

DOES SEX MAKE BABIES?
MARRIAGE, SAME-SEX MARRIAGE AND LEGAL
JUSTIFICATIONS FOR THE REGULATION OF INTIMACY IN A
POST-LAWRENCE WORLD

*Maggie Gallagher**

Most legal arguments in favor of same-sex marriage focus on the question of “horizontal” equal protection, or formal equality between same-sex and opposite-sex couples. Do same-sex couples have a “right” to be treated the same under the law as opposite-sex couples?¹

However, there is an even more basic question of equal protection raised by marriage law—as “vertical” equality, or equal treatment within the category of gay and lesbian people. Particularly in light of *Lawrence’s* assertion of a constitutional right to “private sexual conduct,” what right has the government to prefer one type of relationship (permanent, faithful, twosomes) over the alternatives?² On what basis can the law tell gay and lesbian people that other kinds of intimate or sexual relationships are somehow less worthy of public concern, attention, or benefits than same-sex marriages?

*Maggie Gallagher is President of the Institute for Marriage and Public Policy (www.imapp.org) and co-author of “The Case for Marriage: Why Married People are Happier, Healthier, and Better-Off Financially” (New York: Doubleday, 2000). A version of this paper was presented at the United Nations’ European Regional Dialogue on the Family in Geneva, Switzerland, August 25, 2004.

1. See, e.g., *Tanner v. Oregon Health Sciences Univ.*, 994 P.2d 129 (Ore. App. 1999), *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001); *Cornell v. Hamilton*, 791 N.E.2d 214 (Ind. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

2. As the Court stated:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Lawrence v. Texas, 539 U.S. 558, 578 (2003).

A handful of gay and lesbian critiques of same-sex marriage raise this question. Writing in the *Albany Law Review*, law professor and activist Paula Ettelbrook recently explained:

[M]arriage strategies alone are not consistent with the broader impact of discrimination that fueled our movement's early work to establish family equality. Even if marriage were allowed tomorrow here in New York, there would be many who for any number of reasons would not rush to the county clerk's office, but who nonetheless have viable, committed, mutually supportive relationships. These families should still receive family benefits and privileges for the same effort they put into sustaining their households. Our original goal was to remove marriage as the sole entry point for family benefits. Marriage strategies would narrow that door again.³

Or, as Nancy Polikoff, law professor at American University, wrote in 2003:

Marriage as we know it is a status unlike any other, conferring benefits and responsibilities unavailable to those in other close personal relationships. . . . I advocate here a more sweeping reform, incorporating recognition in every area of the law of the diversity of adult relationships characterized by emotional intimacy and economic interdependence. The law should no longer reward marriage above all other relationships.⁴

A similar argument was earlier made by Professor Martha Fineman, who in her book *The Neutered Mother*, argues that as long as marriage exists:

[I]t will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual

3. Paula Ettelbrick, *Domestic Partnerships, Civil Unions, or Marriage: One Size Does Not Fit All*, 65 ALBANY L. REV. 905, 913 (2001).

4. Nancy D. Polikoff, *Conference on Marriage, Families, and Democracy: Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 201-202 (2003). Professor Polikoff goes on to state:

Elsewhere I have argued for the abolition of marriage as a legal category, joining other distinguished legal scholars. . . . Although I continue to believe that ending the legal category of marriage would be the preferable family law reform, this Article, which advocates eliminating the unique role of marriage in law, would end marriage as we know it and is a more realistic endeavor.

Id. at 202, n.7.

relationships equal with each other and all relationships equal with the sexual?⁵

Outside of the scholarly community, gays and lesbians have raised similar hard questions. One lesbian couple explained why they would not marry:

Those who have fought for gay marriage have made clear that, in the U.S., important benefits are tied to marital status. As the judges of the Massachusetts Supreme Judicial Court noted in the *Goodridge* decision, "Marriage provides an abundance of legal, financial, and social benefits." . . . But focusing on the right to marry perpetuates the idea that these rights ought to be linked to marriage. Were we to marry, we would be contributing to the perpetuation of a norm of "coupleddness" in our society. This preference for couples marginalizes those who are single, single parents, widowed, divorced, or otherwise living in non-traditional constellations.⁶

For the most part, however, this fundamental question about marriage law has been ignored in equal protection analyses: by what right does the law intrude in intimate relationships at all, either to burden and regulate, or to benefit and prefer? What is the legal justification for the state regulation of our most intimate private lives? Why do we have laws about marriage at all?

These questions pose a particular challenge for advocates of same-sex marriage. According to Capitol University Law Professor Mark Strasser, writing in the *DePaul Law Review*, marriage is for "the promotion of stability, the limitation of the disorganized breakdown of relations, and the provision of a home for the production and rearing of children."⁷ E.J. Graff, author, journalist, and same-sex marriage activist from Massachusetts writes: "Western marriage today is a home for the heart: entering, furnishing, and exiting that home is your business alone. Today's marriage—from whatever angle you look—is justified by the happiness of the pair."⁸

5. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230 (Routledge) (1995).

6. Martha Ackelsburg & Judith Plaskow, *Why We Aren't Getting Married*, *THE WASHINGTON BLADE*, June 4, 2004, available at <http://www.washblade.com/2004/6-4/view/columns/why.cfm>.

7. Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 *DEPAUL L. REV.* 51, 74 (1998).

8. As E.J. Graff stated:

Marriage . . . turned into a way to share and shore up one's dearest companion's well-being and inner fortunes. Marriage stopped being justified only by making babies—and became justified by enriching the couple's happiness and intimacy.

This is circular reasoning that begs the question: how is society more stable because gay men having sex are setting up housekeeping together rather than meeting in bars? Or, if the goal is the orderly breakdown of relations, then as the American Law Institute asks, why don't we impose marital obligations upon every group of people sharing a common residence?⁹ If the public rationale of marriage is the happiness of the individuals in them, as Graff asserts, the problem of "vertical" equal protection becomes even more urgent. How can the law deny other kinds of relationships their own vision of personal happiness? By what right do we tell people, who may desire polygamous, polyamorous, or open unions—or no union at all—that their vision of happiness is wrong or defective?

How will the marriage of two men aid in "assuring support obligations and assigning responsibility for the care of children," (as Lenore Weitzman identified the key social goals furthered by marriage)?¹⁰ No parental obligation will arise naturally out of the marriage. Each of the two men will have to, by some additional step, establish a parenting relationship with any children living in their home, either through adoption or the assertion of biological paternity.

The same question of "vertical" equity arises in opposite-sex relationships. In both cases the government has to justify the regulation of intimacy according to a set model. One might pause and ask this related question: why is marriage a universal human institution? In all the wild variety of cultures human beings have created in every kind of economic and ecological niche, every known human society has something called marriage.¹¹ It does not always look very much like

The family . . . started to be seen as a careful and nurturing nest for the vulnerable young, a nest in which men and women are equally qualified to serve as financial protector or personal nurturer or both . . . Social order does remain one of marriage's key purposes: the legal institution attempts to apply a just social consensus to private disputes.

E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 251 (Beacon Press 2004) (1999).

9. American Law Institute, *Principles of the Law of Family Dissolution* § 6.01 (2000) "For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." *Id.*

10. Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1241-45 (1974).

11. As several commentators pointed out:

Marriage exists in virtually every known human society. . . . At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution.

our own marriage tradition, which is deeply rooted in Judeo-Christian ideas. But even in societies that license same-sex relationships, marriage virtually always has something to do with bringing together a man and a woman who might make the baby, so that society gets the next generation it needs, and so that socially-valued children have both a mother and a father.¹²

Here is my argument: the justification for legal preferences for marriage for couples attracted to the opposite sex rests on three assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing.

Each of these ideas is now contested in the public square and particularly, in the academy. This essay will examine the evidence for each proposition asking, in essence, are these statements still true? Together do they continue to constitute a rational legal justification for the regulation of intimacy?

DOES SEX MAKE BABIES?

For most of American history, the relationship of marriage to procreation was axiomatic.¹³ Marriage was society's sexual license par excellence. By authorizing, encouraging, and indeed requiring sex between a man and a woman,¹⁴ marriage ensured the procreation of the

As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.

WILLIAM J. DOHERTY, WILLIAM A. GALSTON, NORVAL D. GLENN, JOHN GOTTMAN ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 8-9 (Institute for American Values) (2002).

12. *Id.*

13. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that "[m]arriage and procreation are fundamental to the very existence and survival of the race."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.").

14. Failure to consummate a marriage (*i.e.*, have sexual intercourse) traditionally made a marriage voidable. *See* Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1103-07 (2002) ("The law considers

human race as well as mutual support and the only lawful sexual satisfaction. By favoring marriage over other kinds of sexual unions, society discouraged out-of-wedlock births, and encouraged procreation within marriage.

Is this still a legitimate justification for marriage? Does sex still make babies? Many scholars and other observers both right and left have concluded the answer is: no. Legalized contraception, they argue, makes traditional notions of marriage as a regulator of reproduction anachronistic at best, irrational at worst.

As one legal scholar put it:

When in the 1960s, oral contraceptives became available, and a constitutional right to use them had been established by the Supreme Court in *Griswold v. Connecticut*, the courts retreated from this rhetoric, perhaps realizing that the survival of the species and of civilization did not depend on every sexual encounter having procreative potential. . . . The point here is that the conception of marriage as sexual, wherever found in the law, has outlived its usefulness. Unless and until we contemplate reestablishing meaningful legal penalties for fornication, the mere existence of marriage as a legal institution cannot realistically be looked upon as a means to control sex outside of marriage, and therefore control out-of-wedlock childbirth.¹⁵

Non-legal observers have come to similar a conclusion:

Today, though, sexual intercourse is delinked from procreation. Since the invention of the Pill some 40 years ago, human beings have for the first time been able to control reproduction with a very high degree of assurance . . . the causal relationships between sex, pregnancy and marriage were severed in a fundamental way . . . Sex, childbearing and marriage now have no necessary connection to one another, because the biological connection between sex and

sexual intercourse to be an implied term of the marriage contract and will grant an annulment when one party secretly intends not to consummate it.”); Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 729, 749 (2000) (“Physical defects and incapacities which render a party unable to consummate the marriage, existing at the time of the marriage, and which are incurable are, under most statutes, grounds for annulment.”). See also ALASKA STAT. § 25.24.030 (Michie 2002); DEL. CODE ANN. tit. 13 § 506(a)(2) (1999); 750 ILL. COMP. STAT. § 5/301(2) (West 1999); MINN. STAT. ANN. § 518.02(b) (West 1990); OHIO REV. CODE ANN. § 3105.31(F) (Anderson 2003); WIS. STAT. ANN. § 767.03(2) (West 2003) (including inability or failure to consummate among grounds for annulment, though several also require nondisclosure of inability to consummate). Failure to have sexual relations was also considered grounds for divorce in many jurisdictions. Borten, *supra* note 14, at 1098 (“[M]any states list impotence as a ground for divorce.”) (*citing* MASS. ANN. LAWS ch. 208, 1 (Law. Co-op. 1994); MISS. CODE ANN. 93-5-1 (1994); Dolan v. Dolan, 259 A.2d 32, 36 (Me. 1969)).

15. Borten, *supra* note 14, at 1114-23.

childbearing is controllable. The fundamental basis for marriage has thus been technologically obviated.¹⁶

Court cases creating same-sex marriage or marriage equivalents have held that marriage no longer has any intrinsic relationship to the making of babies. Observing that “many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children,”¹⁷ and again that “increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children,”¹⁸ the Vermont Supreme Court in 1999 rejected the state’s assertion that marriage laws were intended to promote either children, or a connection between children and their biological parents.¹⁹ The Massachusetts Supreme Judicial Court was even more dismissive:

It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed . . . But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in “the modern age,” “heterosexual intercourse, procreation, and child care are not necessarily conjoined.”²⁰

Are these analyses true? Is there no longer any rational relation between affirming marital sexual unions and preventing unmarried births?²¹ Has contraceptive technology stripped sex of any intrinsic

16. Donald Sensing, “Save Marriage? It’s Too Late: The Pill Made Same-Sex Nuptials Inevitable,” *THE OPINION JOURNAL* (Wall Street Journal online) March 15, 2004.

17. *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

18. *Id.*

19. *Id.*

20. *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 961, n.23 (Mass. 2003) (quoting portions of Justice Cordy’s dissenting opinion).

21. My own perspective on this question is somewhat biased. In the interests of full disclosure, let me state that I came of age in the middle of the sexual revolution (Yale, class of 1982), in which the claim that we had successfully severed sex and reproduction was repeatedly made to me and my peers. My own experience (I became an unwed mother at 22) as well as the experience of many of my peers lead me to investigate the scientific basis of this assertion. We may claim to have separated sex

relationship to pregnancy, thus rendering the state's interest in encouraging men and women attracted to the opposite sex to get into marital unions, rather than other kinds of relationships, obsolete?

Forty years after *Griswold v. Connecticut*,²² we now have considerable social experience testing these propositions. Is there still a rational justification for marriage, on the grounds that, when men and women enter this kind of union, the possibility of out-of-wedlock births is minimized? Or has contraceptive technology rendered this formerly rational relation obsolete? Does sex still make babies?

Yes. Sex between men and women continues to make babies on a regular basis, with or without the conscious intention of the participants. The longer men and women engage in non-marital sexual careers, the greater the risk of a non-marital pregnancy. Despite legal contraception, numerous studies have shown that unintended pregnancy is common, not rare.

Consider these statistics from an analysis of the 1995 National Survey of Family Growth, based on a nationally representative sample of 10,847 women between the ages of 15 and 44.²³ Almost a third of all births between 1990 and 1995 were unintended.²⁴ Fifty-six percent of births to unmarried women were unintended (as were 19 percent of births to married women and 39 percent of births to divorced women.)²⁵ Almost a third of births to married parents and three-fourths of births to unmarried couples were unintended by at least one of the parents.²⁶ About 17 million American women of childbearing age have already had an unintended birth.²⁷

When considering the number of pregnancies (as opposed to births), the statistics are even more striking. Consider this data from a

and reproduction, but unexpected pregnancy, even among highly competent and advantaged young women at elite institutions, nonetheless remains far from rare.

22. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

23. J. ABMA, ET AL., *FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH* (1997). NATIONAL CENTER FOR HEALTH STATISTICS. VITAL HEALTH STAT 23(19).

24. *Id.* at 25 (Table 14) (69 percent of births were "intended." The remaining 31 percent of births were either unwanted (9.1%) or mistimed (21.6%)).

25. *Id.*

26. *Id.* at 28 (Table 17) (70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers.).

27. Abma, et al., *supra* note 23, at 24 (Table 13).

study in *Family Planning Perspectives*, published by the Alan Guttmacher Institute.²⁸

Excluding miscarriages, 49 percent of all pregnancies in 1994 were unintended.²⁹ Almost half of all women aged 15-44 had had at least one unplanned pregnancy in their lives.³⁰ By their late thirties, 60 percent of American women had had at least one unintended pregnancy.³¹ Almost four in ten women aged 40-44 had had at least one unplanned birth.³²

Similarly a scholarly analysis of contraceptive failure rates in actual use concluded, "About three million pregnancies in the United States (48%) were unintended in 1994. Some 53 percent of these occurred among women who were using contraceptives."³³

Contraceptive failure rates in the first year of use varied considerably among different demographic groups but were never trivial: cohabiting adolescent women experience a failure rate of about 47 percent in the first year of contraceptive use, while the 12-month failure rate among married women age 30 and older was 8 percent.³⁴

Another analysis of the 1995 National Survey of Family Growth concluded:

The risk of failure during typical use of reversible contraceptives in the United States is not low—overall, 9 percent of women become pregnant within one year of starting use. The typical woman who uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures.³⁵

28. STANLEY K HENSHAW, "UNINTENDED PREGNANCIES IN THE UNITED STATES," *FAMILY PLANNING PERSPECTIVES* 30(1): 24ff (1998).

29. *Id.* at 26 (Table 1).

30. *Id.* at 28 (Table 3) (finding 47.7% of women aged 15-44 had had at least one unintended pregnancy).

31. *Id.* at 28 (Table 3) (finding 60.0% of women aged 35-39 had had at least one unintended pregnancy).

32. HENSHAW, *supra* note 28 at 28 (Table 3) (finding 38.1% of women aged 40-44 had had at least one unplanned birth).

33. HAISHAN FU, ET AL, "CONTRACEPTIVE FAILURE RATES: NEW ESTIMATES FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH," *FAMILY PLANNING PERSPECTIVES* 31(2): 56-63, 56 (1999).

34. *Id.* at 56.

35. JAMES TRUSSELL AND BARBARA VAUGHAN, "CONTRACEPTIVE FAILURE, METHOD-RELATED DISCONTINUATION AND RESUMPTION OF USE: RESULTS FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH," *FAMILY PLANNING PERSPECTIVES* 31(2): 64ff, 71 (1999)

*The typical woman who uses contraceptives continuously will experience almost two unintended pregnancies.*³⁶

Technology has not obviated the state's interest in encouraging men and women to enter marital sexual unions, as opposed to other kinds. Contraceptive technology lowers the odds of pregnancy, but never eliminates the risk, especially for people who engage in extended non-marital sexual careers.

Without a legal, shared, public category called "marriage," neither law nor culture would be able to motivate young men and women to avoid pregnancy out of wedlock. This is one reason that, while contraceptives may lower the state's interest in absolutely forbidding non-marital sexual relations (given the high degree of intrusion on personal liberty involved), the existence of contraceptives does not eliminate the state's interest in preferring voluntary marital sexual unions between men and women to other kinds. Virtually every child born to a married couple will have a mother and a father already committed to caring for him or her. Most children conceived in sexual unions outside of marriage will not.

Sex between men and women still makes babies. By creating a clear shared public category called "marriage" and preferring marital unions as the context for sex and childbearing, the law (a) informs young people of the importance of doing whatever is necessary to delay pregnancy until marriage (as well as enabling other stakeholders, such as family, friends, and faith communities, to communicate this message), and (b) creates a clear marker for when men and women have created the kind of unions where babies can be encouraged.

DOES SOCIETY NEED BABIES?

The second historic purpose of marriage is to encourage men and women to make the next generation. The idea that babies are a social good is, however, now widely contested. At the same time the widespread use of contraceptive technology helped spark a revolution in ideas about sex and marriage, another dramatic change in social perspective occurred: ominous warnings about a population explosion. High birthrates in the Fifties in developed countries, combined with dramatically lower rates of infant mortality throughout the world,

36. *Id.* ("These high pregnancy rates do not reflect the inherent efficacy of methods when used correctly and consistently . . . but instead reflect imperfect use (because most reversible methods are difficult to use correctly).").

sparked fears that too many babies might overwhelm our economic and ecological systems.³⁷

Does society still need babies? Or has the specter of overpopulation turned the tables on this state interest? Does the state still have a rational interest in encouraging marriage rooted in the need to encourage reproduction?

Relatively few American elites appear aware of the dramatic change in the factual situation of developed countries around the world. Since the 1950s, many countries around the world, especially the industrialized democracies, have experienced a sustained drop in fertility rates that in many countries makes a population *implosion* imminent. According to American Enterprise Institute scholar Nicholas Eberstadt, 83 countries and territories encompassing 44 percent of the world's population are experiencing below-replacement fertility.³⁸

Demographers define "very low fertility" as a birthrate below 1.5 children.³⁹ Europe's total fertility rate (TFR) from 1995 to 2000 was 1.42 children per woman.⁴⁰ The UN's medium variant predicts it will rise to 1.84, the low variant that it will drop to 1.34 children per woman by year 2050.⁴¹ In 2002, 28 nations experienced very low fertility including Switzerland (1.4), Germany (1.3); Austria (1.3); Italy (1.3); Spain (1.2); Greece (1.3); Japan (1.3), Russia (1.3); the Czech Republic (1.1); and most other Eastern European nations.⁴²

In 2000, for the first time in human history there were more old people (age 60 or over) than children (ages 0-14) (19 percent versus 18

37. See, e.g., PAUL R. EHRLICH, *THE POPULATION BOMB* (Ballantine Books 1971) (1968).

38. Nicholas Eberstadt, *The New Trend: A Population Bust*, *THE WASHINGTON POST*, Mar. 18, 2001, at B7 (excerpted from Eberstadt's article entitled *The Population Implosion* in the March/April 2001 issue of *FOREIGN POLICY*).

39. John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, *POPULATION STUDIES*, 57(3) Nov. 2003 at 241, 241. "Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's*, *POPULATION AND DEVELOPMENT REVIEW*, 28(4) Dec. 2002 641-680, 641.

40. POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS OF THE UNITED NATIONS SECRETARIAT (2003). *WORLD POPULATION PROSPECTS: THE 2002 REVISION. HIGHLIGHTS*. (New York: United Nations) (February 26, 2003): 4 (Table 2). North America, by contrast has near-replacement level fertility at 2.01 children per woman. *Id.*

41. *Id.*

42. John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, *POPULATION STUDIES*, 57(3) Nov. 2003 241, 242 (Table 1).

percent) in the developed countries of the world.⁴³ By 2050, the UN projects there will be twice as many elderly people as children (32 percent versus 16 percent).⁴⁴ Under the UN's "medium" projection, by the year 2050, the median aged person in Europe will be almost 48 years old.⁴⁵

It could get worse. In the former East Germany, women are now having less *than one child each*, on average, a level which if continued leads to the virtual extinction and/or replacement of the resident population in a few generations.⁴⁶

How serious is the possibility of population decline? For a thought experiment, consider the effects of a total fertility rate of 1.0 babies per woman, close to what many European countries are now experiencing. At a total fertility rate of 1.0, every 100 people (50 women) in the first generation will have 50 children (the second generation). This second generation of 50 (25 women) will in turn have 25 children. This third generation of 25 will then produce just 12.5 children, shrinking the population by 87 percent in just four generations (once the older generations die off).⁴⁷

Of course this is a radically simplified scenario. Immigrants and their progeny add to the native population. Progress in longevity means that the consequences of below-replacement fertility may take years to manifest. But over the long-term, the consequences of below-

43. POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS OF THE UNITED NATIONS SECRETARIAT (2003). *WORLD POPULATION PROSPECTS: THE 2002 REVISION. HIGHLIGHTS*. (New York: United Nations) (February 26, 2003): 15.

44. *Id.* Based on the medium variant, which assumes total fertility in developed nations will rise to a rate of 1.85 children per woman by the year 2050, while fertility rates in less developed countries continues to fall. *Id.* at 4 (Table 2).

45. *Id.* at 15 (Table 9) (medium variant assumes European fertility rates will rise to 1.84 by the year 2050).

46. RON LESTHAEGHE, *EUROPE'S DEMOGRAPHIC ISSUES: FERTILITY, HOUSEHOLD FORMATION, AND REPLACEMENT MIGRATION*, Paper presented to the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline, Population Division, Dept of Economic and Social Affairs, United Nations in New York October 16-18, 2000: 5 (Table 1).

47. One review found that:

[A] TFR of 1.3 also implies an annual decline of the population size by 1.5 percent A TFR of 1.3 also implies a reduction of the birth cohort by 50 percent and a halving of the stable population size every 45 years. If the TFR declines further and persists at a level of 1.0, the annual rate of decline in the stable population rises to 2.4 percent and the halving times of population size and birth cohorts are merely 29 years.

See, e.g., Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's*, *POPULATION AND DEVELOPMENT REVIEW*, 28(4) Dec. 2002 641,642

replacement fertility are clear. As early as 1982, Kingsley Davis and a colleague warned that if “women in industrial societies today are not motivated to achieve replacement fertility . . . the social order that gave rise to it will be replaced by another—either one that supports traditional sex roles or some new order that rewards women adequately for reproduction.”⁴⁸

World leaders are beginning to notice. Russian President Putin sounded the alarm about population decline in his 2000 State of the Nation address, warning, “If the current trend persists, the nation’s survival will be threatened.”⁴⁹ In 2002, the Japanese Health Minister Chikara Sakaguchi warned that unless the nation’s birthrates stop plunging, “the Japanese race will become extinct.”⁵⁰ “Europe Has Every Right to Worry About Disappearing,” is the headline over a Canadian university professor’s op-ed:

Will Europe Disappear? the magazine cover bluntly asks. The question does not refer to rising waters caused by global warming . . . it refers to a current European obsession: depopulation. There will soon be fewer Europeans than there currently are. Moreover Europeans will matter much less than they have during the last 200 years.⁵¹

A London expert warns, “The social and economic upheaval implied by depopulation on this scale would be immense. . . . Only in the last 15 years has a serious risk arisen that the population of Europe may not be reproducing itself.”⁵² Kojima Akira, a professor at Kyoto University in Japan warns:

48. Kingsley Davis and Pietronella van der Oever, *Demographic Foundations of New Sex Roles*, POPULATION AND DEVELOPMENT REVIEW 8(3) Sept. 1982 495, 511. (quoted in John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, POPULATION STUDIES, 57(3) Nov. 2003 241, 244.)

49. ANATOLY ZOUBANOV, “POPULATION AGEING AND POPULATION DECLINE: GOVERNMENT VIEWS AND POLICIES,” PAPER PRESENTED TO THE EXPERT GROUP MEETING ON POLICY RESPONSES TO POPULATION AGEING AND POPULATION DECLINE, POPULATION DIVISION, DEPT OF ECONOMIC AND SOCIAL AFFAIRS, United Nations in New York October 16-18, 2000: 4.

50. Reuters, *Japanese Threatened with Extinction, Minister Says* (May 21 2002).

51. John English, *Europe Has Every Right to Worry About Disappearing*, TORONTO STAR, September 1 2001 at A15.

52. Tim Congdon, *The Ideas Exchange: Expert View—Babies Can Deliver Us From a Crisis*, INDEPENDENT ON SUNDAY (London), January 13, 2002 at Business page 2.

I once heard one of my friends wonder whether the last Japanese will be a man or woman. We can no longer laugh at such a joke now that rapid depopulation is becoming a reality. The decline in the number of children and the aging population is not merely an economic problem. It is a serious problem that will force changes in the social and political frameworks.⁵³

A scholar at the Center for Strategic and International Studies in Washington D.C. warns about the military implications:

As NATO grows older, there will be fewer young people to fill military roles. The shrinking of the alliance's domestic work forces is now a demographic certainty, and the competition from the private sector will make military recruitment harder than ever before. Countries with manpower shortages may prove unwilling to commit to military confrontations... raising questions about the reliability or value of NATO alliance for the United States.⁵⁴

A reporter notes:

No-one is entirely sure why so many women in this quaint, cobblestoned city south of Berlin stopped having babies 10 years ago. But it does not take a degree in sociology to see the effects of the rock-bottom birthrates. . . . Workers have begun to dismantle, piece by piece, dozens of vacant apartments, part of a plan to demolish 5,000 units over the next decade.⁵⁵

“Scotland's population decline has set off alarm bells in the corridors of power. . . . Economists warn continued slow growth and the falling population are feeding off each other to create an unstoppable dynamic of decline,” warns another journalist.⁵⁶

The proportion of governments expressing concern that their birthrates were too low increased from 11 percent in 1993 to 15 percent in 1999.⁵⁷ An even higher proportion (38 percent) of countries expressed major concern about a related demographic phenomenon—

53. Kojim Akira, *Depopulation in Japan*, JOURNAL OF JAPANESE TRADE AND INDUSTRY, September 1, 2002.

54. Craig Romm, *Will NATO be Defeated by Demography?*, THE SAN DIEGO UNION-TRIBUNE, October 4, 2002 at B7.

55. Thomas Fuller, *Low Birthrates Pose Challenge for Europe: The Depopulation Bomb*, INTERNATIONAL HERALD TRIBUNE, December 12, 2002 at 1.

56. Tom Martin, *Focus: With a Falling Birthrates, Experts Warn of Crisis Ahead*, SUNDAY EXPRESS, Septebmer 28, 2003 at 21.

57. ANATOLY ZOUBANOV, POPULATION AGEING AND POPULATION DECLINE: GOVERNMENT VIEWS AND POLICIES, paper presented to the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline, Population Division, Dept of Economic and Social Affairs, *United Nations* in New York October 16-18, 2000 at 2.

population aging—mostly developed countries in Europe with below replacement-level fertility.⁵⁸ In more developed regions, the proportion of governments who had policies aimed at increasing population growth rose from 16 percent in 1993 to 23 percent in 1999.⁵⁹

What are the consequences of low fertility rates? According to a paper presented at one recent UN conference, fertility levels of 1.5 to 1.8 children per woman constitute a

strong dearth calling for deep revision of population policy . . . [H]igher risk of labor shortage and reduced capacity to integrate new immigrants; since the main engine of integration of foreigners is the school, this integration cannot happen if a minimal fertility is not realized among the resident population.⁶⁰

As fertility levels fall to 1.2 to 1.5 children per woman (the European average), the result is “[h]eavy and structural contraction, which digs a deep hole at the base of the age pyramid and consequently compromises the future of the society at large . . . the resident population is progressively replaced by a continuous and bulky inflow of immigrants.”⁶¹

As fertility falls to less than 1.2 children per woman, as in Spain and Italy, the situation becomes an

58. *Id.* at 2-3.

59. *Id.* at 23 (Table 4). Note, however the proportion committed to maintaining current population levels dropped from almost 34 percent to just over 10 percent, and the proportion committed to no intervention on population increased from 48 percent to almost 65 percent, indicating the difficulties liberal democracies have in policies that appear to interfere with the private ordering of sexual and childbearing choices, as well as the financial pressures to reduce the cost of child allowances and other fertility subsidies. As populations age, political pressures to reduce support for children might also be expected to increase, since the UN estimates that elderly cost twice as much a child in terms of government and social supports, mostly due to high medical costs. UNITED NATIONS, REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND AGEING POPULATIONS? 93 (2000), *available at*: <http://www.un.org/esa/population/publications/migration/migration.htm> (“A number of researchers . . . report that when considering the public provision of programs or taking into account private non-medical expenses, public education expenses and medical care, the costs are roughly two and a half times greater to support an older person (aged 65 or older) than to support a young person (under 20 years of age).”).

60. JEAN-CLAUDE CHESNAIS, THE INVERSION OF THE AGE PYRAMID AND THE FUTURE POPULATION DECLINE IN FRANCE: IMPLICATIONS AND POLICY RESPONSES, Paper presented at the Expert Group Meeting on Policy Responses to Populating Ageing and Population Decline in New York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United Nations: 3.

61. *Id.*

[e]xtreme case that is less and less rare, namely in Southern Europe and in the former Eastern bloc. A severe amputation of the base of the age pyramid is taking place under our eyes. . . . Acute and rapid aging process; deep and longlasting migratory dependency that could be unbearable or unmanageable.

62
...

The familiar population explosion is replaced by a population implosion or “exponential decrease.”⁶³ Financial consequences include “a growing transfer of resources for the elderly (pension and health care costs) to the detriment of younger workers,” which can create a “feedback effect, creating a disincentive to fertility.”⁶⁴

An older labor force “means more rigidity, less geographical and occupational mobility, smaller capacity to adapt to economic change; this could represent a threat to innovativeness which is so important in global competition.”⁶⁵ Then there is “downward pressure on the value of assets” especially the housing market. “In a shrinking and greying population, the supply of vacant houses grows faster than the demand, thus reducing the prices . . . family capital could melt.”⁶⁶

In Italy, at current fertility levels (1.2 children per woman), the population will fall from 57.3 million in 2000 to 36.8 million in 2050.⁶⁷ Italy is already one of the “oldest” countries in the world.⁶⁸ In 1995, children under the age of 15 comprised just under 15 percent of the population; almost 4 percent of Italians were over age 80.⁶⁹ If current fertility rates continue, by 2050 there will be twice as many octogenarians as children in Italy.⁷⁰

62. *Id.*

63. *Id.* at 2.

64. Chesnais, *supra* note 60, at 8.

65. *Id.* at 10.

66. *Id.*

67. ANTONIO GOLINI, POSSIBLE RESPONSES TO POPULATION AGEING AND POPULATION DECLINE: THE CASE OF ITALY. Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United Nations: 2.

68. *Id.* at 2. “Italy has now become the “oldest” country in the world, recording the highest proportion of population aged 65 and over, and the lowest proportion of people aged under 15.

69. RITA-MARIA TESTA, FEWER AND OLDER ITALIANS, MORE PROBLEMS? LOOKING FOR SOLUTIONS TO THE DEMOGRAPHIC QUESTION, Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United Nations: Table 1.

70. *Id.* (predicting children to comprise 8.3 percent of the population, and octogenarians 15.7 percent).

There is no agreement on the causes of low fertility, which are likely to be complex.⁷¹ But the move away from preference for marriage, as well as a decline in the extent to which marriage is seen as a childbearing institution, play a clear role:

Low fertility can also be linked to the movement away from marriage, which many western European countries have experienced for the recent decades. Of course, marriage is no longer a pre-condition for childbearing in most of these populations, but it remains true that married couples have a higher fertility than non-married people, even those who live in a “marriage-like” cohabitation.⁷²

Similarly another UN analysis focused on “the interaction of marital and reproductive behaviors resulting in below-replacement fertility”:

The demographic transition from high to replacement fertility has consistently been associated with the implementation of reproductive choices within marital unions. Post-transitional developments have been driven mostly by transformations of partnership behavior. During the last decades of the twentieth century, the family as a social institution changed, obligation and commitment with regard to formal marriage eroded and new forms of partnership proliferated in many countries. The range of options for individuals expanded. These options consisted of a permanent or much more prolonged state of celibacy, and of partnership that did not assume formal contractual status and may or may not have involved childbearing. The diversification of partnership options relaxed obligations to previously strict

71. For a discussion of theories (and an introduction to the literature on causes of low-fertility), see John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, POPULATION STUDIES, 57(3):241-263 (2003).

72. PATRICK FESTY, LOOKING FOR EUROPEAN DEMOGRAPHY, DESPERATELY? Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United Nations: 3. Patrick Festy also stated:

The countries with the highest TFRs, France and UK, are those in which low nuptiality has been compensated for by the rise of fertility out of marriage. In the countries with very low period fertility, the decline in marriages has been directly consequential for fertility, because marriage remains *the* place for childbearing, without any substitutes for it.

Id.

social norms when choosing the path of union formation. *Marriage and parenthood were starting to exist independently of each other. . . .*⁷³

Once the social, cultural, economic, and legal changes that produce population decline are in place, they become extremely difficult to reverse, especially in democratic societies. Children don't vote and older people do. Once a population has disconnected marriage and childbearing, and the norms supporting marriage as a procreative union have weakened or disappeared, there is little political leaders can do to improve the situation for young families without creating enormous resistance. Coming up with the necessary resources to keep pension promises becomes a central preoccupation. Even as Europe begins to dwindle, "European governments were for the most part ignoring the problem, 'In practical terms nothing has been done, or just very, very marginally,'" said Dr. Carlo De Benedetti, an Italian financier who created a foundation to study the effects of aging in Europe.⁷⁴

Whatever the specific causes, the larger point remains: far from making marriage obsolete as a regulator of childbearing, widespread contraceptive technology (combined with profound economic changes associated with industrialization that make children an expense rather than an asset to families) may actually make more salient, not less, the traditional role of marriage in encouraging men and women to make the next generation that society needs.

As Philip Longman points out, the levels of depopulation now projected for Japan rival the levels experienced by Europe during the Black Plague.⁷⁵

[F]orecasts by the UN and other organizations show that, even in the absence of major wars or pandemics, the number of human beings on the planet could well start to decline within the lifetime of today's children. . . . Long before then, many nations will shrink in absolute size, and the average age of the world's citizens will shoot up dramatically. . . . No industrialized country still produces enough children to sustain its population over time, or to prevent rapid population aging. Germany could easily lose the equivalent of the current population of what was once East Germany over the next half-century. Russia's population is already contracting by three-quarters of a million a

73. Population Division, Department of Economic and Social Affairs, *United Nations Secretariat*, 2002. "Partnership and Reproductive Behavior in Low-Fertility Countries," *POPULATION NEWSLETTER* 74 (December): 4 (emphasis added).

74. Thomas Fuller, *Low Birth Rates Pose Challenge for Europe: The Depopulation Bomb*, *INTERNATIONAL HERALD TRIBUNE*, December 12 2002 at 1.

75. Phillip Longman, *The Global Baby Bust*, *FOREIGN AFFAIRS* 83(3) May/June 2004 64, 66.

year. Japan's population, meanwhile, is expected to peak as early as 2005, and then to fall by as much as one-third over the next 50 years—a decline equivalent, the demographer Hideo Ibe has noted, to that experienced in medieval Europe during the plague.⁷⁶

Relatively high birth rates in America (just below replacement level), coupled with high levels of immigration, make the American experience, to date, considerably different than the European. But the underlying reality is true for all societies including America: high birth rates may not be better than lower birth rates; but societies that fail to reproduce do not survive. Every society needs an institution that encourages men and women to have children if they want them.

The more legal, cultural, and technological choice individuals have about whether or not to have children, the more need there is for a social institution that encourages men and women to have babies together, and creates the conditions under which those children are likely to get the best care.

DO CHILDREN NEED MOTHERS AND FATHERS?

The final historic purpose of marriage is to encourage men and women to create a particular kind of family form: one where children have both their own mother and their own father in a single family. By making marriage a permanent sexual union based on the fidelity of both spouses, the state seeks to increase the likelihood that children will be raised in “intact” families. State preferences for marriage over other kinds of unions transmit a clear message to the next generation: the man and the woman who make the baby are supposed to stick around, take care of each other and their baby, too. As twelve family scholars pointed out recently:

Marriage exists in virtually every known human society. . . . At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship

76. *Id.* at 65-66.

obligations and sharing of resources between men, women, and the children that their sexual union may produce.”⁷⁷

I and others have written extensively on the social science evidence on the importance of intact, married biological parents elsewhere.⁷⁸ There is now an enormous body of social science evidence which supports the common wisdom of humanity that has created a broad, non-partisan scholarly consensus that family structure matters. In the last thirty years, thousands of studies evaluating the consequences of marriage have been conducted in various disciplines (*e.g.*, psychology, sociology, economics, and medicine). Twelve leading family scholars summarized the research literature this way: “Marriage is an important social good associated with an impressively broad array of positive outcomes for children and adults alike. . . . [W]hether American society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern.”⁷⁹

Among their conclusions:

Marriage increases the likelihood that children enjoy warm, close relationships with parents.

77. WILLIAM J. DOHERTY, WILLIAM A. GALSTON, NORVAL D. GLENN, JOHN GOTTMAN ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 8-9 (Institute for American Values) (2002)

78. LINDA J. WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (Doubleday 2000); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62(3) LA L. REV. 773 (2002); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 N.D. J.L. ETHICS & PUBLIC POL’Y 225 (2004); Maggie Gallagher, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, MARGINS LAW REVIEW (forthcoming 2004); Maggie Gallagher & Joshua Baker, *Do Mothers and Fathers Matter?*, iMAPP Policy Brief (Feb. 27, 2004), available at www.marriagedebate.com. See also WILLIAM J. DOHERTY, ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* (Institute for American Values 2002) at 6; Paul R. Amato and Alan Booth, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (Harvard University Press 1997); SARAH McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (HARVARD UNIVERSITY PRESS 1994); Kristin Anderson Moore, et al., 2002. “Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?”, *Child Trends Research Brief* (Washington, D.C.: ChildTrends)(June):1 (available at <http://www.childtrends.org/PDF/MarriageRB602.pdf>); THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES, 2000. (New York: Institute for American Values), 11, available at www.marriagemovement.org.

79. WILLIAM J. DOHERTY, ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* (Institute for American Values 2002) at 6.

Cohabitation is not the functional equivalent of marriage.

Children raised outside of intact married homes are more likely to divorce or become unwed parents themselves.

Marriage reduces child poverty.

Divorce increases the risk of school failure for children, and reduces the likelihood that they will graduate from college and achieve high status jobs.

Children in intact married homes are healthier, on average, than children in other family forms.

Babies born to married parents have sharply lower rates of infant mortality.

Children from intact married homes have lower rates of substance abuse.

Divorce increases rates of mental illness and distress in children, including the risk of suicide.

Boys and young men from intact married homes are less likely to commit crimes.

Married women are less likely to experience domestic violence than cohabiting and dating women.

Children raised outside of intact marriages are more likely to be victims of both sexual and physical child abuse.⁸⁰

They conclude,

Marriage is more than a private emotional relationship. It is also a social good. Not every person can or should marry. And not every child raised

80. *Id.*

outside of marriage is damaged as a result. But communities where good-enough marriages are common have better outcomes for children, women, and men than do communities suffering from high rates of divorce, unmarried childbearing, and high-conflict or violent marriages.⁸¹

Recent analyses by mainstream child research organizations confirm this consensus that family structure matters across ideological and partisan lines. For example, a *Child Trends* research brief summed up the scholarly consensus:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.⁸²

An Urban Institute scholar concludes, “Even among the poor, material hardships were substantially lower among married couple families with children than among other families with children. . . . The marriage impacts were quite huge, generally higher than the effects of education. The impacts [of marriage] were particularly high among non-Hispanic black families.”⁸³

A Centers for Disease Control report notes, “Marriage is associated with a variety of positive outcomes, and dissolution of marriage is associated with negative outcomes for men, women, and their children.”⁸⁴

A Center for Law and Social Policy Brief concludes, “Research indicates that, on average, children who grow up in families with both their biological parents in a low-conflict marriage are better off in a

81. *Id.* at 18.

82. Kristin Anderson Moore, et al., 2002. “Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?”, *Child Trends Research Brief* (Washington, D.C.: Child Trends) (June): 1 (*available at* <http://www.childtrends.org/PDF/MarriageRB602.pdf>). This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families.

83. ROBERT I. LERMAN, IMPACTS OF MARITAL STATUS AND PARENTAL PRESENCE ON THE MATERIAL HARDSHIP OF FAMILIES WITH CHILDREN, The Urban Institute 2002 (Urban Institute Washington, D.C.)(July2002) at 27 (*available at* <http://www.urban.org/url.cfm?ID=410538>).

84. MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES, CDC Advance Data no. 323 (May 31, 2001), at 1.

number of ways than children who grow up in single-, step-, or cohabiting-parent households.”⁸⁵

The social costs associated with alternative family forms have never been formally estimated at the national level, but are likely to be substantial. As one group of scholars and civic reformers noted:

Divorce and unmarried childbearing create substantial public costs, paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditures; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating.⁸⁶

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred,⁸⁷ the weight of social science evidence strongly supports the idea that family structure matters and that the family structure that is most protective of child well-being is the intact, biological, married family.

This consensus is not of course a universal one. Both courts and advocates who favor same-sex marriage often argue that family structure is not very important or is unrelated to marriage. Testifying before Congress, Professor Judith Stacey argued:

85. Mary Parke, 2003. “Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being,” *CLASP Policy Brief* no. 3 (Washington, D.C.: Center for Law and Social Policy) (May): 6. These are findings about the family structure debate in general. On the question of sexual orientation and parenting, the brief summarizes the social science this way:

Although the research on these families has limitations, the findings are consistent: children raised by same-sex parents are no more likely to exhibit poor outcomes than children raised by divorced heterosexual parents. Since many children raised by gay or lesbian parents have undergone the divorce of their parents, researchers have considered the most appropriate comparison group to be children of heterosexual divorced parents. Children of gay or lesbian parents do not look different from their counterparts raised in heterosexual divorced families regarding school performance, behavior problems, emotional problems, early pregnancy, or difficulties finding employment. However, as previously indicated, children of divorce are at higher risk for many of these problems than children of married parents.

Id. at 5.

86. THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES, (Institute for American Values: New York:), 2000 at 11. Available at www.marriagemovement.org.

87. See, e.g., E. MAVIS HEATHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE—DIVORCE RECONSIDERED (W. W. Norton & Co. 2002).

The research shows that what places children at risk is not fatherlessness, but the absence of economic and social resources that a qualified second parent can provide, whether male or female. . . . Moreover, the research on children raised by lesbian and gay parents demonstrates that these children do as well if not better than children raised by heterosexual parents. Specifically, the research demonstrates that children of same-sex couples are as emotionally healthy and socially adjusted and at least as educationally and socially successful as children raised by heterosexual parents.⁸⁸

However, as the *Child Trends* brief cited above indicates, current research finds that many forms of two-parent families (cohabiting and stepfamilies, for example) compare unfavorably with the intact, married biological family in terms of promoting child well-being.⁸⁹ Existing research on children raised by same-sex couples is preliminary, and many scholars have raised serious doubts about its reliability (at this stage) as a source of guidance for public policy.⁹⁰ Especially, I would argue, given the weight of evidence now existing in favor of married mothers and fathers for child well-being.

Norms attaching marriage and childbearing have certainly weakened, and this fact has been used to argue that there is no longer any rational relation between marriage and family structure. In *Goodridge*, for example, the court argued that by allowing gays and lesbians as well as single mothers to adopt, the state legislature had already decided that family structure was not important to children:

88. WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?: HEARING BEFORE THE SUBCOMM. ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 108th Cong., (2003) (written statement of Prof. Judith Stacey, Ph.D., Department of Sociology, New York University).

89. Kristin Anderson Moore, et al., 2002. "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?", *Child Trends Research Brief* (Washington, D.C.: Child Trends) (June): 1 (available at <http://www.childtrends.org/PDF/MarriageRB602.pdf>). This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families.

90. See, e.g., Diana Baumrind, 1995. "Commentary on Sexual Orientation: Research and Social Policy Implications," *Developmental Psychology* 31 (No. 1): 130; Affidavit of Stephen Lowell Nock, *Halpern v. Attorney General of Canada*, No. 684/00 (Ont. Sup. Ct. of Justice); Robert Lerner & Althea K. Nagai, 2001. *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Washington, D.C.: Marriage Law Project). For a summary of the existing research see Maggie Gallagher & Joshua Baker, *Do Mothers and Fathers Matter?*, iMAPP Policy Brief (Feb. 27, 2004), available at www.marriagedebate.com.

[T]he Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. . . . Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Massachusetts has responded supportively to “the changing realities of the American family,” and has moved vigorously to strengthen the modern family in its many variations.⁹¹

But adoption is the way the law helps cope with needs of children who, by definition, do not have the ideal situation, where not even one parent is able or willing to care for them. Under these circumstances, the state legislature may well be rationally concerned about getting any parent at all for a child rather than keeping children in foster care in hopes of obtaining a theoretical “ideal” family form. Such a legislative choice does not at all suggest a decision by the state legislature that family structure does not matter for children. The existence of children in many family forms may well justify widening efforts to help children in nonmarital families. But do they render legal preferences for marriage as the only generally reliable way to give children the love and care of both their mom and dad irrational or discriminatory? No.

LEGAL JUSTIFICATIONS FOR THE REGULATION OF INTIMACY

By what right does the government intrude on the deeply personal realm of intimacy? What is the public purpose involved in creating marriage laws preferring certain kinds of relationships (*e.g.*, faithful, opposite-sex couples, committed to permanence) over other visions of what love and care should be?

Legal preferences for marriage are justified by the underlying purposes of marriage: to regulate the sexual relationships that produce children in order to (a) discourage men and women from having children in fragmented families and (b) encourage the creation of children under the conditions in which they are most likely to flourish, and pose the least burdens to the community. Sex still makes babies, society needs babies, and babies still need mothers and fathers.

91. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962-63 (Mass. 2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000)) (internal citations omitted).

By affirming and preferring marriage, the law is directing young men and women sexually attracted to opposite sex into the kind of sexual unions where (a) children can be encouraged; (b) children will have mothers and fathers; and (c) women will not be handicapped by the enormous burdens of parenting alone. The more men and women who are married, the fewer non-marital births. The more stable marriages are, the safer men and women feel about having children, and the more likely that “accidental” children will be protected.

If this analysis is correct, it is not clear what the parallel or comparable state interest in regulating gay and lesbian relationships that is sufficient to justify the intrusion on private decisions about intimacy, might be.