

# GENDERLESS MARRIAGE AND INSTITUTIONAL THEORY

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## I. INTRODUCTION

The stuff of the marriage debate is not static. That is particularly true in the courts, where the legal definition of marriage is debated, at least in the United States, most thoroughly and most consequentially. Since 1971, when a same-sex couple first advanced the claim that constitutional guarantees mandated the redefinition of marriage from the union of a man and a woman to the union of any two persons,<sup>1</sup> each side's bundle of arguments has changed and is still changing. Much of the change entails a refinement of arguments, a wholly understandable phenomenon in a judicial/political engagement hard fought for more than twelve years now.<sup>2</sup> But an important part of that change is the dropping and adding of entire arguments.

The dropping has invariably resulted as a response to a pattern of judicial rejection. Examples include the “definitional preclusion,” “natural limits,” and “marriage as supra-legal construct” arguments. Each of these, in its own way, says in

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1. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

2. The judicial/political engagement began in earnest with the decision of the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993). William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. Pub. L. 623 (2004), provides a descriptive overview of that engagement in the United States. F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625–26 (2003), and Nicholas Bala, *The Journey to Recognize Same-Sex Relationships in Canada and the United States: Same Direction but Different Speeds* (paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law, 19 – 23 July 2005, Salt Lake City, Utah), do the same relative to Canada. J.A. Robinson, *The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights* (paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law, 19 – 23 July 2005, Salt Lake City, Utah), does the same relative to South Africa.

effect that something essential to marriage precludes alteration by the law. In a triumph for the undiluted positivist view of law, the courts have generally rejected these arguments, and consequently the proponents of man/woman marriage no longer tend to use them; instead of denying the power of the law to radically alter a core constitutive meaning of marriage, those proponents now focus instead on the wisdom of doing so. Likewise, the proponents of genderless marriage appear to have abandoned, after judicial rejection, the argument premised on the federal constitution's eighth amendment that precluding same-sex couples from marrying constitutes cruel and unusual punishment.<sup>3</sup>

Proponents have recently advanced arguments not effectively or centrally a part of the earlier debate – that is, have advanced new arguments – because the debate itself has caused deep reflection on and analysis of both the old institution (man/woman marriage) and the new institution (genderless marriage) proposed as its replacement. And that reflection and analysis have not been unfruitful. For example, there is the “conservative” argument for genderless marriage, focusing on the beneficial effects entry into marriage may have on gay men.<sup>4</sup> As a further example, on the man/woman marriage side, there are new arguments arising from application of institutional theory<sup>5</sup> and from

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3. E.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973). The reasons for my use of the phrases *genderless marriage* and *man/woman marriage* are given in Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 15-16 (2004), available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>.

4. E.g., William Eskridge, *THE CASE FOR SAME-SEX MARRIAGE* (1996); Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, 30 June 2003, at 76.

5. E.g., Monte Neil Stewart and William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. Rev. 555, 560-67, 589-595, available at [http://manwomanmarriage.org/jrm/pdf/Marriage\\_Betrayal\\_of\\_Perez.pdf](http://manwomanmarriage.org/jrm/pdf/Marriage_Betrayal_of_Perez.pdf); Stewart, *supra* note 3, at 35-36, 71, 75-85; Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* 9, 15 (Daniel Cere & Douglas Farrow eds., 2004) [hereafter *DIVORCING MARRIAGE*].

critical review of the genderless marriage proponents' use of close personal relationship theory.<sup>6</sup>

My intent with this paper is to summarize the application of institutional theory to the debate over the redefinition of marriage, that is, to present one of the new arguments now drawing judicial attention.<sup>7</sup>

## II. MARRIAGE AS A SOCIAL INSTITUTION

### A. General Concepts from Institutional Theory

Marriage is a social institution.<sup>8</sup> As such, it shares with all other social institutions certain salient features. Or stated slightly differently, what can be said accurately about all social institutions can be said accurately of the institution of marriage. One of the most important understandings is this: social institutions are constituted in large measure by shared public meanings. Although in pedestrian use the word "institution" may conjure up an image of an edifice constructed of steel, concrete, and glass, a social institution is not so constituted. Rather, it is "constituted by complex webs of social meaning."<sup>9</sup> John Searle explains this social reality using the example of another social institution, money:

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6. E.g., Daniel Cere, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (Council on Family Law 2005), available at [http://www.marriagedebate.com/pdf/future\\_of\\_family\\_law.pdf](http://www.marriagedebate.com/pdf/future_of_family_law.pdf); Stewart, *supra* note 3, at 85-86, 95-99.

Like the arguments' substance, the rhetoric deployed, that is, the strategies to move the reader's or listener's feelings, has also evolved. One important example is the genderless marriage proponents' increasing (and increasingly refined) deployment of the "atypical couples tactic," which "uses as the public face of the genderless marriage campaign a number of carefully selected same-sex couples virtually indistinguishable (except for gender) from Ozzie and Harriet Nelson or Clair and Heathcliff Huxtable and then points relentlessly to those couples as the 'answer' to what the genderless marriage campaign is all about." Stewart & Duncan, *supra* note 5, at 586.

7. E.g., *Lewis v. Harris*, 2005 Westlaw 1388578 (14 June 2005).

8. E.g., *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("[T]he marriage relation [is] an institution more basic in our civilization than any other."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) ("Marriage is a vital social institution.").

What follows in this section tracks Stewart and Duncan, *supra* note 5, at 561-67.

9. Stewart, *supra* note 3, at 83.

[W]e can say, for example, in order that the concept ‘money’ apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, *marriages*, buying and selling, political offices, and so on.<sup>10</sup>

The shared meanings that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others. “An institution is a *web of interrelated norms*—formal and informal—governing social relationships.”<sup>11</sup>

Social institutions shape and guide individuals’ identities, perceptions, aspirations, and conduct. An institution “supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside.”<sup>12</sup> This profound influence ought not to be underestimated; institutions “shape[] what those who participate in [them] think of themselves and of one another, what they believe to be important, and what they strive to achieve.”<sup>13</sup> Thus,

an institution guides and sustains individual identity in the same way as a family, forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual’s possibilities depend on the opportunities opened up within the institution to which the person belongs.<sup>14</sup>

But inasmuch as human societies create and sustain social institutions, a society can change its social institutions. “Institutions can be changed in the sense that they will

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10. John R. Searle, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995) (emphasis added).

11. Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998).

12. Stewart, *supra* note 3, at 111.

13. *Id.*

14. Helen Reece, *DIVORCING RESPONSIBLY* 185 (2003).

necessarily change if sufficiently many individuals try to change them.”<sup>15</sup> And because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.

An individual may withdraw his deposit from a bank, or break the law, or the rules [of] a game, without causing the change or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective [without causing that change or collapse]. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this.<sup>16</sup>

Just as social institutions can be changed by alteration of the constitutive shared public meanings, so they can be renewed and strengthened by use consistent with those shared public meanings.

[A]s several social theorists have pointed out, institutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as *marriage*, property, and universities. . . . [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.<sup>17</sup>

And just as social institutions can be changed or reinforced, social institutions can be entirely dismantled.

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society

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15. Eerik Lagerspetz, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* 28 (1995).

16. Eerik Lagerspetz, *On the Existence of Institutions*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Eerik Lagerspetz et al. eds., 2001).

17. Searle, *supra* note 10, at 57 (emphasis added).

refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.<sup>18</sup>

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is magnified by its authoritative voice.<sup>19</sup> And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution. Regarding the reinforcing function, Joseph Raz observes:

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.<sup>20</sup>

Use of the law to reinforce or alter or extinguish the shared public meanings that constitute a social institution is a political act. As Edward Schiappa notes, "Definitions put into practice a special sort of social knowledge—a shared understanding among people about themselves, the objects of their world, and how they ought to use language."<sup>21</sup> He continues:

If we look hard enough, all definitions serve some sort of interests . . . . Defining what is or is not part of our shared reality is a profoundly political act. The establishment of authoritative definitions by law or custom requires a

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18. *Id.* at 117.

19. E.g., Joseph Raz, *THE MORALITY OF FREEDOM* 162 (1986) ("Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 69–71 (1996).

20. Raz, *supra* note 19, at 161.

21. Edward Schiappa, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003).

political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.<sup>22</sup>

To alter a social institution by altering the shared public meanings that constitute it (whether by use of the law or otherwise) is to alter—if not immediately then certainly soon—the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution being changed, the greater the changes in the individual.<sup>23</sup>

### **B. Institutional Theory and the Legal Definition of Marriage**

Almost universally, a shared, public, and core meaning is that marriage is the union of a man and a woman.<sup>24</sup> Thus, that meaning has been a constitutive core of the institution. That core meaning has been and continues to be influential in forming individual identity, perceptions, aspirations, and conduct in a way and to an extent that common sense readily comprehends.

[M]arriage is an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide. It negotiates a stable partnership of life and property. It seeks to manage the procreative process and to establish parental obligations to offspring. It supports the birthright of children to be connected to their mothers and fathers.

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Michael Foucault contends that marriage has fostered a particular type of human identity, namely, the “conjugal self.” Be that as it may, marriage has always been the central cultural site of male-female relations. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have

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22. *Id.* at 69–70 (citation omitted).

23. E.g., Raz, *supra* note 19, at 392.

24. As put by Justice Blair in the Ontario Divisional Court decision in *Halpern v. Toronto*, 60 O.R.3d 321 (Ont. Div. Ct. 2002), *aff'd in part, rev'd in part*, 65 O.R.3d 161 (Ont. 2003), “Anthropological, sociological and historical studies reveal that from time immemorial ‘marriage’ has *almost* universally been viewed as a monogamous union between a man and a woman.” *Id.* at para. 40.

been generated by the institution of marriage, which encodes a unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.<sup>25</sup>

Man/woman marriage is deemed to provide well, and even uniquely, a number of social goods besides those just identified. It is the only institution that can confer the status of *husband* and *wife*;<sup>26</sup> in particular, it is the only effective means to socialize and acculturate and thereby transform males into husbands—a process the institution sustains both before and after the wedding.<sup>27</sup> The institution performs the same transformative role in the creation of husband/fathers, another identity beneficially different than that of a mere male.<sup>28</sup> It also promotes (by privileging) that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>29</sup>

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution.<sup>30</sup>

Much has been and can be said about public meanings influencing, [or] constituting, social institutions, which in turn influence, even define, the human participants. All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes and activities) will intend and sustain “the social understandings, the practices, the

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25. Cere, *supra* note 5, at 11, 14 (footnote omitted).

26. See F.C. DeCoste, *supra* note 2, at 625–26.

27. See Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 5, at 41, 47–48.

28. See, e.g., David Popenoe, *LIFE WITHOUT FATHER* 139–88 (1996).

29. Stewart, *supra* note 3, at 52–57.

30. Observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of these differences between the two possible institutions of marriage. This is so regardless of the observers’ own sexual, political, or theoretical orientation or preference. See, e.g., Ladelle McWhorter, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 125 (1999); Raz, *supra* note 19, at 393; Cere, *supra* note 5, at 11–18; Douglas Farrow, *Canada’s Romantic Mistake*, in *DIVORCING MARRIAGE*, *supra* note 5, at 1, 1–5; Young & Nathanson, *supra* note 27, at 48–56.

goods, and the social selves” in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.<sup>31</sup>

The difference in constitutive meanings of necessity means that what the new institution teaches relative to individual identity, perceptions, aspirations, and conduct is substantially different from the formative instruction of the current institution of man/woman marriage. That does not mean, of course, that there is no overlap in formative instruction; the significance is in the divergence. One important divergence centers on the normativeness of married heterosexual relations and the normative exceptionality of all other forms of intimate human conduct. Another centers on the relative pre-eminence or subordination of the interests and desires of adults, on one hand, and of the interests and needs of children, on the other hand.<sup>32</sup>

Redefinition has other practical outcomes. For my purposes, perhaps the most important is found at the intersection of the law’s authoritative role (relative to marriage’s meanings) and the unitary nature of the institution. By unitary nature, I mean simply that society can sustain one and only one marriage institution. Society cannot, at one and the same time, tell the people (and especially the children) that marriage, in its core meaning, is the union of any two persons and that marriage, in its core meaning, is the union of a man and a woman. Given the role of language and meaning in constituting and sustaining institutions, two “coexisting” social institutions known society-wide as *marriage* would

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31. Stewart, *supra* note 3, at 77 (footnote omitted).

32. See Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 5, at 66–67, 78; Seana Sugrue, *Marriage: Inside and Out* 14–15 (paper presented at Illuminating Marriage Conference, Kananaskis, Alberta, Canada, 18–20 May 2005) (“Hence, same-sex marriage as well as a number of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults.”); Jane Adolphe, *The Same-Sex Marriage Debate in Canada: Promoting Adults and Ignoring Children* (paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law, 19 – 23 July 2005, Salt Lake City, Utah).

seem to amount to a factual impossibility. When I speak of law’s authoritative role relative to marriage’s meaning, we are thinking of this: Once the law (on constitutional grounds no less) has taken a stand that the core meaning is the union of any two persons, the law will then be unrelenting and thoroughgoing in enforcement of that decision. The law’s own internal logic and institutional mandates require no less. Thus, at the intersection of the unitary nature of marriage and the law’s authoritative role in marriage’s meaning, what will result is the new meaning being mandated in texts, in schools, and in virtually every other part of the public square, and also being voluntarily published by the media and other institutions.<sup>33</sup> Even linguistic, social, or religious enclaves dedicated to preserving the old meaning will have a difficult time.<sup>34</sup>

This repetition seems merited. These realities regarding social institutions in general and the social institution of marriage in particular are not controversial in the literature on the nature of institutions. Although each side’s “spin” and emphasis in the current genderless marriage debate differ dramatically, no scholarship (to date, anyway) has attempted to refute the social realities summarized above.

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33. *Id.* at 111.

34. Helen Reece explains:

When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep: the dissident community may seem unthinkable or may be too costly for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community. Reece, *supra* note 14, at 38.

### III. APPLICATION IN THE MARRIAGE DEBATE

My main thesis is that there is, unavoidably, a price tag on the redefinition of marriage from the union of a man and a woman to the union of any two persons. My reflections on that price tag run as follows:<sup>35</sup>

A society can sustain one and only one marriage institution. Society cannot, at the same time, tell the people (and especially the children) that marriage is the union of any two persons and that marriage is the union of a man and a woman. Two “coexisting” social institutions known society-wide as *marriage* is a factual impossibility. Thus, legal redefinition of marriage will in the process of time necessarily displace the institution of man/woman marriage and necessarily deprive society of the social goods provided, sometimes uniquely, by the old institution.<sup>36</sup> So, although one may by selective reference to social institutional realities tout genderless marriage as the way to a more just and equal society, the full panoply of relevant institutional realities compels acknowledgement of the awesome price that must be paid for entry into such a radically new and different world.

How large the price is suggested by a listing of what must of necessity be lost with the deinstitutionalization of man/woman marriage:

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35. This section tracks Stewart & Duncan, *supra* note 5, at 589-95.

36. What I am saying contrasts starkly with the “definitional preclusion,” “natural limits,” and “marriage as supra-legal construct” arguments. Each of those, in its own way, says in effect that something essential to marriage precludes alteration by the law and, hence, by society. I am saying plainly that the law and, hence, a society do indeed have the power to alter the constitutive meaning of marriage in that society; the real issue is the wisdom of doing so. I need to say at the same time that, as a matter of social institutional reality, same-sex couples cannot enter the marriage institution that has come down to us; their law-mandated marriage constitutes entry into a different institution, one defined at its core as the union of any two persons and one embodying the close personal relationship model of marriage. Stewart, *supra* note 3, at 84 (“Same-sex couples look to the law to let them into the privileged institution, and the law . . . may want to, but it cannot; it can only give them access to a different institution of different value.”).

First, husbands and wives. Man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband (a social identity quite different from “partner”),<sup>37</sup> and thus that can transform males into husband/fathers (a category of males particularly beneficial to society).<sup>38</sup>

Second, an effective bridge over the male-female divide. “[M]arriage has always been the central cultural site of male-female relations”<sup>39</sup> and society’s primary and most effective means of bridging the male-female divide—that “massive cultural effort of every human society at all times and in all places.”<sup>40</sup>

Third, the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling.<sup>41</sup> The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.

Fourth, the effective means to make real the child’s right to know and to be brought up by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult).

[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a *prima facie* right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified

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37. See, e.g., DeCoste, *supra* note 2, at 625–26.

38. See, e.g., Popenoe, *supra* note 28, at 139–88.

39. Cere, *supra* note 5, at 14.

40. Young & Nathanson, *supra* note 27, at 43.

41. Stewart, *supra* note 3, at 44–52.

exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.<sup>42</sup>

Fifth, authoritative encouragement of the child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute)<sup>43</sup> with the optimal outcomes deemed crucial for a child’s (and hence society’s) well being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.<sup>44</sup>

Sixth, the power to officially endorse that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>45</sup>

The arguments marshaled to discount this price tag or even to deny its existence strike me as fundamentally inadequate. The first and most often deployed argument simply ignores the social institutional realities of marriage: “Redefinition will not really change anything. Just as many straight men and women will marry—and have just as many

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42. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 32, at 67.

43. As Justice Sosman said in her dissenting opinion in *Goodridge*:

[S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) . . . [T]he most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. . . . The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?

*Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 979–80 (Mass. 2003) (Sosman, J., dissenting) (citation omitted).

44. Stewart, *supra* note 3, at 64–70.

45. *Id.* at 54–57. Because the redefinition occurs by judicial mandate, assertedly compelled by constitutional norms, any official or “state action” acknowledgement of marriage as the union of a man and a woman is constitution-taboo.

children—if gays can marry or not.”<sup>46</sup> But this mantra entirely misses the point. The point is what the straight men and women will be marrying “into.” They will be marrying into a much different social institution than their parents married into simply because, undeniably, a constitutive core meaning will be radically different. And that means that they (and the generations after them) will undergo a much different formative and transformative experience.

The inadequacy of this “no downside” argument does not end there. Social institutions are renewed and strengthened by use consistent with the shared public meanings constituting them. “[E]ach use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage . . . .”<sup>47</sup> After redefinition, every use of the new institution by a man/woman couple will validate and reinforce it; after all, that couple will be invoking on their union the sanctioning power of a polity that rigorously views their union as one between “two persons.” Because those “two persons” happen to be a man and a woman, the consequences may initially be misunderstood by many or even most, but the strengthening effect on the new institution is largely unavoidable.<sup>48</sup> Thus

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46. Another “argument” may actually be moving into first position among genderless marriage advocates. It is simply to proceed from the assumed or implied premise that of course man/woman marriage violates equality norms and constitutes discrimination. In other words, the speaker proceeds as if she “owns” the words *equality* and *discrimination*. From this beginning, it is not difficult to move to the conclusion that man/woman marriage violates equality norms and constitutes discrimination. But it goes without saying (or rather, should go without saying) that what the contest is all about is the meaning of equality and discrimination in the context of marriage, particularly its social institutional realities. The increasingly popular new “argument,” being wholly circular, hinders rather than helps in reaching an understanding of the rational use of those two words in the marriage context.

47. Searle, *supra* note 10, at 57.

48. I say “largely” because a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire—but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community (in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act). The price for doing so

the argument—“just as many straight men and women will marry”— actually cuts against, not in favor of, genderless marriage once willful blindness toward the social institutional realities is no longer tolerated.

The other main argument advanced to discount or to evaporate the cost is the following: “The law won’t really have that big of an impact on a fundamental social institution. People know what they think; it doesn’t matter what the law says is right. Something like marriage will just go on as before.” This appeal to the impotency of the law, of course, ignores the historical truth that when in America the law starts a current running through society—and does so in the name of the Constitution—that current will broaden and deepen and become ever swifter until it has transformed the landscape. The ending of *de jure* segregation in the South after *Brown v. Board of Education*<sup>49</sup> amounted to “revolutionary racial change,”<sup>50</sup> and other than the end of apartheid in South Africa, it is difficult to identify in history a social transformation of equal magnitude effected without war.

To understand the “impotent law” argument’s kinship with the “enclave” argument is to further understand the inadequacy of both arguments. The “enclave” argument is that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests that institution advances can simply enter an enclave—linguistic, social, and/or religious—where they can do their own marriage

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includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least “discriminatory”)—that is, as hostile to the constitutional ideal of equality.

49. 347 U.S. 483 (1954).

50. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11 (1994).

thing unaffected by the new social institution. But as I have noted elsewhere,<sup>51</sup> there are problems with the notion that resourceful people could still find ways to communicate to the next generations of children the unique goods of man/woman marriage and its value. Certainly some might; by private educational endeavor it is possible for families or other groups to establish a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them. But to the degree that members of the enclave were to adopt the speech of the community, they would lose the power to name and, in large part, the power to discern what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible. The bare possibility that people could, with considerable difficulty and sacrifice, maintain the meanings for their children of man/woman marriage is therefore just that—a bare possibility.

The possibility becomes even less substantial upon realization that

[t]o change the core meaning of marriage from the union of a man and a woman . . . to the union of any two persons [will result in] . . . the new meaning [being] mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.<sup>52</sup>

Only an excessively sanguine artist would paint this post-redefinition picture: the polity of (fill in the blank: Canada, South Africa, Massachusetts, California, etc.) as the happy

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51. Stewart, *supra* note 3, at 82–83.

52. *Id.* at 111. Helen Reece's observation merits repetition here:

When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep: the dissident community may seem unthinkable or may be too costly for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community.

Reece, *supra* note 14, at 38.

home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. There is reason to believe that the genuinely realistic picture as a matter of legal and social fact is far different: The state mandates by force of polity-wide law one and only one marriage institution and one and only one marriage norm, and that is genderless marriage. That norm will be mandated in and reinforced by texts, mandated in and reinforced by schools, and mandated in and reinforced by many other parts of the public square and, furthermore, will be voluntarily published by the media and other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained, will be officially disdained.<sup>53</sup> To say otherwise is to say that the law, as an institution itself, would not be subject to strong institutional mandates—some sounding in logic and consistency, some in more elementary considerations—to be persistent and thoroughgoing in enforcing its newly declared “constitutional” norm. In the same vein, to say otherwise is to say that the law is impotent to reinforce, to alter, or to dismantle social institutions, and no rational, informed person says that. No, the law is tremendously potent in this area, and the unavoidable price of using the law to enthrone the genderless marriage institution is the dismantling and loss (if not immediately, then certainly sooner rather than later) of the marriage institution heretofore central in our society.

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53. Farrow, *supra* note 18, at 101–02 (“The preamble to this draft legislation [the Chrétien government’s proposed genderless marriage bill of 2003] indicates that redefining marriage to make it accessible to same-sex couples will ‘reflect values of tolerance, respect and equality’ consistent with the *Charter*. But of course it follows that those who oppose redefinition do not reflect such values. This charge, publicly made and enshrined in law, can only diminish the respect in which such people are held . . . .”); Darrel Reid & Janet Epp Buckingham, *Whose Rights? Whose Freedoms?*, in *DIVORCING MARRIAGE*, *supra* note 5, at 84 (“The fact is that millions of Canadians who are opposed to same-sex marriage have now been told by the courts that their view on marriage is contrary to the *Charter* and, by extension, un-Canadian.”).