

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-224-03T5

MARK LEWIS and DENNIS WINSLOW;
SAUNDRA HEATH and CLARITA
ALICIA TOBY; CRAIG HUTCHISON
and CHRIS LODEWYKS; MAUREEN
KILLIAN and CINDY MENEHIN;
SARAH and SUYIN LAEL; MARILYN
MANEELY and DIANE MARINI; and
KAREN and MARCYE NICHOLSON-MCFADDEN,

Civil Action

Plaintiffs-Appellants,

v.

On Appeal from the Superior
Court of New Jersey,
Appellate Division

GWENDOLYN HARRIS, in her official
capacity as Commissioner of the
New Jersey Department of Human
Services; CLIFTON R. LACY, in his
official capacity as the Commissioner
of the New Jersey Department of
Health and Senior Services; and
JOSEPH KOMONISKI, in his official
capacity as Acting State Registrar
of Vital Statistics of the New Jersey
State Department of Health and
State Services,

Defendants-Respondents.

Sat Below:
Stephen Skillman, P.J.A.D.
Anthony J. Parillo, J.A.D.
Donald G. Collester, Jr., J.A.D.

BRIEF AMICUS CURIAE OF THE FAMILY LEADER FOUNDATION

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PROCEDURAL HISTORY

Amicus adopts the statement of procedural history of the defendants-respondents.

STATEMENT OF FACTS

Amicus adopts the statement of facts of the defendants-respondents.

BRIEF OF AMICUS CURIAE

INTRODUCTION

Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. For the law to replace that meaning with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Because of the very nature of social institutions -- and marriage is unquestionably a social institution --, it could not be otherwise.

This brief demonstrates the veracity of those three opening sentences. It does so by using generally accepted understandings of and knowledge regarding social institutions -- what constitutes them, how they affect individuals, how they provide social goods, how they interact with the law, and how the law has power both to sustain and to destroy (deinstitutionalize) them. This brief thus uses *public reason* for sustaining man/woman marriage¹; it meets the challenge of "delineat[ing] precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political

¹ E.g., John Rawls, *The Idea of Public Reason Revisited* 64 U. CHI. L. REV. 765 (1997).

values implicit in our public culture.”²

The brief does so in this fashion: Section I.A. sets forth general understandings from the study of social institutions, that is, understandings that apply to all social institutions, including marriage. Among these is the way society uses the law effectively to reinforce, to alter, or to dismantle a social institution. Section I.B. applies these understandings in the context of marriage, including the legal definition of marriage. This subsection describes the valuable social goods resulting from a core constitutive meaning of the marriage institution, the union of a man and a woman, and necessarily lost when the law suppresses that meaning and replaces it with another. This subsection also demonstrates the substantial differences between the marriage institution constituted at its core by the man/woman meaning (man/woman marriage) and the proposed new marriage institution constituted by the “any two persons” meaning (genderless marriage).

Section II demonstrates how the court decisions that have mandated genderless marriage -- *Goodridge*³ in Massachusetts,

² Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage* 66 *FORDHAM L. REV.* 1241, 1251 (1998).

³ *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941, 948 (Mass. 2003).

*EGALE*⁴ in British Columbia, *Halpern*⁵ in Ontario, and others -- have elided the social institutional realities of marriage, and how court decisions that have given those realities their due have rejected the argument that constitutional norms mandate the redefinition of marriage.

Section III demonstrates the deficiencies inhering in non-judicial efforts to counter what this brief presents, the social institutional argument that the law, consistent with constitutional norms of equality, liberty, and dignity, may continue to sustain and nurture a social institution of betterment defined at its core as the union of a man and a woman and authoritatively called *marriage*.⁶

⁴ *EGALE v. Attorney General (Canada)* 2003 BCCA 251,225 DLR (4th) 472 (2003).

⁵ *Halpern v. Toronto (City)* 225 DLR (4th) 528 (Ont. Ct. App. 2003).

⁶ A word regarding terminology: Rather than use the more common phrase *same-sex marriage*, this brief uses the phrase *genderless marriage* to refer to the form of civil marriage legally defined as the union of any two persons. The phrase *same-sex marriage* is subtly misleading (as are its pop media equivalents, such as *gay marriage* and *homosexual marriage*); although the legal definition of civil marriage as the union of any two persons allows same-sex couples to marry, it of course also allows a woman and a man to marry, and everywhere the debate focuses on *one* legally recognized relationship known as *marriage*, not *two*. The phrase *same-sex marriage* thus conveys the sense (erroneous) of a legally recognized marriage separate or different from the marriage of a man and a woman. This brief refers to civil marriage defined as the union of a man and a woman as *man/woman marriage*.

Genderless is used instead of *non-gendered* and *man/woman* instead of *gendered* because, as a matter of contemporary

I.

MARRIAGE IS A VITAL SOCIAL INSTITUTION.

Marriage is a social institution,⁷ and thus 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. What follows, then, is an essential overview of the wealth of explanation and understandings provided by social institutional studies, including what constitutes social institutions, how they provide various social goods, how they educate, form, and transform individuals, how society (especially through the law) reinforces, alters, or destroys (deinstitutionalizes) these institutions, and how such changes affect individuals and society.

A. Understandings from Social Institutional Studies.

One of the most important understandings is this: Social

language usage, to use the words *gendered* and *non-gendered* could be seen as an endorsement of certain versions of social constructionist thought. Because of the focus of this brief, neither endorsement nor rejection of those versions is a relevant task.

⁷ *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.”); Dunphy v. Gregor 136 N.J. 99, 114, 642 A.2d 372, 379 (1994) (speaking of “society’s commitment to the institution of marriage” and its “preferential status under the law.”).

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."⁸ John Searle explains this social reality using the example of another social institution, money:

[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.⁹

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

⁸ Monte Neil Stewart, *Judicial Redefinition of Marriage* 21 CANADIAN J. FAM. L. 11, 83 (2004) [available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>]. See generally Mary Campbell, *HOW INSTITUTIONS THINK* (1986).

⁹ John R. Searle, *THE CONSTRUCTION OF SOCIAL REALITY* 32(1995)(emphasis added).

relationships."¹⁰

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."¹¹ 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."¹² 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.¹³

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 necessarily change if sufficiently many individuals try to

¹⁰ Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* (Mary C. Brinton & Victor Nee eds., 1998)19, 19.

¹¹ Stewart, *supra* note 8, at 111.

¹² *Id.*

¹³ Helen Reece, *DIVORCING RESPONSIBLY* (2003) 185.

change them."¹⁴ 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.¹⁵

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.¹⁶

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 refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to

¹⁴ Eerik Lagerspetz, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* (1995) 28.

¹⁵ See Eerik Lagerspetz, *On the Existence of Institutions*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* (Eerik Lagerspetz et al. eds., 2001) 70, 82; 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.").

¹⁶ See Searle, *supra* note 9, at 57.

exist in that society.¹⁷

B. The Law's Powerful Role Relative to Social Institutions.

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.¹⁸ 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.¹⁹

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."²⁰ He continues:

¹⁷ *Id.* at 117.

¹⁸ *E.g.*, Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman 2 U.ST.THOMAS L.REV. 33, 51 (2004) ("Laws do more than incentivize or punish ... They educate directly and indirectly."); Cass R. Sunstein, *Foreword: Leaving Things Undecided* 110 HARV. L. REV. 4, 69-71 (1996); *Minister of Public Health v. Fourie*, CCT 60/04, slip op. at para. 138 (S. Afr. Const. Ct Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>) ("The law is ... a great teacher [and] establishes public norms ...").

¹⁹ Raz, *supra* note 15, at 161.

²⁰ Edward Schiappa, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* (2003) 3.

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 political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.²¹

Schiappa's reference to "a shared understanding among people about ... the objects of their world" illuminates a distinction that ought not be missed, the distinction between a social institution, on one hand, and, on the other hand, the objects or arrangements to which the institution relates most directly or intimately. They are not the same, although casual or uncritical thought may mistake the latter for the former. A dollar bill, although commonly referred to as *money*, is not the social institution of money. Likewise, a wheat farm or a phosphate mine or a marshmallow factory, although reflexively thought of in our society as *private property*, is not the institution of private property. The dollar bill and the

²¹ *Id.* at 69-70 (citation omitted) (emphasis in original). Kitzinger and Wilkinson apply the reality articulated by Schiappa to the marriage context:

Marriage is a linchpin of social organization: its laws and customs interface with almost every sphere of social interaction. Its foundational role in defining structures of social institution and citizenship means that definitional authority over what "counts" as marriage, and who is allowed access to it, has always been intensely political.

Celia Kitzinger and Sue Wilkinson, *The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership* 14 FEMINISM & PSYCHOLOGY 127, 132 (2004).

marshmallow factory are only objects in our world about which we may or may not share understandings, meanings, and norms -- depending on the presence or absence in our particular society of particular social institutions.

Still focusing on the law's role in sustaining, altering, or extinguishing social institutions, if the extinguishing law is "constitutional law," meaning the most fundamental law of the polity, the legal project of suppressing the old meanings and/or replacing them with radically different meanings operates across the entire public square. The very logic of constitutional law requires that it not be otherwise. An example of "deinstitutionalization" by constitutional law is the first Soviet constitution's treatment of private property, which in great detail converted every form of property "into the property of the Soviet Workers' and Peasants' Republic."²²

Finally, from these understandings of social institutions there necessarily follows this: 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

²² SOVIET CONST. (Constitution (Fundamental Law) of the R.S.F.S.R, 1918) ch. 2, art. 3, available at http://www.politicsforum.org/documents/constitution_rsfsr_1918.php.

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.²³

C. An Illustration of Social Institutional Realities

A simple event helps put flesh on these uncontroversial but somewhat abstract concepts. After winning a spot on the American team headed to the 1960 Olympic Winter Games in Squaw Valley, California, 18-year-old speed skater Barbara Lockhart decided to learn Russian.²⁴ At that time, the Soviet Union had the best speed skaters in the world, and Barbara wanted to become acquainted with them and even establish some friendships. She succeeded. Klara Guseva, who won the gold medal in the 1,000 meter race, and Barbara spent a fair amount of time together at Squaw Valley and became friends.

Near the end of the Games, Barbara and two American teammates were visiting in their Olympic Village dorm room. Klara entered, removed the slippers she was wearing, and began trying on the American athletes' shoes. She seemed particularly pleased with a pair of brown loafers. With the loafers on her

²³ *E.g.*, Raz, *supra* note 15, at 392.

²⁴ Barbara Lockhart related this experience orally to counsel in September 2005 and then reviewed and confirmed the accuracy of the written account appearing in the text. Dr. Lockhart has been a professor of exercise science at Temple University, the University of Iowa, and Brigham Young University.

feet, Klara walked out. The Americans watched dumbfounded. Klara kept the shoes for her own use, and the flummoxed Americans never could bring themselves to seek the shoes' return.

The profound differences in Barbara's and Klara's respective conducts regarding, relationships with, and perceptions of the brown loafers, and indeed their respective self-identities in that context, are rather readily explained by understandings of social institutions. Clearly, Barbara and Klara had radically different relationships to and understandings of the same pair of brown loafers. The reason is that Barbara had been taught, formed, and transformed by her society's strong social institution of private property, an institution reinforced by law and even enshrined in American constitutional law,²⁵ while Klara's society had no equivalent private property institution but rather another institution that, in radically different ways, taught, formed, and transformed individuals in relation to such things as marshmallow factories, wheat farms, and shoes, with, again, that different institution being reinforced by

²⁵ *E.g.*, United States Constitution, amendment 5 and amendment 14, section 1; New Jersey Constitution, article 1, subparts 1 and 20.

Soviet law and constitution.²⁶

The American private property institution had formed an important part of Barbara's identity, or, more accurately, identities; she understood herself to be relative to some objects an "owner" and relative to other objects "not an owner." Since her early childhood, the institution had been teaching her the complex web of meanings, relationships, projects, and conducts comprising those two interrelated identities. Likewise, the Soviet property institution had, equally effectively, formed Klara's identities and hence her conducts relative both to various objects and to the various users of those objects. Except perhaps in an abstract fashion, Barbara's "property ways" were incomprehensible to Klara and to Klara's parents - but not to her grandparents, for they would have been taught and formed by an effective social institution of private property. The startled reaction of the American athletes that day in that Olympic Village dorm room evidences that they had a similar incomprehension of Klara's "property ways."

On the foundation of these understandings from social institutional theory, this brief now turns to the social institutional realities pertaining to the legal definition of

²⁶ Not until 1977 was there any Soviet constitutional reference to something akin to "private property." 1977 Soviet Constitution, Chapter 2, Article 13.

marriage.

D. Social Institutional Realities 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.²⁷ 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. Any word-picture of that influence seems doomed to incompleteness, but here is Daniel Cere's concise effort:

[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.

. . . .

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 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.²⁸

²⁷ See Gallagher, *supra* note 18, at 45-46.

²⁸ Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* (Daniel Cere & Douglas

As Cere's description suggests, man/woman marriage is deemed to provide well, and even uniquely, a number of social goods. Without claiming completeness or suggesting any significance to the order of appearance, we set forth six of those valuable social goods gleaned from the literature and particularly relevant in the context of the current marriage debate. The six social goods set forth are particularly relevant exactly because the institution's man/woman meaning plays at least a powerful and usually an indispensable role in producing them.

1. Six Social Goods Provided by Man/Woman Marriage.

First, the institution of man/woman marriage is quite certainly society's best and probably its only effective means to make meaningful a child's right to know and 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).²⁹ This must be what Cere had in mind when he said: "[Man/woman marriage] supports the birthright of children to be connected to their mothers and fathers."

Second, the institution almost certainly qualifies as the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by

Farrow eds., 2004) 9, 11, 14 (footnote omitted) [hereafter DIVORCING MARRIAGE).

²⁹ Margaret Somerville, *What About the Children?*, in DIVORCING MARRIAGE, *supra* note 28, at 67.

passionate, heterosexual coupling.³⁰ Indeed, the provision of this social good has been called "society's deep logic of marriage."³¹ That logic can be understood as follows: Two essential realities of man/woman intercourse are its procreative power and its passion. Society's interest relative to those realities is in assuring, to the greatest extent possible, the provision of adequate private welfare to children. (As used here, 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.) Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the procreative encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest

³⁰ Stewart, *supra* note 8, at 44-52.

³¹ *Id.*

practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. Although the immediate objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.³²

The third social good is related to the second. Man/woman marriage is the irreplaceable foundation of the child-rearing mode – that is, married mother/father child-rearing – that correlates (in ways not subject to reasonable dispute³³) with the

³² Justice Cordy's dissent in *Goodridge* articulates these understandings particularly well. *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting).

³³ Regarding this notion of "not subject to reasonable dispute" in the context of different child-rearing modes and outcomes, 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

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.³⁴

Fourth, man/woman marriage serves as an effective bridge over the male-female divide. "[M]arriage has always been the central cultural site of male-female relations"³⁵ 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."³⁶

Fifth, man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male

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).

Regarding married mother/father as the optimal child-rearing mode when compared with all other adequately studied modes, see Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS L. REV. 161 (2004) (collecting references to and summarizing the literature).

³⁴ Stewart, *supra* note 8, at 64-70; Gallagher, *supra* note 18, at 50-51.

³⁵ Cere, *supra* note 28, at 14.

³⁶ Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 28, at 43.

into a husband or a female into a wife (a social identity quite different from "partner"),³⁷ and thus that can transform males into husband/fathers (a category of males particularly beneficial to society)³⁸ and females into wife/mothers (likewise a socially beneficial category).³⁹

Sixth, legally recognized and privileged man/woman marriage constitutes both social and official endorsement of that form of adult intimacy -- married heterosexual intercourse -- that society may rationally value above all other such forms. That rationality has been demonstrated elsewhere,⁴⁰ and to date there has been no counter to that demonstration.⁴¹

³⁷ See, e.g., 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).

³⁸ See, e.g., David Popenoe, LIFE WITHOUT FATHER 139-88 (1996).

³⁹ See Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS L. REV. 161 (2004) (collecting references to and summarizing the literature).

⁴⁰ Stewart, *supra* note 8, at 52-57; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPIAC L. REV. 447 (2004).

⁴¹ Nor is there any sound basis for a constitutional challenge to a societal judgment valuing and on that basis privileging one form of adult intimacy above all others, although many uncritically assume that the United States Supreme Court decision in *Lawrence v. Texas* 539 U.S. 558 (2003), prohibits society from making such a judgment. One or more of the many possible readings of *Lawrence* may well prohibit government from burdening a particular form of adult intimacy on no basis other than conventional morality, but no responsible reading to date takes *Lawrence* so far as to prohibit a government, acting on the basis of demonstrable rationality,

2. *Why Genderless Marriage Cannot Deliver the Same Social Goods.*

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution.⁴²

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

from most highly valuing and on that basis privileging married heterosexual intercourse.

⁴² 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 observer's own sexual, political, or theoretical orientation or preference. See, e.g., Ladelle McWhorter, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* (1999) 125; Raz, *supra* note 15, at 393; Cere, *supra* note 28, at 11-18; Douglas Farrow, *Canada's Romantic Mistake*, in *DIVORCING MARRIAGE*, *supra* note 28, at 1, 1-5; Young & Nathanson, *supra* note 36, at 48-56; Gallagher, *supra* note 18, at 53 ("Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage."); Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage* 24 *Social Theory and Practice* 111, 114 (Spring 1998); Andrew Sullivan, *Recognition of Same-Sex Marriage* 16 *QUINNIPIAC L. REV.* 13, 15, 17-18 (1996); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry* 1 *LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES* 9, 12-19 (1991); E.J. Graff, *Retying the Knot*, 262 *THE NATION* 12 (June 24, 1996) ("The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. ... Marriage is an institution that towers on our social horizon, defining how we think about one another ... [S]ame-sex marriage ... announces that marriage has changed shape.").

regarding purposes and activities) will intend and sustain "the social understandings, the practices, the 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.⁴³

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.⁴⁴ 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.⁴⁵

⁴³ Stewart, *supra* note 8, at 77 (footnote omitted).

⁴⁴ See Gallagher, *supra* note 40, at 448-49.

⁴⁵ See Hernandez v. Robles, Index No. 103434/04, 2005 NY Slip Op 09436 at *7 (N.Y. App. Div. Dec. 8, 2005) ("Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society"), available at

http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm; Margaret Somerville, *supra* note 29, 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

That last point leads to further evidence of the radical difference between the two possible marriage institutions, and that is the profound difference in social goods provided. For example, as noted man/woman marriage makes meaningful a child's right to know and be reared by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult), hereafter referred to in shorthand as *the child's bonding right*. Governmental selection of genderless marriage in the place of man/woman marriage, and especially a constitutional mandate for such, further withdraws official recognition of the child's bonding right.⁴⁶ It could not be otherwise because a core part of the argument for genderless marriage is that same-sex couples have the power to bring donor-conceived children into their family and that both the same-sex couples and these donor-conceived children are entitled to the benefits of civil marriage. In this way genderless marriage is not just neutral towards the child's bonding right but actually undercuts it, while, in contrast, man/woman marriage has always provided powerful institutional

of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults.").

⁴⁶ We say "further" because government allowance, albeit regulated, of anonymous donor conception began the erosion of the child's right. As explained in the text, recognition of genderless marriage (especially as a constitutional mandate) would appear to render the right a complete nullity.

support to that right. Margaret Somerville explains the radical difference, in this context, between the two institutions:

[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 exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.⁴⁷

Another example pertains to the bridge over the male/female divide. The man/woman marriage institution ascribes a high value to that endeavor and provides a host of supports for its accomplishment. With a core meaning of "the union of any two persons," the genderless marriage institution quite simply does neither. Moreover, as Camille Williams has shown, man/woman marriage "is the only important social institution in which women have always been necessary participants."⁴⁸ Displacement of that institution "may result in future generations with a decreased ability or desire for men and women to cooperate in families, and may ultimately contribute to a new form of gender

⁴⁷ Margaret Somerville, *supra* note 29, at 67.

⁴⁸ Camille S. Williams, "Women, Equality, and the Federal Marriage Amendment") 1, paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Provo, Utah (9 September 2005), available on-line at http://www.law2.byu.edu/marriage_family/.

hierarchy and a new variation of a sex-segregated society.”⁴⁹

The reason is that man/woman marriage produces, indeed is,

the norm for cooperation between the sexes. While marriage patterns and practices have varied across cultures and over time, marriage has involved both sexes, and by doing so has set a pattern for cooperation between the sexes.⁵⁰

The last example given here is the preparation for, conferral of, and sustenance in the status of *husband* or *wife*, with there being no need to belabor the large differences between the two possible marriage institutions relative to that social good.

This exercise is not meant to suggest that genderless marriage proponents do not predict that the new, replacement institution will uniquely provide valuable social goods. Proponents of that institution have so predicted, and this brief takes up that issue later. The point is that man/woman marriage and genderless marriage are radically different social institutions as demonstrated by their wide divergence relative to important social goods.

3. *One or the Other: The Limit to One Marriage Institution.*

Governmental selection of genderless marriage has other practical outcomes. For our 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

⁴⁹ *Id.*

⁵⁰ *Id.* at 9.

institution. By *unitary nature*, we 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 seem to amount to a factual impossibility. When we 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.⁵¹ Even linguistic, social, or religious enclaves dedicated to

⁵¹ *Id.* at 111.

preserving the old meaning will have a difficult time,⁵² a matter discussed at more length later.

4. *Inclusion and Exclusion: Limits on and Effects of the Law's Power.*

Two other and related social institutional realities merit note. First, same-sex couples cannot enter the institution of marriage as it has existed to the present; in other words, it is not possible in reality for same-sex couples to enter the privileged and vital civil institution previously enjoyed only by opposite-sex couples. The very act of legal redefinition will radically transform (not all at once, of course, but over time and probably quickly) the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Some 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

⁵² 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 13, at 38.

different institution of different value.⁵³

The second reality applies to already married opposite-sex couples. Redefinition and no act of their own removes them from the institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our societies now know it but to pull married man/woman couples into what the media calls imprecisely "gay marriage" and this brief calls genderless marriage.⁵⁴

⁵³ Brian Bix, *Reflections on the Nature of Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY (Alan J. Hawkins, Lynn D. Wardle, David O. Coolidge eds., 2002) 111,112-13:

Marriage is an existing social institution. One might also helpfully speak of it as an existing "social good." The complication in the analysis is that one cannot fully distinguish the *terms* on which the good is available from the *nature* of the good. As Joseph Raz wrote regarding same-sex marriage, "When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage."

⁵⁴ This reality has been understood since before the marriage issue drew public attention.

[Adoption of genderless marriage] has fascinating potential for denaturalizing the gender structure of

5. *Society's Compelling Interests in Man/Woman Marriage.*

All these social institutional realities regarding marriage bring into sharp focus the societal (and hence governmental) interests in preserving marriage as the union of a man and a woman. For it is that man/woman meaning, among the complex web of meanings constituting the marriage institution, that uniquely (or at least materially) provides the social goods described above and without which, therefore, society would be deprived of those vital social goods. This realization, lit by understandings of social institutions in general and marriage in particular, thus renders less consequential the heated battle over the appropriate standard of judicial review of constitutional challenges to the legal definition of marriage.⁵⁵ That is because society's interests in the perpetuation of those uniquely provided goods is quite simply compelling and because what ostensibly⁵⁶ is sought through this great contest - same-sex

marriage law for heterosexual couples. ... [T]he impact [of genderless marriage], if such ... prevails, will be to dismantle the legal structure of gender *in every marriage*.

Nan D. Hunter, *supra* note 42, at 16,19 (emphasis added).

⁵⁵ See, e.g., *McCann v. Clerk of City of Jersey City* 167 N.J. 311, 325-26, 771 A.2d 1123, 1131 (2001)..

⁵⁶ We say "ostensibly" because of strong evidence that the movement to replace man/woman marriage with genderless marriage sees that project not as an end in itself but rather as a means to an essentially "nonmarriage" end. Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L.REV. 555; see also Minister of Public Health

couple entry into that institution of marriage highly esteemed for so very long now -- is simply not possible.

* * * * *

The courts that give these social institutional realities their due reject the argument urged by the appellants, that man/woman marriage violates constitutional norms and therefore must be replaced with genderless marriage. The courts that have held man/woman marriage to be constitutionally infirm have, in one way or another, gotten to that result by eliding the social institutional realities.⁵⁷ The next section so demonstrates.

v. Fourie, CCT 60/04, slip op. at para. 137 (S. Afr. Const. Ct Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>); Sue Wise and Liz Stanley, *Beyond Marriage: "The Less Said About Love and Life-long Continuance Together the Better"* 14 FEMINISM & PSYCHOLOGY 332, 335 (2004) (referencing the gay/lesbian rights movement's advocacy of genderless marriage; "This position acknowledges the key, foundational properties of marriage as a social institution, for this is precisely why it is thought it will lead to social equality.").

⁵⁷ A word about the recent New York and South Africa appellate decisions in marriage cases:

The media widely reported that the South Africa Constitutional Court mandated genderless marriage, *Minister of Public Health v. Fourie*, CCT 60/04, slip op. (S. Afr. Const. Ct. Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>), but a minimally careful reading of the opinion reveals that the court did not do so and, in sending the issue of a legal arrangement for same-sex couples to Parliament, gave Parliament the leeway to fashion such an arrangement without redefining marriage from the union of a man and a woman to the union of any two persons.

In New York, the decision was 4-1 to sustain man/woman marriage against a state constitutional attack. *Hernandez v.*

II.

THE COURTS THAT HAVE REDEFINED MARRIAGE HAVE ELIDED THE SOCIAL INSTITUTIONAL REALITIES OF MARRIAGE.

A. *Lewis v. Harris*: The Dissenting Opinion Entirely Ignores the Social Institutional Argument.

In the decision of the court below, the two judges in the majority engaged the social institutional realities⁵⁸ and went on to reject the argument that state constitutional norms mandated the redefinition of marriage. The dissenting opinion, however, would have held that man/woman marriage must be replaced by

Robles, Index No. 103434/04, 2005 NY Slip Op 09436 (N.Y. App. Div. Dec. 8, 2005). The lone dissenter ignored the social institutional argument.

⁵⁸ Both the majority opinion and the concurring opinion in the decision of the court below addressed the social institutional nature of marriage, and the concurring opinion sets out in fairly complete fashion the social institutional argument. Thus, the concurring opinion notes that marriage is a social institution comprised by shared public meanings, that those meanings extend beyond the constricted "close personal relationship" model of marriage (which "strips the social institution 'of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved'"), that to eliminate the core constitutive meaning of the union of a man and a woman would be to render the institution "non-recognizable and unable to perform its vital function" and would be to "seriously compromise[], if not entirely destabilize[] ... the durability and viability of this fundamental social institution," that the law "has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions," and that "its opposite-sex feature makes it [the marriage institution] meaningful and achieves important public purposes," including the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage's "private welfare" purpose. *Lewis v. Harris* 378 N.J. Super. 168, 875 A.2d 259, 275-78 (N.J. Super. 2005)(Parrillo, J., concurring).

genderless marriage. But in arguing for redefinition of marriage, that opinion quite simply ignored entirely the social institutional argument,⁵⁹ even though that argument was material to the majority's analysis and conclusion.

The dissenting opinion's approach may be fairly characterized as the "willful blindness" elision. The other judges who, to date, have ruled for genderless marriage have employed other kinds of elision. Each of the following subsections describes one of these judicial elisions and, in so doing, captures the essence of the analytical failure behind it.

B. The Elisions in *Goodridge*, *Halpern*, and *EGALE* Destroy Those Opinions' Intellectual Integrity.

The phenomenon of judicial elision of the social institutional argument can be seen clearly in the three most important genderless marriage cases -- *Goodridge*⁶⁰ in Massachusetts, *EGALE*⁶¹ in British Columbia, *Halpern*⁶² in Ontario.⁶³ There is considerable similarity of analytic strategy

⁵⁹ *Id.* at 278-290 (Collester, J., dissenting) .

⁶⁰ *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941 (Mass. 2003).

⁶¹ *EGALE v. Attorney General (Canada)* 2003 BCCA 251, 225 DLR (4th) 472 (2003).

⁶² *Halpern v. Toronto (City)* 225 DLR (4th) 528 (Ont. Ct. App. 2003).

⁶³ Consideration of both American and Canadian cases is warranted in this context for several interrelated reasons. Most fundamentally, despite some not insubstantial differences in equality jurisprudence between the two nations, certain fundamental concepts (although carrying different labels) appear

between the three across a number of issues,⁶⁴ and that similarity is certainly present with respect to the social institutional argument.⁶⁵ The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.⁶⁶ Moreover, the three courts repeatedly acknowledged both the large change they were mandating in the public meaning of marriage and the law's strong "educative" or "expressive" function in cases such as this.

So the important question arises how these courts proceeded to reach a conclusion that mandated genderless marriage. The answer is that, with a variety of tactics, they elided the very argument that sustains the constitutionality of man/woman

nearly universally in the equality jurisprudence of polities with judicial review and constitutional equality norms, and that includes Canada and the American jurisdictions, including New Jersey. See generally Stewart, *supra* note 8, at 26-31, 36-38. One of the universals in the equality equation is the weight of the societal (or governmental) interest advanced (or thought to be) by the impugned state action. The social institutional argument aims to give a fair weight to the societal interests implicated by the man/woman limitation in marriage. Thus, the argument has been raised in both countries, Canadian judicial experience with equality-based demands for redefinition of marriage is at least as great as the corresponding American experience, and the elision phenomenon is to be seen in both countries.

⁶⁴ Stewart, *supra* note 8, at 41-99.

⁶⁵ *Id.* at 75-85.

⁶⁶ Indeed, the plurality opinion in *Goodridge* begins: "Marriage is a vital social institution." 798 N.E.2d at 948. The opinions in that case then go on to refer to institution in the context of marriage over 80 times. The *Halpern* decision has more than 40 such references; the decision in *EGALE*, more than 35.

marriage.

1. *The "large change/no change" elision.*

As noted, the three courts repeatedly acknowledged the large change the courts' mandates would effect in the public meaning of marriage. *EGALE* states that "the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change."⁶⁷ The lower court in the *Halpern* case expressed the same view,⁶⁸ and the *Goodridge* plurality opinion stated: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."⁶⁹ But juxtaposed with these assessments of "profound" and "significant" change of meaning are assertions that the genderless marriage decisions do not and will not change the institution of marriage. Thus, the *Goodridge* plurality opinion says, immediately after the sentence just quoted: "But it [the court's decision] does not disturb the fundamental value of marriage in our society."⁷⁰ And *EGALE* and *Halpern* manifest a

⁶⁷ 2003 BCCA 251 at para. 78.

⁶⁸ [2002] OJ 2714, 215 DLR (4th) 223 (Ont. Civ. Ct.) at paras. 97-98.

⁶⁹ 798 N.E.2d at 965.

⁷⁰ *Id.*

similar view.

These judicial assertions of "no change" in the institution of marriage, in light of the acknowledged "profound" and "significant" change in the public meaning of marriage, are flatly contradicted by social institutional realities. Social institutions are constituted by -- are nothing other than, if you will -- shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically is to deinstitutionalize the old institution (and thereby lose its social goods) and to replace it with a new one.

And the argument advanced by *Halpern* and *Goodridge* to buttress the "no change" assertion is itself contradicted by social institutional realities. The *Goodridge* plurality opinion presents as proof of "no change" the intentions of the same-sex couples then before the court: "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage",⁷¹ and: "That same-sex couples are willing to [enter civil marriage] ... is a testament to the enduring place of marriage in our laws and in the human spirit."⁷² *Halpern* takes the same tack: "The Couples are not seeking to abolish the

⁷¹ *Id.* at 995-97.

⁷² *Id.*

institution of marriage; they are seeking access to it."⁷³ Yet the probative value of such intentions and willingness is not at all apparent; it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those meanings. The social reality is that the intentions and conduct of an individual or even a small group of individuals can neither prevent nor effect institutional change.

2. *The "selectively impotent law" elision.*

The second answer to the key question of how these three courts handled the social institutional argument is that they used what fairly may be called the "selectively impotent law" elision. Again as noted, the three courts acknowledged the law's strong "educative," or "expressive," function and, indeed, make that function a linchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a "stamp of approval" to stereotypes.⁷⁴ And *Halpern* repeatedly speaks of the definition of man/woman marriage "perpetuating" "views" about the capacities of same-sex couples.⁷⁵ Yet the acknowledged educative function of law seems

⁷³ 225 DLR (4th) 529 at para. 129.

⁷⁴ 798 N.E.2d at 962.

⁷⁵ *E.g.*, 225 DLR (4th) 529 at para. 94.

to reinforce the lessons of social institutional theory regarding civil institutions as webs of significance; law has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions. More directly to the present context, the social institution of marriage is not at all immune but rather is open to fundamental change resulting from a profound change in the law's definition of marriage. The three cases manifest a quick readiness to acknowledge law's educative and hence society-changing power when some preferred value is being advanced, while manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage at risk. Yet the law is not both potent and impotent in the very same endeavor.⁷⁶

Even if it were a proper judicial role to weigh the societal costs against the societal benefits flowing from a profound change in the public meanings of marriage (it is not, as shown later), the three cases' fundamental inconsistency of approach to benefits and costs cannot qualify as a defensible judicial performance.

3. Preserving the institution and providing child welfare:

⁷⁶ For a strong rejection of the "impotent law" argument by a leading scholar on historical and contemporary marriage in America, see Nancy F. Cott, *The Power of Government in Marriage* 11 THE GOOD SOCIETY 88 (2002).

eliding the differences.

The *Goodridge* plurality opinion contains another elision, one unique to itself. The Commonwealth had pled for the preservation of man/woman marriage by pointing to one of its valuable social goods: man/woman marriage provides for that child-rearing mode -- married mother/father child-rearing -- that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's (and hence society's) well being. The plurality opinion studiously avoided taking issue with the reality of that social good. What it did rather was shift the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to "[p]rotecting the welfare of children",⁷⁷ and, on that shifted basis, argued that limiting marriage to opposite-sex couples does not promote the present welfare of all children, is contrary to the Commonwealth's policy and practice of helping children whatever their family situation, and "penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."⁷⁸

This analysis is valid only to the extent that protecting the optimal child-rearing mode (man/woman marriage) is the same governmental endeavor as "protecting the welfare of children"

⁷⁷ 798 N.E.2d at 962-63.

⁷⁸ *Id.* at 962-64.

(as the plurality opinion uses that phrase). But this is not at all clear. Reflection suggests that the two endeavors are substantially different. Protecting the present welfare of individual children found in varying circumstances is, in the way the plurality opinion addresses it, the provision of public assistance of some form or another to individuals (or their care-takers). By contrast, protecting the optimal child-rearing mode (man/woman marriage) entails the protection, sustenance, and perpetuation of a social institution. Thus understood, the two different governmental protective endeavors are just that, different. The plurality opinion disappoints in that it provides no demonstration of the equivalency or overlap of the two endeavors and thus provides no justification for its shift from one to the other. Nor does the difference the plurality opinion ignores seem much diminished by the common notion of "child welfare" even broadly conceived; that is because the endeavor to protect the optimal child-rearing mode, with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the personalized protective endeavor made the basis of the plurality opinion's argument is an exercise in the present provision of public welfare.

Simply put then, the *Goodridge* plurality opinion never

honestly came to grips with important social institutional realities relative to man/woman marriage, because it chose yet again to elide those realities.

4. *The "speculative" elision.*

Finally, there is an elision unique to *Halpern*. With respect to the Attorney General's institutional argument, the *Halpern* court insisted that the government must prove with "cogent evidence" that the redefinition of marriage would in the future result in any loss of valuable social goods or otherwise lead to societal harm. Ignoring the predictive power of institutional theory in general and the power of the Attorney General's specific demonstration -- the no-fault divorce "reform" battered permanence as a core constitutive meaning of the marriage institution, resulting in a great upsurge in divorce with all that development's accompanying and now well-documented societal harm⁷⁹ -- the *Halpern* court labelled any evidence of adverse consequences from legal redefinition as "speculative." It did this without acknowledging the obvious reason no historical (as opposed to "speculative") evidence

⁷⁹ *E.g.*, ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); JUDITH S. WALLERSTEIN, JULIA M. LEWIS, SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A TWENTY-FIVE YEAR LANDMARK STUDY* (2000); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* (1996).

exists in the genderless marriage context; genderless marriage is a new experiment, and it is the very pace of the genderless marriage advocates' march that leaves "unprovable" with historic evidence the experiment's outcomes. As to the uncontroversial teachings of social institutional theory and its resulting predictive power, the court was silent.

**C. Four Elisions Seen in Trial Court Decisions
Are Likewise Inexcusable.**

1. Shifting from the macro to the micro.

The first elision is a common one in the popular debate, a shift from the macro to the micro. Genderless marriage proponents often deploy the language of autonomous individuality. By that, we mean a discourse focused solely on individuals *qua* individuals, or couples *qua* couples, with no reference to their social context or to institutional realities. An example of this is actually the most effective political tactic deployed by genderless marriage proponents. It is to ask, "How can letting me and my [same-sex] partner marry in any way hurt your marriage?" Or, "How is Jim and John marrying going to have any effect on yours and your husband's relationship." By its very language, this question forces the issue into the micro framework, that is, it requires that the marriage issue be decided on the basis of benefits and harms to specific individuals or couples, as in "me and my partner" or

"you and your husband." And by that same language, the question precludes consideration of the marriage issue in the macro framework, that is, the framework provided by social institutional theory. Moreover, it is precisely because of this "forcing" mechanism that the question is so often an effective political tactic. After all, not many lay people are prepared to respond by saying, "Well, if Jim and John marry, that means that our society will have changed a core constitutive meaning of the vital social institution of marriage from the union of a man and a woman to the union of any two persons. With that radical change, the old institution will disappear and therefore, necessarily, its invaluable social goods will disappear. Those social goods have meant a great deal to my forebears and their society and to me and my society and I want my posterity to have those social goods down through their generations, because I don't think they can have a good society without them."

Nor can the macro-to-micro shift be justified by the assertion that the constitutional rights at play, whether of equality or liberty, are individual rights and that therefore the legal analysis must operate at the micro level. Although the relevant equality and liberty rights are indeed individual (or personal) rights, the social institutional argument is not

advanced to counter abstract notions of equality, liberty, or dignity but rather to give a clear understanding of the scope and power of the societal (and hence governmental) interests at stake in the decision to preserve or jettison the social institution of man/woman marriage. That understanding matters very much - unless a court is prepared to hold that genderless marriage is an imperative of some absolute right, whether of equality or liberty. At some point any rational equality or liberty jurisprudence must, to retain its rationality, give important societal interests their due. New Jersey's equality and liberty jurisprudence do that. And a rational constitutional jurisprudence requires, even demands, a clear-eyed understanding and fair measurement of the societal interests at stake in each case invoking personal constitutional rights, and, in the marriage cases, that is what the social institutional argument provides. The macro-to-micro shift is a mechanism to obscure that understanding and thereby preclude that fair measurement.

2. The "variety of marriages" elision.

A common and further elision is the notion that ubiquitous variety in individuals' marriage customs, perceptions, and conduct somehow means that the whole institution is up for grabs. Yet this notion elides the virtually universal reality

that a shared core and constitutive meaning of marriage is the union of a man and a woman.⁸⁰ Although it is true that in our society the constitutive meanings of the marriage institution do not include a bride in a white wedding gown or a stay-at-home wife, those meanings most certainly include a bride and a groom, a wife and a husband. And of course it is that core meaning of the union of a man and a woman that must leave in order for genderless marriage to arrive.

3. *The "two co-existing marriage institutions" elision.*

This elision is seen when a court suggests or implies that society can indeed sustain at the same time two social institutions authoritatively called marriage but radically different in their core constitutive meanings. This is an argument that society, at one and the same time, can teach the people (especially the children) that marriage means the union of a man and a woman and that marriage means the union of any two persons. But of course society cannot do that; it is nonsensical to say that it can.

This notion of two co-existing "arrangements" makes sense

⁸⁰ Gallagher, *supra* note 18, at 45 ("Marriage is a virtually universal social institution. ... [E]verywhere marriage has something to do with bringing together a man and a woman into a public - not merely private - sexual union, in which the rights and responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly - not privately - defined and enforced.").

only if a court has in mind the de-institutionalization of marriage, for a society is capable of accommodating a number of alternative lifestyles. But it seems clear that the courts have no such thing in mind; certainly the genderless marriage proponents are not asking the courts to de-institutionalize marriage but rather to replace the old man/woman institution with the new genderless marriage one.

4. *The "enclave argument" elision.*

The enclave argument holds that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests genderless marriage advances can simply retreat to an enclave, whether it be a linguistic, social, and/or religious enclave. In their own enclave, such persons would be free to do their own marriage thing unaffected by the new social institution.

But as scholarship has noted elsewhere,⁸¹ 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

⁸¹ *E.g.*, Stewart, *supra* note 8, at 82-83.

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. (This was Klara's experience relative to the social institution of private property.) 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.⁸²

Thus, this picture is misleading: New Jersey as the happy 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

⁸² *Id.* at 111.

fact is far different: The State mandates by force of state-wide law one and only one marriage institution and one and only one marriage norm, and that is genderless marriage. After all, the advocates of genderless marriage are not taking the position that the law should get out of the marriage business and leave the definition of marriage to private action or private enclaves. Quite the contrary, they are insisting that constitutional doctrine compels the statewide adoption of the genderless marriage institution. Consequently, the genderless marriage 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.⁸³

⁸³ Gallagher, *supra* note 18, at 67 ("If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right. The capacity of schools and faith communities to transmit the marriage idea to the next generation will be sharply curtailed. People who believe that children need mothers and fathers will be treated like bigots in the public square."). Farrow, *supra* note 42, 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

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.

III.

THE OTHER EFFORTS TO HARMONIZE GENDERLESS MARRIAGE WITH SOCIAL INSTITUTIONAL REALITIES ALSO FAIL.

A. The “Evolving Marriage Institution” Argument Cannot Sustain the Redefinition of Marriage.

The “evolving marriage institution” argument⁸⁴ amounts to an attempt to counter the social institutional argument and thereby

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 28, 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.”).

⁸⁴ This argument’s most recent and perhaps most articulate iteration is Nicholas Bala, “The Debates About Same-sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution,” paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Provo, Utah (9 September 2005), available on-line at http://www.law2.byu.edu/marriage_family/].

keep the door open to judicially mandated genderless marriage. This counter is premised most fundamentally on the uncontroversial understanding that certain aspects of marriage in our society and in our society's predecessors have changed. This leads to the assertion that marriage is therefore an "evolving" social institution.⁸⁵

The "evolving" argument generally acknowledges that "marriage laws [have] both reflected and reinforced changes in attitudes towards and behavior in marriage."⁸⁶ This, of course, is simply an acknowledgement of the uncontroversial social institutional reality that society uses the law's authoritative voice to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution.

The next step is to point to legal "reforms" already in place and deemed to prepare the way for genderless marriage. These include legal changes moving away from gender-based rights

⁸⁵ In Professor Bala's words:
[M]arriage has not been a static social or legal institution. Rather marriage has changed over the course of history in response to changing religious beliefs, social values and behaviors, technology and even demographics. Similarly there is great variation today in marital behaviors, attitudes and laws about marriage in different countries.

Id at 1.
⁸⁶ *Id.*

and roles towards legal equality of spouses⁸⁷; away from "the procreation of children ... as a central purpose of marriage, as ... reflected in the common concept of consummation"⁸⁸; away from no legal protection (even penalties) for unwed, co-habiting couples and their offspring towards legal provision to them of a variety of rights and protections⁸⁹; and away from the recognition of natural parenthood (that is, parenthood arising from biological ties) towards the recognition of legal parenthood (that is, parenthood as solely a status conferred by law, which may or may not consider biological ties).⁹⁰ Regarding the elimination of gender rights and roles in marriage, for example, it is asserted: "It is more difficult to argue that marriage requires two spouses of opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of 'husband' and 'wife.'"⁹¹ The emergence of both marriage-like legal arrangements governing unwed, co-habiting couples and the recognition of legal parenthood, is also deemed to have laid the groundwork for a

⁸⁷ "Spouses are viewed as legally equal. Gender roles in marriage are no longer *legally* prescribed." Bala, *supra* at 85, at 6 (emphasis in original).

⁸⁸ *Id.* at 3, 6-7.

⁸⁹ *Id.* at 3, 8-12.

⁹⁰ *Id.* at 12-14. Bala does not note this but C-38, the Canadian law mandating genderless marriage, contains a provision, albeit amending the Income Tax Act, expressly replacing natural parenthood with legal parenthood.

⁹¹ *Id.* at 7.

more flexible approach for the recognition of same-sex relationships.

The "evolving" argument can be fairly abridged to this: The social and legal trends relative to the marriage institution are clear; the constitutive meanings of the institution are changing in a way that must inevitably lead to the law's replacement of the core man/woman meaning with the "any two persons" meaning.

Any helpful evaluation of the "evolving" argument requires the application of two important distinctions. The first is between institutional change resulting from forces other than the law, on one hand, and, on the other hand, law-mandated institutional change. In other words, the law can either require or merely reflect institutional change, and those are different phenomenon. With some subjects, those two phenomenon may play on each other so subtly and imperceptibly that they appear as one. But that is certainly not the North American marriage experience. But for *EGALE* and *Halpern*, there would be no genderless marriage in Canada today. In the presence of authoritative court decisions holding that man/woman marriage is compatible with and can certainly continue to be nurtured under the Canadian Charter of Rights and Freedoms, there would be no genderless marriage in Canada for a long time, if ever. But

for *Goodridge*, there would be no genderless marriage anywhere in the United States today. To state the obvious in slightly different words, it was *EGALE*, *Halpern*, and *Goodridge* that switched the meaning of marriage at its core, not society. As noted earlier, while it is true that in our society the shared constitutive meanings of the marriage institution do not include a large number of less central practices, those shared constitutive meanings most certainly include a bride and a groom, a wife and a husband.

For reasons that should become clear, the second important distinction is related practically to the first. That is the distinction between judge-made law and legislation. In the world, we see judicial redefinition of marriage with no legislative role (Massachusetts), legislative redefinition of marriage pursuant or in response to a judicial mandate (Canada), and legislative redefinition without judicial involvement (Netherlands, Belgium, Spain).

The "evolving" argument fails to work through the implications of these two distinctions. Consequently, the "evolving" argument is ill-situated in the judicial arena, especially if this is what the "evolving" argument intends to say to a judge: "The direction and pace of the social/legal changes relative to the marriage institution make inevitable the

big change to genderless marriage. Therefore, Judge, you can greatly discount the societal interests in man/woman marriage's social goods because of those goods' very short shelf-life." The validity of this argument, of course, depends on the validity of the claim of inevitability, a claim founded on a confidently made reading of where social currents in history will certainly carry the marriage institution. Although the message of inevitability is a brilliant political move,⁹² as an intellectual proposition it is dubious. No one, especially a judge, should accord to the inevitability message relative to genderless marriage any more respect and acknowledgements of validity than is due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. If nothing else, the course of Marxism should teach all to be amply humble when setting forth, as an intellectual proposition, the inevitability of something as radical as the deinstitutionalization of man/woman marriage and its replacement by the institution of genderless

⁹² This message of inevitability is a brilliant political move because it strengthens and encourages the troops on one side to see the long conflict through to its inevitable glorious outcome. At the same time, the message is influential in making those whose hearts and minds have them on the other side of the conflict more passive, more defeatist, less willing to make the kinds of sacrifices that could well make a material difference in the conflict.

marriage.⁹³

A particularly toxic aspect of the inevitability argument in the judicial arena is its proclivity to become a self-fulfilling prophecy. Each judge who acts on the basis of the argument supplies further "evidence" of the inevitability of genderless marriage. It is possible that a bare majority of the judges (21 individuals) on the highest courts of a handful of key states -- Massachusetts (a 4-3 decision), Washington, New Jersey, California, and New York -- will play a material role in replacing man/woman marriage with genderless marriage. To then label that outcome the result of irresistible social forces is to be devious; to label it the work of 21 individuals who could have (and almost certainly should have⁹⁴) chosen to do otherwise is to be very much more accurate.

The "evolving" argument may also be saying to a judge, "The direction and pace of the social/legal changes relative to the marriage institution means that the change to genderless marriage must be seen as a relatively small and evolutionary

⁹³ Maggie Gallagher strongly counters the "inevitability" argument at Gallagher, *supra* note 18, at 68-69, and, with Joshua K. Baker, at "Not Inevitable," National Review Online (1 December 2004), available on-line at http://www.nationalreview.com/comment/baker_gallagher200412010836.asp.

⁹⁴ See Stewart, *supra* note 8, at 130-32 (a summary of how the *EGALE*, *Halpern*, and *Goodridge* courts "did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case.").

step, which means in turn that the societal impacts will be small and readily accommodated, without any serious societal harm." But this argument ignores social institutional realities. One is that, although constitutive meanings interact, some of the social goods provided by an institution flow quite particularly from one core meaning, while some of its other goods flow from another.⁹⁵ The "evolving" argument does not explain how past changes of some constitutive meanings of marriage (whether for good or for ill) make more or less wise the proposed elimination of the man/woman meaning. Unless the argument is that change for change's sake is good, it seems fair to require that any argument based on the "evolving" nature of marriage demonstrate the wisdom of the next proposed change. After all, the valuable social goods identified at this brief's outset result in large measure or entirely from the man/woman meaning. To lose that meaning is to lose those goods, just as the loss, through the no-fault divorce "reform" of the 1970s, of the core meaning of permanence meant the loss of that meaning's goods, a loss now viewed, in the midst of considerable resulting suffering, as grievous. Any comfort derived from this assurance thus seems illusory: "Genderless marriage must be seen as a relatively small and evolutionary step, which means in turn that

⁹⁵ See section I.D.1. *supra*.

the societal impacts will be small and readily accommodated, without any serious societal harm.”

Two additional aspects of the “evolving” argument merit analysis. That argument often invokes the classic statement of the “no-downside” argument: “[R]ecognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children.”⁹⁶ This language suggests, and no doubt intends to, that all the goods of man/woman marriage will still be available post-redefinition because men and women will continue to marry each other at an undiminished rate. But this suggestion 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 it is not state-sanctioned opposite-sex coupling that produces the old institution’s social goods; it is the old institution’s meanings that do that. So with the loss of those meanings comes the loss of the social goods and thus the collapse of the “no-downside” argument.

This realization of what opposite-sex couples will be marrying into illuminates a further inadequacy of the “no-downside” argument. Social institutions are renewed and

⁹⁶ Bala, *supra* note 84, at 21.

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. . . ."97 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.98 Thus the argument -- "just as many straight men and women will marry" -- actually cuts against, not in favor of, genderless marriage once the social institutional realities are given their due.

B. The "Overt Social Engineering" Argument is Likewise Fatally Defective.

⁹⁷ SEARLE, *supra* note 9, at 57.

⁹⁸ We 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 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.

The "overt social engineering" argument accepts, at least implicitly, virtually all the building blocks of the social institutional argument. On that basis, it then asserts that, exactly because of the powerful formative and transformative nature of social institutions, especially marriage, this core man/woman meaning must be changed, for to do so will result in a more just and equal society.

The "overt social engineering" argument, however, provides no answer to two questions raised by what it does provide. The first question is this: Why should we conclude that a rigorous valuation of the promised gains and the certain losses will show a net gain to society generally? The second: To what extent, if any, is that valuation, that cost-benefit analysis, rightly a job for judges?

That first question brings us back to Barbara and Klara. The 1918 Soviet constitution replaced the old private property institution with a new property institution. That exchange undoubtedly made for, in certain respects, a more equal society. But with its eye on the whole of human experience, history has judged that exchange a very bad one indeed. So the first question is crucial, and to date no one has made a careful, transparent valuation of man/woman marriage's unique social goods sure to be lost and genderless marriage's necessarily

speculative benefits. Those who have spoken somewhat openly about using the institution of marriage for non-marriage ends speak almost exclusively of genderless marriage's benefits to the gay and lesbian community and thus say virtually nothing about the consequences to society generally, apparently out of a lack of interest in that subject or on the basis of an unstated assumption that what is good for the gay and lesbian community is good for society generally. Yet absent a credible society-wide valuation of the losses and gains to result from the proposed institutional exchange, the case for that exchange must remain materially deficient.

The second question - should judges be in the business either of creating their own or evaluating someone else's valuation of the losses and gains to result from the proposed institutional exchange - quite clearly ought to be answered "no." Even the judges mandating genderless marriage in *Goodridge*, *Halpern*, and *EGALE* did not claim a competence to engage in such a task; they achieved their desired end by denying the possibility of any losses, any downside, from their replacement of the old institution with the new, a denial clearly false. Once social institutional realities are given their due, and consequently once the judicial task can no longer be characterized with any credibility as discarding a legal

definition of marriage with no rational basis,⁹⁹ the fact-finding and constitutional competence of judges to engage the real task must be seriously doubted.¹⁰⁰

The "overt social engineering" argument has other defects. It is plagued by a very considerable circularity in its notion of using the marriage institution to make ours a more just and equal society. The notion proceeds from the assumed or implied premise that of course man/woman marriage violates equality norms and that genderless marriage will make ours a more equal society. From this beginning, it is not difficult to move to the conclusion that man/woman marriage violates equality norms and that genderless marriage will make ours a more equal society. But it should go without saying that what the important discourse is all about is the meaning of equality in the context of marriage, particularly its social institutional realities. The debate to date strongly suggests that the equality argument for genderless marriage can succeed only if one ignores those realities and, even more, only if one replaces

⁹⁹ See *Goodridge v. Dept. of Public Health* 798 N.E.2d 941 (Mass. 2003);

¹⁰⁰ *Cf. United States v. Lopez* 514 U.S. 549, 605 (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments ... reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.")

the full institutional understanding of man/woman marriage with the impoverished "close personal relationship model." That model is of a "pure relationship," that is, a relationship stripped of any goal or end beyond the intrinsic, emotional, psychological, or sexual satisfaction that the relationship brings to the two adult individuals involved.¹⁰¹ Judicial rejection of that model because it inadequately describes what marriage "is" results in judicial rejection of the equality argument for genderless marriage.¹⁰² Judicial acceptance of that model's accuracy and adequacy is the foundation for judicial acceptance of that equality argument,¹⁰³ but to date judicial acceptance of the close personal relationship model has been an unexamined and unproven starting point of analysis, not the result of thoughtful examination. This obvious feature of cases such as *Halpern* and *Goodridge* has led Douglas Farrow to label, and fairly so, their approach as "obviously circular, and viciously so."¹⁰⁴

¹⁰¹ Stewart, *supra* note 8, at 95-96; Cere, *supra* note 28, at 12.

¹⁰² Lewis v. Harris 378 N.J. Super. 168, 875 A.2d 259, 275-76 (N.J. Super. 2005) (Parrillo, J., concurring).

¹⁰³ Stewart, *supra* note 8, at 97 ["Language in [*EGALE*, *Halpern*, and *Goodridge*] suggests ... that the courts deciding those case have consciously accepted the arguments of the close personal relationship theorists."; collecting language and citations].

¹⁰⁴ Douglas Farrow, *Rights and Recognition, in* DIVORCING MARRIAGE, *supra* note 28, at 98-99:

Further, the equality argument for genderless marriage has not yet come to grips with other social institutional realities, particularly the understandings that same-sex couples simply

To proceed at all, we need to notice that the main rights argument [equality] amounts to a nice piece of subterfuge. Its conclusion is that marriage must be redefined. This distracts us from the fact that marriage has *already* been redefined in the argument's very first move. That is, a new category - the "close personal adult relationship"- has been invented to provide a framework for our understanding of marriage. Once this framework is accepted, it follows that homosexual unions can be marriage-like and, in that case, should qualify as marriage. If marriage is nothing but a certain form of publicly acknowledged sexual intimacy and commitment between two persons, one to which gender and biology and procreation are not directly relevant, why should the two persons not be of the same sex? Would we not be discriminating against such persons by denying to their relationship the name and benefits of marriage? And what requires such a denial? Merely the common-law definition of marriage as the union of a man and a woman. So let us change the definition and write into law that marriage is a close personal relationship between adults, a union of two persons. That will erase the discrimination and resolve the equality-rights violation. Marriage will be open to homosexuals.

This argument is obviously circular, and viciously so. Certainly there can be nothing wrong with saying that, if marriage is simply a union of two persons, two persons of the same sex must not be denied a marriage licence. Nor is it necessarily wrong (though it may be foolish) to write into law that marriage is, or rather will be, simply a union of two persons. It is wrong, however, to claim that we *must* write this new definition into law in order to avoid unconstitutional discrimination and equality-rights violations, when in fact no such discrimination or violation is possible until after the new definition is in place.

cannot enter the privileged marriage institution we have always known and that the sought for "marriage equality" can be achieved only by creating a radically new institution into which already married men and women are pulled and into which all couples seeking marriage in the future will enter. These understandings necessarily lead to reflection on some basic ideals of equality jurisprudence; to treat similarly situated people similarly and to not treat dissimilarly situated people as the same.¹⁰⁵ The simple fact is that, relative to the valued marriage institution received to date, man/woman couples and same-sex couples are not similarly situated. And this is not a matter of "legal definitional preclusion." Rather, this is a matter of the very nature and purposes of this social institution. That nature and those purposes are clearly not the result of any anti-gay/lesbian animus¹⁰⁶ but have their own

¹⁰⁵ Lewis v. Harris 378 N.J.Super. 168, 220, 875 A.2d 259, 290 (Colleston, J., dissenting)("Our Constitution and the Federal Constitution require that all similarly situated people be treated alike."); Village of Willowbrook v. Olech (2000) 528 U.S. 562, 564; Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 439 (the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."); Aristotle, ETHICA NICHOMACEA (1925)(trans. W. Ross, Book VC, 1925) 1131a-6("[T]hings that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood").

¹⁰⁶ Baker v. State 744 A.2d 864, 887 (Vt. 1999)("Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was

practical logic and effectiveness. In this light, those making the equality argument for genderless marriage simply have not made their case at the most fundamental level of equality jurisprudence. In this light, the equality argument for genderless marriage shows itself as nothing more than a demand that the law eliminate a vital social institution -- an ancient institution of betterment and one fashioned from the beginning with no relevant animus, an institution that provides social goods crucially important to society -- so that those dissimilarly situated relative to that institution will be leveled.

V.

CONCLUSION

This brief has verified the three sentences with which it opened: Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. For the law to replace that meaning

designed to maintain the pernicious doctrine of white supremacy."); *compare* Hernandez v. Robles, Index No. 103434/04, 2005 NY Slip Op 09436, at *19 (N.Y. App. Div. Dec. 8, 2005) (Catterson, J., concurring) ("Plaintiffs have not alleged, much less proved, that the legislators who enacted the New York statutes related to marriage were motivated by" an "anti-homosexual animus"), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm, with *id.* at *34 (Saxe, J.P., dissenting) ("The discriminatory impetus for the distinction made by the [marriage] statutes ... was implicit.").

with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Because of the very nature of social institutions, including marriage, it could not be otherwise.

This brief has also fulfilled its promise to engage the marriage issue on the basis of public reason. This fulfilled promise must not be overlooked exactly because of an unfortunate phenomenon in the contemporary marriage debate, one described by Margaret Somerville in these words:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. Good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level. ... These [tactics] ... do not serve the best interests of either individuals or society in this debate.¹⁰⁷

Finally, to not blink at the social institutional realities is to realize, with understandable regret, that there can be no "win-win" outcome to the present marriage contest. A society can sustain and nurture man/woman marriage but only by declining genderless marriage. Or a society can sustain and nurture genderless marriage but only by causing, through force of law, the demise of the old institution. Each society must choose. And a choice as portentous as this choice may never come before

¹⁰⁷ Margaret Somerville, *supra* note 29, at 70-71.

us again.¹⁰⁸

Dated: ***

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¹⁰⁸ Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 18 (1996): "The work we do today, and the issues we raise in this debate are among the most profound that this country has ever discussed and among the most important the country now faces."

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