JUDICIAL REDEFINITION OF MARRIAGE

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CHAPTER ONE

INTRODUCTION

Judicial alteration of the meaning of civil marriage from the union of a man and a woman to the union of any two persons raises a number of legal issues not raised by legislative redefinition; these are separation-of-powers issues centred in notions of the proper scope and role of judicial review, creation of standards to guide judicial application of broad and open-ended constitutional guarantees like equality, liberty, and dignity, judicial deference to the political branches, and the like. But besides the problems inherent in discerning the proper divide between judicial and legislative activity in this area, there is the challenge – once the judiciary gets involved – of getting more usual but still essential judicial tasks done well. This article examines whether those tasks have been done well. It does so in the context of a handful of key issues as treated in four appellate cases.

Those four cases are Vermont's *Baker v. State*,[1] British Columbia's *EGALE Canada Inc v. Canada (Attorney General)*,[2] Ontario's *Halpern v. Toronto (City)*,[3] and Massachusetts' *Goodridge v. Department of Public Health*.[4] Developments in the redefinition of civil marriage in various parts of the world position these cases as, to date, the most important relative to the large separation-of-powers issues implicated by judicial activity in this area. But those same developments also have combined to make the four cases the best samples, to date, of the focus of this article: performance of traditional judicial tasks in resolving a few issues central to redefinition or not of civil marriage.

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1 170 Vt 194, 744 A2d 864 (1999) [*Baker*].

2 2003 BCCA 251, (2003) 225 DLR (4th) 472 [*EGALE*].

3 [2003] OJ No 2268, (2003) 225 DLR (4th) 529 (Ont. C.A.) [*Halpern*].

4 440 Mass 309, 798 NE2d 941 (2003) [*Goodridge*].

For purposes of this article, all those issues have as their context equality jurisprudence. That is not to suggest that the issues, or some of them anyway, may not arise in other contexts. They may and do, particularly in the context of liberty jurisprudence (whether couched in terms of interests in privacy, autonomy, or identity). But limiting the context to equality jurisprudence seems justified for reasons beyond the omnipresent need for many such limitations in a work of this kind. First, in this area of marriage for same-sex couples the great bulk of Canadian and American judicial work has centred on equality guarantees (and this will be the case for the work yet to take place in South Africa). Second, equality jurisprudence in those countries encompasses all or virtually all the arguments plausibly made under any rights theory, and, indeed, at least the Massachusetts court deems equality and liberty analysis in this area to be essentially the same.[5] Third, the well-developed equality jurisprudence across the chosen jurisdictions facilitates comparative analysis. Fourth, despite internal debate and lack of unanimity, in large measure activists pushing for the redefinition of marriage have chosen equality arguments to serve as the dominant centre of their political and legal approach.[6]

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5 *Goodridge*, *supra* note 4 at 320-21.

6 A number of essays – collected in R. Wintemute and M. Andenaes, eds., *Legal Recognition of Same-Sex Partnerships* (Oxford-Portland, Oregon: Hart, 2001) – both verify that the activists have so chosen and discuss the implications of that choice, including D. Richards "Theoretical Perspectives"; N. Bamforth "Same-Sex Partnerships and Arguments of Justice"; C. Feldblum "The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage"; J. Halley, "Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate"; and W. Eskridge "The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)".

The key issues are the relevant meanings of procreation (chapter three), the relevance of differing modes of child-rearing (chapter four), the relevance of competing theories of gender and of the marriage relationship (chapter five), and the application, in light of their origins, of a right to equal concern and respect and the value of human dignity the right is deemed to entail (chapter six). Chapter four also examines a concept applicable to both the procreation and the child-rearing issues, the plausibility of redefinition adversely affecting the institution of marriage as it has been known.

One clarification seems needful here. This article does not suggest that judicial work on the issues chosen for examination somehow avoids separation-of-powers questions, particularly the proper measure of deference to the legislature. As the following chapters demonstrate, deferring or not to legislative judgment (whether actual or only conceivable) forms a vivid background to the judicial strugglings with the issues chosen for examination, and the outcome in the courts ultimately turns on the deference question. When this article speaks of more usual but still essential judicial tasks, it is referring to certain foreground tasks. Those tasks include preeminently the assessment of arguments, that is, the judgment of what qualifies as a good argument and what does not. That in turn requires teasing out the components of an argument; seeing how those components, like bricks, are stacked together to form a stable structure, or not; identifying argument chains, whether of causation or of logic; and measuring the strength of the links, whether factual or rational – in other words, doing what judges are supposed to do and do well in any case. This article will ultimately suggest that, in the area of the redefinition of marriage, better performance of the foreground tasks makes easier the resolution of the ultimate deference-to-the-legislature issues.

Regarding terminology, rather than use the more common phrase *same-sex marriage*, this article uses the phrase *genderless marriage* to refer to the form of civil marriage legally defined as

the union of any two persons. The phrase *same-sex marriage* is subtly misleading; although the legal definition of civil marriage as the union of any two persons allows same-sex couples to marry, it of course also allows a woman and a man to marry, and everywhere the debate focuses on one legally recognized relationship known as *marriage*, not two. The phrase *same-sex marriage* thus conveys the sense (erroneous) of a legally recognized marriage separate or different from the marriage of a man and a woman. This article refers to civil marriage defined as the union of a man and a woman as *man/woman marriage*.

Genderless is used instead of *non-gendered* and *man/woman* instead of *gendered* because, as a matter of contemporary language usage, to use the words *gendered* and *non-gendered* could be seen as an endorsement of certain versions of social constructionist thought, versions that this article refers to in the aggregate as *radical social constructionism*. Although those versions may be valid, this article stands neutral on the validity question for reasons made clear in chapter five.

Some legislatures have created statutory arrangements providing to same-sex couples (and sometimes also to opposite-sex couples) a legally recognized status more or less marriage-like but not carrying the title *marriage*. These arrangements have various names: civil partnership, civil union, domestic partnership, civil pact of solidarity (the translation of France's *pacte civil de solidarite*), or statutory cohabitation (the translation of Belgium's *cohabitation légale*). This article uses the shortest of the alternative names, *civil union*, to refer generally to all such statutorily regulated, legally recognized relationships.

In a number of jurisdictions, civil unions encompass essentially all the legal elements of man/woman marriage except the name *marriage*. Moreover, increasingly jurisdictions are prepared to provide civil unions to same-sex couples (sometimes to avoid judge-ordered genderless marriage); this strong trend seems certain to continue. So the observation seems valid that the

intense cultural, social, political, and legal conflict is really over the use (and, in a sense, the possession) of a word – *marriage*. Recognition of that fact may initially evoke memories of Swift's Big Endians and Little Endians. But one of this article's suggestions, created almost as a by-product of the work it pursues straight-forwardly, is that the conflict over the use of the word *marriage* is not just emotionally but also rationally important to the people on each side and is of profound importance to society.

The next chapter gives in summary fashion necessary background information. This includes a short legal history of same-sex couples and civil marriage, certain aspects of equality jurisprudence in general, and features of equality jurisprudence unique to or at least highly characteristic of American and Canadian equality jurisprudence. The chapter concludes by summarizing each of the four cases. As specified above, the remaining chapters address in turn each of the key issues selected for close examination.[7]

CHAPTER TWO

HISTORICAL AND LEGAL CONTEXT

A. A Short Legal History of Same-Sex Couples and Civil Marriage

As early as 1970, same-sex couples in North America were seeking marriage licenses and, when denied, making constitutional arguments to the courts.[8] The courts rejected these arguments, evincing utter certainty regarding the correctness of

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[7] Events pertaining to judicial redefinition of marriage have occurred frequently during the writing of this article, necessitating use of a cut-off date; the date used is 15 March 2004.

[8] *Baker v. Nelson*, 191 N.W.2d 185, 291 Minn. 310 (Minn. 1971); *North v. Matheson* (1975), 52 DLR (3d) 280, 20 R.F.L. 112 (Man. Co. Ct).

their conclusions and a corresponding certainty that the same-sex couples' legal claims were beyond the pale.

The fifteen years between 1989 and 2003, however, brought dramatic changes to the law governing the relationship of same-sex couples. In Europe, change began in Denmark, which in 1989 was the first nation to adopt civil union legislation.[9] Other European nations followed: Norway (1993), Sweden (1994), Iceland (1996), The Netherlands (1998), some Spanish Autonomous Communities, France (1999), Belgium (2000), Germany (2001), and Finland (2002).[10] Still other European jurisdictions appear poised to join that list.[11] In 2001, the Netherlands, by legislation, became the first nation to redefine marriage so as to include same-sex couples.[12] Belgium, also by legislation, became the second in 2003.[13]

In Europe, Australia, and New Zealand, despite or because of legislative activity, the courts have declined to redefine marriage, rejecting arguments based on national constitutions or international instruments.[14]

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9 *Registered Partnership Act*, Law No. 372 of 7 June 1989.

10 K. Boele-Woelki & A. Fuchs, "Foreword" in K. Boele-Woelki &A. Fuchs, eds., *Legal Recognition of Same-Sex Couples in Europe* (Antwerp: Intersentia, 2003).

11 *Ibid*.

12 K. Boele-Woelki, "Registered Partnership and Same-Sex Marriage in the Netherlands" in Boele-Woelki & Fuchs, *supra* note 10, 41 at 41-42.

13 *Supra* note 10.

14 B. Verschraegen, "The Right to Private Life and Family Life, the Right to Marry and Found a Family, and the Prohibition of Discrimination" in Boele-Woelki & Fuchs, *supra* note 10, 194 (European Court of Human Rights' precedents contrary to redefinition); *Quilter v. Attorney General*, [1998] 1 N.Z.L.R. 523 (C.A.) (Bill of Rights Act did not require a judicial order that marriage licenses be issued to same-sex couples); J. Millbank & W. Morgan, "Let Them Eat Cake and Ice Cream: Wanting

In 1992 in South Africa, as pneumatic pressures were bringing the apartheid regime to its end and people's minds were focussed on the shape of a newly emerging constitutional model, Edwin Cameron gave a highly influential lecture making the point that the situation posed a test of the new dispensation's commitment to human rights: "The debate about sexual orientation occasions a test of the integrity of the Constitution-making process and those who dominate it."[15] The next year, the interim constitution expressly prohibited discrimination based on sexual orientation[16] (the first national constitution to do so), and that provision (now joined by one on marital status) was carried into the permanent constitution in 1996.[17]

Between 1998 and 2003, South Africa's Constitutional Court applied the equality and anti-discrimination provisions of the constitution, particularly the express reference to sexual orientation, to strike down or alter a number of laws deemed to discriminate against gays, lesbians, or same-sex couples.[18] Then

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Something 'More' from the Relationship Recognition Menu" in Wintemute & Andenaes, *supra* note 6, 295 and 305 ("[P]artly because of the lack of a constitutional equality guarantee, Australia is falling behind other developed legal jurisdictions when it comes to the judicial recognition of same-sex relations."); *Joslin v. New Zealand* UN Human Rights Committee (30 July 2002) UN Doc CCPR/C/75/D/902/1999 (no ICCPR right to genderless marriage).

15 E. Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 South Africa Law Journal 450-451.

16 *Constitution of the Republic of South Africa*, Act 200 of 1993, s 8.

17 *Constitution of the Republic of South Africa*, Act 108 of 1996, s 9(3).

18 *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) S.A. 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) S.A. 1 (CC); *Satchwell v. President of the Republic of South Africa* 2002 (9) B.C.L.R. 986 (CC); *Du Toit v. Minister for Welfare and Population Development* 2002 (10) B.C.L.R. 1006 (CC); *J v. Director General, Dept of Home Affairs* 2003 (5)

late in 2003, the Court received a case arguably calling for resolution of the question whether the constitution mandated that civil marriage be opened to same-sex couples; the Court, however, dismissed the appeal because of a procedural defect, stating that for the time being the proper appellate route was to the Supreme Court of Appeal.[19]

In the most recent case where it reached the merits, the Constitutional Court ended with a note of impatience at the on-going failure of the legislature to enact "[c]omprehensive legislation regularising relationships between gay and lesbian persons".[20] Activists, however, have asserted that they will wait no longer for legislative action but instead will pursue litigation in an effort to secure a ruling that the constitution mandates genderless marriage.[21] Accordingly, resolution of the marriage issue in South Africa seems imminent, either by judicial action, legislative action, or both.

The same is true in Canada. The Charter of Rights and Freedoms, adopted in 1982, did not specify sexual orientation as a ground protected by its equality and nondiscrimination provisions, but Canadian judicial activity on that ground, particularly with respect to marriage, has gone far. The first case presenting sexual orientation discrimination to the Supreme Court of Canada resulted in a closely divided court giving judgment in

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B.C.L.R. 463 (CC) .

19 *Fourie v Minister of Home Affairs* 2003 (10) B.C.L.R. 1092 (CC).

20 *J v. Director General*, *supra* note 18 at para. 23.

21 "Constitutional Court Dismisses Same-Sex Marriage Appeal" *Lesbian and Gay Equality Project Press Release* (31 July 2003), online: Lesbian and Gay Equality Project <http://www.equality.org.za/press/2003/07/31ssmar.htm> (26 January 2004); Interview (telephone) of Evert Knoesen, National Director, Lesbian and Gay Equality Project (Johannesburg, 3 February 2004) (already prepared lawsuit to be filed immediately after national elections in April 2004).

favour of a statute providing supplemental social security payments to the "spouse" in a man/woman relationship but not to a similarly situated partner in a same-sex relationship.[22] By the next case, however, the Court had unanimously accepted that sexual orientation was analogous to those grounds that the Charter expressly protected against discrimination and hence should receive the same constitutional treatment as the enumerated grounds.[23] Then in 1999, the Supreme Court held violative of the Charter a provision of the Family Law Act that allowed a person in a long-term man/woman relationship, upon its termination, to apply for an order of support, while not granting that same opportunity to a similarly situated person in a same-sex relationship.[24]

In May 2003, the British Columbia Court of Appeal in *EGALE* held that the Charter mandated genderless marriage but stayed its judgment for a little over a year to allow Parliamentary action.[25] In June 2003, the Ontario Court of Appeal in *Halpern* ruled the same on the Charter issue but declined to stay its judgment, giving it immediate effect.[26] In response, the British Columbia court ended its stay.[27] The Chretien government declined to appeal either judgment and instead proposed a bill defining marriage as the union of any two persons.[28] In

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22 *Egan v. Canada,* [1995] 2 SCR 513, 124 DLR (4th) 609.

23 *Vriend v. Alberta,* [1998] 1 SCR 493, 156 DLR (4th) 385 at paras. 90-91.

24 *M v. H,* [1999] 2 SCR 3, 177 DLR (4th) 577.

25 *Supra* note 2.

26 *Supra* note 3.

27 *EGALE, supra* note 2, additional reasons at, [2003] BCCA 406, 228 DLR (4th) 416.

28 "Backgrounder: Reference to the Supreme Court of Canada" *Department of Justice Newsroom*, online: Department of Justice, Canada <http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html>

connection, the Chretien government referred three questions to the Supreme Court dealing with the authority of Parliament to redefine marriage as proposed and to allow religious organizations to decline to solemnize a marriage between a same-sex couple.[29] But in December 2003, Prime Minister Chretien retired and was replaced by Paul Martin. In late January 2004, the Martin government stated that it favoured the genderless marriage bill but that Parliament"s decision on it ought to be informed by a Supreme Court ruling whether the Charter mandates genderless marriage.[30] Accordingly, the government added these additional questions to the previous referral:

> Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the Federal Law - Civil Law Harmonization Act, No. 1, [S.C. 2001, c. 4], consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?[31]

Thus, Canadian resolution of the marriage issue seems imminent, either by judicial action, legislative action, or both.

(26 January 2004).

29 *Ibid*.

30 "Government of Canada Reaffirms Its Position on Supreme Court Reference" *Department of Justice Newsroom*, online: Department of Justice, Canada <http://canada.justice.gc.ca/en/news/nr/2004/doc_31106.html> (29 January 2004); "Background: Civil Marriage and the Legal Recognition of Same-sex Unions" *Department of Justice Newsroom*, online: Department of Justice, Canada <http://canada.justice.gc.ca/en/news/fs/2004/doc_31108.html> (29 January 2004).

31 "Fact Sheet: Reference to the Supreme Court of Canada on Civil Marriage and the Legal Recognition of Same-sex Unions" *Department of Justice Newsroom*, online: Department of Justice, Canada <http://canada.justice.gc.ca/en/news/fs/2004/doc_31110.html> (29 January 2004).

American resolution of the issue, by contrast, promises to take many more years. That is due, in part, to the fact that the states, not the federal government, define marriage and set the qualifications for those wishing to marry,[32] a situation just the opposite of that in South Africa and Canada.

In 1993, the Hawaii Supreme Court held that the state constitution allowed man/woman marriage only if the State could demonstrate compelling governmental interests for continuing to exclude same-sex couples from marriage.[33] The case was remanded to see if the State could meet that heavy burden, but before the case returned for further appellate review the citizens amended the state constitution to assure continuance of man/woman marriage.[34] Much the same happened in Alaska after a trial court ruling in favour of genderless marriage.[35] In response to such judicial activity, Congress enacted in 1996 the Defense of Marriage Act (DOMA),[36] with two provisions. One defined marriage for all federal statutory purposes as the union of a man and a woman.[37] The other authorized each State not to "give effect to any public act, record, or judicial proceeding of any

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32 L. Wardle, "Institutionalizing Marriage Reforms Through Federalism" in A. Hawkins, L. Wardle & D. Coolidge, eds., *Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage* (Westport, Conn: Praeger, 2002) 167 at 167-70; A. Leonard, "Legal Recognition of Same-Sex Partners Under US State or Local Law" in Wintemute & Andenaes, *supra* note 6, 133 at 133-34.

33 *Baehr v. Lewin*, 74 Hawaii 530, 852 P2d 44 (1993).

34 *Baehr v. Miike*, 92 Hawaii 634, 994 P2d 566 (Table) (1999) .

35 The Alaska experience is touched on in *Bess v. Ulmer*, 985 P2d 979 (Alaska 1999) 988.

36 Defense of Marriage Act of 1996, Pub L No 104 -199, 110 Stat 2419 (1996) (codified at 28 USC § 1738C and 1 USC § 7).

37 1 U.S.C. § 7.

other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State".[38] The latter raises a substantial constitutional question because the full faith and credit clause of the federal constitution says: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[39] That clause underlays the old American legal adage: "Married in one state, married in all states."

Then in 1999, the Vermont Supreme Court in *Baker* held that the state constitution"s equality guarantee prohibited the exclusion of same-sex couples from the benefits and protections incident to marriage but also held "that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion."[40] The legislature responded with a civil union act.[41]

In June 2003, the United States Supreme Court held that federal constitutional notions of liberty, privacy, and autonomy invalidated statutes criminalizing private, non-meretricious, consensual, adult homosexual conduct.[42] In November 2003, the Massachusetts Supreme Judicial Court held in *Goodridge* that the state constitution's liberty and equality guarantees render man/woman marriage unconstitutional because there is no "rational basis" for continuing it.[43] The court stayed its judgment until 17 May 2004 "…to permit the Legislature to take such

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38 28 U.S.C. § 1738C.

39 U.S. Const. art. IV, § 1.

40 *Baker*, *supra* note 1 at 225-26.

41 *An Act Relating to Civil Unions*, Act 91 of 2000.

42 *Lawrence v. Texas*, 539 US 558, 123 S Ct 2472 (2003).

43 *Goodridge*, *supra* note 4.

action as it may deem appropriate in light of this opinion."[44] The Massachusetts senate in December 2003 referred to the court the question whether a civil union act would satisfy the court's judgment.[45] The court responded that it would not, stating that the state constitution required genderless marriage.[46] The Governor called for an amendment to the state constitution to preserve man/woman marriage, and the legislature voted to begin the amendment process.[47]

Activists are pursuing in other American states litigation aimed at achieving genderless marriage.[48] Thirty-nine states, however, have by now adopted legislation or amended the state constitution to enshrine man/woman marriage as the only acceptable form.[49] Even such express law-making, however, does not preclude litigation, as evidenced by the City of San Francisco's recent actions. The City took the position that the California state constitution voided the voter-passed law preserving man/woman marriage and, on that basis, began issuing

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44 *Ibid*. at 344.

45 *Request for Advisory Opinion* (A-107*)* SJC-09163 (Mass 2003).

46 *Re Opinions of the Justices to the Senate* 440 Mass 1201, 802 NE2d 565 (2004).

47 M. Romney, "Statement of Governor Romney on SJC Decision on Gay Marriage" (18 November 2003), online: Commonwealth of Massachusetts <http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_031118_statement_gay_marriage_xml> (23 January 2004); K. Peterson, "Fifty state rundown on gay-marriage laws", online: Stateline.org <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058> (24 May 2004).

48 See *e.g*. *Lewis v. Harris* 2003 WL 23191114 (N.J. Super. L. 5 November 2003) (unpublished opinion).

49 "United States' Laws Prohibiting Same-Sex Marriage", online: Liberty Counsel <http://www.lc.org/ProFamily/DOMAs.html> (30 April 2004).

marriage licences to same-sex couples, with the resulting controversy now before the courts.[50]

In response to these developments, political support has mounted for a federal constitutional amendment (known as the "Federal Marriage Amendment" or "FMA") defining marriage in the United States as the union of a man and a woman.[51] President Bush gave his support to such an amendment in February 2004.[52]

Thus, the possibilities for and the extra-territorial effect of genderless marriages in the United States will not be finally resolved until some final judicial/legislative resolution of the genderless marriage issue in Massachusetts, New Jersey, California, and any number of other states thereafter, a final decision from the United States Supreme Court on the constitutionality of DOMA, and final success or failure in adopting a federal marriage amendment.

B. Equality Jurisprudence

The State rarely makes a law that in its content and application affects all persons equally. In large measure, law-making is an exercise in drawing lines that distinguish between certain groups of persons and other groups and then in imposing burdens and affording benefits differently on the groups thus distinguished. At the same time, the super-norm of most modern liberal

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50 "California Supreme Court Takes Action in Same-Sex Marriage Cases", online: Judicial Council of California <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR15B4.HTM> (12 March 2004).

51 "Federal Marriage Amendment", online: Alliance for Marriage <http://www.allianceformarriage.org/reports/fma/fma.cfm> (28 January 2004).

52 "President Calls for Constitutional Amendment Protecting Marriage" *The White House News*, online: The White House <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (26 February 2004).

democratic States includes in one form or another the mandate that the State treat people equally, or the mandate that it not discriminate against them on grounds either specified or left unstated, or both.[53]

Thus on a fairly continuing basis the modern liberal democratic State confronts the task of reconciling the mandates of its equality provision with the reality that virtually all its laws treat people unequally. Because of their current concepts of judicial review, in Canada and the United States that task is preeminently the judiciary's. This judicial task includes the articulation of some demarcation between the super-norm's mandate of equality (or non-discrimination) and the legislature's duty to order and regulate (with all the line-drawing that unavoidably entails), a demarcation that gives to each – constitutional mandate and legislative duty – its due scope. As aids in performing that task, the courts develop, refine, and refashion conceptual tools articulated as principles, doctrines, "tests," or guides and used on a case-by-case basis to adjudge whether the impugned state (or private) action falls on one side or the other of the line of demarcation. Sometimes, constitutional text provides a conceptual tool more or less fully formed, but not infrequently ideas inherent in the notion of equality necessarily call forth such a tool. Such conceptual tools – principles, doctrines, "tests," guides – and their applications in cases constitute a jurisdiction's equality jurisprudence. Although each State's equality jurisprudence differs in some respects from that of every other State, certain fundamental concepts (although carrying different labels) appear nearly universally. This article assumes the reader's familiarity with those fundamental, recurring concepts of equality jurisprudence.

The equality jurisprudence of Canada and the United States each in its own way adds to and modifies the fundamental

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53 See *e.g. Constitution of the Republic of South Africa*, 1996, Act 108 of 1996, s. 9; *Canadian Charter of Rights and Freedoms*, s. 15.

and recurring components of equality jurisprudence found across States. The following sections describe briefly the aspects of those jurisdictions' equality jurisprudence implicated by the key issues selected for review and then, in summarizing the four cases, begin to show how those aspects have engaged genderless marriage arguments.

C. The United States: One Plus Fifty

In the United States, the national government and nearly all the states have their own constitutional equality provision.[54] And as already noted, under American federalism, family law has always been viewed as the province of the states and that includes the definition of marriage and the qualifications of those entering into it. The implications of this arrangement can be sorted as follows:

a) A Supreme Court ruling under the fourteenth amendment[55] in favour of genderless marriage will make that form universal throughout the nation.

b) But in the absence of such a ruling or in the presence of a contrary ruling (that is, a ruling in favour of the federal constitutional validity of man/woman marriage), the genderless marriage issue will be decided pursuant to the constitution of each state.

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54 R. Maddex, *State Constitutions of the United States* (Washington, DC: Congressional Quarterly, 1998); R. Williams, "Equality Guarantees in State Constitutional Law" 63 Texas L. Rev. 1195 (1985).

55 In the unlikely event the issue were to arise in a case attacking federal legislation preserving man/woman marriage, the constitutional analysis would be the same, *cf Bolling v. Sharpe* 347 U.S. 497, 74 S. Ct. 693 (1954), as would the constitutional consequence, that is, nationwide genderless marriage.

c) That means that, in each state that has not amended its constitution to preserve man/woman marriage, the state's highest court will resolve the issue, probably under the state constitution's equality provision and, in so ruling, that court will not be bound by the decisions of the federal Supreme Court but rather will apply the state's own equality jurisprudence.

Although theoretically independent to fashion an equality jurisprudence differing from the federal model, the states' highest courts have to a very considerable extent followed that model. This is due in part, no doubt, to the nature of equality and anti-discrimination ideals; as noted earlier, that nature gives rise to certain fundamental and recurring concepts. This imitation is also due in part to the prestige enjoyed by the federal model, largely as a consequence of the powerful social impacts of Supreme Court equality decisions.[56] In any event, because of the federal model's influence on the state courts, analysis begins with that model.

1. Federal Equality Jurisprudence (the Federal Model)

"Level of scrutiny" is the dominant feature of the federal model, which presently includes (expressly) three such levels: rational basis, intermediate (or heightened), and strict. Generally understood, the rational basis level of scrutiny will sustain official discriminatory action on the mere showing of some "reasonably conceivable state of facts that could provide a rational basis for" the action.[57] At times, however, this level of judicial scrutiny is changed more or less covertly into "rational basis with teeth," an approach much less deferential to state action.[58] Rational basis

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[56] See *e.g. Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954) (school desegregation); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964) (legislative reapportionment).

[57] *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637 (1993) at 320.

[58] C. Sunstein, "Foreword: Leaving Things Undecided" (1996) 110

scrutiny is the default position; it is applied to all cases except those requiring intermediate or strict scrutiny.

Strict scrutiny applies when government discrimination disadvantages or at least implicates "suspect classes" or "suspect categories" (the paradigmatic example being freed slaves and their progeny) or impinges on the exercise of a "fundamental right" (such as freedom of expression). In such a case, the court will sustain official discriminatory action only on a showing that the action advances a compelling governmental interest not adequately served by a less-objectionable, alternative scheme. Or, to use language from general equality jurisprudence, State discrimination can withstand this level of scrutiny only if the State"s interest(s) advanced by the law is of the highest order, only if the connection between the impugned law's means and its purposes is strong and direct, and only if the law is superior relative to plausible alternatives, with respect both to effectiveness and to precision. No federal court has yet held homosexuals to be a suspect class. In the context of man/woman marriage, the Supreme Court has held the right to marry fundamental, but no appellate court has yet extended the federal fundamental right to marry to the context of same-sex couples.

Intermediate scrutiny applies to gender-based discrimination: "to withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[59] Since 1996, government must also demonstrate an "exceedingly persuasive justification" for such a classification.[60] In addressing federal and state constitutional

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Harvard L Rev 4, 59-64 [Sunstein, "Foreword"].

59 *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451(1976) at 197. Intermediate scrutiny also applies to distinctions based on legitimacy of birth. *City of Cleburne v. Cleburne Living Center,* 473 US. 432, 105 SCt. 3249 (1985) at 441.

60 *United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264 (1996) at 533.

arguments to the contrary, the courts generally have held that classifications based on homosexuality (either status or conduct) do not constitute gender-based discrimination.[61]

2. Vermont: *Baker v State*

Wardle has demonstrated that Vermont has two bodies of equality jurisprudence, one found in the *Baker* majority opinion and the other in all the previous and subsequent cases concerned with the state constitution's Common Benefit Clause.[62] This demonstration thus confirms the analysis and predictions of Justice Dooley's concurring opinion in *Baker*.[63] The following paragraphs summarize *Baker*, focussing on its equality analysis.

Upon application, three same-sex couples were denied marriage licenses, and the trial court dismissed the ensuing complaint, which invoked the Vermont constitution"s equality provision, the Common Benefit Clause. The trial court held that man/woman marriage "rationally furthered the State's interest in promoting 'the link between procreation and childrearing'."[64] The appeal produced three opinions: majority (three justices),

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[61] In the context of genderless marriage, compare *Singer v. Hara*, 11 Wash App 247, 522 P2d 1187 (1974) and *Baker*, *supra* note 1 at 215, n. 13 with *Baehr v. Lewin*, *supra* note 33 at 63-67, plurality opinion, *Baker*, *supra* note 1 at 253-62, Johnson J. concurring and dissenting, and *Goodridge*, *supra* note 4 at 245-50, Greaney J., concurring. Additional analysis appears in P. Linton, "Same-Sex 'Marriage' Under State Equal Rights Amendments" (2002) 46 St. Louis U. LJ 909 and W. Duncan, "'The Mere Allusion to Gender': Answering the Charge that Marriage is Sex Discrimination" (2002) 46 St. Louis U. LJ 963.

[62] L. Wardle, "The Curious Case of the Missing Legal Analysis - Baker v. State" (paper presented at *the Symposium on The Future of Same-Sex Marriage Claims: The Third Generation and Beyond*, Provo, Utah, August 2003).

[63] *Baker*, supra note 1 at 235-43.

[64] *Ibid. at* 198.

concurring (Dooley J), and concurring and dissenting (Johnson J.). All opinions agreed that man/woman marriage violated the Common Benefit clause; all but Judge Johnson's, that the proper remedy was to allow the legislature to adopt either genderless marriage or civil union legislation. Regarding the holding of violation, the majority applied its newly crafted standard of review: one "broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective,"[65] and thus one requiring the courts to "engage in a meaningful, case-specific analysis to ensure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals."[66] Justice Dooley applied the pre- and post-*Baker* model, "at least a close cousin of the federal equal protection test,"[67] and saw homosexuality as a suspect class requiring strict scrutiny. Justice Johnson applied that same model[68] but saw sex-based discrimination because

> the sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women[;] the classification is still unlawful sex discrimination even if it applies equally to men and women.[69]

In applying their differing equality principles, the justices rejected in turn each of the key arguments advanced by the State, beginning with "the government's interest in 'furthering the link

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65 *Ibid*. *at* 203.

66 *Ibid*. *at* 204.

67 *Ibid*. *at* 231.

68 *Ibid*. *at* 252.

69 *Ibid*. at 254.

between procreation and child rearing'";[70] the court found unacceptable imprecision in the means (man/woman marriage) used to advance the governmental interest, with that imprecision reflected in the fact that many married couples cannot or elect not to procreate, while many same-sex couples use assisted-reproductive technologies (hereafter ART) and adoption laws.[71] The justices likewise rejected the asserted governmental interest in promoting married mother/father child-rearing as the optimal child-rearing mode, noting in passing "that child-development experts disagree and the answer is decidedly uncertain"[72] and then holding that legislative allowance of same-sex couple adoption meant that the asserted interest was not a genuine and contemporary governmental interest.[73]

Chapters three and four examine closely the court's reasoning regarding, respectively, procreation and child-rearing, while chapter five uses the Johnson J. concurring and dissenting opinion as its primary vehicle for a close examination of the role of competing gender theories.

3. Massachusetts: *Goodridge v Department of Public Health*

Upon application, seven same-sex couples were denied marriage licenses, and the trial court dismissed the ensuing complaint, which invoked the Massachusetts constitution's equality and liberty provisions. The appeal produced five opinions: plurality (three justices), concurring (Greaney J.), dissenting (Spina J.), dissenting (Sosman J.), and dissenting (Cordy J.), with each dissenting justice joining each dissenting opinion. The plurality concluded that man/woman marriage did not pass the rational

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70 *Ibid*. at 216.

71 *Ibid*. at 218-19.

72 *Ibid*. at 222.

73 *Ibid*.

basis test.[74] The concurring opinion concluded that, because of the presence of both a fundamental right (marriage) and sex-based discrimination, man/woman marriage must be subjected to strict scrutiny and, for the reasons given by the plurality, it could not survive.[75] (The dissenting opinions are addressed in later chapters as warranted.)

The Commonwealth had argued that man/woman marriage served its "legitimate interest in fostering and protecting the link between marriage and procreation."[76] The plurality opinion rejected arguments regarding procreation (however cast) for the same reasons given in *Baker*: imprecision of fit between legislative means and governmental interest in light of the many married who do not or cannot procreate and the increase through ART and adoption of same-sex couples with children.[77] The plurality opinion also rejected arguments regarding optimal child-rearing. The first step was to recast the governmental interest not as one in promoting the optimal mode of child-rearing (married mother/father) but of "[p]rotecting the welfare of children",[78] meaning all children because the perceived Massachusetts policy was to "move vigorously to strengthen the modern family in its many variations."[79] From here the court focused on the welfare of the children of same-sex couples, seeing the limitation of man/woman marriage as detrimental to their welfare and suggesting that the Commonwealth penalizes those children because it "disapproves of their parents' sexual orientation."[80]

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74 *Goodridge*, *supra* note 4 at 312-44.

75 *Ibid*. at 344-51.

76 *Ibid*. Brief of Defendants-Appellees at 110.

77 *Ibid*. at 344-51.

78 *Ibid*. at 333-34.

79 *Ibid*. at 334.

80 *Ibid*. at 336.

The plurality opinion made, relative to both the procreation and the child-rearing issues, an important argument labelled in this article *the no-downside argument*. (The Canadian courts in *EGALE* and *Halpern* had previously done the same.[81])

> The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit.[82]

The plurality opinion did not engage the Cordy J. dissent's arguments presented to counter the no-downside argument.[83]

Because of its role in *Goodridge*, *EGALE*, and *Halpern*, the no-downside argument merits this elaboration: The argument may concede, at least for purposes of argument, that man/woman marriage serves well, even optimally, important governmental interests relative to procreation and child-rearing in ways that a marriage of same-sex couples cannot. It then asserts, however, that opening marriage to same-sex couples will visit no harms upon, will result in no downside to, the institution of marriage; that is, the rate of man/woman marriage will not decline and married men and women will continue at an undiminished rate to have and rear children. At the same time, the argument asserts, such opening will result in valuable goods, namely, an increase in same-sex couples' sense of dignity and equality and greater

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81 *EGALE*, *supra* note 2 at paras. 126-127; *Halpern*, *supra* note 3 at para. 121.

82 *Goodridge*, *supra* note 4 at 334.

83 *Ibid*. at 390-94.

security for their children. The argument's conclusion is that it is irrational not to "open" marriage to same-sex couples where there is no downside and such substantial upside.

Goodridge is an important case and portions of the various opinions are analysed in chapters three, four (both parts), and five.

D. The Charter and Canadian Equality Jurisprudence

For all practical purposes, Canada's equality jurisprudence began with adoption of the Canadian Charter of Rights and Freedoms in 1982. Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision is limited by section 1: The Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court of Canada (hereafter SCC) first comprehensively explicated Charter equality rights in 1989, in *Andrews v. Law Society (British Columbia)*,[84] and thereafter engaged in a vigorous judicial dialogue on the subject. In 1999, in *Law v. Canada (Minister of Employment & Immigration)*,[85] the SCC, in an effort to harmonize and rationalize various strands of

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84 *Andrews v. Law Society (British Columbia)*, [1989] 1 SCR 143, 56 DLR (4th) 1.

85 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

equality jurisprudence resulting from that dialogue, again comprehensively explicated Charter equality rights. The result of these developments is an unusually detailed, multi-step approach to resolving equality claims. The detail of that approach defies a summary that is both short and fair, as evidenced by the fact that the SCC's own summary in *Law* of just the section 15(1) portion of the analysis (ie, without the section 1 analysis) requires three full pages.[86] The SCC's own summary of the *purpose* of section 15(1), however, merits quotation:

> In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[87]

This statement reflects the SCC's conclusion in *Law* that:

> [T]he equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light of the above [ie, dignity-centred] understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses *all* elements of the discrimination analysis (emphasis added).[88]

In this fashion, the SCC welded the value of human dignity to the Charter's equality guarantee. Canada has, however, no free-

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[86] *Ibid*. at para. 88

[87] *Ibid*.

[88] *Ibid*. at para. 54

standing, substantive right to dignity; the Charter never uses the word, and although the SCC cases use dignity as a guiding value in equality adjudication, it has not fashioned an independent, substantive right to dignity. (Chapter six addresses some implications for the genderless marriage issue.)

Regarding section 1 analysis, after a conclusion of discrimination prohibited by section 15(1) – a conclusion reached without any regard to the nature or value of the governmental interests sought to be furthered by the impugned statute,[89] – it then becomes "the government's burden under s. 1 ... to justify a breach of human dignity."[90] That burden seems closely akin to that born by an American governmental entity faced with heightened or even strict scrutiny of its impugned action.

1. British Columbia: *EGALE Canada Inc v. Canada (Attorney General)*

Again, this was a case brought by unsuccessful applicants for marriage licenses. By the time the British Columbia Court of Appeal issued its decision, two other Canadian courts had concluded that man/woman marriage (whether found in common-law or statutory definition) contravenes section 15(1) of the Charter and cannot be justified under section 1. Those were the lower court in the *Halpern* case (a three-judge panel of the Ontario Divisional Court)[91] and a Quebec trial court in *Hendricks v. Quebec*.[92] The Court of Appeal relied heavily on both, particularly the former, and concluded that the common-law definition of marriage as the union of a man and a woman

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89 *Halpern*, *supra* note 3 at para. 92 (relying on *Lavoie v. Canada*, [2002] 1 SCR 769, 210 DLR (4th) 193 (2002) at paras. 809-810.

90 *Ibid*. [emphasis in original].

91 *Ibid*.

92 *Hendricks v. Quebec*, [2002] QJ 3816, [2002] R.D.F. 1022 (Qc. Sup. Ct.).

violated section 15(1) and was not saved by the section 1 limitation.

The relevant meanings of procreation were at issue in both the section 15(1) analysis and the section 1 analysis.[93] The Court of Appeal, relying on the Blair J Divisional Court opinion in *Halpern*, took the view that whether section 15(1) discrimination was even present depended on the relative degree of procreation's centrality to marriage. At some unspecified but high degree of centrality, it must be said that "[s]ame-sex couples are simply *incapable* of marriage because they cannot procreate".[94] Below that degree, discrimination is present.[95] The court found the latter. The court grounded its rejection of justification under section 1 on two conclusions. First, the governmental interest was no longer sufficiently strong to justify the man/woman limitation:

> [T]he emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage and its role in society ... [P]rocreation (including the rearing of children) resulting from sexual intercourse between a husband and a wife, can no longer be regarded as a sufficiently pressing and substantial objective ...[96]

Second was the no-downside argument.[97]

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93 *EGALE, supra* note 2 at paras. 85-92, 117-127.

94 *Ibid.* at para. 89.

95 *Ibid.* at para. 90.

96 *Ibid.* at para. 124.

97 *Ibid.* at paras. 126-127.

Other than the short parenthetical in the quote just above, the court did not address any possible governmental interest relative to different modes of child-rearing.

2. Ontario: *Halpern v. Toronto (City)*

This case was also brought by unsuccessful marriage license applicants. The Ontario Court of Appeal sustained the same-sex couples' equality claims. In doing so, it addressed neither procreation nor child-rearing in the section 15(1) context, only as part of the section 1 analysis. The court in its section 15(1) analysis did, however, devote extensive attention to dignity[98] and to the law's expressive, or educative, function[99] (as it would do again in its section 1 analysis).

In an effort to meet the government's section 1 burden, the Attorney General pointed to marriage's success as "one of the most durable institutions for the organization of society" and its valuable purposes "of uniting the opposite sexes, encouraging the birth and raising of children of the marriage, and companionship."[100] The court refused to evaluate the societal interest in "uniting the opposite sexes" because this interest (regardless of its weight or importance) constituted "a purpose that demeans the dignity of same-sex couples" and is therefore "contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial."[101] The court rejected procreation and child-rearing as adequate grounds because of the no-downside argument,[102] because (relative to

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98 *Halpern*, *supra* note 3 at paras. 78-79, 107.

99 See *e.g. ibid.* at para. 107.

100 *Ibid.* at para. 116.

101 *Ibid.* at para. 119.

102 *Ibid.* at para. 121.

procreation) of adoption and ART,[103] and because (relative to child-rearing) the evidence of the superiority of married mother/father child-rearing was not sufficient to be "acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons."[104]

CHAPTER THREE

THE RELEVANT MEANINGS OF PROCREATION

This chapter's purpose is to assess, with one exception, the four cases' arguments relative to procreation, to assess to what extent they qualify as good arguments. Thus, this chapter's purpose is much akin to the task conventionally performed by judges -- to judge arguments, to determine their rational, logical, and empirical strengths and weaknesses. The one exception mentioned is the no-downside argument. It is more aptly addressed in the next chapter, the purpose of which is to assess the four cases' arguments relative to child-rearing.

A. The Common Pattern of Argument and Strategy

A common pattern of argument regarding procreation -- with two central facets -- emerges from the four cases. One facet minimizes procreation's place and meaning in the institution of marriage, while maximizing the place and meaning of other components, preeminently companionship. This endeavour entails a summary of what marriage "is," with the summary presented as descriptive (what the continuing evolution of marriage has made the institution now days), rather than as aspirational (what, for purposes of the good life, the institution ought to be). It further entails the idea that if procreation's place and meaning in marriage is not "essential" or "central" or even

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[103] *Ibid*. at para. 122.

[104] *Ibid.* at para. 123.

"exclusive," then any argument from procreation in favour of man/woman marriage must fail. A consistently used tool in the minimization of procreation is the over-inclusive/under-inclusive argument: Laws regulating marriage do not exclude opposite-sex couples who cannot or will not procreate, and same-sex couples create children through an array of techniques by which conception, gestation, and child-bearing occur (ART). Therefore, the argument continues, those laws themselves demonstrate that the State's asserted interest in marriage as a regulator of procreation is at best de minimis. The other facet of the common argument is to suggest that the procreative nature of man/woman marriage is not substantially different from the nature of same-sex couple relationships. And running through all this is a shift of perspective: The opinions often shift from assessing marriage as "a vital social institution" (to quote *Goodridge*'s opening sentence), that is, from assessing society's meanings, purposes, and uses of marriage, to an assessment of the individual couple's perspective on the marriage experience.

After briefly exemplifying the common pattern of argument, the following paragraphs seek to assess the quality of the judicial performance.

Regarding the minimization of procreation's place and meaning in the institution of marriage and the maximization of other components, the *Goodridge* plurality opinion asserts: "While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[105] That opinion also says that "[c]ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family"[106] and in another

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105 *Supra* note 4 at 332.

106 *Ibid*. at 322.

place seeks to demonstrate with the law's allowance of "nonmarital child bearing" that procreation is not "a necessary component of civil marriage."[107] For its part, *Halpern* summarizes marriage as "one of the most significant forms of personal relationships" through which "individuals can publicly express their love and commitment to each other" and by which society approves "the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships."[108]

EGALE adopts the Blair J. argument in the lower court *Halpern* decision,[109] which proceeds through a telling progression: Procreation is not "such a compelling and central aspect of marriage . . . that it -- and it alone -- gives marriages its defining characteristic"[110]; procreation is "no longer ... the central characteristic of marriage"[111]; and finally, "procreation is not essential to the nature of the institution" of marriage.[112] Later, *EGALE* states that "the emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage."[113] *Baker* speaks of official recognition and protection of "the professed commitment of two individuals to a lasting relationship of mutual affection".[114]

Regarding the second facet of the common argument -- the insubstantial difference between man/woman marriage and

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107 *Ibid*. at 333.

108 *Supra* note 3 at para. 5.

109 *Halpern v. Toronto (City)*, [2002] OJ 2714, 215 DLR (4th) 223 (Ont. Div. Ct.).

110 *Supra* note 2 at para. 87.

111 *Ibid*. at para. 90.

112 *Ibid*.

113 *Ibid*. at para. 124.

114 *Supra* note 1 at 228.

same-sex couple relationships with respect to procreation --, all four cases point to the prevalence of married couples who are not procreative and of same-sex couples who get children through ART or adoption.[115] And regarding the societal versus individual perspective on marriage, *Halpern* consciously uses the individual perspective, believing that Canadian equality jurisprudence requires such, apparently even in the analytical task of weighing the governmental interests.[116] This language in *Goodridge* exemplifies the shift away from the societal to the personal perspective: "Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self- definition."[117]

B. Society's Deep Logic of Marriage: Children as Consequences

It is not easy to detect in the four cases' common argument any direct engagement with the States' procreation argument as actually advanced; rather, the opinions seem to elide the argument by altering it into something different. Explication of the argument actually advanced helps illuminate the extent to which, and how, the four cases actually engage it.

The States' procreation argument is grounded in a component of what this article refers to as society's *deep logic of marriage*, a component that the States' briefs and facta refer to as "the government's interest in 'furthering the link between procreation and child rearing.'"[118] The phrase *deep logic of marriage* merits this care: The phrase is meant to encompass the

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115 *Supra* note 4 at 331-33; *supra* note 3 at para. 93; *supra* note 2 at para. 128; *supra* note 1 at 217-221.

116 *Supra* note 3 at paras. 91, 119, 123.

117 *Supra* note 4 at 322.

118 *Baker*, *supra* note 1 at 216-17.

complex of purposes and values that the literature suggests inheres in the social institution of marriage as now experienced in Canadian and American societies.[119] Use of the phrase is not intended to say anything about the relative stasis or dynamism of that complex of purposes and values. Nor does this article by any means attempt to delineate any of those purposes and values other than the component of the complex most directly implicated by the procreation issue as raised in the four cases. With those limiting clarifications, the article returns to its explication of the States' procreation argument.

The relevant component is understood in the literature as a response to two essential realities of man/woman intercourse: its procreative power and its passion. The component's purpose is understood as the provision of adequate private welfare to children. (As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child-bearing, has important implications for society. Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. This purposive component of society's deep

[119] This statement may be relevant to other countries that share cultural and legal traditions with Canada and the United States.

logic of marriage is hereafter referred to as the *private welfare purpose*. Although the immediate objects of the protective aspects of the private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.

Here is the important explanation of the private welfare purpose from the Cordy J. dissent in *Goodridge*:

> Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. ... [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. ... [A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. ... The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.[120]

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120 *Supra* note 4 at 381-83.

Since the first case, *Baker*, the judges have had the States' procreation argument and the supporting literature available to them, and in *Goodridge* the majority justices had before them also their dissenting colleague's explication of the concepts, with references to the literature. Yet, with one exception shortly addressed, the majority opinions do not appear to engage directly the States' argument and its implications for the man/woman marriage issue. That is because the two central facets of the opinions' common argument entails avoidance of direct engagement. Implementation of the common strategy does, however, *indirectly* engage to a certain extent the States' procreation argument. The quality of that indirect engagement is considered next.

The indirect engagement resulting from implementation of the first facet of the strategy is this: the four cases' assertions that procreation is not a "compelling" or "central" or "essential" or "core" component of the institution of marriage. In one sense, these assertions seem accurate: The law, if not society, imposes no obligation on married couples to procreate, and myriad married couples for many different reasons do not. The relevancy of this sense, however, seems problematic in that it hardly if at all addresses the place and meaning of procreation in the institution of marriage that defenders of man/woman marriage have advanced. They have said that a central and probably preeminent purpose of the civil institution of marriage (its deep logic) is to regulate the *consequences* of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter. The opinions simply avoid this point when they say that marriage law does not require an intent or ability to procreate in order to marry or actual procreation to stay married; they miss the States' point that marriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences.

In the light of the States' understanding of marriage's purposiveness as centred in the consequences of passionate

man/woman intercourse, to deny the centrality of procreation to the institution of marriage is defensible only if human sexuality has radically changed, only if the powerful tide of heterosexual attraction and procreative power has been stilled. Nothing appears suggesting such a fundamental alteration in the human condition in the Canadian and American societies. Just the contrary; each year in Canada and the United States, many millions of children, conceived in passion, are born, and arguably those societies have no greater concern or interest than in the situation, the circumstances, of those children. In other words, those societies have an important interest in the adequacy of the private welfare available to the millions of children born annually as the result of man/woman intercourse. And experience shows that marriage -- built on the private protective purpose of society's deep logic of marriage -- well serves that interest. In the United States and Canada, society's burdens (the negative consequences of child-bearing) are *inversely* correlated to the extent of private welfare, the extent of private welfare is *directly* correlated to parental and familial ability, and parental and family ability is *directly* correlated to marriage and its endurance.[121] Or stated slightly differently, of all adequately studied child-rearing modes, married mother/father child-rearing is the optimal mode as determined by measurement of outcomes deemed crucial for a child's (and hence society's) well-being, including physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behaviour such as drug abuse and high-risk sexual conduct.[122]

Regarding the second facet of the common strategy (minimize in the context of procreation the differences between man/woman marriage and same-sex couple relationships), the four cases' resulting indirect engagement with the States'

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121 See text between note 147 and note 150.

122 *Ibid*.

procreation argument is likewise problematic. First, it seems that the courts' enthusiasm to implement this facet of the strategy resulted in rather startling conceptual and linguistic gaffes. Thus, *EGALE* eight times and *Goodridge* once speak of "heterosexual procreation",[123] thereby appearing to imply that such procreation is not exclusive and somehow stands in comparison to the "procreation" of same-sex couple relationships. Yet the phrase is misleading in its redundancy; the *only* form of human procreation is heterosexual and that will continue to be the case until humankind begins human cloning. The greater conceptual and linguistic gaffe, however, belongs to *Goodridge* alone:

> It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world…[124]

Adoption, of course, is not a "means ... by which children ... come into the world"; it only places them once "heterosexual procreation" brings them into the world. Such are the mistakes resulting from a blinkered implementation of the second facet of the common strategy.

Regarding the one substantive (as opposed to solely linguistic) basis for the strategy's second facet, ART, the four cases do not address how congruent or not it is with society's deep logic of marriage. The States can argue that, from their perspective, the nature of ART assures that conception will be the result of deliberation, planning, preparation, and commitment, which in turn assures to a high degree all the same relative to

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123 *Supra* note 2 at paras. 87-90; *supra* note 4 at 333.

124 *Supra* note 4 at 332 note 23.

provision of private welfare at birth and thereafter. Thus, deliberative procreation by ART, for those dependent on it, to a not inconsiderable extent performs to society's benefit the role that marriage was designed to fill for the far greater number engaged in passion-based procreation; hence, the incongruity between a genderless marriage claim based on "procreation by ART" and an important part of society's deep logic of marriage.[125]

The States' procreation argument, as advanced, would seem to merit more than the elision seen in the four cases' majority opinions. The *Goodridge* plurality opinion's one effort at direct engagement with the argument, however, does not adequately supply what is merited but not otherwise provided. The plurality opinion asserts that "until very recently ... the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed"[126] and then says that even the Cordy J. dissent "acknowledges, in 'the modern age,' 'heterosexual intercourse, procreation, and child care are not necessarily conjoined.'"[127] Regarding the first quote, it is, of course, true and irrelevant. The question is not the strength of the link prior to "very recently"; the question is its strength now, and all the quote intimates is that presently the link is less strong than "very strong indeed." But what is needed is some plausible basis for believing that the link is now so weak as to remove the deep logic as a necessary component of rational analysis of the genderless marriage issue, and the plurality opinion offers no such basis. The second quote, taken from the Cordy J. dissent, does not qualify as supportive of

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125 Opposite-sex couples use ART in far greater numbers than do same-sex couples; the incongruity relative to the former is overridden by a strong societal aversion to governmental inquiry into marital procreative intentions and capacities. See text between note 137 and note 142.

126 *Supra* note 4 at 332, n. 23.

127 *Ibid*.

the plurality opinion's argument; that quote is a fragment of this thought:

> Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.[128]

"[T]he fact that sexual intercourse commonly results in pregnancy and childbirth" is both true and relevant.

Reflection suggests a reason why the plurality opinion, with its contraception argument, went no further than to intimate that "the link between heterosexual sex and procreation" is now, to some unspecified degree, less strong than "very strong indeed"[129] The American and Canadian data suggests that the link, although undoubtedly diminished to some extent by contraception, retains substantial force. Nonmarital American births approximated 1.4 million in 2002 and in that same year accounted for 34% of all births.[130] In Canada in 1998, out-of-wedlock births accounted for 28% of all births.[131] Although some

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128 *Ibid*. at 382.

129 *Ibid*. at 332, n. 23.

130 Child Trends, "Percentage of Births to Unmarried Women," online: Child Trends Data Bank <http://www.childtrendsdatabank.org/indicators/75UnmarriedBirths.cfm> (27 February 2004).

131 Stephanie J. Ventura & Christine A. Bachrach, "Nonmarital Childbearing in the United States, 1940-99," online: Centers for Disease Control and Prevention <http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf> (27 February 2004) at 15 figure 26.

of those out-of-wedlock births are undoubtedly the result of deliberative procreation, the plurality opinion provides no basis for seeing a large number as not preeminently the result of passion, a neglect of available contraceptive techniques, and an aversion to resort to abortion. However effective a contraceptive culture can be theoretically, that is not the North American culture. The private welfare purpose of marriage thus retains substantial vitality generally. The *Goodridge* plurality opinion's effort to show otherwise disappoints in its inadequacy.

C. Societal Valuation of Different Kinds of Sexual Conduct

An extraordinarily interesting part of the *Goodridge* plurality opinion is its treatment of society's relative valuations of different kinds of sexual conduct. The opinion at page 331 asserts: "Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family." Assessment of this assertion requires a step back to look at whether, and if so, why and how society values differently different kinds of sexual conduct.

That our societies through their laws value different sexual conducts differently seems true enough. The evidence in the laws is circumstantial (ie, no explicit relative valuations) but strong. The evidence is perhaps strongest at the disapproval end of the spectrum, which usually has been and is the criminal law's domain. The recent successful prosecution of America's most famous living polygamist, Tom Green, illustrates.[132] Green was convicted of four counts of bigamy (that variety known as *unlawful cohabitation*, which has a sexual conduct element), one count of criminal non-support (arising from his failure to financially support the product of his sexual conduct, more than twenty children), and one count of child rape (arising from his

[132] The author was one of the prosecutors.

act, as a 38-year-old man, of sexual intercourse -- evidenced by childbirth -- with a 13-year-old "wife"). Green received a prison sentence for each count of the judgment of conviction, with the sentence for bigamy being more onerous than that for criminal non-support and the sentence for child rape being much more severe than all the others. The reasons for the varying levels of disapproval are readily apprehended; the point is not those reasons in themselves; the point is that the levels of disapproval vary and that the variance is rational. It is rational to deem the protection of children from sexual exploitation a more important State interest than preventing a polygamous life-style or scaring "dead-beat dads" into fulfilment of their support obligations.[133]

A typical criminal code, even now days, covers a broad range of sexual conducts, usually involving in some way violence, coercion, deceit, publicity, commercialism, or youth.[134] That range, although broad, still covers only a portion of all the various kinds of human sexual conduct. That does not mean, of course, that all sexual conducts not criminalized fall on the same point on the disapproval/approval spectrum, say a shared point of "tolerance" or "approval." Because of a variety of policy considerations and principles (discussed later on), a State may civilly regulate but not criminalize what it has the power to criminalize and may leave free of any regulation what it has the power to regulate.

A society rationally approaches the valuation of different kinds of sexual conduct when it assesses the kinds of consequences to society generally resulting from each kind of conduct. Thus, a society may rationally disapprove of adultery on the view that it tends to damage or destroy that which produces a

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[133] This does not purport to be a complete list of all State interests sought to be advanced by the respective criminal statutes appearing in the example.

[134] See *e.g.* American Law Institute *Model Penal Code* (Philadelphia, Pennsylvania ALI 1985) arts. 213, 230, 251.

range of societal benefits (enduring marriage) and promotes that which produces a range of societal ills (divorce). On the view that these effects are magnified when minor children are involved, a society may sensibly disapprove even more that particular sub-category of adultery. As for the important point that our societies have largely repealed laws against adultery and, to a lesser extent, eliminated it as a consideration in divorce proceedings, that is addressed shortly.

As already seen, for society, children are a large consequence of man/woman intercourse, or more accurately, a large complex of large consequences. Putting aside arguments of overpopulation, which vary in rational force from society to society, the positive societal consequences of child-bearing include the perpetuation of society itself, the provision of a new workforce to sustain temporally the current workforce post-retirement, and the common joy that children uniquely provide. The phrase *perpetuation of society* merits this enlargement: Society is more than just its human bio-mass; it is also its culture (broadly construed) and its institutions. Because that is so, a society perpetuates itself in large measure through the socialization and acculturation of its children, and this in turn is why a society that values itself may rationally value domestic procreation over large-scale immigration to meet the need for a replacement population. As also already seen, the negative consequences of child-bearing tend to be highly situational; that is, the negative societal consequences' presence or absence, their greater or lesser extent, depend on the child's situation at birth and thereafter. The American and Canadian experience is that marriage (ie, married mother father child-rearing) is most highly correlated with the minimal negative societal consequences of child-bearing.[135] The substantial positive social consequences of child-bearing and marriage's success in minimizing child-bearing's negative social consequences means this for societal valuation of different kinds of man/woman sexual conduct: A

[135] See text between note 147 and note 150.

societal judgment placing highest approval on married man/woman intercourse is rational.

Still addressing the rationality of societal valuations of different kinds of sexual conduct -- and nothing else -- , there is the comparison of marital man/woman intercourse with same-sex intimate conduct occurring in a setting deemed marriage-like in all other meaningful respects. When society places a higher, even a substantially higher, value on the marital man/woman intercourse than on the same-sex sexual conduct, its judgment is rational. That is because, while all other consequences of the two kinds of sexual conduct are deemed equal, only the former *conduct* provides the substantial societal benefits of child-bearing.

Now turning to society's relative valuations of different *types* of *relationships*, there is the comparison of man/woman marriage with same-sex relationships deemed marriage-like in all other meaningful respects. When a society places a higher value on man/woman marriage than on the same-sex relationship, its judgment is rational. Indeed, with all other things being equal, it would seem irrational for society not to value the man/woman marriage more highly. That is because, while all other components of the two types of relationship are deemed equal and each of the two types of relationships has *a* sexual conduct component, the man/woman marriage has *the* sexual conduct component rationally given highest value by society. And this conclusion of rationality does not depend on a showing that the sexual conduct component of marriage is the most "important" component among many, or the most "essential," or the most "central"; the conclusion of rationality depends only on intimate sexual relations being an important and defining component of each *type* of the two relationships, and no voices are heard denying that.

But the key question remains whether these rational conclusions are embedded in our societies' laws. The answer seems to be yes, and the best supporting example is the law's

limitation of marriage to the union of a man and a woman. And that brings the analysis back to the *Goodridge* plurality opinion's assertion: "Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family." The simple fact is that the very existence of marriage ("our laws of civil marriage") does "privilege procreative heterosexual intercourse between married people above every other form of adult intimacy." Marriage is a privileged state (that is exactly why genderless marriage advocates are fighting this war), *and* "procreative heterosexual intercourse between married people" is an important part of that privileged state's sexual conduct component, *and* that part is a fundamental reason why society privileges marriage. "Procreative heterosexual intercourse between married people" gives society the substantial benefits of children while minimizing the concomitant societal burdens. As noted earlier, it would be irrational for society not to "privilege" or value such conduct "above every other form of adult intimacy"; the existence of and privileges pertaining to man/woman marriage may sensibly be viewed as proofs that, in this respect, society is not irrational.

The plurality opinion, however, seems to offer two proofs in support of its assertion. The first is that the law allows men and women to marry without inquiring into their procreative intentions and capacities and allows them to stay married without regard to intentions, capacities, or actual procreation. For the plurality opinion, this aspect of the law proves that the law does "not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy." That conclusion follows, however, only if there is no other equally plausible reason for the law's reticence at making inquiry into marital procreative intentions and capacities. There is such a reason; the next section addresses it. The second proffered proof is more implicit than explicit but nevertheless important. Not only the *Goodridge* plurality opinion but other opinions in the

four cases appear to proceed on the assumption that recent changes in the law -- for example, the de-criminalization of adultery, fornication, and sodomy or the move from fault-based divorce (which addresses faulted sexual conducts) to no-fault divorce -- have resulted from application of liberalism's *neutrality* principle. That principle says that the State (specifically, its laws) should be neutral among competing conceptions of what is good or right for individuals and this extends to individuals' choices of sexual conducts.[136] The problem with this assumption is the presence of alternative explanations, probably more forceful, for the changes in the law. One alternative is that at least some of the changes are the result of legislative application of liberalism's *harm* principle. That principle says that the state should not use coercion directly or indirectly to discourage conduct not harmful to persons other than those who consent to engage in it.[137] And the harm principle leads readily to another explanation, legislative solicitude for the limitations of law enforcement and adjudicative resources. None of the four cases make (nor does it seem possible to make) a showing that the changes in or repeal of laws regulating various kinds of sexual conducts are the result of the Canadian and American societies' decision, in deference to the neutrality principle, to cease making all valuations of all sexual conducts except those criminalized. And, as shown above, it would seem to be irrational for society to abandon its decision, reflected in the limitation of marriage to the union of a man and a woman, to "privilege procreative heterosexual intercourse between married people above every other form of adult intimacy."

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136 J. Finnis "Legal Enforcement of 'Duties to Oneself': Kant v. Neo-Kantians" (1987) 87 Colum. L. Rev. 433 at 433.

137 *Ibid.*

D. Governmental Inquiry Into Marital Procreative Intentions and Capacities

The opinions in the four cases make use of the fact that marriage law does not provide for governmental inquiry into marital procreative intentions and capacities, or, in those opinions' formulation, marriage law does not require an intent or ability to procreate in order to marry or actual procreation to stay married. As already seen, the fact is used as proof that society does not place that high a value on marital procreation and that therefore society's high regard for marriage must be grounded elsewhere, such as in companionship. This is good proof, however, only if there is no equally plausible explanation for society's decision regarding governmental inquiry into procreative intentions and capacities. Reflection suggests that there is and that the alternative is not just equally plausible but more plausible, in light of our societies' long-standing traditions relative to marital privacy.

That our societies have a long-standing sensibility against personalized governmental inquiries into marital procreative intentions and capacities seems true. Certainly the development of American common law and constitutional law suggests that the aversion to public and certainly governmental inquiries into an individual's marital procreative intentions and capacities qualifies as a social norm of some antiquity. Before turning to that development, though, reflection suggests that the norm has always been reinforced by certain pragmatic (and interrelated) considerations. These include sensible suspicion of the candour of responses regarding procreative intentions, equally sensible suspicion when it comes to responses about procreative capacities, the scientific (ie, medical) difficulty or impossibility of securing evidence of such capacities, and the costs associated with that endeavour if attempted.

The development in the law is best exemplified by *Griswold v. Connecticut.*[138] There the United States Supreme Court reviewed a statute that prohibited even married couples from possessing contraceptives.[139] The Court struck it down because its very existence created the possibility of governmental investigation into marital procreative intentions:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[140]

In so ruling, the court saw the right of marital privacy as embedded in a social norm of some antiquity, a norm that in 1965 matured into a judicially recognized fundamental liberty interest protected by the fourteenth amendment's due process clause and did so exactly because that norm was "'so rooted in the traditions and conscience of our people'".[141]

The role of this social norm relative to man/woman marriage can be seen in this: Regulation of marriage, such as marriage licensure, stops short of any inquiry into procreative intentions and capacities. It seems that neither the advocates of genderless marriage nor the four courts could be oblivious to the teachings of *Griswold*. It is troubling that the courts identified a supposed societal lack of interest in procreation as the cause of the absence from the marriage laws of a procreation requirement, rather than identifying the much more plausible and robust explanation readily available: a strong social norm against

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138 *Griswold v. Connecticut,* 381 US 479, 85 S.Ct. 1678 (1965) [Griswold].

139 *Ibid*. at 480.

140 *Ibid*. at 485-86.

141 *Ibid*. at 487, Goldberg J., concurring.

government inquiry into marital procreative intentions and capacities.

E. What Marriage Now "Is" and the Personal Perspective

As noted, the four cases speak of the centrality to marriage of companionship; indeed, the *Goodridge* plurality opinion asserts that "the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, ... is the sine qua non of civil marriage."[142] To the extent the reason for so speaking was to show that procreation is not important to the institution of marriage, the matter has already been addressed. But something else may be going on here. The expressions in the four cases appear highly descriptive of what the literature refers to as the *close personal relationship* theory of marriage. Sociologists have developed the theory as a way of unifying their analysis of a range of dyadic relationships, the theory's popularisers have advanced some core concepts as a model of what, for the good life, marriage ought to be, and there is no doubt that many married couples adopt the model as theirs.[143] Nor is there any doubt that the theory is congenial (perhaps indispensable[144]) to the genderless marriage position. But no

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[142] *Supra* note 4 at 332. Although arguing that the marriage laws (specifically, the absence of a requirement of marital procreation) prove that procreation is not central to marriage, the plurality opinion takes no such approach when arguing that "the exclusive and permanent commitment of the marriage partners to one another ... is the sine qua non of civil marriage." Massachusetts' no-fault divorce laws belie the reference to "permanence," and no Massachusetts law requires a vow of fidelity ("exclusive") or penalizes a breach of fidelity.

[143] See *e.g.* T. Janz, "The Evolution and Diversity of Relationships in Canadian Families," online: Law Commission of Canada <http://www.lcc.gc.ca/en/themes/pr/cpra/janz/janz_main.asp> (8 March 2004); D. Cere, *The Experts' Story of Courtship* (New York: New York Institute for American Values 2000).

[144] D. Cere, "The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?" (paper presented at the Re-visioning Marriage in

responsible observer has asserted that the close personal relationship model has become the dominant or even the majority model in our societies (meaning the real world, not the "world" created by television and cinema).[145] The four cases are undoubtedly accurate in their general references to large and perhaps accelerating societal changes affecting marriage, but if the juxtaposition of those references with language evocative of the close personal relationship theory of marriage is meant to teach that the latter constitutes what marriage now "is," the teaching is dubious. If, on the other hand, that evocative language signals judicial "constitutionalization" of that particular social theory, then the phenomenon is best addressed in chapter five's treatment of the role of competing social theories.

Finally, a central feature of the language from the four cases, quoted earlier, is its shift to the personal perspective -- "the personal hopes, desires and aspirations", "the professed commitment of two individuals", and the "deeply personal commitment of the marriage partners to one another". The societal interest and role in all this couple-centeredness is only "public celebration" of it, that is, society is an important guest at the wedding. But a wedding is not a marriage. A marriage seems better understood as participation in and engagement with a rich, complex, influential social institution whose meanings and deep logic seem best accounted for primarily by reference to societal interests, not individual hopes and desires. A fundamental and recurring theme of equality jurisprudence across States is the centrality of the governmental interest(s) served by the law

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Postmodern Culture Conference, Toronto, December 2003) [unpublished] at 2 ("The inflation of the category of marriage to include all dyadic close relationships (same-sex or opposite-sex) serves as the leverage issue to advance a complete redefinition of the public meaning of marriage. The proposed redefinition of marriage as 'a union of two persons' distills marriage down to its pure close relationship essence.") [Cere, "Conjugal"].

145 *Ibid*.

impugned for treating people differently; but for that centrality, the myriad (nearly all of them) laws that draw lines and distinguish between individuals and groups of individuals must stand largely defenceless before the core concepts of equality. Yet, when speaking of civil marriage, the shift in judicial focus to the wedding and to other manifestations of the personal perspective and away from society's interests embedded in and served by the institution of marriage *of necessity* diminishes the force of those societal interests in the equality analysis. The four cases clearly reflect that shift of focus, and that shift may at least partially explain the lack of judicial attention, also clearly reflected, to the societal (governmental) interests served by the private welfare purpose of marriage and by the privileged marital sexual conduct.

F. Conclusion

In sum, the four cases elide the States' argument from one premised on marriage as society's mechanism for the regulation and amelioration of the consequences of passionate and procreative heterosexual intercourse (children) to one premised on the silly view of marriage as a mechanism mandating procreation. The majority opinions do not acknowledge the elision and, consequently, do not seek to justify it, and no justification independently presents itself. The indirect engagement with the States' argument as actually advanced -- the engagement resulting from implementation of the two facets of the common strategy -- is deficient because of fundamental flaws in the strategy's conception; the private welfare purpose of marriage retains vitality because the tide of heterosexual attraction and procreative power in our societies remains powerful, and because, in the context of procreation, man/woman marriage continues fundamentally different from same-sex couple relationships, as shown by adequate consideration of adoption and ART. The *Goodridge* plurality opinion's talk of contraception -- its one direct engagement with the States' argument as actually advanced -- is far from adequate. Likewise inadequate are the

cases' bases for suggesting that the law accords no preference for marital sexual relations, above all other kinds of sexual conducts; for suggesting that aversion to governmental inquiry into marital procreative intentions and capacities "proves" how little important procreation, as a component of marriage, is to society; for intimating that, as a matter of fact, the close personal relationship model of marriage must be taken as what marriage now "is"; and for allowing a shift to the personal perspective of the marriage (or, more accurately, wedding) experience to distort, for purposes of equality analysis, the role of the governmental interests advanced. Aesthetically, then, in the context of the States' procreation argument, the judicial performance disappoints, and not a little.

The more important question, of course, is whether the defects in the judicial performance are material in the final resolution of the genderless marriage issue. In a jurisdiction willing to apply the traditional rational basis test to that resolution, the answer would clearly be yes; the logic, the rationality, of the private protective purpose of society's deep logic of marriage cannot be gainsaid; society can rationally value marital sexual relations above all other kinds of sexual conduct; and even the fit between governmental means and governmental ends (irrelevant for a genuine rational basis analysis[146]) becomes much more precise when viewed against the backdrop of society's aversion to governmental inquiry into marital procreative intentions and capacities. Had *Baker* been true to Vermont's pre- and post-*Baker* equality jurisprudence, and had *Goodridge* been true to the equality jurisprudence it claimed to be applying, the States' procreation argument, as actually made, would in itself have sustained man/woman marriage. But all four cases applied in fact a form of heightened scrutiny. In a context

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[146] See *e.g. Tuan Anh Nguyen v. Immigration and Naturalization Service*, 533 US 53 at 77, 121 S. Ct. 2053 (2001) [*Tuan Anh Nguyen*]; *Murphy v. Department of Correction*, 429 Mass 736 at 741-42, 711 NE2d 149 (1999).

of heightened scrutiny, the private protective purpose of society's deep logic of marriage becomes one among several important foci.

CHAPTER FOUR

THE RELATIVE VALUE OF DIFFERENT CHILD-REARING MODES

In the four cases, the defenders of man/woman marriage asserted a difference between that kind of marriage and genderless marriage that is material for purposes of equality analysis, a difference premised on readings of the social science data. The asserted difference is that married mother/father child-rearing is the optimal child-rearing mode,[147] as suggested by correlations between that mode and outcomes deemed crucial for a child's (and hence society's) well-being.[148] Those outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behaviour such as drug abuse and high-risk sexual conduct. These defenders asserted that the credible social science studies

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147 The phrase *optimal child-rearing mode* was not an assertion that married mother/father child-rearing exclusively provides the general kind of social goods in question (that is, those goods flowing from a good setting for child-rearing); rather, the idea was that the married mother/father mode's outcomes are the best or most favourable or advantageous condition now known.

148 See *e.g.* P. Amato & A. Booth, *A Generation at Risk* (Cambridge, Massachusetts: Harvard University Press 1997); S. Mayer, *What Money Can't Buy* (Cambridge, Massachusetts: Harvard University Press 1997); D. Poponoe, *Life Without Father* (New York: The Free Press 1996); D. Blankenhorn, *Fatherless America* (New York: Basic Books 1995) ; cf M. Gallagher & L. Waite, *The Case for Marriage : Why Married People are Happier, Healthier, and Better off Financially* (New York: Doubleday 2000).

demonstrate that the outcomes correlated to married mother/father child-rearing are superior to those measured for the children of same-sex couples and further asserted that the studies suggesting no material differences in the outcomes of the two child-rearing modes are scientifically suspect (and, hence, that a rational decision-maker could and would decline to premise judgment on those studies).[149] This argument was made against a background of consensus in the social sciences that the outcomes of married mother/father child-rearing are significantly superior to those of the other long-present modes, including unmarried mother/father, married parent/step-parent, cohabiting parent, single mother, and single father.[150]

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[149] The Cordy J. dissent in *Goodridge* collects citations to much of the most relevant literature. *Supra* note 4 at 386-387. For the Sosman J. dissent's treatment of the literature, see *ibid*. at 358-59.

[150] See *e.g.* S. Nock, "The Social Costs of De-Institutionalizing Marriage" in A. Hawkins L. Wardle & D. Coolidge, eds., *Revitalizing the Institution of Marriage for the Twenty-First Century* (Westport, Connecticut: Praeger 2002) 110 ("There is also unequivocal evidence that children fare better in [man/woman] marriages than in other forms of relationships.") Better outcomes for children of the married mother/father mode relative to those for children of the unmarried biological mother/father mode are confirmed by Popenoe and Whitehead. Their review of the studies led them to conclude that child-rearing outcomes are better generally for married biological parents than for unmarried biological parents and specifically and dramatically better in avoidance of child-abuse, avoidance of childhood poverty, and permanence of parental relationships. D. Popenoe & B. Whitehead, "Should We Live Together? What Young Adults Need to Know about Cohabitation Before Marriage: A Comprehensive Review of Recent Research," online: Smart Marriages <http://www.smartmarriages.com/cohabit.html> (27 April 2004).

Although the correlations showing married mother/father child-rearing as the optimal mode are uncontroversial (except presently relative to same-sex couple child-rearing), inferences regarding causation and reasons are not; that is because of the difficulties of controlling for a

In resolving the child-rearing issue against the backdrop of the optimal-child-rearing argument, the four courts took various tacks, but none -- except the dissenters in *Goodridge* -- addressed the merits of the argument from the social science data. Rather, the courts found other routes to a conclusion of "no difference," or relied on the no-downside argument, or both. The following section evaluates the quality of those other routes. The section after that evaluates the no-downside argument.

Before proceeding, however, it merits noting that this article does not independently assess the argument from the social science data. What is important and telling here is the four courts' avoidance of that argument. *Goodridges*' avoidance seems especially telling because of the thorough review of the argument in the Sosman J. and Cordy J. dissents. This long quote from the Sosman J. dissent is merited because of its success in capturing the essence of the argument in the context of equality jurisprudence:

> Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. ... [S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by

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maddeningly long list of possible variables besides just the basic structure of the respective modes. The argument is that the correlations established between various child-rearing modes and favorable outcomes (for two examples, high academic achievement and low crime) show the married mother/father mode as optimal and therefore that policy makers rationally can, with due caution, infer causation and, in turn, rationally privilege man/woman marriage.

> same-sex couples. ... Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) ... [T]he most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. ... The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?[151]

A. Married Mother/Father Child-Rearing as the Optimal Mode

The "conspicuously absent" reference just quoted is valid; neither the *Goodridge* plurality nor the concurring opinion addresses the adequacy-of-studies issue at all, despite the attention it received in the Sosman J. and Cordy J. dissents.[152] Rather, the *Goodridge* plurality opinion shifts the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to "[p]rotecting the welfare of children",[153] and, on that shifted basis, argues that limiting marriage to opposite-sex couples does not promote the present welfare of all children, is contrary to the

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151 *Supra* note 4 at 358-59.

152 *Ibid*. at 386-87.

153 *Ibid*. at 333-34.

Commonwealth's policy and practice of helping children whatever their family situation, and "penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."[154]

This analysis is valid to the extent that protecting the optimal child-rearing mode (man/woman marriage) is the same governmental endeavour as "protecting the welfare of children" (as the plurality opinion uses that phrase). But this is not at all clear. Reflection suggests that the two endeavours are substantially different. Protecting the present welfare of individual children found in varying circumstances is, in the way the plurality opinion addresses it, the provision of public assistance of some form or another to individuals (or their care-takers). By contrast, protecting the optimal child-rearing mode (man/woman marriage) entails the protection, sustenance, and perpetuation of a social institution. As explained in detail in this chapter's section B, a social institution is something far different than the sum of the individuals affected by it; rather, social institutions "are constituted by complex webs of social meaning."[155] That in turn suggests that protection involves preservation of meanings fundamental or core to the institution (an idea also developed in section B below). Thus understood, the two different governmental protective endeavours are just that, different. The plurality opinion disappoints in that it provides no demonstration of the equivalency or overlap of the two endeavours and thus provides no justification for its shift from one to the other. Nor does the difference the plurality opinion ignores seem much diminished by the common notion of "child welfare" even broadly conceived; that is because the endeavour to protect the optimal child-rearing mode, with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the personalized

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154 *Ibid*. at 333-36.

155 *Supra* note 144 at 3.

protective endeavour made the basis of the plurality opinion's argument is an exercise in the present provision of public welfare.[156]

The *Baker* majority opinion addresses the argument from the social science data in this way. First it acknowledges that it "is conceivable that the Legislature could conclude that opposite-sex partners offer advantages [over same-sex couples] in this area [ie, child-rearing], although we note that child-development experts disagree and the answer is decidedly uncertain."[157] It then argues, however, that Vermont law had already rejected the assertion that married mother-father child-rearing is superior to same-sex couple child-rearing. For proof, the opinion points to the state's allowance of adoption by same-sex couples.[158] It therefore concludes that the State's asserted interest in protecting marriage as the optimal child-rearing mode is "patently without substance."[159] The *Goodridge* plurality opinion makes the same argument but with a subtle but important shift added; it speaks not of the relative value of the two modes of child-rearing (the State's point) but only whether the studies show that children are "not harmed" in the same-sex couple mode.[160] The main argument used in both opinions, however, appears logically flawed at its foundation; allowance of adoption cannot be equated with a legislative assessment that all child-rearing modes into which a child may be adopted are equal:

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156 And the plurality opinion's arguments about the good of providing marriage's intangible benefits to children of same-sex couples would seem to be valid only if that very judge-ordered act of provision does not adversely affect over time the availability and quality of those benefits for all children, a possibility addressed in this chapter's section B.

157 *Supra* note 1 at 222.

158 *Ibid*.

159 *Ibid*.

160 *Supra* note 4 at 339, n. 30.

> The eligibility of a child for adoption presupposes that at least one of the child's biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has "lost" the optimal setting in which to raise that child--it is simply not available. In these circumstances, the principal and overriding consideration is the "best interests of the child," considering ... the options that are available for that child. ... The Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child.[161]

The argument appears irrefutable.

Halpern's method of avoiding the optimal-child-rearing-mode argument is also problematic in that the opinion relies on a burden-shifting approach not well suited to the task at hand.[162] The issue of burden shifting, however, is better dealt with in the context of the no-downside argument. Because *EGALE* relies exclusively and *Halpern* relies primarily on that argument, and because *Goodridge* also invokes it, this article addresses it next.

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[161] *Ibid*. at 389-90, Cordy J., dissenting.

[162] *Supra* note 3 at para. 123.

B. The No-Downside Argument: Social Institutions as Webs of Meanings

1. Practical Aspects of the No-Downside Argument

The no-downside argument engages equality analysis in two different ways. One, it can be an argument for distributive justice premised on "the right to equal concern and respect," or, more specifically, a component of that right known as "the right to equal treatment." This particular argument is analysed in detail in chapter six section A. Two, the no-downside argument engages the strength of the State's interests relative to man/woman marriage, with the State asserting that those interests are both substantial and vulnerable, while the genderless marriage advocates assert the contrary on both points. These advocates argue invulnerability by way of the no-downside argument.

This understanding has at least one practical implication. It pertains to "burden of proof." The argument for distributive justice/right to equal treatment would likely leave any burden of proof on the claimant.[163] The State, however, may be assigned the burden of proof relative to the strength of the government's interests. Canadian equality jurisprudence appears to limit consideration of the strength of the government's interest(s) to the section 1 analysis, where "the government's burden ... is to justify a breach of human dignity."[164] The *Halpern* court considered this downside argument from the Attorney General:

> Changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. The AGC points to no-fault divorce as an example of how changing one of the essential features of

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163 *Supra* note 57 at 320-21.

164 *Supra* note 3 at para. 92 [emphasis in original].

> marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results.[165]

But the court rejected this as "speculative", that is, as not supported by "cogent evidence" establishing the feared future adverse effects.[166] And in the United States, heightened scrutiny (although not the rational basis test) imposes a burden on the government to justify its limitation, including to establish the value and vulnerability of its interest(s) at stake.[167] Although ostensibly applying the rational basis test, the *Goodridge* plurality opinion says, in the no-downside argument context, that the government "has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children", and, accordingly, there is "no rational relationship between the marriage statute and the ... goal of protecting the 'optimal' child rearing unit."[168]

These intimations of a requirement that the government produce "evidence" or "cogent evidence" or else lose the no-downside argument appear to be unsound, especially when measured against policy considerations. The policy argument would proceed along these lines: It is not at all clear -- and the

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165 *Ibid*. at para. 133.

166 *Ibid*. at para. 134.

167 The differences between burdens in a rational basis context and burdens in a heightened scrutiny context were well and recently summarized in the O'Connor J. dissent in *Tuan Anh Nguyen*, *supra* note 146 at 74-78.

168 *Supra* note 4 at 334.

courts provide no clarity on -- just what might qualify as "cogent evidence" of the adverse *future* effects of a genderless marriage mandate; the very idea of genderless marriage is, after all, new in our societies. Whatever is said about future effects, whether as beneficial or inimical, must be "speculative." It makes little sense to resolve an issue of such enduring societal importance by assigning one side or the other the "burden" of "proving" a future event; whichever party is so assigned (since all either side can do is "speculate") thereby becomes the losing party and thereby the fate and future of society's most vital institution is determined. Such a weighty determination should turn on something more substantial than application of a generic rule of burden shifting. That determination merits the best thinking that can be brought to bear on the likely consequences of the redefinition of civil marriage.

This policy argument has much to commend it. A generic burden-of-proof approach seems too thin a basis for doing what that approach does in *Halpern* and *Goodridge* -- justifying avoidance of a thorough analysis of the likely consequences of the redefinition of marriage. Before turning to such an analysis, however, a few words are merited regarding the burden-of-proof problem in the context of the social science data and various child-rearing modes.

As noted earlier, *Halpern* uses a notion of burden-shifting to avoid the merits of the social science data/child-rearing modes issue. The opinion's language on this point merits quotation:

> [A] law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of childrearing. The AGC ... takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that

> the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons.[169]

The central difficulty with this analysis is its failure to acknowledge fairly *why* the "social science research is not capable of establishing the proposition one way or another." As the Sosman J. dissent makes clear in *Goodridge*, the fundamental reason for the unresolved dispute is that "the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation [of same-sex couple child-rearing] that has been available."[170] In other words, it is the very pace of the genderless marriage advocates' political and legal march that leaves contested whether same-sex couple child-rearing -- like all other modes -- is less successful in rearing children from infancy to adulthood than is married mother/father child-rearing. It seems anomalous, to say the least, for a court in those circumstances to declare the party not responsible for the uncertainty, rather than the responsible part, the "loser" exactly because of the existence of the uncertainty. Nor does *Halpern's* analysis gain genuine traction by invoking the notion of a "stereotypical assumption." The assumption that married mother/father child-rearing is the optimal mode -- relative to *all* other modes -- is premised not on some demeaning view of gay men and lesbians but on the social science data showing the superior outcomes for married mother/father child-rearing relative to every other mode where circumstances have allowed adequate study (that is, every other mode except same-sex couple), and that includes unmarried mother/father, married parent/step-parent, cohabiting parent, single mother, and single father. *Halpern's* use of a burden-shifting tactic in its approach to married mother/father child-rearing is simply inadequate.

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169 *Supra* note 3 at para. 123.

170 *Supra* note 4 at 358-59.

2. The Likely Consequences of the Redefinition of Marriage

"Marriage is a vital social institution."[171] So begins *Goodridge*. The opinions in that case go on to refer to *institution* in the context of marriage over 80 times. *Halpern*'s references exceed 40; *EGALE*'s, 35. Yet none of the cases evidences any clear conception of what constitutes a social institution and, hence, any clear conception of what, if anything, changes an institution and of what the consequences of such changes might be.

This article presents for consideration such conceptions. It presents the view that "[s]ocial institutions are constituted by complex webs of social meaning"[172] and that therefore they are changed by alternations in the social or public meanings that in large measure constitute them. It further presents the view that a social institution supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside.[173] Thus, fundamental

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171 *Ibid*. at 312.

172 *Supra* note 144 at 3.

173 H. Reece, *Divorcing Responsibly* (Oxford: Hart 2003) at 185:

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

In this way, institutions have a force and an effect somewhat similar to paradigms:

> [P]aradigms are deeply embedded in the socialization of adherents and

change in the institution changes what its members think of themselves and of one another, what they believe to be important, and what they strive to achieve.

Over the past forty years, social anthropologists and other observers have explored the relationship of public meaning and social institutions.[174] Cere's recent summary of the literature states that

> institutions are more than instrumental mechanisms for the production of goods and services for individuals. Social institutions are constituted by complex webs of social meaning. ... The reason for the gravity of debates over the public meaning of institutions lies in the fact that these social institutions are constituted, in large part, by their social meanings. Change the constitutive meaning of an institution and you transform its social reality.[175]

He also draws the implications of these insights for the institution of marriage in the context of the genderless marriage issue:

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practitioners telling them what is important, what is legitimate, what is reasonable. Paradigms are normative; they tell the practitioner what to do without the necessity of long existential or epistemological considerations.

Y. Lincoln, "The Making of a Constructivist" in Guba *The Paradigm Dialog* (London: Sage 1990) at 80 (quoting Michael Patton).

[174] *Ibid*.; E. Lagerspetz H. Ihaheimo & J. Kotkavirta, eds., *On the Nature of Social and Institutional Reality* (Juvaskyla, Finland: SoPhi Academic Press 2001); E. Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* vol. 22 (Dordrecht, Netherlands: Law and Philosophy Library, Kluwer Academic Publishers 1995).

[175] Cere, "Conjugal", at *supra* note 144 at 3-4.

> Meaning is not nominal or incidental to the life of social institutions; it constitutes their life. This helps to account for the highly charged nature of conflicts over the core public meanings and purposes of institutions like marriage. In this sense, the politics of definitional discourse is not just a quibble over words. Definitions matter. They constitute and define authoritative public knowledge. We "define" social reality into existence and we define it out of existence. ... 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.[176]

Much has been and can be said about public meanings influencing, constituting, social institutions, which in turn influence, even define, the human participants.[177] All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes and activities) will intend and sustain "the social understandings, the practices, the goods, and the social selves" in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.

Although seemingly unaware that social institutions are constituted in large measure by social meanings, the courts in the four cases appear to assess accurately the magnitude of the change they are effecting. *EGALE* states that "the relief

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[176] *Ibid*. at 4-5 [footnotes omitted].

[177] *Ibid*. at 3-4 [footnotes omitted].

requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change."[178] The lower court in the *Halpern* case expressed the same view,[179] and the *Goodridge* plurality opinion stated: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."[180] But juxtaposed with these assessments of "profound" and "significant" change of meaning are assertions that the genderless marriage decisions do not and will not change the institution of marriage. Thus, the *Goodridge* plurality opinion says, immediately after the sentence just quoted: "But it [the court's decision] does not disturb the fundamental value of marriage in our society."[181] And *EGALE* and *Halpern*, with their adoption of the no-downside argument, manifest a similar view. For example, in *Halpern*, the Attorney General argued that "[c]hanging the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution",[182] but the court rejected this as "speculative."[183]

These judicial assertions of "no change" in the institution of marriage, in light of the acknowledged "profound" and "significant" change in the public meaning of marriage, are contradicted by the social anthropology summarized above. And the argument advanced by *Halpern* and *Goodridge* to buttress the "no change" assertion is unpersuasive. The *Goodridge* plurality

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178 *Supra* note 2 at para. 78.

179 *Supra* note 109 at paras. 97-98.

180 *Supra* note 4 at 337.

181 *Ibid*.

182 *Supra* note 3 at para. 133.

183 *Ibid*. at para. 134.

opinion presents as proof of "no change" the intentions of the same-sex couples then before the court: "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage",[184] and: "That same-sex couples are willing to [enter civil marriage] ... is a testament to the enduring place of marriage in our laws and in the human spirit."[185] *Halpern* takes the same tack: "The Couples are not seeking to abolish the institution of marriage; they are seeking access to it."[186] Yet the probative value of such intentions and willingness is not at all apparent; it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those meanings. Moreover, the courts' own argument can be turned against them; a not insubstantial portion of those urging genderless marriage do so with the stated intention and willingness "to undermine the institution of civil marriage."[187]

Although manifesting a troubling lack of understanding that alterations of its public meanings change a social institution, the four cases repeatedly evidence an awareness of law's "expressive," or "educative," function[188] and, indeed, make that

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184 *Supra* note 4 at 337.

185 *Ibid*.

186 *Supra* note 3 at para. 129.

187 See *e.g*. J. Halley, "Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate" in Wintemute & Andenaes, *supra* note 6, 97 at 103; J. Millbank & W. Morgan, "Let Them East Cake and Ice Cream: Wanting Something 'More' from the Relationship Recognition Menu" in Wintemute & Andenaes, *supra* note 6, 295 at 297 & n. 5; *cf* W. Eskridge, "The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)" in Wintemute & Andenaes, *supra* note 6, 113 at 129 table 3 column 3.

188 Sunstein, "Foreword", *supra* note 58 at 69-70 [footnotes omitted]:

Official pronouncements about law ... have an expressive function.

function a lynchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a "stamp of approval" to stereotypes.[189] And *Halpern* repeatedly speaks of the definition of man/woman marriage "perpetuating" "views" about the capacities of same-sex couples.[190] Yet the acknowledged educative function of law seems to reinforce the lessons of social anthropology regarding civil institutions as webs of significance; law has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions. More directly to the present context, the social institution of marriage is not at all immune but rather is open to fundamental change resulting from a profound change in the law's definition of marriage. The four cases manifest a quick readiness to acknowledge law's educative and hence society-changing power when some preferred value is being advanced, while manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage at risk. It may or may not be a proper judicial role to weigh the societal costs against the societal benefits flowing from a profound change in the public meanings of marriage, but the four cases' fundamental inconsistency of approach to benefits and costs cannot qualify as a defensible judicial performance.

In light of the understandings set out above, no reason is apparent why a rational and prudent legislator,[191] considering

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They communicate social commitments and may well have major social effects just by virtue of their status as communication. ... By communicating certain messages, law may affect social norms. ... Much of the debate about measures relating to equality, or about "animus," concerns the law's expressive function.

189 *Supra* note 4 at 333.

190 *Supra* note 3 at para. 94.

191 In considering future costs from present actions, a court can take two approaches. Either it can demand that the party raising the prospect of future unacceptable costs provide some kind of empirical evidence

acceptance or rejection of the redefinition of marriage and balancing resulting societal risks and benefits, could not reasonably adopt the following line of thinking: The goods of marriage do appear to be at risk. It is difficult to see how the redefinition can avoid effecting a profound alteration in the institution of marriage; that redefinition would seem destined to unavoidably transform the institution from the residence of the broad, rich, complex meanings comprising the communal and conjugal tradition into the exclusive residence of the "close personal relationship" model of marriage, a model of "a relationship which has been stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved."[192] What must then be lost is the social institutional support for all that the older tradition embraces beyond the scope of a "close personal relationship," and that appears to be much; indeed, it appears to be most of

> the fundamental facets of [traditional] conjugal life: the fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological

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sustaining the prospect or it can invoke the rational and prudent legislator standard, that is, it can assess the rationality of the full range of considerations that a reasonable legislator contemplating the present action might consider. The first section of this chapter demonstrated the problems with the former approach. A strong judicial tradition supports use of the latter approach. See *e.g. Heller, supra* note 57 at 320-21. Accordingly, the discussion of costs in the text is not fashioned to be a "proof" of costs but a non-exclusive, rational line of thinking that a reasonable legislator might adopt.

[192] *Supra* note 144 at 6. Chapter five examines this model and its underlying social theory in detail.

> parents, and the rich genealogical nature of heterosexual family ties.[193]

The legislator might continue the line of thinking: Social institutions in general and the institution of marriage in particular supply understandings of what people should aim for, dictate what is acceptable or effective for them to do, and teach how they must relate to other members of the institution and to those on the outside; institutions shape what its members think of themselves and of one another, what they believe to be important, and what they strive to achieve.[194] The institution of genderless marriage will support the narrow close personal relationship model of marriage, and such support will shape corresponding aspirations in the children now and in each generation of children hereafter. That shaping may well not include, for example, aspirations for married mother/father child-rearing for their own children because the public meanings of marriage will not permit identifying that optimal mode as distinctive.

The legislator might continue the line of thinking:[195] There are problems with the counter-argument that resourceful people could still find ways to communicate to the next generations of children the unique goods of man/woman marriage and their value. Certainly some might; by private educational endeavour it is possible for families or other groups to establish a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them. But to the degree that members of the enclave were to adopt the speech of the community, they would lose the power to name and in large part the power to discern what once mattered to their forbears. To that degree their forbears' ways would seem implausible to them, and

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193 *Ibid*. at 19.

194 *Ibid*. at 2-5.

195 The author acknowledges his indebtedness to Professor C. Terry Warner for insights and expressions in the formulation of this paragraph.

probably even unintelligible. The bare possibility that people could with considerable difficulty and sacrifice maintain the meanings for their children of man/woman marriage does not go very far to diminish the risks that enacting genderless marriage presents.[196] There are thus considerable costs of appropriating a primary educative instrument of society, the institution of marriage, in the ways that adoption of genderless marriage entails.

To the extent the hypothetical legislator's line of thinking about likely consequences, just set out, is rational, it undermines a central pillar supporting the ultimate holdings in the four cases. That central pillar, built by assertion, not argument or analysis, is that there will be no costs to society, no downside, as a consequence of the transformation of the institution of marriage resulting from the alteration of a core public meaning of marriage.

Another consequence merits consideration, but this one appears to be more than just likely; it seems highly probable in light both of the understandings of social institutions as constituted by complex webs of social meaning and of the move from man/woman marriage to genderless marriage as a profound change of meaning. *Halpern* says that the claimants in that case

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196 Reece, *supra* note 173 at 38:

> The next question is who can change the [new] norms. ... [One] possibility is dissident groups. When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community. Sometimes, the dominant norms are too damaging to human well-being to leave their overthrow [or resistance] to dissident communities.

"are not seeking to abolish the institution of marriage; they are seeking access to it."[197] This language reflects a commonly held misunderstanding. It is that same-sex couples can enter the institution of marriage as it has existed to the present; in other words, that the act of changing the public definition of marriage will allow same-sex couples to enter the privileged and "vital civil institution" previously enjoyed only by opposite-sex couples, who will continue to enjoy it. This qualifies as a misunderstanding in light of the ideas examined above: The very act of redefinition will radically transform (not all at once, of course, but over time and probably quickly) the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Same-sex couples look to the law to let them into the privileged institution, and the law (as in the four cases) may want to, but it cannot; it can only give them access to a different institution of different value.[198] Thus, the four cases proceed on an assumption not easily defended, that they can do what they most probably cannot do; just so, any magnanimity motivating those cases' holdings is fundamentally false. And there is another aspect of this same consequence, one affecting already married opposite-sex couples.

Redefinition and no act of their own removes them from the

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197 *Supra* note 3 at para. 129.

198 B. Bix, "Reflections on the Nature of Marriage" in Hawkins, Wardle & Coolidge, *supra* note 32, 111 at 112-13:

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

institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our societies now know it but to pull married man/woman couples into what the media calls imprecisely "gay marriage" and this article calls genderless marriage.

To the extent the understanding of social institutions presented here is correct, the no-downside argument advanced by *EGALE*, *Halpern*, and *Goodridge* -- an argument that ignores that understanding -- is materially flawed.

CHAPTER FIVE

COMPETING THEORIES OF GENDER AND OF ADULT RELATIONSHIPS

Whatever flaws may mar other aspects of his philosophy of law, Holmes manifested a particular genius for identifying the intellectual currents of his own age as they flowed through and shaped (properly or improperly) judicial decisions. In his first opinion for the United States Supreme Court, he cautioned against the tendency of judges, consciously or unconsciously, overtly or covertly, to read social theories into the constitution: "Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions . . ."[199] Even more pithy was his statement that the Constitution did not "enact Mr. Herbert Spencer's *Social Statics*",[200] a book embodying the

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199 *Otis v. Parker*, 23 S.Ct. 168, 187 US 606 (1903) 608-609.

200 "Supreme Court Justices: Oliver Wendell Holmes (1841-1935)", online: Michaelariens.com <http://www.michaelariends.com/ConLaw/

social Darwinism that gained considerable currency in American constitutional law under the mantra "freedom of contract."[201]

Two contemporary intellectual currents are discernible in the four cases and appear to be shaping judicial conclusions relative to genderless marriage. The first is the social constructionist approach to gender; the second, the close personal relationship theory of marriage. Social constructionist thought is broad and variegated.[202] This article concerns itself *only* with the versions of that thought that sustain this conclusion: The law must accept the absence – as between man and woman – of any inherent (or essential) differences that might sustain any reference to gender in the marriage laws. Such a conclusion, although arising from feminist thought, if accepted clearly sustains a same-sex couple's equality claim and mandates genderless marriage. Such versions are hereafter referred to in the aggregate as *radical social constructionism*.

A. Radical Social Constructionism

Radical social constructionism provides a theory of gender and does so generally in opposition to its essentialist rival. The very word *gender* is caught up in the dispute between the two positions. (This article uses a meaning generally accepted before the word became so embroiled: *gender* means the condition of being female or male.) Both the essentialist and the radical social constructivist acknowledge (although not in the same way) the biological differences between male and female humans and also acknowledge (again, not in the same way) the reality of social influences in individual development, including gender identity. Essentialism teaches that gender is an essential characteristic of individual identity and that inherent, or natural, differences

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justices/holmes.htm> (29 November 2003).

201 See *e.g. Lochner v. New York*, 25 S.Ct. 539, 198 US 45 (1905).

202 See *e.g.* E. Guba, *The Paradigm Dialog* (London: Sage, 1990).

between the sexes extend beyond the mere differences in body parts to certain differences of cognition and emotion that are expressed socially, and often differently from culture to culture. Radical social constructionism, at its core, holds that everything that our language codes as male or female, masculine or feminine, and especially most everything that really matters for human experience and growth, is socially and culturally constructed.[203] Under this approach, a sharp distinction is often made between *sex* or *sexuality*, on one hand, and *gender*, on the other, with *sex* referring to the biological distinction between females and males, and *gender* referring to "the social meanings and value attached to being female or male in any given society, expressed in terms of the concepts femininity and masculinity."[204]

Adherents to the radical social constructionist position see the man/woman binary as socially constructed, as facilitative in nearly all cultures of unequal power relationships, and as harmful to the individual's fullest human development, and to a greater or lesser extent they understandably take it as their project to deconstruct the 'gendered' differences between men and women.[205] It is because they see marriage as preserving the man/woman binary that at least some of them wish to deconstruct

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203 D. Richardson, "Sexuality and Gender" *International Encyclopedia of the Social and Behavioral Sciences 14018-21 (Elsevier Science 2002)*,online: Science Direct <http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6WVS46RN52G56&_rdoc=25&_hierId=4355&_refWorkId=21&_explode=4355&_fmt=full&_orig=na&_docanchor=&_idxType=SC&view=c&_acct=C000010360&_version=1&_urlVersion=0&_userid=126524&md5=38366146fb3ffc0979b8195412228 1f9.> (28 November 2003).

204 *Ibid*.

205 See *e.g*. J. Culler, *Literary Theory: A Very Short Introduction* (Oxford, Oxfored University Press, 1997) 97-101; M Wittig 'One Is Not Born a Woman' in M Wittig (ed) *The Straight Mind* (Harvester Wheatsheaf New York 1992).

it.[206] Some of their deconstructive strategies include advocating that law not make gender-based distinctions and that law redefine civil marriage from a man/woman relationship to a person/person relationship.[207] Genderless marriage advocates have tended to use radical social constructionist conclusions.[208] This is understandable; as noted, if there are no differences between men and woman that matter (or should matter) in the eyes of the law, there is no defensible basis under equality jurisprudence for defining civil marriage as a man/woman relationship rather than a person/person relationship. In any event, radical social constructionism has found acceptance by a number in the academy and among portions of other elites such as the media and the law.

The concurring and dissenting opinion in *Baker* (hereafter referred to as *the c/d opinion*) shows perhaps the most likely way that radical social constructionism can work in judicial resolution of the genderless marriage issue. In support of man/woman marriage, Vermont's Attorney General raised a number of rationales, including the state's "interests in 'promoting child rearing in a setting that provides both male and female role models,' ... [and] 'bridging differences' between the sexes".[209] Regarding the former, the majority opinion counters with the argument, noted above, based on same-sex couples' legal eligibility to adopt but is silent regarding the latter. The c/d opinion's approach is much different. Early on it argues that

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206 See *e.g.* K. Millet, *Sexual Politics* (London: Virago, 1977) at 33-36.

207 See *e.g.* C. Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Cambridge: Polity, 1990) at 1, 27-29, 129-31; C. Pateman, *The Sexual Contract*, (Cambridge: Polity, 1988) at 167, 187-88, 225.

208 M. Bonauto, "The Freedom to Marry for Same-Sex Couples in the United States of America" in Wintemute & Andenaes, *supra* note 6, 177 at 188.

209 *Baker*, *supra* note 1 at 222.

man/woman marriage constitutes sex-based discrimination to the extent it serves no "valid purpose" but is "rather ... a vestige of sex-role stereotyping that applies to both men and women ... even if it applies equally to men and women."[210] The opinion then reviews the legal history of civil marriage in Vermont, emphasizing the law's earlier unequal treatment of husband and wife (including the wife's confinement to the "thraldom of the common law"[211]) and the reforms leading to "the partners to a marriage [today being] equal before the law."[212] The opinion then, at page 258, sets up the key issue in this way: "The question now is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today." Next the c/d opinion at some length describes and characterizes the state's important arguments; for clear understanding of what is going on in the opinion, the language requires quotation in full:

> In the first category, the State asserts public purposes--uniting men and women to celebrate the "complementarity" (sic) of the sexes and providing male and female role models for children--based on broad and vague generalizations about the roles of men and women that reflect outdated sex-role stereotyping. The State contends that (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the

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210 *Ibid.* at 254.

211 *Ibid.* at 257.

212 *Ibid.*

> young of the value of such a union. The State relies on social science literature, such as Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development* (1982), to support its contention that there are sex differences that justify the State requiring two people to be of opposite sex to marry.[213]

The c/d opinion then proceeds with these counter-arguments: Man/woman differences are "a valid argument for women's full participation in all aspects of public life" but the "goal of community diversity has no place ... as a requirement of marriage."[214] Apparently this is so because, even accepting as true "that the female voice or point of view is sometimes different from the male," these differences "are not necessarily found in comparing any given man and any given woman" and whatever differences are present may well be "more related ... to other characteristics and life experiences" than to their sex.[215] The State's view of things is nothing more than "sex stereotyping of the most retrograde sort."[216] And this conclusion leads, of course, to the further conclusion that the state can have no valid "interest in 'instructing the young of the value of uniting male and female qualities.'"[217] The c/d opinion's final summation is this: The state's justifications supporting man/woman marriage are "based on impermissible assumptions about the roles of men and women"; the classification inherent in man/woman marriage "is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected"; and therefore the protections conferred

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213 *Ibid.* at 258.

214 *Ibid.* at 259.

215 *Ibid.*

216 *Ibid.*

217 *Ibid.*

by Vermont's equality provision "cannot be restricted by the outmoded conception that marriage requires one man and one woman, creating one person – the husband."[218]

Something is missing from this opinion, something without which the opinion is hardly intelligible. That something is an express, straight-forward statement of the core legal conclusion of radical social constructionism – there are no essential or inherent differences between men and women that can rationally matter in law-making – followed up with the unavoidable conclusion of equality jurisprudence – therefore, there is no rational basis for limiting civil marriage to a man and a woman rather than defining it as the union of any two persons. That missing something is not supplied by the opinion's references to the law reforms (the "more recent legislative enactments and our own jurisprudence") leading to "the partners to a marriage [today being] equal before the law."[219] That is because it does not rationally follow that a law reform designed to create greater equality between a man and a woman in the marriage relationship is premised any more on the core conclusion of radical social constructionism than it is on the essentialism underlying the notion of "complementarity." In other words, it is no more or less likely that a typical Vermont legislator voted to modify laws regulating women's marital rights because she thought it "fair" and/or a way to improve the interaction of essentially different men and women in the "complementarity" of the marriage relationship than it is likely that she so voted because of some understanding and acceptance of radical social constructionism.[220] The c/d opinion requires the

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[218] *Ibid.* at 261-62.

[219] *Ibid.*

[220] In the exercise of "proving" which social theory most likely informs contemporary American political judgment, one can point to this bit of evidence: All the serious Democratic contenders for the 2004 presidential nomination stated their opposition to genderless marriage.

reader to assume the legislative and judicial adoption of radical social constructionism by the very laws that the opinion then uses to "prove" that the adoption has in fact taken place and therefore must guide resolution of the genderless marriage issue.

The interesting question is why the c/d opinion fails or refuses to expressly set out the core legal conclusion of radical social constructionism and thereby render the opinion intelligible. Two possible answers suggest themselves: The author was so taken with that social theory that she failed to understand that many citizens are not and that education and persuasion thus remain necessary. Or the author assessed the political climate as unfavourable to the social theory and therefore chose not to jeopardize the theory's legal "ends" or conclusion by exposing the "means" to that climate's rigours. Both answers, however, suggest a serious defect in judicial performance. The former suggests a lack of rigorous thought; the latter, a breach of any defensible boundary of judicial activism and hence to a violation of fundamental notions of separation of powers. Or, in Holmesian terms, either the c/d opinion evidences a failure to understand that Vermont's Common Benefit Clause had not previously "evolved" to the point of "enacting" Ms Judith Butler's *Gender Trouble* or it chooses to effect that enactment as an exercise of raw political power used covertly.

The United States Supreme Court avoided these mistakes in a decision that both the State of Vermont and the c/d opinion expressly relied on, *United States v. Virginia*.[221] The Supreme Court found Virginia's maintenance of an all-male military academy violative of federal equality jurisprudence. The State attempted to justify the school's exclusion of women by reference to the extraordinarily rigorous, almost brutal, nature of the school's unique educational experience, and thereby potentially raised a question regarding relevant inherent (or essential) differences between men and women. What is important for

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221 *Supra* note 60

present purposes is this language from the Supreme Court's opinion:

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to ... advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, ... to create or perpetuate the legal, social, and economic inferiority of women.[222]

The court was true to this language. It did *not* strike down the exclusion of women from the school on the basis that there are no relevant "inherent differences" for purposes of education law; rather, the court avoided, carefully it appears, any assessment of the extent to which women are biologically or socially different from men.[223] The court acted because Virginia "use[d] women's differences from men as a justification for prescribing gender roles in a way that deprives women of equal opportunity"[224] and, by so acting, the court "avoid[ed] a claim that equal treatment is necessarily required in all contexts."[225]

Previous to the *Baker* decision, Sunstein had made this "minimalist" aspect of the *United States v Virginia* decision – and the benefits thereof – clear, in other words, had demonstrated, without referring to radical social constructionism by name, that the decision did not "enact" that theory.[226] And the author of the

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222 *Ibid*. at 533-34.

223 Sunstein, "Foreword", *supra* note 58 at 76.

224 *Ibid*.

225 *Ibid.* at 77.

226 *Ibid.* at 72-79.

c/d opinion had read Sunstein.[227] But the opinion nevertheless rejects the State's rather carefully constructed "complementarity" or "'diversity' argument [as] based on illogical conclusions from stereotypical imaginings that would be condemned by the very case [*United States v. Virginia*] cited for its support."[228] This language implies that *United States v. Virginia* rejects all legal distinctions between the sexes as "illogical conclusions from stereotypical imaginings" when it clearly does not. That rejection is rather the hallmark of the c/d opinion itself. That rejection consists of nothing more than a rejection of the essentialism underlying the State's argument, a rejection premised on the assumed validity of the rival social theory and accomplished with generous resort to phrases like "illogical conclusions from stereotypical imaginings" and "sex stereotyping of the most retrograde sort".[229] Yet the United States Supreme Court had declined to touch the validity of radical social constructionism, and, as already noted, the c/d opinion neither proves that Vermont's laws had previously "enacted" and thereby validated the theory nor proves the theory's validity directly. The theory's validity is thus nothing more than the opinion's fundamental "article of faith" or presupposition; that being so, the c/d opinion rationally cannot be taken seriously.

The c/d opinion in *Baker* is a cautionary tale, and a valuable one at that. The temptation to use radical social constructionism, covertly or overtly, as the motive force in judicial redefinition of civil marriage is great.[230] It is great for

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227 *Baker*, *supra* note 1 at 256, n 13.

228 *Ibid.* at 259.

229 *Ibid.*

230 The *Goodridge* plurality opinion, in a much more cryptic fashion than in the c/d opinion but making the same mistakes seen there, attempts to use radical social constructionism to deflect arguments in the Cordy J. dissent premised on man/woman marriage's unique goods. *Goodridge*, *supra* note 4 at 337, n. 28.

gay men and lesbians wanting to marry (and for those sympathetic to their cause) because the theory, if accepted, compels a legal conclusion that, in the context of equality jurisprudence, mandates genderless marriage. The temptation is great for those who adhere to the theory for other reasons, including feminists, because the theory's adoption in a genderless marriage case both officially validates the theory and gives the theory the widest and deepest possible social and legal impact. That impact is the widest and deepest possible because it seems politically impossible to have in our societies a more radical and extreme application of the theory's legal conclusion than in a case mandating genderless marriage. All less extreme applications must then necessarily follow. In that fashion, the social/legal agenda of what almost certainly constitutes a minority faction is implemented.

B. The Close Personal Relationship Theory

"Close relationship theory is a leading paradigm in contemporary social research on human intimacy and conjugality ... [T]he close relationship paradigm ... has permeated academic theorizing on sexual intimacy."[231] Giddens has demonstrated[232] that the paradigm's approach to human relations has changed both the academic and the popular conception of adult dyadic relationships in general and marriage in particular. Thus, there is perception of a

> movement from a marriage culture to a culture which celebrates "pure relationship." A "pure relationship" is a relationship which has been stripped of any goal or end beyond the intrinsic

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[231] D. Cere "Redefining Marriage and Family: Trends in North American Jurisprudence" (paper presented at Family Law Project Conference, Harvard University March 2003) at 6. [Cere, "Redefining"]

[232] See *e.g.* A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (California: Stanford University Press Stanford, 1992).

> emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved. In this new world of "relationships," marriage is placed on a level playing field with all other long-term sexually intimate relationships.[233]

Close relationship theorists have suggested that the law ought to be responsive to, ought to adapt itself to, the close personal relationship theory,[234] and some law reform efforts have unquestionably moved in that direction, including the American Law Institute's *Principles of the Law of Family Dissolution*[235] and the Law Commission of Canada's *Beyond Conjugality: Recognizing and Supporting Close Personal Relationships Between Adults*.[236] These efforts promote the view that the law ought to recognize, on an equal footing, any adult dyadic relationship characterized by interdependence, mutuality, intimacy, and endurance.[237]

The close personal relationship theory is contested in the academy, and its manifestations in popular culture are disputed and opposed in that arena.[238] In the academy, Cere and others

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233 Cere, "Redefining", *supra* note 231 at 6.

234 *Ibid*. at 7 (referencing the work of Scanzoni, Polonko, Teachman, and Thompson).

235 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Philadephia: Executive office, American Law Institute, 2002).

236 Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Between Adults Relationships* (Ottawa: Law Commission of Canada, 2002).

237 For a discussion of these proposals, see Cere, "Redefining", *supra* note 231 at 8-19.

238 Among the important popularizers of the opposing and alternative view of marriage are the University of Chicago's Amy and Leon Kass, see *e.g.* A. Kass & L. Kass, eds., *Wing to Wing, Oar to Oar: Readings on*

have noted that the close personal relationship theory has "stubborn blind-spots" and reaches distorting conclusions because of its own "conceptual blinders."[239] In particular, the "theory is not designed to generate much conceptual insight into the fundamental facets of conjugal life."[240] Thus, although use of the theory may provide "helpful insights" into aspects of "human intimacy," that approach "is handicapped by its stubborn blind-spots in a discussion of 'marriage.'"[241]

In short, as with the rival theories of gender, society has before it competing theories of marriage. These rival theories, at their core, attempt to answer what marriage "is" or "ought to be," and they give very different answers. The close personal relationship theory gives an answer congenial to and probably indispensable for the position of those advocating genderless marriage. But for the judiciary, the threshold question is whether it should be in the business of choosing between those rival theories, of anointing one as more valid than the other.

Language in the four cases suggests, but does not finally establish, that the courts deciding those cases have consciously accepted the arguments of the close personal relationship theorists. *Baker* assures that marriage is the "official recognition [of] and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection …"[242] The *Goodridge* plurality opinion states that "it is the exclusive and

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Courting and Marrying (The Ethics of Everyday Life) (Notre Dame, Ind.: University of Notre Dame Press, 2000), and David Blankenhorn and the Macks, see *e.g.* D. Mack, D. Blankenhorn & C. Mack, eds., *The Book of Marriage: The Wisest Answers to the Toughest Questions* (Grands Rapids, Mich.: William B Eerdmans, 2001).

239 Cere, "Redefining", *supra* note 231 at 19.

240 *Ibid*.

241 *Ibid*.

242 *Baker*, *supra* note 1 at 228.

permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[243] That opinion also says that "[c]ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family".[244] For its part, *Halpern* summarizes marriage as "one of the most significant forms of personal relationships" through which "individuals can publicly express their love and commitment to each other" and by which society approves "the personal hopes, desires and aspirations that underlie loving, committed conjugal [meaning sexually intimate] relationships."[245]

The four cases, however, evidence no judicial awareness of the content of the competing social theories nor of the way each of those theories challenges the other.[246] Most importantly, none of the four cases provides any reasoning for accepting one of the rival theories as more valid than the other and therefore as a fit basis for further legal analysis of the genderless marriage issue. It is possible but not attractive that the courts' apparent adoption of the close personal relationship theorists' views of what marriage "is" or "ought to be" is strictly functional, as sustaining a conclusion (genderless marriage) reached for other reasons. This unattractive scenario also allows for and encompasses the possibility that the judges have internalized more or less consciously the values of the close personal relationship theorists and, deeming those values good, are giving them official sanction, albeit without an explicitly reasoned basis for doing so.

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243 *Goodridge*, *supra* note 4 at 332.

244 *Ibid.* at 322.

245 *Halpern*, *supra* note 3 at para. 5.

246 At least one of the courts was aware, however, of certain of the law reform proposals ultimately grounded in close personal relationship theory. *EGALE, supra* note 2 at para. 152.

What was said above regarding the rival theories of gender applies here. The temptation to use close personal relationship theory and its associated values as the motive force in judicial redefinition of civil marriage is great. It is great for gay men and lesbians wanting to marry (and for those sympathetic to their cause) because the theory, if accepted, powerfully promotes judicially mandated genderless marriage. The temptation is great for those who adhere to the theory for other reasons, including those whose preeminent family law value is promotion of "diversity," because the theory's adoption in a genderless marriage case both officially validates the theory and gives the theory wide social and legal impact. And again, by these means, the social/legal agenda of what almost certainly constitutes a minority faction is implemented.

C. Foreground Tasks and Background Tasks

Chapter one suggests that, in the area of judicial redefinition of marriage, better performance of the foreground tasks makes easier the resolution of the ultimate deference-to-the-legislature issues. This is born out by both the cautionary tale from *Baker* (the c/d opinion) relative to the rival gender theories and a similar tale from all of the four cases relative to the rival theories of marriage. A standard foreground task is explicit identification of the presuppositions of arguments. That task is more vital when those presuppositions include the validity of a social theory attractive to influential elites but contradicted by a social theory with majority support. The task is even more vital still when the validity of the rival theories is not subject, for the foreseeable future, to resolution by "objective" or "scientific" means. Once that foreground task is done well, deciding whether it is for judges or legislators to anoint one rival theory as the more valid would seem to be a less difficult task for a court committed to the integrity of its deliberative processes.

CHAPTER SIX

AT THE INTERSECTION OF EQUALITY AND DIGNITY

Human dignity as a guiding value in equality jurisprudence is a relatively recent development but an extraordinarily consequential one. The SCC has led the way,[247] but the South African Constitutional Court has also given the matter considerable attention,[248] and the idea of human dignity has even begun to appear, tentatively, in some American equality cases. For example, the opening paragraph of the *Goodridge* plurality opinion says that the "Massachusetts Constitution affirms the dignity and equality of all citizens."[249]

But it remains the Canadian cases that most thoroughly link dignity and equality. In *Law*,[250] after careful review of its previous equality cases, the SCC notes that the equality guarantee is the Charter provision most "conceptually difficult", most "elusive", and most lacking in "precise definition".[251] Relative to this problem of relative indeterminancy, *Law* may suggest that a focus on the value of human dignity ameliorates "the difficulties in defining the concepts of 'equality' and 'discrimination' [caused by] the abstract nature of the words and the similarly abstract nature of words used to explain them."[252] Be that as it may, *Law* sees the value of human dignity as a thread running throughout the SCC's equality jurisprudence since the foundational *Andrews*

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247 See *e.g. Law v Canada*, *supra* note 85.

248 S Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17(1) S.A.J.H.R. 34, analyzes most of the relevant cases.

249 *Goodridge*, *supra* note 4 at 312.

250 *Law v. Canada, supra* note 85.

251 *Ibid.* at para. 2.

252 *Ibid.* at para. 52.

case[253] in 1989. *Law* quotes from the majority reasons of Wilson J in *Andrews* regarding persons "vulnerable to having their interest overlooked and their rights to equal concern and respect violated."[254] By the time the SCC decides *Law* in 1999, the "right to equal concern and respect" appears at the core of section 15(1)'s perceived purpose, which is "to prevent the violation of essential human dignity ... and to promote a society in which all persons enjoy equal recognition at law as human beings ... equally capable and equally deserving of concern, respect and consideration."[255] This welding of human dignity to the Charter's equality guarantee is consequential because the "overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the [section 15(1)] discrimination analysis."[256] Indeed, that "overriding concern with protecting and promoting human dignity" now also infuses apparently all aspects of the section 1 justification analysis. *Halpern* so reads the law.[257]

The use of dignity as a guiding value in equality jurisprudence has generated an extensive secondary literature,

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253 *Andrews v. Law Society (British Columbia)*, *supra* note 84.

254 *Law v. Canada*, *supra* note 85 at para. 29 (quoting *Andrews*, *supra* note 84 at 152).

255 *Ibid.* at para. 51. The complete quote reads:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

256 *Ibid.* at para. 54.

257 *Halpern*, *supra* note 3 at para. 119.

primarily in Canada[258] and South Africa,[259] where that use is central to equality jurisprudence. Most of the literature addresses problems related in one way or another to the relative indeterminancy of the dignity concept. This article takes a different tack. It examines the *origins* of the "right to equal concern and dignity" for this one purpose: to see what light those origins may cast on the genderless marriage issue as treated in *EGALE* and *Halpern*. This article also addresses briefly the implication for the genderless marriage issue when dignity, although a guiding value in interpretation and application of the equality right, is not itself an independent, substantive right.

A. The Right to Equal Concern and Respect

1. The Origins and Content of the Right

Before its reference to the right in *Andrews*, the SCC had never spoken of a "right to equal concern and respect." The originator of the phrase and the original advocate of the right is Ronald Dworkin, although he argues that the "right to equal concern and respect ... must be understood to be the fundamental concept of Rawls's deep theory"[260] underlying *A Theory of Justice*.[261] To sustain this conclusion of Rawlsian origins, Dworkin in *Taking Rights Seriously* proceeds through a long analysis that "is complex" and that "take[s] us, at times, far from his [Rawls's]

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258 See *e.g.* D. Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L. J. 627; E. Mendes, "Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12(1) N.J.C.L. 1; J. Ross, "Response to Professor Mendes" (2000)12 N.J.C.L. 39.

259 Cowan, *supra* note 248,references most of the relevant South African literature.

260 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 181.

261 J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap, 1971).

text, but not, I think, from its spirit."[262] In the end, Dworkin sees his claim that the right is "the fundamental concept of Rawls's deep theory" as being "reasonably clear from the [Rawls] text."[263] It may not matter so much now whether the right to equal concern and respect is derived from Rawls or is merely erected on his high pedestal; what matters is how Dworkin develops and uses the idea, and on that score three of his initial points are important. First, Dworkin sees the right as "a natural right of all men and women ... simply as human beings with the capacity to make plans and give justice."[264] Second, the right is one "to equal concern and respect in the design and administration of the political institutions that govern them",[265] but cannot be made less abstract than this and thus "permits arguments" about more specific "derivative" rights and goals.[266] Third, no "more radical concept of equality ... exists."[267]

When Dworkin revisits the right to equal concern and respect, it is not only to promote it as fundamental, especially when conceived of as "the right to treatment as an equal",[268] but to "propose that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights."[269] His argument

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262 *Supra* note 260 at 159.

263 *Ibid*. at 182. Dworkin also argues in this same chapter that Rawls's theory of justice is rights-based, not duty-based or goals-based. *Ibid*. 171-77.

264 *Ibid*.

265 *Ibid*. at 180.

266 *Ibid*. The broad range of arguable derivative rights and goals identified by Dworkin himself foreshadows later concerns with the indeterminacy of the right of equal concern and respect.

267 *Ibid*. at 182.

268 *Ibid*. at 273.

269 *Ibid*. at 273-74.

proceeds like this: Regarding the role of democratic processes in identifying the common good or general welfare (for utilitarian purposes), Dworkin distinguishes between personal preferences (which he sees as legitimate in those processes) and external preferences (which he sees as illegitimate, racism being paradigmatic, because to give them effect is to not give equal concern and respect to the preferences of the minority, particularly those whose "form of life is despised by others"[270]). He then proposes this general theory of substantive rights, which is true to his proposition just-quoted that such rights "must be recognized only when the fundamental right to treatment as an equal can be shown to require" them:

> The concept of an individual political right ... is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.[271]

For present purposes, it is important to note that Dworkin singles out these as examples of illegitimate external preferences: "that many members of the community disapprove on moral grounds of homosexuality, or contraception, or pornography .... They prefer ... that no one else [indulge in these activities], and they believe that a community that permits rather than prohibits

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[270] *Ibid.* at 275-76.

[271] *Ibid.* at 277.

these acts is inherently a worse community."[272] Now this establishes (if accepted) that an adult has "an individual political right" to the sexual partner(s) and private sexual activities of his choice, but appears not to address the question whether same-sex couples have a right to marry. That is because such a right, if it exists, must be grounded not on the right to treatment as an equal but on the other and different equality right "comprehended by that abstract right" to equal concern and respect: "the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given."[273] Dworkin's example is the one-man one-vote ruling from the United States Supreme Court in the reapportionment cases.[274] But this other equality right – the right to equal treatment – is of a much lesser order than the right to treatment as an equal: "the more restrictive right to equal treatment holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right" to treatment as an equal.[275] Dworkin does not address (not surprisingly for 1977) a right of same-sex couples to marry; accordingly, there is no examination in that context (or in any other, for that matter) of the presence or absence of the determinative "special circumstances" or "special reason."

Soon thereafter, in his *Natural Law and Natural Rights*[276] of 1980, John Finnis challenged Dworkin's interpretation of a right to equal concern and respect. Before examining his challenge, it is helpful to point out a fundamental difference between Finnis and Dworkin that seems to inform much of their particular differences. Dworkin views individual political rights as something over against the State, as something

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272 *Ibid.* at 275-76.

273 *Ibid.* at 273.

274 *Ibid.*

275 *Ibid.*

276 J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980).

in opposition to and (when vindicated) trumping the general welfare or common good (as revealed through democratic processes),[277] whereas Finnis views "the maintenance of human rights [as] a fundamental component of the common good" and speaks of most human rights "being subject to or limited by each other and by other *aspects* of the common good, aspects which ... are fittingly indicated ... by expressions such as 'public morality'."[278] Against that background, Finnis sees Dworkin's conception of a right of equal concern and respect as being a tool for unequal concern and respect. That is because the Dworkinian right is used to demean and nullify the preferences of those who succeed, through democratic processes, in instituting what Finnis calls "paternalist" legislation, such as legislation designed to create a "milieu that will support rather than hinder his own pursuit of good and the well-being of his children".[279] In other words, the Dworkinian right cannot avoid being used (indeed, is designed to be used) for "overriding someone's political preferences and compelling him to live in a society's whose ways he detests" and therefore promotes "unequal concern and respect for him" in every meaningful context.[280]

Others besides Finnis challenged Dworkin's interpretation of a right of equal concern and respect,[281] with the result that in the course of time Dworkin modified or otherwise moved away from his 1977 arguments promoting his conception of the right, such that, by 2000 with publication of his *Sovereign Virtue: The Theory and Practice of Equality*,[282] that conception is

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277 See *e.g.* Dworkin, *supra* note 260 at 91, 191, 269.

278 Finnis, *supra* note 276 at 218. [emphasis in original]

279 *Ibid.* at 222.

280 *Ibid.*

281 J. Ely, "Professor Dworkin's External/Personal Preference Distinction" (1983) Duke L.J. 959 (providing some criticisms and referencing others by Hart, Sager, and Regan).

282 R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*

not to be found in any intact and recognizable form. Indeed, *Sovereign Virtue*'s only reference to *Taking Rights Seriously* speaks of "what I believe to be the more attractive morality of equality of resources."[283] But in the meanwhile, that is, in 1989, the SCC inserted into its equality jurisprudence the right of equal concern and respect without setting forth analysis. In the SCC's most recent sexual orientation discrimination case, 1999's *M v H*,[284] four of the five justices giving reasons used the right of equal concern and respect as a settled component of the court's jurisprudence, in both the section 15(1) discrimination and the section 1 justification contexts.[285] This role in SCC equality jurisprudence of the right to equal concern and respect probably results from the seeming correspondence between equal respect and respect for dignity. Certainly the equality right and the value of dignity are now welded in Canadian equality jurisprudence, and that fact requires a brief examination of dignity.

Dignity can be either a constitutional right or a constitutional value. The South African constitution expressly makes it both.[286] The United Nation's 1948 Universal Declaration of Human Rights speaks in article 1 of all being equal in dignity and in article 22 of everyone being "entitled to realization ... of the economic, social and cultural rights indispensable for his dignity". The Canadian Charter of Rights and Freedoms, however, does not use the word *dignity*; the

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(Cambridge, Mass.: Harvard University Press, 2000).

283 *Ibid.* at 481, n. 9. It is a commonplace that Dworkin is a moving target. What is important for purposes of Canadian equality jurisprudence is the content of Dworkin's right to equal concern and respect as the SCC adopted it in 1989, with its reiterations since.

284 *M v. H, supra* note 24.

285 *Ibid.* at para. 124, Iacobucci J, s 1; *Ibid.* at para. 254, Gonthier J, dissenting; *Ibid.* at para. 282, Major J, s 15(1); *Ibid.* at paras. 316,321, Bastarche J, s 1.

286 *Supra* note 17 at, ss. 7, 10, 36(1), 39(1).

concept's use in Canadian equality jurisprudence is a judicial choice, and the SCC uses dignity, as a value, to aid interpretation and application of the equality right. But dignity is not a free-standing substantive right in Canadian jurisprudence; it operates only as a value that "infuses all elements" of the section 15(1) and section 1 analyses; hence, in describing the purpose of section 15(1), the repeated references to *equal* and *equally*: "all persons enjoy equal recognition at law as human beings ... equally capable and equally deserving of concern, respect and consideration."[287]

2. The Problematic Application of the Right in the Marriage Context

These understandings of the origins of the equality/dignity phenomenon in Canadian jurisprudence raise at least three problems meriting attention. One is the radical nature of the right to equal concern and respect and the implications of that radicality for the judicial role, but this article, not attending to such background issues, leaves that problem aside. Another problem is that emerging from Dworkin's own distinction between the fundamental right to treatment as an equal and the lesser and subordinate right to equal treatment (the basis of a same-sex couple's equality claim to marriage). The third problem is that raised by Finnis soon after Dworkin first set forth the right to equal concern and respect, that is, the right's penchant for showing unequal concern and respect. The following paragraphs address first Dworkin's own distinction and then Finnis's critique.

It seems clear that a law criminalizing sodomy (especially one like the Texas law reviewed in *Lawrence v Texas* , which was limited to homosexual sodomy,[288]) falls within the scope of the fundamental right to treatment as an equal; Dworkin says as

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[287] *Law v. Canada, supra* note 85 at para. 51.

[288] *Lawrence v. Texas, supra* note 42

much.[289] It seems equally clear that a same-sex couple's challenge to man/woman marriage falls within the scope of the second component of the more abstract right to equal concern and respect, that is, the right to equal treatment. Both Dworkin's description of the latter right and his example of the reapportionment cases confirm this conclusion. He describes the latter right as a right "to the same distribution of goods or opportunities as anyone else has or is given."[290] That phrase captures the essence of both the equality claim and the surrounding political rhetoric now advanced in support of genderless marriage. The reference to the reapportionment cases also confirms the conclusion because they addressed the political distribution of electoral power present in the vote, with voting seen as an important civil right. *EGALE* and *Halpern* likewise address the political distribution of benefits present in marriage, with marrying asserted as an important civil right.[291]

Yet the lesser and subordinate right of equal treatment is contingent, and even Dworkin is not confident the right was properly applied in the reapportionment cases.[292] The contingency is that the right "holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right" to be treated as an equal.[293] Dworkin does reference a "special circumstance" (but no "special reason") in the reapportionment cases but does not expressly identify it; it may be, however, identifiable. Traditionally (and, the consensus is, properly), the courts have given broad deference to and

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289 Dworkin, *supra* note 260 at 275-77.

290 *Ibid.* at 273.

291 *EGALE*, *supra* note 2 at para. 130; *Halpern*, *supra* note 3 at paras. 100-107.

292 Dworkin, *supra* note 260 at 273 (the right to equal treatment is "perhaps" properly applicable in the reapportionment cases).

293 *Ibid.*

cloaked with a strong presumption of constitutionality political decisions made through the democratic processes and pertaining to the distribution of goods, benefits, and opportunities.[294] That deference and presumption flow in large part from the particular legitimacy of the democratic political processes arising from equal rights of participation in those processes – rights of expression, assembly, petition, and voting.[295] The reapportionment cases came before the United States Supreme Court with the impugned laws lacking that legitimacy, exactly because the grossly unequal apportionment reviewed there meant significantly unequal participation in the processes leading to those laws.[296] This special circumstance, of course, does not apply to the genderless marriage debate; genderless marriage advocates are well-funded, well-organized, well-placed in institutions of power, articulate, and active in the political processes. But there certainly may be other special circumstances and special reasons justifying a court in applying the right to equal treatment to the man/woman marriage laws. Reflection leads to one such possibility.

It may be argued that the strong presumption of constitutionality in distribution settings is necessary because of scarcity; there is simply not enough of whatever is being distributed to go around to everyone's full satisfaction; in such a case the distribution problem should not be "constitutionalized" by resort to an equality guarantee but rather should be left to the usual democratic processes, to which all have fairly equal access.

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294 See *e.g. Kotch v. Board of River Port Pilot Comrs*, 330 U.S. 552, 67 S.Ct. 910 (1947).

295 *Nixon v. Administrator of General Services*, 433 U.S. 425 at 506, 97 S.Ct. 2777 (1977).

296 *Ibid.* ("[T]his Court has held that the presumption of constitutionality does not apply with equal force where the very legitimacy of the composition of representative institutions is at stake.") (citing *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964)).

Civil marriage, however, is not this kind of case; a virtually unlimited number of marriage licenses can be printed up and issued. Civil marriage, far from being a scarcity case, is simply a matter of giving all who want to participate equal opportunity to participate in a resource that is not scarce or hardly even finite. Indeed, because the resource is virtually unlimited, the preferences of those who want to maintain the status quo must be suspect, as emanating from selfishness or mean-spiritedness or hatred.

Further reflection, however, leads to a view of marriage as a case of genuine scarcity. A wedding is not a marriage. A marriage is participation in and engagement with a rich, complex, influential social institution. As shown in chapter four section B, the marriage institution, like all social institutions, is constituted by a complex web of meanings that supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside, in other words, that profoundly shapes what those who participate in the institution think of themselves and of one another, what they believe to be important, and what they strive to achieve. And to the extent of alternations in the social or public meanings that in large measure constitute it, an institution is transformed. To change the core meaning of marriage from the union of a man and a woman (with all the radiating implications of that limitation) to the union of any two persons is to transform profoundly the institution, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution. Whether the transformation is good or bad does not matter. What matters is that, if it happens, it will create a genuine scarcity: Those who want the institution of man/woman marriage will not have it because it will not be there to be had. And if the transformation does not happen, that will create

another but much smaller scarcity: Those who want the institution of genderless marriage (whatever that may turn out to be is uncertain, other than that it will be markedly different from the present institution) will not have it because it will not be there to be had. Thus, to the extent these understandings about meanings and the institution of marriage are correct, to that extent the democratically made decision on the definition of civil marriage is a classic case of distribution in a setting of scarcity. And that means "that the more restrictive right to equal treatment [does not] hold[]."[297]

Regarding Finnis's challenge to Dworkin's right of equal concern and respect, the counter-argument must be that the majoritarian preferences being demeaned and nullified (that is, not being shown equal concern and respect) are, in Dworkin's language, "external" or, in more common judicial language, manifestations of "animus." Animus was central to the United States Supreme Court's analysis in *Romer v. Evans*.[298] In that case, the Colorado voters amended the state constitution to prevent legal protections against sexual orientation discrimination or legal preferences based on sexual orientation. The court struck down the amendment "because it was based not on a legitimate

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297 *Ibid.* Of course, a court that has adopted Dworkin's right to equal concern and respect into its equality jurisprudence may assert that its adoption was of some "core concept" and not of all the elements of the theory as promulgated; in other words, that the court is not necessarily bound by the theory's self-limitations. In such a case, however, it would seem that the court would be under a duty to publicly demonstrate the severability of the limitation. That would be especially so where, as here, the theory is a carefully integrated and unitary piece of legal craftsmanship that does not suggest any rational or logical basis for severance of the limitation. To jettison a part of the theory that stands in the way of a particular end (genderless marriage) on unpersuasive grounds may fairly open such a court to serious charges against its institutional integrity.

298 *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996) at 633.

public purpose but on a form of 'animus', with the apparent suggestion that statutes rooted in 'animus' represent core offenses against the equal protection guarantee."[299] The *Goodridge* plurality opinion makes a move towards an animus argument:

> The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[300]

And certainly genderless marriage advocates make animus a central argument in their political and legal communications.[301]

In the context of preserving man/woman marriage, however, the animus charge appears dubious. The *Goodridge* plurality opinion's proof – because there is no rational basis for continuing the limitation of man/woman marriage, the only other possible reason must be animus – is only as probative as its

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299 Sunstein, "Foreword", *supra* note 58 at 53. For a penetrating analysis of the United States Supreme Court's use of "animus", see Steven D. Smith, "Conciliating Hatred" *First Things 144 (June/July 2004):17*, online: <www.firstthings.com/ftissues/ft0406/articles/smith.htm.>

300 *Goodridge*, *supra* note 4 at 341-42, quoting *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879 (1984). Almost immediately (in its n. 33), however, the plurality opinion acknowledges that there is no need to address intent; discriminatory effect is enough.

301 See *e.g.* M. Bonauto, "The Freedom to Marry for Same-Sex Couples in the United States of America" in Wintemute & Andenaes, *supra* note 6, 177 at 205.

foundation ("no rational basis") is strong. As chapters three, four, and five show, however, that foundation is problematic; the judicial performance leading to the "no rational basis" conclusion can be judged as materially defective. Moreover, those chapters suggest that legitimate positive reasons support preservation of man/woman marriage. Thus, it is reasonable to conclude that the citizens supporting the preservation of man/woman marriage are doing so for just that reason, to preserve the institution of man/woman marriage and what they deem to be its uniquely positive contributions. In other words, in expressing their preferences, the citizens in the majority are looking in a positive way towards man/woman marriage, not in a hateful way towards gay men and lesbians. Accordingly, unless one proceeds on the presupposition that the citizens in the majority are invariably or inherently mean-spirited and otherwise irrational, all this supports the view that the majority's preferences are "equally deserving of concern, respect and consideration"[302] and that Finnis's critique of the right of equal concern and respect holds in the genderless marriage context.

Thus, the marriage issue may properly be viewed as presenting a distribution case (and thus subject to Dworkin's analysis regarding the lesser right to equal treatment), and that issue may properly be viewed as not presenting an animus case (meaning the issue is validly subject to Finnis's critique). This being so, a judicial holding in favour of genderless marriage is not defensible when made on the ground that homosexuals have an "already disadvantaged position within ... society" and have been subject to "the imposition of disadvantage, stereotyping, or political or social prejudice."[303] Occurring in a distribution case that is not an animus case, such a holding (which appears to be at work in *Halpern*[304]) is nothing more nor less than a judicial edict

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302 *Law v. Canada*, *supra* note 85 at para. 51

303 *Ibid.* at para. 88

304 *Halpern*, *supra* note 3 at paras. 84-87, 94, 107.

that, because homosexuals have been deprived of due respect in the past, they will now receive the respect flowing from unfettered access to civil marriage. And that edict is no different philosophically or practically from a judicial edict holding that, because poor people have been deprived of a due share of financial resources in the past, they will now receive the financial resources flowing from unfettered access to the national bank. Society has reasons for limiting unfettered access to the national bank, just as it has reasons for limiting unfettered access to the civil institution of marriage; without those limitations, neither institution will be at all recognizable in short order, nor able to perform its vital functions. Accordingly, the judiciary seems hardly justified in disregarding the reasons behind the institution-protecting limitations and acting to remedy deprivation solely because such deprivation exists.[305]

Neither *EGALE* nor *Halpern* considers any of these ideas: Dworkin's ideas inhering in the right of equal concern and respect and operating to define and limit that right's scope; Finnis's critique of the right; and the problems inhering in a pure redistributive approach. These ideas apparently were not fully presented to the courts in those cases, and the courts did not otherwise grasp them. This is troubling because of the role these ideas ought to have in any thoroughly analysed resolution of the genderless marriage issue in Canada. These ideas lead to the conclusion that the right of equal concern and respect does not properly sustain a genderless marriage claim.

B. Equality and Dignity

Dignity's presence in Canadian jurisprudence – dignity as a value used to guide interpretation and application of the equality right – and its absence – dignity is not an independent, substantive right

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[305] Even the impulse to magnanimity would come to condemn the judicial action if, in time, the societal costs incurred (and judicially denied at the outset) mount and mount.

– have an important implication for the genderless marriage issue. Because the right of equal concern and respect, which encompasses the value of dignity, does not properly sustain a genderless marriage claim, dignity has no further or independent role to play in the resolution of such a claim. In and by itself, the concept of dignity cannot ground a genderless marriage claim.

Theoretically, dignity could independently ground such a claim if it were a substantive right, either created by constitutional text or conjured into being by judicial activism. But an important insight by Sunstein suggests that, even in that case, dignity would not sustain a genderless marriage claim. He provides this insight in the midst of his analysis of *Romer v. Evans*,[306] the case originating in Colorado and summarized in the previous section. The majority opinion never once mentioned the United State Supreme Court's earlier decision in *Bowers v Hardwick*,[307] holding that substantive due process (based on the fourteenth amendment's Due Process Clause) did not protect private, consensual, adult homosexual acts against criminal sanctions; yet the *Romer* opinion went on to strike down the Colorado amendment, which did not criminalize homosexual conduct but, less onerously, prevented homosexuality from being used as the basis for legal benefits. Scalia J in dissent stated the problem: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[308] Sunstein neatly resolves the tension between the two cases on the basis that the earlier case invoked only the due process clause; the latter, the equal protection clause.[309] The details of that resolution are not important, but this insight is:

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306 *Romer v. Evans*, *supra* note 298

307 *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986), overruled by *Lawrence v. Texas*, *supra* note 42.

308 *Romer v. Evans*, *supra* note 298 at 641.

309 Sunstein, "Foreword", *supra* note 58 at 64-69.

> Perhaps the rights protected by the Due Process Clause must grow out of longstanding practices. But as it has come to be understood, the Equal Protection Clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting. The Equal Protection Clause sets out a normative ideal that operates as a critique of existing practices; the Due Process Clause safeguards rights related to those long-established in Anglo-American law. ... The content of the Equal Protection Clause is not given by tradition; that Clause is rooted in a principle that rejects many traditional practices and in any case subjects them to critical scrutiny.[310]

No reason appears why this insight cannot be validly generalized to all similar constitutional States, that is, those with guarantees of both substantive rights and equality. The meaning seems to be this for such States: Under notions of judicial review, constitutional creation of a substantive right confers a correlative power on the judiciary, the power to order society in a way that vindicates the right. And limitations on the scope of the right itself are pro tanto limitations on the scope of the judiciary's society-ordering power. To a considerable extent, traditions (long-standing and widely held notions regarding the scope of the right) provide the limitations, and a court is deemed under a duty to discern those traditions. When it does so (or appears to do so), its judgment has legitimacy as ordering society according to its (society's) own (and best) norms rather than re-ordering society by judicial fiat. The majority opinion in the American marital contraception case, *Griswold v. Connecticut*,[311] well demonstrates this approach; once the constitutional norm of

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310 *Ibid.* at 67-69.

311 *Griswold v. Connecticut, supra* note 138.

marital privacy is deemed adequately demonstrated (by a now-famous paragraph), the opinion strikes down the law and abruptly concludes.[312]

The important question in South Africa (with its textually created right to dignity[313]) and in any other State recognizing such a substantive right is the scope of the right. The American constitutional tradition, certainly robust although not uncontroversial in all its applications,[314] would point to a tradition-protecting approach to the nature and scope of the substantive right to dignity. And such an approach seems unlikely to sustain a genderless marriage claim. This conclusion is suggested by the American cases holding that a "right" allowing same-sex couples entry into civil marriage is not one 'so rooted in the traditions and conscience of our people as to be ranked as fundamental ', nor is it to be found among those rights "implicit in the concept of ordered liberty."[315] This conclusion also follows from a largely untested sense of what might be the fruits of a rigorous historical inquiry – one into the best philosophical and legal thought of Western civilization on the meaning of human dignity[316] – and the meaning of those fruits

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312 *Ibid.* at 486; 1682. Tradition, as Sunstein notes, plays no comparable limiting role in equality jurisprudence. Sunstein, supra note 58 at 69. The most famous American equal protection case, *Brown v. Board of Education* (together with its progeny), demonstrates this difference; the long and wide-spread American tradition of race-segregated schools (*de jure* and *de facto*) was not a constraint on the court's power but rather the very target of that power. The limitations on a court's power under an equality guarantee reside not in tradition but in the polity's equality jurisprudence.

313 *Constitution of the Republic of South Africa*, Act 108 of 1996, s. 10.

314 See *e.g. Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).

315 See *e.g. Baehr v Lewin*, *supra* note 33 at 551-57.

for a genderless marriage claim premised on a substantive right to dignity. (Such an historical inquiry is beyond the scope of this article.)

CHAPTER 7

UNDERSTANDING *GOODRIDGE*

Between the decision in *Goodridge*[317] and the follow-up decision in response to the Massachusetts Senate's proposed civil union bill, *Re Opinions of the Justices to the Senate*,[318] the justices of the Supreme Judicial Court produced eight opinions. Throughout, those opinions reflect the same 4-3 split, with the one-justice majority mandating genderless marriage. A number of those eight opinions appear to demonstrate, in a rather pointed way, an important distinction that Dworkin drew and elaborated more than 25 years earlier in *Taking Rights Seriously*.[319] The distinction, in his view, is necessary for a correct understanding of Rawls' *A Theory of Justice*[320] but even more importantly "is significant and consequential for our moral philosophy."[321] This chapter first summarizes Dworkin's work on that important distinction, then demonstrates the applicability of that work to the Supreme Judicial Court's treatment of genderless marriage, and finally uses that work to assess the treatment's value.

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316 A good beginning point might be Kant; his treatment of dignity is discussed in Finnis, *supra* note 136 at 441-42 and in T. Hill, "Humanity as an End in Itself" (1980) 91 Ethics 84 at 91-92; also see J. Rabkin, "What We Can Learn About Human Dignity from International Law" (2003) 27 Harv. J.L. & Pub. Pol'y 145.

317 *Supra* note 4.

318 *Supra* note 46..

319 Dworkin, *supra* note 260.

320 Rawls, *supra* note 261.

321 Dworkin, *supra* note 260 at 160.

A. Dworkin's Distinction

Dworkin perceived Rawls as employing a "technique of equilibrium"[322] where those who think about justice "proceed back and forth between our immediate judgments [that is, immediate intuitions or convictions about what is morally right] and the structure of explanatory principles", all the while "tinkering first with one side [moral intuitions] and then the other [principles], until we arrive at ... the state of reflective equilibrium."[323] "The technique of equilibrium supposes what might be called a 'coherence' theory of morality. But we have a choice between two general models that define coherence and explain why it is required."[324] As already noted, the choice between the two models "is significant and consequential for our moral philosophy", and indeed "the equilibrium technique makes sense on one [model] but not the other."[325]

One model Dworkin calls the "natural model."[326] It presupposes that at least some people possess a faculty to intuit aspects of a pre-existing and "objective moral reality."[327] "These intuitions are clues to the nature and existence of more abstract and fundamental moral principles .... Moral reasoning or philosophy is a process of reconstructing the fundamental principles by assembling concrete judgments in the right order."[328] When an intuition conflicts with a previously accepted

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322 *Ibid.* at 155-56.

323 *Ibid.* at 156.

324 *Ibid.* at 160.

325 *Ibid.*

326 *Ibid.*

327 *Ibid.*

328 *Ibid.*

principle, the observer attempts to discover a harmonious principle. If she succeeds, she accepts that principle; its very harmony with the intuition validates the principle. If she fails, she then adheres to "a policy of following the troublesome intuition, and submerging the apparent contradiction, in the faith that a more sophisticated set of principles, which reconciles that intuition[,] does in fact exist though it has not been discovered."[329]

The other model, called the "constructive model," is "quite different" and "not unfamiliar to lawyers" because it is "analogous to one model of common law adjudication."[330] This model

> demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions. It demands that we act on principle rather than on faith. Its engine is a doctrine of responsibility that requires men to integrate their intuitions and subordinate some of these, when necessary, to that responsibility. It presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice.[331]

The technique of equilibrium makes sense on the constructive model but not the natural model, with which the technique is "incompatible."[332] Although Dworkin devotes

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329 *Ibid.* at 161.

330 *Ibid.* at 160.

331 *Ibid.* at 162.

332 *Ibid.* at 163.

several pages in support of this conclusion,[333] only portions of his analysis need be set forth here; those are the portions demonstrating that the natural model, unlike the constructive model, is deficient relative to "necessarily and profoundly practical" results of the equilibrium technique.[334] Thus, the natural model may well serve a lone individual making moral judgments affecting only his conduct, but it ill serves the collective making of moral judgments. The very purpose of the equilibrium technique is "to reconcile men who disagree by fixing on what is common ground among them"; this approach "concededly will yield different results for different groups, and for the same group at different times, as the common ground of confident intuition shifts."[335] The constructive model is necessarily superior because it, and only it, can sensibly reject "even a powerful conviction that ... cannot be reconciled with other convictions by a plausible and coherent set of principles." The constructive model rejects such a conviction not because it must be deemed "a false report, but simply [because it is] ineligible within a program that meets the demands of the model" for a plausible and coherent set of principles.[336] "The [constructive] model requires officials or citizens to proceed on the best program they can now fashion, for reasons of consistency that do not presuppose, as the natural model does, that the theory chosen is in any final sense true."[337] And, finally, the constructive model consistently "may call into question whether any group is entitled to treat its moral intuitions as in any sense objective or transcendental ..."[338]

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333 *Ibid.* at 163-68.

334 *Ibid.* at 166.

335 *Ibid.*

336 *Ibid.* at 168.

337 *Ibid.*

338 *Ibid.*

B. The Natural Model in *Goodridge* and *Re Opinions of the Justices*

This section examines whether the 4-3 split in Massachusetts results, in some fundamental way, from the majority's adherence to the natural model while the minority was adhering to the constructive model. That examination begins with the Greaney J concurring opinion in *Goodridge* and then proceeds to the majority opinion in *Re Opinions of the Justices*.

Whereas the *Goodridge* plurality opinion purported to apply the deferential rational basis test, the concurring opinion asserted that the law's preference for man/woman marriage must be subjected to strict scrutiny "using traditional equal protection analsysis" both because the Commonwealth's 1976 equal rights amendment banning sex-based discrimination so required and because the "right to marry" must be deemed a fundamental right in the context of same-sex couples.[339] The dissenters effectively challenged both arguments. Regarding the latter argument, they made these cogent points: To begin with the presupposition that genderless marriage is a fundamental right efficiently but not helpfully leads to the conclusion that genderless marriage is a fundamental right; certainly nothing in the traditions of the American people or even just those in Massachusetts grounds a claim of a fundamental right to genderless marriage.[340] Regarding the former argument, the dissenters pointed to the still-fresh history of the adoption of the Commonwealth's equal rights amendment, specifically the avowal by the amendment's supporters that, if adopted, the amendment would not and could not be used to sustain genderless marriage.[341]

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339 *Goodridge*, *supra* note 4 at 344-51.

340 See *e.g. Ibid.* at 351-53, Spina J. dissenting; *ibid.* at 365-66, 368-75, Cordy J. dissenting.

341 *Ibid.* at 375-79, Cordy J. dissenting.

To the challenge regarding "fundamental right" the concurring opinion provides no analysis beyond the bare conclusion that, because the law recognizes a fundamental right to man/woman marriage, genderless marriage is a fundamental right too. To the challenge based on the history of the equal rights amendment, the concurring opinion responds with its footnote 6, which, because of its telling content, merits some examination. The first of two arguments is that the intent of the people of Massachusetts in 1976 in enacting the equal rights amendment cannot properly constrain a judge in 2003; any original intent approach to constitutional interpretation is to be rejected. Yet the footnote's language, in tone, content, and context, is so extreme as almost to appear as the satirical work of a proponent of original intent spoofing his opponents:

> In so reasoning [that what the voters clearly intended in 1976 matters], the separate opinion [of Cordy J] places itself squarely on the side of the original intent school of constitutional interpretation. As a general principle, I do not accept the philosophy of the school. The Massachusetts Constitution was never meant to create dogma that adopts inflexible views of one time to deny lawful rights to those who live in another. The provisions of our Constitution are, and must be, adaptable to changing circumstances and new societal phenomena, and, unless and until the people speak again on a specific subject, conformable in their concepts of liberty and equality to what is fair, right, and just.[342]

This extremism, however, was apparently too much even for the concurring opinion's author, who immediately back-tracked with these words: "I am cognizant of the voters' intent in passing the amendment to art. 1 in 1976. Were the revision alone the basis

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342 *Ibid.* at 350, n. 6.

for change, I would be reluctant to construe it favorably to the plaintiffs, in view of the amendment's recent passage and the voters' intent."[343] Most problematic, the footnote's next (and last) two sentences appear to abandon the entirety of the separate concurring opinion and to note simply a concurrence with the plurality opinion: "The court's opinion [not the opinion of the concurring justice], however, rests in part on well- established principles of equal protection that are independent of the amendment. It is on these principles that I base my opinion."[344] Yet despite that last sentence, the text of the concurring opinion, including its discredited "fundamental right" and equal rights amendment arguments, still stands unchanged; it remains a genuine concurring opinion.

The problematic, even embarrassing, nature of the concurring opinion calls for some explanation of that nature, an explanation the following analysis may provide. The author had a strongly held personal intuition or conviction that genderless marriage was right, but despite an effort of some pages to harmonize that intuition with established constitutional principles, could not do so. When the dissenters made that failure plain, the author makes one last but futile reach for sustaining principle, suggesting it is found in the plurality opinion; but of course, it is not, as the prior chapters demonstrate. In the end, the author reveals himself to be (consciously or otherwise) an adherent of the natural model; in Dworkin's words, the author "submerg[es] the apparent contradiction, in the faith that a more sophisticated set of principles, which reconciles that intuition[,] does in fact exist though it has not been discovered." Here then is that revelation, the open rejection of the constructive model and its insistence on consistency with a "plausible and coherent set of principles" and the concomitant public embrace of the natural model with its insistence on the "objective and transcendental"

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343 *Ibid.*

344 *Ibid.*

truth of the author's guiding intuition: "Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do."[345]

That remarkable act of judicial self-revelation is repeated four months later in *Re Opinions of the Justices.*[346] In *Goodridge*, the plurality opinion said no rational basis existed for depriving same-sex couples of all the benefits of civil marriage. The senate responded with a bill giving those couples all the benefits of civil marriage except the name *marriage* and asked the Supreme Judicial Court if the bill satisfied the perceived constitutional defect. Thus, the question for the court was whether a rational basis existed for that one limitation on the use of the word *marriage*. It is difficult to characterize the four-justice majority response as anything other than a refusal to engage meaningfully the rationality of making that one distinction between civil marriage and civil union; what is seen instead are numerous value-laden and conclusory phrases such as "second-class citizen status", "stigma of exclusion", "stain", "invidious", "unconstitutional, inferior, and discriminatory status", and the like. So seen, the majority opinion strongly suggests that the distinction based on the word *marriage* offends the four's "natural" intuitions or convictions; the value-laden and conclusory phrases is their substitute for plausible and coherent principles sustaining of those intuitions but not yet discovered. And the majority's adherence to the natural model process seems most evident when the majority opinion asserts: "The

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345 *Ibid.* at 349-50. To the extent this was an invitation to the dissenters to abandon the constructive model and convert to the "right thing", the invitation was rejected: "However minimal the risks of that redefinition of marriage may seem to us from our vantage point, it is not up to us to decide what risks society must run, and it is inappropriate for us to arrogate that power to ourselves merely because we are confident that 'it is the right thing to do.'" *ibid.* at 362, Sosman J dissenting.

346 *Re Opinions of the Justices, supra* note 46.

denomination of this difference by the separate opinion of Justice Sosman ... as merely a 'squabble over the name to be used' so clearly misses the point that further discussion appears to be useless."[347] The statement that "further discussion appears to be useless" seems to flow directly from the fundamental presupposition of the natural model, that only some people possess a faculty to intuit aspects of a pre-existing and "objective moral reality."[348] This presupposition certainly seems to suggest that those persons who diverge from the "right" intuition thereby reveal their lack of the requisite faculty and that "further discussion" with them is, exactly because of that lack, ultimately "useless."

C. The Value of the Natural Model and the Majority's Opinions

If, as Dworkin argues at length, the constructive model is much more useful than the natural model in resolving public issues of justice, and if, as the previous section seeks to demonstrate, the majority's opinions flow from the latter, not the former, those opinions may be fundamentally defective. Indeed, it seems difficult to escape the conclusion that the majority's resort to the natural model has made "bad law" in Massachusetts, "bad" in the sense that it lacks the vital legitimacy essential to the political and moral success of any judge-made law. The simple fact appears to be that a substantial portion of the thoughtful citizenry have a moral intuition regarding the "rightness" of genderless marriage exactly contrary to that of the four justices. Moreover, the former intuition, in contrast to the latter one, appears to enjoy a substantial harmony with principles of justice as reflected in settled equality jurisprudence, while the four justice's efforts to articulate "a more sophisticated set of principles"[349] sustaining of

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347 *Ibid.* at 570.

348 *Ibid.*

349 Dworkin, *supra* note 260 at 161.

their intuition appear largely unavailing, leaving them only to their "faith."[350] But all that means is that the four justices have called on substantial portions of the citizenry to abandon their faith with its sustaining principles of justice and adopt the justices' faith not now manifestly supported by any articulated principles of justice.

As Dworkin understood, the constructive model, unlike the natural model driving the opinions of the four justices, is "appropriate to identify the program of justice that best accommodates the community's common convictions ... with no claim to a description of an objective moral universe."[351] It is exactly the natural model's insistence on the primacy of an individual's particular moral intuition that makes the four justices' opinions so problematic as "authoritative" in the public sphere where, and only where, those opinions operate. Dworkin foresaw this problem:

> If the technique of equilibrium is used by a single person, and the intuitions allowed to count are just his and all of his, then the results may be authoritative for him. Others, whose intuitions differ, will not be able to accept his conclusions, at least in full, but he may do so himself. If, however, the technique is used in a more public way [pursuant to the natural model] ... then the results will be those that no one [of contrary intuitions] can accept as authoritative, just as no one could accept as authoritative a scientific result reached by disregarding what he believed to be evidence at least as pertinent as the evidence used.[352]

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350 *Ibid.*

351 *Ibid.* at 163.

352 *Ibid.* at 167.

> Thus, the citizenry, including even those citizens who share the four justices' moral intuitions on genderless marriage but are well schooled and disciplined in the democratic ethos, may legitimately "call into question whether any group [ie the four justices] is entitled to treat its moral intuitions as in any sense objective or transcendental."[353] It seems quite certain that our "particular society" is one, by rather conscious choice, "which does [not] treat particular convictions in that way"[354]; in the public square, a naked assertion of "faith" is accorded little respect or influence.
>
> The present problem in Massachusetts thus presents itself as a problem of effective governance, that is, a "profoundly practical"[355] problem. That problem seems rooted in this reality: That which does command respect and influence in the public square under our traditions, such as articulated principles of justice of the kind given primacy by the constructive model, is to be found almost exclusively in the opinions of the three dissenting justices. The four justices' promotion of their particular intuition regarding genderless marriage – and their reliance on heated rhetoric to the virtual exclusion of articulated general principles of justice sustaining of that intuition – seems to have unavoidably (under Dworkin's analysis) doomed their resulting opinions to a nagging illegitimacy not readily altered. A bit ironically, legitimacy for genderless marriage in Massachusetts, if genderless marriage is ultimately to endure in the Commonwealth, would seem attainable only by voter rejection of the proposed state constitutional amendment – which genderless marriage proponents most passionately do not want to go to the voters.

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353 *Ibid*. at 168.

354 *Ibid*.

355 *Ibid*. at 166.

CHAPTER EIGHT

CONCLUSION

The genderless marriage question presented to the Vermont, British Columbia, Ontario, and Massachusetts appellate courts a handful of material foreground issues, issues requiring performance of traditional judicial tasks. With respect to each issue, the tasks were not done well. Rather, the judicial performance can be adjudged materially defective.

With respect to the procreation issue, the courts simply refused or otherwise failed to come to grips with the argument advanced by defenders of man/woman marriage, an argument that equality jurisprudence makes important: Society fashions, preserves, and privileges marriage as a man/woman institution because of society's own deep logic of marriage. Man/woman marriage is society's mechanism for intelligently ordering the consequences of the great tide of heterosexual attraction in society. Society can rationally value most highly the married man/woman relationship because unique to that relationship is the sexual conduct component that society can rationally value most highly; man/woman marriage uniquely provides the positive social consequences of child-bearing while best minimizing its negative social consequences. This difference between man/woman marriage and all other sexually related dyadic relationships qualifies as a difference that matters for equality jurisprudence. Yet the four cases steadfastly avert their attention from society's deep logic of marriage and, without provision of justification for doing so, recast the "procreation" argument into one dismissible by resort to the close personal relationship model of marriage or by resort to the no-downside argument (both of which tactics themselves constitute defective judicial performances).

With respect to the valuation of different modes of child-rearing, the courts simply refused or otherwise failed sensibly to

engage the validity of this one idea: Of all adequately studied child-rearing modes, married mother/father child-rearing is the optimal mode. The courts' resort to an argument based on legislative allowance of same-sex couple adoption fails to meet minimal standards of judicial analysis for reasons plainly stated to the courts but ignored by them.

Nor does the no-downside argument qualify as acceptable judicial work. *EGALE*, *Halpern*, and *Goodridge* expressly recognize that the redefinition they order constitutes a profound and significant change in the public meaning of marriage, yet at the same time deny that this change will alter the "vital social institution." Social anthropology, however, plainly refutes this denial. The three cases then underscore their own error with their quick readiness to acknowledge law's educative and hence society-changing power when some value preferred in those cases is being advanced, while manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage at risk. A rational legislator doing defensible analysis on this issue, however, could reasonably conclude that legal redefinition will indeed place those goods at risk.

Nor does the judicial performance relative to competing social theories pass muster. The four cases seem to be arguing that the close personal relationship model of marriage accurately describes what marriage now "is" in our societies, yet no responsible observer supports the view that this model is in fact dominant or even approaching majority acceptance. And for reasons clear at least since Holmes' day, judicial anointment of the close personal relationship theory as more valid than the rival theory is not defensible. The same is true relative to radical social constructionism.

EGALE's and *Halpern*'s use of the right to equal concern and respect and its allied notion of respect for human dignity is problematic. The deep analysis done in bringing forth the right to

equal concern and respect teaches that the right cannot be construed to support a same-sex couple's claim to genderless marriage. Nor has there been any adequate answer to the critique that the right to equal concern and respect, in the marriage context, actually becomes a tool for showing unequal concern and respect. Further, dignity is not a free-standing substantive right in Canadian jurisprudence but operates only as a component, albeit a pervasive component, of equality jurisprudence. With the failure of the argument based on a right to equal concern and respect, dignity cannot independently sustain a genderless marriage claim. Certainly dignity alone cannot defensibly sustain a judicial edict based on the notion (which appears to be at work in *Halpern*) that, because homosexuals have been deprived of due respect in the past, they must now receive the respect flowing from unfettered access to civil marriage. That notion ignores – and, if allowed, could well be inimical to – the powerful societal reasons for fashioning the institution of marriage with the man/woman relationship as a core, defining feature.

In sum, the majority opinions in the four cases do not amount to an adequate judicial treatment of a few material, foreground issues. The courts did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case. That failure is not conclusive proof, of course, that no court can adequately perform those foreground tasks and still rule, in principled fashion, in favour of genderless marriage. But it gives pause.