

PREPARED STATEMENT OF MAGGIE GALLAGHER

*Maggie Gallagher**

In this essay, I have a limited goal. I want to make visible to gay marriage supporters the way the world looks to the majority of Americans who disagree with them.¹ For many supporters, gay marriage is primarily—indeed, almost exclusively—about what we as a society think about gay people. That is an important issue.

But for the stubborn majority of the American people who do not support gay marriage,² the issue looks rather different. Even as Americans move rapidly toward a position of tolerance of gay people, many are drawing the line around marriage.³ Many Americans recognize at least some other goods are at stake in the gay marriage debate.

To gay marriage supporters I would say: By the end of this essay, even if you retain your firm belief that gay marriage is the right answer, I hope you develop a new respect towards those Americans who disagree with you, and acknowledge that at least some of their concerns are noble and not rooted in hatred, prejudice, or unreason. In the current environment, this in itself is an ambitious goal.

I want to speak on behalf of the majority of Americans who oppose same-sex marriage even as they favor anti-discrimination,⁴ allowing “gay men and lesbians” to serve openly in the military,⁵ allowing gay teachers in

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1. See Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP, May 24, 2010, <http://www.gallup.com/poll/128291/Americans-Opposition-Gay-Marriage-Eases-Slightly.aspx> (showing 53% of Americans oppose legalizing gay marriage, and 44% support legalizing gay marriage).

2. See *id.*

3. See PEW FORUM ON RELIGION & PUB. LIFE & PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS: MOST STILL OPPOSE SAME-SEX MARRIAGE 1–2 (2009), available at <http://people-press.org/reports/pdf/553.pdf> (showing 57% of Americans support legalizing civil unions, but only 39% support legalizing gay marriage).

4. See Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP, May 29, 2007, <http://www.gallup.com/poll/27694/tolerance-gay-rights-highwater-mark.aspx> (showing 59% of Americans believe “homosexual relations between consenting adults” should be legal).

5. See CBS/NEW YORK TIMES POLL, GAYS IN THE MILITARY (2010),

schools,⁶ and dismantling the legal and cultural disabilities on gay people.⁷ This combination of powerful endorsements of tolerance and continued concern about marriage should at least make one pause before concluding that the only reason the American people oppose same-sex marriage is a dislike of—or even hostility toward—gay people.

My argument for retaining our historic understanding of marriage is not merely a consequentialist argument, although I do believe there will be consequences to gay marriage. The core argument I wish to advance is that marriage is not discriminatory; there are key differences between same-sex and opposite-sex couples with regard to legitimate public purposes of civil marriage. It is not discrimination to treat different relationships differently.⁸

To win the argument that marriage is not discriminatory implies very little about alternative ways we deal with gay people in our society. We may wish to provide civil unions and domestic partnerships for non-marital same-sex couples. We may look for other ways to address our new social problem: how do we demonstrate social respect and concern for the gay people in our midst?

But regardless of whether, and how, we explore alternative strategies for meeting the legitimate needs of gay and lesbian people, the core question in the marriage debate will remain: Is our marriage tradition discriminatory? If the answer is yes, then one cannot buy the right to discriminate with civil unions or anything else. If the answer is no, then the decision to offer benefits to same-sex couples is no longer driven by rights or equality, but by compassion and civility.

If the question we faced was primarily about which legal benefits could be extended to same-sex couples, American society would turn its

http://www.cbsnews.com/htdocs/pdf/poll_021110_2pm.pdf?tag=contentMain;contentBody (showing 70% of Americans favor allowing “gay men and lesbians” to serve in the military, while only 59% support allowing “homosexuals” to serve).

6. See Kyle Dropp & Jon Cohen, *Acceptance of Gay People in Military Grows Dramatically*, WASH. POST, July 19, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071802561.html> (showing only 28% of Americans believe “local school boards should have the right to fire teachers known to be gay . . . down sharply from the 51% who said so in 1987”).

7. See Saad, *supra* note 4.

8. Cf. Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 577–85 (1983) (exploring the concept of equality under Aristotle’s definition that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalike”).

attention to cutting and slicing and figuring out how to do it. But the question of benefits is not really the main question for either side in this marriage debate. The core question is fundamentally a moral one: is our marriage tradition good or is it discriminatory? This is the reason the debate is so hot and so difficult to compromise.

The second core idea I am going to present is that marriage is not a relationship invented by the government.⁹ Marriage is primarily and most importantly a social institution, with deep roots in nature, but which requires support from law, culture, and society if marriage is to matter at all.

Nor is the law, in my view, the *main* support for marriage. The civil law cooperates in the task of creating a marriage culture which matters, but in fact, the legal institution of marriage is at this point relatively weak, as the increasing number of cohabiters demonstrates.¹⁰ But even when the law was a stronger player, the most important thing about marriage was that it was—and still is—a social institution.¹¹

For marriage to matter it has to be a social institution powerful enough to actually change the sexual behavior of people, both the married and the unmarried. The main public good of marriage is to bring together mothers and fathers into stable unions, in which they raise their children together.¹² What must a young person attracted to the opposite sex do to ensure his or her children are raised by their mother and father? There are

9. See F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALTA. L. REV. 1099, 1111–15 (2005) (discussing the development of marriage as a religious institution and noting that “[t]he state came to marriage even later than did the Church”).

10. See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 1, 38 (2004) (“Once, two very great legal goodies were distributed exclusively to married couples by the law: First, the right to have sex. Having nonmarital sex subjected a person to potential criminal penalties, however rarely enforced, from fornication through adultery and sodomy. Second, legal paternity, meaning for men the right to care and custody of one’s children, and for women the right to claim a father’s financial support.”); see also INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUB. POLICY, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* 12–14 (2006), available at <http://www.marriedebate.com/pdf/imapp.mlawstmnt.pdf> (detailing concerns about the ways in which the law has deinstitutionalized marriage).

11. See generally CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis ed., 1985); GEORGE P. MURDOCK, *SOCIAL STRUCTURE* 260–83 (1949) (examining the history of marriage and discussing marriage as a social institution).

12. See MURDOCK, *supra* note 11, at 1–22.

a variety of potential mechanisms—though we do not always agree in this society on which are appropriate—ranging from abstaining from sexual relationships until marriage to using contraception in every sexual act outside of marriage to having an abortion if necessary. There are some interim steps that would reduce the risk of family fragmentation, such as confining one's sexual relationships to serious, committed, and loving relationships that could become marriages were a child to arise from the union. After marriage, that same young person must be absolutely sexually faithful to ensure children are not created outside the union by either partner.

Each of these potential strategies is effortful. In the absence of social norms surrounding marriage that are strong enough to affect sexual behavior, the default situation for sexual relations among men and women is the creation of babies across multiple households at random and irregular intervals, circumstances in which anything resembling joint parenting becomes increasingly difficult to accomplish.

Influencing sexual passion is difficult. Regulating sexual behavior is challenging. Creating norms that support marital fidelity, permanence, and postponing childbearing until marriage requires enormous effort and energy on the part of society's main players: parents, family, friends, neighbors, educators, religious congregations, psychologists, counselors, and child care professionals.

Without a rich, complex matrix of attitudes, values, and practices that support the reality of the marriage as a social institution, entering into marriage has relatively little significance—it will not matter much. The most important thing about marriage is that it is first and foremost a social institution and not merely a legal construct.

This distinction highlights the ways in which conceiving the marriage debate primarily as a constitutional debate misses the main point of marriage. If the law constructs marriage, then changing the law will necessarily change the construct. If you change the law of corporations, corporations will be different afterward. But if the law of marriage becomes sufficiently disassociated from the social concept of marriage, the law becomes ineffectual in key ways. This has consequences both for marriage as we now understand it and for gay marriage as advocates wish society to understand it.

So why is the law involved in this thing called marriage? Let me tell you first what the answer is not. Civil marriage did not arise because we want to demonstrate special respect for certain intimate adult relationships.

In the Anglo–American legal tradition, the way we demonstrate the sanctity, importance, and intimacy of an adult personal relationship is not to surround it by a lot of government regulations. In general, as the adult relationship becomes more important, personal, and intimate, the law is less likely to regulate it.

For example, I am an aunt, a best friend, a godmother, a mentor, a coach, a sister—and the law touches these relationships only peripherally, if at all. The general rule is the law regulates commercial adult relationships, not personal ones.

So why is the law involved? What is the public purpose? Why is the government involved in marriage? The history of family law in this country provides a clear answer, historically speaking. The answer, which may strike postmodern ears as very odd, is described repeatedly in a very long line of Supreme Court and lower court decisions: the primary public purpose of marriage was to regulate sexual relationships that could create children.¹³

13. See, e.g., *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“Marriage 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.”); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (observing a “state has a compelling interest in encouraging and fostering procreation of the race”), *aff’d* 673 F.2d 1036 (9th Cir. 1982); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 463–64 (Ariz. Ct. App. 2003) (“We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.”); *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (blending the expressive and emotional value of marriage with its social function: “the structure of society itself largely depends upon the institution of marriage The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (Ferren, J., concurring and dissenting) (explaining the “central purpose of the marriage statute—this emphasis on childbearing—provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples” (internal citation omitted)); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”); *Carris v. Carris*, 24 N.J. Eq. 516, 524 (1873) (“One of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union.” (quoting *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 605, 609 (1862))); *Williams v. Witt*, 235 A.2d 902, 903 (N.J. Super. Ct. App. Div. 1967) (“[S]ince procreation is considered to be an essential element of the marriage, there exists an implied promise at the time of the marriage to raise a family. An undisclosed contrary intention, therefore, constitutes a fraud going to an essential of the marriage.”)

How does marriage do this? First, it solves the problem of random reproduction—that is, of children being created as a result of a relatively random sexual encounter—in which adults are neither prepared nor committed to raising the child together.¹⁴

Each pair of husband and wife, regardless of whether they have children from their union, help serve this purpose of protecting children. This man and this woman will not, if they are faithful to their vows, produce fatherless children across multiple households.

Moreover, marriage regulates even the behavior of young people who are not married. How do you, as a single person, know if you are having an out-of-wedlock child, or committing adultery? The bright legal line of marriage provides important information that makes cultural efforts to sustain the sexual norms surrounding marriage possible.

Inversely, marriage itself not only prevents harms, it maximizes the possibilities for the social ideal: children will be born to, and raised by, the man and the woman who conceived them. Marriage dramatically increases the likelihood more children will be raised by their own mother and father. We know there are substantial advantages to children who are born to and raised by their own married mothers and fathers.¹⁵ We also know the majority of children conceived in marital unions will enjoy this great good.¹⁶ Conversely, very few children conceived in other unions will enjoy this great good.¹⁷

(citations omitted).

14. Excluding miscarriages, 49% of all pregnancies in 1994 were unintended. Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 FAM. PLAN. PERSP. 24, 24 (1998). In 1944, almost half of all women aged 15–44 have had at least one unplanned pregnancy in their lives. *Id.* According to the same study, by their thirties, 60% of American women have had at least one unintended pregnancy. *See id.* at 29. The study also estimates almost four in ten women aged 40–44 has had at least one unplanned pregnancy resulting in birth. *Id.*

15. KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? 6 (2002), available at <http://www.childtrends.org/files/marriagerb602.pdf> (noting social science research “demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. . . . There is thus value for children in promoting strong, stable marriages between biological parents.”).

16. *See* ELIZABETH TERRY-HUMEN ET AL., CHILD TRENDS, BIRTHS OUTSIDE OF MARRIAGE: PERCEPTIONS VS. REALITY 6 (2001), available at http://www.childtrends.org/files/rb_032601.pdf.

17. *See* Sara McLanahan et al., *Unwed Fathers and Fragile Families* 7–8 (Ctr. for

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Marriage is a mechanism that simultaneously copes with and celebrates an underlying natural reality. It provides the answer we have arrived at in trying to take the abstract ideal and make it real in the lives of children. Marriage has been in our culture—and in virtually every other culture—a sexual union of male and female. These sexual unions cause unique problems and pose unique opportunities. Only these unions make life and connect those children to their mother and father.

If this is what marriage is—if this is what we continue to believe marriage is in our culture—then same-sex couples do not fit. They do not serve this purpose. In fact they clearly contradict and repudiate it, as a purpose of marriage.

In his closing arguments in the challenge to Prop 8, Ted Olson found this view impossible to understand:

I don't believe that it's because statements protect procreation among heterosexual persons or the institution of marriage that much of that procreation takes place in—a lot of it doesn't—but that's not what it is, because there is no evidence that one couple or one pair of individuals in this state or in this country will decide, I'm not getting married because those people are getting married. There is no evidence of that.

And there is no evidence that there will be a diminished procreative instinct, God forbid, because people are allowed in the privacy of their homes to enter into an intimate relationship because they want a family like someone else.¹⁸

Unlike Olson, half of the state supreme courts that have considered this issue have rejected a state constitutional right to same-sex marriage. New York,¹⁹ Washington,²⁰ and Maryland²¹ all rejected the idea that there is a constitutional right to same-sex marriage. They held the definition of marriage is a male–female union—a union of husband and wife—that is

Research on Child Wellbeing, Working Paper No. 98-12, 1998), *available at* <http://crrw.princeton.edu/workingpapers/wp98-12-FF-McLanahan.pdf>.

18. Transcript of Closing Argument at 3003–04, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), *available at* <http://www.equalrightsfoundation.org/wp-content/uploads/2010/06/Perry-Vol-13-6-16-10.pdf>.

19. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

20. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

21. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

rationally related to a legitimate public purpose,²² which Professor Lynn Wardle may be responsible for dubbing “responsible procreation.”²³

The majority in the New York high court’s ruling did not sound particularly enthusiastic about the idea “responsible procreation” is the best public purpose for marriage, but when faced with the argument that inevitably future generations are going to believe something else, the court said, “we do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives.”²⁴

The idea marriage has something important to do with procreation was not made up in response to gay marriage. We did not invent it because we do not like gay people. In the hundreds of years prior to this debate, it was an obvious, visible truth to most Americans, and most American judges, that old people could marry and not all married couples had children. It was also true the judges who ruled on procreation understood one can make babies without being married. This was viewed as the problem marriage was attempting to address.

To say as Ted Olson does, that gay marriage is not a profound change in the public meaning of marriage²⁵ and that legally recognizing gay marriage is just like recognizing marriages of elderly couples,²⁶ lacks intellectual weight, or the capacity to comprehend the historic views of marriage.

Olson’s view makes sense only to be for whom marriage is only about love and caring. Our society supports the idea marriage is the ultimate celebration of romantic love.²⁷ For people who understand marriage in this way, adding same-sex couples is a no-brainer. Under this view of marriage,

22. See *Conaway*, 932 A.2d at 630; *Hernandez*, 855 N.E.2d at 11–12, *Andersen*, 138 P.3d at 990.

23. Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 781–84 (2001).

24. *Hernandez*, 855 N.E.2d at 12.

25. See Transcript of Closing Argument, *supra* note 18, at 3003–04 (Ted Olson speaking).

26. Ted Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 9, 2010, available at <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html>.

27. See, e.g., Transcript of Closing Argument, *supra* note 18, at 2975 (Ted Olson speaking) (“The plaintiffs have said that marriage means to them . . . a public commitment to the world.”).

if you can romance and commit, you can marry.²⁸

But let us recognize from a historical perspective, and from the perspective of millions of Americans, treating same-sex unions as marriage greatly alters the institutional and public understanding of marriage.²⁹ It will, as many gay marriage advocates have recognized, “announce that marriage has changed shape” because, “if same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.”³⁰ E.J. Graff believes marriage has already become so severed from procreation in modern conditions that recognition of gay marriage currently “fits.”³¹

Of course, the simple fact that marriage has a historic public purpose of “responsible procreation” cannot be dispositive. The question remains: Do we still need a social institution understood in this way? From a constitutional-law perspective, this is the key question in determining whether there is a constitutional right to same-sex marriage. (Even if there is no constitutional right to same-sex marriage, that still does not end the inquiry. There are ways to get to same-sex marriage other than by viewing it as a fundamental right—like legislation.)³²

Why am I involved in this debate? Let me give you my answer. I could be doing a lot of things with my time. It is not really the pathway to riches, and the kind of celebrity that you get is not particularly desirable. I came into this discussion as a result of a twenty-year debate on family fragmentation, high rates of divorce and unwed childbearing, and dissolution of social and cultural norms that were leading to the reality many children (including my oldest son, who was born out of wedlock)

28. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 213–15 (2009).

29. Transcript of Closing Argument, *supra* note 18, at 3045 (Charles Cooper speaking) (stating many people have a different view of the role and function of marriage since the gay-marriage movement began).

30. E.J. Graff, *Retying the Knot*, in *SAME-SEX MARRIAGE: PRO AND CON* 135, 137 (Andrew Sullivan ed., 2004).

31. E-mail from E.J. Graff, Resident Scholar, Brandeis Women’s Studies Research Center, to Maggie Gallagher, President, Institute for Marriage and Public Policy (Aug. 31, 2010, 08:31 CST) (on file with author).

32. For example, Maine’s legislature passed a law banning marriage discrimination, which would have allowed same-sex marriages; however, the law was overturned six months after it was passed. See 2009 Me. Laws c. 82, §1; Maria Sacchetti, *Maine Voters Overturn State’s New Same-Sex Marriage Law*, BOSTON GLOBE, Nov. 4, 2009, available at http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/?page=1.

were being raised without an effective relationship to their fathers and many women were left parenting alone.³³ Eventually I came to believe our endorsement of all family forms would also dehumanize men by telling them they were not important to the task of creating and raising new human life.

For me, the gay marriage debate is primarily a debate about marriage, and the place to begin is to recognize marriage is a nearly universal social institution. It exists in virtually every known human society.³⁴ These marriage institutions are often wildly different. They do not necessarily look very much like what I mean by marriage in important particulars. Marriage changes, adapts, and evolves.³⁵ But marriage as an opposite-sex sexual union also emerges again and again in completely diverse human societies.

Marriage emerges with many differences but also with the same basic shape. Marriage is generally a sexual union, not some other kind of relationship. It is also a public union,³⁶ not just a private, personal, and intimate union—that is the difference between a spouse and a lover. Finally, marriage is a union in which the rights and responsibilities between the man and woman³⁷ toward each other and toward any children her body

33. See COAL. FOR MARRIAGE, FAMILY & COUPLES EDUC., INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 1 (2000), available at <http://www.americanvalues.org/pdfs/marriagemovement.pdf>.

34. BLANKENHORN, *supra* note 28, at 105–06; see also WILLIAM J. DOHERTY ET AL., INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8–9 (2002).

35. BLANKENHORN, *supra* note 28, at 91.

36. Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE: UNVEILING THE DANGER IN CANADA'S NEW SOCIAL EXPERIMENT 45 (Daniel Cere & Douglas Farrow eds., 2004) (“Comparative research on the worldviews of both small-scale societies and those of world religions, both Western and Eastern, reveals a pattern: Marriage has universal, nearly universal, and variable features. Its *universal* features include the fact that marriage is (a) supported by authority and incentives; (b) recognizes the interdependence of men and women; (c) has a public, or communal, dimension; (d) defines eligible partners; (e) encourages procreation under specific conditions; and (f) provides mutual support not only between men and women, but also between them and children.”).

37. It is a union between at least one man and one woman because polygamy is, frankly, a common human variant, especially among small tribal societies. Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis: Final Report for Status of Women Canada 22–28* (McGill Univ., Working Paper Series, H3A 1W9, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360230 (surveying worldwide polygamy practices and national laws governing them).

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produces are publicly defined and supported.³⁸ This means we do not leave it up to adolescents in the throes of erotic, romantic, sexual, and psychological drama to work out on their own what this whole big dimension of human experience means.

The institution of marriage attempts to connect sex, love, babies, caretaking, and mothers and fathers without requiring every individual person to stumble upon these moral truths and natural realities all on their own. That is what institutions are for—they are substitutes for the process of requiring individuals, on their own, to figure out best practices without any aid from civilization.³⁹

I am not saying that just because marriage has always been this way, it cannot be changed. I am raising this truth to point to a different question: why does this basic marriage shape emerge over and over again?

Why is it that in the steppes of Asia, the jungles of the Amazon, and the deserts of Africa, with completely disconnected societies—different economies, different ecologies, different cultures, and different religious traditions—humans continually arrive at the same basic idea of marriage? If you ask the question, the answer is not hard to find. Marriage is a response to a real, persistent, and virtually universal need in human cultures.

Marriage, as a universal human idea, has deep roots in three persistent truths about humans.

The first truth is that the vast majority of us are powerfully attracted, and not by reason, to an act that, without a great deal of effort, makes human life. Sex between men and women makes babies. The second truth is society needs babies. Reproduction is optional for the individual; not everyone has to do it. But only those cultures that find a way to grapple with the procreative implications of male and female attraction have survived.

The third idea on which marriage is based is children ought to have a father, as well as a mother. It is fatherhood that is conceptually most at stake in the marriage debate.⁴⁰ Since I was a young girl, our society has

38. BLANKENHORN, *supra* note 28, at 99–102.

39. *See id.* at 97–99.

40. *See* Jason S. Carroll & David C. Dollahite, “Who’s My Daddy?” *How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, in *WHAT’S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 47, 59–64 (Lynn D. Wardle ed., 2008).

been in the middle of a big roaring tussle about gender and what it means in both public and private life. For the moment, let us put the question of gender differences to one side. I am not saying men are more important than women or fathers are more important than mothers or vice versa. I am not even necessarily saying mothers and fathers parent differently, even though I really believe they do somewhat.⁴¹

The truth I am pointing to is more basic. Let me put it this way, when a baby is born, there is bound to be a mother close-by. If we want fathers to be there for their children and for the mothers of their children, biology alone will not take us very far.⁴² We need a cultural mechanism powerful enough not only to attach fathers to the mother-child bond, but also to affect the sexual and romantic behavior of the young people in the middle of their romantic, sexual, erotic, emotional, psychological dramas. Absent a socially powerful institution of marriage, the default position for male-female attraction is the creation of many children who will be cared for by only one parent, if that.

We are in the middle of a marriage crisis. Gay people did not cause the marriage crisis, and they cannot cure it. But this marriage crisis has everything to do with the question: how much do we care about whether children have mothers and fathers and how much do we believe that marriage is about getting this good for children? Resolving this crisis will require reconnecting marriage to its core public task of creating a society in which children are raised by their mother and father in the same family unit. We do not want to sever marriage from love or romance, but to reconnect it to a larger mission. In doing so, the goal is to make romance the friend and not the enemy of the children it creates.

If government changes the legal definition of marriage, what happens to marriage itself? As a matter of justice, gay marriage advocates ought to examine their goals. Marriage has power, not because of the legal words, but because it is a social institution, which the law recognizes and supports. They are proposing to change the meaning of some of the most important identity-producing words by which Americans live. One of them is marriage. For those of us who oppose gay marriage, marriage is not something separate from the union of husband and wife. Marriage IS the

41. See W. Bradford Wilcox, *Five Myths on Fathers and Family*, NAT'L REV. ONLINE, June 19, 2009, available at <http://familyrights.us/armory/bin/Five%20Myths%20on%20Fathers%20and%20Family.pdf>.

42. See DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 18–22 (1995).

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union of husband and wife, intrinsically connected to the good of making life and connecting those children to the man and woman who made them. Gay rights activists are asking them to change marriage itself, along with other important identity-producing words, such as “husband.”

Right now, a husband is a man who disciplines his sexual drive to take on the responsibility for his wife and their children. In adopting gay unions as marriages, the law will change the meaning of “husband,” “wife,” “mother,” and “father” for the broader culture. Currently, these words are complementary and interconnected. Husband points to wife. Mother points to father. Together they point to the child. This classification system was not merely invented by politicians; it has deep roots in nature and civil society.

The first problem caused by redefining marriage is linguistic. By way of an analogy: What if the government passes a law changing the word “cat” to mean “either cat or dog” because cats and dogs are really rather similar? They are both small, furry animals with four legs and a tail, and we keep them as domestic pets. We might not be able to point to the specific problem or the way it was created. But, there would not be a word that means cat. If it is important we be able to talk about cats and their specific characteristics, the law is going to be a problem.

It is going be difficult to rebuild a culture that reconnects marriage with its erstwhile core public purpose of connecting sex, love, commitment, and babies with mothers and fathers, if the word that means “marriage” no longer points in that direction. Culture consists of words, images, ideas, classification. The government takeover of the word “marriage” is a problem in itself.

The problems intensify when the reason the courts are taking over this word, is that the historic understanding of marriage is now judged bigoted and discriminatory. How do you teach the next generation that “marriage matters because children need a mom and dad” when the law is saying: a. that is not the purpose of marriage and b. the idea that children need a mom and dad is discredited bigotry?

The core argument for gay marriage is there is no morally relevant difference between same-sex and opposite-sex couples. If that is what the law is endorsing in endorsing same-sex marriage, it is going to affect a lot of people.

Equality is the state religion. If you disagree with the state religion of equality, the law intervenes powerfully to repress you and your ideas. This

is not a complaint. It is the attempt at objective analysis by thinking through how gay marriage is likely to affect marriage as a social institution. The cultural energy for the task of reconnecting sex, love, babies, mothers, and fathers, is most likely to come from traditional religious groups. Same-sex marriage will put traditional religious groups in new legal peril. Moreover, the government will begin using the law to repress this view of marriage, exactly at the moment when marriage needs to be strengthened if we are to have hope of building a stronger marriage culture.

I do not know if anyone will be persuaded by these arguments. Nevertheless, I can suggest some alternative ideas about how supporters of gay marriage can use this information. If I am right about the importance of marriage as a social institution, the important thing is to stop pursuing a constitutional right to same-sex marriage as the movement's key goal.

If the goal is to actually get gay marriages and unions respected as "genuine" marriages by Americans, gay marriage advocates have the hard task of persuading Americans that it is true, and that gay marriage is a good idea.

Second, both sides need to find ways to reduce the ugliness of the moral clash involved in the same-sex marriage debate. I do not know if this ugliness is disturbing to gay marriage advocates or not, and in some ways it is unavoidable. Either way, I have begun to think about the underlying causes and how to at least lessen the ugliness of the clashes.

One way to lessen the intensity of the clash is to understand, at the very least, how a good person might disagree with you, even if they are wrong. Half of Americans believe it is wrong for two men to have sex with each other, but nonetheless endorse the rights of gay people in society in a broad way.⁴³ What is tolerance? Tolerance is not endorsing the idea we are all the same and therefore there are no important differences. Tolerance is the difficult moral virtue of endorsing the rights of people with whom you morally disagree.

Most Americans, particularly religious Americans, are working pretty hard to figure out a response that leads to a genuine culture of pluralism and tolerance. However, people in traditional faith communities want to respond without losing the right to their own moral views, as the race analogy requires of us.

43. See Saad, *supra* note 4 (showing that 47% believe homosexual relations are morally wrong, but 89% feel homosexuals should have equal rights for job opportunities).

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Prepared Statement of Gallagher

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If we can all recognize some good on both sides of the argument, regardless of the ultimate outcome, it would be a different America than where we are heading now.

I do not believe all gay marriage supporters really believe the opposition to gay marriage stems from bigotry that is the moral equivalent of racism. I do not think they really believe grandma is like George Wallace, trying to keep black people down. California's willingness to offer civil unions but unwillingness to offer same-sex marriage is not at all like Jim Crow—and to equate the two is a morally preposterous smear.

If some reading this essay conclude that even if they think their opponents are wrong, our historic understanding of marriage is not rooted in hatred or prejudice, that there are some goods at stake in this debate, that would be social and moral progress.