

# BEYOND THE EXPANSION FRAMEWORK: HOW SAME-SEX MARRIAGE CHANGES THE INSTITUTIONAL MEANING OF MARRIAGE AND HETEROSEXUAL MEN’S CONCEPTION OF MARRIAGE

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## OVERVIEW

Social institutions profoundly affect human behavior. They provide human relationships with meaning, norms, and patterns, and in doing so encourage and guide conduct; they are the “humanly devised constraints that shape human interaction.”<sup>1</sup> That is their function. And when the definitions and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change.

Marriage is society’s most enduring and essential institution. As with any institution, changing the basic definition and social understanding of marriage—such as by nullifying its gendered definition—will change the behavior of men and women in marriage and will even affect whether they enter marriage in the first place. Whether deemed good or bad, redefining

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1. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990).

marriage separate from its historically gendered purposes will have significant consequences.

We know this not only as a matter of sound theory, logic, and common sense, but from experience with other changes to marriage and marriage-related expectations. Specifically, the advent of no-fault divorce changed the legal and social presumption of permanence in marriage. That change had profound consequences. While affording adults greater autonomy and facilitating an easier end to dangerous or unhealthy relationships, it also contributed to an unexpected increase in divorces from low-conflict marriages, created a tangible sense of fragility for all marriages, and left more children being raised without present fathers, with attendant adverse consequences.

Although it is far too early to know exactly how redefining marriage to include same-sex couples will change marriage, we argue that such a significant change will likely further weaken heterosexual men's connection to marriage. Marriage has been an important way that adult men establish their masculinity in a way that benefits women, children, communities, and society. A de-gendered conception of marriage likely weakens the institution's power to channel men's generative masculinity in child- and family-centered ways. This, in turn, will likely increase the risk that more children will be raised without the manifest benefits of having their fathers involved day to day in their children's lives. These risks justify states' caution in redefining marriage in non-gendered terms.

#### INTRODUCTION

Social institutions exist primarily to guide and channel human behavior in ways that benefit society. Preeminent social anthropologist A. R. Radcliffe-Brown described social institutions as a means for society to order "the interactions of persons in social relationships."<sup>2</sup> In social institutions, "the conduct of persons in their interactions with each other is controlled by norms, rules or patterns."<sup>3</sup> As a consequence, "a person [in a social institution] knows that he [or she] is expected to behave according to these norms and is justified in expecting that other persons should do the same."<sup>4</sup>

Through such rules, norms, and expectations—some legal, others cultural—social institutions become constituted by a web of public

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2. A.R. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 11 (1952).

3. *Id.* at 10.

4. *Id.* (alteration in original).

meaning.<sup>5</sup> Social institutions, and the language we use to describe them, in large measure, define relationships and how we understand and act within them.

[L]anguage—or more precisely, normative vocabulary—is one of the key cultural resources supporting and regulating any [social] institution. Nothing is more essential to the integrity and strength of an institution than a common set of understandings, a shared body of opinion, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set of understanding with the consequent fracturing of meaning.<sup>6</sup>

Marriage is a vital institution. As a group of prominent family scholars said: “[A]t least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution.”<sup>7</sup> Courts have long recognized the institutional nature of marriage.<sup>8</sup>

Thus, although serving many private ends, marriage’s institutional nature means that it is not merely a private arrangement. It exists also to shape and guide human behavior to serve public and social purposes. And those *public* purposes have centered on uniting a man and a woman to order their sexual behavior and maximize the welfare of their children:

Marriage exists in virtually every known human society. . . . As a virtually universal human idea, marriage is about . . . the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.<sup>9</sup>

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5. See Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998) (“An institution is a *web of interrelated norms*—formal and informal—governing social relationships.”).

6. Barbara Dafoe Whitehead, *The Expert’s Story of Marriage* 7 (Inst. For Am. Values, Working Paper No. WP14) (alteration in original), quoted in Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 52–53 (2004).

7. WILLIAM DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES, INST. FOR AM. VALUES 8 (2002).

8. See, 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.”) (alteration in original).

9. DOHERTY ET AL., *supra* note 7, at 8–9.

That has been the social, linguistic, and legal meaning of marriage from ancient times and that meaning continues in contemporary society.<sup>10</sup> Indeed, until very recently, “it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.”<sup>11</sup> This was the accepted pattern due to the fact that only the union of a man and a woman can produce a child. And until a few years ago, the law universally reflected and reinforced that historical, cultural, linguistic, and biological understanding.

Abandoning marriage’s gendered definition and redefining it in non-gendered terms would fundamentally alter its meaning and many of its public purposes. That necessarily follows from the very nature of marriage as a social institution. As Professor Daniel Cere of McGill University has explained: “Definitions matter. They constitute and define authoritative public knowledge. . . . Changing the public meaning of an institution changes the institution. [The change] inevitably shapes the social understandings, the practices, the goods, and the social selves sustained and supported by that institution.”<sup>12</sup>

As we have observed the current debate over the meaning of marriage, our overwhelming impression is that the debate is cast predominantly as a decision about whether to “expand” or “extend” the boundaries of marriage to include same-sex couples. This argument rests on the assumption that the basic nature of marriage will remain largely unchanged by granting marriage status to same-sex partnerships, and that all this policy change would do is absorb same-sex partnerships within the boundaries of marriage and extend the benefits of marriage to a wider segment of society.<sup>13</sup> Indeed, the very term “same-sex marriage” implies that same-sex couples in long-term committed relationships are *already* a type of marriage that should be

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10. See JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 24 (2002) (“[A] lasting, socially enforced obligation between a man and a woman that authorizes sexual congress and the supervision of children” exists and has existed “[i]n every community and for as far back in time as we can probe.”); G. ROBINA QUALE, *A HISTORY OF MARRIAGE SYSTEMS* 2 (1988) (“Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.”); NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (marriage is the “act of uniting a man and woman for life”).

11. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

12. Daniel Cere, *The Conjugal Tradition in Postmodernity: The Closure of Public Disclosure?* 4–5 (Dec. 2003) (alteration in original) (unpublished paper presented at the Re-visioning Marriage in Postmodern Culture Conference), *quoted in* Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 *CAN. J. FAM. L.* 11, 76–77 (2004).

13. See *Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014) (“The reality that marriage rights in states across the country have begun to be extended to more individuals fails to transform such a fundamental right into some ‘new’ creation. Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia’s adult citizens.”) (footnote omitted).

appropriately recognized and labeled as such. But this understanding is flawed in that it fails to understand how recognizing same-sex partnerships as marriages would signify a fundamental change in how marriage is collectively understood and the primary social purposes for which it exists.

If marriage is redefined to mean the union of two people without regard to gender, it will weaken its *inherent* focus on children. Such a change, to be sure, would afford a few more children living in same-sex-couple households the opportunity to grow up in what the law would deem a married household. But the law would then teach that marriage is “essentially an emotional union”<sup>14</sup> that has no inherent connection “to procreation and family life.”<sup>15</sup> In a formal statement, seventy prominent academics from all relevant disciplines expressed “deep[] concerns about the institutional consequences of same-sex marriage for marriage itself,” concluding that “[s]ame-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage” and “undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.”<sup>16</sup> Defining marriage as merely the union of two persons, in short, would “distill[] marriage down to its pure close relationship essence.”<sup>17</sup>

Courts and jurists have likewise acknowledged the profound change in social meaning that would follow a change in marriage’s basic definition:

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.<sup>18</sup>

#### I. NO-FAULT DIVORCE: A PRECEDENT FOR UNDERSTANDING LEGAL CHANGE TO THE DEFINITION OF MARRIAGE

The conclusion that redefining marriage will materially alter the mix of social benefits marriage provides is supported not only by sound socio-

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14. ROBERT GEORGE ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 7 (2012), noted in *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting).

15. GEORGE ET AL., *supra* note 14, at 7.

16. THE WITHERSPOON INST., *MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES* 18–19 (2006).

17. Stewart, *supra* note 12, at 61 n.144 (alteration in original).

18. *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). See also *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 981 (Mass. 2003) (Sosman, J., dissenting) (“[I]t is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure.”).

institutional theory, logic, and common sense, but by experience with other changes to marriage and marriage-related expectations. Of course, no one can know the precise, long-term consequences of redefining marriage to include same-sex couples. It is simply too soon, and the ways it may affect marriage are too complex to be understood without ample time and extensive conceptual and empirical inquiry. Justice Alito recently made this point:

Past changes in the understanding of marriage . . . have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.<sup>19</sup>

Compelling cautionary lessons can be drawn from recent changes to marriage law and marriage-related expectations. Perhaps the most relevant cautionary lesson comes from an analysis of the impact of no-fault divorce. No-fault divorce had unintended consequences that weakened marriage and fatherhood, and thus harmed children;<sup>20</sup> it is a likely template for understanding the effects of same-sex marriage.

There are many important reasons for no-fault divorce laws. The fault-based systems of the past undoubtedly created many problems and, at times, serious injustices. Among its benefits, no-fault divorce affords adults greater autonomy<sup>21</sup> and facilitates the end of unhealthy, necrotic, or dangerous unions.<sup>22</sup>

Reformers were optimistic that no-fault divorce would have no detrimental effects on children. In fact, as Barbara Dafoe Whitehead has chronicled, many early “experts” provided extensive and intricate rationales for how divorce would benefit children—divorce “for the sake of the children.”<sup>23</sup> Empirically, however, this early optimism has proven short-

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19. *Windsor*, 133 S. Ct. at 2715 n.5 (Alito, J., dissenting) (“As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society.”) (citing JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY* (2000)).

20. See ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* 91 (2000); JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* 297 (2000).

21. See WALLERSTEIN ET AL., *supra* note 20, at 297.

22. Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress* (Nat’l Bureau of Econ. Research, Working Paper No. 10175, 2003).

23. See e.g., Whitehead, *supra* note 6 (predicting how divorce would benefit children).

sighted.<sup>24</sup> Reformers may have reasoned children's exposure to harmful parental conflict would decrease, and their parents would readily find greater happiness that would improve parenting. But divorce often does not end parental conflict,<sup>25</sup> and the evidence suggests that parenting quality generally declines with divorce.<sup>26</sup> Also, half of divorces come from low-conflict marriages, not high-conflict or abusive ones.<sup>27</sup> Divorce does not lead reliably to greater personal happiness.<sup>28</sup>

So as scholars acquired sufficient data to adequately assess the empirical realities of divorce, the evidence revealed less favorable outcomes.<sup>29</sup> It is true that the children of chronic, high-conflict marriages actually do better, on average, when that relationship ends,<sup>30</sup> furthering societal interests in children's well-being. But this is not the typical divorce scenario because, as mentioned above, most divorces come from low-conflict marriages, and these children do worse when their parents divorce compared to children whose parents are able to sustain the marriage.<sup>31</sup> Most unhappy marriages become happy again if given time,<sup>32</sup> further benefitting their children.

Accordingly, the potential salutary benefits of no-fault divorce for one subset of children and parents are balanced against the harms it imposes on another, larger subset of children and parents. A prolonged period of greater instability is a primary contributor to these harms. For most children (and adults), marital dissolution begins a prolonged process of residential and relational instability as families move, new romantic interests move in and out of the household, and many children lose contact with their fathers.<sup>33</sup>

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24. See Donald Moir, *A New Class of Disadvantaged Children*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE* 63, 67–68 (Douglas W. Allen & John Richards eds., 1999).

25. E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR WORSE: DIVORCE RECONSIDERED* 138 (2002).

26. *Id.* at 126–40.

27. See PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAM. UPHEAVAL* 220 (1997); Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison of High and Low Distress Marriages that End in Divorce*, 69 *J. OF MARRIAGE AND FAM.* 621, 621 (2007).

28. LINDA WAITE ET AL., *INST. FOR AMERICAN VALUES, DOES DIVORCE MAKE PEOPLE HAPPY? FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES 4* (2002).

29. Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 *THE FUTURE OF CHILDREN* 2, 75–76 (2005); Paul R. Amato & Christopher J. Anthony, *Estimating the Effects of Parental Divorce and Deaths with Fixed Effects Models*, 76 *J. OF MARRIAGE AND FAM.* 370 (2014).

30. AMATO & BOOTH, *supra* note at 27, at 220.

31. *Id.*

32. See WAITE ET AL., *supra* note 28, at 12–14.

33. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND FAMILY TODAY* 17 (2009).

While there is a long list of caveats, and while most children are resilient,<sup>34</sup> the empirical fact remains that, on average, children whose parents divorce are at significantly greater risk for a host of economic, behavioral, educational, social, and psychological problems.<sup>35</sup>

Moreover, the impact of no-fault divorce must also be assessed at the institutional level, not just the individual level. Scholars have debated the specific effects of no-fault divorce on subsequent divorce and marriage rates. It certainly contributed to a short-term increase in divorce in the 1970s, but evidence suggests it has also contributed modestly to increased divorce rates above their long-term historical trends.<sup>36</sup> Regardless of its precise impact, the high rates of divorce of the past half-century have contributed greatly to a psychological climate of marital fragility, which may be influencing current declines in our overall marriage rate as well as further increases in divorce rates. Judith Wallerstein concluded from her twenty-five year study of the effects of divorce that changes to family life, including the high incidence of divorce, have “created new kinds of families in which relationships are fragile and often unreliable.”<sup>37</sup> The current best estimates are that nearly half of all marriages now end in divorce,<sup>38</sup> making marriage seem like a risky proposition for all. This discourages some from entering into marriage at all<sup>39</sup> and keeps the specter of divorce ever-present during times of marital discontent. Research also has found a contagion effect for divorce, such that a divorce in one’s social circle increases one’s own risk of divorce.<sup>40</sup>

The advent of no-fault divorce (with accompanying shorter waiting periods) did not just make it procedurally easier to exit an unsatisfying relationship. It changed the legal and social presumption of permanence in marriage. Intentionally or unintentionally, no-fault divorce diminished the institutional and social expectation of marital permanence. It changed the public meaning of marriage from a legally binding life-long union that was expected to weather the inevitable disappointments and challenges of romantic unions (“for better or for worse”), to a union whose duration depended on the subjective choice of one spouse—the traditional vow “for as

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34. Amato & Anthony, *supra* note 29, at 370.

35. See Amato, *supra* note 29.

36. PARKMAN, *supra* note 20, at 93.

37. WALLERSTEIN ET AL., *supra* note 20, at 297.

38. Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, CTR. FOR DISEASE CONTROL 323, 5 (2001); Sheela Kennedy & Steven Ruggles, *Breaking Up Is Hard to Count: The Rise of Divorce in the United States, 1980–2010*, 51 DEMOGRAPHY 2, 587 (2014).

39. WALLERSTEIN ET AL., *supra* note 20, at xvi, 37.

40. See Rose McDermott et al., *Breaking Up Is Hard to Do, Unless Everyone Else Is Doing It Too: Social Network Effects on Divorce in a Longitudinal Sample*, 92 SOC. FORCES 491 (2013).



long as we both shall *live*” has been replaced by “for as long as we both shall *love*.” Before no-fault divorce, our laws reinforced the ideal that divorce should not be a ready option, although it may be a necessity. After no-fault divorce, our laws teach that divorce is always a ready option, even if it is not a necessity.

The legal change of no-fault divorce has, to some extent, tipped the scales of marriage in favor of adult emotional interests and personal choice over its institutional, child-centered elements. It weakened permanence as a fundamental public meaning of marriage and contributed to a generational shift in attitudes and behaviors within individual marriages in ways that harmed overall child interests. Permanence was not just an element of the legal definition of marriage; it was a primary mechanism by which marriage produced its benefits for children (and adults). The expectation of permanence provides a strong incentive for parents to work through their problems to achieve a satisfying relationship; it encourages parents to prioritize their children’s long-term needs above their own short-term desires, and it helps to harness two adults in the rearing of their children. Weakening the expectation of permanence in the legal and cultural understanding of marriage unexpectedly weakened each of these child-centered factors, on average, harming the well-being of children.

The no-fault divorce experience serves as a cautionary tale, especially with respect to child welfare. The definition of the institution of marriage—its legal rules and norms and the social and personal meanings and expectations that flow from them—affects the behavior of all couples within marriage. That, in turn, can have profound effects on the overall well-being of children, even if the immediate rationale of the change is intended to benefit a specific subset of children and adults.

As with early advocates for no-fault divorce, proponents of eliminating the gendered definition and understanding of marriage confidently predict that such a change will have no adverse consequences for heterosexual marriages or their children.<sup>41</sup> What could be the harm to marriage-related interests of allowing same-sex couples to marry? Indeed, for the vast majority of people, the argument goes, nothing would change: “If you like your marriage, you can keep it.”

This recalls the optimistic early thinking about no-fault divorce. Yet some humility is in order. It is unlikely that contemporary thinkers

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41. See Ellen C. Perrin & Benjamin S. Siegel, *Policy Statement: Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 AM. ACAD. FOR PEDIATRICS 1374 (April 1, 2013), <http://pediatrics.aappublications.org/content/early/2013/03/18/peds.2013-0376>; Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. CR-CL, 81, 82 (2011).

attempting to define the consequences of another major change to the legal definition of marriage—the removal of gender as a defining pillar—are more gifted at secular prophecy than were thinkers in the early years of the no-fault divorce revolution. Indeed, in our view, the no-fault divorce revolution provides the clearest precedent for rational predictions about the effects of redefining marriage in genderless terms. Knocking out a defining marital pillar of gender is not just a remodeling to make room for more potential residents; it is a major architectural change with potential consequences for the viability of the entire structure of the institution of marriage.

## II. HOW WILL A NON-GENDERED DEFINITION OF MARRIAGE DIMINISH THE RELEVANCE AND VALUE OF MARRIAGE AND FATHERHOOD TO HETEROSEXUAL MEN?

Just as the innovation of no-fault divorce benefited men and women in irretrievably broken marriages, same-sex couples may benefit from being able to marry and form the non-gendered understanding of marriage that such a redefinition would create. It is reasonable to assume that some existing children living in same-sex households would also benefit from marriage if it brings greater stability and more social support to their family. But as the history of no-fault divorce suggests, there are also reasons to doubt such straightforward predictions. More importantly, one has to look beyond the effects within same-sex families alone to accurately gauge the full impacts of a de-gendered understanding of marriage.

Benign predictions about the effects of such a redefinition, moreover, are based on the assumption that legalizing same-sex marriage would not be a significant change in the core definition of marriage, or that even if it is, such a change will have little or no adverse consequences on marriage as an institution and on those who depend on its current definition. But, in fact, the legalization of same-sex marriage would eliminate gender as a definitional pillar of the social institution of marriage. It would not just expand or extend marriage to another class of relationships, leaving unchanged the basic institution for its traditional members (in a way that eliminating holdover anti-interracial marriage laws did a generation ago); it would effect a fundamental change in the meaning of marriage. Changing its meaning will most likely change behavior. To deny this likelihood is intellectually untenable—it is to deny that meaning matters to social institutions and that marriage matters as a social institution.

How a new, de-gendered meaning of marriage will change attitudes toward and behaviors within marriage cannot be known with precision. But based on what is known about marriage as an institution and the roles it has

long played in society, we can make some reasonable projections. We focus here on one in particular: that stripping marriage of its gendered meaning will likely diminish the relevance and meaning of marriage and fatherhood to heterosexual men, weakening their connection to marriage and to the children they possibly father.

Far from being a relic of history or a quaint custom that has outgrown its usefulness in modern society, gender is a crucial component of not only the definition of marriage, but of how marriage produces its benefits for children and society. In fact, it may be more crucial now than it has ever been because of changes that have occurred in the meaning of marriage over the past five decades that have dramatically weakened men's ties to their children and their children's mother.<sup>42</sup>

According to eminent family sociologist Steven L. Nock, marriage is a primary means of shaping men's identities and behaviors (e.g., sexual, economic, etc.) from self-centered in nature to child- and family-centered in orientation:

Historically, masculinity has implied three things about a man: he should be the father of his wife's children, he should be the provider for his wife and children, and he should protect his family. Accordingly, the male who refused to provide for or protect his family was not only a bad husband, he was somehow less than a man. In marriage, men do those things that are culturally accepted as basic elements of adult masculinity. . . . [M]arriage changes men because it is the venue in which adult masculinity is developed and sustained.<sup>43</sup>

Moreover, Nock argues that, "In their marriages, and by their marriages, men define and display themselves as masculine."<sup>44</sup>

[B]y calling for behaviors of a certain type [socially valuable behaviors], the expectations of normative marriage also reinforce and build [generative] masculine identities. In this sense, normative marriage is a masculinity template. . . . When we ask why marriage appears to be beneficial to men [and women and children], one possible answer is that the institution of marriage, at least in its most traditional form, is a socially approved mechanism for the expression of [mature] masculinity.<sup>45</sup>

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42. See generally DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 9–24 (1995).

43. STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* 4 (1998).

44. *Id.* at 58.

45. *Id.* at 59 (alteration in original).

Even in our progressive twenty-first century (and perhaps even more observable now because of our modern attitudes about diverse ways of forming families), marriage is the most important social mechanism we have to channel young men's adult identity into other-oriented behaviors of sacrifice, generosity, and protection for their own children and even for all children in society. Marriage is a transformative act, especially so for men, because of how it funnels men's adult identity into service to their families and to society.

Fatherhood is more socially constructed and more contextually sensitive than motherhood, according to a landmark report to the U.S. Department of Health and Human Services, which was later published in a leading peer-reviewed journal.<sup>46</sup> Fatherhood is more problematic than motherhood because men's commitment to and investment in parenting is more difficult to achieve. Many of the historical supports that have traditionally preserved men's involvement in their children's lives have been eroding for contemporary families. Historic high rates of non-marital cohabitation, out-of-wedlock childbirth, and marital divorce have dramatically altered the landscape of fathering,<sup>47</sup> leaving unprecedented numbers of children growing up with ambiguous or non-existent relationships with their fathers.

While these demographic trends have changed family life in general, they have been particularly grim for father-child relationships, which are more sensitive than mother-child relationships to contextual forces and supports.<sup>48</sup> Accordingly, any signal that men's contributions are not central to children's wellbeing threatens to further decrease the likelihood that men will channel their masculine identities into responsible fathering. The official de-gendering of marriage sends such a signal. A gender-free definition of marriage risks diminishing the achievement of mature, other-centered masculinity (as opposed to immature, self-centered masculinity) as a primary motivation for marriage and fathering.

Thus, the legal recognition of same-sex marriage is not just an extension or expansion of marriage's borders to accommodate a new kind of family form; it is a fundamental change to the meaning of marriage and fatherhood. In our opinion, to legally proclaim that gender is not an essential component of marriage undermines in a profound, far-reaching, and official way the very mechanism that creates many of the benefits that marriage produces. If marriage is redefined as two committed sexual partners, regardless of their

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46. See William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. OF MARRIAGE & FAM. 277 (1998).

47. See generally BLANKENHORN, *supra* note 42, at 9–24.

48. See Doherty et al., *supra* note 46, at 277.

gender, then the institution's connection to men's roles as fathers is necessarily ambiguous. A genderless meaning of marriage puts at risk the cultural sense that marriage and life-long fatherhood are central to defining men's identities. It invites—even demands—new ways of understanding families that make men's unique contributions to family life and their children optional. It deepens the destructive, decades-long cultural trend of questioning the necessity and importance of fathers as day-to-day nurturers, providers, and protectors within families—a trend that has weakened father-child bonds and familial ties.

In sum, if men are legally defined as optional to marriage and childrearing, then marriage will likely struggle to maintain its primacy as a means for men to establish their masculine identity in ways that serve children best. A gender-free definition of marriage—where gender is officially irrelevant to its structure and meaning—will likely have less social power to draw heterosexual men into marriage and, thus, less power to serve marriage's vital child-welfare purposes. No doubt these potential effects, like many others, would be felt most keenly and quickly by the children and families of the most disadvantaged men in our society—men who already are struggling under a sense that they are optional and of secondary importance to their children and families, and whose masculinity is already challenged by their tenuous participation in our economic system.<sup>49</sup>

We have argued how abandoning the gendered definition of marriage will tend to further alienate heterosexual men from marriage and fatherhood. Although precise effects cannot be known with certainty at this early stage, that alienation is likely to harm the state's interests in securing the welfare of children in heterosexual families—and specifically in maximizing the likelihood that children will be reared by a father as well as a mother—in at least four concrete, predicable, and interrelated ways.

#### A. *Fewer and Less Stable Marriages*

Redefining marriage in genderless terms will undermine the state's interest in encouraging heterosexual fathers to marry the mothers of their children. As we have argued, if men no longer view marriage as central to defining their adult identities—if they see themselves as unnecessary to the intrinsic meaning and purpose of marriage and, thus, view marriage as optional to their sense of maleness—they will be less likely to marry, even when they become fathers. Marriage, in other words, will simply be less

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49. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 216–28 (2013).

relevant to men and, thus, less attractive to them. In an already highly individualistic culture such as ours, men will be more likely to seek to establish their adult identities through other means, such as career and financial success, personal pursuits, leisure activities, and non-marital sexual relationships. The children of such men will be less likely to be raised by their fathers and will suffer as a result.

Redefinition will also undermine the state's interest in encouraging married heterosexual fathers to remain married for the benefit of their children despite marital difficulties.

Until the current generation, the widely held (and now empirically supported) belief that children needed their fathers was a central tenet in social norms encouraging men to work through marital troubles with their wives . . . . This retreat from the ideal may be particularly devastating for [the family involvement and parenting of] men who, according to research, are more reliant on such social and relationship supports to foster their healthy involvement in family life and parenting.<sup>50</sup>

As we noted previously, studies have found that most divorces come from low-conflict marriages and that children in these families do worse when their parents divorce compared to children whose parents are able to sustain the marriage.<sup>51</sup> Also, most unhappy marriages become happy again if given time,<sup>52</sup> further benefitting their children. A gendered definition of marriage and parenting emphasizes that fathers *are* important and unique in the lives of their children. This perspective helps men see that their children are stakeholders in their marriages and discourages divorce. Same-sex marriage denies that men are essential to marriage and, thus, that fathers are essential in the lives of their children, replacing this cultural ideal with the idea that two parents, regardless of gender, are equivalent, which will increase the likelihood that fewer heterosexual fathers stay married for the sake of their children.

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50. Jason S. Carroll & David C. Dollahite, *Who's My Daddy? How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, in *WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETIES?* 47, 62 (Lynn Wardle ed., 2008) (alteration in original).

51. AMATO & BOOTH, *supra* note 27, at 220.

52. See WAITE ET AL., *supra* note 28, at 12–14.

### B. *Less Parenting by Fathers*

Altering the gendered definition of marriage will also diminish the likelihood of men, even married men, being responsible fathers, or being fathers at all. Indeed, it is likely that redefining marriage:

would support a retreat from fatherhood altogether among some American men. One aspect of a self-defined parenting ideology in society is the option of not being a parent at all. If fathering is not a cultural ideal, the potential exists for an increase in men who live outside marriage and parenthood altogether. Given the data on the negative social consequences of communities that have a large number of unmarried men (e.g., higher rates of crime and other anti-social behavior), we should resist movement toward a parenting culture that would suggest that men can be viewed as “sperm donors” whose only essential “parenting role” is conception and then women can do it alone, either as single parents or as a lesbian couple. The loss of a cultural ideal for men to become responsible fathers could lead to increased numbers of men and children who live in non-generative contexts.<sup>53</sup>

This would harm the state’s interest in encouraging the optimal mother-father, biological parenting model, resulting in more children being raised without the benefits of a biological father—or any father at all.

### C. *More Conception Outside Marriage Rather than Inside Marriage*

For similar reasons, abandoning the gendered definition of marriage would make it more likely that men will engage in sex outside marriage, and will thus produce comparatively more children who will likely be raised by their mothers alone. For many men, the current (but weakening) cultural expectation that they will be active fathers to any children they help conceive serves as a natural deterrent to engaging in extra-marital sex and, thus, risking the incursion of such an obligation. Weakening or removing that cultural expectation—that is, by making the father’s role optional—when redefining marriage in genderless terms will reduce that deterrent and, therefore, likely increase the relative number of children conceived and born outside of marriage with no expectation that the father will be actively involved in rearing them. In short, redefinition will likely increase the *proportion* of fatherless children in two ways: by reducing the

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53. Carroll & Dollahite, *supra* note 50, at 62–63.

number of children born within marital unions, and by increasing the number born outside of such unions.

Of course, current increases in non-marital childbirth rates reflect large increases in the amount of cohabiting couples having children, which is increasingly being seen by many as another culturally viable form of family formation. If young mothers and fathers were actually marrying each other a year or two after the arrival of their first child and remaining together, non-marital childbirth rates might not be much to worry about. But that is not what is happening. Nearly forty percent of cohabiting twenty-something parents who had a baby between 2000 and 2005 split up by the time their child was five; that is three times higher than the rate for twenty-something parents who were married when they had a child.<sup>54</sup> Cohabiting parents were also over three times more likely than married parents to move on to another cohabiting or marital relationship with a new partner if their relationship did break up.<sup>55</sup> Research paints a sobering picture of the effect these disruptions have; children suffer emotionally, academically, financially, and other ways when they experience this type of relationship carousel.<sup>56</sup>

#### D. *Less Self-Sacrificing by Fathers*

Finally, further alienating men from marriage and fatherhood by redefining it to make their presence unnecessary would likely diminish self-sacrificing behavior by men for their wives and children. If, as we argue above, a genderless definition of marriage undermines marriage and fatherhood as a primary vehicle for adult identity-creation, then men will be less likely to sacrifice their self-interests for the child-centric interests inherent in traditional male-female marriage and fatherhood. When faced with choices regarding career, housing and neighborhood decisions, long-term saving, child educational needs, personal recreational activities, activities with friends, sexual fidelity to spouse, alcohol and drug use, and a host of other decisions affecting the welfare of their children, fathers will be more likely to choose their own individual interests over those of their wives and children. As child interests take a back seat, the welfare of children suffers in a host of ways.

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54. Kay Hymowitz et al., *Summary*, KNOT YET REPORT: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA, <http://twentysomethingmarriage.org/summary/> (last visited Mar. 3, 2015).

55. *Id.*

56. See CHERLIN, *supra* note 33, at 20, 22–23; Amato, *supra* note 29, at 75–76.



## CONCLUSION

Courts should not make the mistake that redefining marriage to include same-sex couples is only a matter of extending to such couples the legal benefits and obligations of marriage. Redefinition changes the meaning for all, not just a few new members to the institution. Social institutions are constituted by legal and social meanings that shape and guide human behavior. Marriage, foremost among our social institutions, has profound connections with child welfare and adult male identity. Indeed, both are integrally related. We believe marriage cannot simply be redefined in non-gendered terms without significant consequences for all children.

The risks associated with legalizing same-sex marriage may prove difficult to disentangle from the negative effects from other strong social changes. After all, we believe a de-gendered understanding of marriage is an additional force in a larger trend that is uncoupling sexuality, marriage, and parenthood, and making men's connections to children weaker. It is not a unique and independent force. Thus, it may be difficult to separate the potential effects of de-gendering marriage from the effects stemming from powerful forces to which it is related: the sexual revolution, the divorce revolution, and the single-parenting revolution. Clearly, the potential effects of redefining marriage to include same-sex couples are intertwined with the effects of other powerful forces, but this does not diminish the importance of these effects or the potential harms they can impose on marriage. Removing gender from the legal meaning of marriage will add to the grand social experiment of the past fifty years of deinstitutionalizing marriage and fatherhood.<sup>57</sup> And we fear its consequences will only add to the problems this change in family life is producing.

Much as no-fault divorce changed the presumed permanence of marriage, which created unexpectedly adverse consequences for children, abandoning the gendered definition of marriage threatens to further destabilize marriage as a key definer and shaper of mature male identity. This, in turn, is likely to further alienate men from marriage, resulting in harm to marriage's vital role in advancing child welfare—and particularly in maximizing the likelihood that children, as much as possible, will be reared by a father as well as a mother. While the precise effects of redefining marriage cannot be known with statistical certainty, these risks are rational and reasonable and should not be ignored.

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57. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. OF MARRIAGE AND FAM. 848 (2004).