

THE ATTACK ON MARRIAGE AS THE UNION OF A MAN AND A WOMAN

LYNN D. WARDLE*

I. INTRODUCTION: LIKE MOISHE THE BEADLE

*They called him Moishe the Beadle. . . .*¹

With those words, Elie Wiesel begins *Night*, the powerful autobiographical account of how he, his family, and their entire Jewish community went from living freely in the small Hungarian town of Sighet, to incarceration, suffering, and death in terrible Nazi concentration camps during World War II.² One of the Jews in the village knew of the imminent danger and tried to warn his neighbors.³ His name was Moishe the Beadle.⁴ In tribute to him, the Nobel-prize-honored Wiesel records Moishe's name in the first line of his book, as the first of all persons he mentions.

Moishe the Beadle and the other foreign Jews who lived in Sighet had been arrested and deported in crammed cattle trucks, but months later Moishe secretly returned to the village with a fantastic tale of how the Gestapo had stopped the trucks in a distant forest, made the Jews dig their own graves, and shot them all, including Moishe who miraculously had survived.⁵ Wiesel remembers:

Day after day, night after night, he went from one Jewish house to the next, telling his story and that of Malka, the young girl who lay dying for three days, and that of Tobie, the tailor who begged to die before his sons were killed. . . . But people not only refused to believe his tales, they refused to listen. . . .

As for Moishe, he wept and pleaded: "Jews, listen to me! That's all I ask of you. No money. No pity. Just listen to me!" he kept

*Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. This article is based in part on a paper presented at the World Congress of Families IV in Warsaw, Poland on June 12, 2007. My student research assistant, Clifford Arthur, provided valuable research assistance.

1. ELIE WIESEL, NIGHT 3 (Marion Wiesel trans., Hill & Wang 2006) (1972).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 7.

shouting in synagogue, between the prayer at dusk and the evening prayer.

Even I [Wiesel admits] did not believe him.⁶

In *Night*, Elie Wiesel poignantly records the consequences of the willful ignorance of the Jewish community in Sighet, Hungary, who refused to listen to Moishe the Beadle.

On the seventh day of Passover, the curtain finally rose: the Germans arrested the leaders of the Jewish community.

From that moment on, everything happened very quickly. The race toward death had begun. . . .

Moishe the Beadle came running to our house.

“I warned you,” he shouted. And left without waiting for a response.⁷

As Moishe had warned, the Jews in the peaceful village of Sighet were eventually rounded up and forced to live in a ghetto. They were then transported to concentration camps, where some were selected for immediate extermination, and others were brutally worked to death—few survived.⁸

As a Family Law professor concerned about the dangers of legalizing same-sex marriage and the related erosion of a culture of marriage and marital families, I sometimes feel like Moishe the Beadle. During the past ten years I have spoken, debated, or lectured at more than twenty American law schools about same-sex marriage. I always begin my presentations by asking the audience, mostly law students, where they stand on the issue of legalizing same-sex marriage. Over ten years, the audience responses have changed. While some students today express opposition to same-sex marriage, at most American law schools, the number of students favoring legalization of same-sex marriage now is much larger than the number opposing it. For example, I participated in a panel discussion last October at a respected law school in New York City. It was sponsored by a prominent church. Yet, more than ninety percent of the audience, mostly students, raised their hands in support of legalizing same-sex marriage; while less than five percent of the audience raised their hands as opposing same-sex marriage.

I do not blame those young law students, for they are bombarded relentlessly by their professors, peers, and the popular media with

6. *Id.*

7. *Id.* at 10.

8. *Id.* at 10-12.

propaganda that legalizing same-sex marriage is fair, egalitarian, just, and harmless. If anyone says children, families and society will be hurt, they are treated like Moishe the Beadle was treated—brushed aside, ignored, or ridiculed.

II. THERE IS A GLOBAL MOVEMENT TO LEGALIZE SAME-SEX MARRIAGE

There is a global movement to legalize same-sex marriage and other marriage-equivalent domestic relations. As Appendix 1 shows, as late as 1985, no nation permitted same-sex couples to marry or created marriage-equivalent legal unions for them. In fact, in the entire history of the world, no country had ever before allowed same-sex marriage. When the new millennium dawned in 2000, same-sex marriage was not legal in any nation on earth, and domestic partnerships were recognized in only one nation.

Today, however, the movement to legalize same-sex marriage has made great progress. Appendix 2 shows the current legal status of same-sex marriage and of marriage-equivalent same-sex unions (called “civil unions” or “domestic partnership,” or something else, but entitled to all or nearly all of the same legal rights and responsibilities as conjugal marriage) in the United States and the world. Five nations have redefined marriage to allow same-sex couples to marry.⁹ Fifteen nations, including two with same-sex marriage, have created same-sex “marriage-like” laws giving marriage-equivalent legal status and most or all of the marital benefits to registered same-sex couples.¹⁰ Additionally, a few other nations have given

9. Elizabeth Kukura, *Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights*, 13 HUM. RTS. BRIEF 17, 17-19, 20 nn. 4, 7, 8, 9 (2006).

10. ILGA Europe, Same-Sex Marriage and Partnership: Country-By-Country, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country (last visited Apr. 8, 2008) (indicating that the nations of Andorra, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, Norway, Slovenia, Sweden, Republic of South Africa, Switzerland, and the United Kingdom recognize registered partnerships for same-sex couples); see Kukura, *supra* note 9, at 18 (citing and discussing these and other same-sex marriage-like relationship laws including New Zealand).

Six American states have enacted similar marriage-equivalent status for same-sex couples. *E.g.*, California Registered Domestic Partner Rights and Responsibilities Act of 2003, CAL. FAMILY CODE § 297 (2003); CONN. GEN. STAT. § 46b-38pp (2006); N.H. REV. STAT. ANN. § 457-A:1 (2008) (creating civil unions giving same-sex couples “all the rights, obligations, and responsibilities of parties entering a civil union”); New Jersey Domestic Partnership Act, N.J. STAT. ANN. § 26:8A (2008) (expanding to full equivalence following *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)); 2007 OR. LAWS ch. 99 (2007) (creating domestic partnerships and extending “any privilege, immunity, right or benefit granted . . . because the individual is or was married” to same-sex partners); VT. STAT. ANN. tit. 15 § 1202 (2000).

at least some marriage-like, but not all marriage-equivalent, legal rights and benefits to same-sex couples.¹¹

Thus, the movement to legalize same-sex marriage, literally or by legal equivalence, has achieved remarkable success in a relatively short period in history. This development has not been unopposed, and there have been some significant counter-reactions, including the adoption of provisions in the constitutions and basic legal charters of thirty-two nations and twenty-seven American states.¹² It is also noteworthy that, despite claims that historically some Native American Indian tribes and other aboriginal or first nation ethnic groups encouraged or practiced homosexual unions that were marriage-like,¹³ none of the 561 recognized American Indian tribes permits same-sex marriage,¹⁴ and some have acted to explicitly prohibit same-sex unions.¹⁵

11. See, e.g., Int'l Gay & Lesbian Rights Comm'n, Croatian Law on Same Sex Civil Unions, <http://www.iglhr.org/site/iglhr/content.php?type=1&id=73> (last visited Apr. 15, 2008) (citing the Croatian same-sex civil union law); ILGA Europe, Legal Details of the Czech Republic Registered Partnership Law, http://www.ilga-europe.org/europe/guide/country_by_country/czech_republic/legal_details_of_the_czech_registered_partnership_law (last visited Apr. 15, 2008); *Hungary Legalizes Same-Sex Civil Partnerships*, REUTERS, Dec. 18, 2007, available at <http://in.reuters.com/articlePrint?articleId=INL1861742220071218>.

("Hungary's parliament passed a law late on Monday that allows same-sex couples to register a civil partnership with many of the rights and obligations of marriage."); Kukura, *supra* note 9, at 20 n.16 (noting benefits for same-sex partners in Portugal and Israel); see also Domestic Partnership Equality Amendment Act of 2006, D.C. Law 16-79 (providing inheritance, probate, and guardianship rights for domestic partners); S. 5336, Reg. Sess. (Wash. 2007) (effective July 22, 2007) (creating same-sex domestic partnerships with limited benefits); Kukura, *supra* note 9, at 18, 20 nn.18, 19 (indicating Hawaii and Maine have laws providing benefits for same-sex partners that are similar to some marriage rights); Alaska Civil Liberties Union v. State, 122 P.3d 781, 794 (Alaska 2005) (finding that the denial of state employment benefits to same-sex partners of state employees violates equal protection); State v. Alaska Civil Liberties Union, 159 P.3d 513, 515 (Alaska 2006) (holding regulations providing state employment benefits to same-sex partners of state employees that were issued by the Commissioner of Administration under court order are valid).

Additionally, some jurisdictions provide some benefits to at least some unregistered same-sex couples. Kukura, *supra* note 9, at 18; ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 408-12 (2004) (providing a country-by-country description of laws giving some legal rights to same-sex couples).

12. Lynn D. Wardle, *What Is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53, 98 app. 1 (2006).

13. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 27-30 (1996); see also William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1419-20 (1993). But see Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1322-23 (1998).

14. As of November 25, 2005, there were 561 federally recognized American Indian Tribes and tribal entities. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71194 (Nov. 25, 2005); see Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 55 (2006). This is not an insignificant American population group. In the 2000 Census, the number of Native Americans was 2,447,989, reporting only Indian or Alaska Native race, and 4,315,865 reporting some Indian or Alaska Native race in combination. U.S. CENSUS BUREAU, WE THE PEOPLE:

III. THE SAME-SEX MARRIAGE MOVEMENT THREATENS THE INSTITUTION OF MARRIAGE, CHILDREN, FAMILIES, AND SOCIETY

A. THE PUBLIC INTEREST IN THE SOCIAL INSTITUTION OF CONJUGAL MARRIAGE

Helping people to see that legalizing same-sex marriage or marriage-equivalent domestic relationships is an attack on marriage is not easy. The harm it causes is not like a broken bone sticking through the skin or blood pouring from a severed artery. It is more gradual and subtle. It is like the dangers of smoking—the damage is not obvious at first, and by the time people realize that smoking is harmful to them, irreversible damage has often been done (they may have cancer, emphysema, heart attacks, or strokes).

It is useful to begin by explaining that marriage is not merely a private matter because there are so many important public, social consequences. Marriage is a *public institution*, a *public status*, with *public benefits*.¹⁶ Marriage is carefully defined and regulated by the law because the public has a huge interest in protecting this basic social institution.¹⁷ People are vulnerable in marriages, and when marriages fail, society must pick up the

AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 2 (2006), available at <http://www.census.gov/population/www/socdemo/race/censr-28.pdf>. That is nearly 1.5% of the total American population. The largest tribes were Cherokee (875,276), Navajo (209,575), Choctaw (173,314), Sioux (167,869), Chippewa (159,744) and Apache (104,556). *Id.* Just one-third of these people lived on tribal lands; nearly two-thirds lived outside of tribal areas. *Id.* at 14.

15. See Angela R. Riley, (*Tribal*) *Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 837 n.284 (2007).

In 2004, the Cherokee Nation Tribal Council unanimously passed a law banning same-sex marriages. On April 22, 2005, the Navajo Nation Council overwhelmingly passed the Diné Marriage Act of 2005, prohibiting same-sex marriages. On May 1, 2005, Navajo Nation President Joseph Shirley, Jr., vetoed the bill. On May 1, 2005, Navajo Nation President Joseph Shirley, Jr., vetoed the bill.

Id. (internal citations omitted); Justin T. Wilson, Note, *Preservationism of the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 584 n.127 (2007) (“To date, no Native American tribes permit same-sex marriage, but several tribes—including the Cherokee and Navajo—have taken up the issue in recent years.”); see also Fletcher, *supra* note 14, at 63 (explaining the potential impact of a federal marriage amendment on Indian tribes). It is worth noting that the federal Defense of Marriage Act, 28 U.S.C. 1738C, allows states and Indian tribes to decline recognition of same-sex unions treated as marriages from any other state or Indian tribe.

16. *Maynard v. Hill*, 125 U.S. 190, 213 (1888).

17. Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 3, 9 (2006) (discussing the institutional role of marriage in society); Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 560-67 (analyzing marriage as a social institution and an attempt to redefine marriage).

pieces and the public incurs social costs such as for increased mental health treatment, medical services, juvenile delinquency, impaired education, and reduced labor productivity.¹⁸

How marriage is defined sends signals to and reflects common understandings about the expectations of the relationship. Keeping those signals clear is critical to protect the vulnerable, including children, adults who invest a large part of their lives in families, and persons who depend on the care given by families. Legalizing same-sex marriage will drain marriage of social meaning. Marriage links not only men with women, but parents with children.¹⁹ Legalizing same-sex marriage obscures that linkage, weakens the message connecting marriage with spousal and parental responsibility, and guarantees that children will be deprived of an extremely valuable and protective relationship with their father or their mother.²⁰ This is why former California Governor Pete Wilson said: “Government policy ought not to discourage marriage by offering a substitute relationship that demands much less and provides much less than is needed by children and ultimately much less than is needed by society.”²¹

Marriage is more than a mere “word” or “piece of paper.”²² It is the oldest social institution in the world; it is literally a pre-legal, pre-state institution.²³ Thus, merely calling the union of two men or two women a marriage does not make it so. It is like the story attributed to Abraham Lincoln. He is said to have once asked how many legs a dog would have if

18. See, e.g., David G. Schramm, *Individual and Social Costs of Divorce in Utah*, 27 J. FAM. & ECON. ISSUES 133, 133 (2006) (indicating that public and private direct and indirect costs of divorce total \$33.3 billion annually in the United States).

19. See Stewart & Duncan, *supra* note 17, at 589-91 (discussing the detrimental impact of redefining marriage upon the child’s welfare and the child’s right to know and be raised by her parents).

20. Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 231-55 (2006) (explaining the importance of dual-gender marriage in parenting and harm resulting when it is absent).

21. *Domestic Partner Bill Vetoed in California*, N.Y. TIMES, Sept. 13, 1994, at A14.

22. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate A Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 768 (1998) [hereinafter Wardle, *Legal Claims for Same-Sex Marriage*].

23. See Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 612 (2005) (describing marriage as the oldest social institution). “Men and women of full age . . . have the right to marry and to found a family. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/819 (Dec. 10, 1948), available at http://www.unhchr.ch/udhr/lang/eng_print.htm; see Mary Bonuto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont*, 5 MICH. J. GENDER & L. 409, 442 (1999) (explaining that marriage is undeniably one of oldest social organizations); Bill Muehlenberg, “Marriage as a Universal Norm,” available at http://www.marriage.org.au/marriage_as_a_universal_norm.htm (last visited Feb. 14, 2008) (“Marriage is also the norm, both universal and historical.”).

you counted a tail as a leg. To the response “five legs,” Lincoln said, “No; calling a tail a leg doesn’t make it a leg.”²⁴ In other words, marriage is not merely a positivist creation, but a fundamental human relationship deeply imbedded and essentially defined in human nature and history.²⁵

If same-sex marriage is legalized on the principle of personal choice, there is no principled basis to deny those who want to call incestuous relationships “marriages,” or polygamous relationships or unions “marriages.” Marriage involves the complementary, conjugal union of a man and a woman. As Supreme Court Justice Ruth Bader Ginsburg wrote in a famous decision, “Physical differences between men and women . . . are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’”²⁶

Men and women are different in a universe of complementary ways and aspects. The gender integrative union of a man and a woman is different than the gender apartheid union of two men or two women. The union of a man and a woman in marriage creates a unique and uniquely valuable union much greater than the sum of the parts. Conjugal marriage contributes more to society than other forms of intimate adult relationship (including male-male, female-female, polyamorous, etc.).²⁷

Marriage establishes the moral core of the family and the moral baseline and standards for society in many ways. “Marriage is a society’s cultural infrastructure. . . .”²⁸ In marriage and family, the individual acquires his core kinship identity. Without a solid family identity, many persons struggle and some turn to gangs and extremist movements as a substitute for family identity.²⁹ In conjugal marriage and the marital family most

24. J. BARTLETT, *THE SHORTER BARTLETT’S FAMILIAR QUOTATIONS* 218(d) (1961).

25. See generally Lynn D. Wardle, *Same-Sex Marriage and the Limits of Legal Pluralism*, in *THE CHANGING FAMILY* 381, 392 (John Eekelaar & Thandabantu Nhlapo eds., 1998) (discussing the Kelsenian flaw of same-sex marriage); Wardle, *Legal Claims for Same Sex Marriage*, *supra* note 22, at 735 (same).

26. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

27. See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. REV.* 1, 38-39 (describing the essentialism of conjugal marriage).

28. David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, 68 *POL’Y REV.* 9, 9 (1994) (“The history of human society shows that when people stop marrying, their continuity as a culture is in jeopardy.”).

29. Historically, and in the twenty-first century, this has been a reason for such great concern about so many children being born and raised out of wedlock. Robert J. Stonebraker, *The Joy of Economics: Making Sense Out of Life, Moral Decay*, <http://faculty.winthrop.edu/stonebraker/book/unwedmoms.htm> (last visited Apr. 9, 2008); see also Lynn D. Wardle, *The Morality of Marriage*, in *HOW LEGALIZING SAME-SEX MARRIAGE WILL HARM CHILDREN, FAMILIES AND SOCIETY* (book manuscript on file with author).

persons learn the most poignant lessons about how to live in meaningful relationships.³⁰ Marriage is not only the most critical bridge and bonding connection in society, it is the instrument of the most important moral transformation of individuals. Marriage connects us as individuals from strangers into kin, from men and women into husbands and wives, from persons of separate generations into families.

Marriage cultivates a morality of love and sacrifice. In conjugal marriage we learn through practice to subordinate self-interest to service, to sacrifice for the welfare of others, to nurture, give, and express love, to forgive and be one with another (who at times seems so different, even hostile, to our interests, needs and goals).³¹ Societies for ages have channeled sexual relations into conjugal marriage, because married couples enjoy the most healthy,³² most satisfying,³³ and most socially-beneficial sexual relations.³⁴

Same-sex relationships differ in profound ways in all of these critical aspects. The difference is the danger. The inclusion of same-sex relationships with different values in the social understanding of marriage will transform the social understanding of that basic unit of society.

B. WHAT IS THE HARM?

1. *Some Quantitative Harms*

Those who advocate legalizing same-sex marriage argue that “the sky did not fall” in the Netherlands, Canada, or Massachusetts when they legalized same-sex marriage a few years ago.³⁵ This is an attempt to switch

30. Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 39; TAKEO DOI, *THE ANATOMY OF DEPENDENCE* 144 (John Bestor trans., 1973) (explaining that healthy relationships between parents impact the emotional well-being of children).

31. *See generally* Lynn D. Wardle, *All You Need Is Love?*, 14 S. CAL. REV. L. & WOMEN'S STUD. 51, 60-65 (2004) (explaining that marital love is not identical with romance, but includes and requires much more).

32. *See* LINDA J. WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 47-52, 152-58, 162-65 (2000) (noting relations of spouses are healthier, with less domestic violence, and less victimization of many kinds).

33. *Id.* at 75-89 (indicating married couples generally have more sex, enjoy it more, and find it more physically and emotionally satisfying than non-married couples).

34. *Id.* at 165-68 (finding husbands and wives are both happier than singles and have better mental health).

35. Ian Ayres, *Mark(et)ing Nondiscrimination: Privatizing ENDA With A Certification Mark*, 104 MICH. L. REV. 1639, 1691 (2006) (“Marriage was extended to same-sex couples in Massachusetts (as well as some Western European countries) and the sky did not fall.”); Larry Cata Backer, *Inscribing Judicial Preferences Into Our Fundamental Law: On the European Principle of Margins of Appreciation As Constitutional Jurisprudence in the U.S.*, 7 TULSA J.

the burden of proof about harm to those who defend marriage rather than those who are proposing a radical change. This argument diverts attention; the enduring harms of same-sex marriage become evident over decades, not overnight. It will take that long to clearly document the detrimental consequences of legalizing same-sex marriage, just as it took to document clearly the harm of unilateral, no-fault divorce on demand, which many American states adopted thirty to thirty-five years ago.³⁶

Some harm can be identified already. At this early stage, as often in social science research, the evidence of harm is correlational not causal. One of the best summaries of such evidence comes in a book published recently, written by David Blankenhorn, entitled *The Future of Marriage* and in an article written by Blankenhorn published in the *Weekly Standard*.³⁷ Using a poll of data reporting interviews with 50,000 adults in thirty-five nations, Blankenhorn created four categories of countries according to their laws regarding same-sex unions and analyzed attitudes towards marriage.³⁸ He reports:

The correlations are strong. Support for marriage is by far the weakest in countries with same-sex marriage. The countries with marriage-like civil unions show significantly more support for marriage. The two countries with only regional recognition of gay marriage (Australia and the United States) do better still on these support-for-marriage measurements, and those without either gay marriage or marriage-like civil unions do best of all.³⁹

In nations without gay marriage, people are twice as likely to say married people are happier than in nations with gay marriage, and nearly twice as likely to say that people with children ought to marry.⁴⁰ Performing a similar analysis, the World Values Survey produced similar results.⁴¹

COMP. & INT'L. L. 327, 337 n.47 (2000) (comparing Justice Scalia to "Chicken Little" for his strong concerns about forcing legalized acceptance of same-sex relations).

36. See BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 68-71 (1997) (indicating that, in the 1960s and 1970s, advocates of permissive divorce argued it was good for adults and for children); *id.* at 93-106 (noting that by the 1980s, research was beginning to show long-term harms to both adults and children, and that data has continued to grow); WAITE & GALLAGHER, *supra* note 32, at 66-71 (providing social science evidence that marriage is beneficial, and divorce is harmful).

37. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007); see also David Blankenhorn, *Defining Marriage Down . . . Is No Way To Save It*, *WEEKLY STANDARD*, Apr. 2, 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/451noxve.asp> [hereinafter Blankenhorn, *Defining Marriage*].

38. Blankenhorn, *Defining Marriage*, *supra* note 37 (analyzing data from the International Social Science Programme).

39. *Id.*

40. *Id.*

41. *Id.*

These two data pools show a stair-step correlation: support for marriage is weakest in nations that have legalized same-sex marriage, stronger in nations that have legalized marriage-equivalent civil unions or partnerships, stronger again in nations that have only a few jurisdictions where same-sex unions are legalized, and strongest by far in nations that do not recognize either same-sex marriage or civil unions.⁴²

The morality and behavioral expectations of gays and lesbians differ markedly from married men and women.⁴³ For example, promiscuity, infidelity, multiple sexual partners, and dangerous sexual practices are the behavioral norms among gay couples (and also, to a lesser extent, lesbian couples), rather than monogamy and sexual self-control which are the norms fostered by and nurtured in heterosexual marriages.⁴⁴

For example, a study by Dutch AIDS researchers, published in 2003, reported on the number of partners among Amsterdam's homosexual population.⁴⁵ They found:

- 86% of new HIV/AIDS infections in gay men were in men who had steady partners.
- Gay men with steady partners engage in more risky sexual behaviors than gays without steady partners.
- Gay men with steady partners had eight other sex partners (“casual partners”) per year, on average.
- The average duration of committed relationships among gay steady partners was 1.5 years.⁴⁶

American researchers Bell and Weinberg reported that 43% of white male homosexuals had sex with 500 or more partners, with 28% having one thousand or more sex partners.⁴⁷ A more recent study of 2583 older sexually active gay men reported that “the modal range for number of sexual partners ever was 101-500,” while 10.2% to 15.7% had between 501

42. *Id.*

43. Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1016-23 (2007) (providing some of the characteristic consequences of gay sex) [hereinafter Wardle, *Biological Causes*].

44. *Id.* at 1024-25.

45. Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029 (2003), available at <http://www.aidsonline.com/pt/re/aids/pdfhandler.00002030-200305020-00012.pdf;jsessionid=FrMF7bsJNjx6Znq8QlqzTFXPQSShnmnLTy4TG4pmbXlySXPTnyz9!1057067369!-949856144!8091!-1>. The purpose of the study was to assess whether provision of certain AIDS drugs had resulted in an increase of unsafe sexual practices in the gay community in the Netherlands. *Id.*

46. *Id.*

47. MARTIN S. BELL & ALAN P. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-09 (1978).

and 1000 partners, and another 10.2% to 15.7% reported having had more than one thousand sexual partners in their lifetime.⁴⁸ Kirk and Madsen reported that “the cheating ratio of ‘married’ gay males, given enough time, approaches 100%. . . . Many gay lovers, bowing to the inevitable, agree to an ‘open relationship,’ for which there are as many sets of ground rules as there are couples.”⁴⁹

A study published in 2006 of same-sex registered partnerships in Norway and Sweden, noted significant problems with stability of the relationship and significantly higher rates of breakup.⁵⁰ The divorce-risk levels were about fifty percent higher for registered gay partnerships than for comparable heterosexual couples, and controlling for variables, the risk of divorce was twice as high for lesbian couples as it was for gay men couples.⁵¹ Another study of Swedish registered partnerships found that gay couples were 50% percent more likely to divorce than married heterosexual couples, while lesbian couples were over 150% more likely to divorce than heterosexual couples.⁵² Controlling for variables, gay couples were 23% and lesbian couples 200% more likely to divorce than heterosexual couples.⁵³

Giving formal marital equivalent status and benefits to homosexual couples does not change their behavior significantly. A study of civil unions in Vermont reported that gay men both in civil unions and not in civil unions had nearly four times the rate of infidelity (approximately 60%) as married heterosexual men (15.2%), and the difference in infidelity rates between gay men in a civil union and those not in a civil union was less than three percent (2.8%).⁵⁴ Likewise, lesbian couples both in and not in civil unions had much higher rates of meaningful extra-relationship affairs than women in heterosexual marriages—4.7% and 3.0% compared to

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

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

50. Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79, 89-90 (2006), available at <http://muse.jhu.edu/journals/demography/v043/43.1andersson.pdf>.

51. *Id.*

52. Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden*, IMAPP POLICY BRIEF, May 3, 2004, at 2.

53. *Id.*

54. Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 571, 571 (2005).

0.0%.⁵⁵ Legal marriage-like status did not significantly reduce lesbian or gay sexual irresponsibility.

Also, the expectation of fidelity that came with the relationship commitment was drastically different for conjugally married men and women than it was for gays and lesbians in formal and non-registered same-sex relationships. About 50% more lesbians both in and not in civil unions in Vermont decided that extra-relationship sex was acceptable than married women, and for gay men both in civil unions and not in civil unions it was from 1250% to 1400% higher than for men in conjugal marriages (40.3% and 49.5% compared to 3.5%).⁵⁶ McWhirter and Mattison interviewed 156 male couples and found that all the couples who had been together at least five years had incorporated some provision for outside sexual activity in their relationships.⁵⁷

Gay sexual intercourse is the primary means of transmission of AIDS in the United States and a dominant transmission method worldwide.⁵⁸ AIDS is estimated to have killed over twenty-five million people worldwide and is thus one of the most destructive epidemics in recorded history.⁵⁹ AIDS is fulfilling the ominous prediction made in 1987 by the Secretary of Health and Human Services, Otis R. Bowen, that the disease could make earlier epidemics, such as bubonic plague in Europe, smallpox, and typhoid, “pale in comparison.”⁶⁰ AIDS is not the only sexually transmitted disease or public health problem with extremely disproportionate incidence in homosexual men. Doctors who treat homosexual men for diseases now look for at least fifteen *common* sexually related afflictions besides HIV/AIDS, that are not common in heterosexual men.⁶¹

2. *Some Qualitative Harms*

Legalizing same-sex marriage will change the core meaning and moral message of the social institution of marriage through “the transformative

55. *Id.* The authors said there was no significant difference between lesbians and married heterosexual women in infidelity. *Id.*

56. *Id.* at 574.

57. DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE* 252 (1984).

58. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVICES, HIV/AIDS SURVEILLANCE REPORT 14 tbl.12 (1993) (finding fifty-three percent of all AIDS cases reported through June of 1993 (166,023 cases) involved the single mode of exposure of men who have sex with men). The second most common method of transmission was intravenous drug use, which accounted for only twenty percent of the AIDS cases. *Id.*

59. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), WORLD HEALTH ORG. (WHO), AIDS EPIDEMIC UPDATE (2003); WORLD HEALTH ORGANIZATION (WHO), SUMMARY OF HIV/AIDS EPIDEMIC (2005).

60. BioLaw, *Updates: AIDS Statistics*, § 3-8 at U:274 (1987).

61. *Id.* at 21; *see also id.* n.92.

power of inclusion.” When same-sex marriage is legalized, the moral qualities and characteristics of homosexual relations and lifestyles will become part of the institution of marriage, and will have some transformative effect upon the qualities and characteristics of the institution of conjugal marriage. Modification of marriage to make it more like gay-relations will cause serious harm to society, families, and individuals.⁶² Thus, redefining marriage to include gay and lesbian couples will have a profound impact upon sexual morality and public health in society. Sexual standards in marriage will change as homosexual relations will be instantly normalized and equated with marital relations.

Same-sex marriage undermines parenting and child-rearing. Every child deserves to be raised by his or her mother and father. While unwed birth and divorce impair that right for some children of conjugal unions, same-sex marriage *guarantees* that *all* children who are born during or raised in such unions will be deprived totally of this fundamental moral right.⁶³ Further, the linkage between responsible procreation and parenting is weakened when marriage is redefined to allow gay unions that absolutely are incapable of procreation.⁶⁴ Also, the co-parenting message of marriage is weakened when marriage is redefined to include relations among same-sex couples that are designed for sexual pleasure and lack the ability to co-parent.⁶⁵

Legalizing same-sex marriage will instantly transform the meaning of *marriage, spouse, husband, wife, parent, child* and by that redefinition will profoundly influence the meaning of public education, school curriculum, civil rights, family, inheritance, intimacy, relations, public behavior, privacy, disclosures, security, accommodation, filings, custody, guardianship, visitation, reasonable conduct, medical treatment, preferences, privileges, rights, duties, etc., because so many laws that regulate these matters include and reference “marriage.”⁶⁶ If the meaning of marriage is changed, it will

62. See generally Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 *passim* (1997); Stewart, *supra* note 17.

63. That is, a single mother who gives birth out of wedlock or who is divorced is free to marry a man to provide a male-father role model for her child; a woman in a same-sex “marriage” or “civil union” or “domestic partnership” is in a binding legal relationship and not free to marry a man. The child is guaranteed to be deprived of the influence of a father figure in her home unless her mother first terminates the same-sex relationship which, like all relational terminations, can be expected to be painful and traumatic for children.

64. 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, 796 (2001).

65. *Id.*

66. In 1997, “the General Accounting Office (GAO) identified 1,049 federal laws ‘in which marital status is a factor.’ In January 2004, the GAO updated this report, identifying 1,138 incidents of marriage in federal law.” Joshua K. Baker, *1000 Benefits of Marriage? An Analysis of the 1997 GAO Report*, IMAPP PUBLIC POLICY BRIEF, May 26, 2004, at 1 n.3, *available at*

influence all incidental matters regulated by laws, which reference marriage. Thus, the attempt to legalize same-sex marriage or give equivalent legal status and benefits to same-sex couples constitutes a very real and dangerous attack upon the institution of conjugal marriage. Redefining marriage to include homosexual couples will alter the behavioral characteristics, social expectations, and moral message of our most basic social institution.

C. LEGALIZING SAME-SEX MARRIAGE WILL ENDANGER CIVIL RIGHTS

Legalizing same-sex marriage will undermine the civil rights of those who oppose same-sex marriage. Gay marriage supporters argue that it is a basic right or matter of equality, and that those who oppose same-sex marriage, like those who oppose inter-racial marriage, are simply bigots.⁶⁷ If same-sex marriage becomes law, that principle becomes the law. Opposition to same-sex marriage may be deemed “invidious discrimination” and punished. Public schools, teachers, administrators, adoption agencies, psychologists, social workers, marriage counselors, fertility experts, artificial reproductive treatment (ART) clinics, religiously-affiliated schools, and social-service agencies and workers who do not support same-sex marriage will be branded “bigots.” They will face civil liability, job discrimination, and be forced to conform or lose government contracts, government employment, government licensing, and tax and other benefits. The persecutions of parents, teachers, other public employees, and church-affiliated adoption agencies in Massachusetts in just three years since same-sex marriage was legalized there, shows the kind of harm that can be expected.⁶⁸

<http://www.marriedebate.com/pdf/iMAPP.GAO.pdf> (last visited September 13, 2006) (citing Letter from GAO Associate General Counsel Barry Bedrick to the Hon. Henry Hyde (Jan. 31, 1997)).

67. See generally Maggie Gallagher, *The Senator Who Cried ‘Bigot,’* REAL CLEAR POLITICS, June 7, 2006, available at http://www.realclearpolitics.com/articles/2006/06/the_senator_who_cried_bigot.html.

68. See, e.g., Thomas J. Paprocki, *Marriage, Same-Sex Relationships, and the Catholic Church*, 38 LOY. U. CHI. L.J. 247, 260-61 (2007) (describing incidents in California and Massachusetts in which Catholic Social Services had been attacked or excluded from the public square); Helen M. Alvare, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 LOY. U. CHI. L.J. 349, 375-76 (2007) (describing restriction of Catholic Church ability to meet needs of its community because of restrictive gay rights laws); Maggie Gallagher, *Banned in Boston*, WEEKLY STANDARD, May 15, 2006, at 20 (reporting that after a century of providing adoption services, a Catholic group had been forced to close its adoption work because Massachusetts had adopted a new rule requiring all agencies, including church-affiliated agencies, to place children for adoption with gay and lesbian adults seeking to adopt).

Marriage is one of the most important concerns of religion. It is also a critical element in hundreds of civil laws. Changing the core definition of marriage in the law will lead to clashes between law and religion. Religious organizations may be compelled to provide support for and service for same-sex married couples or be punished for not doing so. Civil liability or exclusion from government benefits may be imposed on religions and religious believers that decline to accommodate same-sex marriage.

From soup kitchens to homeless shelters, from hospitals to social services, religious organizations provide a variety of services to the public and participate in many public service programs that may be shut down or censored if they do not accommodate same-sex marriage.⁶⁹ Religious universities have been forced to provide housing to gay and lesbian couples in violation of core religious principles,⁷⁰ and shelters may be similarly treated. In Massachusetts since same-sex marriage has been legalized, Boston Catholic Charities, which provided adoption services to Catholic families for a century, had to shut down because a law required all adoption agencies to place children with gays and lesbians, in violation of the strong moral principles of the Church.⁷¹ Now the United Kingdom has adopted the same kind of law threatening Catholic adoption services in that nation.⁷² In California, public non-discrimination laws were used to force a Protestant adoption agency to provide adoption services to lesbian couples.⁷³

The Catholic Church's Georgetown University was required to allow the Gay Rights Coalition and their programs to promote homosexual lifestyle with the same access to facilities and the same university support, resources and services as it provides to its own church-doctrine-supporting groups.⁷⁴ In California, which has given same-sex partnerships the same rights as marriage, Catholic Charities was required to violate its own core religious principles and provide contraceptives in health insurance coverage, or to provide no benefits at all.⁷⁵

69. See generally Roger Severino, *Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty*, in WHAT'S THE HARM: HOW LEGALIZING SAME-SEX MARRIAGE WILL HARM CHILDREN, FAMILIES AND SOCIETY (manuscript on file with author).

70. See, e.g., *Levin v. Yeshiva University*, 754 N.E.2d 1099, 1105 (N.Y. 2001).

71. See *Gay Issue Spurs Catholic Group to End Adoptions*, ABC NEWS, Mar. 12, 2006, <http://abcnews.go.com/GMA/Story?id=1715489&page=1>.

72. George Jones, *Church Loses Opt-Out Fight Over Gay Adoptions*, TELEGRAPH.CO.UK, May 6, 2007, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/01/30/ngay30.xml>.

73. Christopher Lisotta, *Gay Foster Parents Win California Ruling*, GAY.com, <http://www.gay.com/news/article.html?2003/03/04/3> (describing a case holding that an adoption agency must serve lesbians).

74. *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. Cir. 1987).

75. *Catholic Charities of Sacramento v. Superior Ct.*, 85 P.3d 67, 73 (Cal. 2004).

In Canada, the Knights of Columbus was held liable and forced to pay damages by the British Columbia Human Rights Commission after it cancelled, very politely and promptly, rental of its hall for a marriage celebration, when it learned that it was for a lesbian wedding.⁷⁶ In the United States, the Boy Scouts who require their members to be “morally straight” have been denied privileges and the use of public facilities and lands.⁷⁷ The most recent example of this is in Philadelphia, where the Scouts have been ordered by the openly gay City Solicitor to vacate a building that they built with their own funds nearly eighty years ago and donated to the city in return for a lease in perpetuity.⁷⁸

Since hospitals are regulated public institutions, church-owned hospitals and teaching clinics may be forced to offer procedures, like sex-change operations, and teach about gay lifestyle, violating church doctrines. In the United States, this has occurred in the abortion context, so we should expect it to occur with same-sex marriage, also.⁷⁹

Educators and schools are vulnerable. Religious schools that refuse to approve, subsidize, perform or endorse same-sex marriages could lose access to public facilities, programs, and tax exemptions (even be prosecuted).⁸⁰ In Massachusetts since same-sex marriage has been legalized, there already have been numerous controversies about curriculum, assemblies, classes, clubs, and parents’ rights to protect their children from exposure to gay propaganda.⁸¹ In British Columbia, Canada, the government-

76. *Lesbian Couple Wins \$2,000 Settlement*, CBC NEWS, Nov. 29, 2005, http://www.cbc.ca/canada/story/2005/11/29/knights_lesbians051129.html; *B.C. Tribunal Awards Lesbian Couple Damages*, CTV.ca, Nov. 30, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051129/tribunal_lesbiancouple_051129/20051129?hub=Canada; Terry Vanderheyden, *Knights of Columbus Forced to Pay Damages to Lesbians for Refusing to Rent Hall for “Wedding” Reception*, LIFE SITE, Nov. 30, 2005, <http://www.lifesite.net/ldn/2005/nov/05113006.html>.

77. Heather Mac Donald, *Boy Scout Battle Pits Gay Activists vs. Minority Kids*, WALL ST. J., July 6, 2000; Peter Ferrara, *The War on Boy Scouts: The ACLU Never Sleeps*, WEEKLY STANDARD, Sept. 29, 2003, available at http://www.bsalegal.org/downloads/War_on_Scouts.pdf; *Supreme Court Rejects Boy Scouts’ Appeal*, MSNBC, Oct. 16, 2006, <http://www.msnbc.msn.com/id/15289493/>.

78. Robert Knight, Culture & Media Inst., *Post Sugarcoats Thuggery Against Philadelphia Boy Scouts*, Nov. 20, 2007, <http://www.cultureandmediainstitute.org/articles/2007/20071120152550.aspx>.

79. See generally James Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235 (2007); Lynn Marie Kohm, *From Eisenstadt to Plan B: A Discussion of Conscientious Objections to Emergency Contraceptions*, 33 WM. MITCHELL L. REV. 787 (2007); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEG. MED. 177 (1993).

80. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to a university that engaged in racial discrimination).

81. E.g., Mass Resistance, David Parker—His Arrest, Court Appearances, Abuse by School Officials, Harrassment by Pro-Gay Activists in Town, and Federal Civil Rights Lawsuit!, <http://www.massresistance.com/docs/parker/> (last visited Feb. 11, 2008) (illustrating that in the Jacob Parker incident in which a father protesting the reading of a gay propaganda book to his son

accrediting agency denied accreditation to Trinity Western University, sponsored by the Evangelical Free Church of Canada, for its Teacher Training Program because the school requires students to sign an honor code manifesting their belief in Bible verses that condemn homosexual behavior as immoral, and the provincial supreme court affirmed.⁸² In Massachusetts, the grade-school son of a man who protested the homosexual lifestyle-acceptance promotion by elementary school curriculum, was beaten up, with nary a public voice of protest by those who espouse “tolerance.”⁸³ The litany of abuses in Massachusetts of families and individuals who oppose the imposition of gay-promoting governmental policies is deeply disturbing.⁸⁴

in a first-grade class was arrested, the child was later beaten at the school); *see also* Parker v. Hurley, 514 F.3d 87, 107 (1st Cir. 2008), *aff'g*, 474 F. Supp. 2d 261, 278 (D. Mass. 2007) (dismissing federal constitutional claims by parents whose elementary school child was given controversial pro-gay-family material in public school without prior notice to, or consent of parents).

82. Trinity W. Univ. v. College of Teachers, [2001] S.C.R. 223.

83. Traditional Values Coalition, *Where's the Media Outrage Over the Beating of David Parker's Son?*, <http://www.traditionalvalues.org/modules.php?sid=2763> (last visited Apr. 14, 2008).

84. One partial reporting of events in 2006 noted:

Two courageous families residing in Lexington, Massachusetts, are suing the school district over its insistence on promoting gay-themed literature in the classroom. (Two of the parents are long-time friends of mine, and I can attest that they are thoughtful, reasonable people who did not go to court lightly.)

This past week, in honor of Gay Pride Week (which promotes a number of obscene groups and activities), the Boston Macy's at Downtown Crossing placed a prominent display in its front window, including a male mannequin with a skirt and breasts. When a number of private citizens objected to the display, Boston Mayor Tom Menino referred to us as right-wing bigots.

Catholic Charities can no longer facilitate adoptions in Massachusetts. Placing children with gay couples is a violation of Catholic religious belief, but state law mandates that gay couples have the right to adopt children. By a minor miracle, other religious groups have avoided similar state and media attention, but their time will come.

In North Truro, Massachusetts, Leo “Skip” Childs, a long-time volunteer fire-fighter, lost his position on the Board of Fire Engineers because he had signed the petition in favor of putting a traditional marriage amendment on the Massachusetts ballot.

Massachusetts Equality (the organization defending gay marriage in Massachusetts) has listed the name and contact information of every person who signed that petition so that their members can contact us to “persuade” us to change our minds.

“Vote on Marriage” (the umbrella group for all pro-family groups in Massachusetts) gathered over 170,000 signatures for the traditional marriage amendment (the most in state history). Their polls indicate that 75% of voters want an opportunity to vote on marriage.

Nonetheless, the legislature has repeatedly postponed calling a constitutional convention and will use every tool in its power to prevent the amendment from going to the ballot. [In 2007, the legislature voted against allowing the proposed amendment to go to the people for a vote.]

Posting of Dionne Harmer, Massachusetts Litany of Harassment, Legacy Listserv (June 9, 2006) (on file with author).

Schools and school children are a particular target of the advocates of same-sex marriage. The gay marriage movement seeks to drastically change culture and morality, and schools are among the prime targets for this effort. For example, the California legislature in 2007 enacted SB 777, containing radical curriculum requirements designed to remove pro-conjugal marriage values from the public school curriculum and to socialize public school children into acceptance of the gay lifestyle.⁸⁵ It requires “textbooks, instruction materials, and school activities to promote ‘sexual orientation’ (defined as homosexuality and bisexuality) and ‘gender’ (defined as including transsexuality) in all grades in California public schools.”⁸⁶

The new, “non-discriminatory” materials would have to include:

- Sex-change handouts (Omitting sex-change material in sex education class would “reflect adversely” on e.g. homosexuality)
- Transvestite speakers (Limiting classroom speakers to biologically born men and biologically-born women would “reflect adversely” on e.g. homosexuality)
- Transsexual, bisexual and homosexual videos (Showing videos depicting only the traditional family or man-woman relationships would “reflect adversely” on e.g. homosexuality).⁸⁷

Thus, it is not surprising that Brentwood, California, middle school officials planned a school-sponsored cross-dressing day in 2007, where all the kids were encouraged to dress as the opposite sex.⁸⁸

Elsewhere, free speech rights also have already been abused. In Sweden, Pentecostal Pastor Ake Green, was prosecuted, initially convicted, and forced into years of litigation for preaching from the Bible against

85. Bob Unruh, *Revealed: ‘Gay’ Plans to Target 2-Year-Olds*, WORLDNETDAILY, Dec. 17, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=59259.

86. *Teaching California Kindergarteners to be Transsexual, Bisexual and Homosexual?*, CFF MEDIA: NEWS RELEASES, Mar. 27, 2007, http://www.savecalifornia.com/getpluggedin/news_details.php?newsid=71.

87. *Id.* The legislation prohibits using any textbook that “reflects adversely” on a variety of sexual lifestyles, including homosexuality. *Id.*

Additionally, because parental units are gender-specific, married couples or a family with a “father and a mother” would be portrayed as mere stereotypes—outdated ideas—and could be prohibited from textbooks because their discriminatory inclusion “reflects adversely.” Under SB 777, school curriculum in every public school throughout California, in every grade K-12, would have to portray transsexual and bisexual “parents” as normal. In essence, SB 777 would teach schoolchildren that there is no such thing as the natural family.

Id.

88. *Middle Schools Cancels ‘Gender-Switch’ Day After Parents Object*, CATHOLIC NEWS AGENCY, Nov. 2, 2007, <http://www.catholicnewsagency.com/new.php?n=10869>.

homosexual relations.⁸⁹ Similar cases have been reported in Canada and England.⁹⁰ In Ireland, during public debate over legalizing same-sex unions, the Irish Council for Civil Liberties warned that Catholic Bishops and clergy who distributed a Vatican publication opposing homosexual relations could be prosecuted for violating a hate speech act.⁹¹

The movement to legalize same-sex marriage threatens harm for many. The attacks on the institution of conjugal marriage extend to those individuals who defend that institution, to the groups that defend that institution (especially religions), and to all others whose values are opposed to same-sex relations and same-sex marriage.

IV. OPPORTUNITY FOR A GLOBAL MARRIAGE RENAISSANCE MOVEMENT TO PROTECT THE INSTITUTION OF MARRIAGE

This article describes some of the serious dangers of the growing movement to legalize same-sex marriage and equivalent relations in the world today. However, the future is not bleak; simultaneously, there are signs of a revival of interest in protecting marriage. The early stages of what may become a renaissance of the institution of conjugal marriage and marital families are visible. Time and space do not prevent a full development of the evidence of this promising development, but five examples may suffice to illustrate the point.

First, most young people today yearn to have a good marriage, and a marital family. More young people than ever before want to have jobs and lifestyles that will allow them to spend time with and enjoy their families. Young people are worried about marital instability, and many approach marriage more seriously, with a greater commitment to make their marriage succeed than in prior generations.⁹²

89. The Becket Fund, Sweden—Criminalizing Religious Speech—Ake Green, <http://www.becketfund.org/index.php/case/93.html> (last visited Apr. 15, 2008).

90. A. Scott Loveless, *Children on the Front Lines of an Ideological War*, 22 ST. LOUIS UNIV. PUB. L. REV. 371, 391 n.63 (2003).

91. Liam Reid, *Legal Warning to Church on Gay Stance*, IRISH TIMES, Aug. 2, 2003, available at <http://www.ireland.com/newspaper/frontpage/2003/0802/1059775167952f.html>.

92. See PEW RESEARCH CTR., AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT (2007), <http://pewresearch.org/pubs/526/marriage-parenthood> (finding marriage remains ideal for young, old, and unmarried; most unmarried say they want to marry); BARBARA DAFOE WHITEHEAD & DAVID POPENOE, NAT'L MARRIAGE PROJECT, CHANGES IN TEEN ATTITUDES TOWARD MARRIAGE, COHABITATION AND CHILDREN 1995-1975 (1999), available at <http://marriage.rutgers.edu/Publications/pubteena.htm> (indicating more high school students want to get married than before, and more believe in the importance of marriage and family life); WASHINGTON POST/KAISER/HARVARD SURVEY PROJECT, AMERICAN VALUES: 1998 NATIONAL SURVEY OF AMERICANS ON VALUES 7 (1998) (asking participants whether divorce should be easier, harder or the same and the response was: easier 22%; harder 62%; and, same 11%). Even the movement to legalize alternative relationships (whether

Second, there even are some indications of greater interest in conjugal marriages in some nations where same-sex marriage has been legalized.⁹³ Perhaps one short-term reaction to the legalization of same-sex marriage is a temporary appreciation of the value of the institution of conjugal marriage. The public awakening caused by the legalization of same-sex marriage provides a golden short-term opportunity for a counter-movement to develop.

Third, many nations in the world clearly reject same-sex marriage.⁹⁴ While the regulation of marriage is normally not a concern of constitutional drafters, the national constitutions of thirty-two nations already contain explicit provisions that clearly define marriage as the union of a man and a woman, as Appendix 3 shows. In the United States, statutes ban same-sex marriage in forty-four states, and constitutional amendments forbid same-sex marriage in twenty-seven states.

Fourth, the emerging influence of the southern hemisphere in world affairs holds some potential to revitalize conjugal marriage. For example, the strong reaction of the African, and other, churches in the Anglican communion has had some positive impact to curtail the radical policies about same-sex unions promoted by branches of that Church in affluent North America and Western Europe.⁹⁵ Likewise, all major branches of Islam forbid same-sex marriage as do all the nations (nearly sixty) where Islamic people have dominant political influence⁹⁶

Fifth, the incorporation into the European Union of the new democracies of Central and Eastern Europe is bringing into the “Old Europe” some promising values of the “New Europe,” including traditional views about marriage and families. For example, Eurostat 2005 shows that the marriage rate is higher in the “New Europe” than in the “Old Europe.”⁹⁷ Also, the

nonmarital cohabitation or same-sex relations) manifests, at one level, a strong reaction by young adults to the instability, dysfunction, and painful failure of many of their own parents' marriages, and in the families of their childhood friends. Wardle, *Legal Claims for Same-Sex Marriage*, *supra* note 22, at 762.

93. WILLIAM N. ESKRIDGE & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 173-79 (2006).

94. *See infra* App. 3 (outlining the thirty-two nations with constitutional provisions barring same-sex marriage).

95. *See The Widening Division in the Anglican Communion*, CHRISTIANITY TODAY, May 5, 2007, available at <http://www.christianitytoday.com/ct/special/anglicans.html>.

96. Muhammad M. Abu Layiah, *Hacked By Seyyar Mafya Turk Defacer*, <http://www.legacyleader.com/ln/article.asp?articleid=21&print=1> (last visited Apr. 15, 2008) (“Gay marriage is totally prohibited in Islam . . .”); Ibrahim B. Syed, *Same Sex Marriage and Marriage in Islam*, http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm.

97. *Id.* (providing a table showing the 2003 marriage rate of 4.76 in EU-25, but 4.72 in EU-15). “Old Europe” consists of the fifteen nations of traditional “Western Europe,” while the “New

practice of delaying marriage in Central and Eastern Europe is less pronounced where, in 2000, the median age of marriage was approximately twenty-four years old.⁹⁸ The status of same-sex marriage and marriage-equivalent relations in eleven nations of Central and Eastern Europe is revealing. In none is same-sex marriage allowed; in only two (Slovenia and Germany) are same-sex unions given status comparable to marriage; in only one of the eleven (Germany, an “Old Europe” nation) may gay and lesbian couples adopt children.⁹⁹ Five nations in Central and Eastern Europe have constitutions that explicitly define marriage as the unions of a man and a woman.¹⁰⁰ The 2003 European Omnibus Survey (EOS) based on interviews with over 15,000 persons living in 30 European countries reported that 55% of persons from the “Old Europe” nations *opposed* the authorization of adoption by homosexual couples, while 76% of the population surveyed in the nations of “New Europe” *opposed* legalization of gay adoptions.¹⁰¹ Thus, there are signs of a renaissance of marriage in the world. It is spring in the seasons of the world, and we have the opportunity to revitalize marriage if we will.

V. CONCLUSION: WE MUST ALL SPEAK UP AND CONSTANTLY DEFEND MARRIAGE

Elie Wiesel was one of the Jews who refused to believe the warnings of Moishe the Beadle, yet he remembered gratefully Moishe the Beadle’s effort to warn his people, and honored his memory in the first line of his internationally-honored memoir. In his Nobel Peace Prize Acceptance Speech in 1986, Elie Wiesel recalled being, at fourteen years of age, one of those disbelieving Jews. Speaking of himself in the third-person, he said:

I remember his bewilderment. I remember his anguish. It all happened so fast. The ghetto. The deportation. The sealed cattle car. The fiery altar upon which the history of [the Jewish] people and the future of mankind were meant to be sacrificed. I remember he asked his father, “Can this be true? This is the twentieth century,

Europe” consists mostly of the newly democratic Central and Eastern European nations that were behind the “iron curtain” until about 1990.

98. DIMITER PHILIPOV, MAJOR TRENDS AFFECTING FAMILIES IN CENTRAL AND EASTERN EUROPE 2-3 (2003), *available at* <http://www.un.org/esa/socdev/family/Publications/mtphilipov.pdf>.

99. *See* Lynn D. Wardle, Presentation at the University of Vienna Colloquium on Marriage: The Need for and Prospects of a Second Renaissance—of Marriage (Oct. 6, 2006) (on file with author).

100. *See infra* App. 3 (listing Bulgaria, Latvia, Lithuania, Moldova, Poland, and Ukraine).

101. GALLUP EUROPE, THE EUROPEAN OMNIBUS SURVEY, *available at* <http://www.gallupeurope.com/history.htm> (last visited Sept. 10, 2003).

not the Middle Ages. Who would allow such crimes to be committed? How could the world remain silent?" And now the boy is turning to me. "Tell me," he asks, "what have you done with my future, what have you done with your life?" . . . And then I explain to him how naive we were. . . . And that is why I swore never to be silent. . . . We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor. . . .¹⁰²

The message of Elie Weisel is clear. We all must speak up.

Elie Weisel was not the only person to learn this lesson from the bitter losses and destructions of World War II. German pastor Martin Niemoller described the consequences of remaining silent in a poem that he wrote after World War II.

They came first for the Communists,
and I didn't speak up because I wasn't a Communist.
Then they came for the Jews
and I didn't speak up because I wasn't a Jew.
Then they came for the trade unionists
and I didn't speak up because I wasn't a trade unionist.
Then they came for the Catholics
and I didn't speak up because I was a Protestant.
Then they came for me—
and by that time no one was left to speak up.¹⁰³

One of our responsibilities as parents, citizens, and especially scholars is to warn of dangers, to find where the threats to our fundamental social institutions exist, and to warn of social proposals and trends that may threaten loss of things we value. We value marriage. While some people think that same-sex marriage is quite harmless, it is a disaster in the making. All of us who realize and recognize this have an obligation to raise a warning voice.

In his book *Standing for Something*, the President of the Church of Jesus Christ of Latter-day Saints Gordon B. Hinckley, expressed it well when he wrote, "We go to great lengths to preserve historical buildings and

102. WIESEL, *supra* note 1, at 118.

103. The Becket Fund, UNCHR Speech on Ake Green, April 14, 2005, *available at* <http://www.becketfund.org/index.php/article/386.html> (reciting Martin Niemoller's poem, *First They Came . . .*).

sites in our cities. We need to apply the same fervor to preserving the most ancient and sacred of institutions – the family!”¹⁰⁴ He said:

What we *desperately need* today on all fronts . . . are leaders, men and women who are *willing to stand for something*. We need people . . . who are willing to *stand up* for decency, truth, integrity, morality, and law and order . . . even when it is unpopular to do so—perhaps *especially* when it is unpopular to do so.

. . . .

. . . Never before, at least not in our generation, have the forces of evil been so blatant, so brazen, so aggressive as they are at the present time. . . .

. . . .

*We are involved in an intense battle. It is a battle between right and wrong, [W]e desperately need men and women who, in their individual spheres of influence, will stand for truth in a world of sophistry. . . . We need moral men and women, people who stand on principle, to be involved in the political process. . . . The weight of our stance may be enough to tip the scales in the direction of truth and right.*¹⁰⁵

Elie Wiesel ended his Nobel speech stating: “There is so much to be done, there is so much that can be done. One person—a Raoul Wallenberg, an Albert Schweitzer, a Martin Luther King, Jr.—one person of integrity can make a difference, a difference of life and death.”¹⁰⁶ That point is worth emphasizing in conclusion. There is much to be done. The naïve young law students in America and around the world will someday be the lawmakers and judges and leaders of nations. Unless we persuade them now of the dangers of legalizing same-sex marriage, then they will naïvely adopt laws and policies that will cause tragic consequences.

As Wiesel said, one person of integrity and commitment can make a huge difference in his or her family, community, school, profession, or nation. We all can make a difference on the issue of same-sex marriage. We can stand up and defend the institution of marriage. The task we face is not for summer soldiers or weekend warriors who are willing to work for a season, then quit. We must realize that we have the opportunity to initiate a

104. GORDON B. HINCKLEY, *The Family, We Can Save Our Nation by Saving Our Homes*, in *STANDING FOR SOMETHING* 143, 145 (2000).

105. *Id.* at 167, 170-71 (emphasis added).

106. Elie Wiesel, Nobel Prize Acceptance Speech Delivered in Oslo, Norway (Dec. 10, 1986), available at <http://www.eliewiesel.org/nobelprizespeech.aspx>.

renaissance of marriage and the family, and that will take decades, not days to accomplish. So we must enlist for the long term. As Gordon B. Hinckley wrote: “We cannot effect a turnaround in a day or a month or a year. But with enough effort, *we can begin a turnaround within a generation, and accomplish wonders within two generations*—a period of time that is not very long in the history of humanity.”¹⁰⁷

May all of us speak up and stand against legalizing same-sex marriage. May we all be as dedicated in warning about the dangers of same-sex marriage as Moische the Beadle was about warning of the dangers facing his people. If we act diligently, persistently, with good will, and with good judgment, over time we may succeed in averting the social disaster that is coming with the acceptance of same-sex marriage. We may also succeed in generating a real renaissance of marriage in the United States of America and throughout the world.

107. GORDON B. HINCKLEY, *The Family, We Can Save Our Nation by Saving Our Homes*, in *STANDING FOR SOMETHING*, *supra* note 104, at 144-45.

Appendix 1

**Global Progress of Same-Sex Marriage
and
Marriage Equivalent Civil Unions or Partnerships,
1985-2007**

YEAR	Same-Sex Marriage	Same-Sex Marriage- Equivalent Unions/Partners
1985	0	0
1990	0	1
1995	0	3
2000	0	6
2005	3	13
2007	5 ¹⁰⁸	15 ¹⁰⁹

108. The Netherlands has both Same-Sex Marriage and Same-Sex Partnerships. South Africa has both also; parties who take advantage of the civil union law can choose to call their relationships marriages. Thus, these two nations are “double-counted.”

109. The Netherlands and South Africa are “double-counted.”

Appendix 2

**Legal Status of Marriage
As Union of Man and Woman
in the United States and the World
31 December 2007**

**Same-Sex Marriage Legal:
Five Nations and One USA State¹¹⁰**

The Netherlands, Belgium, Canada, Spain, South Africa; (and Massachusetts)

**Same-Sex Unions Equivalent to Marriage Legal in
Fifteen Nations and Six US states¹¹¹**

Andorra, Denmark, The Netherlands, Norway, Sweden, Iceland, Finland, France, Germany, Luxembourg, New Zealand, Slovenia, South Africa, Switzerland, UK; (and CA, CN, NH, NJ, OR, VT).

**Same-Sex Unions Registry & Some Benefits in
At Least Seven Nations and Four US states**

Israel, Hungary,¹¹² Portugal, Croatia, Czech Republic, Argentina, & Columbia; (and HI, ME, WA, & DC)

110. *See supra* notes 108-09 and accompanying text.

111. *See supra* notes 108-09 and accompanying text.

112. Prior to December 2007, Hungary had for over a decade allowed same-sex couples to claim the same limited legal rights as unmarried heterosexual cohabitants. On December 17, 2007, the Hungarian Parliament reportedly passed legislation allowing same-sex couples to register as civil partners and enjoy the same inheritance, taxation and some other financial rights as married conjugal couples. *Hungary Legalizes Same-Sex Civil Partnerships*, *supra* note 11. But the scope of rights extended as described in the media appears to be significantly less than equivalent to marriage.

*Appendix 3***Constitutions Defining Marriage As Union of Man and Woman
in the USA and the World**

May 2, 2007

**137 Nations Have Constitutional Marriage Provisions (82)
and/or Family Provisions****Thirty-two Nations with Constitutional Provisions Explicitly or
Implicitly Defining Marriage As Union of Man and Woman**

Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Cambodia (art. 45), China (art. 49), Columbia (art. 42), Cuba (art. 43), Ecuador (art. 33), Eritrea (art. 22), Ethiopia (art. 34), Honduras (art. 112), Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 31), Moldova (art. 48), Nicaragua (art. 72), Mongolia (art. 16), Namibia (art. 14), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Somalia (art. 2.7), Suriname (art. 35), Tajikistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (art. 51), Venezuela (art. 77), Vietnam (art. 64).¹¹³

**Same-Sex Marriage Banned by State Marriage Amendments
(SMAs) to U.S. State Constitutions in 27 States:**

AK, AL, AR, CO, GA, HI, ID, KY, KS, LA MI, MS, MO, MN, NB, NV, ND, OH, OK, OR, SC, SD, TN, TX, UT, VI, & WI (average voter approval ~ 70%).

-Constitutional Mandate for SSDPs rejected: CO

-SMAs rejected by voters in one state: AZ (49-51)

-*Same-Sex Marriage Explicitly Prohibited by Statutes in 44 US states*
(all except CN, MA, NJ, NM, NY, RI).

**Sodomy is Illegal in at Least 75 Nations and a
Capital Offense in 9 Nations:**

Afghanistan, Iran, Mauritania, Nigeria, Pakistan, Sudan, Saudi Arabia, UAE, Yemen¹¹⁴

113. See, e.g., CONST. OF BULGARIA art. 46 (“(1) *Matrimony is a free union between a man and a woman . . .*”) (emphasis added); CONST. OF UKRAINE art. 51 (“Marriage is based on the free consent of a woman and a man.”) (emphasis added).

114. Sodomy Laws, Laws Around the World, <http://sodomylaws.org/world/world.htm> (last visited Dec. 31, 2007) (listing nine nations where sodomy is punishable by death, and seventy-five nations where it is illegal in some or all cases); Kukura, *supra* note 9, at 17-18; Nat’l Conference of State Legislatures, Same Sex Marriage, Civil Union and Domestic Partnerships, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Feb. 8, 2008).

