

# All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage

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Saturday, June 26, 1999: A young teenager, marching in Houston’s Gay Pride Parade under the banner of the Houston Area Teen Coalition of Homosexuals, carries a sign reading “We are your children.”<sup>1</sup>

Sunday, July 11, 1999: *The Houston Chronicle* prints the marriage announcement and photograph of a lesbian couple who were united in a downtown hotel before 400 relatives and friends.<sup>2</sup>

Twenty years ago, it would have been unthinkable for a teenager to admit, let alone celebrate, his homosexual orientation in so public a fashion in a conservative Southwestern city such as Houston. Likewise, no one would have imagined a photograph of a lesbian couple appearing alongside the pictures of happy brides and grooms in the Sunday paper;<sup>3</sup> or, for that matter, that the idea of gay marriage would have been broached at all in the mainstream press.<sup>4</sup> Although not directly related, both events demonstrate the progress that gay people have made in emerging from the shadows; and they demonstrate as well a further step by many gay people to affirm and take a rightful place within the family unit.

Many of us no longer accept the role of the outsider as the price of our gay identities. As the sign in the parade proclaims, we are

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1. Author’s personal observation.
2. *Vickie McClanahan-Clyde Williams Union*, HOUSTON CHRON., July 11, 1999, at 10F.
3. *See id.*
4. A search of the Lexis Newspaper database on Feb. 8, 2001 for articles with the word “marriage” within five words of “homosexual,” “gay,” or “same-sex” produced 30,994 hits. Of those, only 684 appeared before 1990.

heterosexual America's mothers and fathers, sons and daughters, uncles and aunts, and nieces and nephews.<sup>5</sup> We value and cherish our families and the ideals of family life. We want to participate in our families, and not merely from the periphery as the "funny" aunts or uncles. As human beings, we naturally wish to share fully in all aspects of life that are central to the human experience. We believe we have every right to participate in and contribute to family life to the same extent as our heterosexual brothers and sisters—including claiming the right to marry the persons we love.<sup>6</sup>

The wedding announcement in the *Houston Chronicle* is no fluke.<sup>7</sup> Although the number of gay couples who have entered into marital relationships cannot be determined precisely, such relationships are increasingly common.<sup>8</sup> Ironically, there may be currently no greater testament to the enduring hold of the institution of marriage upon the human consciousness than the rise of same-sex marriage. More and more gay couples are embracing marriage as the fulfillment of an innate spiritual need, notwithstanding that their unions receive no legal recognition.<sup>9</sup> Gay marriages bring with them no governmental benefits

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5. Observation, *supra* note 1.

6. See *Vickie McClanahan-Clyde Williams Union*, *supra* note 2, at 10F (asserting that "The state of Texas lacks a provision in legislation for marriage of same sex couples. However, Clyde and Vickie decided that their relationship was too important not to experience that universally meaningful ritual of marriage. Law cannot encompass the warmth, affection and shared experiences that brought Vickie and Clyde together, nor provide the support of their families and friends and the dreams and sense of fun that will keep them together.")

7. See *id.*

8. See, e.g., Terry Johnson, *Altering Tradition; Commitment Ceremonies Help Gay and Lesbian Couples Put a Deeper Meaning Into Their Relationships*, CHI. TRIB., June 9, 1997, Tempo Section, at 1 (noting that gay people have been getting married in commitment ceremonies for decades); Darragh Johnson, *Legal Marriage Is Out for Florida Gays and Lesbians, but That Doesn't Stop Them from Making Solemn Vows*, SARASOTA HERALD-TRIB., Feb. 9, 1997, at 1E [hereinafter Johnson, *Legal Marriage Is Out*] (discussing steady growth of same-sex commitment ceremonies in Southwest Florida); Shoshana Hoose, *Growing Number of Gays Support Rights*, PORTLAND PRESS HERALD, Oct. 13, 1996, at 8A (noting increasing number of same-sex commitment ceremonies in Maine).

9. See Tim Cornwell, *Two Kids and a House in the Suburbs, Please*, THE INDEP. (London), July 17, 1996, at 2. But see Douglas Sadownick, *Do I? Gays and Lesbians on Same-Sex Marriage*, L.A. WKLY., June 20, 1997, at 32 (discussing alternative view of gays and lesbians on the desirability of same-sex marriage). For a discussion of the legal hurdles facing same-sex couples, see generally HAYDEN CURRY ET AL., *A LEGAL GUIDE FOR GAY AND LESBIAN COUPLES* (Robin Leonard ed., 1998). The disparity of treatment of different-sex and same-sex relationships is illustrated by two events. On February 15, 2000, a man chose and married a woman from a group of contestants he had never met on a two-hour television special called *Who Wants to Marry a Multimillionaire?* in a ceremony accorded legal recognition in all fifty states and that automatically entitled the couple to all the privileges and benefits that marriage provides. See Bill Carter, *Lights, Camera, Marriage and Big Ratings*, N.Y. TIMES, Feb. 17, 2000, Sec. A, at 1. Four days earlier, an appellate court in Tacoma, Washington, ruled that a man who had shared a house, business and financial assets with his gay lover for twenty-eight years could not inherit his

or entitlements, and require extensive and costly legal documentation to cement the relationships and to protect them from intrusions that heterosexual couples could scarcely imagine.<sup>10</sup>

Viewed in this context, gay marriage is not a radical act. It is the human response of two people who grow to love each other and seek to commit themselves to their mutual well-being over the course of their lives. That this sounds like a “traditional” definition of marriage is precisely the point. Many of us who enter into marriage with our same-sex partners do so with what are very traditional concepts of the nature of the relationship.<sup>11</sup> These concepts include defining the commitment as one that is monogamous and also binding “til death do us part.” They also encompass the expectation that the marriage will enhance our existing families.<sup>12</sup>

In the hearts and minds of the couples who enter into such same-sex unions, these are marriages in every sense.<sup>13</sup> All that is lacking is the marriage license, but the marital relationship is not created by government form alone.<sup>14</sup> David Coolidge, an opponent of same-sex marriage, rightfully notes that marriages between heterosexuals do not exist because of state authorization.<sup>15</sup> Similarly, the lack of state authorization does not negate the marriages of homosexuals. Given the requisite love, commitment, and seriousness of purpose, marriage, in its essence, is present with or without state sanction.<sup>16</sup> Gay couples realize this and, importantly, so do many of their families. America’s Thanksgiving tables tell the tale. More and more, one sees grouped around these tables, mothers, fathers, heterosexual children with their spouses and offspring, and homosexual children with theirs.<sup>17</sup> The diners

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intestate partner’s estate under the state’s community property law, notwithstanding that the same law allows common-law heterosexual spouses who have never formally married to inherit the property of a partner who dies without a will. *Vasquez v. Hawthorne*, 994 P.2d 240, 241-43 (Wash. Ct. App.), *pet. for review granted*, 11 P.3d 825 (Wash. 2000); *see also Court Reverses Gay Partner’s Award*, LEGAL INTELLIGENCER, Feb. 22, 2000, at 4.

10. *See generally* CURRY ET AL., *supra* note 9.

11. *See, e.g.*, ANDREW SULLIVAN, *VIRTUALLY NORMAL* 183 (Vintage Books ed., 1996).

12. *See* Kay Harvey, *More Gay, Lesbian Couples Starting Families*, TIMES-PICAYUNE (New Orleans), Apr. 4, 1999, at B4 (discussing the so-called “gayby boom”).

13. *See Vickie McClanahan-Clyde Williams Union*, *supra* note 2, at 10F.

14. *See id.*

15. David Organ Coolidge, *Same-sex Marriage? Baehr v. Muike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 53 (1997).

16. *See* Jim Graham, *Gay Lives*, WASH. POST, Dec. 14, 1997, at X08 (reviewing ANDERSON JONES, *MEN TOGETHER, PORTRAITS OF LOVE, COMMITMENT AND LIFE* (1997); noting that the long-term relationships of the men profiled are, in the words of the author, “a reminder that love does not require anybody’s stamp of legitimacy in order to exist”).

17. *See* David Link, *I Am Not Queer*, in *BEYOND QUEER* 266, 266-69 (Bruce Bawer ed., 1996) (describing one such family’s Thanksgiving table).

do not need to see a marriage license to understand that a marital relationship exists between the gay couple, a relationship that enriches not only the couple's lives, but also those of the other family members through a bond of shared experience.<sup>18</sup>

These Thanksgiving tables demonstrate how gay marriage can be an important force to strengthen families. Underlying gay marriage is the recognition that gay and heterosexual family members are more alike than not in their human desires to achieve acceptance, emotional and sexual fulfillment, and a sense of place. By creating a road for homosexuals that parallels the path traveled by their heterosexual family members (from sexual awakening, to dating, to "going steady," to marriage), gay marriage invites the gay family member to channel these basic human desires within a social framework known from birth. This framework is, literally, as familiar to him or her as it is to the heterosexual members of the family.

Consequently, gay marriage allows the homosexual person not only the opportunity to acknowledge his or her sexual identity, but to do so in a context that is rooted in the family experience.<sup>19</sup> At the same time, it creates a reference with which the heterosexual members of the family can easily relate.<sup>20</sup> Because gay marriage encourages everyone in the family to focus upon the commonality of their experiences, empathy may replace the alienation that so often devastates families when the homosexuality of a family member is disclosed.<sup>21</sup>

Gay marriage, however, does not simply provide gay family members the opportunity to achieve personal fulfillment within the context of the family; it nurtures the extended family as well. Like different-sex marriage, same-sex marriage revitalizes the family through the inclusion of spouses who can create new bonds and strengthen existing ties.<sup>22</sup> These new sons and daughters-in-law may enhance the family in a material way by bringing talents that the family has heretofore lacked or by introducing the family to new opportunities for advancement. Gay marriage, like different-sex marriage, can serve also as the wellspring for sustaining the family by raising another generation of children.<sup>23</sup>

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18. *See id.*

19. *See* Joseph Landau, *Marriage as Integration*, in *SAME SEX MARRIAGE: PRO AND CON, A READER* 323, 323-26 (Andrew Sullivan ed., 1997) (arguing for same-sex marriage as a means of integrating the common aspects of heterosexual and homosexual lives); ANDREW SULLIVAN, *VIRTUALLY NORMAL* 183-84 (Vintage Books 1996) (same).

20. *See* Landau, *supra* note 19, at 323-26.

21. *See id.*

22. *See* Link, *supra* note 17, at 268 (describing a family's affection for a gay "in-law").

23. *See* Harvey, *supra* note 12, at B4.

Same-sex marriage carries great potential to enrich the family spiritually. The gay marriage that is a model of love and commitment can serve as a powerful example to other family members, whether they are heterosexual or homosexual, married or unmarried, minors or of marriageable age. By bearing witness to the essential goodness of marriage in the conduct of their daily lives, the gay couple affirms for these others all that marriage has to offer. They literally teach by example and, because they are part of the family, they reinvigorate the ideals of marriage within the family at large.<sup>24</sup>

Advocates of same-sex marriage view marriage as a dynamic and vital institution that is so deeply rooted in the human consciousness and the human sense of family that it can and should incorporate all members of the human race, homosexual as well as heterosexual, who share its ideals and accept its duties and responsibilities.<sup>25</sup> We deem the right to marry to be a basic human right, one which should no more distinguish on the basis of sexual orientation than on race or religion. To deny gay people the right to marry is to deny a part of our humanity, to deprive us of the opportunity to achieve one of the pinnacles of human fulfillment, and to forswear our ability to participate most fully in family life. This denial brands us as alien to the human family when, in fact, we are all in the family.<sup>26</sup>

The writings of same-sex marriage opponents are noteworthy for the total absence of gay people, not only in the authors' conception of marriage, but also in their conception of the family itself.<sup>27</sup> Viewing marriage as an institution that is teetering on the brink of collapse, these commentators respond by circling the wagons to keep out what they perceive as alien invaders.<sup>28</sup> They do so, typically, in two ways: (1) as a matter of definition, by asserting that marriage can only involve the

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24. See Sidney Callahan, *Why I Changed My Mind; About Gay Marriage*, COMMONWEAL, Apr. 22, 1994, at 6 (asserting that same-sex marriage confirms Christian teaching on the goodness of monogamous marriage).

25. See Brent Staples, *Why Same-Sex Marriage Is the Crucial Issue*, N.Y. TIMES, Sept. 5, 1999, § 4, at 10 (asserting that denying legitimacy to same-sex marriage "declare[s] gay love less valid than heterosexual love and gay people less human").

26. See *id.*

27. See generally CHRISTIAN MARRIAGE TODAY (Klaus Demmer & Aldegonde Brenninkmeijer-Werhahn eds., 1997) (asserting that the family, as well as marriage, is conceived of exclusively as a union of heterosexuals).

28. See, e.g., Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible*, 47 CATH. U. L. REV. 1245 (1998) (asserting that homosexual's inability to engage in vaginal intercourse makes marriage for them an unattainable goal). See, e.g., Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998) [hereinafter Wardle, *Legal Claims*] (asserting that homosexual's moral deficiency bars them from entering into, or even advocating, same-sex marriage).

joining of a male and a female because such unions are intrinsically superior to same sex unions<sup>29</sup> or (2) by asserting that gay people are morally, psychologically, and physically unfit for the marital relationship.<sup>30</sup> Both responses, albeit in varying degrees, denigrate gay people as less than their heterosexual brothers and sisters and stigmatize them as an endangerment to marriage and family life. Both responses are unfounded, essentially selfish, and inhumane. Both responses constitute a form of exclusion that diminishes the institution they purport to defend.

#### I. THE DEFINITIONAL EXCLUSION

The definitional response to gay marriage (although acknowledging in its more charitable iterations that some gay relationships may be socially useful for the mutual support they engender) asserts that the entry of a gay couple into marriage is impossible because marriage, by definition, requires two characteristics that even the most devoted and committed same-sex couple can never acquire: complementarity and the ability to reproduce.<sup>31</sup> This argument, however, fails to take into account that gay relationships are complementary in effect, if not in form, and that they foster procreation in precisely the same way as certain heterosexual relationships that are routinely accorded the status of marriage.

Taking the position that same-sex unions cannot fall within the definition of marriage, Professor Teresa Collett asserts that complementarity lies at the heart of the “mystery of marriage” and springs directly from the “innate desire and unique capacity for union” of a man and a woman.<sup>32</sup> She believes that the communion of the heterosexual couple, sparked and enriched by the differences between male and female, achieves its greatest fulfillment in marriage.<sup>33</sup> In Professor Collett’s view, this level of communion could not be achieved by an equally loving and committed gay couple because such differences that exist between the gay partners are only individual, not innate.<sup>34</sup> As Professor Collett puts it, “[t]he similarities inherent in a same-sex union weaken the union in the same manner that similarly formed pieces joined

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29. See Collett, *supra* note 28.

30. See Wardle, *Legal Claims*, *supra* note 28.

31. See Collett, *supra* note 28, at 1260-63.

32. *Id.* at 1262.

33. *Id.* at 1261-62.

34. *Id.* at 1262.

by adhesive are less durably connected than interlocking pieces of the same material joined by the same adhesive.”<sup>35</sup>

Difference, however, is not a prerequisite of complementarity.<sup>36</sup> Moreover, even in Professor Collett’s narrow vision of complementarity, which is predicated upon the attraction of opposites, the essence of complementarity lies not in the mechanics of bipolarity *per se*, but rather in the ultimate sense of completeness that is produced through the loving sexual and spiritual communion of one married partner with the other.<sup>37</sup> Given that Professor Collett is heterosexual, it is hardly surprising that she views the male/female dichotomy as the catalyst that allows a man and a woman to achieve so complete a union in marriage.<sup>38</sup> What Professor Collett fails to fully understand is that for a person of homosexual orientation, such completeness is achieved through communion with a devoted partner, albeit in a different way.

For homosexuals, the spark that ignites and sustains our intimate relationships is fired not by gender differences, or even by individual differences, but rather by the force that emanates powerfully and mysteriously from the innate qualities of our own sex. Because the sexual and spiritual desires of homosexual couples spring from their celebration of likeness, rather than difference, they experience total communion (the completeness that stands at the heart of complementarity) through the unique bond of man to man or woman to woman. Thus, complementarity nurtures and sustains homosexual relationships just as it does heterosexual ones; it simply flows from a different source. For many homosexuals, like their heterosexual brothers and sisters, this sense of being one with one’s partner reaches its culmination in a relationship based on love and commitment or, more precisely, marriage.<sup>39</sup>

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35. *Id.*

36. See WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 371 (2d ed. 1970) (defining “complement,” the root of complementarity, as “(a) what is needed to complete or fill up something . . . (b) that which completes or brings to perfection; (c) something added to complete a whole; either of two parts that complete each other”).

37. See Collett, *supra* note 28, at 1262.

38. See *id.*

39. See Johnson, *Legal Marriage Is Out*, *supra* note 8, at 1E (quoting Ron Knox and Ed Hooper, a male couple, who celebrated their holy union five years previously:

Hooper and Knox are now so in sync with each other that they sense one another’s wants and concerns before anything is said, Knox said:

‘Love and genuine care is what makes it happen,’ Hooper said.

‘His needs are more important than my needs,’ Knox said. ‘And I wanted him to know that I was totally committed to this.’

A holy union was the logical next step for them.).

Professor Collett's assertion that the communion of committed homosexual partners is less complete or binding than that of married heterosexuals is unjustified. The sense of completeness that I, as a gay man, experience with my partner in our marriage provides the greatest fulfillment I have ever known. Professor Collett describes the fulfillment she receives from her marriage in similar terms.<sup>40</sup> Neither one of us rightfully can argue that the degree of communion we achieve with our respective spouses in our respective relationships is either more or less than that achieved by the other. No one can ever measure what is in the heart, mind, and soul of even one other person, let alone demonstrate that the innermost personal feelings of one group of people in the human family are superior to the equivalent feelings of another. Professor Collett's analogy comparing the relative strengths of heterosexual and homosexual relationships is inaccurate.<sup>41</sup> In each relationship, an innate force has melded the pieces into one to bring total completion. In the final analysis, the results are the same.

The second prong of the definitional argument asserts that the law recognizes marriages principally for their procreative potential and stresses that only different-sex partners have the ability to reproduce.<sup>42</sup> However, since infertile and elderly heterosexual couples are no more able to bear children than homosexual couples, the proponents of this argument must explain why the privilege of marriage is accorded routinely to the former groups and not to the latter. In response, they assert, that simply because the qualifications for marriage happen to be overinclusive does not mean that the underlying rationale is invalid.<sup>43</sup> On the other hand, they argue that the marriage of infertile heterosexuals is appropriate because these couples have taken no voluntary action to prevent the process of reproduction that occurs as the natural outcome of the union of the male and female.<sup>44</sup>

The problem with the overbreadth argument is that it implicitly suggests that infertile heterosexual couples have been given a lucky break in the marriage stakes, which they do not deserve. Yet, the alternative argument is equally problematic for its implicit assumption that these heterosexual couples would reproduce if they could, a proposition that seems highly unlikely in the case of the elderly and in

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40. Author's discussion with Professor Collett on Feb. 6, 2001.

41. See Collett, *supra* note 28, at 1260-62.

42. See *id.* at 1260.

43. See *id.* at 1257 (quoting *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980)) (rejecting the claim that same-sex unions should be recognized as marriages for immigration purposes), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982).

44. Collett, *supra* note 28, at 1261.



the case of couples who are infertile by choice through sterilization or the use of contraceptives.

Both of these rationalizations for the legitimacy of infertile marriages fail to take into account that society honors these marriages because they contribute to the procreation and rearing of children by creating committed and loving relationships that produce nurturing environments for the children who come in contact with them. These couples set a living example of the kind of mutual commitment and support to which we would like our children to aspire; they espouse the ideals of family life that we hope our children will choose as their own. If these relationships do not create life, they nonetheless help lead life down the right road, and so society properly accords them the status of marriage.<sup>45</sup>

Married gay couples set the same kind of example and deserve equal recognition in return. In an age when the so-called “gay lifestyle” is often portrayed as an exercise in soulless hedonism, same-sex couples in committed marital relationships demonstrate the existence of an alternative grounded in love, mutual responsibility, and sharing that transcends the individual.<sup>46</sup> While their example is particularly important as a positive role model for gay youth, it shines out to all young people as an affirmation of marriage, not just as a good for some but rather as a universal good that enriches all people who accept its duties and responsibilities.<sup>47</sup> Thus, like childless heterosexual marriages, gay marriages reinforce values that go to the heart of family life and that are central to the development of the young. Because both gay marriage and childless heterosexual marriage enhance procreation in similar ways, one is as deserving of legal recognition as the other.

In short, the definitional response to same-sex marriage constitutes exclusion by semantics. By elevating form over substance, its proponents lose sight of the common ground that heterosexual and homosexual unions share. Both types of unions enrich the lives of the parties, of the parties’ families, and of future generations in similar ways.

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45. See Lillian Carson, *Why We Need Grandparents*, NEWS & RECORD (Greensboro, N.C.), Sept. 8, 1996, at F1 (noting that a natural task of grandparents is to nurture the young and to build family continuity by imparting values and purpose).

46. See Frank Rich, *Family Values Stalkers*, N.Y. TIMES, Jan. 13, 1999, at A19 (quoting an e-mail from reader Keith Thompson: “I keep doing my best to take seriously the notion that ‘family values’ and ‘the rights of people of faith’ are and must be diminished by the fact that some gays and lesbians wish to marry, practice monogamy, raise children. But each time I check my heart, gut and mind, I keep finding that my faith in God and my appreciation for family are in fact deepened and strengthened by knowing that other people who aren’t straight/white/married have similar aspirations.”).

47. Callahan, *supra* note 24, at 6.

Both are a quintessentially human response to attraction and love.<sup>48</sup> Both deserve the status of marriage.

## II. THE OUTSIDER EXCLUSION

A second line of criticism of same-sex marriage brands homosexuals as outsiders who are disqualified from marriage, not only as a matter of definition, but also on the grounds that they are immoral, are incapable of maintaining stable relationships and are prone to communicating disease.<sup>49</sup> As enunciated by Professor Lynn D. Wardle, this argument asserts that, given these factors, opening the doors of marriage to gay people would be akin to letting the fox into the chicken coop; in short, the institution, itself, would not survive.<sup>50</sup>

In Professor Wardle's view, the immorality of homosexuality disposes of gay marriage once and for all.<sup>51</sup> Admittedly, many Americans share Professor Wardle's belief that homosexuality is morally wrong.<sup>52</sup> However, many others do not, believing that homosexuality is God's gift that grants gay people the potential to express and experience love for another in its highest form, as heterosexuality allows straight people to express theirs.<sup>53</sup> The consensus that homosexual relations are

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48. See *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999) (holding that the legal recognition of a same-sex commitment "provides stability for the individuals, their family, and the broader community" and is "a recognition of our common humanity").

49. See Wardle, *Legal Claims*, *supra* note 28, at 759-60.

50. See *id.* at 754, 758-59, 762.

51. See *id.* at 756 (asserting that those who repudiate morality by engaging in homosexual practices and advocating sexual conduct outside of traditional heterosexual marriage cannot consistently appeal to another moral value, equality, in their defense of same-sex marriage). In short, Professor Wardle argues that gay people, by dint of their homosexuality, are stripped of any moral authority to address this issue of significant public concern as, presumably, is anyone else who has ever engaged in what Professor Wardle would deem immoral conduct.

52. See John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 49 (reporting the results of a Newsweek poll in which 46% of the respondents say they believe that homosexuality is a sin, down from 54% in a similar poll in 1998); Richard Lacayo et al., *The New Gay Struggle; The Wyoming Lynching Is Enraging but It Hides a Deeper Truth. Gay Life, and Gay Politics Has Changed*, TIME, Oct. 26, 1998, at 32 (reporting the results of a Time/CNN Poll in which 46% of the respondents stated that homosexual relationships are morally wrong and 45% stated that such relationships are not a moral issue; however, 52% of the respondents stated that homosexuality is acceptable for others but not self, 12% said it was acceptable for others and self, and 33% asserted that it was not acceptable at all).

53. See, e.g., Gene Huff, *Homosexuality and Christian Faith: Questions of Conscience for the Churches*, CHRISTIAN CENTURY, mar. 8, 2000, at 280 (reviewing *HOMOSEXUALITY AND CHRISTIAN FAITH: QUESTIONS OF CONSCIENCE FOR THE CHURCHES* (Walter Wink ed., 2001) (quoting contributor Richard Rohr, a Franciscan, who "insists that God asks of homosexual relationships exactly what God asks of heterosexual ones: 'truth, faithfulness, and striving to enter into covenants of continuing forgiveness of one another'"); Homer A. Spencer, *Bible Does Not Condemn*, THE LEDGER (Lakeland, Fla.), Sept. 21, 1999, at A7 (quoting a retiring Presbyterian minister who asserts, "When we get to know gay people we find them to be like the

bad acts, such as one finds in reference to the practices of rape or incest, is simply not present. Rather, people of faith and of high moral rectitude are divided.<sup>54</sup>

Given such division, the moral case against same-sex marriage is not nearly so open and shut as Professor Wardle asserts.<sup>55</sup> When the population is deeply divided upon a moral issue, as it is in this case, judges and lawmakers in a civil legal system have a duty to look beyond religious or moral principles.<sup>56</sup> Although these principles should not be withdrawn from the table, neither must they be deemed to dispose entirely of the issue.<sup>57</sup>

Even so, the moral objections to same-sex marriage cannot be ignored by advocates of gay marriage. Foremost among these objections stands the concern that the recognition of gay marriage will effect a fundamental change in the institution itself.<sup>58</sup> Gay marriage would, Professor Wardle argues, take society down a slippery slope to a world of no moral absolutes, where any union logically could be deemed a marriage as long as the parties agreed that their relationship was a good thing.<sup>59</sup> Thus, the argument goes, the legalization of gay marriage could lead inexorably to the recognition of marriages between siblings or between multiple partners.<sup>60</sup>

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rest of us . . . . The gays I know are kind, considerate, helpful and dedicated in their Christian commitment. Their lives express the ‘fruits of the Spirit’ about which Paul and Jesus spoke.”

54. See, e.g., *Religious Declaration on Sexual Morality, Justice, and Healing*, N.Y. TIMES, Jan. 25, 2000, at A10 (paid advertisement calling for the full inclusion of sexual minorities in congregational life, including their ordination and the blessing of same-sex unions). As of Feb. 15, 2000, 1371 theologians and clerics from a variety of religious backgrounds had signed the declaration. See [www.religionproject.org](http://www.religionproject.org); see also Diego Ribadeneira, *Gay Marriages Gaining Allies in Many Religious Communities*, BOSTON GLOBE, Feb. 14, 1998, at B2; William R. Wineke, *Church Leaders Show Support of Gays, Lesbians*, MADISON STATE J., May 13, 1997, at 1B (reporting on statement promising church support of gays and lesbians, signed by sixty Madison, Wis. clergy of the American Baptist, Episcopal, Evangelical Lutheran Church in America, Quaker, Moravian, United Methodist, Presbyterian Church (U.S.A.) and United Church of Christ denominations).

55. Nor can it be presumed that gay people are immoral *per se* on account of their homosexuality. See *Accept Gay Orientation, Say Catholic Bishops; National Conference of Catholic Bishops’ Pastoral Letter to Families and Parents of Gays and Lesbians*, CHRISTIAN CENTURY, Oct. 22, 1997, at 936-37 (reporting on a pastoral letter of Catholic bishops, which urges parishioners to “concentrate on the person, not on the homosexual orientation” and asserts that “by itself, a homosexual orientation cannot be considered sinful”); Lacayo, *supra* note 52, at 32, 34 (reporting that the richest gay organization in the United States is the predominately homosexual Metropolitan Community Church).

56. See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1187 (1999) (noting that the Bible cannot be controlling given the first amendment requirement of the separation of church and state).

57. See *id.*

58. See Wardle, *Legal Claims*, *supra* note 28, at 749, 760-61.

59. See *id.*

60. See *id.*

This argument, however, assumes that gay marriage is devoid of moral parameters, which is not the case. In fact, my conception of same-sex marriage, like traditional heterosexual marriage, affirms such moral absolutes as the inherent goodness of monogamy, fidelity, and the selfless love of one human being for another. Marriage, be it heterosexual or homosexual, is the union of two unrelated human beings who commit to enter into a monogamous union based upon attraction and love. The goal is to create a new family unit that also will strengthen the preexisting families of the individual partners through the shared experience of marriage and family life. Although I would open the door to marriage a little wider, I would not change the direction of the path; while my definition of marriage extends its arms to people who are gay as well as straight, it is entirely antithetic to relationships grounded in incest or polygamy.<sup>61</sup> In that respect, it parallels the conception of marriage of many of those who oppose gay marriage for moral reasons. In fact, because the marital values I espouse are basic human values framed in the context of family life, the opponents of gay marriage and I are, but for our differing views on the morality of homosexuality, largely on common ground.<sup>62</sup>

That difference, of course, constitutes the great divide for such opponents of gay marriage as Professor Wardle. The fact that many gay and heterosexual people share similar values relating to marriage and family is of no account if the entry of homosexuals into the institution of marriage will, as he predicts, undermine existing and future marriages of heterosexuals or threaten family life.<sup>63</sup> However, Professor Wardle's predictions do not withstand scrutiny.

Professor Wardle believes that the extension of marital privileges to homosexuals, whose lifestyle he considers morally bankrupt, would taint the institution of marriage for all.<sup>64</sup> Yet, even as it presently stands, the institution of civil marriage is a big tent for which morality is not the

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61. See Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON, A READER 285, 287-88 (Andrew Sullivan ed., 1997) (noting that there are ample grounds to oppose polygamous and incestuous marriages, which have nothing to do with the same-sex marriage debate).

62. Professor Wardle argues, however, that any such equivalence argument is flawed for being overinclusive in that, for example, persons engaged in an incestuous relationship could make a similar argument in terms of their subjective preferences and commitments. See Wardle, *Legal Claims*, *supra* note 28, at 749. Yet, given my definition of marriage, this could not be the case. Moreover, it is interesting that overinclusiveness is considered a fatal flaw in this instance, but apparently is not in relation to the equally overinclusive extension of marital privileges to heterosexual persons who have no capacity for procreation.

63. See *id.* at 757-61.

64. See *id.* at 761 (arguing that "all-tolerating relational relativism" would destroy the fundamentals of the marital relationship).

price of admission.<sup>65</sup> It encompasses some heterosexuals who have married for reasons which other heterosexuals find morally repugnant; it encompasses other heterosexuals who, by any measure, have done immoral things. Most heterosexuals, however, do not view the peccadilloes of their peers, however distasteful, as a denigration of their own marriages because, although publicly recognized, each marriage is also considered inherently unique and private.<sup>66</sup>

Although heterosexuals freely criticize each other's marriages, they rarely hold them up as a negative reflection of their own. Under the circumstances, it seems highly improbable that the extension of marriage to gay people would change how heterosexuals view their marriages at all. While those who disapprove of homosexuality would surely criticize gay marriages, they are more likely to view their own marriages as superior to, rather than, diminished by the marriages of homosexuals.<sup>67</sup>

Professor Wardle also believes that the recognition of gay marriage will promote a greater tolerance of homosexuality in our society, and he fears that any abatement of the social stigma of homosexuality will encourage some people to choose a homosexual path who would not otherwise do so.<sup>68</sup> Among the outcomes he predicts are the breakdown of existing marriages as dissatisfied partners try out homosexual relationships in preference to resolving their troubled heterosexual unions, the adoption of homosexual relationships by rebellious young people who perceive the institution of heterosexual marriage as deeply flawed, and an increase overall in the number of openly gay youth.<sup>69</sup> He

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65. See generally *Turner v. Safley*, 482 U.S. 78 (1987) (affirming right of prisoners to marry).

66. Ellen Goodman, *In the End, We Look to Hillary*, BUFF. NEWS, Feb. 1, 1998, at 3H (quoting a young mother's reaction to allegations of President Clinton's affair with Monica Lewinsky: "If he committed perjury that's our problem; if he had sex that's [President and Mrs. Clinton's] problem.").

67. See *House Debate on the Defense of Marriage Act, May 30, 1996*, in SAME-SEX MARRIAGE: PRO AND CON, A READER 225, 226 (Andrew Sullivan ed., 1997) (colloquy between Representative Barney Frank and Representative Henry Hyde on the Defense of Marriage Act:

Mr. Frank: How does [same-sex marriage] demean your marriage? If other people are immoral, how does it demean your marriage? That's what you are saying.

Mr. Hyde: It demeans the institution. It doesn't demean my marriage. My marriage was never demeaned. The institution of marriage is trivialized by same-sex marriage.).

See also Sheryl McCarthy, *The Last Civil Frontier Is Gay Marriage*, NEWSDAY (New York, N.Y.), Nov. 23, 1998, at A32 (asserting that the marriage of gay people would not bring other people's marriages tumbling down).

68. See Wardle, *Legal Claims*, *supra* note 28, at 762-66.

69. See *id.*

asserts that the resultant blossoming of homosexuality would seriously undermine the family.<sup>70</sup>

This, in my view, is the more interesting thesis because (although fatally compromised on factual and moral grounds) embedded within it are points on which Professor Wardle and I agree. In fact, it stands to reason that the legal recognition of gay marriage would mark a further change in the social climate from the active condemnation of homosexuality to the toleration, if not the validation, of it; more people of homosexual orientation probably would give public expression to this aspect of their personhood if there were less stigma attached to it.<sup>71</sup>

On the other hand, Professor Wardle's apprehension of a dramatic upsurge in homosexuality is unfounded. Implicit in Professor Wardle's argument is the notion that sexual orientation is akin to the flavor of the month, a matter of whim that has no more import than the choice of hair color or the preference for contact lenses over glasses. Yet, however sympathetic the social climate towards homosexuality may be, the acknowledgment that "I am a homosexual" rarely is taken lightly. Indeed, many homosexuals recognize their sexual orientation through a gradual process of self-awareness and the experience of feelings deep within themselves.<sup>72</sup>

Likewise, it seems highly improbable that the hold of heterosexuality upon straight individuals is so tenuous as to justify the stigmatization of homosexuals. Relatively few heterosexual people view sexual orientation as just another option on the menu of life. The vast majority of heterosexuals, assuming they ever think about it, consider their sexual orientation to be preordained or, at the very least, fixed.<sup>73</sup> Although more closeted homosexual people of all ages might acknowledge their homosexuality and opt to enter into same-sex unions if gay marriage were recognized, surely homosexuals would remain a

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70. See *id.*

71. See Lacayo, *supra* note 52, at 32 (noting that "the simple fact that there are a greater number of visible and comfortable gays has created more of the same").

72. See Richard Jerome et al., *Growing Up Gay*, PEOPLE, Aug. 17, 1998, at 44 ("The issue of sexual orientation generally lies buried until kids enter puberty, when they find it increasingly difficult to ignore impulses that may seem strange and unwelcome.").

73. See *Social Science and the Citizen; Research Studies on the Prevalence of Homosexuality and Other Sex Practices*, ASAP, July 1993, at 2 (discussing national study of male sexual behavior conducted by researchers at the Battelle Human Affairs Research Center in Seattle that reported that only about 2% of the men surveyed had engaged in homosexual sex and that 1% considered themselves exclusively homosexual; noting also a nationwide 1989 survey of sexually active adults over eighteen conducted by the University of Chicago's National Opinion Research Center, which found that 1.2% of the males and females reported homosexual activity in the year preceding the survey).

small minority within a predominately heterosexual society.<sup>74</sup> Consequently, even if gay marriages were legalized, it is unlikely that a tidal wave of homosexuality would sweep over the American family as Professor Wardle fears.

At the crux of Professor Wardle's fear is his unjustified assumption that homosexuality is utterly incompatible with family life. As I have noted, the absence of homosexuals in the models of family offered up by Professor Wardle and most other critics of gay marriage is striking.<sup>75</sup> However, if you believe, as many of these critics apparently do, that the basis of marriage and family lies exclusively in the commitment of heterosexuals to procreate and raise other heterosexuals, there simply can be no role for the homosexual in family life.<sup>76</sup>

Professor Wardle predicts that gay marriage, in particular, would erode fundamental concepts of marriage and family.<sup>77</sup> Indeed, he argues that even if same-sex marriages were permitted under the parameters I propose, gay people still would be psychologically incapable of undertaking the kind of commitment required.<sup>78</sup> He asserts that homosexuals cannot enter successfully into marital relationships grounded on fidelity in light of statistics that gay people, particularly gay men, have many sexual partners, *and* that their intimate relationships are of relatively short duration.<sup>79</sup> Wardle further asserts that, even if their relationships should endure, they often encompass sexual relations outside the relationship.<sup>80</sup> These statistics, he argues, suggest that if same-sex marriages were legalized, they would most likely take the form of so-called "open marriages," that is, marriages that encompass multiple sexual partners.<sup>81</sup> Thus, he posits that the recognition of gay marriage necessarily would undermine the importance of fidelity and monogamy

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74. See Elizabeth M. Saewyc et al., *Sexual Intercourse, Abuse and Pregnancy Among Adolescent Women: Does Sexual Orientation Make a Difference?*, 31 FAM. PLAN. PERSP. 127-31 (May/June 1999) (noting tendency of some lesbian adolescents to enter heterosexual relationships either to "cure" themselves of their homosexual interests or to prove to others that they are not lesbians).

75. See generally Wardle, *Legal Claims*, *supra* note 28.

76. Presumably, Professor Wardle, for one, would respond to the appearance of an openly gay family member at his Thanksgiving dinner table by showing him or her the door—at least if children were present. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894 [hereinafter Wardle, *Parenting*] (advocating a rebuttable presumption that the exercise of parental rights, including visitation, by an active homosexual is not in the best interest of the child).

77. Wardle, *Legal Claims*, *supra* note 28, at 759-61.

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

as core values of the institution of marriage and would alter drastically the make-up of a family.<sup>82</sup>

While Professor Wardle brands homosexuals as unsuited for marriage on account of their unbridled sexuality, he cites as a benefit of marriage its capacity to moderate the sexual urges of heterosexuals who otherwise would engage in the promiscuity for which Professor Wardle chastises homosexuals.<sup>83</sup> Professor Wardle's argument, therefore, places homosexuals in the classic "Catch-22." Having lacked the support provided by marriage, an institution that is hailed for channeling sexual activity in a way that benefits both the individual and society, and desiring the more stable relationship that marriage provides, gay people seek access to it. Yet, their application to enter into and reap the benefits of this institution is rebuffed because their sexual behavior and relationships fail to measure up to the standards of the heterosexual insiders, like Professor Wardle, who have already benefited.

Paradoxically, significant numbers of heterosexuals honor those same standards only in the breach. Nearly fifty percent of heterosexual marriages end in divorce.<sup>84</sup> Adultery by married heterosexuals is not uncommon.<sup>85</sup> The heterosexual community suffers from high rates of illegitimate births and a significant percentage of absentee fathers.<sup>86</sup> Applying Professor Wardle's reasoning, do not these statistics, in turn, demonstrate that heterosexuals are unfit for marriage? Simply posing the

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82. Wardle, *Legal Claims*, *supra* note 28, at 759-61. However, Professor Wardle's assumption overlooks the fact that many gay people *Seek* the recognition of same-sex marriage precisely because they deem committed, monogamous relationships to be desirable. See Elaine Herscher, *Today's Gay Magazines—Less Sex, More Families*, S.F. CHRON., Apr. 18, 1998, at A1 (noting a palpable shift in the interest of gay men and lesbians in monogamous relationships); Lisa Magged, *New Attitudes; Devoted Gay Partners Deserve Recognition*, ATLANTA J. & CONST., Jan. 17, 2000, at 13A (noting decrease of promiscuity in the gay community); Jonathan Rauch, *Bush Miscalculates on Gay Republicans*, N.Y. TIMES, Apr. 17, 2000, at A19 (asserting that "[t]he new gay agenda stresses commitment over frolic and responsibility over liberation")

83. See Wardle, *Legal Claims*, *supra* note 28, at 754 (asserting that an important purpose of marriage is its promotion of civic virtue and public morality).

84. See *Bible Belt Class Targets Nation's Top Divorce Rate*, DESERET NEWS, Nov. 13, 1999, at A09 (noting also that the divorce rates in the "Bible Belt" states of Tennessee, Arkansas, Alabama and Oklahoma are even higher, making them, along with Nevada, the top five states in the nation in the frequency of divorce).

85. See Neil D. Rosenberg, *Eighteen Percent of Married People Admit to Having Extramarital Affair; Scientific Study Says*, MILWAUKEE J. SENTINEL, Dec. 19, 1998, News Section, at 10 (comparing 21.5% rate of adultery for men to 12% rate for women).

86. See Jason Collington, *What a Difference a Dad Makes. Absent Fathers Growing in Numbers*, TULSA WORLD, Jan. 16, 2000 (reporting that 32.4% of all births in the United States are to unwed mothers and that thirty-nine percent of the nation's children under the age of eighteen live apart from their biological fathers, with more than one third of those children having no fraternal contact); see also Mike Celizic, *New Teen Pregnancy Data Put Us Among Thirdworld Nations*, THE RECORD (Bergen Co., N.J.), Oct. 28, 1999, at L15 (noting that the teenage birthrate in the "Bible Belt" is the highest in the country).



question illustrates the unfairness of the equivalent argument against gay marriage.<sup>87</sup>

Moreover, Professor Wardle's argument is predicated upon a gross stereotype that stands on a par with such canards as "All Jews are greedy," "All Blacks are lazy," and "All conservative Christians are closed-minded bigots." The statistics, even if you accept them at face value, do not demonstrate that gay people cannot live in committed monogamous relationships.<sup>88</sup> In fact, many gay people do and many of their relationships have endured far longer than the average heterosexual marriage.<sup>89</sup> If many other gay people do not live such lives, that is not necessarily indicative of their innate inability to do so, but rather of the tremendous difficulty in sustaining relationships that receive almost no support from society at large and that many people, including a number of critics of same-sex marriage, actively will to fail.<sup>90</sup>

To refute the notion that families and homosexuals cannot coexist and mutually prosper, one only need hearken again to those thousands of Thanksgiving tables, around which sit straight and gay family members and their offspring, united by bonds that make no distinction between

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87. I do not cite these statistics to suggest that heterosexuals in general or evangelical Christians in particular are bad people (certainly, most are not), but only to illustrate the irrelevance of equivalent statistics pertaining to homosexual people. All any of these statistics demonstrate is that human beings are, by their very nature, subject to certain temptations to which many people, regardless of their sexual orientation, submit. The benefits flowing from fidelity, monogamy, and joint responsibility as exemplified in marriage should not be denied to anyone on the basis of reported lapses in the behavior of the groups to which they belong.

88. The stigmatization of homosexuals that Professor Wardle apparently favors may even contribute to the promiscuity that he also condemns. See Magged, *supra* note 82, at A13 (asserting that promiscuity is the result of low self-esteem and the need for validation and noting that "[c]asual sex has been pervasive in the gay community in the past because of oppression, shame and demoralization").

89. See Cornwall, *supra* note 9, at 2 (quoting Eric Shore, who has lived with another California man for fifteen years:

Growing up as an adolescent, . . . my dream wasn't about a lifetime of promiscuous sex. It was about being a happy gay man. The values that I grew up with were a family, and marriage, and the good life. . . . People talk about the lack of commitment in modern society. . . . We are talking about making commitment);

See Kathy Maeglin, *Lesbian Myths; What Are the Misconceptions That Persist*, CAPITAL TIMES (Madison, Wis.), Jan. 29, 1998, Savvy Section, at 1F (countering misconception that lesbians do not have long term relationships by citing specific relationships enduring from fifteen to thirty-seven years); Gali Kronenberg, *Intimate Friends of the Long Haul; Older Gay Couples Quietly Committed*, S.D. UNION-TRIB., Mar. 2, 1992, at C-1 (noting recent public celebration marking same-sex relationships of forty-one, forty, and thirty-eight years, respectively, and examining three other homosexual relationships with durations ranging from twenty-seven to fifty years).

90. See Paul Varnell, *Gay Marriage: Ready, Set . . .*, at <http://www.indegayforum.org/articles/varnell5.html> (last visited Mar. 22, 2001) (observing that gay people have had no practice in thinking about marriage even as a possibility).

sexual orientation.<sup>91</sup> These tables reveal no radical departure from family life; indeed, the people sitting at them will testify in very traditional ways to the profound place their families occupy in their lives.<sup>92</sup> Yet, because such families are not precisely the kind to which Professor Wardle and other critics of same-sex marriage aspire, they denigrate these families as a social evil, if they do not deny them family status altogether.<sup>93</sup>

In “melting pot” America, however, the family has come to be regarded as an institution that is both intensely personal and highly pluralistic. As long as general boundaries are observed, we believe that families are best left alone; as a corollary, we understand that “family” accommodates a wide variety of forms, customs, and values.<sup>94</sup> The families and extended families of homosexual couples have demonstrated that they can fit comfortably within these parameters with no significant social upheaval.<sup>95</sup>

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91. This observation is supported further by legal and sociological findings. See *Baehr v. Miike*, No. CIV.91-1394, 1996 WL 694235, at \*18 (Haw. Cir. Ct. Dec. 3, 1996) (finding of fact No.139 in Hawaii marriage trial that “[s]imply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage.”); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 197-98 (1995) (noting the dearth of studies showing that children of lesbian mothers and gay fathers have difficulties in development relative to heterosexual parents); Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Misuse of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 210-15 (1995) (reporting that research demonstrates that, relative to heterosexual parents, homosexual parents have equal parenting skills and raise psychologically healthy children who show no predilection for a homosexual orientation); Kathryn Kendall, *Sexual Orientation and Child Custody*, TRIAL, Aug. 1999, at 42 (asserting that research shows no difference in the basic measures of well-being between children raised by homosexual parents and those raised by heterosexuals). *But see* Wardle, *Parenting*, *supra* note 76, at 852 (questioning reliability of data on effects of homosexual parenting and asserting that a disproportionate number of children raised by same-sex parents also will develop “homosexual interests and behavior”). On the latter point, it is noteworthy that Professor Wardle cites the work of Paul Cameron, a psychologist who was ousted from the American Psychological Association after complaints by his peers of unethical conduct and who has said in regard to homosexuals: “[A] plausible idea would be extermination. Other cultures have done it.” Ward Harkavy, *Slay It with a Smile; Paul Cameron’s Mission to Stop Homosexuality Is Hard to Swallow*, DENVER WESTWORD, Oct. 3, 1996.

92. See Link, *supra* note 17, at 268.

93. See Wardle, *Legal Claims*, *supra* note 28, at 765 (linking homosexuality to “family disfunctioning”); Callahan, *supra* note 24, at 6, 7 (quoting Pope John Paul II’s characterization of gay and lesbian families as “false families”).

94. See William J. Doherty, *Private Lives, Public Values; Pluralism in Family Relationships of the Future*, PSYCHOL. TODAY, May 1992, at 32 (discussing the plethora of family types that has emerged); Dominick Vetri, *Lesbians, Gays, and the Law*, 26 S.U. L. REV. 1, 21 (1998) (noting that “a legally married heterosexual couple living with their biological children is no longer the dominant pattern of the American household”).

95. Indeed, the critics of same-sex marriage are out of the mainstream. In seeking to close the doors of matrimony to homosexuals, they advocate for all a conception of marriage and family that is, on the one hand, radically intrusive in its insistence that marital privileges extend only to those who commit to procreation, see Collett, *supra* note 28, at 1260-61, and which, on

Professor Wardle further predicts that same sex marriages would infect the family not only conceptually, but also literally, because, in his view, same-sex relationships adversely affect the physical health of everyone in society.<sup>96</sup> AIDS, he points out, is simply the most dramatic illustration of the propensity for gay relationships to jeopardize public health through the transmission of sexually transmitted disease.<sup>97</sup>

This is a curious argument. On the one hand, considering how Professor Wardle makes the point that heterosexual marriage benefits society by promoting safe sexual relations (presumably by reducing the spread of sexually transmitted disease), the public seemingly would benefit if marriage also were extended to another group that has suffered greatly from such contagion.<sup>98</sup> On the other hand, if Professor Wardle's argument is given credence and followed to its logical conclusion, the marriage of heterosexuals would be outlawed in some parts of Africa and in other regions where AIDS has ravaged the heterosexual population with particular virulence.<sup>99</sup> Presumably, heterosexuals in this country, who are statistically predisposed to certain sexually transmitted diseases, would find themselves disqualified from marriage on similar grounds.<sup>100</sup>

Over the last two decades, gay people have struggled to alleviate the AIDS pandemic. They have devoted vast amounts of time and money to the problem and, equally significant, have strived to change their sexual behavior.<sup>101</sup> AIDS taught the gay community many lessons

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the other hand, is extremely monolithic in its insistence upon the traditional two-parent model. See Wardle, *Legal Claims*, *supra* note 28, at 766.

96. See Wardle, *Legal Claims*, *supra* note 28, at 756.

97. See *id.*

98. See *id.* at 754.

99. See *South Africa Overwhelmed by AIDS Epidemic*, DESERET NEWS, Jan. 9, 2000, at A10 (reporting that one in ten people in South Africa is infected with the AIDS virus, which is transmitted primarily by heterosexual sex); see also Katherine Butler, *Modern Plague Ravages Urban Eskimos; An Aids Epidemic Is Threatening to Wipe Out the Inuit of Greenland*, THE INDEP. (London), June 6, 1998, News section, at 18 (reporting another regional AIDS epidemic that is transmitted almost exclusively by heterosexual contact).

100. Heterosexual women, for example, would be one group that apparently would face disqualification. See, e.g., Jerome Groopman, *Contagion: A Sometimes Lethal Sexual Epidemic That Condoms Can't Stop*, THE NEW YORKER, Sept. 13, 1999, at 34-35 (discussing the papilloma virus, which is the most commonly sexually transmitted infection in the United States, occurring at some point in up to seventy-five percent of sexually active women; it is estimated that about ten million American women have active infections, of whom one million have diseased, and perhaps precancerous, cervical tissue as a result). Nor would heterosexual men likely escape the prohibition either, given the prevalence of other sexually-transmitted diseases in the United States that affect all genders. See Cheryl Wetzstein, *Index of 'Cultural Indicators' Sees Trends Decidedly Mixed; Crime, Welfare Down, but STDs, Unwed Births Increasing*, WASH. TIMES, Oct. 12, 1999, at A10 (reporting an estimated forty-five million cases of genital herpes in the United States and high rates of gonorrhea and syphilis compared with other developed countries).

101. See Lawrence K. Altman, *New York Study Finds Gay Men Using Safer Sex*, N.Y. TIMES, June 28, 1999, at A1 (reporting a survey of New York City gay men, showing

as it struggled to take care of its own, not the least of which was the value of committed relationships.<sup>102</sup> Consequently, I would argue that the AIDS crisis and the gay community's response to it do not disqualify gay people from marriage, but rather prove that gay people have come of age and are truly ready and able to undertake the kinds of commitments and responsibilities that marriage entails.<sup>103</sup>

In his criticism of homosexuality and same-sex marriage, Professor Wardle eschews putting any human faces on these issues, choosing instead to portray the homosexual as a nameless instrument of corruption who presents a danger to children and families.<sup>104</sup> As so framed, this characterization of gay people packs an undeniably powerful punch. What Professor Wardle neglects to mention is that, whether or not it is so intended, his punch lands ultimately not on some anonymous thing, but rather on someone else's child, a real person with a name and a face. That person may be the youngster who is taunted on the playground for being a "sissy," or the teenager who views suicide as the solution to a world where, as in our nation's high schools, the phrase "That's so gay" ranks among the most derogatory of epithets,<sup>105</sup> or the individual of any age who is assaulted or even murdered for no other reason than that he or she is perceived to be gay.<sup>106</sup> Professor Wardle's argument that the stigmatization of homosexuals is a social necessity boils down to the proposition that other people's gay or seemingly gay children must be

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significantly reduced levels of risky sexual behavior and a sharp drop in the number of men infected with the AIDS virus); Wetzstein, *supra* note 100, at A10 (reporting that AIDS cases in the United States decreased fifty-five percent from 1993 to 1998).

102. See Yoel H. Kahn, *The Kedushah of Homosexual Relationships*, in SAME SEX MARRIAGE: PRO AND CON, A READER 71, 76 (Andrew Sullivan ed., 1997) (in which a rabbi describes the devotion of same-sex couples in the face of AIDS).

103. Laura Ingraham, *Test of Devotion; What My Gay Brother Taught Me About Tolerance*, WASH. POST, Feb. 23, 1997, at C01 (citing the gay community's response to the AIDS crisis as an example of the conservative virtue of self-help).

104. See Wardle, *Legal Claims*, *supra* note 28, at 749 (expressly rejecting any discussion of stories of real-life, committed, long-term same-sex relationships that have benefited their families and communities).

105. See Jerome, *supra* note 72, at 44 (referring to a 1995 survey of over 4000 students conducted by the Massachusetts Department of Education which found that 36.5% of gay and lesbian high school students try to commit suicide each year); Ann Dowsett Johnston, *Gay-bashing Comes Out*, MACLEAN'S, May 24, 1999, at 50; Barbara Whitaker, *To Outlaw Gay Group, District May Ban Clubs*, N.Y. TIMES, Feb. 10, 2000, at A24 (reporting that a survey by the Gay, Lesbian and Straight Education Network found that ninety-one percent of students polled regularly heard derogatory comments about homosexuals at school and that more than two-thirds of the gay respondents said they had been verbally, physically or sexually harassed on a daily basis).

106. See Kenneth Sherrill & Alan Yang, *From Outlaws to In-laws; Anti-Gay Attitudes Thaw*, 71 THE PUB. PERSP. 20 (2000) (noting that while violent crime in the United States has decreased generally, hate crimes have increased, with gay men and lesbians most likely, on a per capita basis, to be the victims, and to face a disproportionate level of violence).

denigrated to insure that heterosexual children are not tempted to stray.<sup>107</sup> This proposition is not only selfish, it is also morally wrong because it hurts everyone, whether they are straight or gay.

The wrong extends beyond the fact that some human beings are being treated unequally simply for being whom they are. More egregious is the implicit denial that these beings are even human. The society that relegates some of its members to a realm outside of common human experience creates a class of “non-humans,” who are all too often perceived as expendable. A society crossing that line is poisoned. If one distinguishable group can be pushed acceptably outside the fold of humanity, who is to say that some other “other” should not also follow? The sense of shared humanity that serves as the foundation of civilized public discourse in a democratic society crumbles. The majority disparages the “others” in the most inhumane terms and the “others,” once they summon the courage to fight back, respond in kind.<sup>108</sup> Ultimately, everyone loses the basic humanity that distinguishes democracies and, indeed, cements them together.

The moral argument against gay marriage that stigmatizes homosexuals as cultural outsiders fails, in part, because the evils it predicts lack any substantial factual underpinning. But this argument also endangers moral and social values that are the bedrock of a democratic society by fostering a kind of otherness that is antithetical to basic notions of equality. In so doing, it unfairly victimizes some, and, in the final analysis, robs everyone of the common humanity that is essential for a democracy to endure.<sup>109</sup>

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107. See Wardle, *Parenting*, *supra* note 76, at 754-55.

108. See REGINALD HILL, *BLOOD SYMPATHY* 243 (Pap. ed., Worldwide 1996) (providing a cogent examination of the effects of social stigmatization within the context of detective fiction); Andrew Sullivan, *What's So Bad About Hate*, N.Y. TIMES MAG., Sept. 26, 1999, at 57 (noting that people who are demeaned in society may develop a hatred of their tormentors that is even more hateful in its expression than the prejudice they have been subjected to); see also Hanna Rosin & Richard Morin, *As Tolerance Grows, Acceptance Remains Elusive; In Majority's View, Still Unacceptable; For Some, an Uneasy Tolerance*, WASH. POST, Dec. 26, 1998, at A01, A13 (describing the fears of some in a Madison, Wisconsin focus group who hold religious or moral objections to homosexuality that if further ground is ceded to gay groups “people like themselves [would] be persecuted for their personal beliefs and lifestyles, just as homosexuals once were publicly humiliated and punished for their sexual orientation”).

109. While I in no way assert that it is immoral either to believe or to say that homosexual practices are in themselves immoral, I argue that it is morally wrong and socially destructive to equate a single characteristic of a homosexual person's personality with the sum of the individual in order to demonize and dehumanize him or her. In this respect, it is interesting to compare the same-sex marriage critique of Coolidge, *supra* note 15, at 94 (calling for the respect of people on both sides of the same-sex marriage issue) to the critique of Wardle, *Legal Claims*, *supra* note 28, at 752, 756 (questioning homosexuals' moral authority in general and comparing consensual homosexual relations variously to violence, adultery, rape, and incest).

## III. CONCLUSION

Whereas many who advocate same-sex marriage do so in affirmation of the same human values as their heterosexual counterparts, the critics of same-sex marriage strive to segregate homosexuals to a world apart. Although these critics do not speak with a single voice, they share a palpable fear of gay people. Claiming that every gay person poses a threat to the stability of marriage, opponents of same-sex marriage would deny marital status even to those gay couples who, but for their homosexuality, measure up to every standard of the canons of marriage which these commentators espouse. These critics reserve no place for gay persons at their family tables. Whether consciously or not, they conceive the gay person as a corrupting force whose presence alone is enough to subvert marriage and family by leading the impressionable astray.

And who are these impressionable people? They are ordinary heterosexuals who are perceived as not firmly subscribing to the traditional values the critics of same-sex marriage esteem. The critics view these heterosexuals as people at risk and fear that they, too, pose a danger to the stability of marriage.

How these dual fears play out is saddening. To keep potentially wavering heterosexuals on course, it becomes necessary to stigmatize homosexuals. Look closely at what the critics of gay marriage are saying: The love that gay people have for each other is not as strong as ours; gay people are not suited for long-term committed relationships like we are; gay relationships hurt us because they bring with them disease. The underlying message is clear: "You don't want to be associated with them!" The message is ugly, base, selfish, and frightening. These critics attempt to defend marriage by dehumanizing another class of human beings; in so doing, they defile marriage, that most *human* and *humane* of institutions.<sup>110</sup>

Same-sex marriage eventually will receive legal recognition because people recognize good when they see it. As more and more gay people take their rightful places at the family table and enter into marital relationships, the good that flows from these marriages will benefit the individuals, their families, and society. The legalization of gay marriage will flow, in turn, from the realization of those benefits and the recognition by the people who are touched by them that homosexual

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110. See Sharon Underwood, editorial, VALLEY NEWS (White River Junction, Vt./Hanover, N.H.), Apr. 30, 2000 (in which the mother of a gay son castigates critics of Vermont's domestic partnership law for talking about "protecting families and children from the homosexual menace, while [they themselves] tear apart families and drive [homosexual] children to despair").

human beings and heterosexual human beings are, indeed, all in the family.