

# Portrait of an Institution: How Recent Cases Distort Our Understanding of Marriage

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## INTRODUCTION

In the legal debate over the meaning of marriage there is an obviously crucial element that has been overlooked in much of the commentary. This missing element is the matter of what the courts believe marriage to be. This is probably because it is really a presupposition, or set of presuppositions, that must usually be inferred from written opinions. Thus, even when, as in most cases, it is obvious, it is not usually scrutinized in the same way as questions of standard of review, discrimination theories, state interests, and even remedies.

Obviously, the question of the meaning of marriage is central, and the opinions thus far have directly addressed the issue, although sometimes circuitously. It is, however, not usually the subject of much debate. This is somewhat surprising, considering that distinct views on this baseline matter may dramatically alter the resolution of the marriage question. This article argues that recent cases involving challenges to the legal definition of marriage seriously distorts the widely shared understanding of marriage by redefining the core essence of what the institution means.

Part I of the Article provides a review of recent cases involving challenges to the legal definition of marriage, using their language to present a composite picture of the purported meaning of marriage. Part II critiques this new view of marriage, emphasizing three “distortions” in the portrait. The article concludes with an extension of the “portrait” analogy and some suggestions about the way in which the law ought to approach marriage.

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## I. THE PORTRAIT

An excellent article by Professor Charles Reid invokes an important analysis by Judge John T. Noonan regarding the way marital theory has suffered in court decisions in the decades subsequent to Judge Noonan's article.<sup>1</sup> Professor Reid notes that current decisions seem to have been borne out of Judge Noonan's concerns. In a penultimate passage, Judge Noonan's article asks whether marriage is almost gone, like the gingerbread man in the children's story, because of decisions of the United States Supreme Court.<sup>2</sup> When Judge Noonan's article was written, the exact nature of marriage was not the topic of judicial scrutiny that it has become, but the question Judge Noonan raised was important and prescient. The decisions surveyed in this Article suggest that it has become pressing and immediate.

In half a dozen cases courts have suggested that, to overcome a constitutional infirmity, the institution of marriage should be redefined to include same-sex couples. After decades of unsuccessfully urging courts to consider the current institution of marriage unconstitutional, activists were finally able to persuade a plurality of the Hawaii Supreme Court<sup>3</sup> that marriage should be redefined to include same-sex couples.<sup>4</sup> The case involved three same-sex couples seeking marriage licenses and the court ruled that the plaintiffs had established their claim that Hawaii's marriage law discriminated on the basis of sex and remanded to the trial court for a determination of whether the state could show a compelling state interest to justify the discrimination.

In discussing the state's power to regulate marriage, the plurality described marriage as "a state conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship. This court construe[d] marriage as 'a partnership to which both partners bring their financial resources as well as their individual energies and efforts.'"<sup>5</sup> This minimalist sketch emphasizes: (1) state creation of the status; (2) the combining of resources and efforts; (3) a partnership; and (4) the fact that benefits come with the

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1. Charles J. Reid, Jr., *The Gingerbread Man Thirty Years On: The Parlous State of Marital Theory*, 1 U. ST. THOMAS L.J. 656 (2003) (citing John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255 (1973)).

2. John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255, 274 (1973).

3. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

4. *Id.*

5. *Id.* at 58 (quoting *Gussin v. Gussin*, 836 P.2d 481, 491 (Haw. 1992)).

status. Each, in turn, becomes a common theme in the subsequent decisions' portraits.

Five years later, this scant description was outdone by the most ambiguous description yet given in any of the cases surveyed. In *Brause v. Bureau of Vital Statistics*, involving a same-sex couple who challenged the state's marriage law, an Alaska trial court judge ruled that the state's marriage law interfered with plaintiffs' right of privacy as guaranteed in a specific state constitutional provision.<sup>6</sup> In doing so, the court re-characterized the right to marry as "the right to choose one's life partner."<sup>7</sup> This certainly employs the broadest strokes of any of the decisions, but it also introduces a recurring theme. Just as in Hawaii, the court here emphasized partnerships, but the language here also emphasizes the "chosen" nature of the relationship.<sup>8</sup>

The significance of the use of "life partner" is not clear since it is not a term of art. While it seems encouraging that the court is imputing the idea of lifelong permanency upon the institution of marriage, I suspect it is used more euphemistically to signify the closeness of the relationship.<sup>9</sup>

Although this Article focuses on United States case law, the portrait of marriage in one Canadian case should be included because it attempts to provide the fullest and most flowery picture of marriage as a social institution:

Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.<sup>10</sup>

The court here decided that the province of Ontario must immediately begin licensing marriages between persons of the same sex. Its

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6. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

7. *Id.* at \*4.

8. *Id.*

9. *E.g.*, *O'Kelley v. Perdue*, No. 2004CV93494, 2006 WL 1350171, at \*7 (Ga. Super. Ct. May 16, 2006) ("The personal advantages of marriage come from the companionship, caring, intimacy and commitment associated with sharing one's life with another.").

10. *Halpern v. Att'y Gen.*, [2003] D.L.R. 529 (Can.).

description returns to the themes of closeness and fleshes out this concept with its references to love and commitment. The most significant addition here is the notion of marriage's *public-ness*, both in terms of its use by couples to publicly announce their relationship and as a way for the government to "sanction" the relationship. The court's repetition of the term "public" suggests its importance. Additionally, the court endorses the idea that family law should be used to bolster the self-esteem of same-sex couples.<sup>11</sup>

This focus on the use of marriage to make its participants feel accepted probably also reflects an admission of the goal of the redefinition effort—the mobilization of the law's ample power on behalf of the view that sexual behavior and family structure are morally neutral matters. It does not seem to have occurred to either this court, or the plaintiffs before it, that government recognition may not be a sound basis for determining individual worth and dignity.

The most well known United States court decision is the 2003 Massachusetts Supreme Judicial Court decision, *Goodridge v. Department of Public Health*.<sup>12</sup> In *Goodridge*, the court stated that the state must begin to issue marriage licenses to same sex couples. Here, the court stated that "[m]arriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society."<sup>13</sup> This opinion contains a definitional element and, like the decisions from Alaska and Hawaii, it is hardly robust.

We see the themes of partnership and commitment again in *Goodridge*. The court also echoes the Hawaii decision, stating that "the government creates civil marriage."<sup>14</sup> Similarly, in language reminiscent of the Ontario Court, the court here stated that "[c]ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."<sup>15</sup> This is an interesting locution because it seems to refrain from saying that marriage can be characterized by "mutuality, companionship, intimacy, fidelity, and

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11. *See id.* ("This can only enhance an individual's sense of self-worth and dignity.")

12. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

13. *Id.* at 948.

14. *Id.*

15. *Id.* at 954.

family.”<sup>16</sup> Instead, the court seems to be saying that marriage is a way a couple nods to those “ideals.” This may be realistic, given that some marriages fail to exemplify these ideals, but it also seems to treat marriage as merely a public rite with only symbolic significance. It should be noted that the issue of choice is stressed as well.

In 2004, two cases were decided in Washington Superior Courts, both finding that the marriage law was unconstitutional. In *Andersen v. King County*, which involved a straightforward challenge to Washington’s marriage statute, the court posits three kinds of marriage: (1) linguistic, (2) religious, and (3) civil.<sup>17</sup> The court goes on to add that the plaintiffs, individuals in same-sex relationships, “in a basic or linguistic sense [ ] are in fact now married.”<sup>18</sup> Finally, the court concludes by stating that couples married in the “linguistic” sense should be afforded a right to a civil marriage.<sup>19</sup> Thus, the linguistic and civil definitions converge and the definition endorsed by the court for both becomes: “[t]o ‘marry’ means to join together in a close and permanent way.”<sup>20</sup> This is thin gruel indeed. The court does say, however, that “it has developed as social custom that public expression of this commitment will add to the strength of the bond.”<sup>21</sup> As such, we may infer that its definition includes a public element. As if to compete with its fellow court’s definition in breadth and simplicity, the court, in *Castle v. Washington*, also a challenge by same-sex couples to the state marriage statute, defined marriage as “a ‘private vow’ which, with community approval,<sup>22</sup> turns into a ‘civil contract that carries with it many obligations, many benefits and many burdens.’”<sup>23</sup>

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16. One assumes that the court’s use of the word “family” here is a way of alluding to the idea of marriage as a way of starting a family, a nod to the way many people still view marriage—as a prelude to having children.

17. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, \*2 (Wash. Super. Ct. Aug. 4, 2004).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. The use of “community” in this passage might seem unaccountable because of the way that term is usually used (as a way of describing the people among whom we live or with whom we share some common identity) would not refer to a group that creates a civil status for legal purposes. The court, however, gives a clue to its thinking early in the opinion when it says: “All branches taken together form one government: the community of the state of Washington.” *Castle v. Washington*, No. 04-2-00614-4, 2004 WL 1985215, \*1 (Wash. Super. Ct. Sept. 7, 2004). Perhaps then, the court is just saying what it says summarily later: “Marriage has become a government approved civil contract.” *Id.*

23. *Id.* at \*15.

The next important case arose in New York. Before being overturned on appeal, a Manhattan trial court also mandated a redefinition of marriage.<sup>24</sup> In *Hernandez v. Robles*, the court seems to endorse the idea of different types of marriage merged by constitutional requirements: “Simply put, marriage is viewed by society as the utmost expression of a couple’s commitment and love. Plaintiffs may now seek this ultimate expression through a *civil* marriage.”<sup>25</sup> The court goes on to say that “[m]arriage as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children. The relationships of plaintiffs fit within this definition of marriage.”<sup>26</sup> Thus, the court redefines the right to marry as the “fundamental right to follow their hearts and publicly commit to a lifetime partnership of their choosing.”<sup>27</sup>

This recent opinion brings us to the point where we can venture a composite portrait of marriage, as it appears to the courts that have concluded that it must be redefined. The relevant elements seem to be: (1) a government-created institution; (2) involving two people; (3) in a close, possibly committed and loving, relationship; (4) publicly announcing their commitment; and (5) triggering legal benefits and responsibilities. What this picture lacks in the power to fire the imagination, it certainly makes up for in inclusiveness.

## II. THE CRITIQUE

The obvious question now is whether the new portrait of marriage is recognizable as the social institution we have inherited? What do we see when we compare this view to our inherited understanding of marriage as reflected in our existing marriage laws? In comparing the definition posited by the courts just reviewed<sup>28</sup> with the definition they have sought to replace, there appears to be ample reason to believe that the new vision of marriage, while certainly interesting, is as likely to obscure as to reveal. Specifically, I believe the picture of

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24. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

25. *Id.* at 609 (emphasis in original).

26. *Id.* The reference to children here is somewhat confusing because it cannot mean, as it seems to, the mutual children of the couple because same-sex couples cannot have children without the intervention of a third party. This third party would not be a party to the marriage as the court here describes (which involves only “two”). It must mean, then, the children of either of the two individuals in the marriage.

27. *Id.*

28. *See supra* Part I.

marriage created by the redefining courts oversimplifies the nature of marriage, overemphasizes some features at the expense of others, and entirely removes some aspects of the institution from consideration.

In his novel, *That Hideous Strength*, C.S. Lewis imagines the use of distorted artwork to disorient individuals.<sup>29</sup> Is it fair to ask whether a distorted portrait of marriage will create social disorientation and impinge on the ability of the institution to continue the work it has done to this point? To some degree, any answer to this question must, of necessity, be speculative, but the answer again seems to be affirmative. The distorted picture of marriage dilutes its institutional strength, unduly promotes some values while denigrating others, and warps the channeling function marriage has served in the past.

To use another analogy,<sup>30</sup> we could compare the contrasting pictures of marriage to different blueprints for building a home. Obviously, a different blueprint will result in a different building, and the blueprint offered by the new understanding of marriage does more than just rework a nonessential room, it involves the removal of a foundation.

#### A. Minimalism

The most initially striking feature of the redefining courts' picture of marriage is its simplicity, prompting the observer to ask "is that all?" If there is any one feature that seems to immediately stand out in the composite definition created from the courts' decisions, it would have to be inclusiveness. Remarking on the Hawaii court's all-inclusive definition, Professor Reid notes:

The definition the [Hawaii Supreme] court proposes is virtually indistinguishable from the definition one might accord a business partnership between two persons. Eliminate the word "both" and it might include a committee charged with planning a Fourth of July celebration, or a school board setting its budget. Indeed, it could embrace nearly all forms of collaborative enterprise.<sup>31</sup>

The simplification of marriage is necessary, though, to justify the result the courts reach in mandating redefinition. The less exacting the definition of marriage, the more pliable or susceptible to manipulation it will be.

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29. C.S. LEWIS, *THAT HIDEOUS STRENGTH* 297-99 (1946).

30. Catherine Duncan is the originator of this analogy.

31. Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. PUB. L.* 449, 473-74 (2004).

This minimalism, which makes the law more inclusive, raises the question of whether the institution of marriage will soon become meaningless.<sup>32</sup> As Professor Hafen suggests, “the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends on, among many other important things, maintaining the family as a legally defined and structurally significant entity.”<sup>33</sup> On this principle, if marriage does not carry some default requirements that make demands of individuals beyond what they would conveniently desire, it will not create the benefits that justify its preferential treatment as a social institution given legal recognition. As Judge Janice Rogers has noted, the strength of the family as a social institution can be lost “if the family is simply ‘a collection of individuals united temporarily for their mutual convenience and armed with rights against each other.’”<sup>34</sup>

Currently, the law of marriage serves a “channeling function” by promoting certain ideals, for which citizens are encouraged to strive. Ideals that are thought to serve the long-term interests of society.<sup>35</sup> The norms that constitute the social institution of marriage are aspirational in nature. This means these normative models “are not and never were the descriptions of any universal empirical reality.”<sup>36</sup> If that changes, however, so that marriage becomes merely a public rite signaling a private choice with no additional substantive content, it seems certain that the new understanding will have effects on social practices.

One obvious possible result of officially adopting this spare depiction of marriage is that individuals who might have been channeled into marriage may cease being interested in it. Cohabitation, for instance, has been growing significantly as a household arrangement option, particularly among young adults.<sup>37</sup> The new vision of marriage propounded in the cases discussed above looks an awful lot like cohabitation with the addition of an official legal status and attendant

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32. Cf., Stanley Kurtz, *Dissolving Marriage*, NAT'L REV., Feb. 3, 2006, available at <http://www.nationalreview.com/kurtz/kurtz200602030805.asp>.

33. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 867 (1989).

34. Sharon S. v. Superior Court, 73 P.3d 554, 586 (Cal. 2003) (Brown, J., concurring & dissenting) (quoting Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1859 (1985)).

35. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

36. *Id.* at 502.

37. See William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2004).

benefits and responsibilities. As suggested by Roger Scruton, “[n]ot surprisingly, when marriage is no more than an official rubber stamp affixed to a purely private contract, people cease to see the point of it.”<sup>38</sup> Additionally, when the “official rubber stamp” comes with potential legal liabilities, such as the need for judicial oversight of the breakup, it may look even less attractive than the undemanding discipline of cohabitation. Perhaps this is a partial explanation of the relative lack of interest in marriage, even among same-sex couples newly granted the option.<sup>39</sup>

This is not to say that marriage will not continue to serve some functions. Instead, the functions are likely to be very different and potentially uninspiring and of lesser value. For instance, the *Halpern* case, noted above, promises that its understanding of marriage “can only enhance an individual’s sense of self-worth and dignity.”<sup>40</sup> Similarly, the *Goodridge* court sees the benefits of a leaner definition of marriage, stating:

Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It 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.<sup>41</sup>

Much of this vaunted benefit seems circular, because the government must decide to use marriage as a marker for identification, distribution, welfare, and tracking purposes.

The court does not explain why the government must use marriage in the ways it identifies. It also does not address the fact that these benefits can easily be provided in other ways. For instance, parental support obligations provide, quite possibly, the most significant way to accomplish distribution and welfare services. Additionally, such things as parental concern and social pressure are adequate at encouraging stable rather than transient relationships. Individuals can be tracked with social security numbers, and the Census Bureau and Departments of Health seem capable of accounting for single individ-

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38. Roger Scruton, *Sacrilege and Sacrament*, in *THE MEANING OF MARRIAGE* 9 (Robert P. George & Jean B. Elshtain eds., 2006).

39. See Monte N. Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 583-85 (2005).

40. *Halpern v. Att’y Gen.*, [2003] D.L.R. 529 (Can.).

41. *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

uals as easily as the married. One must be sympathetic to the individual who sees these promises, offered as the benefits of marriage, and concludes, “What’s the use?” The decrease in institutional strength resulting from the meek portrait of marriage is not the only consequence of this new portrait.

## B. Changing Values

In simplifying marriage to make it more general, some elements remaining in the resulting portrait will inevitably loom larger. Two traits, in particular, stand out in the picture created by the redefining courts: a magnification of the government’s role and the elevation of the value of choice. Certainly, choice<sup>42</sup> and government regulation<sup>43</sup> existed in previous iterations of marriage, but they were balanced with other elements.<sup>44</sup> In isolation, they promote values different from those historically served by the social institution of marriage.

Statism is a typical feature of the descriptions some courts have given to the institution of marriage. Some go so far as to claim that marriage is a government creation. This overemphasis of the state’s role allows the court to avoid the charge of intervention in a pre-political institution, not historically subject to state micromanagement. It may, however, also shift the focus of the institution itself. For instance, most of the functions served by the new version of marriage listed by the Massachusetts court are beneficial primarily to the state and only secondarily to individuals or society.

I have written elsewhere about the state focus inherent in new understandings of the family.<sup>45</sup> For the purposes of this Article, however, I will just note that government creation implies government regulation, and the more the state claims ownership, the more plausible its claims to further regulation become. State regulation, in turn, will advance state values such as radical autonomy or egalitarianism. Before these redefinition decisions, our understanding of marriage allowed for non-governmental entities to significantly shape the norma-

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42. For instance, the value of choice is recognized in the laws regarding age, consent, and capacity to marry.

43. Government regulation existed primarily in the licensing provisions, but also in the matter of divorce.

44. Choice and government regulation were balanced by elements such as non-interference with an ongoing marriage relationship or the presumption of paternity of a husband of a child’s mother.

45. See William C. Duncan, *State, Society and the Redefinition of Marriage*, 19 FAM. AM. 1 (2005).

tive content of marriage, while the government's role was largely confined to creating a legal shell that gave the institution status and legal effect. A state institution is not a social institution, and its characteristics and effects will be different than those of an institution shaped and molded by non-governmental actors in accordance with non-political values.

The emphasis on choice in the new portrait is necessary to overcome the presumption that marriage has an intrinsic nature. The historical nature of marriage can only be jettisoned by recasting marriage as a subset of a more general right to personal autonomy, which, by extension, trumps things like historical continuity and state interests in marriage. In identifying choice as the primary defining characteristic of marriage, the previous balancing concept of obligation is inevitably diminished.<sup>46</sup> This is true not only of obligations between partners, but to others as well.

“The new kind of civil union exists merely to amplify the self-confidence of the partners. Children, neighbors, community, the world—all such others are strangers to the deal.”<sup>47</sup> For instance, marriage between a man and a woman has been understood to create obligations to children, because children may result from the marriage, whether as a result of choice or not. The decision to marry creates an obligation to support the children of the marriage, an obligation not contingent on desire. A same-sex partnership cannot create the same obligation because there is no potential for unintentional procreation in that context.

Some of the courts try to compensate for the absence of obligation by invoking concepts like “commitment,”<sup>48</sup> but commitment is an awfully diluted substitute for obligation. Commitment and even love are terminable in a way that obligation is not because both are subjective and can, to some degree, be chosen or unchosen. On the other hand, one may ignore an obligation, but cannot will it out of existence. An obligation is objective.

It is also worth noting, though only in passing, that the exaltation of choice as the supreme value in family relationships relies on an untenable philosophy of humanity. Specifically, it is based on the belief that, if freed from artificial constraints, people will naturally act

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46. See Scott Fitzgibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41 (2002).

47. Scruton, *supra* note 38, at 9.

48. See *supra* Part I.

for the best.<sup>49</sup> This ideology, mixed with the reliance on state power, invites aggressive social engineering as the power of government is mobilized to counteract social norms and pressures to create a society where an individual can flourish in its most atomistic form. The seemingly ironic alliance of statism and individualism has been much remarked<sup>50</sup> and cannot be ignored in the context of the debate over the meaning of marriage, because it threatens the autonomy of families long recognized as a chief value in the United States.

### C. Omissions and Channeling

The courts do not ignore children entirely, even in the process of removing them from their portrait of marriage. Perhaps they cannot be totally ignored. The treatment of children, however, is an ancillary to marriage, or rather to the adult choice that becomes the *sine qua non* of marriage. In an important essay, Professor Seana Sugrue describes the new understanding: “Far from being the foundation from which springs a sacred duty rooted in the inherently unequal status of children, marriage is a contract, binding two adults for so long as they may choose.”<sup>51</sup>

The shift in the position of children in marriage from the center to the margins is significant. When children are mentioned by the redefining courts in relation to marriage they seem to be important only as secondary beneficiaries of the advantages adults will gain by being given marriage licenses, for example, they may receive health insurance from the non-parent spouse or they may feel better knowing that society accepts the parents’ relationship. This is not dissimilar to the theory that children, far from being harmed by parental divorce, will actually be benefited by the happiness it allows their parents to experience.<sup>52</sup> At other times, children seem to enter these

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49. FYODOR DOSTOEVSKY, NOTES FROM THE UNDERGROUND 20 (1993).

Oh, tell me, who first announced, who was the first to proclaim that man does dirty only because he doesn’t know his real interests; and that were he to be enlightened, were his eyes to be opened to his real, normal interests, man would immediately stop doing dirty, would immediately become good and noble, because, being enlightened and understanding his real profit, he would see his real profit precisely in the good, and it’s common knowledge that no man can act knowingly against his own profit, consequently out of necessity, so to speak, he would start doing good? Oh, the babe! Oh, the pure, innocent child!

*Id.*

50. *E.g.*, ROBERT A. NISBET, THE QUEST FOR COMMUNITY 190-93 (1969).

51. Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in THE MEANING OF MARRIAGE 181 (Robert P. George & Jean Bethke Elshtain eds., 2006).

52. *See* BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 6 (1997). For a thoroughly convincing demonstration that this has not, in fact, been the experience for children of

cases as a mere rhetorical device. Specifically, the presence of children in the homes of same-sex couples, either from previous marriages, adoption, or the use of assisted reproductive technology, is used as a way of rebutting the claim that marriage has anything to do with children.<sup>53</sup>

Another result of the simplified portrait is that some things must be completely removed to increase the elasticity of its application. One element, sexual difference, has been consciously removed, but this element is intertwined with another, procreation, the absence of which is stunning in its implication. Roger Scruton notes:

Marriage has grown around the idea of sexual difference and all that sexual difference means. To make this feature accidental rather than essential is to change marriage beyond recognition. Homosexuals want marriage because they want the social endorsement that it signifies; but by admitting same-sex marriage we deprive marriage of its social meaning, as the blessing conferred by the living on the unborn.<sup>54</sup>

Professor Reid also notes that “[a]bsent from [the Hawaii court’s] definition is any notion of procreation.”<sup>55</sup> The omission is glaring, because procreation and child-rearing have been central to the meaning of marriage and the justifications for the state’s recognition of it.<sup>56</sup>

“In all observed societies some form of marriage exists, as the means whereby the work of one generation is dedicated to the well-being of the next.”<sup>57</sup> A recent report from the National Assembly of France contains recommendations from a commission which had taken as its mission to “make the best interests of the child the central factor in family law.”<sup>58</sup> The commission considered proposals to redefine marriage to include same-sex couples but was “of the view that it

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divorce, see ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005).

53. See William C. Duncan, *Is There a Link Between Adoption and Same-Sex Marriage?*, 18 ST. THOMAS L. REV. (forthcoming 2006) (collecting examples). Ironically, of course, if as the courts conclude, procreation and child-rearing are not essential to marriage, why would there even be a need to mention that some same-sex couples are rearing children at all. *Id.*

54. Scruton, *supra* note 38, at 26.

55. Reid, *supra* note 31, at 473-74.

56. See Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage* 12 BYU J. PUB. L. 277, 278 (1998); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 164-71 (2004).

57. Scruton, *supra* note 38, at 5.

58. NATIONAL ASSEMBLY, *PARLIAMENTARY REPORT ON THE FAMILY AND THE RIGHTS OF CHILDREN*, Jan. 26, 2006, at 6, available at <http://www.marriageinstitute.ca/homeeng.html> (follow “Executive Summary in English” hyperlink). The full report in French is available at [http://www.assemblee-nationale.fr/12/dossiers/mission\\_famille\\_enfants.asp](http://www.assemblee-nationale.fr/12/dossiers/mission_famille_enfants.asp).

is not possible to think of marriage separately from filiation: the two questions are closely connected, in that marriage is organized around the child.”<sup>59</sup>

The meaning of the change in the position of children relative to marriage is elucidated by returning to the concept of family law’s channeling function. Professor Carl Schneider, who has written perceptively about this function in family law notes that “in the channeling function the law recruits, builds, shapes, sustains, and promotes social institutions.” He adds that “our failure to recognize the function regularly causes courts and scholars to misunderstand the regulation of families and the work of the law.”<sup>60</sup> He writes:

Generally, the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus[,] people can be said to be channeled into them.<sup>61</sup>

A number of court decisions rejecting the constitutional claims to a redefinition of marriage have recognized how this channeling function has been served by the legal category of marriage in a way that benefits children. A recent decision of the Indiana Court of Appeals rejecting the constitutional claim for a mandate to redefine marriage quotes an earlier decision, stating: “Through the institution of marriage, biological drives are directed into channels of socially accepted activity. . . . [C]hildren are theoretically provided with a stable environment; a means is provided by which such children might be reared and educated. . . . [F]amily continuity from generation to generation is established.”<sup>62</sup> The court goes on to say that marriage “encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.”<sup>63</sup> Additionally, marriage “both encourages such couples to enter into a stable relationship before having children

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59. *Id.* at 7.

60. Schneider, *supra* note 35, at 498.

61. *Id.*

62. *Morrison v. Sadler*, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005) (quoting *O’Connor v. O’Connor*, 253 N.E.2d 250, 258 (Ind. 1969)).

63. *Id.*

and to remain in such a relationship if children arrive during the marriage unexpectedly.”<sup>64</sup>

In a recent decision from New York’s appellate division, the court stated that:

It is an undisputed fact that the vast majority of procreation still occurs as a result of sexual intercourse between a male and a female. In light of such a fact, “[t]he State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children.”<sup>65</sup>

The risk of a redefinition of marriage is that this social understanding and the goods it promotes are in danger of being lost in the new adult-centered version of marriage.

An adult-centered view of marriage, particularly with the primacy of choice as its constitutive element, may affect even our view of children. Professor Gilbert Meilaender has identified the longstanding view of children by their parents: “The child is always a gift and, even, a mystery—one like them who springs from their embrace, not an inferior being whom they have made and whose destiny they should now determine.”<sup>66</sup> This view is threatened by an ethic that treats children primarily as the products of adult will. He notes:

I have suggested . . . that the transformation of procreation into reproduction involves new ways of thinking about human life—which, of course, is not surprising because symbols give rise to thought. Perhaps most dangerous is the possibility that we will find it more difficult to think of the child as one who is equal in dignity to those who make it.<sup>67</sup>

The loss of the previous understanding is problematic. “That our culture desperately needs to reclaim such a vision before our care for children is debased still further seems, to me at least, evident.”<sup>68</sup> Though raised in the context of reproductive technology, these points are appropriate when considering the transformation of a child-cen-

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64. *Id.*

65. *Samuels v. N.Y. State Dep’t of Health*, 811 N.Y.S.2d 136, 145 (N.Y. App. Div. 2006).

66. Gilbert Meilaender, *Products of the Will: Robertson’s Children of Choice*, 52 WASH. & LEE L. REV. 173, 188 (1995).

67. *Id.* at 195.

68. *Id.* at 188.

tered institution into an instrument for maximizing adult choices of family structure.

Proponents of a redefinition of marriage contest the idea that a change in the legal definition of marriage could have broad, perhaps unintended, consequences. They argue that the only people that will be affected by the new picture of marriage will be the same-sex couples who may now be married and thus gain the tangible and intangible benefits that come with that status. So, to those who object to same-sex marriage they say, "Don't get one." While this is an effective talking point for debates before already convinced audiences, it fails to take into consideration a very relevant experience that illustrates the way legal changes interact with culture and social behavior.

The last major effort to modify the portrait of marriage involved the element of permanence. From the late-1960s to the mid-1980s, nearly every U.S. jurisdiction was influenced by the no-fault divorce revolution, in which states either removed the traditional requirement of a showing of fault before a divorce was granted or added a new no-fault ground. Understood as a way of making divorce proceedings less hostile, it had the additional effect of increasing the rate of divorce, often dramatically.<sup>69</sup> The analogous pre-revolution argument would have been, "If you don't like divorce, don't get one." Our understanding of family law's channeling function, however, suggests that this kind of argument does not adequately predict the possible ramifications of legal change.

No-fault divorce did not *absolutely* remove the element of permanence from marriage because a spouse still must initiate a divorce in order to put an affirmative end to the marriage. It did, however, remove the concept as a *normative* matter. On the other hand, in the cases discussed here, the element of sexual difference is removed entirely, but the effect of this removal is hard to predict precisely.<sup>70</sup> Similarly, the normative link between marriage and children will also be severed. A subset of marriages under the new definition will intrinsi-

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69. See Paul A. Nakonezny, Robert D. Shull, & Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477, 480 (1995). For a history of the no-fault divorce law and statutory citations, see Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79-91 (1991) and J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994).

70. However, Professor Hadley Arkes has made a very convincing case that the justifications offered for the removal of this element will also support removal of others. Hadley Arkes, *The Family and the Laws*, in *THE MEANING OF MARRIAGE*, *supra* note 38, at 116.

cally have no link to procreation and the default rules of the new institution will have to reflect this reality, thereby excluding the possibility of a legally recognized link for those for whom procreation is a possibility.

Of course, non-governmental institutions may cling to the old normative understanding and shape individuals and communities who will do so, but they will have to do this in opposition to the channeling power of the law and to the formidable value-promoting apparatuses of the state. Additionally, this adherence to the old normative understanding of marriage will be done at a risk of running afoul of other legal provisions such as anti-discrimination statutes.

### CONCLUSION

John Singer Sargent's portrait of the author Henry James was on display on May 4, 1914, at the Royal Academy in London. In the afternoon, "an elderly woman of distinctly peaceable appearance" attacked the portrait with a "meat chopper."<sup>71</sup> At Police Court, the portrait's assailant acknowledged the attack: "I did it—as a protest."<sup>72</sup> She later argued that: "I have tried to destroy a valuable picture because I wish to show the public that they have no security for their property nor their art treasures until women are given political freedom."<sup>73</sup> Accordingly, her statement was added to the immense catalog of manifestations of the "ideology made me do it" defense.

A vastly different kind of portrait is now being subjected to the scrutiny of a different ideology. The evidence from court decisions suggests that this portrait, if not being attacked with a meat cleaver, is being significantly modified. The Sargent portrait was restored and hangs in the National Portrait Gallery in London.<sup>74</sup> The damage was not great and the nature of the object made restoration possible.

Marriage is a profound social institution, formed over millennia, not by an act of will, but by the accumulation of social practice and with the interaction of government, individuals, and the intermediate associations of society. Like society, marriage "is an organic entity, with internal laws of development and with infinitely subtle personal

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71. Mary Wood, *Sargent Portrait of Henry James Damaged: A Woman in Custody*, N.Y. TIMES, May 5, 1914, available at <http://www.npg.org.uk/live/rp1767a.asp>.

72. *Id.*

73. *Id.*

74. JOHN SINGER SARGENT, PORTRAIT OF HENRY JAMES (1913), available at [http://www.npg.org.uk/live/search/portrait.asp?LinkID=MP\]02396&tNo=0&role=sit](http://www.npg.org.uk/live/search/portrait.asp?LinkID=MP]02396&tNo=0&role=sit).

and institutional relationships. Society cannot be created by individual reason, but it can be weakened by those unmindful of its true nature, for it has deep roots in the past—roots from which the present cannot escape through rational manipulation.”<sup>75</sup>

If our legal portrait of marriage is damaged through oversimplification or by removing key aspects of its nature, it is doubtful that it can be restored as easily as a painting. Because the damage would flow not only to the institution, but to the society of which that institution is a part (especially to those whose vulnerability the institution is meant to protect), it is fair to doubt that something as simple as a touch-up here and there will be enough. The power of ideology may be enough to propel some to ignore these cautions, but the peril is not ameliorated by sincerity of motives.

Perhaps by seeing what is being done to the picture of marriage we have inherited from our ancestors, we can summon the will to resist. If we are to preserve the good in what has been left to us, we can hardly act too soon.

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75. Robert Nisbet, *Conservatism and Sociology*, 58 *Am. J. Soc.* 167, 169 (1952).