

Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage

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I. INTRODUCTION

As the debate about marriage equality¹ has made its way through the courts, most of the discussion and analysis has focused on rights; specifically, whether denying same-sex couples entry into the institution of marriage violates constitutional guarantees of equal protection and

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1. There is currently a debate concerning the best term for describing the drive towards marriage rights for same-sex couples. It has been suggested that referring to the right as one of “same-sex marriage” implies that such marriages are somehow different from other marriages, so that the term “marriage equality” better captures the essence of the struggle, and carries a certain rhetorical strength (who can argue with equality?). One problem with “marriage equality” is that some readers might be unfamiliar with the term, which, on its face, does not convey that the question concerns the rights of same-sex couples. In this Article, I split the difference, using “same-sex marriage” where, as in the title, I believe it to be necessary to convey the subject under discussion, and otherwise using the term “marriage equality.”

due process.² Given the proper role of courts, this approach is of course appropriate. In the legislative arena, too, GLBT³ activists have often emphasized the denial of equality that lack of access to marriage surely creates.⁴ On the other side, opponents of same-sex marriage make Herculean efforts to avoid rights-talk entirely.⁵

Their avoidance is understandable. For advocates of marriage equality, the rights-based approach has rhetorical power, because the national commitment to formal equality, while often elusive, has a central place in our self-definition. This commitment is evident in other areas of law and policy affecting the GLBT community. For example, consistent and substantial majorities of people have come to support legislation that protects the gay, lesbian, and bisexual (but only sometimes the transgendered) community against discrimination in the workplace and in regard to other important rights and protections.⁶

Formal equality arguments are limited by their own logic, though. Consider the otherwise inexplicable gulf between public support for civil unions—which carry the same rights as marriage but withhold the title⁷—and the opposition to same-sex marriage.⁸ Talk to reasonable

2. Other arguments have been tried, thus far without much traction. One spectacularly unsuccessful example is the effort to read a state's marriage laws as permitting same-sex couples to marry, absent a specific prohibition against such marriages. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952-53 (Mass. 2003); Hernandez v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006). Another, more powerful argument that has similarly failed to gain any purchase in the judicial system is that denying marriage rights to same-sex couples constitutes an impermissible infringement on free speech, given that entering into marriage carries a powerfully expressive message. *See, e.g.,* David B. Cruz, *Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928 (2001).

3. This is the commonly used abbreviation for gay, lesbian, bisexual, and transgendered, so I use it from time to time in this Article. But the issues are in fact quite different for the transgendered community, for reasons I do not address here.

4. *See, e.g.,* *Testimony in Support of Marriage Equality: Hearing on S.B. No. 963 Before the Judiciary Comm.*, 2005 Leg. Sess. (Conn. 2005) (statement of Anne Stanback, President, Love Makes a Family).

5. In other cases involving the rights of the GLBT community, oppositionists invoke the cant of "special rights." This assertion is more viscerally understood in areas such as employment protection and hate crimes laws, where recognition of current and historical discrimination leads to singling out certain classes of people for needed protection. Thus, the more common effort in opposing marriage equality is to deflect attention from the denial of basic rights by arguing that same-sex couples are "really" seeking a redefinition of marriage.

6. *See* Gallup Poll, May 10-13, 2007, <http://www.pollingreport.com/civil.htm> (last visited Sept. 8, 2007). This site contains many polls, among them a Gallup Poll conducted in May of 2007 showing that Americans are more willing to allow equal rights benefits to the GLBT community in the workplace (89% support) than in marriage (46% support). Various other polls at this site also make clear that strong majorities favor hate crime protection for GLBT people, as well as allowing gays to serve openly in the military. *Id.*

7. In the United States, at least three distinct entities have arisen as alternatives to marriage: domestic partnerships, reciprocal beneficiaries, and civil unions. The civil union,

people about the rights of GLBT people and expect their understanding and agreement. But use the word “marriage” and other images and associations flood in—some religious and some traditional. These unspecified objections are ill-articulated but carry a meaning for many people—gay and straight alike—that moves the discussion away from rights. Once that step is made, the results become messy and hard to predict.

The gulf between support for civil unions and marriage equality is enough to show that talk of rights is insufficient.⁹ Political and legal realities buttress the point. For example, as of this writing the two Democratic candidates for President in 2008 support civil unions, but not full marriage equality.¹⁰ This difference has not gone unnoticed by legal scholars, some of whom have made laudable efforts to move beyond a solely rights-based analysis.¹¹ Most often, these forays have taken the form of morality-based arguments. Those opposing marriage equality argue (often either explicitly or implicitly from religious premises) that such marriages (and the conduct of those in them) are simply wrong.¹² Those supporting them make the more persuasive case that marriages, including those by two people of the same-sex, serve an important unitive function, and that marriage is an important part of identity and self-definition.¹³

This Article contends that these disputes about rights and morality have downplayed or omitted another vital approach to the question of

currently available in Connecticut, Vermont, New Jersey, and most recently New Hampshire, has come to mean “marriage by another name.” In other words, it confers all of marriage’s benefits, but withholds the approbation of the title itself. See CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-28(d) (West 2007); VT. STAT. ANN. tit. 15, § 1204(a) (2002). New Hampshire legalized civil unions as of January 1, 2008. See Act of June 4, 2007, ch. 58, 2007 N.H. Laws 457-A. Domestic partnerships and reciprocal beneficiary relationships (the latter available only in Hawaii) typically confer some subset of marriage rights, but their content varies, and they may be granted by either states or localities. See HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2005). California’s domestic partnership statute most closely approximates the full package of rights more commonly associated with civil unions, but requires at the time of filing that the would-be domestic partners have a common residence, even though one or both may also have additional residences. See CAL. FAM. CODE §§ 297(b)(1), (c) (West 2007).

8. See, e.g., L.A. Times/Bloomberg Poll, Oct. 19-22, 2007, www.pollingreport.com/civil.htm (indicating that a majority favor at least civil unions (adding marriage and civil unions for a total of 56% support) but that only 30% favor full marriage equality).

9. *Id.*

10. Democratic Hopefuls Pressed on Gay Issues at Forum, Aug. 10, 2007, <http://www.cnn.com/2007/POLITICS/08/10/gay.forum/index.html>.

11. See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1881-82 (1997).

12. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1065-68 (1994).

13. See, e.g., Ball, *supra* note 11, at 1936-38.

marriage equality. In short, marriage serves vital public health and policy purposes, and such purposes would be well served by allowing same-sex couples access to the institution.

At times, those opposing marriage equality have ventured into this territory. Their argument often proceeds somewhat as follows: Marriage is and has been a vital and useful social institution, but today it is suffering a decline, both in numbers and in society's view of its value. There are a host of reasons for this decline, including no-fault divorce, increased numbers of people not wanting children (and the role of birth control in making that goal more attainable), and the changing role of women. Concededly, gay people haven't caused any of this decline, inasmuch as one cannot be held responsible for problems with an institution to which one is denied access. But, this argument continues, society should be trying to rebuild that institution, not facilitating its demise by fundamentally changing its definition.¹⁴ Allowing gays to marry will signal that the institution is not worth entering into, and, one is invited to infer, flight from it will accelerate.¹⁵

In most cases, this argument is not made by states trying to justify laws to courts, but by commentators and amici. In *Goodridge v. Department of Public Health*, for example, amici said that allowing same-sex couples to marry would "trivialize" marriage,¹⁶ presumably making it less attractive for heterosexual couples.

14. Brief for Marriage Law Project et al. as Amici Curiae Supporting Defendants—Appellees, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

The implicit philosophical course charted by Plaintiffs that is evident from their proposals gives the Commonwealth legitimate ground to raise the concern it has over the potential that Plaintiffs' proposal would lead to inclusion of incestuous and polygamous unions in the proposed brave new world of marriage. If the hallowed and venerable institution of marriage is now susceptible to reformulation by judicial officers, what is to keep it from even further innovation, beyond Plaintiffs' specific request? Once our inherited institutions and moral restraints are consigned to the ash heap, all the fences are gone. The policy arguments and legal analysis presented by Plaintiffs in this action would, without a scintilla of modification, serve the purposes of all manner of the perversely creative.

15. For example, one amicus brief states:

Changing the essential nature of the institution of marriage by allowing same-sex individuals to marry would sow deep seated confusion about these codes which provide order to our lives and those of our children, especially in the realm of marriage and personal relationship, and which are in large measure the creators of responsible and productive members of society.

Brief for Joseph Ureneck as Amicus Curiae Supporting Appellee, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860).

16. *Goodridge*, 798 N.E.2d at 965.

Some who take this position cast the issue as a choice between what is good for gay people and what is good for society as a whole. In sum, the assertion is this: “I have nothing against gays or even their relationships, but we should do what’s best for society, not just for them. And what’s best for society is to exclude them from marriage.”¹⁷

This assertion needs to be countered, and to some extent it has been. One way of doing so has been through analysis of demographic data from European nations that have allowed increasing rights to same-sex couples, lately leading to marriage in a handful of these nations.¹⁸ As was recently admitted by a conservative commentator reviewing a book on the issue, these analyses show no causal connection between the legal recognition of same-sex marriage and the decline of marriage rates in those countries.¹⁹

These efforts at analyzing the data have powerfully countered the gay marriage will “destroy the institution” assertion, and this Article contains a discussion of the point.²⁰ But my central mission is to take the public policy argument in another direction, by emphasizing the public health benefits of marriage. These benefits, I argue, would redound to the benefit of gay people, their children, and the larger society.

Part II provides a brief overview of public health, and discusses the state’s role in furthering it. This background discussion is followed by a consideration of the relationship between public health and the legal and social institution of marriage.

Part III then analyzes the decision by the Massachusetts Supreme Judicial Court in *Goodridge*, particularly in reference to the court’s lonely discussion of the public health and welfare benefits of marriage. The court begins the argument that extending marriage to same-sex couples would benefit not only those couples but the broader society, but does not develop it fully. Nonetheless, the decision provides a useful springboard for further consideration of these issues by other courts, and by legislators. Part III also mines other recent decisions on marriage equality for discussions of public health and policy, but finds very little

17. Podcast file: Listen to the Controversy over Marriage with Jonathan Rauch and Maggie Gallagher (Aug. 23, 2005), <http://www.uctv.tv/popup.asp?showID=9865> (comments of Maggie Gallagher).

18. See generally WILLIAM N. ESKRIDGE, JR. & DARREN SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006) (examining legal unions and the same-sex marriage debate in Scandinavia). See discussion *infra* Part IV.C.

19. See David Blankenhorn, *Defining Marriage Down Is No Way To Save It*, 12 WKLY. STANDARD, Apr. 2, 2007, <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/451noxve.asp>.

20. See *infra* Part IV.B.

ore. For the most part, judicial treatment of policy centers on the effects of marriage equality on children.²¹ Although this focus is obviously vital, the effects of marriage are not limited to children (who are not even present in many marriages). The dearth of careful consideration of the public dimension of marriage has needlessly ceded important territory to marriage equality opponents, and the time for response is overdue.

This observation about the neglected public health dimension of the marriage debate flows directly into Part IV, which begins with a more systematic consideration of the public health and policy benefits of allowing same-sex couples to marry. Foregrounding this discussion is a summary of the public goods of marriage generally, developed from a well-researched book co-authored by one of the most vocal opponents of marriage equality.²² The analysis then moves to a preliminary consideration of this central question: To what extent would the public health benefits of marriage be realized by marriage equality? Of course, this exercise is in some measure speculative, because same-sex couples have not been able to marry. But by piecing together data from cohabitating same-sex couples and from countries that have begun to allow same-sex unions (not only marriage), and by making reasonable inferences from data about opposite-sex couples, I advance a preliminary case that allowing same-sex couples to marry would materially advance public health, and that (in any event) public policy arguments to the contrary have largely been cast in general, speculative terms. The discussion concludes by circling back to rights and basic notions of fairness, noting the inextricable connection between public goods and policy, on the one side, and rights, on the other.

II. PUBLIC HEALTH AND ITS CONNECTION TO MARRIAGE: PRELIMINARIES

The term “public health” refers to the health (and safety) of the population as a whole—not the health care outcome that a patient and a doctor, for example, are concerned about in a private setting. As stated by the Institute of Medicine, “[p]ublic health is what we, as a society, do

21. See, e.g., *Goodridge*, 798 N.E.2d 941; *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). Another policy point that seems in vogue lately is renewed effort to tie marriage to procreation, by noting that, since opposite-sex couples can procreate “accidentally,” marriage is needed to provide institutional stability for the resulting offspring. See, e.g., *Hernandez*, 855 N.E.2d at 7; *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006). As has been persuasively argued by judges in response, this observation—even to the extent valid—does not provide any grounds for *excluding* from marriage those who are incapable of “accidental” procreation. See, e.g., *Hernandez*, 855 N.E.2d at 30-31 (Kaye, C.J., dissenting).

22. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* (2001).

collectively to assure the conditions for people to be healthy.²³ Thus, traditional public health measures include sanitation, vaccination, quarantine of the infected, regulation of dangerous substances, and the like; and the Institute of Medicine's definition identifies these important measures of population-based health.²⁴ However, as the Institute and others have recognized, today public health has a broad compass, and includes such issues as obesity, domestic violence, and seat belt/motorcycle helmet safety laws.²⁵ Why are these public health issues? Because although the problems just identified are not "infectious" in the limited sense of the term, they affect the general public in regular and predictable ways, so that we can devise public policies and interventions to deal with them, resulting in an overall increase in public health. Seat belts are an obvious example. Their consistent use reliably decreases serious injuries and mortality resulting from traffic accidents. Interventions ranging from public service campaigns encouraging seat belt use to fines for noncompliance have an effect on reducing those injuries and fatalities, thereby leading to better population-wide (i.e., public health) outcomes.²⁶

The state's principal legal authority to regulate public health and welfare is through the police power, which is the state's most general type of authority, limited in its reach only by constitutional safeguards against unwarranted incursions into personal liberty. In *Goodridge*, the Massachusetts Supreme Judicial Court defined the police power as follows:

23. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, DIV. OF HEALTH CARE SERV., INST. OF MED., *THE FUTURE OF PUBLIC HEALTH* 19 (1988) <http://www.nap.edu/openbook/0309038308/html/19.html>.

24. *See id.* at 37-40.

25. *See, e.g., id.* at 19 (stating that public health issues include "enduring problems, such as injuries and chronic illness; and growing challenges, such as the aging of our population"); Ctrs. for Disease Control, *Intimate Partner Violence Prevention, Facts*, <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm> (last visited Sept. 15, 2007); Ctrs. for Disease Control, *Obesity and Overweight: Introduction*, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Sept. 15, 2007).

26. The evidence on the effect of legislation requiring seat belt use on the rate of such use is compelling. *See, e.g.,* Linda Lyons, *Are Teens Buckling Up?*, <http://www.gallup.com/poll/6145/Teens-Buckling-Up.aspx> (last visited Jan. 15, 2008) (documenting seatbelt usage among teenagers in 2002, and noting that the NHTSA found that "click it or ticket" program raised average usage by 9% in May of 2001); Nat'l Highway Traffic Safety Admin., *Safety Belts and Teens: 2003 Report*, <http://www.nhtsa.dot.gov/people/injury/airbags/buassteens03/> (last visited Jan. 15, 2008) (studying teenagers and the effects of education, policies, and enforcement in increasing seatbelt wearing behavior); Nat'l Highway Traffic Safety Admin., *Safety Belt Use in 2003*, <http://www.nhtsa.gov/people/injury/airbags/809646.pdf> (last visited Jan. 2, 2008) (stating that seat belt usage increased in states where people could be pulled over for failure to wear seat belts).

“Police power” . . . [is] . . . the Commonwealth’s . . . lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. . . . [I]t is the Legislature’s power to enact rules to regulate conduct, to the extent that such laws are “necessary to secure the health, safety, good order, comfort, or general welfare of the community.”²⁷

The state’s regulation of marriage is clearly an exercise of this police power, and is manifested in licensure and solemnization requirements for entry, and in providing the means of legal exit.²⁸ Indeed, the state monopolizes these processes, providing no alternative private mechanism through which these actions can be performed. It is easy to understand why government has an interest in regulating exit from marriage, because the legal obligations and benefits that the status confers must be undone clearly and decisively.²⁹ Only in that way can the parties formally end their mutual involvement and declare themselves eligible to enter into a new marriage, if they so desire. But the value of legal process in marital dissolution begs a prior question: Why does the state license marriages in the first place?

A first answer to the question is that the state regulates marriage and who can enter it because of the benefits it confers. As the Massachusetts Supreme Court stated in *Goodridge*:

The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.³⁰ The

27. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (citations omitted) (quoting Opinion of the Justices, 168 N.E.2d 858 (1960)).

28. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 212-18 (3d ed. 2006).

29. Of course, dissolution of marriage is often complex with consequences and entanglements (relating to finances and children) extending well into the future. With the advent of no-fault divorce and the increasing emphasis on dissolution agreements between the parties, the state’s role in many dissolutions is less pervasive. Nonetheless, court approval is still required for the dissolution to take effect. See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). The United States Supreme Court held that the state’s monopolization of the dissolution process requires waiving court costs for those unable to afford them. *Id.* at 383. It is less clear whether the state is also required, at its own expense, to provide indigents with legal counsel for this purpose. Decisions in other areas of substantial state involvement suggest a negative answer to this question. See *United States v. Kras*, 409 U.S. 434, 449-50 (1973) (holding that indigent parties do not enjoy a right to free bankruptcy discharge); *Ortwien v. Schwab*, 410 U.S. 656, 660-61 (1973) (finding that there is no constitutional right to waive filing fees in welfare appeal proceedings). Of course, states may afford more expansive protections under their own constitutional or statutory law. See, e.g., *Sholes v. Sholes*, 760 N.E.2d 156, 157 (Ind. 2001) (holding that Indiana law requires the state to provide counsel for an indigent, lifetime inmate involved in divorce proceedings).

30. *Goodridge*, 798 N.E.2d at 955 (citation omitted).

Legislature has conferred on “each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have.”³¹

The court then cited several cases in which valuable rights and interests were denied to couples who had cohabited but chosen not to marry. In particular, claims for equitable property distribution,³² support payments,³³ and even the right to recover in a loss of consortium claim³⁴ were limited to those who had “accepted the correlative responsibilities of marriage.”³⁵

Insofar as they are conditions of obtaining benefits, marriage licenses are akin to more humdrum grants of state permission, such as a driver’s license. In each case, the “aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications.”³⁶

In the case of a license to drive, the connection between qualification and public health and safety is clear; licenses are issued only to those whose ability to pass written and field tests to provide some measure of confidence that they will navigate the roadways with skill and care.³⁷ Those who choose to drive without licenses deprive the state of the ability to assess their capacity, and unlicensed drivers therefore risk hefty and often justified penalties.³⁸

At first blush, then, it may seem surprising that the requirements for obtaining a marriage license are so simple to satisfy. All adults (and some older minors, depending on the jurisdiction)³⁹ are free to marry anyone of their choice, provided that neither party is already married, that the parties are not too closely related, and that the chosen partner is of legal age. Exclusions of debtors and even prisoners have been deemed

31. *Id.* (quoting *Wilcox v. Trautz*, 693 N.E.2d 141, 147 (Mass. 1998)).

32. *See Collins v. Guggenheim*, 631 N.E.2d 1016, 1017 (Mass. 1994).

33. *See Davis v. Misiano*, 366 N.E.2d 752, 754 (Mass. 1977).

34. *See Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987).

35. *Goodridge*, 798 N.E.2d at 955 (quoting *Feliciano*, 514 N.E.2d at 1096).

36. *Id.* (quoting *Ludec v. Commonwealth*, 657 N.E.2d 755 (1995)).

37. WILLIAM N. ESKRIDGE JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 106 (1996).

38. *See, e.g.*, 21 DEL. CODE ANN. tit. 21, § 2701 (2007) (stating that the penalty for unlicensed driving ranges from \$50 to \$200 for first offences and up to \$500 and six months imprisonment for each subsequent offence); VA. CODE ANN. § 46.2-300 (2007) (driving without a license is a class 2 misdemeanor for the first violation; class 1 misdemeanor for each subsequent violation).

39. The state’s prohibition of marriages involving those under a certain age is an example of the other main legal tool available to the state for furthering the goals of public health—the *parens patriae* power, which protects the interests of minors and incompetent persons. *See* LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 27 (2000).

unconstitutional,⁴⁰ suggesting that low barriers to entry are favored. As one commentator has put it: “[T]he state is not a bit choosy about who can marry.”⁴¹ He might have added that driver’s licenses are harder to obtain.

In the United States, however, citizens (except in Massachusetts) wishing to marry are restricted by one other qualification: they must be of opposite sexes. But why? From the state’s perspective as an issuer of marriage licenses, and given the otherwise permissive view on the right to marry, what justifies this blanket exclusion? Asked another way, *why* does the state grant marriage licenses in the first place? Only by understanding the justification for state-sanctioned support of marriage can restrictions on membership be critically assessed.

By this point it should be clear that our earlier answer to this question—that marriage is licensed because married couples enjoy substantial benefits—was insufficient. The deeper question is why those benefits are restricted to married couples. An institution whose members have such wide privileges, and are subject to such nonnegotiable obligations, needs substantial justification. Thus we come to a discussion of the underlying issue. The state recognizes and licenses marriage because of the contribution that institution is thought to make to the reservoir of public good(s). This point, however, has been insufficiently discussed by courts considering whether to extend the benefits and obligations of marriage to same-sex couples. As the discussion in Part III shows, what little discussion there is of the public good tends to be limited to the welfare of children and the need to regulate procreation between those couples who can have children without third-party intervention, such as surrogacy, in vitro fertilization, or adoption. These points are both weak in their own right, and strangely silent on a host of other benefits of, and reasons for, marriage.

III. MARRIAGE AND PUBLIC HEALTH: THE MISSING ANALYSIS

In a way that other courts have not,⁴² the *Goodridge* court plainly articulated some of the central reasons that societies have long favored

40. See *Turner v. Safley*, 482 U.S. 78, 96, 99-100 (1987) (holding that prisoners retain their constitutional rights to marriage); *Zablocki v. Redhail*, 434 U.S. 374, 375-77 (1978) (finding a Wisconsin statute withholding marriage as punishment for nonpayment of child support an unconstitutional bar to a person’s right to marry).

41. ESKRIDGE, *supra* note 37, at 106.

42. Occasionally, the failure to consider public health and policy has been criticized by judges in dissent. In a New Jersey appellate decision upholding the state’s right to exclude same-sex couples from marriage, Judge Collester’s dissent pointed out that “neither the State nor the majority opinion suggest a reason of health, safety or general welfare to justify a prohibition of

marriage over its less formal counterparts.⁴³ The court began with this general statement: “Marriage is a vital social institution. The exclusive commitment of two individuals to each other . . . brings stability to our society.”⁴⁴ The court later expanded on this insight, noting that “civil marriage enhances the ‘welfare of the community.’ It is a ‘social institution of the highest importance.’ Civil marriage anchors an ordered society by encouraging stable relationships over transient ones.”⁴⁵

Unfortunately, the court did not much develop the ways in which stable relationships bring order to society (although it seems intuitive that they would), but did offer at least one weighty elaboration: “[Marriage] is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.”⁴⁶

Many vital characteristics of marriage are packed into the foregoing statement. First, identifying someone as married relieves the state of many practical difficulties in determining and vindicating all sorts of rights and obligations. The difficulties routinely faced by gay couples in seeking recognition for their relationships in the absence of this state-created status are well known and were recently summarized sympathetically by the Washington State Supreme Court: “[M]any day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples, unlike married couples who automatically have the advantages and rights provided to

[the plaintiff’s] right to marry the person of their choosing.” *Lewis v. Harris*, 875 A.2d 259, 279 (N.J. Super. Ct. App. Div. 2005) (Collester, J.A.D., dissenting), *aff’d in part, modified in part*, 908 A.2d 196 (N.J. 2006).

43. Common law marriage might in a sense be thought of as an exception to this rule, because the state recognizes informal, nonlicensed marriages. See WEISBERG & APPLETON, *supra* note 28, at 223-26. In fact, though, the better argument is that both the historical existence and near-demise of common law marriage attest to the state’s preference for marriage. Given the difficulty of obtaining marriage licenses in far-flung settlements in the early days of our nation’s development, common law marriage was seen as a necessary expedient to provide couples who wished to solemnize their unions, but could not. One might even say that through common law marriage the state, upon the request of either party, sometimes solemnized unions that at least one party did not want recognized, thereby capturing and domesticating otherwise lawless relationships. Now that ceremonial marriages are easily procured, the state’s interest in predictability and stability has led to an erosion of support for common law marriage, with only a minority of states recognizing such unions. *Id.* at 22 (listing states that continue to recognize common law marriage).

44. *Goodridge*, 798 N.E.2d at 948.

45. *Id.* at 954 (quoting *French v. McAnarney*, 195 N.E. 714, 715 (Mass. 1935)).

46. *Id.*

them in . . . laws and policies such as those surrounding medical conditions . . . probate . . . and health insurance.”⁴⁷

If excluding same-sex couples from marriage were independently defensible, such difficulties might be justified. Thus, recognizing that marriage serves an identifying and privileging role still invites this inquiry: What public benefits of marriage might support the preferential treatment afforded it by law? This question should be taken seriously, not sidestepped by the tautological statement that “the State has a compelling interest in regulating and preserving the institution of marriage as that institution has been defined by the State.”⁴⁸

The next part of the above quotation⁴⁹ from *Goodridge* regarding the value to society of having both children and adults supported by private, rather than public sources, is a seed for developing a deeper exploration of the public health and policy benefits of marriage.⁵⁰ In that respect, at least, *Goodridge* advanced the discussion of the public function of marriage in a way that other courts have largely failed to do.⁵¹

Instead, when courts have ventured into this more public dimension of marriage at all, they have ignored the *Goodridge* court’s invitation to consider the full range of public benefits that might flow from marriage equality, and have instead relied on two central justifications for upholding marriage laws that bar same-sex couples. First, they have argued that marriage serves the useful function of encouraging only

47. *Andersen v. King Country*, 138 P.3d 963, 990 (Wash. 2006). The plurality opinion from which this quotation is drawn nonetheless decided that the state could, consistent with its constitution, bar same-sex couples from marrying. The court did suggest that it might have been more sympathetic to the claim that denying the “statutory rights and obligations” incidental to marriage was unconstitutional. *Id.*

48. *Id.* at 1008, ¶ 220 (quoting *State v. Green*, 99 P.3d 820, 836 (Utah 2004)).

49. *See supra* note 46 and accompanying text.

50. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003). It is also true, as the *Goodridge* court noted, that marriage records track important data, but such tracking could be done without conferring the benefits of marriage, and in any event does not independently justify the institution of marriage.

51. Legislators, at least when they are not fulminating in general terms about the “sanctity of marriage,” have at times been more willing to discuss the public health justifications for marriage. For example, during the debate about the federal marriage amendment (which would enshrine into the United States Constitution that marriage would be limited to the union of one man and one woman), Senator Brownback of Kansas stated:

Traditional marriage is a boon to society in a variety of ways Marriage has economic benefits not only for the spouses but for the economy at large. . . . [E]conomists tell us that the uncounted but real value of home activities such as child care, senior care, home carpentry, and food preparation is still almost as large as the “official” economy.

150 CONG. REC. S7928 (daily ed. July 12, 2004). One might respond by asking why such benefits would not also be realized by same-sex couples.

couples who have the potential to procreate without reproductive assistance to raise their resulting offspring together in a state-supported and uniquely privileged institution. The potential for “accidental” procreation is then said to justify state support to manage the consequences.⁵² Second, they have sometimes focused on the potential effects of marriage equality on children, noting (for example) that the data on children raised by same-sex couples are still sufficiently preliminary that a rational legislature could choose to withhold the privileges of marriage at least until further study has been done. Neither of these purported justifications survives scrutiny.

The first argument, even to the extent valid, is simply insufficient. Granting that the regulation of unruly heterosexual procreation is a justification for allowing opposite-sex couples to marry, it hardly follows that it is *the* justification for doing so.⁵³ And once one sees that marriage has many purposes, the unanswered question raised by dissenting judges in both *Andersen v. King County* (Washington) and *Hernandez v. Robles* (New York) becomes decisive: How can this one highlighted purpose of marriage justify *excluding* those to whom it does not apply?⁵⁴ Although a comprehensive examination of the public goods of marriage is deferred until Part IV, it bears noting here that the state’s interest in having children raised in stable homes is neither defined nor limited by biological parentage.⁵⁵

This point has sometimes been conceded, if inadvertently, by judges defending the exclusion of same-sex couples from marriage. In *Goodridge*, Judge Cordy’s dissent foretold the later majority decisions in *Andersen* and *Robles* by noting that “an orderly society requires some mechanism [marriage] for coping with the fact that sexual intercourse

52. This assertion was made by both the New York Court of Appeals and the Washington Supreme Court within three weeks of each other. See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (decided July 6, 2006); *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006) (decided July 26, 2006). A more recent decision by Maryland’s highest court did not employ this argument, however. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007). Instead, the court accepted the more frequent argument that the state could limit marriage to only those couples capable of unassisted reproduction. *Id.* at 633-34.

53. This has not been the only effort to announce that a particular purpose of marriage is the only purpose. For a discussion of a different “essence” (the Victorian “gathering-in of a woman’s sexuality”) and my response to it, see John G. Culhane, *The Heterosexual Agenda*, 13 WIDENER L.J. 759, 789-92 (2004).

54. See *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting); *Andersen*, 138 P.3d at 1018-19 (Fairhurst, J., dissenting).

55. Cf. *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (“Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”).

commonly results in pregnancy and childbirth.”⁵⁶ So, is marriage all about the biological duality between men and women that sometimes results in children? No. As Cordy himself noted, the presumption of paternity follows marriage, not biology. To be explicit, marriage trumps biology: “Modern DNA testing may reveal actual paternity, but it establishes *only a genetic relationship between father and child*.”⁵⁷ Thus, having first insisted on the centrality of intercourse and procreation, Judge Cordy then stated that marriage and procreation might, in fact, be disconnected, even between opposite-sex couples capable of procreating without third-party involvement.⁵⁸

Once this disconnection is brought to the fore, we are left to decide from a policy perspective how to allocate rights and responsibilities from a functional, rather than a biological, point of view.⁵⁹ In the case of a same-sex or opposite-sex couple that enlists the assistance of a third party for procreative purposes, marriage would for them cement their rights and responsibilities *over* those of the biological parent who is often, in all but that physical sense, a stranger to the family.⁶⁰ Adoption, whether second-parent or joint, and whether by an opposite-sex or a same-sex couple, makes a related case: marriage brings stability and order to the family of choice, often in fact by excluding the biological parent(s).⁶¹

56. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).

57. *Id.* at 996 n.16 (emphasis added).

58. It does not appear that Judge Cordy recognized the inconsistency of the points he was making. Soon after acknowledging that marriage and not biological parenting controlled, he stated that, “without the institution of marriage . . . heterosexual intercourse [and] procreation . . . are largely disconnected processes.” *Id.* at 996. But in the example to which he adverted to of a biological father who is not the husband of the mother, this disconnection is a reality to the extent that the law recognizes the male spouse—not the biological father—as the legal father. *Id.*

59. See Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Parenthood*, 38 ARIZ. ST. L.J. 809 (2006).

60. Instructive in this regard is the New Jersey Supreme Court’s discussion of the presumption that would likely attach in the case of same-sex married couples, a presumption emphasizing practicality over biology: “It appears that the presumption [in the case of same-sex couples] would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.” *Lewis v. Harris*, 908 A.2d 196, 216 n.18 (N.J. Super. Ct. App. Div. 2005).

61. One especially bizarre justification for limiting marriage to opposite-sex couples is that same-sex couples do not need the same legal protections for themselves and their children, because creating a family in these cases requires a great deal more planning and thought. See *Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005). This statement could only have been written by a court with no acquaintance with reality. Consider a same-sex couple, the sister of one of whom is unable to raise her own biological child. This couple might well feel a certain pressure to adopt that child, yet lack both the resources and the ability to plan that the court

The issue of adoption brings us to the second public policy argument courts have raised: Same-sex couples can rationally be excluded from marriage because children might not do as well in households headed up by same-sex couples as they do in stable, two-parent homes with a mother and a father. This argument has been treated and refuted elsewhere,⁶² so I do not dwell extensively on it here. Because the point is central to any consideration of the public benefits of marriage, however, and because courts have at times written as though marriage is *only* about children, a brief response is in order.

The New York Court of Appeals' presentation of the belief that "children need mothers and fathers"⁶³ can serve as the one in need of answer. The majority begins by noting that the legislature could rationally have concluded that it is better for children to grow up with both a mother and a father.⁶⁴ The court then states that social science studies to the contrary do not compel the contrary conclusion, even if their methodology is sound, and even though they have detected no relevant differences between children raised by opposite-sex, as opposed to same-sex, couples.⁶⁵ This conclusion is based on what the court considers the "rather limited observation" of these studies, and its view that "the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home."⁶⁶ Although other judges have taken a more skeptical view of the positive social science literature,⁶⁷ the majority's opinion on that score reflects the consensus view.

The New York court never specifies what would constitute sufficient evidence to overcome the "common sense" proposition, but there are deeper difficulties in its analysis. Most obvious of these is that in New York State—as well as in Washington, New Jersey, Vermont, and

imagines is routine. Yet it will find itself taking on the same (assume unwanted) burden as an opposite-sex couple, just without any of the state recognition or benefits.

62. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998).

63. There is a substantial body of literature in support of the proposition that children do best in stable, two-parent homes, and in these studies, those homes have typically been headed by a mother and a father. But many of these studies compare such homes with single-parent homes, *not* with two-parent homes headed by a same-sex couple. As I have pointed out elsewhere, this omission is often not acknowledged. Culhane, *supra* note 53, at 785-86. The issue is further discussed *infra* Part IV.

64. See *Hernandez*, 855 N.E.2d at 7.

65. See *id.* at 8.

66. *Id.*

67. See, e.g., *Andersen v. King County*, 138 P.3d 963, 1005-07 (Wash. 2006) (Alexander, C.J., concurring).

other states that have considered the marriage equality issue—same-sex couples are permitted to adopt children on the same basis as opposite-sex couples.⁶⁸ Unless one assumes that the state is simply not concerned about the welfare of children in adoptive homes (a point that in any event the government would not concede), it is difficult to justify allowing children to be raised by same-sex couples but then withholding from these children’s parents the right to have their relationship recognized. This anomaly has been criticized by courts that have required legal recognition of same-sex couples,⁶⁹ as well as by dissenting judges in states that have denied such recognition.⁷⁰ If anything, the European model would seem to commend itself to courts concerned about children—that is, recognize the legal status of same-sex couples, but withhold for a time the right to adopt or otherwise raise children.⁷¹ Moreover,

[m]arriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage Indeed, the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship.⁷²

What, then, are the public benefits of marriage for those adults who enter into it, and would those societal goods be furthered by admitting same-sex couples into this institution? To that question this Article now turns.

68. See N.J. STAT. ANN. 9:3-37 (2007) (providing that New Jersey’s adoption statute is liberally construed and does not prohibit joint adoption by unmarried persons); N.Y. COMP. CODES R. & REGS. 421.16(h)(2) (2007) (stating that applicants to adopt in New York State “shall not be rejected solely on the ground of homosexuality”); VT. STAT. ANN. tit. 15A, § 1-102 (2007) (providing that in Vermont, right to adopt exists regardless of sex of adopting parents); WASH. REV. CODE ANN. § 26.33.140 (West 2007) (stating that adoption in the state of Washington is not limited to married couples).

69. See *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (requiring legislature to allow same-sex couples to marry, or to enter into unions with identical rights); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

70. See, e.g., *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting); *Andersen*, 138 P.3d at 1018-19 (Fairhurst, J., dissenting).

71. See generally International Lesbian and Gay Association, *Same-Sex Marriage and Partnership: Country by Country*, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country (last visited Sept. 22, 2007). By now, several European courts have overcome their initial reluctance to allow same-sex couples to adopt, recognizing them as married with all of the legal incidents thereto, including the right to adopt. The Netherlands provides one example. See Parliament of the Netherlands, Act of 21 December 2000 Amending Book 1 of the Civil Code, concerning the opening up of marriage for same sex (Act on the Opening up of Marriage, Stb. 2001, No.9, (Bill 22672) (Dec. 21, 2000)).

72. *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting).

IV. THE MUTUALLY REINFORCING PUBLIC AND PRIVATE BENEFITS OF MARRIAGE

Here is what the authors of an influential book on marriage had to say in support of it:

[M]arriage means the purely voluntary option to raise your commitment to each other out of the purely private emotional realm Getting married doesn't merely certify a preexisting love relationship. Marriage actually changes people's goals and behavior Marriage creates not just a new unit of consumption but a new unit of production: Getting and staying married produces goods for the partners, for their children, and for the rest of society.⁷³

The discussion that follows draws heavily on the research summarized and explained by these two authors. I have chosen this book as the basis for looking into the public benefits of marriage for two reasons. First, the work is clear, accessible, and an able summary of the social science research on the benefits of marriage.⁷⁴ Second, one of the two authors, Maggie Gallagher, is one of the most vocal opponents of marriage equality. It is therefore particularly apt to draw on her work in analyzing the public health and benefits side of marriages—opposite-sex, or same-sex.

This Part is divided into two subparts. The first summarizes the case that marriage is good for those who enter into it, and that it is superior to cohabitation. Insofar as the benefits to married couples hold across the population, their public health benefit is also evident. The next section undertakes a preliminary examination of whether these benefits would be realized, at least to an extent, by same-sex couples if permitted to marry.

73. WAITE & GALLAGHER, *supra* note 22, at 17.

74. An important caveat, repeated with varying emphasis throughout this Part of the Article, is that the author's contention that marriage is intrinsically beneficial is subject to serious challenge. One central problem is that marriage is compared to cohabitation and "non marriage" more generally in a society that has the marriage option. Would the benefits be revealed as illusory (to at least some extent) if marriage were no longer recognized? That is, would society continue to look much the way it now does? The question is impossible to answer unless marriage were in fact abolished, but this prospect is highly unlikely, at least in the near future. For an able discussion of this point, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 159-67 (2003). It is not the aim of the present Article to resolve this question of social science. Rather, this Article summarizes the "pro-marriage" side of the argument, and then questions the extent to which the benefits of marriage (to the extent realized) would likely extend to same-sex couples entering into marriage.

A. *The Argument for Marriage*

Primary among the benefits claimed for marriage are those relating to health. Married people live longer, and have better health outcomes than single people.⁷⁵ Mortality rates for unmarried people are about 50% higher among women and 250% higher among men than for married people.⁷⁶ For example, studies of cancer patients indicate that married patients have higher survival rates, smaller hospital bills, shorter hospital stays, and a lower likelihood of being discharged into nursing care than unmarried patients.⁷⁷ Waite and Gallagher suggest that the most crucial way marriage affects health—particularly for men—is by inspiring changes which reduce causes of death that can have a behavioral component, such as cirrhosis or suicide.⁷⁸ For women, the health benefit appears to be tied to money, with marriage providing access to private health insurance and better health care, as well as improved housing, which may contribute to a sense of security about one's health.⁷⁹

These health benefits of marriage extend throughout life. Married men and women are more likely to report that their health is “excellent” or “very good” at retirement age, and less likely to experience chronic illness or long-term disability.⁸⁰ Elderly married women are less likely to become disabled, and elderly married people of both genders are far less likely to enter nursing homes than nonmarried people.⁸¹

Mental health measures also favor the married. Marriage is correlated with lower levels of depression, anxiety, and other forms of mental health distress, and with higher rates of self-reported happiness.⁸²

75. See WAITE & GALLAGHER, *supra* note 22, at 50 (citing Lee A. Lillard & Linda J. Waite, *'Til Death Do Us Part: Marital Disruption and Mortality*, 100 AM. J. SOCIOLOGY 1131 (1995)).

76. See *id.* at 47 (citing Catherine E. Ross, John Mirowsky & Karen Goldsteen, *The Impact of the Family on Health: The Decade in Review*, 52 J. MARRIAGE & FAM. 1059, 1061 (1990)).

77. *Id.* at 48-49 (citing Howard S. Gordon & Gary E. Rosenthal, *Impact of Marital Status on Outcomes in Hospitalized Patients: Evidence from an Academic Medical Center*, 155 ARCHIVES INTERNAL MED. 2465 (1995)).

78. See *id.* at 52.

79. See *id.* at 60.

80. See *id.* at 49 (citing Karen Glaser & Emily Grundy, *Marital Status and Long-Term Illness in Great Britain*, 59 J. MARRIAGE & FAM. 156 (1997)). These findings are also based on tabulations done by Waite from the Health and Retirement Survey, Wave 11. Self-reporting is notoriously unreliable, however.

81. See *id.* at 60-61 n.51 (citing article in MODELS OF NONCOMMUNICABLE DISEASES: HEALTH STATUS AND HEALTH SERVICE REQUIREMENTS (W. Morgenstern et al. eds., 1992)).

82. See *id.* at 67, 69-71 (citing James A. Davis, *New Money, an Old Man/Lady and 'Two's Company': Subjective Welfare in the NORC General Social Surveys, 1972-1982*, 15 SOC. INDICATORS RESEARCH 319 (1984); Allan V. Horwitz et al., *Becoming Married and Mental Health: A Longitudinal Study of a Cohort of Young Adults*, 58 J. MARRIAGE & FAM. 895 (1996);

The role spouses play as emotional support in acute or chronic illnesses also seems to improve recovery rates and reduce depression.⁸³ Waite and Gallagher also posit that the mental health benefits of marriage may in part relate to the ability of spouses to engage in mutually beneficial emotional specialization, much as spouses will specialize in household tasks and duties.⁸⁴

The public benefits of such advantages are clear. Those who enjoy better physical and mental health are likelier to impose less of a draw on public sources of support. They would also be relatively good risks from an insurance premium perspective, and would thereby contribute to lower overall rates.

Marriage also produces economic benefits to the couple, although not equally to men and women. According to Waite and Gallagher, married men's incomes are 10% to 32% greater than those of their single counterparts, and the gap widens the longer they remain married.⁸⁵ Even accounting for selection (the likelihood that men with higher earnings are more likely to get married), the effect holds: after marriage, husbands' earnings increase at higher rates than those of single men, and the earning advantage appears correlated to the strength of the marital relationship.⁸⁶ Married women receive a smaller earnings boost, but only if they are childless.⁸⁷ White married women without children earn about

Nadine F. Marks & James David Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults: Longitudinal Effects on Psychological Well-Being*, 19 J. FAM. ISSUES 652 (1998)).

83. See WAITE & GALLAGHER, *supra* note 22, at 56 (citing Ross et al., *supra* note 76, at 1064; Debra Umberson, *Gender, Marital Status and the Social Control of Health Behavior*, 34 SOC. SCI. & MED. 907 (1992)).

Some of these health benefits are likely attributable to a selection process whereby individuals who are chronically ill, who engage in risky behaviors, or who are unhappy have a difficult time finding a spouse or remaining married. See *id.* at 51-52, 68. However, Waite and Gallagher argue that selection alone does not explain the health effects of marriage. Married people experience lower mortality rates even when married partners' initial health status is taken into account, *id.* at 52, and increases in mental health during marriage are also seen even when initial status is considered. *Id.* at 70.

84. See *id.* at 68.

85. See *id.* at 99-100.

86. See *id.* at 101 (citing Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 J. HUM. RESOURCES 282, 293-94 (1991)); Robin L. Bartlett & Charles Callahan, III, *Wage Determination and Marital Status: Another Look*, 23 INDUS. RELATIONS 90, 90-96 (1984).

87. WAITE & GALLAGHER, *supra* note 22, at 105 (citing Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 495-96 (1995)). However, women with children—whether married or not—earn less and work less outside the home than childless women. *Id.* at 107. Note, however, that Waite's own tabulations are based on the somewhat outdated National Survey of Families and Households, 1987-1988, which is available at <http://www.ssc.wisc.edu/nsfh>.

4% more than single women, while black married women without children earn 10% more.⁸⁸

The public welfare component of these economic advantages quickly becomes evident. For women, marriage plays an especially significant role in both preventing and leaving homelessness and poverty.⁸⁹ The federal poverty guidelines recognize the advantage married couples have in avoiding poverty, with a married couple sharing a household requiring only 30% more income than a single person to overcome the poverty threshold.⁹⁰

Not only do married couples earn more income than their single counterparts, but there is a wealth advantage, as well. Young married and remarried families possess average higher accumulated net worths than single mothers or cohabitating families, but remarried families had similar net worths as single fathers.⁹¹ Waite and Gallagher contend that marriage also “institutionalizes” social obligations—between partners, to children, and to parents and in-laws—making married people more likely to be financially responsible and to save rather than spend their extra wealth.⁹² The expansion of the extended family created by a marriage also brings greater wealth to married couples, who may receive financial transfers from kin.⁹³ Accordingly, the difference in worth between married and unmarried people increases over time, with the average married couple having about \$410,000 net worth at the brink of retirement, compared to \$167,000 for never-married individuals.⁹⁴ Waite and Gallagher also point out that because most spouses leave each other their property—along with their Social Security and pension benefits—marriage serves as a kind of insurance policy to protect the surviving spouse.⁹⁵ One might also note here that families with greater overall

88. *Id.*

89. *See id.* at 121-22 (citing Mary Jo Bane & David T. Ellwood, *Slipping into and out of Poverty: The Dynamics of Spells*, 21 J. HUM. RESOURCES 1 (1986)).

90. *Id.* at 122.

91. *See id.* at 111 (citing Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269 (1996)).

92. *See id.* at 116-17.

93. *See id.* at 117-18 (citing Hao, *supra* note 91, at 282 tbl. 2). This transfer of assets within extended families seems especially open to the criticism that the supposed advantages of marriage might be illusory. If the state stopped sanctioning marriage, it seems quite likely that many of the same transfers that now occur would continue.

94. *Id.* at 112 (citing *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies* (Shoshana A. Grossbard-Shechtman ed., 2003)).

95. *See id.* at 115-16.

wealth are less likely to rely on government largesse, especially through the Medicaid and Medicare programs.⁹⁶

Waite and Gallagher also describe the intergenerational benefits of marriage, contending that concrete and less tangible advantages extend to married couples' children.⁹⁷ Parents who marry and remain married provide their children with a higher standard of living through the marriage wealth benefit described above. Marriage is also associated with lower infant mortality rates and with lower parent-reported rates of poor health for children than in single female-headed households, even after accounting for income and education disparities.⁹⁸ Children of married parents also receive more education after adjustments for income and family educational level,⁹⁹ and are less than half as likely to drop out of high school than children from single-parent homes.¹⁰⁰ Children in single-parent and remarried households are more likely to commit delinquent acts as teenagers.¹⁰¹ Children in single-parent and remarried homes are also more likely than those whose parents are married to become victims of domestic violence.¹⁰² On the less quantifiable side, the presence of two married parents allows more time for parental bonding and supervision, and greater exposure to the outside community (or greater "social capital").¹⁰³

The above-mentioned benefits to children seem likely to be realized by same-sex couples if allowed to marry, at least to the extent that they are based on the committed and legally sanctioned relationship that marriage itself creates.¹⁰⁴ Are they also available to couples that

96. See generally Henry J. Kaiser Family Found. Kaiser Comm'n on Medicaid Facts, The Medicaid Program at a Glance, <http://www.kff.org/medicaid/upload/7235-02.pdf> (last visited Jan. 23, 2008). See generally Henry J. Kaiser Family Foundation Medicare Fact Sheet, The Medicaid Program at a Glance, <http://www.kff.org/medicare/upload/1066-10.pdf> (last visited Jan. 21, 2008).

97. See WAITE & GALLAGHER, *supra* note 22, at 24.

98. See *id.* at 130-31 (citing Ronald Angel & Jacqueline Lowe Worobey, *Single Motherhood and Children's Health*, 29 J. HEALTH & SOC. BEHAV. 38 (1988); Trude Bennett et al., *Maternal Marital Status as a Risk Factor for Infant Mortality*, 26 FAM. PLAN. PERSPS. 252 (1994)). However, some studies have found lower rates of infant mortality in infants born to unmarried mothers younger than age eighteen compared to similar married mothers. See *id.* at 252.

99. See *id.* at 133 (citing SARAH MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* 41-48 (1994)).

100. See *id.*

101. See *id.* at 134-35 (citing Ross L. Matsueda & Karen Heimer, *Race, Family Structure, and Delinquency: A Test of Differential Association and Social Control Theories*, 52 AM. SOCIOLOGICAL REV. 826 (1987)).

102. See *id.* at 135.

103. *Id.* at 124-30. This argument is especially speculative, however.

104. Most of the discussion about the effect of marriage on same-sex couples is deferred until Part IV.B, but the point seemed worth noting in this context. Whether the more quantifiable

cohabit without marriage? Waite and Gallagher point to studies indicating that a majority of U.S. cohabiting couples either marry each other or split up within two years.¹⁰⁵ They claim that many who enter into cohabitation are drawn to “the idea of relatively easy exit with no well-defined responsibilities.”¹⁰⁶ They also suggest that the major health benefits found in married couples do not arise between cohabiting partners.¹⁰⁷ Cohabitation also appeared to increase rather than decrease risky, health-threatening behaviors, although this conclusion is open to the objection that Waite and Gallagher rely upon studies of cohabiting young people in drawing this conclusion.¹⁰⁸

Waite and Gallagher contend that decreased emotional investment in cohabitation explains the lower rates of fidelity,¹⁰⁹ and lower willingness to pool financial resources,¹¹⁰ to monitor spending with an eye towards a shared economic future, or to allow each other to specialize in particular tasks or areas as married couples do.¹¹¹ By contrast, married couples, who are presumably less likely to maintain financial independence, have higher household incomes and are less likely to suffer some forms of economic hardship.¹¹² Moreover, Waite and Gallagher suggest that despite experiencing some short-term advantages, cohabitators may miss or reduce the long-term benefits of marriage later on. Couples who cohabit with each other prior to marrying experience higher rates of divorce, and cohabitation appears to strengthen negative attitudes towards marriage over time.¹¹³

Whether same-sex couples operate under the same disadvantages as unmarried opposite-sex couples is to an extent unknown. It is reasonable to assume that the effects are different because the circumstances are so

economic benefits would be realized by same-sex couples is more difficult to assess. *See infra* Part IV.B.

105. *See* WAITE & GALLAGHER, *supra* note 22, at 38 (citing Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615 (1989)).

106. *Id.*

107. *See id.* at 52.

108. *See id.* at 63-64 (citing Jerald G. Bachman et al., *Smoking, Drinking, and Drug Use in Young Adulthood: The Impacts of New Freedoms and New Responsibilities* (1997)).

109. *See id.* at 91 nn.3, 21.

110. *See id.* at 39 (citing Marin Clarkberg, Ross M. Stolzenberg & Linda J. Waite, *Attitudes, Values, and Entrance into Cohabitational Versus Marital Unions*, 74 SOC. FORCES 609 (1995) (citing PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* (1983))).

111. *See id.* at 39-40.

112. *See id.* at 41.

113. *See id.* at 46 (citing Lee A. Lillard, Michael J. Brien & Linda J. Waite, *Premarital Cohabitation and Subsequent Marital Dissolution: A Matter of Self-Selection?*, 32 DEMOGRAPHY 437 (1995); Elizabeth Thomson & Ugo Colella, *Cohabitation and Marital Stability: Quality or Commitment?*, 54 J. MARRIAGE & FAM. 259 (1992)).

different. For opposite-sex couples, cohabitation is a decision taken in defiance of still-powerful societal norms encouraging them to marry and “settle down.” Thus, it is hardly surprising that these same couples might also defy more traditional expectations of marriage, such as pooling finances and caring for each other into old age.¹¹⁴ For same-sex couples outside of Massachusetts, marriage is not an option. Given the lengths to which many same-sex couples have gone to cement their relationships, ranging from “marriage-lite” alternatives such as civil unions, to religious or secular commitment ceremonies, to bringing children into their families, to executing legal documents in favor of each other, to mingling their assets, it is fair to say that comparing same-sex couples, who cannot marry, to opposite-sex cohabitating couples, who choose not to marry, is of limited utility. Yet it is reasonable to assume that marriage itself will provide powerful social and economic incentives for many same-sex couples to act in the mutually advantageous ways that Waite and Gallagher describe. It will also create a certain pressure for gay and lesbian people to marry; whether this is a good thing depends on one’s comfort with assimilation to a contestable status quo.¹¹⁵ For the present project, which is to explore justifications for extending the right to marry to same-sex couples, I can remain comfortably agnostic on this issue.

B. Marriage Equality and Its Effects on Couples, Children, and Society

Waite and Gallagher draw no conclusions as to whether the legalization of marriage for same-sex couples would give rise to the same benefits enjoyed by heterosexual marriage partners.¹¹⁶ To the extent that conformity to traditional gender roles contributes to the benefits of heterosexual marriage, Gallagher and Waite believe it is uncertain whether and to what extent the benefits of heterosexual marriage would

114. The statement in the text should not be read to suggest a view that cohabitators are selfish or heartless. Of course many of them have long-term, committed relationships, and may simply oppose marriage on philosophical or practical grounds.

115. Compare Jonathan Rauch, *For Better or Worse*, NEW REPUBLIC, May 6, 1996, at 23 (arguing that marriage, including gay marriage, must be privileged; once marriage equality is achieved, “single gay people over a certain age should not be surprised when they are disapproved of or pitied.”), with Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 170-82 (2005) (offering a richly nuanced view that begins with criticism of marriage as traditionally understood, supports marriage in a forward-looking way that sees it as importantly constitutive of identity for some, and concludes by arguing that the state should recognize and support various forms of relationships, including non-sexual domestic partnerships).

116. See WAITE & GALLAGHER, *supra* note 22, at 200.

arise in gay marriage.¹¹⁷ Nonetheless, legalization could signal a broad preference for marriage over nonmarriage,¹¹⁸ and it appears likely that at least some of the marriage-associated benefits described in *The Case for Marriage* would “transfer” to gay marriages. Additionally, gay marriage could produce new and additional benefits for both gay couples and society.

Certain of the health benefits of marriage will almost certainly inure to gay marriage. With legal recognition, gay spouses will be entitled to employee health benefits, reducing the number of uninsured and underinsured.¹¹⁹ Researchers have predicted that same-sex civil unions in Britain—where even with universal health services, gay men and lesbians have been found to receive lower standards of care—will confer health benefits similar to those enjoyed in heterosexual marriages.¹²⁰ They note that positive health effects have been correlated to stable relationships with either a same-sex or opposite-sex partner.¹²¹ For example, a Swiss study of HIV-positive patients undergoing antiretroviral therapy found that those patients in stable sexual partnerships lasting six months or greater experienced a slower progression towards AIDS and death, regardless of whether the relationship was with a same-sex or opposite-sex partner.¹²²

Moreover, some have urged that denial of equal marriage rights in the United States should be viewed as a threat to the mental health of gay men and lesbians, not only depriving them of the mental health benefits

117. See *id.* Research on gender roles and power balances in gay couples shows that gay and lesbian couples, both with and without children, are more likely than heterosexual couples to divide labor equally. See Michael King & Annie Bartlett, *What Same Sex Civil Partnerships May Mean for Health*, 60 J. EPIDEMIOLOGY & COMMUNITY HEALTH 188, 189 (2006), available at <http://www.jech.com>.

Despite more egalitarian divisions of labor, gay and lesbian couples often report that power is not shared equally between them. See Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1053, 1053-54 (2000). However, the likelihood of power imbalance is lower in lesbian relationships than in heterosexual relationships. See *id.* One study found that 59% of lesbians reported an “exactly equal” power balance in their relationships, compared to 48% of heterosexual women. See *id.*

118. See WAITE & GALLAGHER, *supra* note 22, at 200.

119. This statement is true to the extent that companies would be compelled to treat all legally married couples equally for benefit purposes.

120. See King & Bartlett, *supra* note 117.

121. *Id.* However, according to one analysis, only those companies regulated by state insurance and based within the state that grants marriage equality would clearly be compelled to pay such benefits. See Same-Sex Spousal Benefits in Massachusetts After *Goodridge* (Dec. 2004) <http://hla-inc.org/public/GLADHLAHealthBenefits.pdf>.

122. See generally Jim Young et al., *Stable Partnership and Progression to AIDS or Death in HIV Infected Patients Receiving Highly Active Antiretroviral Therapy: Swiss HIV Cohort Study*, 328 BRIT. MED. J. 15 (2004).

associated with heterosexual marriage, but also adding to external stresses on gay relationships by perpetuating social exclusion, legal uncertainty about partners' status, and a lack of norms by which gay couples can judge their commitment and mutual obligations.¹²³ Further, by increasing the visibility of and public discussion about gay relationships, gay marriage may also lead to greater recognition of the existence of same-sex domestic violence, and could make protective mechanisms available to gay partners who currently cannot obtain them or are turned away because of their gender.¹²⁴

Financial benefits can also be expected to result from legalization of same-sex marriages. There are of course the immediate practical results of granting marital rights to gay and lesbian couples. Gay spouses would receive spousal government or employment benefits. Gay marriage will promote financial security by making it easier for gay spouses to inherit from each other and reducing challenges to wills. Gay marriage will also protect a surviving or caretaking spouse's entitlement to both private and public forms of compensation when his or her partner is killed or injured, including workers' compensation and wrongful death claims.¹²⁵

The effects that would inherently flow from marriage (as opposed to those resulting from the state's preferential treatment) are more difficult to predict, but a positive effect seems likely. There is currently a large earnings gap between gay men and their heterosexual counterparts.¹²⁶ On average, gay men earn between 14% and 16% less than married or single heterosexual men.¹²⁷ This gap suggests that gay men might not experience the "marriage premium" in earnings that heterosexual married men do.¹²⁸ But, because of this gap, gay men might be likely to

123. See Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 SEXUALITY RESEARCH & SOC. POL'Y 35, 35-37, 40-41 (2006), available at <http://nsrc.sfsu.edu>.

124. See James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 349, 358 (2006).

125. See Jodie Leith Chusid, *Tanner v. Oregon Health Sciences University: Justifying the Mandate for Domestic Partner Benefits*, 8 COLUM. J. GENDER & L. 261, 296-97 (1999) (listing both private and public benefits which gay partners may not be entitled to as a result of sexual orientation); John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171, 173 (2005) (discussing that recovery in wrongful death claims is generally limited to close blood relations and those related by marriage).

126. See Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 462-63 (2003).

127. *Id.*

128. See *id.* There is another possible interpretation of these numbers, however. See *infra* notes 131-132 and accompanying text.

view marriage as an opportunity to commit to pooling of financial resources and to experience significant benefits from doing so.

For lesbians, the gap is reversed: gay women's earnings are on average 20% to 24% greater than those of heterosexual women, both married and single.¹²⁹ Given evidence that lesbians are more likely to engage in power-sharing and egalitarianism in relationships,¹³⁰ it seems probable that lesbians would also engage in financial pooling in marriage. The relatively higher earnings for lesbians compared to heterosexual women also indicate that the financial interdependence of marriage offers lesbians a way to mitigate the fact that earnings for women overall in the United States remain lower than for men.

Less quantifiably, gay marriage may also create wealth effects by legitimizing gay relationships. Part of the earnings gap may be attributable to discrimination and occupational selection—gay men may consider themselves less likely to have children and therefore choose an occupation which would not provide income to support a large family,¹³¹ may be kept out of high-paying jobs or be unable to retain them due to discrimination, or may be drawn to occupations which are viewed as supportive and accepting of gay men but provide lower pay. Gay marriage could reduce the social stigma associated with being gay and expand earning opportunities for gay men. Legalizing gay marriage could also increase the likelihood of personal asset transfers to gay spouses from their extended families by legitimizing same-sex marriages and thereby reducing the “outsider” status of GLBT family members. It has already been shown that marriage promotes such transfers to a greater extent than cohabitation by heterosexual couples.¹³²

Given the extensive (sometimes almost exclusive) focus on children's welfare in the decisional law discussed earlier, a few observations about the benefits to children in gay households that would result from marriage are in order before concluding this discussion.

The emerging literature on households headed by same-sex parents suggests that their children could benefit significantly from legalization of their parents' marriages. According to the 2000 census, 34.3% of lesbian couples and 22.3% of gay male couples in the United States are raising children (compared to 45.6% of married heterosexual couples

129. Black, *supra* note 126, at 461-62. The difference in percentages for both gay men and lesbians is related to different possible methods of defining sexual orientation.

130. See Patterson, *supra* note 117, at 1053-54.

131. See Black, *supra* note 126, at 463-64.

132. See Hao, *supra* note 91, at 286-87.

and 43.1% of unmarried heterosexual couples).¹³³ As noted earlier in this Article, research has not shown that being the child of gay or lesbian parents has a deleterious effect on a child's behavior, development, or social relationships, nor that it has a significant effect on children's gender or sexual identity or gender-role behavior.¹³⁴ Although a male or a female couple may not receive the full panoply of economic benefits from marriage, there is little reason to suspect that the sexual orientation of parents would eliminate the benefits to children in terms of parental time and supervision, as well as those relative to stronger social and familial connections. Additionally, because higher levels of education and better health for children are found in heterosexual marriages regardless of income level, these benefits might be realized by the children of same-sex couples, whatever their income advantage through marriage might be.¹³⁵

As noted earlier, marriage equality would also increase children's security by cementing the legal status of children who may not be biologically related to one or both of their gay parents.¹³⁶ The certainty marriage offers could help the children of gay parents feel more secure in a variety of day-to-day situations. The denial of gay marriage to parents can currently affect some gay parents' ability to enroll their children in social benefit programs, make medical decisions for their children, participate in their children's educational plans and exert authority regarding school-related activities, or plan travel that requires proof of legal parenthood.¹³⁷ Finally, as gay marriage legitimizes gay relationships in the public sphere, the children of gay parents should experience fewer negative social consequences based on their family status.¹³⁸

Children born into heterosexual couples where a parent later enters a marriage to someone of the same sex might not experience the same negative consequences from such a subsequent relationship as children in heterosexual stepfamilies.¹³⁹ One relatively small study conducted before *Goodridge* indicated that the daughters of cohabitating lesbian mothers experienced higher self-esteem than those whose lesbian mothers did not

133. Pawelski et al., *supra* note 124, at 351.

134. See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUT. CHILDREN 97, 102-04 (2005), available at http://www.futureofchildren.org/usr_doc/06_foc_15-2_fall05_Meezan_Rauch.pdf; Patterson, *supra* note 117, at 1058-60.

135. See WAITE & GALLAGHER, *supra* note 22, at 130-33.

136. See Meezan & Rauch, *supra* note 134, at 99-100.

137. See Pawelski et al., *supra* note 124, at 357-58.

138. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 21 (N.Y. 2006) (Kaye, C.J., dissenting); *Andersen v. King Country*, 138 P.3d 963, 1018-19 (Wash. 2006) (Fallhurst, J., dissenting).

139. See WAITE & GALLAGHER, *supra* note 22, at 38, 184 (discussing step families).

cohabitate.¹⁴⁰ Gay remarriage following divorce from a heterosexual marriage could be part of a process of coming out and acceptance which is beneficial for the gay or lesbian parent and his or her children in a way heterosexual remarriage is not.

State governments may have a particular interest in the potential legitimizing and strengthening effect marriage could have on same-sex couples because of the significant numbers of gay and lesbian couples who foster or adopt children, or are interested in doing so. Gay and lesbian parents are raising an estimated 65,500 adopted children, more than 4% of the total number of adopted children in the United States.¹⁴¹ More than 14,000 foster children are placed with gay or lesbian foster parents, who provide homes for more than 6% of foster children placed with nonrelatives and almost 3% of all foster children.¹⁴² Gay and lesbian couples appear to represent an important and underutilized pool of potential adoptive and foster parents. One study suggests that almost half (46%) of lesbian and bisexual women have considered adoption, compared with 32% of heterosexual women.¹⁴³ Although data on interest in adoption appear unavailable for gay men, the same study found that gay men were 10% more likely than lesbians to express an interest in having children.¹⁴⁴ Based on these statistics, researchers have estimated that some two million gay, lesbian, or bisexual people have considered adoption.¹⁴⁵

About half a million children are in foster care in the United States on any given day, with about 18% of foster children in institutions or group homes as of 2006.¹⁴⁶ If any of the benefits seen in heterosexual marriage are applicable to gay marriage, legalization should benefit children in existing gay adoptive and foster families, and could encourage more gay couples to pursue adoption and fostering. Legalization should also break down both legal and unofficial barriers to fostering and adopting, particularly in states which directly prohibit or restrict adoption by gays and bisexuals.¹⁴⁷

140. Patterson, *supra* note 117, at 1061.

141. GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 8 tbl.3 (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>.

142. *Id.* at 15 tbl.8.

143. *Id.* at 6 tbl.2.

144. *Id.* at 5 tbls.1, 6.

145. *Id.* at 6.

146. *Id.* at 1.

147. *See id.* at 3. This Article assumes that full adoption rights would be a natural incident of marriage equality. However, Florida explicitly prohibits adoption by gay people, regardless of relationship status. *See* FLA. STAT. ANN. § 63.042(3) (West 2005). Mississippi and Utah both

C. *Applying the Data and Observations*

The arguments against marriage equality seem weak, and the policy arguments in favor of it seem compelling, even though there is an inevitable element of speculation involved. Why, then, would someone like Maggie Gallagher, who has conceded that same-sex couples and their children would likely benefit from same-sex marriage,¹⁴⁸ oppose it? I doubt she would even quarrel with the notion that whatever benefits gay and lesbian couples realize from marriage are also positive for the broader society.

These public goods, for her and others, are outweighed by the potential that allowing same-sex couples to marry has for the institution of marriage. Once the binary male-female component is no longer required, they assert, the public meaning will be changed in some fundamental way, and the institution will suffer irreparably.¹⁴⁹ If this is the only argument that opponents of marriage equality have, this question should be put to rest immediately. It suffers from both a practical and a deeper difficulty.

On the practical side, available data on the effect of allowing same-sex unions on heterosexual marriage rates support marriage equality. Although different cultural and social landscapes can make generalizations based on the experiences of other countries difficult, gay marriage and civil unions in the United States have such a short history

have provisions preventing gay couples from adopting, although it is possible that single gay people might circumvent that restriction. See MISS. CODE ANN. § 93-17-3(5) (West Supp. 2006); UTAH CODE ANN. § 78-30-1(3)(b) (West Supp. 2007). But Utah's law also prevents adoption by any unmarried couple. *Id.* However, even in states where no legal barriers exist to placing children with gays, lesbians, or bisexuals, the discretion of social workers in deeming placements to be suitable may result in discrimination against gay, lesbian, and bisexual people applying to foster or adopt. To the extent that legalization of gay marriage would affect perceptions of gay people and of the strength and stability of gay relationships, it may erode such unofficial barriers in the process.

148. WAITE & GALLAGHER, *supra* note 22, at 200 (“[W]e suspect . . . that adults in . . . same-sex couples would reap some, but not all the benefits of marriage.”).

149. Traditional “marriage” must be defended, according to Gallagher, “because children need mothers and fathers,” and “[t]o lose the word ‘marriage’ is to lose the core idea any civilization needs to perpetuate itself and to protect its children.” See Maggie Gallagher, *Massachusetts vs. Marriage*, WKLY. STANDARD, Dec. 1, 2003, <http://weeklystandard.com/Content/Public/Articles/000/000/003/408utwyh.asp>; Brief for Joseph Ureneck as Amicus Curiae Supporting Appellee at 10-11, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (quoting Stanley Kurtz, *The Coming Battle*, NAT’L REV. ONLINE, Nov. 26, 2002, <http://www.nationalreview.com/kurtz/kurtz112602.asp> (“Once legal marital status and biological connection can be set aside by a court on grounds of emotional connection, the notion of marriage itself is effectively mooted. . . . Homosexuality . . . strikes at the heart of the organization of Western culture and societies, destabilizing both monogamous marriage and the role of two sexually complementary parents within the nuclear family.”)).

that the effect of gay marriage and registered same-sex partnership in Scandinavia may be the best available indicator of possible outcomes. Seven years after Denmark legalized same-sex registered partnerships, the rates of divorce in gay registered partnerships was 17%, compared to divorce rates of 46% in heterosexual marriages.¹⁵⁰ The low rates of divorce in same-sex registered partnerships suggests that legal recognition may strengthen gay couples' sense of commitment to their relationships, just as it does in heterosexual marriages.

In addition, and specifically in reference to the assertion that "same-sex marriage will destroy marriage," after the institution of recognition for same-sex partnerships, Denmark, Norway, and Sweden each saw an increase of between 10% and 28% in the rate of *heterosexual* marriages.¹⁵¹ During the same period, divorces among heterosexual couples declined 13.9% in Denmark, 6% in Norway, and 13.7% in Sweden, with divorce rates in all three countries lower after the institution of legal recognition for gay partnerships than they were in the years preceding.¹⁵² While the reasons for these shifts are uncertain, they could indicate that legal recognition of gay marriage truly does send a message about a governmental and societal preference for all types of marriage.

The deeper deficiency in the Gallagher position is that it places entirely speculative harm—which any opposite-sex couple can choose to avoid, in any case— ahead of real, substantial, and current harm to the lives of millions of gay and lesbian Americans, and their children. Jonathan Rauch has compellingly criticized this view:

[N]o one can make decent social policy without considering both sides of the equation. To assume that "we" (the heterosexual majority) should deny millions of Americans any chance to marry if allowing them to marry would cause "us" any harm or inconvenience at all is to account gay welfare as essentially worthless. . . . [G]ay lives and welfare deserve to be taken as seriously as nongay lives and welfare. A one-eyed utilitarian is a blind utilitarian.¹⁵³

Of course, these points have been, and should be, made in the context of rights, thereby bringing this Article back to the place it pushed

150. Rona Merech, *Gay Couples Can Be as Stable as Straights, Evidence Suggests*, S.F. CHRON., Feb. 27, 2004, at A19, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/02/27/MNG1H59R5Q1.DTL>.

151. Darren R. Spedale & William N. Eskridge, Jr., *The Hitch*, WALL ST. J., Oct. 26, 2006, at A14.

152. *Id.*

153. JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 69 (2004).

off from. Given the public health and welfare benefits of marriage, including same-sex marriages, the rights of gay and lesbian people to share in these goods should not be infringed.

V. CONCLUSION

Perhaps fearful of treading into areas less familiar, many advocates of marriage equality have avoided discussing the public health and welfare benefits of marriage. But to the extent these benefits are real, there is every reason to believe that gay and lesbian couples would share in them, thereby benefiting society as well. In addition, no negative consequences to allowing same-sex marriages have been advanced, other than increasingly discredited speculation about the effects of such unions on the institution. Perhaps a tight focus on public health and welfare will tip the balance in favor of marriage equality.