SAME-SEX MARRIAGE—AND MARRIAGE

A POSITION PAPER FROM THE CENTER FOR INQUIRY OFFICE OF PUBLIC POLICY

AUTHOR: RUTH MITCHELL, Ph.D.

REVIEWING COMMITTEE: PAUL KURTZ, Ph.D., DEREK ARAUJO, J.D., THOMAS W. FLYNN, RONALD A. LINDSAY, J.D., Ph.D., TONI VAN PELT

DATED: NOVEMBER, 2007

SAME-SEX MARRIAGE—AND MARRIAGE

Hamlet. *Farewell, dear Mother.*
King. *Thy loving father, Hamlet.*
Hamlet. *My mother. Father and mother is man and wife,*
Man and wife is one flesh, and so, my mother (Hamlet IV, 3, 60-1).

Same-sex marriage is slowly gaining a foothold across the world. In five countries—the Netherlands, Belgium, Spain, Canada, and South Africa—lesbian, gay, bisexual, and transgender (LGBT) people can marry, although only in Canada is marriage completely equal for both homosexual and heterosexual couples. (The other nations impose special residency requirements on homosexual couples.) Civil unions, registered partnerships, and domestic partnerships are available with varying rights and responsibilities in nineteen other countries, as well as regions of Australia and of three South American countries.

The United States lags behind. Only one state, Massachusetts, issues marriage licenses to LGBT couples. Civil unions (or domestic partnerships) are available in only seven states and the District of Columbia (two more states will be added at the beginning of 2008). Most states (twenty-six) have constitutional amendments or statutes defining marriage as a union of one man and one woman, thus precluding same-sex marriage. On the federal level, the Defense of Marriage Act (DOMA), signed by President Bill Clinton in 1996, provides the same definition of marriage and also purports to allow any state to deny "full faith and credit" to same-sex marriages of other states.

In the most recent Pew Research Poll, 57 percent of the public oppose allowing gays and lesbians to marry legally and only 32 percent favor same-sex marriage. While 44 percent of those between the ages of 18 and 29 are in favor, the largest group in favor (not separated by age) are those who called themselves "secular" (Pew Research Center, 2007, 62–3).

While the struggle to gain equal matrimonial rights for LGBT people continues its uphill battle, the nature of marriage is changing, as the results of the Pew Research Center's survey make clear. As LGBT people have been moving towards marriage, the institution itself has been undergoing significant transformations. Fewer couples are marrying, and fewer couples remain married for life. Those who do marry often delay marriage until they are in their late 20's or 30's. Some couples, both homosexual and heterosexual, shun marriage for various reasons which will be discussed. The institution's purposes are changing and its boundaries are blurring.

This paper will recommend that the option of marriage, not merely civil unions, should be made legally available for LGBT people. In presenting a case for same-sex marriage, this paper also will present a case for reshaping marriage itself by decoupling the social contract that is the basis of marriage from the layers of religious and cultural significance that our history has placed on the institution. Committed unions should be encouraged and enjoy legal and social protection, but there is no need to encumber these unions with extraneous religious associations and traditional prejudices.

Paradoxically, civil unions for all would remove the historical baggage from marriage, but LGBT people want the complete legitimacy that only marriage now offers. As we shall see in this paper, LGBT people want equality. If all couples are joined in civil unions only, then LGBT people will accept them; if marriage is available to heterosexuals, then LGBT people want marriage. Anything less brands them as second-class citizens.

In short, the position of the Center for Inquiry is that if the state recognizes and regulates intimate relationships through the institution of marriage, then marriage should be available for all couples, whatever their sexual orientation. In the alternative, however, the state should recognize and regulate all such relationships via the mechanism of civil unions. Private institutions, such as churches, can then label relationships they deem consistent with their religious doctrine as "marriages" or whatever other label they deem appropriate.

The case for same-sex marriage is based primarily on the following considerations: 1) LGBT people are entitled to the same civil rights and liberties and economic benefits as heterosexuals, that is, they are entitled to full civil and social

equality; 2) in particular, just as heterosexuals can marry someone of their choosing, so too LGBT people should be allowed to marry someone of their choosing, as this is a fundamental right; 3) moreover, marriage provides certain benefits to intimate couples that are not otherwise available; 4) absent some compelling secular justification for denying LGBT people the option of marriage, the State should allow same-sex couples to marry; 5) the State's legitimate interests in regulating intimate relationships are limited primarily to promoting stable relationships, providing for an orderly process for the dissolution of such relationships when necessary, including the equitable division of property and assets, ensuring the orderly transfer of property and assets between generations, and protecting the children who may be nurtured and raised by the couple in the relationship; 6) the available empirical evidence indicates that same-sex couples have relationships that are as capable of stability as relationships between heterosexual couples and same-sex couples are also equally capable of being fit parents. All these considerations compel the conclusion that same-sex marriage should be legally available.

The paper will examine progress towards and opposition to same-sex marriage in the social and political contexts in which they have developed. Arguments against same-sex marriage will be examined and refuted. The current state of marriage in general also will be discussed, making clear that factors operating before same-sex marriage arrived and in parallel with it are altering our attitudes towards marriage and child-rearing. "Parallel" is the operative word here: there is no causal link between the movement towards same-sex marriage and the changes in heterosexual marriage and families, despite the strident claims of Stanley Kurtz (Stanley Kurtz 2004a, 2004b, 2004c). Certain underlying social, cultural, and economic trends may have a role both in changing marriage and in supporting the movement for same-sex marriage, but the institution of marriage would have undergone these changes regardless of any push for the acceptance of same-sex marriage.

This paper will contend that acceptance of same-sex marriage will require changes in public attitudes. For biological, historical, and religious reasons, marriage has been associated with heterosexual couples throughout most of human history. As indicated, one reason for having the institution of marriage is to protect children, as human experience has proven that, in general, children are better off being raised by

loving parents instead of being abandoned or raised by the State itself. Only heterosexual couples produce children through "standard" reproduction (genital-to-genital intercourse), and before the introduction of reliable birth control intimate heterosexual relations often produced children. There is no denying these facts. Because of the long association between marriage and children, even some who are not religious instinctively react against the notion of same-sex marriage. However, in an age where procreation is not considered the primary objective of marriage, and where children can be and are being raised by same-sex couples, this reaction lacks any rational foundation.

These changes in public attitudes may also require changes in the language we use, or at least a refusal to allow the terms of the debate to be framed by the opponents to same-sex marriage. The opposition to same-sex marriage is adept at exploiting phrases such as "traditional marriage" and "family values" in ways curiously similar to the creative use of language in the attempt to foist creationism on the public schools. For example, the Discovery Institute (a name chosen for its apparently benign connotations) uses "critical thinking" to seduce Americans into admitting the Trojan horse of intelligent design into school curricula. It is important to understand how the Religious Right manipulates public discourse, and those who favor same-sex marriage need to resist this manipulation of language to ensure that LGBT people gain complete equality.

Finally, at the end of this paper, we will consider the prospects of legalizing same-sex marriage. Favorable action on same-sex marriage at the federal level seems unlikely. Even action *against* same-sex marriage seems forestalled on the federal level by the failure in Congress of the Federal Marriage Amendment (FMA) in 2006 and the Supreme Court's present tendency to jealously protect states' rights (Araujo 2006). Regulation of marriage is usually a state matter (with the exception of the response to Mormon polygamy, as Araujo points out). Accordingly, the best chance to extend marriage to LGBT couples lies in the states.

Chronology of Same-Sex Marriage

The following is not a history of LGBT emancipation, although it may at times seem close to it. The movement towards same-sex marriage grew out of gay liberation, surprisingly near in time to its watershed event in the U.S., the Stonewall riots in 1969.

Even then, equal marriage seemed the hallmark of complete liberty, the end of second-class citizenship.

A comprehensive history of gay liberation would track the changes in attitude from ancient cultures forward, some of which were more tolerant of homosexual conduct than the Western world under Christianity. Such a history is outside the scope of this paper. Suffice it to say that after Christianity became the dominant religion in the West, homosexuality went underground, prohibited by then-prevailing interpretations of the Bible. Despite the fact that these prohibitions have been shown scientifically to be artifacts of social and political context, they are still cited by such "defenders of marriage" as James Dobson. Religious opposition became encoded in law for most of two thousand years, so that homosexuals were persecuted mercilessly not only by religious authorities but also by governments. George Chauncey reminds us that we have forgotten anti-gay discrimination too easily: "Even well-educated Americans are often startled to learn that the government dismissed more homosexuals than communists at the height of the McCarthy era. It's likely you were startled to learn that there was a legal ban on plays with lesbian or gay characters" (Chauncey 2004, p. 12).

We have probably forgotten the extent of discrimination because we live on the other side of the 1960's. African-Americans led the way in the fight for civil rights, and were soon followed by women struggling for equality. LGBT people joined in as the decade progressed. They adopted the slogan "Gay is Good," modeled on "Black is Beautiful," along with many of the same political strategies such as marches and demonstrations (Chauncey 2004, p. 29).

The watershed came in 1969, with the Stonewall riots in New York, an event that galvanized the gay rights movement. The movement towards same-sex marriage was not an afterthought, something that developed along the way: instead it began almost simultaneously. Extending marriage to LGBT couples seemed only a logical development of civil rights. When the U.S. Supreme Court in *Loving v. Virginia* (1967) swept away objections to interracial marriage, it declared that "Marriage is one of the 'basic civil rights of man'…the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state." After the Massachusetts Supreme Judicial Court ruled in 2003 in *Goodridge v. Department of*

Public Health, 798 N.E.2d 941, that LGBT couples in Massachusetts could obtain marriage licenses, the court chose a significant date for its ruling to become effective—17 May, 2004, the 50th anniversary of *Brown v. Board of Education* (Chauncey 2004, p. 135). Just as *Brown* made clear that separate is not equal in education, *Goodridge* did the same for marriage, at least in one state.

In May 1970, two men, Michael McConnell and Jack Baker, both gay activists and long-time partners, applied for a marriage license in Minneapolis. The petition astonished the clerk who received the application. Three months later, two women applied for a marriage license in Jefferson County, Kentucky. Meanwhile, clergy sympathetic to LGBT people's desire for religious sanction for their unions performed marriage ceremonies, even though they had no legal effect. Eskridge and Spedale summarize: "By 1971, therefore, the framework for a gay-liberal case for same-sex marriage was in place" (Eskridge and Spedale 2006, p. 16).

Although progress was uneven, the movement for LGBT rights seemed to advance through the early 1970's. In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders, to be followed shortly by the American Psychological Association and the American Medical Association. In 1975, the U.S. Civil Service Commission removed its ban on the employment of gays and lesbians. Cities such as San Francisco, Minneapolis, Seattle, and Detroit—and some smaller municipalities like Ann Arbor, MI, and Austin, TX—passed gay rights ordinances, outlawing employment discrimination against homosexuals.

Successful minority movements usually beget a backlash, and in this case the political backlash took the form of callous and baseless fear mongering. In 1977, Anita Bryant led the opposition to a gay rights ordinance in Miami FL. She used the unfounded but potent charge that homosexuals were child molesters, and called her campaign "Save Our Children." Fear swept the country and gay rights ordinances fell left and right, although not in Seattle or California. A statewide initiative of such viciousness that even Ronald Reagan spoke out against it failed to pass. The defeat of this initiative seemed to suggest that anti-gay bigotry had peaked until, three weeks later, Harvey Milk, the first openly homosexual San Francisco county supervisor, was assassinated in his office.

Then in the 1980's Acquired Immune Deficiency Syndrome (AIDS) devastated the male homosexual community, causing a number of premature deaths. To add insult, in 1986, the U.S. Supreme Court upheld the nation's sodomy laws in *Bowers v. Hardwick*, using the word "facetious" to describe the idea that homosexuals had any right to engage in private sexual conduct. Chauncey writes with irony: "The APA had stopped calling homosexuals mentally ill in 1973; but in 1986, the Supreme Court effectively announced that they could still be called criminals" (Chauncey 2004, p.43). By 1987, more than three-quarters of the respondents to a national poll thought that homosexual relations were always wrong.

But attitudes were changing in other countries, especially in Denmark. In the United States, the battle for same-sex marriage has been waged mainly in the courts, but in Scandinavia legislatures have taken the initiative. Temporary committees are set up by the national legislature to research, discuss, and recommend action on social issues. Through discussions in such committees and in collaboration with the Danish Society of 1948, one of the oldest LGBT associations still in existence, Denmark developed the concept of "registered partnerships" during the 1980's, after it became obvious that fully-fledged marriage was not an option. The Danish Parliament passed a bill authorizing partnerships in May 1989, and in October, the first same-sex couples in Denmark were registered as partners in a public ceremony. At first, registered partners were not allowed to adopt children or share custody over children that a partner brought into the union and could not use artificial insemination services provided by the state. As Danish society began to accept registered partnerships as normal, these restrictions were seen to be unnecessary and in 1999, they were lifted by the Danish Parliament.

Thus Denmark led the way, to be followed by Norway in 1993 and Sweden in 1995. The first country to allow same-sex marriage, as opposed to registered partnerships or civil unions, was the Netherlands in 2001. Now LGBT couples can be married in Belgium, which passed a law permitting marriage in 2003; in Spain and Canada since 2005; in South Africa, since 2006; and in Massachusetts since 2004.

It must be made clear, however, that only in Canada is the legal status of couples exactly the same for all, whether hetero- or homosexual. All other nations that permit same-sex marriage have residency requirements that do not apply to heterosexual

marriage. In Massachusetts, married homosexuals cannot file their federal income tax jointly because of DOMA.

Civil unions or registered partnerships are also available nationwide in nineteen countries and in regions of three other countries. In the United States, these unions are recognized in seven states and the District of Columbia, and will be recognized in two other states beginning in 2008.

Despite the ravages of AIDS and the public opposition to homosexuality, the movement towards same-sex marriage was quietly gaining strength in the American LGBT community during the late 80's and early 90's. The AIDS crisis actually helped the movement in two ways: on the one hand, it was argued that marriage would reduce promiscuity among male homosexuals; on the other hand, stories were emerging of devoted same-sex couples suffering tragically when one became ill and the other had no legal right to hospital visits, medical decisions, or to property after a partner's death (Chauncey 2004, 87-122).

In the U.S., a pattern developed: movement towards marriage in the courts was countered by legislative action, nowhere more dramatically than in Hawaii. It almost became the first state to recognize same-sex marriage when in 1993 the state supreme court ruled in *Baehr v. Lewin* that banning marriage seemed to violate the state's Equal Rights Amendment. The supreme court remanded the case to a lower court to determine whether the state had a "compelling interest" in denying marriage to LGBT people. Unfortunately, the lower court waited too long to take up the case, so that it began deliberations on the same day that the U.S. Senate passed DOMA in 1996. The tide of support turned, so that although the lower court in Hawaii found for the LGBT couples and returned the case to the state supreme court, by the time it ruled three years later, a state constitutional amendment prohibiting same-sex marriage had passed in the Hawaii legislature. The same pattern—a court interpretation of the state constitution overruled by a constitutional amendment—played out in Alaska in 1998. Hawaii now allows same-sex couples some rights as partners, as do New Jersey and Maine, but nowhere near the complete rights of marriage.

Vermont was the next state where LGBT activists and lawyers thought they had a chance of success. The Gay and Lesbian Advocates and Defenders (GLAD) brought the

case of three same-sex couples who wanted to marry before the Vermont Supreme Court in *Baker v. State* (1997). The court ruled that denying the benefits of marriage to LGBT couples was unconstitutional and directed the Vermont legislature to remedy the situation. Those benefits were established as "civil unions" and were signed into law by Governor Howard Dean in 2000. In California, the state legislature enacted registered domestic partnerships, with almost all the rights and benefits of marriage for partners in established relationships. However, marriage itself was still denied to these couples. Governor Arnold Schwarzenegger vetoed a bill to recognize same-sex marriage in 2005 (Eskridge and Spedale 2006, 237-9).

Emboldened by the relative success of *Baker v. State*, in 2001 GLAD and its allies brought suit in Boston on behalf of seven couples in *Goodridge v. Department of Public Health*. As the case was being argued, in 2003, the U.S. Supreme Court's ruling in *Lawrence v. Texas* swept away sodomy laws, insofar as they criminalized private conduct between adults. Although the reaction to the decision in *Lawrence* was such that the Federal Marriage Amendment (FMA) was proposed in Congress, a major obstacle to equality for LGBT people was gone. Marriage as a civil right seemed possible.

The case for same-sex marriage is based, ultimately, on the legitimacy of the claim to equal rights by LGBT people. As Mary Bonauto, the lead attorney for GLAD, writes, "the de jure exclusion of same-sex couples from marriage is a massive affront to the dignity of all LGBT Americans." In its 2003 decision, the Massachusetts Supreme Judicial Court agreed: "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, fidelity, and family" (Bonauto 2005, p. 4). The court found "no rational basis" in the Massachusetts government's policy of denying marriage licenses to same-sex couples. The court directed the state to begin issuing marriage licenses to LGBT couples 180 days after it handed down its decision. In Cambridge, the first licenses were issued at 12:01 am on May 17, 2004, to two women who had stood in line for twenty-four hours to claim first place. Behind them were 250 other couples.

But the same pattern that overturned the apparent successes in Hawaii and Alaska still threatened: the Massachusetts state legislature could enact a state constitutional amendment banning same-sex marriage. Although an amendment was voted down in

2005, a citizen initiative was started to place a constitutional amendment on the ballot. This initiative had to receive 50 votes in two successive sessions of the legislature in order to be on the statewide ballot in 2008. On June 14, 2007, the proposed ballot initiative received only 45 votes (17 fewer than during the previous session in January) and same-sex marriage is now secure in Massachusetts until at least 2012. Governor Deval Patrick said: "Today's vote is not just a vote for marriage equality. It was a vote for equality itself" (Boston Globe 2007, p.1).

Litigation over same-sex marriage continues. New York and Maryland have recently upheld bans on same-sex marriage. Although a lower court in Iowa has struck down that state's ban on same-sex marriage, that decision is on appeal. In California, the issue will soon be resolved by the state supreme court. At present Massachusetts remains unique among the states in permitting same-sex marriage, although (as mentioned above) it is not equal in every last detail to heterosexual marriage because DOMA blocks federal recognition of same-sex marriage, even if some states permit it. At this point, then, the U.S. lags behind many other countries in providing the benefits of marriage, with or without the name, to same-sex couples.

In 2004 (a banner year for the movement for same-sex marriage), the American Anthropological Association (AAA) issued a statement strongly opposing a constitutional amendment limiting marriage to heterosexual couples. The AAA depended on its professional expertise when it wrote:

> The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution (AAA 2004).

Three-fifths of a marriage: why not civil unions?

Civil unions in lieu of marriage have been accepted by some legislators and activists. When same-sex marriage seems politically unattainable, some state legislatures and governors—like Vermont Governor Dean in 2000—settle for civil unions or domestic partnerships. Some legislators, such as those in New Hampshire, believe that

civil unions provide partners with the same " 'rights, responsibilities and obligations' as heterosexual marriage, differing in name only" (Moskowitz 2007). Some LGBT activists believe that settling for civil unions or domestic partnerships is a realpolitik strategy, with civil unions serving as a step towards same-sex marriage.

However, civil unions or domestic partnerships are not equivalent to marriage. Accordingly, CFI maintains that LGBT persons are entitled to the option of marriage. To clarify CFI's position, this paper will discuss the distinctions between such legal partnerships and marriage in three sections: the economic and social differences between the two; the second-class citizenship implied in civil unions or domestic partnerships; and the anomalous disparity between adoption laws and marriage laws in many states.

1. Economic and social problems with civil unions and domestic partnerships

Three states in the U.S. offer civil unions: Vermont, which was the first to do so, Connecticut, and New Jersey; New Hampshire will offer them beginning in January 2008. Four others—California, Maine, Washington, and the District of Columbia—provide domestic partnerships, with Oregon providing them in January 2008. Hawaii has a law providing "reciprocal benefits" in lieu of unions or partnerships.

In establishing civil unions or domestic partnerships, legislatures have attempted to reproduce the economic and social benefits of marriage. For example, in Vermont, they have enacted laws enabling mutual financial support between partners; laws on domestic relations, child custody and support; and laws providing spousal benefits (Vermont Secretary of State 2006). The other states have substantially the same provisions. But they cannot ensure recognition for civil unions in other states and they cannot ensure federal benefits. Only marriage can do that:

> Marriage can affect a person's eligibility for federal benefits such as Social Security. Married couples may incur higher or lower federal tax liabilities than they would as single individuals In all, the General Accounting Office has counted 1,138 statutory provisions—ranging from the obvious cases just mentioned to the obscure (landowners' eligibility to negotiate a surface-mine lease with the Secretary of Labor)—in which marital status is a factor in

determining or receiving "benefits, rights, and privileges" (Congressional Budget Office 2004, p.1).

The statutory provisions counted by the Congressional Budget Office here are only on the federal level. Because each state has its own provisions, and in many cases they vary from each other, the total number of provisions affecting marriages in the U.S. is much larger. Married people can rent or buy houses and other property without trouble. They share in health, pension, and insurance benefits, and claim support in divorce settlements. They can claim immigration rights for a spouse of a different nationality. They may not wish to negotiate a surface-mine lease, but the ordinary economic processes of life present no problem.

This is not true of civil unions, despite the attempt to duplicate laws governing marriage. Domestic partnerships and civil unions offer some of the same benefits, but not all of them and not automatically. Large corporations and state government bodies have begun to extend health insurance and related benefits to the same-sex partners of their employees, as well as to their unmarried partners. More than 7,000 employers, including almost half of the nation's Fortune 500 companies, Coca-Cola and the big three automakers, ten state governments and more than 125 municipalities and counties did so by 2004 (Chauncey 2004, p. 117). But civil unions do not guarantee federal social security or pension benefits. Moreover, in civil unions, the employer's contribution to health insurance is subject to taxes on the employee's wages, but married couples are not subject to this tax. In effect, while a number of states, municipalities, counties, and corporations voluntarily provide benefits on a limited basis to domestic partnerships and civil unions, federal law creates obstacles to same-sex couples obtaining such benefits or the full value of such benefits. Finally, the largest employer of all—the U.S. federal government—does not extend benefits to same-sex couples.

In Vermont, the gold standard for civil unions, participants have found in the seven years since they were established that there are "countless ways in which same-sex unions differ from heterosexual marriage" (Liebowitz 2007). Because Vermont is a small state, seeking medical treatment may mean crossing the border into another state, where civil unions are not recognized, and consequently it is necessary to carry legal papers to ensure the partners' ability to make legal decisions.

In New Jersey, where civil unions were made legal in February 2007, the shortcomings of civil unions have recently been made vividly clear by Garden State Equality, a civil rights group mobilizing for same-sex marriage. Couples who obtained civil unions are finding that employers do not always honor requests for spousal benefits. One in eight of New Jersey LGBT couples has been denied some or all benefits they expected (Washington Post 2007; www.eqfed.org/campaign/UPS). At hearings of a Civil Union Review Commission set up by New Jersey legislature to report by the end of 2007, a witness said: "We know in a civil union regime, the burden of inertia favors discrimination….An employer that wants to keep on discriminating simply needs to do nothing" (Kelley 2007).

It may be possible for an unmarried couple to make legal arrangements providing limited security in, and benefits from, their relationship, such as hospital visitation rights, legal guardianship in the case of catastrophic illness, adoption of children, and assignment of pension and survivor benefits, but creating such arrangements would require the expenditure of several thousand dollars in legal fees and other costs and months of time. Marriage provides all these protections as standard issue at a cost of under $100 (Belge 2007).

2. Marriage light: civil unions as inadequate substitute for marriage

For LGBT people, the right to marry is primarily a civil rights issue. LGBT individuals desire intimate, committed relationships no less than heterosexuals. Such relationships are a critical component of a person's life. Heterosexuals have the right to marry and share their life with another person who has the same sexual orientation. Why should LGBT individuals be denied this fundamental right? Moreover, freedom to marry whom they choose means recognition that they are not second-class citizens, just as the same freedom meant that African-Americans were legally equal to everyone else. In the *Goodridge* decision, the Massachusetts Supreme Judicial Court made precisely this point: "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens" (Chauncey, p. 134).

Marriage carries with it a series of rights and responsibilities inherent in the name of an institution that has been bolstered by law over many centuries. Married couples do

not have to fight authorities for visitation rights in hospitals, for power of attorney over medical decisions, or for inheritance rights. They can petition to adopt children without question about their status. And they can make divorce settlements. It is impossible to divorce without being married, and divorce laws contemplate an equitable division of property following dissolution of the marriage. Therefore, married couples benefit from the special status accorded marriage even when the marriage is breaking up.

Given our present legal and social system, which provides a preferred status to married couples in many respects, LGBT people rationally insist on "marriage" and distinguish it from civil unions. No matter how liberating civil unions and registered partnerships may be, there is no substitute for marriage: "Saying a civil union is the same as marriage does not make it so. Civil unions are a newly invented category, neither universally recognized or understood…Why relegate a minority group to a separate category?" (New York Times 2007, editorial).

3. The anomaly of adoption laws

Although marriage is forbidden to same-sex couples in all but one state, by a strange anomaly, adoption—that is, the formation of a family with children—is open to LGBT couples and even to LGBT individuals in a majority of states. Children may be adopted by LGBT individuals or same-sex couples in 34 states; only Florida is logically consistent in its animosity to LGBT persons, forbidding both same-sex marriage and expressly forbidding either LGBT individuals or couples to adopt a child. (Wald believes that Anita Bryant's crusade, mentioned above, is responsible for Florida's blanket prohibition of LGBT adoption. [Wald 2006, p. 412]). In five states LGBT couples may not petition to adopt, and in ten the law is unclear (Human Rights Campaign, 2007).

Clearly policies allowing LGBT individuals or couples to adopt are based on the belief that any family committed to a child by adoption is better than none. This point is made even clearer in the case of foster parenting: the need for foster placements is so great that no state formally excludes gay foster parents (Wald 2006). In other words, where the need is overwhelming (more than100,000 children need foster care placements each year in the U.S.), objections to same-sex relationships become less important.

In the 33 states where couples may petition to adopt but may not marry, the state is in effect declaring that LGBT people can form a family just like heterosexual couples, but cannot enjoy the same right to marry as heterosexual couples. This disparity is irrational. Although the children adopted by LGBT persons may have all the advantages of a loving home where the parents can support them economically and nurture them appropriately, they cannot provide them with the social advantage of married parents.

There is no evidence from social science research that children adopted by same-sex couples suffer any harm in their development, and a great deal of evidence that they do not differ significantly from children reared in heterosexual marriages (Wald 2006; Brief of Amici Curiae American Psychological Ass'n et al. in *Hernandez v. Robles*, [New York 2006], p.3 [hereafter APA Brief]). The major difference for parenting outcomes is between single parents and couples, because couples of whatever orientation usually have higher incomes and between them they have more available time for children than single parents (Wald 2006, p. 403).

If LGBT people in most states are regarded as "good enough" to raise children as adoptive or foster parents, why aren't they "good enough" for marriage? Emotion, not reason, dictates this disparity. As Wald points out, "Policymakers are more likely to look at public attitudes than social science" (p.434), no matter how illogical. Public attitudes are too often based on the gut feelings and unexamined assumptions about homosexuality that we discuss in the following section.

The opposition to same-sex marriage in the United States

At their root the arguments against same-sex marriage are primarily arguments against homosexuality. They stem largely from what Eskridge and Spedale call "the politics of disgust," a revulsion by many against what they consider unnatural, dirty practices, which might pollute them and are therefore immoral (Eskridge and Spedale 2006, 220-3). In religious traditions that accept the Old Testament, homosexuality is an abomination because of injunctions against it in Genesis, Leviticus, and Deuteronomy. Christians add the condemnations of St. Paul.

Somewhere in these prohibitions arose the idea that homosexuality is a choice, an idea that persisted until the last century, although it is still widespread in the writings of

those who oppose the emancipation of homosexuals. A person can choose or not to sin, and therefore can choose or not to behave immorally. This deep-seated belief leads to talk of a "homosexual agenda" to recruit young people to what is called "the homosexual lifestyle." Medical, psychological and psychiatric experts now believe from scientific evidence that homosexuality is not a choice but a normal variant of human development that has biological, hormonal, and environmental origins. The American Psychological Association and the American Psychiatric Association endorse this view in their *amici curiae* brief supporting same-sex marriage that was submitted in the 2006 New York appeal (unfortunately unsuccessful): "Scientific research has firmly established that homosexuality is not a disorder or disease, but rather a normal variant of human sexual orientation" (APA Brief, p. 3). In its policy regarding sexual orientation, the American Medical Association specifically "opposes the use of 'reparative' or 'conversion' therapy that is based upon the a priori assumption that the patient should change his/her homosexual orientation" (AMA policy regarding sexual orientation, 2007).

Unfortunately, these statements do not convince those who have absorbed the rhetoric of disgust or are influenced by religious doctrine. For many people, especially those convinced by Anita Bryant in the 1970s, homosexuals are not only sinners but also criminals because they allegedly molest children. This accusation clings to hated minorities (think of the horrifying tales about Jews and gypsies abducting and sacrificing Christian children) and seems impervious to evidence refuting it. "Put bluntly," write Eskridge and Spedale, "the politics of same-sex marriage involves moral judgments not easily influenced by the facts of social harm" (Eskridge and Spedale 2006, p. 221).

Against this background of revulsion against homosexuality we should place some rigid ideas about marriage, which also bear the imprint of religious tradition. In many Christian and Jewish traditions, marriage is intended to make one flesh of man and wife in the service of procreation and protection of children. In such a marriage, a man and a woman have "proper roles as designated by God," according to Jerry Falwell. Milton declared that Eve should be subordinate to Adam in words that epitomize the religious hierarchy of marriage: "He for God only, she for God in him" (Paradise Lost, IV, 297). Petitions against same-sex marriage on these theological grounds skirt the

Establishment Clause of the U.S. Constitution, because they are basing their view of marriage on a religious conception (Eskridge and Spedale 2006, p. 25).

As many evangelical Christians saw it, women's liberation threatened this natural state of affairs and pushed the nation towards immorality. Concerned with what they perceived as disturbing social trends, Christian fundamentalists founded the Moral Majority in the 1970's, followed by other organizations such as Focus on the Family, and the Traditional Values Coalition. All these organizations played on fears of social disorder if the "natural" form of marriage—a heterosexual relationship with a woman subordinate to a man—were overthrown.

But fundamentalist congregations and their affiliated organizations do not represent the full spectrum of religious institutions, let alone Christian churches, in their attitudes to LGBT marriage. The Roman Catholic Church opposes same-sex marriage, as do Orthodox Jews, but churches such as the Episcopal Church, USA; Christian Church; Presbyterian Church; United Methodist Church; United Church of Christ; and the Unitarian-Universalist Association, to name a few, either marry LGBT people as part of their mission, or include pastors who bless unions. The Metropolitan Community Church, prominent among the supportive churches, has sanctified 85,000 LGBT marriages over 36 years across the country (Chauncey 2004, p. 92). Justin Wilson provides a useful table categorizing religious views on marriage, and shows that a majority of religious institutions are either supportive of LGBT marriage or tolerant to the point of incorporating congregations that bless same-sex couples (Wilson 2006, p. 581). This of course does not mean that a majority of religious *people* either support or tolerate same-sex marriage, because the major denominations in the "Traditional Marriage" column include the largest congregations.

Although opposition to same-sex marriage is primarily emotional and/or reflective of religious doctrine rather than rational, some allegedly secular arguments have been offered against same-sex marriage. Let us now examine them.

1. The connection between marriage and procreation

As previously indicated, before the availability of reliable birth control, heterosexual relationships often produced children; same-sex relationships did not. Given

the State's interest in protecting children, before the modern era one might have been able to use these facts as a basis for distinguishing between official recognition of intimate heterosexual relationships and intimate same-sex relationships. But we live in a different era, and there is no longer a strong connection between children and heterosexual relationships. Many heterosexual couples have no desire for and do not have children, and, given increased longevity, it is no longer unusual for couples past the age of childbearing to become married. On the other hand, in many states homosexual couples can arrange to have children, through adoption or assisted reproduction techniques, and many are raising children from former heterosexual marriages. Importantly, in the extensive research literature, there is no evidence of harm to children raised by same-sex couples. Briefs and evidence submitted during the *Goodridge* trial in Massachusetts supported an earlier review of research studies conducted by the American Psychological Association in 1995 (APA Lesbian and Gay Parenting). As mentioned earlier, no study has found children of same-sex marriage to be disadvantaged in comparison with the children of heterosexual parents, except for one thing—their parents cannot be married (Chauncey 2004, p.133).

Of course, for those religious groups who believe marriage is intended exclusively or primarily for procreation, this response will not be satisfactory. But in a secular state, our laws cannot be based on religious precepts. How these groups struggle to reconcile their view of marriage as a vehicle for procreation with allowing infertile or elderly heterosexuals to marry is a whole other issue which need not detain us.

2. Same-sex relationships as unstable

Besides the alleged connection between marriage and procreation, there is the claim that homosexuals are not stable enough as adults to care for children. There is no evidence to support the claim that same-sex couples do not make fit parents and much evidence to refute it. As summarized in a recent friend-of-the-court brief filed by the American Psychological Association, "the scientific research that has directly compared outcomes for children with gay and lesbian parents with outcomes for children with heterosexual parents has been remarkably consistent in showing that lesbian and gay parents are every bit as fit and capable as heterosexual parents, and their children are as

psychologically healthy and well-adjusted as children raised by heterosexual parents" (APA Brief, p. 35).

Some of the opposition to same-sex parenting stems from the mistaken association of hedonism with homosexuality: homosexuals are supposed to be promiscuous and unstable, so they cannot provide an altruistic space where they yield their own interests to the children's welfare. At times, there seems to be a touch of perverse envy in this argument: homosexuals appear to be enjoying themselves heedlessly, while responsible members of society sacrifice their pleasures and put their children first. No matter. There is scant evidence to support the claim that same-sex relationships are significantly more unstable than heterosexual relationships. To the contrary, studies confirm that a substantial number of same-sex couples are in long-term committed relationships (APA Brief, p. 15).

Moreover, the argument based on "stability" is self-defeating. Supporters of marriage regard it as an institution that imposes stability on its partners. It would presumably act on homosexuals as it does on heterosexuals, encouraging them to settle down as families. But ironically the same people who defend marriage for these qualities refuse its benefits to homosexuals, thus pushing them towards the hedonism, promiscuity, and instability they accuse them of promulgating. The defenders of "traditional" marriage cannot be aware of this paradox, because their arguments for keeping marriage exclusively heterosexual based on social welfare concerns collapse in the face of it.

3. The slippery slope to polygamy, incest, and bestiality (PIB)

An argument that surfaced before *Loving* opened marriage to all races raises its head again in opposition to same-sex marriage: the slippery slope argument. If we let LGBT people marry, where will it stop? Will society permit underage marriages, polyamorous groups, incestuous unions, even marriages with animals? This argument urges us to take a stand at the top of the slope, in the belief that preventing same-sex marriage is necessary to prevent the other "horribles" listed by opponents of same-sex marriage. This parade of horribles is so frequently invoked by opponents of same-sex marriage that it has been abbreviated in the literature to the "PIB argument"—for polygamy, incest, and bestiality (Corvino 2005). However, as Araujo writes, "no one has

ever demonstrated that legalizing gay marriage logically entails the recognition of a marriage among two men, three women, their siblings, a horse, and a brace of pelicans" (Araujo 2006, p. 209, fn.19).

In the contemporary West, marriage is between consenting human adults, so the bestiality analogy is wholly inappropriate, to put it mildly. Polygamy is also readily disposed of. First, what LGBT people want is simply the same right as heterosexual couples, that is, the right to marry *a* person they love that shares their sexual orientation. Moreover, contrary to the false premise of the PIB argument, which is that proponents of same-sex marriage seek completely unrestricted license for everyone to enter into State-sanctioned relationships of whatever shape or form, same-sex couples are willing to accept the restrictions that the West has imposed on marriages for valid reasons, such as the prohibition of marriages with minors or with more than one person. Polygamy threatens exploitation of women. Moreover, it would require a wholesale revision of our institutions. For example, in a polygamous relationship, if one spouse obtains a divorce, is the entire "marriage" dissolved? How is property to be divided and how are issues of custody resolved?

The issue of incest is also a red herring. Parent-child incest or other intergenerational incest (for example, aunt-nephew) of course presents problems of coercion and exploitation, even if the child is an adult. In theory, sibling incest between adults may seem to pose less of a concern, but there is really no meaningful data to support that conclusion. This leads to the next point. There is no large segment of the population clamoring for the right to enter into an incestuous marriage. Trying to argue against giving LGBT people the right to marry based on a hypothetical about marriage between siblings is about as meaningful as arguing against same-sex marriage on the ground that this would require us to recognize marriage between Martians and Earthlings if and when we encounter visitors from our planetary neighbor.

Finally, as Corvino demonstrates, all the arguments against LGBT marriage as gateways to polygamy, incest, and bestiality are also arguments for heterosexual marriage as standing on the brink of the slippery slope. If same-sex marriage could lead to PIB, so could heterosexual marriage (Corvino 2005, p. 526). There is no closer logical or causal connection between PIB and same-sex marriage than there is between PIB and

heterosexual marriage. If we allow heterosexual persons to enter into State-approved intimate arrangements based on their love and affection, why cannot the polygamist and the person desiring a legal bond with a sibling stake his or her claim on the practice of heterosexual marriage? At the end of the day, the PIB argument is just another scaremongering tactic that utilizes and reinforces the revulsion some feel towards homosexuality by not so subtly comparing same-sex marriage to other arrangements rejected by the vast majority of society.

4. Undermining marriage itself

Finally, there is the argument that recognizing same-sex marriage will somehow harm the institution of marriage. There is both a short answer and a more extended answer to this contention. The longer answer will be discussed in subsequent sections of this paper. Marriage is undergoing changes, but, as we will show, these changes are independent of any movement to recognize same-sex marriage. Moreover, to some extent these changes are welcome. As already indicated, defenders of "traditional" marriage often combine their opposition to same-sex marriage with advocacy of a return to the situation in which married women have a defined role and are subordinate to their husbands. Along with most of contemporary Western society, the Center for Inquiry unqualifiedly rejects such a conception of marriage.

But what of the claim that same-sex marriage somehow taints or devalues heterosexual marriage? It simply does not do so on a personal level. What possible difference does it make to my marriage if my neighbors are married lesbians? One would think that the eagerness of LGBT people to marry actually validates the choice made by married heterosexuals that marriage can be a beneficial relationship. Again, those who have religious views of marriage may take offense that people will be getting married who could not get married in their church, synagogue, or mosque, but that is happening already with divorced Catholics and numerous other examples. And, of course, we do not let religious institutions dictate secular policy.

Let us turn now to the social level and the argument that same-sex marriage seems to devalue marriage as the foundation of the family. As states were drawing up their constitutional amendments and statutes prohibiting same-sex marriage in the late 1990's

after DOMA became federal law, the defense of marriage arguments were voiced loudly, in terms such as this, cited in a spirit of irony by Eskridge and Spedale: "Traditional marriage is the main cultural bulwark against the culture of narcissism that homosexuals (among others) represent. Yet it is in peril. If the courts hand over marriage to the homosexuals, the forces of narcissism will have won" (Eskridge and Spedale 2006, p30).

The end of marriage in Scandinavia?

A favorite position taken by writers such as Judge Robert Bork, former senator Rick Santorum, and Stanley Kurtz is that same-sex marriage is ending heterosexual marriage in Scandinavia and will do the same here if we let it. Stanley Kurtz charges:

> Will same-sex marriage undermine the institution of marriage? It already has. More precisely, it has further undermined the institution. The separation of marriage from parenthood was increasing; gay marriage has widened the separation…Scandinavian gay marriage has driven home the message that marriage itself is outdated and that virtually any form, including out-of-wedlock parenthood, is acceptable (Stanley Kurtz 2004, p.1)

But the statistics about marriage, divorce, and parenthood in the Scandinavian countries do not support these charges, as we shall see; and delinking marriage and parenthood is not necessarily harmful where parenthood is socially supported.

Darren Spedale spent 1996 and 1997 in Denmark researching the effects of the Scandinavian registered partnership laws and has continued to gather data since then. The book he wrote with William Eskridge of Yale Law School is a comprehensive account of same-sex unions in Scandinavia and their relevance to the situation in the U.S. (Eskridge and Spedale 2006). The book includes exhaustive appendices listing demographic data for Denmark, Norway, and Sweden.

It is immediately striking how small the number of partnerships is compared to the size of the imputed threat. In Denmark in 2004, just over 5,500 people were living in registered partnerships, out of a population of over five million, or 0.1 percent. In Norway there were 1,275 registered partners, or about 2,500 people, out of a population of about four and half million, or about 0.05 percent. (Sweden records only the

partnerships registered in a year, not the total of existing partnerships). In each country more male than female homosexuals formed partnerships, significantly different from the U.S. (Chauncey 2004, p. 140).

If these partnerships were exercising a malign influence on heterosexual marriage, one would expect a plunge in marriage rates since 1989 when registered partnerships became available in Denmark, and perhaps a rise in divorce rates. But that is not the pattern observed from the statistical tables in Eskridge and Spedale: the population in Denmark has remained reasonably stable at just over five million, while the marriage rate at just below 700 per 100,000 has also remained stable and actually increased after 1989 when registered partnerships became available. The greatest dip in the rate occurred between 1978 and 1985, before registered partnerships. The same pattern is observable with slight variations in Norway and Sweden. There has also been a reduction in the rate of HIV infections among male homosexuals in Scandinavia since partnerships began in each country (Eskridge and Spedale 2006, p. 164).

Have same-sex unions increased the number of nonmarital births, arguably another measure of the possible decay of marriage? We would expect the number to spike after 1989 if the hypothesis is to be confirmed, but the number of births outside marriage has not increased dramatically. The percentage of nonmarital births in Denmark has stayed between 40 and 47 percent since 1983, and actually decreased after 1997. Births out of wedlock in the Scandinavian countries are commonly a matter of choice: the rate of "unwanted" births in Sweden is half that in the U.S., where nonmarital births are frequently to teenage mothers. Only about 25 Danish children a year are available for adoption (Eskridge and Spedale, p. 199). Births to unwed mothers or to registered partners are not only a matter of choice, but they are also supported socially. Scandinavian mothers have generous maternity and child-welfare benefits including child care for working mothers, so that parenthood outside marriage does not mean, as it can in the U.S., the threat of poverty for both mother and children, including an unending struggle to find affordable child care and medical attention.

The decline in marriage rate in Scandinavia was caused by legal recognition of cohabitation and no-fault divorce, plus the development of a government support system for mothers and children. These developments were well underway before same-sex

unions became legal, as Stanley Kurtz himself recognizes, and they are factors wholly unrelated to the legalization of such unions. There is no logical or causal connection between same-sex marriage and the decline in heterosexual marriage.

Effects in the U.S.

Because same-sex marriage has only been possible in a single state in the U.S. since 2004, it is difficult to estimate its effects. Yet the data that we do have suggest that recognizing same-sex marriage has no adverse impact on the health of marriage itself.

In the first two years of same-sex marriage, the divorce rate in Massachusetts, already the lowest in the nation, went down. Judged by the decline in divorces, the state of marriage is healthier in Massachusetts than it has been since 1950. That no catastrophe has happened to marriage in Massachusetts since 2004 may have convinced the seventeen state legislators who changed their minds in six months and ensured that no DOMA-like initiative would go on the state ballot in 2008.

Alarmists like Stanley Kurtz tend to ignore the small size of the LGBT community, as we saw in the case of the Scandinavian countries. In the U.S., about 1.2 million people identified themselves in the 2000 census as living in 600,000 same-sex partnerships. (The census does not ask about sexual orientation, but provides a category of "partners" as opposed to "room-mates.") This is about .6 percent of the total population, and about 1 percent of people aged between 20 and 50. When asked to estimate the potential budgetary impact of recognizing same-sex marriages for a U.S. House of Representatives subcommittee on the Constitution, the Congressional Budget Office (CBO) replied that the impact on the budget over 10 years would be a tiny net increase—less than $1 billion per year in the U.S.'s annual multi-trillion dollar budget. And that would occur only if same-sex marriage were legalized in all fifty states and recognized by the federal government (Congressional Budget Office 2004, p. 1).

Looking at the situation in reverse, where "traditional" marriage is most supported in the U.S. by religious institutions—in the "red" states of the South—and where there is the strongest opposition to homosexuality and same-sex marriage, the rates of divorce, nonmarital births, and single parenting are the highest in the nation (Eskridge and Spedale, p. 200).

The changing perception of marriage

However, the Center for Inquiry does recognize that conceptions of marriage are changing and that more people are deciding to forego marriage. This is not necessarily a bad development. To the contrary, we believe it is essential that marriage as a civil institution be decoupled from its lingering links to religious doctrines, many of which had harmful implications (such as the subordinate role of women). Moreover, it is beneficial to the strength of marriage as an institution if persons choose this arrangement truly voluntarily, instead of feeling they must become married because of social pressure to conform.

Analyzing marriage must begin with separating the word from the religious connotations that are still associated with it. It is undeniable that "marriage" continues to have strong religious overtones, especially in societies influenced by Christianity and Judaism. But those overtones conceal the economic and social base of marriage as an agreement to preserve, share, and extend financial and other resources and ensure the continuation of a family heritage. In addition, more than a contract between two people, present-day marriage now constitutes a contract with governments at all levels, as we have seen in discussing the economic benefits of being married.

At the same time, satisfying the emotional needs of the partners has taken on a more important role in contemporary culture. In the contemporary West, we are fascinated and perhaps repulsed by the arranged marriages of other cultures (and our own earlier history), because we have a romantic view of the close relationship of two people that we think is essential for the happiness that marriage promises. This romantic view can conflict with the "traditional" view of marriage as the foundation of a family in which the emotional needs of the individual partners are subordinated to the welfare of children.

Marriage as a relationship primarily providing emotional satisfaction for the adults seems to have become the norm in the Scandinavian countries, although it should be emphasized that about 50 percent of children are born within marriages in Denmark and Norway today. However, marriage for the benefit of adults rather than for children or family is also a majority view in the U.S.: the recent Pew Research Center survey found that 65 percent of adults believe that the main purpose of marriage is mutual

happiness and fulfillment, and only 23 percent think bearing and raising children is the main purpose. Forty-seven percent think that it is "very important" that two people should marry if they intend to spend their lives together. Twenty-four percent of married people said that they married for "love and commitment," and only ten percent wanted or were already expecting children.

With respect to couples marrying because that is what is expected of them, just less than half of the ever-married (49 percent) said their reasons for getting married included the belief that living together was wrong, or that their religion, upbringing, and social norms influenced them. This may seem like a sizeable number, but social norms are losing their power. Of the ever-married respondents over the age of 65, 27 percent stated they married instead of living together because of social pressures, but only 2 percent of married people between the ages of 18 and 29 married because of social norms (Pew Research Center 2007, 29-31).

Although attitudes to marriage are changing in the direction of greater freedom for heterosexuals to marry or not without social stigma, attitudes towards homosexual unions in any form have hardened. As mentioned earlier, 57 percent of respondents to the 2007 Pew survey oppose marriage for LGBT people, although in March 2006 only 51 percent were opposed. Thirty-two percent approve of same-sex marriage, but this is the lowest approval percentage since 2004. Civil unions seem to evoke slightly more opposition and support, for 46 percent say they approve and the same percentage oppose, but this is the lowest approval since 2003. The authors of the Pew report summarize: "The groups most likely to take issue with gay marriage include men, older adults (ages 50 and above), the less educated (high school or less), Protestants (particularly white evangelicals), and regular church attendees (weekly or more)" (Pew Research Center 2007, p. 47). However, more women now approve of lesbian couples raising children than did so in 1997: 56 percent disapproved in 1997 and 42 percent disapprove today. On the other hand, 59 percent of men disapprove of gay parenting.

As the title of the Pew survey summarizes, marriage and parenthood are drifting apart in the U.S. (*As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact*). In view of its absence for the most part, same-sex marriage cannot be blamed—if, indeed, blame is to be assigned. The major factors seem to be the

emancipation of women who can earn their own living, so they choose when and whether to have children and are free of the economic need to marry; and a cultural shift towards personal fulfillment as the purpose of life as well as of marriage. Eighty-three percent of women told the Pew survey that they thought women could have a complete and happy life while remaining single.

However, the public seems confused by the developing trends. While they think that marriage is a personal and private matter rather than a social duty, they also express considerable anxiety about children born out of wedlock in the U.S. (nearly twice as many as in 1960). Two-thirds of the respondents thought that the trend towards single women having children is a "bad thing for our society," despite the fact that an increasing number are born to women older than twenty who choose to have children but not to marry. The absence in the U.S. of the social supports—maternity and child welfare, child care, medical benefits—that Scandinavian single-sex parents enjoy contributes to the public's anxiety.

Transforming or foregoing marriage

While marriage represents a bundle of personal, contractual, and social arrangements between and among two people, families, and various levels of government, it also brings with it a long history that clings to the name. According to some religious and, many believe, outdated traditions, marriage assigns roles: man is a breadwinner, woman a homemaker and childrearer; man is head of the family, woman his loyal follower. It also confers privileges, as compared to couples who may make homes and families together but do not marry. Because using the word "marriage" evokes these roles and privileges, some couples, both heterosexual and homosexual have decided that they do not want their relationship defined by them. For example, radical homosexuals advocate a "transformative equality" that would change both culture and marriage (Eskridge and Spedale 2006, p. 13). These "gay-radicals**"** do not want to assimilate themselves and their relationships into what they see as oppressive forms burdened with tradition such as "marriage," but instead seek to establish for themselves a completely new form of legal recognition for their unions, presumably with a new name.

According to the 2000 census, 11 million people are living with an unmarried partner in this country, approximately 9.7 million of whom are heterosexuals. They have many reasons for not being married: they repudiate the roles that marriage forces on partners; they believe that marriage is an outdated and oppressive institution; they believe they should be able to form relationships without the sanction of church or state; and some of them are taking part in the "marriage boycott," a movement of heterosexual couples who are remaining unmarried in solidarity with their LGBT relations and friends who cannot be married. The Alternatives to Marriage Project is clearly a minority movement (its budget is less than $60,000), but its website offers economic and legal advice to couples who prefer cohabitating to what they see as the limitations of marriage (Alternatives to Marriage Project 2007.www.unmarried.org).

These movements towards alternative forms of lifelong commitment show how marriage can be detached from some of its less valuable traditions. We should be able to make publicly recognized arrangements ensuring that committed couples, heterosexual or homosexual, receive all the benefits—legal, economic, and social—that marriage now automatically entails, but without its historical baggage or the name that implies stereotyped roles. Thus, all unions would be civil unions. "Marriage" would still be available to couples who want the name, but it would not confer additional benefits. One possible advantage of restructuring relationships in this way is that it may reduce some of the opposition to same-sex relationships among the religious. They can still call their sanctified unions, "marriage," "covenant marriage," "holy matrimony," or whatever label appeals to them to distinguish them from State-supported unions.

At the moment, such an expansion of options so that all partnerships between two people are equal seems well outside the realm of probability in the U.S., although the Scandinavian and some other countries are moving in this direction. Civil unions for all with complete benefits can only be realized in countries that provide social supports for children, who are the collective responsibility of the society as well as members of a family, however composed. Such unions in a supportive context would resolve the dissonance in the U. S. between traditional, religiously influenced marriage and its present form, a dissonance that confuses partners and shortchanges children.

Moving the agenda

Meanwhile, although attitudes to marriage are evolving, LGBT people see their best hope for true civic and social equality in obtaining the right to marry because it assures them of the rights and benefits that automatically accompany marriage, not to mention the respect accorded it as a bedrock social institution. What needs to happen if LGBT are to attain the goal of marriage?

To begin, those who support same-sex marriage cannot allow opponents to frame the debate in their self-serving terms. We must understand the terms in which leaders of the Religious Right speak and write about homosexuality and same-sex marriage and how they vary these terms. There can no doubt that the objective of the Religious Right is to establish fundamentalist Christianity as a primary force in U.S. society and to have public policy conform to their doctrines. Although this objective is being pursued in every aspect of American life, we will take the example of creationism in the schools and show how the rhetoric pushing it parallels that being employed to oppose homosexuality and same-sex marriage.

In each case, the rhetorical strategists of the Religious Right pursue a process that Eskridge calls "sedimentation," that is, layering of objections to a particular practice or policy so that they resemble the geological layers seen in a roadside cut (Eskridge 2000). Justin Wilson applied Eskridge's sedimentation to the rhetoric about same-sex marriage and also noticed its effects in the fight over the teaching of evolution, a perception amplified by Barbara Forrest (Wilson 2007, p.602). In her position paper for the Center for Inquiry, Forrest points out that the proponents of "intelligent design" are modifying their strategy after defeats, chiefly "by altering their terminology" (Forrest 2007, p. 19 et seq). "Creationism" morphed into "intelligent design" after the U.S. Supreme Court in *Edwards v. Aguillard* 1987 forbade the teaching of creationism in public school science classes. When intelligent design no longer served, the preferred phrases became "teach the controversy"; "present both sides"; "teach the full range of scientific views"; "present the strengths and weaknesses of evolution"; and perhaps most insidious, "critical thinking." The Discovery Institute designed these expressions as code words fully understandable to anti-evolution zealots. They also designed them as appeals to the

American sense of fairness: why not present both sides of the controversy? Thus they are insidiously disarming opposition.

Eskridge sees a triple sedimentation in anti-gay rhetoric resembling the sequence in creationism. At the bedrock layer, the arguments against homosexuality depend on religious natural law, which says that homosexual relations are wrong, especially condemned in both Old and New Testaments. As sodomy laws were relinquished, the arguments took on medical terms: homosexuals are diseased (AIDS) and spread their moral and physical infection through child molestation. When these arguments were disproved, then the opposition moved to what Eskridge calls "social republican arguments": people have a right not to be forced to associate with homosexuals (Eskridge 2000). At each level, the rhetoric becomes more palatable (like "critical thinking") so that it appeals to a wider and less prejudiced audience.

Both Forrest and Eskridge emphasize that while later arguments are layered on top of outmoded ones, they also all co-exist. The layers appeal to different audiences, so they extend their scope from outright bigots through reasonable people concerned with fairness at the same time.

Wilson adds:

> Catchphrases such as "traditional marriage," "ideal environment," "gender complementarity," and "values-transmission" abound. They are derived from the larger "family-values"-talk that permeates many religious spheres. However, because phrases like these straddle the line between sounding comfortably secular and signaling a religious objective, it is not always obvious when modernized anti-gay discourse is afoot (Wilson 2007, p. 603).

Therefore in order to counteract such rhetorical strategies, we must recognize them and red-flag them for the unsuspecting public. For example, the phrase "homosexual lifestyle" should never pass unchallenged, because it implies that LGBT people have deliberately chosen to behave in way that the speaker disapproves of. We should not let pass without refutation assertions that LGBT marriages do not provide children with an "ideal environment" or "gender complementarity"; nor should we listen silently (or read without reaction) when same-sex marriage is accused of assaulting "family values." We

cannot allow public speech to be corrupted by illegitimate attempts to introduce religion where it does not belong and in doing so limit the freedom of our fellow citizens.

Beyond decoding the rhetoric of opponents of same-sex marriage, those who are in favor of same-sex marriage need to be aware of the legal and political landscape. Any substantive revisiting of the FMA does not seem likely in a Congress consumed with other matters, although it may play a political role in the 2008 presidential election campaign. Repealing DOMA is also not on top of Congress's agenda, but a Democratic president with a Democratic Congress might be persuaded to see repeal as the beginnings of justice and equality for LGBT people. The constitutionality of DOMA has been challenged on the grounds that it violates the equal protection and the due process clauses of the U.S. Constitution, and that Congress over-reached its authority under the full faith and credit clause, but the U.S. Supreme Court has not accepted any challenges for review. Because Massachusetts LGBT citizens can now marry, they may wish to challenge DOMA in the courts to the extent other states refuse to acknowledge their marriages.

The main action must be at the state level. An incremental strategy should target specific states. Eskridge and Spedale provide a breakdown of the situation in the states by dividing the states into three groups according to their "gay-friendliness":

Group 1 includes the seven states that recognize same-sex unions in some form and have repealed their anti-sodomy laws. All of these states are either in the Northeast or are on the West coast.

Group 2 includes those states largely in the Midwest that have repealed their anti-sodomy laws, but have not included LGBT people in their hate-crime and antidiscrimination laws, and are less likely to recognize same-sex relationships.

Group 3 includes the 26 states that have constitutional amendments on their books that prohibit same-sex marriages. These and the other members of Group 3 still have anti-sodomy laws (although they are unenforceable with respect to private conduct in light of *Lawrence v. Texas*), and are not likely to recognize same-sex unions. These states are clustered in the South and West and exhibit "much greater cultural anxiety about the decline of marriage and the unsettling of sexual boundaries" (Eskridge and Spedale 2006, 241-5).

Same-sex marriage is inching along in the Group 1 states. Eight same-sex couples have a suit before the Connecticut Supreme Court, *Kerrigan and Mock et al v. Department of Public Health*, to compel the state to grant them marriage licenses, although the legislature has withdrawn a bill in view of Governor Jodi Rell's announced intention to veto it. Connecticut already has civil unions, but the plaintiffs want complete equality with heterosexual couples. Rhode Island LGBT citizens who want to marry can do so in Massachusetts, pursuant to a Massachusetts law passed in September 2006. In New York State, the Assembly passed a same-sex marriage bill in June, but the state Senate is unlikely to take it up. Vermont, California, New Jersey, Maine, and Washington State offer civil unions or domestic partnerships, but at the moment, none seems likely to authorize marriage either in the courts or in the legislatures, although a suit is pending in California. As mentioned above, New Jersey is experiencing a surge of political action for marriage in part because civil unions have failed to provide benefits equivalent to those provided by marriage.

Conclusion

Of course, in the final analysis, little headway can be expected as long as misperceptions and myths about LBGT people and same-sex marriage persist. We do not expect fundamentalist religious groups to change their views, but open-minded citizens of all faiths—or none—should cut through the obfuscating rhetoric and focus on the relevant empirical evidence as well as the commonly accepted moral and civic values that are at stake in this debate, such as respect for the dignity, worth, and autonomy of all human beings. LGBT people have the same hopes and desires and the same capabilities (and failings) as heterosexuals. Many of them want to take part in a stable, loving, committed relationship, and those who want children have proven that they are as fit parents as heterosexual couples. They are entitled to enjoy the same social and economic benefits and privileges that married couples possess. Anything less unmistakably brands them as second-class citizens.

The LGBT community has suffered from hostility, prejudice, and violence throughout much of human history, and especially in the West after Christianity acquired dominance. It is fortunate that in recent decades some of the worst barriers to acceptance

of LGBT people have been removed, but true equality has not yet been achieved. In a society where marriage has a privileged status, true equality cannot be achieved as long as we relegate LGBT individuals to the back of the bus and deny them the opportunity to marry.

REFERENCES AND BIBLIOGRAPHY

Alternatives to Marriage Project 2007. Retrieved July 12, 2007 from www.unmarried.org.

American Anthropological Association (AAA), 2004. *Statement on Marriage and the Family from the American Anthropological Association.* Retrieved June 28, 2007 from www.aaanet.org/press/ma_stmt_marriage.htm.

American Bar Association. "Report to the House of Delegates," by Joan F. Kessler and Phyllis G. Bossin, February 2004.

American Medical Association 2007. AMA policy regarding sexual orientation. Retrieved November 20, 2007 from www.amaassn.org/ama/pub/category/print/14754.html.

American Psychological Association 1995. *Lesbian and Gay Parenting: A Resource for Pscyhologists*. Washington, D.C: American Psychological Association.

_____ . 2004. Policy Statement on Sexual Orientation and Marriage. Amicus brief in Hernandez v. Robles, New York Court of Appeals.

_____ . 2004. Policy Statement on Sexual Orientation, Parents, and Children. Amicus brief in Hernandez v. Robles, New York Court of Appeals.

_____et al. 2006. Amicus brief in Hernandez v. Robles, New York Court of Appeals. Available at: http//data.lambdalegal.org/pdf/645.pdf.

Araujo, Derek C.2006. A Queer Alliance: Gay Marriage and the New Federalism. *Rutgers Journal of Law and Public Policy*, 4, 1, 200-263.

Belge, Kathy. 2007. What's the Difference between Civil Unions and Gay Marriage? *About.com: Lesbian Life*. Retrieved November 19 2007 from www.lesbianlife.about.com/cs/wedding/a/unionvmarriage.htm?p=1

Bonauto, Mary L.2005. *Goodridge* in Context. *Harvard Civil Rights-Civil Liberties Law Review*, 40, 1, 1-69.

Boston Globe 2007. Right of gays to marry set for years to come. Friday June 15.

Boswell, John. 1994. *Same-sex Unions in Pre-Modern Europe*. New York: Villard Books.

Brune, Adrian (2004). Anthropologists debunk 'traditional marriage' claim. *Washington Blade Online*, April 16 2004. Retrieved 6/28/2007 from washingtonblade.com/print.cfm?content_id=2676.

Caramagno, Thomas C.2002. *Irreconcilable Differences? Intellectual Stalemate in the Gay Rights Debate.* Westport, CT: Praeger.

Chauncey, George.2004.*Why Marriage? The History Shaping Today's Debate over Gay Equality.* New York: Basic Books.

Congressional Budget Office. 2004. The Potential Budgetary Impact of Recognizing Same-Sex Marriages. Retrieved 5 July 2007 from www.cbo.gov.

Corvino, John. 2005. Homosexuality and the PIB argument. *Ethics* (April 2005): 501-534.

Dobson, James C. 2004. *Marriage under Fire*. Sisters, OR: Multnomah Press

Eskridge, William N. Jr. 2000. No Promo Homo: the Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review. *New York University Law Review*, 75, 5, 1327-1411. Retrieved 12 July 2007 from www.law.nyu.edu/journals/lawreview/issues/vol75/no5/index.html.

---------- & Spedale, Darren. 2006. *Gay Marriage: For Better or Worse? What We've Learned from the Evidence.* New York: Oxford University Press.

Flynn, Tom.2004. Mixed Blessings. *Free Inquiry*, 24, 2.

Forrest, Barbara. 2007. *Understanding the Intelligent Design Creationist Movement: Its True Nature and Goals.* Washington D.C.: Center for Inquiry. www.centerforinquiry.net/uploads/attachments/Forrest_Paper.pdf

George, Robert P. & Jean Bethke Elshtain, eds. 2006. *The Meaning of Marriage: Family, State, Market, and Morals*. Dallas, TX: Spence Publishing Company.

Herrick, James. 2004. Same-sex Marriage Moves Ahead. *Free Inquiry*, 24, 5.

Human Rights Campaign. 2007. Adoption. Retrieved 20 November 2007 from www.hrc.org/issues/parenting/adoptions/adoption_laws.asp .

Kaminer, Wendy. 2001. Marriage, Religion, and the Law. *Free Inquiry*, 21, 4.

Kelley, Tina. 2007. New Jersey Civil Union Law Has Fallen Short in Its First Year, Commission Is Told. *New York Times*, Oct. 24

Kurtz, Stanley. 2003. Beyond Gay Marriage. The Weekly Standard 8, 45. Retrieved on July 10 2007 from www.weeklystandard.com/Utilities/printer_preview.asp?idArtic

_____ .2004. The End of Marriage in Scandinavia. *The Weekly Standard* 9, 20. Retrieved on June 30 2007 from www.weeklystandard.com/Utilities/printer_preview.asp?idArtic

_____ .2004.Deathblow to Marriage. *National Review Online*. Retrieved on June 30 2007 from www.nationalreview.com/script/printpage.p?ref=/kurtz/kurtz2...

_____ . 2004. Slipping toward Scandinavia. *National Review Online*. Retrieved June 30 2007 from www.nationalreview.com/script/printpage.p?ref=/kurtz/kurtz20...

_____ .2005. Rick Santorum Was Right. *National Review Online*. Retrieved June 30 2007 from www.nationalreview.com/script/printpage.p?ref=/kurtz/kurtz20...

Liebowitz, Sarah. 2007. Gay couples learn that union isn't the same as marriage. *Concord Monitor*, May 6. Retrieved November 19 2007 from www.concordmonitor.com/apps/pbcs.dll/article?Date=20075...

Moskowitz, Eric. 2007. N.H.House passes civil unions. Concord Monitor, April 5. www.concordmonitor.com/apps/pbcs.dll/article?Date=20070405/REPOSITORY/704050342

New York Times 2007. Editorial. The Inadequacy of Civil Unions. 7 June.

_____ . Beliefs: A Liberal Explains His Rejection of Same-Sex Marriage. Sat. 23 June.

_____ . An Unusual Debate with Some Traditional Trappings. Tues. 24 July

Pew Research Center 2007. *As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact.* Retrieved 1 July 2007 from www.pewresearch.org/pubs/526/marriage-parenthood.

Purdy, Laura. 2005. Review of *Marriage on Trial: the Case against Same-sex Marriage and Parenting* by Glenn T. Stanton and Bill Maier. *Free Inquiry*, 25, 6.

Vermont Secretary of State 2006. *The Vermont Guide to Civil Unions*. Montpelier VT: Office of the Secretary of State. Retrieved November 19 2007 from www.sec.state.vt.us/otherprg/civilunions/civilunions.html .

Wald, Michael S. 2006. Adults' Sexual Orientation and State Determinations regarding Placement of Children. *Family Law Quarterly*, 40, 3 (Fall 2006), 381-434.

Washington Post 2007. Civil Union Laws Don't Ensure Benefits. Sat., June 30 2007, p. A3.

_____ .When 3 Really Is A Crowd. Mon., 16 July 2007, p. A17.

Wilson, Justin T. 2007. Preservationism, or the Elephant in the Room: How Opponents of Same-sex Marriage Deceive Us into Establishing Religion. *Duke Journal of Gender Law & Policy*, 14:561.

Wolfson, Evan.2004. *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*. New York: Simon and Schuster.