Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce

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I. INTRODUCTION

Considering the negative ramifications that occurred the last time our country amended marriage laws by introducing no-fault divorce, it is no wonder why conservatives and liberals alike would have trepidation about another change. However, same-sex marriage laws cannot be compared to no-fault divorce laws because allowing same-sex marriage would bring a change to marriage entrance rights, making it easier to strengthen a family, rather than a change to marriage exit rights, making it easier to tear one apart.¹ Same-sex marriage laws would not aim to reduce harm in an already negative situation, as proponents of no-fault divorce mistakenly argued, but would increase, celebrate, and reward a known social good. Families headed by same-sex couples merely want to be part of the institution of marriage after seeing, as we all have growing up, the blessings a stable marriage can bring and the pain a divorce can cause, not only to ex-spouses, but also to their children.

No matter their sexual orientation, children who came of age in the wake of the divorce boom experienced the same things. Children of divorce helplessly watched as their parents became less physically, psychologically, and economically stable.² Immediate effects on these children included: declining academic performance, a proclivity toward criminal behavior, and unstable relationships of their own.³ It is now clearer than ever that divorce leaves lasting effects on children who have to take on parenting responsibilities because one of their parents is no longer in the picture.⁴

One of the most divisive issues in the public debate surrounding same-sex marriage is its impact on the existing institution of marriage and the American family. Advocates of same-sex marriage argue that marriage will benefit children by providing same-sex households the same economic protection and legal stability enjoyed by opposite-sex married couples. Opponents argue, however, that same-sex marriage would be the same sort of social experiment that society undertook with the passage of no-fault divorce, and that, just as the institution of marriage was gravely harmed by the “divorce boom,” it would also suffer from the possibly unintended, but very real, harms that opponents believe accompany any major redefinition of marriage.⁵ This

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⁴ See generally Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, The Unexpected Legacy of Divorce (Hyperion 2000).
⁵ See e.g. Douglas W. Allen, An Economic Assessment of Same-Sex Marriage Laws, 29 HARV. J.L. & PUB. POLICY 949 (2006) (arguing same-sex marriage would lead to more divorces because marriage laws would have to adapt to apply to same-sex couples); Elizabeth Marquardt, Gauging America on
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article will argue why same-sex marriage legislation would not repeat the errors of no-fault divorce because where no-fault divorce created negative physical, emotional, and economic consequences to millions of American families by making it easier to tear them apart, same-sex marriage would have the opposite effect by bringing families together and stabilizing the familial relationships the government wanted to incentivize by creating marriage laws in the first place.

The first section of this article will recount the history of no-fault divorce and show why those who rightfully feared the consequences of no-fault divorce should not be threatened by same-sex marriage. The second section will show how marriage positively affects spouses' health and why society would benefit from same-sex marriage legislation. Section three will show how no-fault divorce resulted in economic instability for millions of families and how same-sex marriage would save the government millions of dollars and strengthen our national economy. The fourth section will describe additional detriments to children that result from divorce and how a two-parent household, even with same-sex parents, would bring only benefits rather than harms. The final section will show why the government has a public policy interest in keeping families together through marriage laws and why those concerns should apply to all families, not just ones headed by opposite-sex couples.

II. THOUGH OPPONENTS RIGHTFULLY FEARED INCREASED DIVORCE RATES AS A RESULT OF NO-FAULT DIVORCE LEGISLATION, CHANGING MARRIAGE LAWS AGAIN THROUGH SAME-SEX MARRIAGE WOULD NOT HAVE THE SAME EFFECT

Relying on the adverse consequences of no-fault divorce, opponents of same-sex marriage fear that additional legislation will further negatively affect the institution of marriage, but as history shows, this is not the case. Proponents of no-fault divorce made claims that have proven false, but those arguments do not apply to same-sex marriage. No-fault divorce advocates argued that (1) passage of no-fault divorce would not result in a large increase in divorce, but merely make the process

Gay Marriage: A Fine Idea in Principal, but What about the Kids? Chi. Trib. (Dec. 7, 2003) (available at http://catholiconline.com/featured/headline.php?ID=1061&page=1) (arguing that same-sex marriage, like no-fault divorce would weaken the institution of marriage and family because children would lose the connection with one of their biological parents); Catholic Answers, Inc., Gay Marriage, http://www.catholic.com/library/gay_marriage.asp (accessed May 13, 2010) (“One of the downsides to redefining marriage to include same-sex couples would be the weakening of the meaning of marriage, which would cause more divorces. Human nature being what it is, if the meaning of marriage is weakened, it will be psychologically easier for even more people to divorce. Look at what happened when ‘no-fault’ divorce was legalized. The divorce rate skyrocketed. If the nature of marriage is further undermined in the minds of couples then when things get rocky, more couples will be tempted not to work through their problems and get happy again but rather to divorce and find someone else.” (footnotes omitted)); Stephen Baskerville, The No-Blame Game: Why No-Fault Divorce Is Our Most Dangerous Social Experiment, http://www.fair.org/alabama/corrupt/NoBlame%20Game.htm (Mar. 2005) (arguing that no fault divorce and same-sex marriage are closely connected because “[g]ay marriage would probably not be an issue in the first place if marriage had not already been weakened by divorce.”).

6. See e.g. Allen, supra n. 5; Marquardt, supra n. 5; Gay Marriage, supra n. 5; Baskerville, supra n. 5.
more truthful and less acrimonious; and (2) children of divorce would benefit from the fact that divorce would become less acrimonious. Therefore, even though opponents of no-fault divorce were correct to fear a change to marriage exit rights, changing marriage entrance rights, as in the case of interracial marriage, has not had a similar negative effect, so legalization of same-sex marriage should not be feared.

A. Background: Marriage under the Fault Divorce Regime

Decades of research show that the claim that no-fault legislation would not increase the divorce rate but merely make the process less acrimonious has proven false. Back in 1870, only about three percent of marriages ended in divorce, compared to about 50 percent today. The most current figures available indicate the annual marriage rate is 6.8 per 1,000 individuals and the divorce rate is 3.4 per 1,000. While the divorce rate has steadily increased throughout the years, it did not even spike to 30 percent until about 1945 when World War II sent many women into the workforce, consequently making them less financially reliant upon men. The divorce rate leveled off after the war, but nearly doubled from 27 percent in 1965 to 48 percent by 1975 after the introduction of no-fault divorce.

Though many factors could have contributed to the dramatic increase in the divorce rate, research consistently shows no-fault divorce legislation played a significant role. Some argue that the primary cause of this dramatic increase in divorces was the women’s liberation movement of the 1970s. This theory posits that as more women entered the workforce, they no longer needed financial support from men and consequently marriage lost its social function. Some women’s liberation advocates even argued that marriage only held women back from achieving their goals. Others argued that the sexual revolution contributed to the increase in the divorce rate because “intimate relationships outside of marriage [became] much more common.” While many variables could have contributed to the increase, the one thing that is clear is that the American divorce rate never surpassed 30 percent until states began to introduce no-fault divorce laws.


8. Masci, supra n. 3, at 25, 32.


11. Id. at 25, 33.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id. at 25, 28.
Before no-fault divorce legislation, courts granted a divorce only if one spouse was found at fault, or “guilty,” and the other was found “innocent.” Only serious crimes against the other spouse constituted grounds for divorce, such as abandonment, abuse, and adultery. And even in marriages where one of these crimes existed, a divorce still required the consent of the “innocent” spouse. A guilty spouse could not commit one of these crimes just to get a divorce. If both spouses were guilty, the court would deny the petition as well. Following the introduction of no-fault divorce laws, however, one spouse can unilaterally decide to legally terminate the marriage, as consent of both parties is no longer necessary. Some even argue that as a result of no-fault divorce, marriage obligations have been rendered completely illusory because now only moral obligations keep spouses from breaking their marital vows.

B. Why Did We Move to a No-Fault Divorce Regime?

The initial move toward a no-fault divorce regime as well as continued efforts to reform or repeal it persists as a polarizing debate. States began to reconsider the fault-based divorce system for two primary reasons: (1) spouses had begun to perjure themselves in states where no fault actually existed; and (2) courts wanted to reduce hostility between the parties. To combat the instances of perjury, some states retained the fault system but added the concept of marital breakdown. With this addition, courts could grant a divorce even where no abandonment, abuse, or adultery existed as long as there was proof that the relationship had “irretrievably broken down” meaning “the spouses [could] no longer function as a married couple.” Critics argued, however, that the standard of proof for marital breakdown was subjective and probably varied not only state-to-state, but judge-to-judge.

Critics of no-fault divorce also argue that the attempt to decrease acrimony does not seem successful either, in that 90 to 95 percent of all divorces were uncontested prior to enactment of no-fault divorce laws, meaning any litigation at all

18. Id.
19. Id.
20. Id.
21. Id. at 478.
22. Boyd, supra n. 7, at 613; see also Margaret F. Brining, From Contract to Covenant: Beyond the Law and Economics of the Family 149 (Harvard U. Press 2000).
26. Id.
27. Nakonezny et al., supra n. 17, at 478.
was rare under the fault-based system.\textsuperscript{29} Therefore, even if advocates of no-fault divorce were correct in believing the divorce process has become more honest, acrimony has only increased since no-fault divorce legislation commenced. This could be attributed, however, to society’s increased proclivity toward litigation overall since the 1970s.

Proponents of the no-fault divorce system continue to argue that returning to a fault-based system would only intensify and prolong the already-existing conflict in the divorce process.\textsuperscript{30} They argue, “[t]he fault barrier comes too late in the divorcing process” because most couples do not contemplate divorce until the marriage is already nearly impossible to salvage and some marriages that should not be preserved, including those involving physical domestic violence, would be prolonged with this additional barrier.\textsuperscript{31} Other arguments offered against the return to fault-based divorce include: children would be “caught in the crossfire” of disagreeable spouses forced to stay together; “[m]arital assets would be squandered and dissipated,” leaving fewer resources to take care of the children after their parents separate; and couples contemplating marriage would be more discouraged at the outset from getting married at all.\textsuperscript{32}

\textit{C. The Divorce Rate Increased with the Advent of No-Fault Divorce}

Though scholars disagree about whether the introduction of no-fault divorce was for the better, one fact neither side can dispute is the divorce rate has increased dramatically. A substantial majority of no-fault divorce legislation occurred during the 1970s,\textsuperscript{33} a period now referred to as the “divorce boom.” States first began to include marital breakdown as grounds for a divorce in 1953,\textsuperscript{34} but California was the first state to completely abolish the fault-based system in 1969.\textsuperscript{35} In 1970, the divorce rate per 1,000 individuals in California increased from 4.2 to 5.7.\textsuperscript{36} Critics attributed this increase, however, to Californians getting divorced at home rather than fleeing to Nevada as they had done prior to the enactment of no-fault divorce legislation; so the actual number of Californians getting divorces probably did not change as radically as these figures suggest.\textsuperscript{37} At the time, Nevada was known as a “divorce mill” where couples from any state could easily obtain a divorce.\textsuperscript{38}

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\textsuperscript{29} Boyd, supra n. 7, at 613; see also Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79, 103 (1991).
\textsuperscript{30} Gallagher & Whitehead, supra n. 23, at 24.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Nakonezny et al., supra n. 17, at 479 (stating that 78 percent of the no-fault legislation passed in the 1970s).
\textsuperscript{34} Id.
\textsuperscript{35} Wright Jr. & Stetson, supra n. 25, at 577.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 579.
\textsuperscript{38} Id.
\end{flushleft}
In a study that compared each state’s divorce rate during the three years prior to enactment of the no-fault divorce laws to the three years after the enactment, all states except six showed an increase in the divorce rate. The study found an increase in the national average of divorces from 4.14 per 1,000 individuals three years before no-fault divorce legislation, to 4.93 per 1,000 individuals after the laws took effect. This may not seem like a large change, but with the United States population amounting to more than 205 million in 1970 and more than 225 million in 1979, the number of additional divorces in America overall would have been at least 161,000 and maybe as great as 178,000.

Researchers have provided logical explanations for the variance in five of the six states where divorce did not increase dramatically. Nevada was the “divorce mill” prior to no-fault divorce legislation with a large number of non-residents seeking divorce in that state. After the passage of no-fault divorce laws in neighboring states, divorce “tourism” declined as spouses discovered they could get a divorce just as easily in their home state. Researchers attributed Utah’s variance to its Mormon culture. Other studies have corroborated that the divorce rate seemingly decreases in areas with especially strong religious norms. Oklahoma and Maryland were the first states to permit no-fault divorce, so the law’s novelty may explain the delay in any increase in divorce rates. Similarly, Illinois and Utah were two of the last three states to enact the laws, so these residents may have already divorced in other states. The researchers offered no explanation for Arkansas, a state that enacted its law in the height of the divorce boom, 1979, and saw a dramatic 1.89 decrease in the divorce rate per 1,000 individuals.

D. Some Scholars Argue No-Fault Divorce Merely Reflected a Change in Social Values

Proponents of no-fault divorce argue that the change in marriage laws may have been a response to, rather than a cause of, more divorces. “Law has symbolic importance over and above its regulatory effects; it makes a cultural statement, if only to ratify changes in values that have already occurred,” said Norval D. Glenn of the

39. These states included Oklahoma, Maryland, Nevada, Arkansas, Illinois, and Utah. Nakonezny et al., supra n. 17, at 482.
40. Id. at 480.
42. Id.
43. Nakonezny et al., supra n. 17, at 486.
44. Id.
45. Id.
46. Dorothy M. Stetson & Gerald C. Wright Jr., The Effects of Laws on Divorce in American States, 37 J. MARRIAGE & FAM. 537, 539 (1975).
47. Nakonezny et al., supra n. 17, at 486.
48. Id.
49. Id. at 480.
50. Id. at 487.
Department of Sociology at the University of Texas, criticizing the figures from the study measuring the increase in the divorce rate three years before and after no-fault divorce legislation. Additionally, other research points to independent variables that could have affected the study, such as divorce rate being much higher in areas with greater population mobility and lower in areas with large concentrations of immigrants, or especially strong religious values. Glenn argues,

"Implementation of no-fault divorce was largely redundant in most states in terms of lowering the legal restrictions on divorce. Many states liberalized provisions for divorce several years before they adopted no-fault divorce, and some (possibly most) judges came to use fault grounds such as cruelty almost as de facto no-fault grounds. Almost everyone who wanted a divorce and who was willing to pay the social and economic costs was probably able to divorce even before the implementation of no-fault provisions."

Researchers argue whether the increase in the divorce rate was due to no-fault divorce legislation, "the increasing economic independence of women, declining earning levels, rising expectations for personal fulfillment from marriage, . . . greater social acceptance of divorce," or a combination of them all. Yet one thing is clear: changing exit rights to marriage through no-fault divorce legislation has harmed the institution of marriage by increasing not only the number of divorces, but also the acrimony during the process as well—something that has been proven not to occur when marriage entrance rights are amended.

E. Changing Marriage Entrance Rights Does Not Share the Adverse Effects to the Divorce Rate

Evidence shows that any changes to marriage exit rights throughout the world have harmed the institution of marriage, something that does not occur when entrance rights change. As in the United States, the long-term trend in Scandinavian countries had been toward "lower marriage rates, higher divorce rates, and higher rates of non-marital births" overall; but also as in the United States, the dramatic increase did not occur until these countries enacted no-fault divorce laws. After Denmark

52. Wright Jr. & Stetson, supra n. 25, at 580.
53. Stetson & Wright Jr., supra n. 46, at 539.
54. Glenn, supra n. 28, at 802.
56. Eskridge Jr. & Spedale, supra n. 1, at 173-179.
57. Id. at 173. Further, though Denmark's marriage rates varied from year to year, the steady overall trend since 1950 was downward with only 602 marriages per 1,000 people between 1985 and 1989. Additionally, Norway's marriage rate declined by almost 40 percent between 1973 and 1993. Sweden's marriage rate had also steadily declined throughout the century, falling by almost 200 marriages per 100 thousand people between 1960 and 1973. Id. at 173-177.
58. Id. at 173.
introduced its no-fault divorce laws in 1969, the divorce rate soared by 40 percent the following year.\textsuperscript{59} Sweden eliminated its “for-cause requirement” in divorce laws in 1973 and also saw a two-thirds increase in its divorce rate the following year.\textsuperscript{60} Therefore, with the marriage rate already decreasing and the divorce rate already increasing in these Scandinavian countries, these rates should logically have at least continued after the introduction of same-sex marriage laws, if indeed same-sex marriage laws carry the negative effects that opponents fear.\textsuperscript{61} That did not happen.\textsuperscript{62}

Though it is clear that changes to marriage exit rights have an adverse effect on the institution of marriage, evidence from Scandinavian countries points to the contrary in the case of expanding eligibility.\textsuperscript{63} After Denmark introduced the Registered Partnership Act allowing same-sex unions in 1989, the marriage rate only continued to rise, hitting 720 marriages per 1,000 people in 2000, the highest since 1970.\textsuperscript{64} Also during the 1990s Denmark’s divorce rate dropped “to the lowest levels th[e] country ha[d] seen since it adopted [its] no-fault divorce law[s].”\textsuperscript{65} The rate fluctuated throughout the years, but between 2000 and 2004, the divorce rate was still lower than it had been before the introduction of the partnership laws.\textsuperscript{66} Additionally, the percent increase of cohabitating couples dropped from 4.8 percent between 1980 and 1988, to 1.4 percent between 1989 and 2004.\textsuperscript{67} The percent increase of cohabitating couples with children in Denmark also rose by 70 percent between 1980 and 1989, but dropped to less than 29 percent from 1989 to 2000 and again to only 0.4 percent from 2000 to 2004.\textsuperscript{68}

Norway and Sweden’s marriage and divorce rates reacted similarly.\textsuperscript{69} In 1993, when Norway enacted its Registered Partnership Act, its marriage rate was about one-third lower than Denmark’s, but in the following years, marriage rates increased and divorce rates dropped.\textsuperscript{70} Sweden enacted its partnership laws in 1995 when marriages were down overall, but its marriage rate did increase between 2000 and 2003 to levels higher than they were from 1991 to 1994 (before the partnership laws took effect).\textsuperscript{71} Therefore, expanding marriage eligibility to gays and lesbians did not

\textsuperscript{59} Id. at 178.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 173-179.
\textsuperscript{62} Id. Additionally, those who fear same-sex marriage laws may lead down a slippery slope toward polygamous marriages, incestuous marriages, marriages including minors, or marriages involving animals, etc., can take comfort in the fact that Denmark has now registered same-sex partners for more than twenty years without a single slip in any of those directions. Id. at 36.
\textsuperscript{63} Id. at 173-179.
\textsuperscript{64} Id. at 173-174.
\textsuperscript{65} Id. at 174.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 175.
\textsuperscript{68} Id.
\textsuperscript{69} Id. Sweden’s rates fluctuated more, however, during the 1990s than the other Scandinavian countries because a change in pension laws, allowing inheritance for a spouse in 1989 caused a tremendous spike in the marriage rate that year, leaving fewer eligible singles in the 1990s. Id. at 176-177.
\textsuperscript{70} Id. at 175-176.
\textsuperscript{71} Id. at 177.
negatively impact the institution of marriage as some feared it might because statistics have shown that marriages increased and divorce rates decreased overall after the laws’ introduction in Scandinavian countries. Consequently, the adverse effects of no-fault divorce legislation should not be considered in a discussion about same-sex marriage because, whereas no-fault divorce was a failed attempt to reduce harm, same-sex marriage laws have proven to enhance the social good.

III. SAME-SEX MARRIAGE LEGISLATION WILL REDUCE SOCIETY’S BURDEN OF NEGATIVE HEALTH CONSEQUENCES RATHER THAN INCREASE IT AS NO-FAULT DIVORCE DID

Changing marriage entrance rights by legalizing same-sex marriage will also contribute to society by offering many additional health benefits, a stark contrast from the negative consequences to many American families’ health as a result of no-fault divorce legislation.

A. Divorce Negatively Affects the Ex-Spouses’ Health

Research empirically shows that divorce leaves lasting physical, psychological, economic, and social effects on not only the spouses, but also the children involved, while people in families with married parents are happier, healthier, and live longer. Though the age of individuals getting married for the first time has increased, 83 percent of unmarried respondents, age 20 to 24, in one study indicated that they would like to be married some day. Of those respondents, 70 percent indicated that they thought they would be married within the next ten years. “More than three-fourths of [respondents] agreed that love, fidelity, and a lifelong commitment were [essential] to a successful relationship.” Even with the divorce rate currently at about 50 percent, with most young people still entering marriage with

72. One might also argue that changing marriage entrance rights by allowing African American and eventually interracial marriage did not have the adverse effect on the institution of marriage that no-fault divorce did, but that is beyond the scope of this article. Additionally, other factors differentiating the United States from European countries including Europe’s more lenient child support system and more relaxed attitude toward sexual mores in general should also be kept in mind, but will not be discussed in this article.

73. Amato, supra n. 55, at 1274.
74. Mindy E. Scott, Erin Schelar, Jennifer Manlove & Carol Cui, Young Adults Attitudes about Relationships and Marriage: Times May Have Changed, but Expectations Remain High, Child Trends 1 (July 2009); Yen, supra note 7; Conor Dougherty, New Vow: I Don’t Take Thee: Young Single Adults Surpass Married Peers Amid High Divorce, Cohabitation Rates, The Wall Street Journal (Sept. 29, 2010) (available at http://online.wsj.com/article/SB100014240527487038882404575519871444705214.html?mod=ETw#printMode) (“for the first time the proportion of people between the ages of 25 and 34 who have never been married exceeded those who were married in 2009—46.3% versus 44.9%.”).
75. Scott et. al., supra n. 74, at 4.
76. Id. at 5.
77. Id. at 2.
such high expectations of a lifelong commitment, it is no wonder why divorce causes so much pain emotionally, psychologically, and even physically.\(^{78}\)

Because most people enter marriage with such high expectations, suffering may be prolonged in cases where couples either “[attempt] to renegotiate the relationship, [or seek] advice from others.”\(^{79}\) They may try counseling or other efforts to work on the relationship years before they actually divorce, but counseling is not required for divorcing couples in every state.\(^{80}\) Initial efforts to fix the relationship, whether through counseling or simply between the spouses, coupled with extended litigation after the legal separation, may even prolong the process by several years.\(^{81}\) Research shows, however, that even if a married couple experiences tough times, it will be better in the long run to stay together.\(^{82}\) Couples who eventually divorce are no more distressed than the couples who ended up staying together during their “pre-divorce-decision interview,” but four years later, the couples who divorced have measurably higher distress levels, citing “economic problems, unavailability of confidants, and deterioration” in their standard of living.\(^{83}\)

With new negative consequences still appearing years after a divorce, it is difficult to measure exactly when a divorcée has fully recovered from the experience. “Adjustment” after a divorce has been defined as “being relatively free of signs and symptoms of physical or mental illness; being able to function adequately in the daily role responsibilities of home, family, work, and leisure; and having developed an independent identity that is not tied to the status of being married, or to the ex-spouse.”\(^{84}\) One study showed that without intervention, divorced women continue to struggle in readjusting socially in areas such as homemaking, work functioning, sexual satisfaction, leisure activities, and time with children.\(^{85}\) Some theorists attribute difficulties in readjustment as the result of selection and pathology (people who get divorced are just bad at relationships to begin with) and others as a crisis (like grieving a loved one who died), but the models can be linked in that divorce is “a series of losses and changes” and some may just bounce back from these changes faster than others.\(^{86}\) Proponents of the selection perspective argue that the reason it takes longer for some to cope with a divorce than others may be completely biological. They believe biology plays a factor not only in the recovery process, but also in that it

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78. Amato, supra n. 55, at 1271.
79. Id. at 1271-1272.
80. Even in Louisiana couples have a choice between a “standard” and a “covenant” marriage. See generally Katherine Shaw Spaht, What’s Become of Louisiana Covenant Marriage through the Eyes of Social Scientists, 47 Loy. L. Rev. 709 (2001) (explaining the additional requirements and effects of a covenant marriage in Louisiana).
81. Amato, supra n. 55, at 1271-1272.
82. Kitson & Morgan, supra n. 2, at 914.
83. Id.
84. Id. at 913.
85. Id. at 915.
86. Id.
predisposes certain people to divorce in the first place because of their prior psychological vulnerabilities.\textsuperscript{87}

The length and severity of the suffering may even vary between the ex-spouses. One spouse may view the divorce as a tragedy when the other sees it as an opportunity for growth.\textsuperscript{88} Because many times one spouse wants the relationship to end before the other, the spouses could experience their greatest degree of emotional pain at different times.\textsuperscript{89} Usually, the woman indicates more stress before separating and men experience more symptoms early in the post separation period.\textsuperscript{90} Though some may see a finalized divorce as a fresh start, in reality, the hardship is just beginning. Stressors that follow the actual divorce could include: (1) the custodial parent having to take care of the children on his or her own while still grieving; (2) the noncustodial parent losing contact with his or her children when he needs their support the most; (3) continuing litigation regarding “child support, visitation, or custody”; (4) loss of emotional and social support from “in-laws, married friends, and neighbors” who do not want to take sides; (5) loss of economic stability; and (6) possibly as a result of losing economic stability, having to move the family home into a poorer neighborhood.\textsuperscript{91}

With all of these stressors, it is not surprising that so many people become overwhelmed or depressed during a divorce. A 1994 study showed 54 percent of separated and divorced women sought counseling compared to 28 percent of married women; 46 percent of separated and divorced men also sought help as opposed to only 18 percent of married men.\textsuperscript{92} Though percentages and medians may vary, generally all studies show that divorced spouses, as opposed to married ones, have lower happiness, more symptoms of psychological distress, poorer self-conceptions, increased odds of depression, more social isolation, lower standards of living, less wealth, greater economic hardship, more difficulties in raising children, and less authoritative parenting.\textsuperscript{93}

Even if custodial parents have a strong support network and manage to stabilize psychologically, their physical health may decline as a result of spreading themselves too thin. “The separated and divorced” show higher levels of “mortality and psychological and physical morbidity” compared to the married, single, and even the widowed.\textsuperscript{94} Men should be particularly careful if they are the ones contemplating a divorce because separated and divorced males have even “higher rates of morbidity than females.”\textsuperscript{95}

\textsuperscript{87} Amato, supra n. 55, at 1273-1274.
\textsuperscript{88} Id. at 1272.
\textsuperscript{89} Id.
\textsuperscript{90} Kitson & Morgan, supra n. 2, at 916.
\textsuperscript{91} Amato, supra n. 55, at 1272.
\textsuperscript{92} Kitson & Morgan, supra n. 2, at 917.
\textsuperscript{93} Amato, supra n. 55, at 1274.
\textsuperscript{94} Kitson & Morgan, supra n. 2, at 913.
\textsuperscript{95} Id. at 916.
B. Same-Sex Marriage Legislation Would Have the Opposite Effect of No-Fault Divorce, Leaving Spouses Healthier and Happier

Whereas society took on considerable health risks as a result of no-fault divorce, if same-sex couples are allowed to care for each other through same-sex marriage, they would release society from that burden. Society expects spouses to support and care for each other and in exchange, it gives married couples the power to meet those expectations. Some benefits that same-sex couples are denied without marriage include: (1) the ability to make life-or-death decisions on each other’s behalf if one is incapacitated; (2) hospital visitation rights; (3) knowledge from a doctor about their partner’s condition; and (4) inheritance rights. While some of these rights might be obtained through contracts and living wills, the government does not reimburse those same-sex couples for the thousands of dollars in legal fees that opposite-sex married couples do not have to pay. Additionally, some rights— including receiving compensation from the government as a spouse when a police officer or firefighter dies in the line of duty or having standing to sue a drunk driver as a surviving spouse—same-sex couples do not have the ability to contract for even with an attorney.

It is not just the benefits of marriage that same-sex couples want, but the burdens and responsibilities as well. Not all same-sex couples are looking for a “watered-down” marriage as opponents claim, but rather the commitment marriage was intended to be. As Jonathan Rauch so eloquently puts it, “To be married is to know there is someone out there for whom you are always first in line.” Marriage, compared with cohabitation, brings much more stability and security in that married couples suffer legal consequences by separating, while cohabitation entails no legal ramifications upon separation. A husband is much less likely to walk away when times get tough than a boyfriend or domestic partner.

C. Same-Sex Marriage Legislation Would Decrease Promiscuity and the Spread of Disease

Another health benefit as a result of same-sex marriage laws would be to reduce the spread of HIV and other sexually transmitted diseases and infections by channeling same-sex couples into marriage. Though it is no secret that previous
generations of gay men have been promiscuous, the younger generation puts more stock into the possibility of finding a long-term commitment. Because same-sex couples are now more widely accepted, gay men no longer have to lead double lives in fear of being shunned, beaten, or killed. Additionally, gay men no longer need to resort to underground sex clubs as much as they once did, which undoubtedly contributed to the severance between physical and emotional connections during sexual intercourse between gay men. If same-sex marriage were socially acceptable, gay men would have no reason to rebel against the institution of marriage through promiscuity. Previous generations of gay men did not grow up believing marriage was a possibility, so they saw no reason to save their virginity for it.

Same-sex marriage laws could have a domesticating effect on the next generation of same-sex couples in the same way that the current marriage laws cause young straight couples to settle down. Even critics of same-sex marriage argue that married people are happier, healthier, and live longer because they settle down and develop a greater sense of life purpose; so it defies logic to refuse to afford that opportunity to all Americans. If we give the younger generation the hope and belief that they, too, can and should get married one day, promiscuity will decrease, and with it the spread of disease. As a result, the negative health consequences that increased through no-fault divorce legislation would not accompany same-sex marriage laws.

Community Survey, 2008, 3 (The Williams Institute, UCLA Oct. 2009). Additionally, not all same-sex couples that can get married actually do if they are not ready for the commitment. Same-sex marriage legislation would not force promiscuous couples to get married, but instead would give them the option to commit to each other long-term if they want, just as it does for straight couples. See Eskridge Jr. & Spedale, supra n. 1, at 173-179.


106. Rauch, supra n. 96, at 61.
107. Id.
108. Id. at 19-20.
109. Gay Marriage, supra n. 5.
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Same-Sex Marriage Will Not Repeat the Errors

IV. Society suffered economically as a result of no-fault divorce legislation, but same-sex marriage would help alleviate that burden

Another problem caused by no-fault divorce, which same-sex marriage would help to alleviate through the creation of more family stability, is prevention of the adverse economic consequences that resulted after families split apart and the ex-spouses reached senior citizen status. Even opponents of same-sex marriage agree that marriage has a positive financial impact because spouses pool their resources and work more productively to provide for each other. So why deny same-sex couples the ability to do just that?110

A. Divorce Results in Negative Economic Consequences

After a divorce, most families do not continue to live together in one home. Because the family no longer shares household expenses, it cannot afford the same kind of home in the same quality of neighborhood.111 Additionally, studies show that child support rarely completely satisfies the needs of the custodial parent (if paid at all), so one parent will likely have to work while serving as the children’s primary caretaker.112 Once a child’s custodial parent is financially less stable, the chances for that child to attend college, become involved in after school activities, or even be nourished properly are diminished.113 Comparatively, society would benefit economically from same-sex marriage in several ways: (1) one spouse could stay home providing higher quality parenting without fearing what might happen to the children without child support if the couple breaks up; (2) federal tax revenue; (3) income generated from wedding ceremonies, and; (4) less dependence on public assistance for same-sex retired couples.

With the advent of no-fault divorce laws, some argue that cheating or abusive spouses are actually rewarded economically for their despicable behavior while the innocent spouse is pushed into poverty. Because the no-fault regime neither rewards good marital behavior, nor punishes breaking vows, alimony, child support, and property are divided in a way less advantageous to women.114 “Similarly, divorced women, compared with married women or divorced men, report more chronic financial difficulties, such as being unable to pay bills or purchase necessary goods.”115

110. Id.
111. Amato, supra n. 55, at 1272.
113. Amato, supra n. 55, at 1272.
114. Nakonezny et al., supra n. 17, at 478; Kitson & Morgan, supra n. 2, at 918.
115. Amato, supra n. 55, at 1277.
B. Divorce Especially Harms Women Economically, and as a Result, the Children as Well

According to Lenore Weitzman’s 1985 study of divorced Californians, divorced women “experience a 73 percent decline in their standard of living the first year after a divorce.”116 Her study also showed that men experience an increase of 42 percent in their standard of living the first year after a divorce.117 She also pointed out that “[f]ifty percent of the fathers ordered to pay child support do not comply fully,” and that the “[a]verage child support awards in California could not even cover the cost of daycare.”118 Another study in 1990 showed that “fathers [were still] able to pay [more than] twice the amounts currently awarded in child support,” and noncustodial fathers spent “50 [percent] more per capita on basic expenses” than custodial mothers.119

Four more studies from later in the 1990s showed the situation improved, but the figures were still shocking. A custodial mother’s standard of living still decreased by 36 percent, and the father’s increased by 28 percent.120 Overall, the mother’s standard of living still dropped to about half that of the father’s.121 Consequently, the mother must feed and clothe her children with less than a third of the money she had access to while married. Researchers point out other compounding factors including that (1) women are more likely to have “interrupted work histories” due to raising children; (2) women have “greater work-family conflict,” and; (3) women have more “employment and wage discrimination.”122

Relying on statistics from Weitzman’s book, The Divorce Revolution, feminist Betty Friedan argued that no-fault divorce pushes older women into poverty.123 This fact is evident even without the supporting evidence. Women who spent the majority of their primary working years as homemakers could not possibly maintain the lifestyles they had with their husbands. A marriage is a partnership, or a team. The husband, wife, and children should theoretically work together for a better quality of life for everyone. No two marriages are exactly alike, but when the wife completely gives up her career prospects to raise the children and take care of the home, she should not have to live in fear that the rug will get pulled out from under her. As I will argue more thoroughly in the next section, society benefits greatly from children with quality parenting, and sometimes the best way to provide that is for one parent to stay home.

Similarly, if society has an interest in protecting the ex-spouse in an opposite-sex marriage who stays home to rear the next generation with at least some

116. Moss, supra n. 112, at 36.
117. Id.
118. Id.
119. Kitsun & Morgan, supra n. 2, at 914.
120. Amato, supra n. 55, at 1277.
121. Id.
122. Id.
123. Moss, supra n. 112, at 36.
child support, that same support and stability should be extended to committed same-sex couples. Just like in an opposite-sex marriage, if one same-sex spouse has a demanding yet well-paying job, the other may choose to stay home and raise the children. Statistics show that both spouses retain employment in only 46 percent of same-sex spousal couples, whereas in 70 percent of unmarried same-sex couples both partners are employed.\(^{124}\) That margin is much closer in opposite-sex couples, possibly reinforced by the stability and possibility of child support in case of a divorce.\(^{125}\) Critics who argue that gay couples want to get married for personal reasons, rather than to raise a family, should take note that 31 percent of same-sex spousal couples and 17 percent of unmarried same-sex couples are raising children.\(^{126}\) With 43 percent of both married and unmarried straight couples raising children, same-sex couples actually seem about twice as likely to get married if they are raising children.\(^{127}\)

Some same-sex marriage opponents claim that the institutional rules of opposite-sex marriage would not apply to same-sex marriage because they are “designed to restrict males from exploiting the specific investments women must make in childbearing” and that in a same-sex couple, neither partner makes a human capital contribution.\(^{128}\) Therefore, they argue that same-sex marriage would weaken the institution of marriage because marriage laws would have to adjust to apply to all couples.\(^{129}\) This argument frames the issue too narrowly by presupposing that all marriages must be exactly alike to succeed. It fails to take into consideration straight couples who choose not to have children, or to adopt, lesbian couples in which one mother carries the child, and the fact that in both straight and same-sex couples, one parent sometimes stays home to care for children while the other works and sometimes both parents work and pay a third party for daycare. Sometimes even a father will stay home while the mother works.

C. Same-Sex Marriage Would Have the Opposite Effect and Even Stimulate the Economy

Higher-quality parenting and better-adjusted children would not be the only benefits resulting from same-sex marriage. If same-sex marriage were legalized in all 50 states and recognized by the federal government, the country would save about $1 billion a year on the federal budget.\(^{130}\) The Williams Institute, at the UCLA School of Law, estimates that “extending marriage to same-sex couples would boost the New

\(^{124}\) Gates, supra n. 103, at 7.

\(^{125}\) Id. (showing that both spouses are employed in 52 percent of married opposite-sex couples and 62 percent of unmarried opposite-sex couples).

\(^{126}\) Id. at 8.

\(^{127}\) Id.

\(^{128}\) Allen, supra n. 5, at 962-963.

\(^{129}\) Id.

Jersey economy by almost $200 million during the next three years, creating approximately 1,400 jobs and generating over $15 million in revenues for the state budget." 131 Though New York does not allow same-sex marriages, the New York Court of Appeals upheld a decision to recognize same-sex marriages from other states, so New Jersey will most likely reap the benefits of same-sex marriage "tourism." 132

Additionally, same-sex couples, especially female ones, would have to rely less on public benefits if same-sex marriage were legal and all employers offered benefits to same-sex spouses. 133 Female same-sex couples aged 65 to 70 are about 80 percent more likely to have income from SSI and public assistance as a result of factors including: (1) inability to access social security spousal and survivor benefits; (2) the fact that they have about 20 percent less income than straight couples to begin with; and (3) on average they receive 15 percent less than opposite-sex couples in social security benefits. 134 These figures seem especially unfair considering that the additional costs to employers would be minimal administrative costs. 135

Consequently, changing marriage laws to eliminate the "opposite-sex" element would not carry the same economic threat that eliminating the "permanence" element did with no-fault divorce. Same-sex marriage laws cannot completely eradicate the financial damage of no-fault divorce, but at least these laws would help rather than hurt by creating more tax and other revenue, repealing some reliance from public assistance, and maybe, most importantly, allowing for higher-quality parenting for the next generation of children who will eventually lead this country.

V. NO-FAULT DIVORCE HARMED OUR NATION'S CHILDREN JUST AS MUCH AS THEIR DIVORCING PARENTS, BUT SAME-SEX MARRIAGE LAWS WOULD CREATE MORE FAMILY STABILITY

Possibly the greatest harm of no-fault divorce laws was suffered by our nation's children, a repercussion that would not be repeated, but potentially reversed, through same-sex marriage laws. Same-sex marriage opponents may claim same-sex marriage and no-fault divorce similarly affect children negatively because either way a child will lose a biological parent, 136 but as the following analysis will show, leading medical organizations agree that quality of parenting is more important than the sex of parents.

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131. Chris Ramos & Brad Sears, New Williams Institute Study Estimates that Extending Marriage to Same-sex Couples in New Jersey Would Boost State Economy by $200 Million, Create Over 1,400 Jobs (The Williams Institute, UCLA Dec. 2009).
132. Id.
134. See generally id. at 6-7
135. Id.
136. Marquardt, supra n. 5.
A. Divorce Negatively Affects Children

Though a divorce is economically difficult for the spouses, unfortunately its the children who will suffer the most if the custodial parent does not have the means to feed, clothe, shelter, and send them to the best school possible. Variables including sampling and length of studies make sound empirical research difficult to achieve, but even considering the criticisms, the majority of evidence shows children are much more likely to thrive if they are raised in a two-parent home.137 As a result of the stress and loss of economic resources in a divorce, studies show that children with divorced parents have more emotional, social, and even academic problems than children with parents who stay together.138 Consequently, by solidifying a second parent’s presence rather than stripping one away, same-sex marriage laws could only help a child prosper. Therefore, a change to marriage laws allowing same-sex marriage should not be compared to no-fault divorce because the same harms will not result.

Proponents of the two-parent family argue that it is the channel through which adults “achieve a sense of meaning, stability, and security,” and the place where “children develop into healthy, competent, and productive citizens.”139 Consequently, they argue that the breakdown of the two-parent family structure leads to poverty, crime, substance abuse, declining academic performance, and the overall erosion of the neighborhood and community.140 “Society must recreate itself each generation,” producing appropriately socialized offspring.141 Divorce threatens this process because (1) divorce reduces the income of the woman who is generally the custodial parent; (2) the custodial parent is often overburdened and less able to attend to her children’s developmental and economic needs; (3) children of divorce are less likely to obtain the level of education they would have obtained had their parents remained married; and (4) children of divorce are more likely to experience divorce themselves.142

Like adults, children may experience more pain at different points during the divorce and be affected in different ways. Older children may have an easier time understanding the process of the marriage unraveling, so they may experience more stress initially while younger children may be more bothered by the finality of one parent leaving for good.143 The younger siblings may have a harder time comprehending what is happening and why.144 No matter their age, both older and younger children will experience (1) less effective parenting from the custodial parent;

137. I will illustrate this point through my following analysis.
138. Masel, supra n. 3, at 27.
139. Amato, supra n. 55, at 1270.
140. Id.
141. Kitson & Morgan, supra n. 2, at 920.
142. Id.
143. Amato, supra n. 55, at 1272.
144. In a study of primary school children, one-third still blamed themselves six months after their parents’ divorce. Id. at 1281.
(2) less time with the noncustodial parent; (3) exposure to constant fighting between their parents throughout the process; (4) a decline in economic stability; and (5) the possibility of moving, changing schools, or entering a stepfamily. These factors can all translate into additional stressors.

Other studies, most notably Judith Wallerstein’s longitudinal study, show that delayed effects of divorce last well past adolescence. Children of divorced parents have trouble as they enter adulthood and begin to have serious relationships themselves because they carry the template of their parents’ relationship into adulthood and use it to seek the image of their new family. The absence of a good image negatively influences their search for love, intimacy, and commitment.

Though some argue selection and biology is at work here, children of divorce have a much greater risk of low socioeconomic attainment, poor subjective well-being, increased marital problems, and a greater likelihood of seeing one’s own marriage end.

Longitudinal studies generally offer proof of the selection (biological) theory, but this too could possibly be attributed to factors resulting from the divorce alone. Children of divorce clearly have more problems than children with married parents, but because these problems can manifest up to eight to twelve years before the divorce, especially in boys, some argue the problems may be biological rather than from the crisis of the divorce, but marital conflict preceding the divorce could also play a role. Daughters in these families also had a higher proclivity toward substance abuse, but this too could be attributed to the experience of divorce or mere biological development. Problems associated with parental divorce were similar among biological and adopted children, so genetics may not in fact play a role.

145. Id. at 1272.
146. See generally Wallerstein et al., supra n. 4; contra Masci, supra n. 3, at 29. Critics argue that Wallerstein’s study cannot be relied upon, however, because it focuses only on worst-case scenarios, and high-conflict marriages can cause greater suffering for a more prolonged period than a divorce. Wallerstein’s study was longitudinal, however, meaning it followed the same subjects throughout a longer time period (in her case, 25 years), an attribute many family law studies are criticized for lacking. Additionally, Wallerstein interviewed more than 6,000 children and young adults overall, so she had a wide sampling as well. See generally Wallerstein et al., supra n. 4; Masci, supra n. 3, at 29, 34. Additionally, research shows that most divorces are not preceded by intense, chronic, and overt conflict, so overall, divorce hurts much more often than it helps. Amato, supra n. 55, at 1278.
147. Masci, supra n. 3, at 27 (quoting Wallerstein).
148. Id. (quoting Wallerstein).
149. For example, if as the result of a divorce finances are so tight the children have to get jobs to help their mother with household expenses rather than study or save for college, the divorced woman’s children might still be less likely to go to college even if she did. And without higher education, these children may not ever achieve high paying jobs, resulting in long-term financial damage to their own families even if biologically they had the intelligence and capability.
150. Amato, supra n. 55, at 1278.
151. Id. at 1278-1279.
152. Id. at 1279.
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Undoubtedly, all the stress related to the divorce will keep the children from fully concentrating on their schoolwork. A 1989 Kent State University study found that children of divorce did not perform as well on standardized English and math tests compared to children with intact families.\textsuperscript{153} It also showed children of divorce were more likely to repeat a grade.\textsuperscript{154} Another study from Wisconsin even found that juvenile incarceration rates were more than twelve times higher among children of divorce.\textsuperscript{155}

Even if parents can maintain civility with each other after a divorce, many family law scholars criticize joint custody. One scholar argues that joint custody harms children in that the constant moving from mom’s house to dad’s upsets the stability and security of the child’s schedule.\textsuperscript{156} Any good the child retains through joint custody by getting to see each parent on a regular basis is outweighed by all the traveling and the fact that rules and expectations can be different in each household, confusing the child.\textsuperscript{157} Children were equally disadvantaged when it came to whether the custodial parent was male or female, because children tended to have an economic disadvantage with their mother and a social disadvantage with their father.\textsuperscript{158} Generally, mothers were more involved in school activities, but fathers earned a higher income.\textsuperscript{159}

Other problems arise after a divorce for the 25 percent of all American children who will spend time in a stepfamily before age 18.\textsuperscript{160} This may not seem like a large problem, but 40 percent of American marriages involve one spouse who has been married before.\textsuperscript{161} In 1995, only 42 percent of children lived in first marriage/intact two-parent households.\textsuperscript{162} Difficulties for children entering stepfamilies include: (1) another adjustment to a new stepparent or stepsiblings after only recently adjusting to a divorce; (2) feeling ignored by the parent who remarries; (3) not being treated as well as the stepparent’s own children; and (4) greater difficulties in discipline.\textsuperscript{163} Additionally, stepfamilies are even less likely to stay together than first marriages.\textsuperscript{164}

B. Research Shows that Children Can More Easily and Often Thrive in Two-Parent Families

Given that divorced or single-parent families negatively affect children, the clear choice, considering the best interests of children, is to allow same-sex marriage.

\textsuperscript{153} Masci, supra n. 3, at 29.
\textsuperscript{154} Id. (citing John Guidubaldi, Minority Report and Policy Recommendations of the United States Commission on Child and Family Welfare (July 1996)).
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 28.
\textsuperscript{157} Id. at 31.
\textsuperscript{158} Amato, supra n. 55, at 1281.
\textsuperscript{159} Id.
\textsuperscript{160} Masci, supra n. 3, at 32.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 30.
\textsuperscript{163} Id. at 32.
\textsuperscript{164} Amato, supra n. 55, at 1269.
Advocates argue legalization of same-sex marriages would create a positive atmosphere in which more children could be raised.\textsuperscript{165} \textsuperscript{165} Traditional marriage advocates themselves rely on the research that proves a two-parent family is the best place to raise a child, so it would be counterintuitive to deny this security and stability to children reared by same-sex couples.

Critics point out, however, that a family with same-sex parents differs from traditional families in that same-sex parents cannot conceive a child without the help of a third party. Therefore, they claim, same-sex couples and their families should not be awarded the same protection under the law. The argument against same-sex marriage based on fertility fails, however, because infertile straight couples, women who have already experienced menopause, and divorced heterosexual singles are still allowed to marry and adopt children. Opponents may argue that those circumstances are not ideal, and adoption or a remarriage only happens in the first place because something has already gone wrong. If we were going to outlaw same-sex marriage as a less-than-perfect situation based on those standards, however, second marriages and adoption would also have to be on that list.

Also, many children of same-sex couples are biologically related to at least one of their parents either through a previous opposite-sex marriage or in vitro fertilization. Opposite-sex parents are also no longer necessary to conceive a child considering new reproductive technologies and sperm banks. John Robertson, proponent of assisted reproductive technology, argues,

More than 25 percent of children are now raised in a nonnuclear family, and 30 percent of children are now born out of wedlock. Many children are being raised by adoptive, step or foster parents, by relatives or by other persons in situations in which they will have no or limited contact with their genetic or gestational parents and have close ties with nonbiological rearers. If the phenomenon of split biologic and social rearing is so widespread, one may question why collaborative reproduction should be of special concern.\textsuperscript{166}

C. Medical Professionals Agree the Quality of Parenting is More Important than the Sex of the Parents

Opponents of same-sex marriage also argue that having two parents of the same sex can be harmful to a child.\textsuperscript{167} Research suggests, however, that parental sexual orientation and gender of the parents is less important than the quality of the

\textsuperscript{165} Andrew H. Friedman, Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35 Hof. L. J. 173, 210 (1992).


\textsuperscript{167} Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. Tex. L. Rev. 735 (1998).
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In 2004, The American Psychological Association adopted a statement that said, “Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.” The American Bar Association, the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and other mainstream professional groups have all adopted similar statements.

Therefore, considering there is no significant difference in the welfare of children who are raised by same sex parents, children raised by same-sex parents are no more likely to be gay themselves, and because studies show two-parent, married

170. The American Bar Association’s policy statement adopted in Feb. 1999 reads, “RESOLVED, that the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child.” ABA, Adoption by Gay and Lesbian Adults, http://www.abanet.org/child/foster-adopt.shtml (Feb. 1999).
171. The American Medical Association’s statement, issued in June 2004 states: “Having two fully sanctioned and legally defined parents promotes a safe and nurturing environment for children, including psychological and legal security . . . . Resolved, that our AMA support legislative and other efforts to allow the adoption of a child by the same-sex partner, or opposite sex non-married partner, who functions as a second parent or co-parent to that child.” Am. Med. Assn., Memorial Resolutions, http://www.ama-assn.org/meetings/public/a04/resolutions04.pdf (June 2004).
172. The American Academy of Pediatrics’ statement, issued in Feb. 2002 states, “Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual. When two adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.” Am. Acad. of Pediatrics Comm. on Psychosocial Aspects of Child and Fam. Health, CoParent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 339 (Feb. 2002).
175. A thorough discussion about all the research regarding whether same-sex parents actually have any negative effects on their children is beyond the scope of this article. As stated supra, all studies have flaws that can be criticized in one way or another. Even considered in the light most favorable to same-sex marriage opponents, however, the most that can be concluded is that same-sex parents are no more likely to have a homosexual child than opposite-sex parents. See Susan Golombok & Fiona Tasker, Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families, 32 Dev. Psychol. 3 (1996) offering evidence disproving the assumption that children raised by lesbian parents would themselves grow up to be lesbian or gay and that children raised in lesbian families were no more likely to experience mental health problems, or have lower scores of emotional health; there is no conclusive answer about what causes children to be gay or lesbian); Patterson, supra n. 168, at 241 (one study found few significant differences between development of children raised by divorced lesbian mothers and children raised by divorced heterosexual mothers. Another study, looking at children all conceived using the same
households are better for children than single or divorced parents, the only logical conclusion is that a two-parent, married household is the more optimal environment for childrearing, even if the parents are of the same sex. Again, opponents of same-sex marriage may argue that a divorced or single straight parent is not the optimal environment either, but compiling the research, a two-parent married household is better for children than most alternatives in which children are currently raised.

Research also does not support an argument that same-sex couples are less qualified to be parents or less involved in their children’s lives. Lesbian mothers were actually found to be more confident as parents and sought leadership roles more often than their heterosexual counterparts. They were also found to be more concerned than heterosexual single mothers that their children had male role models in their lives. Research shows that gay fathers were more likely to “endorse paternal nurturance,” less likely to consider economic support as a central aspect of a father’s role, and somewhat less traditional, but still effective, in their overall approach to parenting. Statistics indicate gay and lesbian parents are also just as child oriented, warm, confident, nurturing, and responsive as their heterosexual counterparts.

Some may worry that the children of same-sex couples will have a harder life because their peers will tease them more often. All children are teased for one reason or another, however, and young adults from same-sex family backgrounds are no more likely to remember general teasing or bullying by their peers than young adults raised in heterosexual families. The teasing may be more personal than other children receive, but the social adjustment required of children of gay and lesbian parents aligns with that of children raised by heterosexual parents.

Another counterargument that fails is that homosexual men are more likely than heterosexual men to sexually abuse children. Studies of molestation spern bank with some raised by same-sex and others raised by opposite-sex parents, also found that parental sexual orientation was not related to the children's adaptation and the children's development was more closely correlated to parental warmth and affection. Another study, with an even wider sampling, found adolescents in the two groups were equally likely to say that they had been involved in a romantic relationship in the last 18 months, and they were equally likely to report having engaged in sexual intercourse; Devon Brooks & Sheryl Goldberg, Gay and Lesbian Adoptive and Foster Care Placements: Can They Meet the Needs of Waiting Children? 46 Social Work 147 (April 2001) (finding children raised in families in which a parent is gay or lesbian do not appear to be affected negatively by their experience, including no difference in self-esteem, emotional difficulties, behavioral difficulties, ability to be social, quality of peer relationships, popularity, and hyperactivity); contra Robert Lerner & Althea K. Nagai, No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting, Marriage Law Project, Washington, D.C. (Jan. 2001) (criticizing methods used in studies regarding same-sex parenting); Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? 66 AM. SOCIOLOGICAL REV. 159 (Apr. 2001).

176. Brooks & Goldberg, supra n. 175, at 148.
177. Id.
178. Id.
179. Id.
180. Id. at 149.
181. Id.
established no connection between homosexuality and child molestation. Most pedophiles who act on their urges to molest children do not even have an adult sexual orientation because they never developed the capacity for mature sexual relationships with a man or a woman; their sexual attraction focuses on boys, girls, or sometimes children of both sexes. Again, sound empirical data is difficult to develop because research comes only when a child is molested and the offender can be identified, but one study found the molester to be gay or lesbian in fewer than 1 percent of the 269 cases investigated.

With so many studies agreeing not only that divorce harms children psychologically, economically, and long-term, but also that same-sex parents, at the very least, have no more of an adverse effect on children than married straight parents do, it is hard to imagine what public policy arguments same-sex marriage opponents have left to offer. Additionally, with reproductive technology and adoption, same-sex parents now are more frequently raising their children together from birth. Therefore, arguments that same-sex parents are harmful based on the stepfamily argument do not apply in many cases. The harms to children that came with no-fault divorce would not accompany laws that allow same-sex marriage because same-sex marriage legislation would bring families together rather than split them apart, creating more two-parent households and family stability. Instead of being raised by two men or women who are legal strangers to each other, children would be raised by two adults who have legal obligations to protect and care for each other. The arguments proffered against same-sex marriage seem to only reinforce why marriage is not just a good thing for opposite-sex couples and their children, but for all couples and their children in America.

VI. THE SAME PUBLIC POLICY REASONS THAT CATALYZED THE GOVERNMENT TO REGULATE OPPOSITE-SEX MARRIAGE IN THE FIRST PLACE ALSO APPLY TO SAME-SEX MARRIAGE

To fully understand why some still oppose same-sex marriage we must trace why the government began to regulate marriage in the first place and determine whether that reasoning still applies today. The state’s interest in stable marriages has always been a regularly professed feature of family law. Laws regarding marriage

183. Brooks & Goldberg, supra n. 175, at 149.
185. Id.
186. Masci, supra n. 3, at 32.
187. Alvaro, supra n. 104, at 142 (citing Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 3 (1985) ("Throughout the nineteenth century the basic purposes of legal governance of the family remained fairly constant. In the eyes of the law, the family was as John Adams had visualized it: the primary institution of American society. Public authority was charged with ensuring family stability . . . ").
and divorce regulate the sexual relationships, property distribution, childrearing, and childbearing activities of citizens.\textsuperscript{188}

Some of the most often cited public policy arguments in favor of laws regulating marriage and the family include: "(1) safe sexual relations; (2) procreation and childrearing; (3) the status of women; (4) the stability, strength, and security of the family union; (5) the integrity of the basic unit of society; (6) civic virtue and public morality; (7) interjurisdictional comity; and (8) government efficiency."\textsuperscript{189} Though this list seems to include ways that society would benefit from same-sex marriage, it was actually offered by a scholar who was writing his arguments against it. Many may not realize how fundamentally similar same-sex couples are to straight couples and how similarly their family structures operate. Body parts may be different, but interpersonal relationships should not be treated differently. Same-sex marriage is good for America for the same reasons opposite-sex marriage is good for America.

The argument that the government should not recognize same-sex marriage because same-sex couples cannot produce children on their own fails because the state's interest in marriage expands beyond the birth of the child. Otherwise, the government would be charged with raising, supporting, and educating all of those children whose parents did not want the responsibility. Economists argue that marriage laws were designed to "regulate procreative behavior because the private incentives of men and women at various points in their life cycles are often incompatible with the social objectives of the marriage."\textsuperscript{190} Marriage encourages the care giving aspects, which spouses offer each other and their children, lightening the burden from the rest of society. Additionally, same-sex couples cannot biologically create a child on their own through sexual activity, but the state, nevertheless, has an interest in regulating their sexual relations, evidenced by the government's public policy against the spread of sexually transmitted infections.

Same-sex couples would not be the only group to benefit from same-sex marriage, however; opposite-sex couples and the institution of marriage in general would benefit as well. Rauch argues that taking away its competitors would strengthen the institution of marriage.\textsuperscript{191} For example, when same-sex couples received domestic partner benefits, cohabitating straight couples persuasively argued that it would violate equal protection to deny those benefits to them.\textsuperscript{192} Why should straight persons have to subject their property to equal distribution or support their girlfriends until they get back on their feet just to get on the company insurance plan? Rauch argues by creating so many alternatives to marriage such as domestic partnerships that more closely resemble cohabitation, cohabiting becomes more

\textsuperscript{188} Stetson & Wright Jr., supra n. 46, at 539.
\textsuperscript{189} Wardle, supra n. 167, at 754 (numbering added by author).
\textsuperscript{190} Allen, supra n. 5, at 957 (citing Lloyd R. Cohen, Rhetoric, The Unnatural Family, and Women's Work, 81 Va. L. Rev. 2275, 2290 (1975) ("Marriage is a cultural invention. It is designed to harness men's energies to support the only offspring they may legitimately have, or are likely to have, legitimately or otherwise, in a world in which marriage is the norm.").
\textsuperscript{191} Rauch, supra n. 96, at 33.
\textsuperscript{192} Irizarry v. Board of Educ., 251 F.3d 604, 606 (7th Cir. 2001).
attractive to straight persons, defeating the purpose of trying to "defend" marriage in the first place. Many straight couples seem to agree marriage is no longer necessary because according to the 2000 census, cohabitation increased by 72 percent in the 1990s, and the marriage rate dropped by 40 percent from 1970 to 2000.

Unfortunately, the government must now use taxpayers’ money to support children whose fathers decided they did not want to stick around—something the government intended to prevent by discouraging promiscuity and incentivizing permanent marriages. The following quote comes from an article opposing same-sex marriage, but ponder whether it could also apply to proponents of same-sex marriage:

[I]n the eyes and on the scales of the law, the state is more vigorously protective of children's interests and looks to strong marital unions as the way of assuring these. This is why the state can interfere with parents in cases of child abuse, why divorcing parties may never have the last word about child support or custody, why adoption procedures attend so much more closely to the interests of the child than even the deepest longings of would-be parents, and why recent federal and state lawmaking efforts about marriage, divorce, and welfare all have children as their rallying cry.

Same-sex marriage is currently legal in Vermont, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, and the District of Columbia. Thirty-one states do ban it, however, leading Northwestern University law professor Andrew Koppelman, author of "Same Sex, Different States," to offer a humorous jurisdictional comity argument:

If a man has a husband in Iowa, he might take a wife in Texas without being charged with bigamy. If a married couple from Connecticut has an accident in the Lone Star State, a woman could be barred from her wife’s hospital bedside because she isn't family. . . . Texas could become a safe haven for the gay deadbeat dad who empties the joint account in Vermont and runs out on his husband and kids.

Therefore, considering the public policy reasons behind marriage laws, it seems marriage is in the best interest of all couples and their families, not only ones headed by opposite-sex couples.

193. Rauch, supra n. 96, at 33.
194. Id. at 96-91.
196. These figures may continue to fluctuate before publication. For a complete and accurate list, please visit http://www.hrc.org/laws_and_elections/state.asp.
197. Ellen Goodman, Goodman: Gay Divorce, Texas Style, San Jose Mercury News (Oct. 8, 2009) (citing Andrew Koppelman, Same Sex, Different States: When Same-Sex Marriages Cross State Lines (Sheridan Books 2006)).
VII. CONCLUSION

The New York Court of Appeals identified a realistic way to define a family in a four-factor test: (1) the exclusivity and the longevity of the relationship; (2) the level of emotional and financial commitment; (3) the manner in which the parties have conducted their everyday lives and held themselves out to society; and (4) the reliance placed upon each other for daily family services.\(^{198}\) It seems these factors can describe a relationship that involves a same-sex or opposite-sex couple. Study after study show clear benefits to marriage and clear perils of divorce. America can only benefit by eliminating marriage's alternatives and allowing same-sex marriage. Opponents of same-sex marriage should not fear another change in marriage laws relying on the detriments of no-fault divorce because same-sex marriage will only contribute to a known social good.

Lynn Wardle, vocal opponent of same-sex marriage, argues, "[L]egal marriage is a public institution established to achieve public purposes. It is not the private interests but the public interests and consequences that are relevant to the public policy issue of whether a particular relationship should be given the public status of marriage."\(^{199}\) Professor Wardle is right, but this formula may not lead to the conclusion he desires. If we set aside private interests and then consider all the public purposes behind marriage laws and the benefits to same-sex couples, straight couples, children, America, and the institution of marriage itself, we should come to the conclusion that same-sex marriage should be legalized nationally because it would not result in the same harms as no-fault divorce.

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\(^{199}\) Wardle, supra n. 167, at 753.

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