marriages were happier. The dedication of such couples to their marriages and the collection and dissemination of such information regarding the ways to solve marital problems without divorce suggests that marriage is not obsolete.

For contemporary young people who are wary of marriage, the search for alternatives to marriage is evidence of their looking for the right thing in the wrong places. They have seen the right thing turn into something that is very wrong. While they may fear marriage and be cynical about marital promise, they continue to crave successful marriage relationships.

The current generation is in some sense reminiscent of the generation that wrote the Constitution of the United States. The Founders had experienced the abuses of a strong central government. They had braved a prolonged, nearly disastrous rebellion against such a government. They had established a weak central government and, realizing it

87. Id.
88. Id. at 762–66.
91. Id.
was inadequate for their needs and desires, they somehow found the courage to overcome their well-founded fear of the abuses of power and re-establish a strong central government. In forging this new government, they had the creativity to establish unprecedented principles and structures to cabin that strong government and to prevent it from becoming abusive (such as principles of shared sovereignty in federalism, the separation of powers, and numerous intentional checks and balances).92 Likewise, I believe that the current generation of young people will produce many couples who will have the courage to revitalize marriage and the creativity to find new (or renovate old) ways that will make marriage work, despite the marital failures they have witnessed and experienced in their parents' generation. They may accept more latitude in marital roles and tolerate more alternative relationships, but they will preserve, and may even strengthen, the institution of marriage.

C. Taking Marriage for Granted

Third, in some cases these social phenomena may also suggest that marriage is being taken for granted. It is said that we come into possession of our institutions and our values the same way we come into possession of public buildings and monuments—someone else creates them and we simply inherit them. The risk is that if we do not value them or if we take them for granted, we tend to neglect their maintenance and upkeep. And when institutions are neglected—be they public buildings or private families—they quickly deteriorate, wear out, and lose their value. It is much more difficult to restore an historic building to a condition of high functional strength and beauty than it is to maintain it in its proper condition. The same is true of public institutions like marriage. The cost of neglecting structures like historic buildings and monuments is paid in dollars and cents. The cost of neglecting marriage is paid in human suffering and in years (sometimes lifetimes) of sorrow, pain, and regret. We are paying that price in many ways (e.g., children born out-of-wedlock, single parenting, high divorce rates). If we embrace the legalization of alternative family forms, the toll will be even higher because of the messages conveyed about marriage.

When our law and social policies take marriage for granted, the consequences can undermine marriage and weaken, even destroy,

society. Such consequences include pervasive social distress, resulting from discarded former husbands and wives and inadequately-parented children of divorce who overwhelm our juvenile courts, burden our remedial classes, swamp our clinics, and overwhelm our welfare systems. Because of the neglect and marginalization of marriage and family in our laws and public policies, "we now find ourselves in an altered state that has left some important values too much out of account."  

The benefits of marriage to individuals and to society are easily taken for granted. Because we are constantly surrounded by them, we get used to them, overlook them, and neglect them. Without appreciating what we have, we may begin to fantasize about other relationships, about grass being greener on the other side of the fence, and to embrace movements like those now extant to reform or replace "obsolete" marriage and family structure institutions.

D. The Growing Devaluation of Marriage

Fourth, these social phenomena (e.g. cohabitation, children born out of wedlock) may, in some circumstances, suggest a growing devaluation of marriage rather than the obsolescence of marriage. The proposed legalization and equalization of alternatives to marriage, especially same-sex marriage and domestic partnerships, reflect a lack of appreciation for the social importance of marriage. This phenomenon is likewise not new. A century ago, G. K. Chesterton observed that the marriage-based family is "now never mentioned in respectable circles." Since contempt for marriage has existed for at least one century, it is hardly evidence of a recent massive change in social values. Apparently, a requirement for membership in the progressive elite in America, in the past just as today, is to periodically express disdain for marriage and the marriage-based family; it is simply de rigeur for common intellectuals to call for a leveling of marriage or to insist on a functional deconstruction of the highly preferred status of marriage.

Modern media fosters the expectation of marital dysfunction and failure which discourages investment in family and marriage. Never before has the image of family failures been so thoroughly publicized. While public awareness of such problems can be helpful, the drumbeat of stories about domestic violence, hostile husbands, and deceiving

94. G.K. Chesterton, supra note 43, at 11 (quoting G.K. Chesterton, On Education, in All I Survey 196 (1933)).
wives is constantly in our newspapers, radio, television, and other daily media. Because bad news sells—appealing to our voyeuristic instincts—the media seldom report how many good marriages there are or how much good exists even in marriages that have some difficult periods. Good marriages do not make exciting news. Because the good that ordinary families do is not reported constantly in the news, we tend to forget the magnificent function ordinary husbands and wives, moms and dads, grandparents and stepparents, aunts and uncles, brothers and sisters serve. We do not hear about how many millions of hours and billions of dollars worth of social service family members voluntarily provide to their kin. This amount far exceeds the amount of social service provided by the state. One-sided reporting about marital failures, domestic violence, and spouse abuse effectively conveys a false impression about the quality and kindness in most marriages most of the time.95

Some negative images about marriage have become so popular and so embedded in cultural folklore that they remain despite data to the contrary. For example, it is now conventional wisdom that “the home is a dangerous place” for women because of rampant domestic abuse,96 that domestic violence is “the number one health issue facing women,”97 and that “50–70% of wives experience battery during their marriages.”98 However, a recent National Violence Against Women Survey reports that the annual rate of physical assault by an intimate partner reported among married and unmarried couples in the United States is 1.3% reported by women and 0.9% by men, with a lifetime rate of about 22.1% reported by women and 7.4% reported by men.99 Thus, over

96. See, e.g., Judith Armatta, Getting Beyond the Law’s Complicity in Intimate Violence Against Women, 33 Willamette L. Rev. 773, 775 (1997) (“[T]he most dangerous place for women is the home. While men find refuge there, for millions of women, the home is a prison and a torture chamber.”).
three-fourths of women in all relationships report no assault from their partners, and since violence in cohabitation is significantly higher than in marriages, it is safe to state that the percentage of wives who report spousal violence in their lifetime is less than 20%. Moreover, the rate of domestic violence appears to have fallen by two-thirds in two decades. According to the National Crime Victimization Survey, reported by the Department of Justice, the rate of violent crimes fell by 15% between 1999 and 2000. Nevertheless, the perception of a huge risk of spouse abuse in marriages is still a popular cultural image.

Of course, marriage-based families are not perfect, fail-proof institutions. In defending the traditional understanding of marriage and the value of marriage to society, I do not refer only to "perfect" marriages or marriages that are happy all of the time. I mean marriages where life is lived, where couples grow, where the most important relationships and individual development occurs. Critics remind us that within marriage and families there are abundant opportunities for abuse, bitterness, contempt, disgrace, evil, falsity, hatred, manipulation, mistakes, neglect, oppression, and countless other vices of human nature. It is true that there have been many failures in marriages and there are many imperfections, but we must keep these in perspective. We live in an imperfect world in which no human relationship or institution functions perfectly all of the time. While marriage and family relations are far from perfect, they are incomparably superior to any other model of a companionate or nurturing relationship. While there is some reason for caution about the risks of marriage and marriage-based families, there is no rational basis for believing that any other intimate or nurturing human relationship can do as well. Thus, because the world exaggerates the flaws and undervalues the importance of families, proponents of "alternative" relationships can sell their piece of the blue sky to naïve perfectionists. When the institutions of marriage and the

...
marriage-based family are devalued, investment in them diminishes and individuals are lured into less productive alternatives.  

Historically, social attitudes toward marriage have gone through three phases regarding spousal investment of time and commitment: from total commitment to balanced responsibility to optional interest. Through most of recorded history (and currently in many undeveloped economies and primitive cultures) marriage has been (or is) a matter of total commitment; to provide for the family and to fulfill family functions has required virtually the full-time effort of both spouses. Generally there has been a gender-based division of labor, but the full-time commitment of both husband and wife was required to meet the needs of the small, self-contained, family economic unit.

Later, as economic conditions improved and educational and social opportunities became more widely available, couples’ time, interest, and energy were divided among the competing responsibilities of family, self, and community. Total commitment gave way to balanced responsibility. Family responsibilities were still fundamental, but labor-saving devices, wealth, knowledge, mass communication, trade, education, and travel opened many other areas for investment of time and interest. (This stage often entailed the pursuit of the “supermom” and “superdad” ideal of giving twelve hours a day to their careers, in addition to time for family, personal talents and interests, and community.)

Most recently, the optional interest model blossomed, further reducing both the quantity and quality of investment in marriage and family. Increasingly, the market and the state are seen as able to provide (and attempt to provide) most of the family functions historically performed by spouses, parents, and children. Personal and community interests generally seem to dominate individuals’ commitments, making family responsibilities of secondary or even tertiary importance. Family relations and functions are increasingly viewed as impermanent in this model. Marriage is accessorized; it becomes just one of many optional interests whose value depends entirely upon individual taste or preference. This model of family relations is the dominant image today in media and academia (though not necessarily in the family life of

ordinary Americans), and reflects the comprehensive devaluation of marriage.

Fortunately, American marriages and families do not conform to the devalued perception of marriage prevalent among the image-forming classes. The balanced responsibility or priority commitment model seem to prevail.\textsuperscript{105} The most striking evidence of this has been the enormous resurgence of interest in and expression of commitment to family in the wake of the September 11, 2001 terrorist attacks. That deadly attack upon ordinary moms and dads, parents and children, awakened a renewed sense of the importance of marriage and family.\textsuperscript{106}

\textsuperscript{105} There is a better model in this day of competing opportunities and responsibilities which a significant portion of families follow called the priority commitment model. Husbands and wives who order their lives upon this model make family their top priority. The family is not the whole of their lives, but it is their primary interest and responsibility. The family does not take all of their time or resources, but it comes first. This approach is common but not predominant and certainly is not the most popular with academics or media leaders.

\textsuperscript{106} Dave Curtin, Mind of Colorado Poll Reflects Voters' Post-9/11 Worries, DENVER POST, May 30, 2002, at B1 ("More than 40% say they 'changed their views regarding what is important in life' and 'increased the amount of time spent with family or relatives' as a result of Sept. 11."); see also Liz Doup, Lifestyle: Fact or Fable? It's Been Nine Months Since 9/11. Will the Disaster Cause a Baby Boom?, S. FLA. SUN-SENTINEL, June 24, 2002, at 1D ("'After people suffer a trauma, they look for safety and sanctuary—something that feels comfortable,' says Eric Gentry, co-director of the International Traumatology Institute at the University of South Florida. 'You also heard a lot of people talking after 9/11 about what really mattered. And it was their relationships with family and friends.'"); Marilyn Gardner, Oh, Baby! Look How Your Ranks Grow, CHRISTIAN SCI. MONITOR, Mar. 6, 2002, at 12 (recounting the observations of a birth-announcement company president that, following September 11, catalog requests increased four-fold and there was "a shift toward more biblical, traditional names"); Darryl Haralson, Home Improvement Raises Roof on Growth: Active Housing Resale Market Cited as Key, USA TODAY, May 22, 2002, at 3B ("Cocooning. It's not just economics, but the national mood that's contributing, says Dale Pond, vice president at Lowe's. Americans in recent years have become increasingly 'home centered,' more oriented to spending time with family and friends, Pond says. The September 11 attacks accelerated the trend, he says."); Jennifer Wirth, Spending Surges for Father's Day, FLA. TODAY, June 24, 2002, at 1 ("Scott Krugman, a spokesman for the National Retail Federation, said September 11 created the desire for a strong connection with family that has translated into increased sales in nearly every Father's Day gift category in 2002."). But see Stanford Professor's Poll, S.F. CHRON., July 2, 2002, at A1 ("Dr. David Adamson, a Stanford University professor who is director of Fertility Physicians of Northern California, doubts there will be a baby boom. His office recently received results of a survey it had done of more than 125 patients nationwide."). One question asked of the patients, who were already seeking fertility treatment, was whether their desire to have a family increased, decreased or stayed the same as a result of September 11. About 90% of patients responded that their views were unchanged by September 11, Adamson said. The remaining 10%
Thus, the statistics cited as evidence of a massive social change in perception of marriage may well be explained by other influences. They may be evidence of the unfortunate but normal response to increased sexual stimuli in society, of normal heightened anxiety about marriage in the children-of-no-fault-divorce generation, of marriage being taken for granted, and of a growing devaluation of marriage in the idea-forming and peddling sectors of society (the media and academy). They may indicate that attempts to marginalize and devalue marriage have had some impact on vulnerable segments of society and that there are serious challenges to the institution of marriage today that should not be ignored. However, alternative explanations for the phenomena seem more plausible than the claim that marriage is obsolete.

V. We Should Oppose a Redefinition of Marriage to Include Alternative Relations Like Same-Sex Unions and Cohabitation

If there really has not been a significant change in basic attitudes about marriage, should we encourage society to support a redefinition of marriage to include alternative relationships such as same-sex unions and cohabitation? One response is simply to ask "why?" Must all relationships that are valued by the parties be deemed marriage? If a relationship is denied the legal status of marriage, can it not be valuable anyway? As noted earlier, several writers from the gay community have acknowledged that many of the significant economic protections and private-ordering benefits of marriage are available by means of private arrangement such as contract, will, trust, and joint-ownership. However, the significance of legal status for relationships, particularly the highly preferred legal status of marriage, cannot be ignored. In a time of pervasive government regulation, when so many public benefits and social dignity significantly turn on whether or not parties are legally married, it must be admitted that the consequences of the grant or denial of that status can be profound. We must ask whether alternative relationships should be given marital or marriage-equivalent status and benefits. We must ask whether, as a matter of sound policy, we should try to persuade "the governed" to "consent" to legalize same-sex

were divided equally among those who reported a slight increase or decrease in their desire to have a family, Adamson said.).

107. See supra note 5.
marriage or domestic partnership or give marriage-like legal and economic benefits to nonmarital or cohabiting couples.

A. Lack of Proof of Marriage-Comparable Social Value

Evidence that alternative relationships provide social benefits equivalent to marriage is necessary to support the claim that they should receive equivalent legal status as marriage. Such evidence is lacking. Rhetoric and anecdote are an inadequate substitute for hard evidence. Studies on the subject indicate that alternative relationships do not measure up to the "gold standard" of marriage.

For example, extensive studies on nonmarital cohabitation find that cohabitation entails significant risk to the quality and stability of intimate relationships and jeopardizes some of the most important purposes of marriage. Cohabitation is not as stable as marriage; fewer than one-third of all cohabitation relationships survive five years, and cohabitation before marriage "actually leads to less stable marriages" and "weaken[s] the institution of marriage by undermining its central foundation of permanence." Marriages in which the couples previously cohabited appear to be more likely to end in divorce.

"[C]ohabiting couples ha[ve] higher rates of violence than married couples. Severe violence [in one study] was almost five times as likely in cohabiting relationships [than in marriages]." In their exhaustive review of scientific data about nonmarital cohabiting, David Popenoe and Barbara Dafoe Whitehead report that "cohabiting relationships tend to be less satisfactory than marriage relationships." They also note that, "[a]nnual rates of depression among cohabiting couples are more than


109. Jay D. Teachman et al., Legal Status and the Stability of Coresidential Unions, 28 Demography 571, 579 (1991) (finding that marriages that begin without prior cohabitation were 44% to 55% less likely to be dissolved than those that began with cohabitation; the odds of dissolution in any six-month interval are 63% to 71% lower if the marriage was not preceded by cohabitation).


111. Popenoe & Whitehead, Should We Live Together, supra note 66, at 6.
three times what they are among married couples. And women in cohabiting relationships are more likely than married women to suffer physical and sexual abuse.\textsuperscript{112} Cohabiting men are four times more likely than husbands to cheat on their partners, and cohabiting women are eight times more likely than wives to be unfaithful to their partners.\textsuperscript{113} Those who believe that cohabitation and marriage are of equal social worth have yet to produce evidence to rebut the many studies that show that cohabitation is generally unstable, dangerous, and carries enhanced risk of potential social harm.

Likewise, the assumption that same-sex unions are fungible with marriages in terms of social benefits is simply unsupported by evidence. The heterosexual dimensions of the relationship are at the very core of what makes "marriage" what it is and why it is so valuable to individuals and to society. The union of two persons of different genders creates something of unique potential strengths and inimitable potential value to society. It is the \textit{integration} of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity that constitutes the core and essence of marriage. Thus, cross-gender uniting in marriage is not merely a matter of arbitrary definition or semantic word play; it goes to the heart of the very \textit{concept} or \textit{nature} of the marriage relationship itself. In the same way that "separate but equal" was a false promise in constitutional law, and that racial segregation is \textit{not} the equivalent of racial integration, same-sex marriage is not equal to heterosexual marriage.

\textbf{B. The "Relationships" Movement}

There is a significant movement among some academics to treat all relationships of intimacy as equivalent in law and social ordering. Within the last twenty-five years, a new discipline, the science of close relationships, has emerged.\textsuperscript{114} One reviewer has summarized this movement as a leveling movement:

\begin{quote}
Close relationship theorists argue that we need to bring a common theoretical and methodological approach to the study of all 'sexually based primary relationships.' They argue
\end{quote}

\textsuperscript{112} \textit{Id.} at 7.

\textsuperscript{113} \textit{The Marriage Movement: A Statement of Principles, supra} note 77 (citing \textsc{Waite} & \textsc{Gallagher, The Case for Marriage}).

\textsuperscript{114} Dan Cere, Institute for American Values, \textit{The Experts' Story of Courtship} (2000), at 15 (reviewing the "close relationship" scholarly literature).
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that, at the level of relational processes, alternative sexual lifestyles are not 'qualitatively other from what is known as the benchmark conventional nuclear family.' Close relationship theorists are convinced that the traditional nuclear family can no longer serve as a meaningful paradigm and focus for scholarly research. They maintain that current social trends are on their side. . . . According to John Scanzoni and Karen Polonko, courtship, spousal, and familial relationships can and should be 'subsumed under the broader construct of close or primary relationships.'

This movement also emerged in legal writing in the same decade. Some of the most well-known pieces have been authored by Paula Ettelbrick, Martha Fineman, and David Chambers. Many other legal scholars as well as some politicians have embraced the notion that relationships are the new paradigm in lieu of the traditional marriage-based family. For example, Hawaii Governor Ben Cayetano proposed:

115. Id. at 15-16.

116. See Paula L. Ettelbrick, Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All, 64 ALB. L. REV. 905, 914 (2001) (arguing that family law and policy should be adapted to reflect reality as it exists in numerous different family relationships).

117. See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). Fineman summarizes her view as follows:

I suggest that all relationships between adults be nonlegal and, therefore, nonprivileged—unsubsidized by the state. In this way, "equality" is achieved in regard to all choices of sexual relational affiliations. I suggest we destroy the marital model altogether and collapse all sexual relationships into the same category—private—not sanctioned, privileged, or preferred by law.

Id. at 5.


"The institution of marriage should be left to the church . . . The government should not be in the role of sanctifying marriages," and that the state should "quit the business' of regulating marriage."

The movement to substitute adult personal relationships for marriage is beginning to influence proposed legislation and model family doctrine. For example, in May 2000 the prestigious American Law Institute approved model family law reforms entitled Principles of the Law of Family Dissolution, which included provisions for the recognition of nonmarital, domestic partnerships (both heterosexual and homosexual) and the extension of benefits that married spouses enjoy upon dissolution of the relationship. The ALI based its recommendation upon the false assumption that parties who cohabit in a primary residence together for a year or two "enjoy [the] substance" of marriage, and their relationships "closely resemble marriages," therefore, they should be given equivalent economic status and benefits as bona fide marriages.


120. Bruce Dunford, Governor: Take State Out of Marriage Role, HONOLULU STAR-BULLETIN, Jan. 9, 1996, at A5.
121. Bruce Dunford, Hawaii Lawmakers Pondering Whether to Legalize Gay Marriages, ASSOCIATED PRESS, Jan. 21, 1996.
123. Id. § 6.02 cmt. a.
forms of intimate adult relationships. In conclusion, the Law Commission Discussion Paper urged:

All people should be able to freely choose their intimate partners and their legal relational status without penalty from the state or without financial inducement to abandon their choices. . . The role of the law ought to be to support any and all relationships that further valuable social goals, and to remain neutral with respect to individuals' choice of a particular family form.

As noted earlier, Vermont has created a new legal status called "civil unions" with registration and benefits comparable to marriage, and other states are considering similar schemes.

Some dicta in Supreme Court cases also seems to denigrate or deconstruct marriage. For example, Justice Brennan's well-known dictum in Eisenstadt v. Baird boldly declared:

[T]he 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. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Likewise, in a subsequent line of "privacy" cases, particularly abortion cases, certain members of the Court developed this atomistic view of marriage. In Planned Parenthood v. Casey, for instance, the plurality declared that the Constitution protects "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Later in the same opinion, the role of marriage and homemaking was denigrated in clear terms:

125. Id. at 38 (citing B. Cossman & B. Ryder, Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms 3 (Ontario Law Reform Commission 1993)).
127. 405 U.S. 438, 453 (1972) (Brennan, J., plurality opinion).
Only one generation has passed since this Court observed that 'woman is still regarded as the center of home and family life,' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.\textsuperscript{129}

While these expressions have thus far had relatively little impact on Constitutional law outside of the area of contraception and abortion regulation, they challenge and undermine the long-established precedents that emphasize the unique importance and value of marriage to individuals and society.\textsuperscript{130} In light of the growing intellectual acceptance of the substitution of adult intimate relationships for "marriage," some youthful experimentation with alternative relationships should not be surprising.

\textit{C. Reasons for Not Equating "Relationships" with "Marriage"}

There are four reasons why our laws and legal policies should not embrace the relationship theories and why we should encourage society to not redefine marriage to include same-sex couples or equate cohabitation with marriage. First, marriage is too important. Second, it would endanger the critical mass necessary for social stability. Third, it could

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 897 (citation omitted).
\item \textsuperscript{130} \textit{See}, \textit{e.g.}, \textit{Griswold v. Connecticut}, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); \textit{Maynard v. Hill}, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."); \textit{Murphy v. Ramsey}, 114 U.S. 15, 45 (1885) ("[N]o legislation can be supposed more . . . 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."); \textit{Reynolds v. United States}, 98 U.S. 145, 165 (1878) ("Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.").
\end{itemize}
cause irreparable damage to society. Fourth, relationship theory is oversimplified and flawed.

1. Marriage Is Too Important

First, marriage is too important. Marriage is a uniquely beneficial social institution, which probably explains why it has existed across history and in all cultures.\(^{131}\) It is the fundamental building block of society and the wellspring of social order.\(^{132}\) "[A]ll societies that survive are built on marriage. Marriage is a society’s cultural infrastructure . . . .\(^{133}\)

Not only is marriage important for individuals (especially for children), but the marriage-based "family is the very seedbed of democracy. Home is the place where we get our first ideas about ourself, our attitudes toward other people, and our habits of approaching and solving problems."\(^{134}\) It is in the home that children learn lessons about cooperation and commitment, sharing and sacrifice, and obedience to the unenforceable morals that form the foundation of self-government. It is from their parents that children learn how to make the best of shortages, how to care for others, how to be happy, to love liberty, to fulfill one’s duty, and the critical citizenship skills of mutual respect and cooperation.\(^{135}\) Through marriage and raising children, most adults relearn the importance and refine the skills of sacrificing for others, caring for each other and for the next generation, looking beyond the present, and nurturing the basics of life and community. It is in the home that trust in others and in the future is nurtured, and that is an indispensable prerequisite for democracy. The U.S. Supreme Court put it precisely right when it declared in 1888 that "[m]arriage, as creating the most important relation in life, [has] more to do with the morals and civilization of a people than any other institution . . . .\(^{136}\)

\(^{131}\) See generally Bronislaw Malinowski, Sex, Culture, and Myth (1962) (addressing the role of marriage in African, Aboriginal and Native American tribes); Margaret Mead, Male and Female: A Study of the Sexes in a Changing World (1949).

\(^{132}\) The European Convention on Human Rights, for example, protects "the right to marry and to found a family," which could suggest that marriage is considered the necessary foundation for a family. European Convention on Human Rights, Nov. 4, 1950, art. 12, Council of Europe—Doctorate of Information 28 (1968).

\(^{133}\) David W. Murray, Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy, POL’Y REV. 9 (Spring 1994).

\(^{134}\) Christine Beasley, Democracy in the Home 25 (1954).

\(^{135}\) Id. at 12 ("A basic feeling of respect for every individual human being, no matter what his age or status or personal peculiarities, is the very cornerstone of democracy.").

\(^{136}\) Maynard v. Hill, 125 U.S. 190, 205 (1888).
Professor Linda J. Waite, former president of the American Population Association, reviewed the social science evidence and concluded that individuals gain substantial benefits from being married. For example, behavior involving significant health risks (including marijuana use, drinking and driving, substance abuse, and failure to maintain an orderly lifestyle) is substantially higher for divorced men and women than it is for either widowed or married men and women. A key study reported that “[o]n every dependent variable except marijuana use, the divorced and widowed are more likely than the married to engage in negative health behaviors . . . .” Similarly, research indicates that married men and women enjoy lower mortality rates than non-married men and women of the same age. For example, one study followed a cohort of women and men from age forty-eight to age sixty-five. The percentage of divorced or never-married women and men who survived to age sixty-five was approximately 63%, while the percentage of those married to survive was about 85%. Married men and women report significantly higher rates of physical and emotional satisfaction in their sexual relations and also have greater wealth. The median household wealth per capita for married individuals in the U.S. (per capita, not per couple) is between $65,000–70,000, whereas for divorced it is $33,670, for never-married $35,000, and for widowed individuals $42,275.

Mental health problems, including rates of admission to mental institutions and enrollment in outpatient mental health services, is significantly lower for married persons than for divorced and separated persons. Married persons have lower rates of depression, suicide, substance abuse and alcoholism. Also, the overall death rate from coronary heart disease and a host of other physical illnesses afflict the divorced and separated much more than the married, as do suicide attempts and accidents. The risk that a hospital patient will require nursing-home care is two-and-one-half times greater for unmarried people [than married persons], even taking into account the severity of

138. Id. at 487.
139. Id. at 488–89 (graphing these statistics).
140. Id. at 490–91.
141. Id. at 492–93 (graphing these statistics).
the illness, the diagnosis, age, gender and race."\textsuperscript{145} A recent study summarized: "Compared to married people, the non-married . . . have higher rates of mortality than the married: about 50% higher among women and 250% higher among men."\textsuperscript{146}

A recent study reported a strong positive relationship between marital status and personal happiness in sixteen of the seventeen nations examined.\textsuperscript{147} The report found that being married increased happiness equally for men and women, and marriage was more than three times more closely associated with happiness than was nonmarital cohabitation. Marriage also has substantial benefits for children.\textsuperscript{148}

"The history of human society shows that when people stop marrying, their continuity as a culture is in jeopardy."\textsuperscript{149} The harm, however, is not a "sky is falling" kind of immediate danger. Rather, it is comparable to the consequences of the unilateral adoption of no-fault divorce laws in the early 1970s. Proponents of permissive divorce in the 1970s dismissed concerns that divorce would have harmful social consequences and pointedly denied that children would experience any long-lasting, significant harm.\textsuperscript{150} Today, however, it is universally acknowledged that most children of divorce experience some serious trauma and negative reactions because of the divorce.\textsuperscript{151} Moreover, a significant percentage,

\begin{thebibliography}{99}
\bibitem{146} Id. (citing Catherine E. Ross et al., \textit{The Impact of the Family on Health: The Decade in Review}, 52 J. MARRIAGE & FAM. 1059, 1061 (1990)).
\bibitem{148} \textit{See generally Waite \& Gallagher, supra note 89.}
\bibitem{149} David W. Murray, \textit{supra} note 133.
\bibitem{150} \textit{See Barbara Dafoe Whitehead, The Divorce Culture} 81–107 (1996). Dr. Whitehead reports that thinking about the impact of divorce on children has gone through two cycles. The first cycle in the mid-1970s emphasized that divorce could be good for children. It was argued that children could gain from divorce just as their parents could; divorce gave them a chance for more happiness and individual growth; and that children would "bounce back" from short-term problems associated with divorce. It was also argued that other socio-economic factors caused the detriment associated with divorce, not divorce itself. It was argued that marital strife was the cause of problems, not divorce. Some argued for what William J. Doherty calls "psychological trickle down"—that if the parents were happier, the children would be happier, therefore divorce, to achieve parental happiness, was good for children. \textit{Id.}
\bibitem{151} The second wave of expert opinion about the effects of divorce on children, in the mid-1980s and since then, has been much more sober.
\bibitem{151} "We have not fully appreciated how divorce continues to shape the lives of young people after they reach full adulthood. For example, we know from surveys that grown children from divorce have a higher divorce rate, but that does not tell us anything
about one-quarter of them in the most optimistic assessments, do not fully recover from those harms, carrying the disabling personal and interpersonal fallout of the failure their parents' marriage throughout their lives. However, it took nearly a full generation before those consequences were apparent. Human development takes too long and is too complex for the most serious harms to be immediately evident. Some mock concerns that children raised by same-sex couples will suffer serious harms or that endorsing same-sex marriage will damage the fabric of society because "the sky is not falling" in Denmark, the Netherlands, or Vermont; they have simply failed to learn from the mistakes made by the "divorce-does-not-harm-children" theorists of a generation ago.

Nurturing a family requires a firm and stable foundation. Alternative relationships are simply not comparable to even the reduced stability of contemporary marriage in the era of unilateral, no-fault divorce. As even Judge Posner conceded: "[It] would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages . . . . [P]ermitting homosexual marriage would about their [interior lives]." Judith Wallerstein et al., The Unexpected Legacy of Divorce xix (2000).

Children in close post-divorce families do not, on the whole, look happier, healthier, or more well adjusted, even if one or both parents are happier. National studies show that children from divorced and remarried families are more aggressive toward their parents and teachers. They experience more depression, have more learning difficulties, and suffer from more problems with peers than children from intact families. Children from divorced and remarried families are two to three times more likely to be referred for psychological help at school than peers from intact families. More end up in mental health clinics and hospital settings. There is earlier sexual activity, more children born out of wedlock, less marriage, and more divorce [among children whose parents got divorced]. Numerous studies show that adult children of divorce have more psychological problems than those raised in intact marriages.

Id. at xxiii; see also Judith S. Wallerstein & Sandra Blakeslee, Second Chances (1989).

152. E. Mavis Hetherington & John Kelly, For Better or For Worse: Divorce Reconsidered passim (2002). Based upon a study of almost 1,400 families and more than 2,500 children, some of them for three decades, Dr. Hetherington reports that about 75 to 80% of children from divorced homes are "coping reasonably well and functioning in the normal range," and about 70% of kids in stepfamilies are "pretty happy." However, 20 to 25% of children of divorce are troubled, depressed, impulsive, irresponsible, or anti-social, compared to about 10% of children from intact families. Twenty years after their parents divorced, approximately two-thirds of boys and three-fourths of girls had poor relationships with their fathers compared to 30% of children from intact marriages. About 10% fewer (than children of intact families) report good relations with their mothers.
place government in the dishonest position of propagating a false picture of the reality of homosexuals' lives.\textsuperscript{153} Moreover, Dr. Barbara Defoe Whitehead has warned:

If we fail to come to terms with the relationship between family structure and declining child well-being, then it will be increasingly difficult to improve children's life prospects, no matter how many new programs the federal government funds. Nor will we be able to make progress in bettering school performance or reducing crime or improving the quality of the nation's future work force—all domestic problems closely connected to family breakup.\textsuperscript{154}

Professor Katherine Shaw Spaht has cautioned that "[t]he prosperity of our nation—indeed perhaps its very survival—depends upon the health of its constituent families."\textsuperscript{155} Sociologist Daniel Yankelovich explained that the free-market economy is based upon family values, and that as those values weaken, the health of the economy will be in jeopardy.\textsuperscript{156} Thus, the deterioration of family infrastructure presents a grave threat to the national economy.

Embracing a radical redefinition of marriage, when the institution of marriage is already insecure and under disintegrating pressures, would put these benefits at risk.\textsuperscript{157} At this time, with so many children and adults struggling with the consequences of other ill-conceived marriage reforms (such as unilateral no-fault divorce), it would be exceptionally unwise to plunge ahead with another radical change that would further destabilize the institution of marriage.

156. Daniel Yankelovich, Foreign Policy After the Election, 71 Foreign Aff. 1, 3-4 (1992):  
There exists a deeply intuitive sense that the success of a market-based economy depends on a highly developed social morality—trustworthiness, honesty, concern for future generations, an ethic of service to others, a humane society that takes care of those in need, frugality instead of greed, high standards of quality, and concern for community. These economically desirable social values, in turn, are seen as rooted in family values. Thus the link in public thinking between a healthy family and a robust economy, though indirect, is clear and firm.  
157. See supra notes 15–39 and accompanying text.}
2. The Need for a “Critical Mass”

Second, to include alternative relationships such as same-sex unions within the definition of marriage would endanger the critical mass needed for social stability and the preservation of marital integrity. The fact that some individuals break the law does not mean that society can function lawlessly. A healthy society may accommodate a certain amount of alternative behavior, even defiance, disobedience, and deviation from the necessary, the essential, and the ideal. On the other hand, no society can endure if most of its citizens disregard its foundational standards. As William A. Stanmeyer wrote in another context:

[E]very human organization has an inner life of shared purpose and values, and if too many of its members reject those purposes and discard those values, that inner life is shattered. In other words, when a ‘critical mass’ of citizens who reject society’s beliefs and norms develops, that society falls apart.158

Following social norms is especially necessary in maintaining the foundation of social relations, the structure of marriage, and marital integrity. A critical mass of society must be willing to assume the responsibilities of marriage-based family; if too many citizens are drawn away to “alternative relationships,” the infrastructure of society will erode and collapse.159


It is certain that there never was a society on earth in which all the citizens were of good character. However, perfection is not necessary; society can tolerate a small percentage of evil citizens amid the masses of the good. Nonetheless, as disorder spreads among individual lives, at some point society as a whole is wounded and even endangered. This fact is true whether the disorder arises by physical illness, psychological dysfunction, or criminal conduct: at some point the quantitative changes in individual health or attitude or action add up to a qualitative change.

Whether quick or slow, disintegration of the social structure results when free-riding is encouraged in matters of family relations. In another context, Garrett Hardin called the phenomenon “the tragedy of the commons,” a phrase that would aptly apply to the endorsement of alternative family relations. Among other reasons, the law serves to discourage free-riding, to give incentives to enter constructive relationships that contribute to society, and to discourage relationships that contribute less or involve greater danger to the individuals and to society. Change in legal rules regulating dissolution of family relations already has had serious “unexpected” consequences because of changed behavioral incentives. Likewise, radical change in the definition of marriage will skew relational incentives in a way that will harm the institution of marriage.

3. The One-Way Street

Third, we should reject marriage-equivalent status for alternative relationships because once the institution of marriage slips off its foundation, it will be very difficult to restore. Family demographer William Goode suggested that after marriage is weakened in a society it is nearly impossible to revitalize it absent traumatic and dramatic external pressure such as military conquest, economic collapse, or natural disaster of widespread proportions; it is very difficult to put the genie back in the bottle. Therefore, before starting down the road to legalizing domestic

161. See, e.g., Margaret F. Brinig, From Contract to Covenant: Beyond the Law and Economics of the Family 173–77 (2000) (arguing marriage laws create incentives, which affect how couples live in or leave marriage); Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family (2000) (stating no-fault divorce laws give incentive to divorce); Allen M. Parkman, No-Fault Divorce: What Went Wrong? (1992); Margaret F. Brinig, Comment on Jana Singer’s Alimony and Efficiency, 82 Geo. L.J. 2461 (1994) (suggesting that although women perform similarly to men in the marketplace, they act differently when making decisions for their family; this difference may change due to changes in family law); Margaret F. Brinig & Douglas W. Allen, “These Boots Are Made for Walking”: Why Most Divorce Filers Are Women, 2 Am. L. & Econ. Rev. 126 (2000) (arguing that filing for divorce is driven by self interest, especially concerns about who will get custody of children).
162. Popenoe & Whitehead, Should We Live Together?, supra note 66, at 14 (“The recognition and support of unmarried cohabitation unfortunately casts marriage as merely one of several alternative lifestyle choices. As the alternatives to it are strengthened, the institution of marriage is bound to weaken.”).
partnership or same-sex marriage, we had better be very sure that it leads in a direction we want to go, for history suggests that it is a one-way street.\textsuperscript{164}

A good example of the destructive consequences of false equalization is Sweden, where the government adopted deliberate policies in the 1960s to "be ideologically neutral to the question whether a man and a woman marry, or live together out of wedlock. The choice between marriage and cohabitation has been understood as an ethical, or ideological, choice in which legislators should not be involved."\textsuperscript{165} Thus, Swedish law gives the same or similar legal status and legal benefits to nonmarital cohabitation as to marriage, to childbearing out of wedlock as to childbearing within marriage, and to informal liaisons and de facto temporary families as to formal marriage-based families. Additionally, the Swedish divorce laws were liberalized to protect a spouse's unilateral wish to break up from the marriage. . . .\textsuperscript{166} The effect of these policies upon family life and families in Sweden has been dramatic. Today, more than half of all children in Sweden are born out of wedlock; cohabitation before marriage is extremely high; and when couples finally marry, the divorce rate is nearly 50%.\textsuperscript{167} Regulations of social aid, child-caring allowance, and housing subsidies all manifest "hostility to [mothers'] work in the home" and discriminate against homemakers.\textsuperscript{168} Even moderate scholars now decry the Swedish government's failure to respect the freedom of choice for parents to take care of their own children.\textsuperscript{169}

Francis Grund, the Austrian counterpart and contemporary of Alexis de Tocqueville, emphasized the importance of preserving our domestic virtue in words that are very sobering in light of the challenges to marriage and family today. He wrote:

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\item[(164)] Scandinavian countries have recognized same-sex domestic partnership for a dozen years and heterosexual domestic partnerships for decades. The experience of those countries suggests that legalizing domestic partnership weakens marriage. "[T]here is evidence that the widespread substitution of cohabitation for marriage in Sweden has given that country the highest rate of family dissolution and single parenting in the developed world." Irizarry v. Bd. of Educ., 251 F.3d 604, 608 (7th Cir. 2001) (citing David Popenoe, Disturbing the Nest: Family Change and Decline in Modern Societies 173–174 (1988)).
\item[(166)] Id. at 129.
\item[(167)] Id. at 125–26.
\item[(168)] Id. at 132–33.
\item[(169)] Id. at 133–35.
\end{itemize}
I consider the domestic virtue of the Americans as the principal source of all their other qualities... No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.  

Many Founders of our Constitutional Republic agreed; they spoke of “virtue” as the substructure upon which the Constitutional superstructure rested and without which it could not survive. Thus, in significantly altering the definition and composition of the core unit of society, we risk altering the political and legal foundations of our government, for they are linked to our families.

A proponent of equalizing all intimate relationships might argue that, precisely because marriage is so important it should be made available to persons in all meaningful relationships, those in alternative relationships as well as those in traditional ones. Wouldn’t it be good not only for them but also for their families and for society, for them to enjoy the same benefits?

However, that line of thinking mistakenly assumes that the social benefits flow from the bestowal of the label marriage, not from the nature of the relationship itself. Believing that calling something a marriage will make it a marriage or will infuse it with qualities and characteristics of marriage is the ultimate Kelsean delusion.

173. Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. Tex. L. Rev. 735, 750 (1998) (“It is like the story attributed to Abraham Lincoln: he is said to have once asked how many legs a dog would have if you counted a tail as a leg. To the response ‘five legs,’ Lincoln said, ‘No; calling a tail a leg doesn’t make it a leg.’”).
The relationship movement is built on flawed assumptions. “Marriage is not just an inferior version of going steady, or a sexual barter, or a consumer good. Love is more than a style.”

Marriage has an ethical or moral dimension lacking in other relationships and that unique quality has the potential to transfigure the relationship into a socially beneficial institution. Relationship theory neglects this trait and “radically relativizes and privatizes every possible dimension of human relationships, rejecting any criterion for relationship success other than the self’s subjective assessment of the self’s needs, denying any real connection between courtship and marriage, and obliterating any meaningful distinction between marriage and other sexually close relationships.”

Thus, close relationship theory is simplistically reductionism.

D. Same-Sex Marriage Would Serve Only Private, Not Public, Interests

There is a difference between the private or individual interests in marriage and the social or public interests in marriage. The social interest usually secures individual interests, but focuses on the interests that the individual members of society have in common. Private individual interests reflect the highly personalized preferences that particular individuals or groups of individuals pursue. The panel title focusing on legal marriage reminds us that marriage laws are enacted to secure public, not private, interests.

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, should not be) enacted simply to promote private lifestyle preference or personal interests. Arguments that public laws should be designed or amended to promote private interests should have little persuasive effect in debate over public policy.

Claims to legalize same-sex marriage are suspect under the public-private distinction because legalizing same-sex relationships is not in the common interest of society. The benefits of legalizing same-sex marriage

174. Id. at 31.
175. Cere, supra note 114, at 30.
176. 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.”).
177. See id. at 177 (“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.”).
would not flow to society in general, except in indirect, insignificant ways (while, as noted earlier, broad social interests would be harmed). Indeed, given the small number and percentage of same-sex couples who have entered into same-sex marriage in the Netherlands (about 5%), or even registered civil unions in Vermont (about 33%), it would appear that even in the gay and lesbian community same-sex marriage does not represent a strong common interest of that small subset of society. If it is not a common interest within the gay community, it certainly does not represent an interest that the members of American society in general share in common. Thus, legalizing same-sex marriage would, at best, further private not public interests.

VI. Same-Sex Domestic Partnership Probably Will Be Legalized in a Minority of States

Returning to the consent of the governed standard, the final question I will address is whether it is likely that alternative relationships will be given marital or quasi-marital status in American states. Of course, I have no crystal ball or special expertise in predicting such things, but it would not surprise me if alternative relationships were given legal status in varying degrees (mostly of a moderate, compromise nature) in several states. It has already happened in Vermont by an unusual judicial-legislative process, and similar proposals have been introduced in other state legislatures. While I believe that such compromise proposals are bad policy, if enacted by the legislature, they would be in accordance with Mr. Jefferson's prime principle of the consent of the governed. When the citizens of a given jurisdiction choose by proper democratic processes to experiment with new social orders, the will of the people should be respected. In a federal system such as the United States, we can live with some interstate diversity on these matters. Our Constitution can endure and accommodate some bad policies if legitimately enacted. So long as a critical mass protects marriage, our constitutional

178. In the Netherlands, which has legalized same-sex marriage and domestic partnership, it is reported that only one in twenty same-sex couples have married, and an additional 10% signed up for registered partnership; thus, about six out of seven same-sex couples in the Netherlands have rejected both marriage and domestic partnership. Likewise, in Vermont, where same-sex couples can obtain all the benefits of marriage by registering as a civil union, two out of every three same-sex couples have not registered. Zogby International/GLCensus Partners, Attitudes Towards Gay Rights Organizations, available at http://www.glcensus.com/polls/gayrights.htm (last visited Oct. 27, 2003).

179. See supra notes 35–39 and 59 and accompanying text.
republic probably can endure that development. Such differences between the States would not be ideal, or neat, or tidy; there will be lots of collateral questions, problems, and debates, especially concerning interjurisdictional recognition, but that is precisely how Jefferson's principle and our constitutional system work.

However, the imposition of the same policy by judicial decree would be improper and objectionable. A political ploy to impose by judicial "legislation" a rendition of marriage that the representatives of the people in the legislature reject is dangerous. It violates Mr. Jefferson's standard of legitimacy. Yet that is the route chosen by some advocates of radical marriage reforms and domestic partnership.

Conclusion

The great Russian writer Leo Tolstoy suggested the answer to the question of this symposium in the opening paragraph of Anna Karenina: "Happy families are all alike; every unhappy family is unhappy in its own way." Tolstoy did not mean that families must be identical to be happy, but that certain principles are necessary for happiness and success in family life just as in other areas of human endeavor. Those who live according to such principles generally are happy and those who do not, eventually are not. And the sorrow, suffering and despair of failed relationships take a heavy toll not just on the individuals who make unwise choices, but on society as well. Society bears the burden of the consequences in juvenile courts, hospitals, mental therapy and institutions, remedial education, and lost productivity. The people should not have to bear the heavy social consequences of a radical redefinition of marriage to which they have not democratically consented.

Pursuant to the consent of the governed standard, marriage is not obsolete because the people have not consented to a radical redefinition of marriage (including same-sex couples, for instance). Moreover, such a redefinition would threaten the integrity of the institution of marriage and its benefits to society. We still need marriage—the received tradition of life-long, committed, mutually-supportive, exogenous male-female marriage. Since most of the members of society today still recognize that, so long as Jefferson's consent-of-the-governed principle contacts the making of our laws, that understanding of marriage will continue to be reflected in our marriage laws, as it should.
