

Spring 2012

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Jessica Feinberg

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### Recommended Citation

Jessica Feinberg, *Exposing the Traditional Marriage Agenda*, 7 Nw. J. L. & Soc. Pol'y. 301 (2012).  
<http://scholarlycommons.law.northwestern.edu/njlsj/vol7/iss2/3>

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# Exposing the Traditional Marriage Agenda

Jessica Feinberg<sup>\*</sup>

## ABSTRACT

*The success of a social justice movement, especially with regard to issues upon which the public will be voting, depends in significant part on how the issues are defined or framed. Anti-same-sex marriage campaigns frequently urge voters to vote in favor of laws defining marriage as between a man and a woman in order to “protect traditional marriage.” Instead of framing the issue as a question of whether individuals of the same sex should be banned from marrying, anti-same-sex marriage campaigns often frame the issue as a question of whether traditional marriage should be protected from redefinition. This strategy has proven successful for anti-same-sex marriage campaigns. However, same-sex marriage opponents rarely have been challenged with regard to the meaning of “traditional marriage.” In exploring the history of marriage within the United States, it becomes clear that, contrary to the understanding of the term held by the general public, traditional marriage consists of much more than opposite-sex spouses. The requirements of traditional marriage also include permanence, gender roles, monogamy, and procreation. As it turns out, the leading anti-same-sex marriage organizations are well aware of these other requirements of traditional marriage and do a significant amount of work to protect them—work about which the public remains largely unaware. This Article argues that exposing the true meaning of traditional marriage and the leading anti-same-sex marriage organizations’ efforts to protect the other requirements of traditional marriage would be a helpful strategy for pro-same-sex marriage campaigns. Specifically, it would give same-sex marriage proponents an effective response to the argument that people should vote against same-sex marriage in order to protect traditional marriage and provide pro-same-sex marriage campaigns with a compelling new way to frame the issue.*

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<sup>\*</sup> Assistant Professor, Mercer University School of Law. I am extremely grateful to Nancy Polikoff and Gary Simson for their insightful feedback on earlier drafts of this Article. Thank you also to Lindsay Bozicevich, Bill Eskridge, Nan Hunter, Dylan Malagrino, and Tony Varona for providing helpful comments and critique. The idea for this Article came from my work years ago as a Fellow in the Organizing and Training Department of the National Gay and Lesbian Task Force. The grassroots organizers, who work tirelessly day and night, often going door-to-door to speak to complete strangers about why they, their family members, or their friends deserve the right to marry the people they love, continue to inspire me.

## INTRODUCTION

The success of a social justice movement, especially with regard to issues upon which the public will be voting, depends in significant part on how the issues are defined or framed.<sup>1</sup> Often, each side puts forth multiple frames for an issue when a controversial policy question is being debated.<sup>2</sup> The individuals and organizations leading the charge to ban same-sex marriage frequently justify their position as necessary to protect what they refer to as “traditional marriage” from redefinition (“the protection frame”).<sup>3</sup> That is, rather than framing the issue as a question of whether to ban individuals of the same sex from marrying, anti-same-sex marriage campaigns frame the issue as a question of whether to protect traditional marriage from redefinition.<sup>4</sup> Interestingly, however, the fight to protect traditional marriage did not begin in response to the perceived threat of same-sex marriage. In fact, for most of the nation’s history, organizations and individuals have been decrying a marriage problem,<sup>5</sup> and taking positions on various marriage-related issues in order to protect traditional marriage.<sup>6</sup> This then raises the question—what exactly is this institution that requires so much protection? More specifically, what is traditional marriage?

<sup>1</sup> SCOTT BARCLAY ET AL., QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 208–210, 229–30 (2009).

<sup>2</sup> *Id.* at 210–11, 214, 234, 247.

<sup>3</sup> See, e.g., *About Us*, PROTECTMARRIAGE.COM, <http://protectmarriage.com/about> (last visited July 4, 2011) (explaining that “Protectmarriage.com is defending traditional marriage in the courts, through activism and advocacy, and through public education and academic research”); *Why Marriage Matters*, PROTECTMARRIAGE.COM, <http://protectmarriage.com/why-marriage-matters> (last visited Feb. 28, 2012) (arguing that same-sex marriage should not be allowed because “[t]raditional marriage is the foundation of society and has served our state well for centuries”); *Commonly Asked Questions*, WISCONSIN COALITION FOR TRADITIONAL MARRIAGE, <http://www.savemarriagewi.org/faq.html> (last visited July 4, 2011) (“Traditional marriage is a bedrock institution of our communities, state, nation and society. It is not discriminatory. It is foundational. Protecting its historic definition for the sake of our children and our future is both wise and courageous . . . .”); *Talking Points on Traditional Marriage*, CONCERNED WOMEN FOR AMERICA OF KANSAS, <http://states.cwfa.org/images/content/TalkingPoints.pdf> (last visited July 4, 2011) (“One of the biggest debates in our society is the conflict between those who defend traditional marriage and those who advocated changing the definition of marriage to include homosexual unions. . . . Just because you think it would be nice to let someone you know who is homosexual get married, you do not throw away the mainstay of our culture for thousands of years to foist a social experiment on the entire culture.”); see also Suzanne Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 249 n.2 (2006) (listing various anti-same-sex marriage arguments that rest upon the maintenance of historical traditional marriage).

<sup>4</sup> Goldberg, *supra* note 3, at 249 n. 2; BARCLAY ET AL., *supra* note 1, at 214; *Marriage Talking Points*, NATIONAL ORGANIZATION FOR MARRIAGE, [http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage\\_Talking\\_Points.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm) (last visited July 5, 2011) (“Say we’re against ‘redefining marriage’ or in favor of ‘marriage as the union of husband and wife’ NEVER ‘banning same-sex marriage.’”).

<sup>5</sup> See KRISTIN CELELLO, MAKING MARRIAGE WORK: A HISTORY OF MARRIAGE AND DIVORCE IN THE TWENTIETH-CENTURY UNITED STATES 16 (2009).

<sup>6</sup> *Id.* at 16, 126, 128, 151; NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 7, 213–14, 219–20 (2001); Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 87 (1991).

*Merriam-Webster Dictionary* defines “tradition” in relevant part as “a body of beliefs or stories relating to the past that are commonly accepted as historical.”<sup>7</sup> Scholars discussing traditional marriage as it is understood in the United States have used a similar definition of the term “tradition,” focusing on the nation’s historical attitudes regarding marriage in identifying the requirements of traditional marriage.<sup>8</sup> Specifically, in describing traditional marriage it has been noted that “[e]ven if reality has always been diffuse, contradictory, and complex, until a generation ago there was a social consensus as to what marriage meant. Marriage was permanent and monogamous; children were automatic, essential, and central; husbands earned money and made decisions; wives stayed home taking care of house, children, and husband.”<sup>9</sup> If traditional marriage is defined in this manner, the requirements of traditional marriage extend beyond opposite-sex spouses to include: (1) permanence,<sup>10</sup> (2) gender roles,<sup>11</sup> (3) procreation,<sup>12</sup> and (4) monogamy,<sup>13</sup> which I will refer to collectively as “the other requirements of traditional marriage.”

Over the years, both U.S. society and the legal system have, in many ways, rejected the other requirements of traditional marriage. For example, rejection of the permanence

<sup>7</sup> MERRIAM-WEBSTER DICTIONARY 2011, <http://www.merriam-webster.com/dictionary/tradition> (last visited Apr. 20, 2012).

<sup>8</sup> See *infra* note 9.

<sup>9</sup> Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 207 (1982); see also Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 BYU J. PUB. L. 195, 202 (2006) (“With all of these changes in the nature of ‘traditional’ marriage[—]the virtual abolition of the concept of illegitimacy, the discarding of legally proscribed gender roles in marriage, and the advent of ‘no fault’ divorce—it is understandable that the question of the legal recognition of same-sex relationships is arising now.”); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 93 (1998) (“Traditional marriage was a lifelong commitment to an institution with well-defined, complementary gendered roles.”); Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 246 (2011) (describing the traditional understanding of marriage as “the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together”); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 463 (1998) (explaining that “traditional marriage seemed to assume that all couples . . . desired a permanent marriage with traditional sex roles and with procreation as a major purpose”); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907–08 (2000) (“The set of norms that the spouses adopt and by which they agree to be bound in traditional marriage includes both commitment norms and gender norms, which together regulate both the spousal and the parental roles.”).

<sup>10</sup> See also COTT, *supra* note 6, at 220 (“Where public authorities a century earlier had been primed to defend the Christian-monogamy model from free love, interracial coupling, polygamy, self-divorce, and commercial sex, now the Congress found heterosexuality the crucial boundary to maintain.”); Focus on the Family Issue Analysts, *Marriage*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/socialissues/social-issues/marriage.aspx> (last visited Feb. 29, 2012) (“Unfortunately, the standard of lifelong, traditional marriage as the foundation of family life in our nation is under attack . . . [b]attered by high rates of divorce . . .”).

<sup>11</sup> See also Tiffany C. Graham, *Something Old Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN’S L.J. 53, 57 (2008) (“Traditionalists who oppose same-sex marriage have identified . . . fundamental principles[,] [including] the role complementarity of the sexes.”).

<sup>12</sup> See *id.* (“Traditionalists who oppose same-sex marriage have identified . . . fundamental principles: biological procreation”).

<sup>13</sup> See also COTT, *supra* note 6, at 220.

requirement is demonstrated by the widespread acceptance of divorce, particularly no-fault divorce, which allows individuals to end their marriages more quickly and easily.<sup>14</sup> Similarly, the rejection of traditional marital gender roles is reflected by the repeal of most laws that mandated or encouraged such roles and the widespread non-adherence to traditional gender roles among married couples.<sup>15</sup> The repeal of the majority of laws providing criminal and civil penalties for adultery and the general lack of enforcement of the laws that do exist in this context demonstrate the rejection of the monogamy requirement of traditional marriage.<sup>16</sup> Finally, the increasing number of married couples who choose to remain childless and the repeal of most laws that mandated or encouraged marital procreation demonstrate that procreation is no longer viewed as a requirement of marriage.<sup>17</sup>

Though U.S. society and the legal system increasingly reject the other requirements of traditional marriage, many of the leading anti-same-sex marriage organizations are working to protect and restore these requirements. For example, leading anti-same-sex marriage organizations are working to limit the ability of married couples to divorce, reintroduce civil and criminal penalties for adultery, and promote measures that encourage or mandate that married men and women adhere to the gendered provider/dependent model of traditional marriage and procreate.<sup>18</sup> While the voting public likely understands traditional marriage to mean marriage between a man and a woman because that is the aspect of traditional marriage stressed in anti-same-sex marriage campaigns, in reality traditional marriage means much more to the leading anti-same-sex marriage organizations.

Exposing the true meaning of traditional marriage and the efforts undertaken by the leading anti-same-sex marriage organizations to protect the other, widely rejected, requirements of traditional marriage (“the traditional marriage agenda”), would help pro-same-sex marriage campaigns to reach a wider variety of voters and achieve greater success at the polls. The protection frame continues to be one of the primary frames used by anti-same-sex marriage campaigns due to its success in resonating with voters in the past.<sup>19</sup> The protection frame has achieved such success for three main reasons: (1) by sending the message that marriage has always been defined as between a man and a woman, which happens to comport with how most people’s marriages look and how most unmarried individuals anticipate their future marriages will look, it sets forth a cultural argument that is accessible to voters; (2) it gives many voters a personal stake in the issue by telling them that their current or future opposite-sex marriages will be harmed by the legalization of same-sex marriage; and (3) same-sex marriage proponents have struggled to create a direct and effective response to this frame.

Educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda (“the proposed strategy”), however, would provide same-sex marriage proponents with a direct response that would dismantle this popular frame.

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<sup>14</sup> See *infra* subpart II.A.1.

<sup>15</sup> See *infra* subpart II.C.1.

<sup>16</sup> See *infra* subpart II.B.1.

<sup>17</sup> See *infra* subpart II.D.1.

<sup>18</sup> See *infra* subparts II.A.2, II.B.2, II.C.2, II.D.2.

<sup>19</sup> See *infra* note 350 and accompanying text.

In addition, it would supply pro-same-sex marriage campaigns with their own accessible cultural frame—a frame that would also serve to provide voters with a greater sense of personal stake in voting against same-sex marriage bans.

The proposed strategy would provide a direct and effective response to the protection frame by challenging whether traditional marriage is really something voters are interested in protecting. Specifically, the strategy challenges voters to think about whether they support a return to a form of marriage where the ability to leave unhappy marriages is taken away or severely limited, adulterous acts are criminalized, men and women are required to adhere to traditional gender roles, and meaningful choice regarding procreation is limited. It also would provide same-sex marriage proponents with their own accessible cultural frame by advancing the idea that the traditional marriage agenda is working to protect an antiquated form of marriage that society has widely rejected. In addition, by framing the issue as a question of whether to support or oppose the traditional marriage agenda, same-sex marriage proponents would provide significantly more voters with a personal stake in the issue. It is likely that a considerable number of voters who do not anticipate that they or someone close to them will want to enter into a same-sex marriage do not feel a strong personal stake in supporting same-sex marriage. However, many of these voters would feel a strong personal stake in opposing one or more of the other goals of the traditional marriage agenda. Specifically, there are a number of voters who, based on their personal interests, would be against the reintroduction of mandated marital permanence, monogamy, gender roles, or procreation and would therefore oppose an agenda that included the reintroduction of such requirements.<sup>20</sup> Thus, the proposed strategy would help pro-same-sex marriage campaigns to persuade more voters—something that has been difficult for these campaigns as evidenced by the passage of anti-same-sex marriage ballot measures across the country.<sup>21</sup>

The Article proposes that same-sex marriage proponents add their own traditional marriage frame to the same-sex marriage debate by educating voters about the true meaning of traditional marriage, exposing the traditional marriage agenda, and urging voters to consider whether traditional marriage is really something they would like to support. Part II considers the legal and cultural histories of the other traditional marriage requirements within the United States. It also identifies and explores recent efforts by leading anti-same-sex marriage organizations to further these other requirements of traditional marriage. Part III discusses the relevant tactics employed by each side of the same-sex marriage debate in framing the issue. It then sets forth the argument that undertaking the proposed strategy would positively affect pro-same-sex marriage campaigns for a variety of interrelated reasons. Finally, Part IV identifies and examines the likely classes of voters who would feel a strong personal stake in opposing the traditional marriage agenda if it was exposed and offers a number of ideas regarding the implementation of the proposed strategy with regard to the specific wording of the message that is ultimately advanced to the voting public.

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<sup>20</sup> See *infra* Part IV.

<sup>21</sup> See *infra* note 339 and accompanying text.

## I. THE HISTORY OF THE OTHER REQUIREMENTS OF TRADITIONAL MARRIAGE AND THE MORE RECENT EFFORTS OF THE LEADING ANTI-SAME-SEX MARRIAGE ORGANIZATIONS TO PROTECT SUCH REQUIREMENTS

To fully understand the meaning of traditional marriage, it is necessary to review how U.S. society and the legal system have, over the years, treated the other requirements of traditional marriage—permanence, monogamy, gender roles, and procreation. In the early years of the United States the legal system often aided in reinforcing the historical requirements of traditional marriage, reflecting society's views regarding the value of such requirements.<sup>22</sup> Over the years, however, both U.S. society and the legal system have come to largely reject the other requirements of traditional marriage. Although today most aspects of the other requirements of traditional marriage have been rejected by the U.S. public and removed from the law, many of the leading anti-same-sex marriage organizations continue their efforts to maintain or reintroduce such requirements.

### A. Permanence

#### 1. The History of the Permanence Requirement of Traditional Marriage

Permanence as a core requirement of traditional marriage within the United States is reflected in the earliest U.S. laws and societal beliefs. During colonial times, the Southern colonies generally did not have provisions for judicial divorce, keeping in line with England's rejection of the practice.<sup>23</sup> In New England, however, courts and legislatures occasionally granted divorces.<sup>24</sup> Following the Revolutionary War, more states began to permit judicial divorces.<sup>25</sup> While it was more difficult to obtain a divorce in some states than in others, all of the states that permitted divorce had strict rules regarding the circumstances under which a divorce could be obtained.<sup>26</sup> For example, in New York, one of the stricter states, divorce was granted only on the grounds of adultery.<sup>27</sup> California, on the other hand, allowed for divorce on myriad grounds including adultery, abandonment, neglect, intemperance, felony conviction, and extreme cruelty.<sup>28</sup> Most states adopted more moderate laws, identifying adultery and a few other grounds for divorce.<sup>29</sup> Divorce rates steadily increased during the first half of the nineteenth century.<sup>30</sup> As a result, divorce became an increasingly controversial issue.<sup>31</sup>

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<sup>22</sup> See Shultz, *supra* note 9, at 207.

<sup>23</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 204 (1985); MARY JONES, *AN HISTORICAL GEOGRAPHY OF CHANGING DIVORCE LAW IN THE U.S.* 18 (1987) ("The Southern colonies, dominated as they were by the Church of England, did not allow absolute divorce for any reason.").

<sup>24</sup> FRIEDMAN, *supra* note 23, at 204.

<sup>25</sup> Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 *B.U. PUB. INT. L.J.* 87, 89 (2004).

<sup>26</sup> *Id.* at 90.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> JONES, *supra* note 23, at 20, 26–27.

<sup>31</sup> *Id.*

Opponents of liberal divorce laws argued that such laws endangered the sanctity of marriage.<sup>32</sup> In contrast, proponents argued that liberal divorce laws were fundamental to the maintenance of a free society and were necessary to protect women from abusive husbands and to give women some control in an otherwise patriarchal institution.<sup>33</sup> In the 1850s, “divorce became a rallying point for social critics who saw the rate as irrefutable evidence of creeping moral decay in the United States.”<sup>34</sup> In response to these criticisms, during the 1870s and 1880s many state legislatures adopted more stringent divorce laws.<sup>35</sup>

As the country grew, divorce rates continued to increase, and areas settled in the first half of the twentieth century established more expansive divorce laws.<sup>36</sup> Additional grounds for divorce such as non-support, insanity, voluntary separation, and incompatibility were promulgated in many areas, and the number of uncontested divorces grew.<sup>37</sup> In 1950, in an effort to combat increasing divorce rates, a few states established mandatory pre-divorce marital counseling programs.<sup>38</sup> These programs were quickly abolished, however, due in part to low success rates.<sup>39</sup> Opponents of divorce at this time viewed divorce as an evil that, if allowed, would result in the destruction of the institution of marriage.<sup>40</sup> Opponents also feared that the widespread availability of divorce would lead to, among other things, women’s rejection of traditional gender roles, thereby further dismantling the institution of marriage.<sup>41</sup>

In the latter half of the twentieth century, Americans became increasingly unhappy with fault-based divorce laws.<sup>42</sup> As opposed to the earlier widely held view that permanence was a core requirement of marriage, “[t]he emerging view was one of marriage as a partnership between two individuals which was terminable at the will of those involved when the marriage failed to meet the needs of either party.”<sup>43</sup> Fault-based divorce laws produced a number of undesirable effects. These laws often resulted in costly and humiliating litigation aimed at proving one party was at “fault” so that the divorce could occur.<sup>44</sup> Where none of the specified grounds existed, couples had to stay legally married or fraudulently claim that one of the parties had committed an act that qualified to put that party at fault.<sup>45</sup> Fault-based divorce laws were also criticized for oppressing women by encouraging traditional gender roles and making it difficult for

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<sup>32</sup> CELELLO, *supra* note 5, at 18.

<sup>33</sup> *Id.* at 20; JONES, *supra* note 23, at 27.

<sup>34</sup> CELELLO, *supra* note 5, at 19.

<sup>35</sup> *Id.*

<sup>36</sup> Kathleen A. Portuan Miller, *Who Says Muslim Women Don’t Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT’L L. REV. 201, 205 (2009).

<sup>37</sup> *Id.*

<sup>38</sup> Matthew J. Astle, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 FAM. L.Q. 733, 739 (2004).

<sup>39</sup> *Id.*

<sup>40</sup> CELELLO, *supra* note 5, at 85.

<sup>41</sup> *Id.*

<sup>42</sup> Portuan Miller, *supra* note 36, at 205.

<sup>43</sup> Nicole D. Lindsey, *Marriage and Divorce: Degrees of “I Do,” An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL’Y 265, 267 (1998).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

women to leave unhealthy marriages.<sup>46</sup> For example, a wife's failure to conform to traditional gender roles by neglecting her household duties could establish grounds for divorce, while "a husband's behavior would not rise to the level of divorce-inducing misconduct unless he repeatedly abused his wife physically (one violent incident generally was not enough) or completely abandoned her financially."<sup>47</sup>

In 1969, California became the first state to adopt "no-fault divorce," meaning there was no longer any legal requirement that an individual or couple seeking a divorce prove that one party was at fault.<sup>48</sup> The no-fault movement quickly gained traction, and between 1969 and 1985 almost every state incorporated some form of no-fault divorce.<sup>49</sup> Overall, it is believed that the widespread acceptance of no-fault divorce resulted from society's changing view of the role of women, increasing acceptance of non-marital sex and children born out of wedlock, "dissatisfaction with the cost of fault divorce," the decreased role of religion in defining marriage, and "growing recognition of marriage as a partnership."<sup>50</sup>

Between 1970 and 1990, the divorce rate in the United States increased by thirty-four percent.<sup>51</sup> The no-fault divorce movement "revealed more profoundly that increasing numbers of people did not treat marriage as an agreement for life."<sup>52</sup> As a result, opponents of no-fault divorce restated their claim that such laws were destroying the institution of marriage.<sup>53</sup>

During the 1990s, with around forty percent of all marriages ending in divorce,<sup>54</sup> a strong anti-divorce movement fueled by social conservatives began.<sup>55</sup> The most dramatic attempts to protect traditional marriage from divorce and maintain permanency as a core aspect of marriage involved the creation of an alternative form of marriage called "covenant marriage."<sup>56</sup> Covenant marriage laws, seen as "a revolutionary attempt to strengthen marriage," provide for an enhanced level of marital commitment.<sup>57</sup> In the states that have enacted covenant marriage laws, couples have the opportunity to choose between entering a covenant marriage and a standard marriage.<sup>58</sup> Covenant marriage laws

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<sup>46</sup> Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110 (1989).

<sup>47</sup> *Id.* at 1110, 1111.

<sup>48</sup> Lindsey, *supra* note 43, at 267.

<sup>49</sup> *Id.*

<sup>50</sup> Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 271 (2003).

<sup>51</sup> Lindsey, *supra* note 43, at 269.

<sup>52</sup> Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 314 (1992).

<sup>53</sup> See Astle, *supra* note 38, at 735; Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 871 (2010).

<sup>54</sup> *Divorce Statistics Collection, Divorce Rates*, AMERICANS FOR DIVORCE REFORM, <http://www.divorcereform.org/rates.html> (last visited July 4, 2011).

<sup>55</sup> See Astle, *supra* note 38, at 739; CELELLO, *supra* note 5, at 151.

<sup>56</sup> See Astle, *supra* note 38, at 735–39.

<sup>57</sup> *Id.* at 735–36.

<sup>58</sup> Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467, 468 ("As a legal response to the social costs levied by the streamlined divorce system, three states have adopted covenant-marriage statutes that offer couples an optional—and I argue preferable—form of marriage.").

share three major requirements.<sup>59</sup> First, they limit the grounds for divorce and reintroduce the concept of fault.<sup>60</sup> Divorce may be granted upon request only if one of the traditional fault-based grounds exists, such as adultery, imprisonment, abandonment, or physical or sexual abuse (only the Arizona covenant marriage law includes emotional abuse as a ground for divorce).<sup>61</sup> If none of the fault-based grounds exist, a couple is not allowed to divorce until a significant period of time has passed, usually at least one or two years, although in Arizona a divorce may be granted without satisfying a waiting period when both spouses agree to dissolution of the marriage.<sup>62</sup> Second, covenant marriage laws require couples to undergo premarital counseling,<sup>63</sup> and in Arkansas, pre-divorce counseling is also required.<sup>64</sup> Third, before a marriage license is issued, the couple must sign a declaration of intent stating that they will do everything in their power to save their marriage before seeking a divorce.<sup>65</sup>

At the height of the anti-divorce movement in 1997 and 1998, over one-third of the states introduced covenant marriage bills.<sup>66</sup> To date, however, only three states, Arizona, Louisiana, and Arkansas, have actually passed covenant marriage laws.<sup>67</sup> The widespread rejection of such laws is notable, as “[r]emarkably, the failure of covenant marriage bills to pass has occurred even though the legislation simply offers a couple an alternative to the prevailing legal regime of ‘no-fault divorce’ marriage.”<sup>68</sup> While most states have rejected covenant marriage laws and every state has now implemented some form of no-fault divorce,<sup>69</sup> over the years a number of states,<sup>70</sup> aiming for less drastic measures, have adopted mandatory pre-divorce counseling.<sup>71</sup> In addition, the majority of states now require some type of mandatory waiting period in the context of no-fault divorces.<sup>72</sup> Today, the divorce rate remains at forty percent, similar to what it has been over the past

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<sup>59</sup> Astle, *supra* note 38, at 736.

<sup>60</sup> *Id.*

<sup>61</sup> ARIZ. REV. STAT. ANN. § 25–903 (2012); LA. REV. STAT. ANN. § 9:307 (2012); ARK. CODE ANN. § 9–11–808 (2011).

<sup>62</sup> *See supra* note 61.

<sup>63</sup> *See supra* note 61.

<sup>64</sup> Brummer, *supra* note 50, at 282.

<sup>65</sup> Astle, *supra* note 38, at 736

<sup>66</sup> *Id.* at 737.

<sup>67</sup> *Id.* at 735.

<sup>68</sup> Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 605 (2005).

<sup>69</sup> Karen Rubin, *New York State Implements ‘No-Fault’ Divorce, Mandates Interim Spousal Support*, EXAMINER.COM (Sept. 2, 2010), <http://www.examiner.com/populist-in-long-island/new-york-state-implements-no-fault-divorce-mandates-interim-spousal-support>. A number of jurisdictions, however, allow fault to be a consideration in the judicial determination of alimony, spousal support, or property division even in the context of no-fault divorces. Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R.3d 1116 (2010).

<sup>70</sup> Astle, *supra* note 38, at 739.

<sup>71</sup> Astle, *supra* note 38, at 739.

<sup>72</sup> DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 443 (2d ed. 2009); *see also* NATIONAL SURVEY OF STATE LAWS 396–411 (Richard E. Leiter ed., 6th ed. 2008). Among U.S. jurisdictions, the statutory durational requirement that the couple live “separate and apart” from one another ranges from six months to three years. *See id.*

two decades.<sup>73</sup> In the three states that have enacted covenant marriage laws, the number of couples who have chosen covenant marriages has been extremely low—it is estimated that only one to two percent of couples who have married in those states chose covenant marriages.<sup>74</sup>

Covenant marriage laws and laws that mandate lengthy waiting periods have been widely opposed and criticized on numerous grounds. Critics have argued that covenant marriage “involves unconstitutional state support of religion, entails too much state involvement in marriage, infringes on the right to marry, and is harmful to women and children.”<sup>75</sup> Opponents of covenant marriage posit that the limits on the grounds for divorce and lengthy mandatory waiting periods seriously harm spouses and children involved in unhealthy marriages.<sup>76</sup> In addition, since the rules surrounding covenant marriage make exiting the marriage more difficult, costly, and time-consuming than exiting a standard marriage,<sup>77</sup> spouses who lack sufficient resources (and thus are the most vulnerable) and their children might be unable to leave unhealthy marriages.<sup>78</sup> Other critics cite the harms of reintroducing the often-humiliating litigation necessary for proving fault and the incentives for couples to perjure themselves or manufacture fault in order to leave the marriage.<sup>79</sup> Similarly, critics have also set forth the argument that the lengthy litigation that will be necessary in many cases for dissolving a covenant marriage will have a “negative impact on miring our already crowded courts in lengthy, messy, and acrimonious divorces.”<sup>80</sup>

Premarital and pre-divorce counseling requirements have also been criticized on several grounds. In addition to the argument that the government requiring marital counseling for couples who do not wish to undergo such counseling is an unconstitutional infringement on individual liberties,<sup>81</sup> some critics point out that requiring couples to undergo counseling has proven ineffective at preventing divorce in the past.<sup>82</sup> Moreover, with regard to pre-divorce counseling requirements, forcing individuals involved in

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<sup>73</sup> Lindsey, *supra* note 43, at 269; Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465, 466 (2009) (“[I]t is estimated that 40% of marriages in the United States end in divorce.”); *Divorce Statistics Collection*, AMERICANS FOR DIVORCE REFORM, <http://www.divorcereform.org/rates.html> (last visited July 4, 2011) (listing divorce rates from 1990 to 2005).

<sup>74</sup> See Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169, 170 (2003); Rick Lyman, *Trying to Strengthen an “I Do” with a More Binding Legal Tie*, N.Y. TIMES, Feb. 15, 2005, at A1.

<sup>75</sup> *Issues and Controversies, Covenant Marriage*, FACTS ON FILE NEWS SERVICES (May 7, 1999), [http://2facts.es.vrc.scoolaid.net/icof\\_story.aspx?PIN=i0401120](http://2facts.es.vrc.scoolaid.net/icof_story.aspx?PIN=i0401120).

<sup>76</sup> White, *supra* note 53, at 871, 877.

<sup>77</sup> Daniel W. Olivas, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored*, 71 TENN. L. REV. 769, 770 (2004).

<sup>78</sup> *Id.* at 792–93.

<sup>79</sup> See *id.* at 793–94.

<sup>80</sup> Stephanie Mansur, *Covenant Marriage: Divorce Reform Louisiana-Style*, NORTH CAROLINA FAMILY POLICY COUNSEL 3 (1998), <http://www.ncfpc.org/PolicyPapers/Findings%209808%20Covenant%20Marr.pdf>.

<sup>81</sup> Astle, *supra* note 38, at 743.

<sup>82</sup> FACTS ON FILE NEWS SERVICES, *supra* note 75; Astle, *supra* note 38, at 739.

abusive or unhealthy marital situations to have continuing contact with their spouses through required counseling can pose a significant danger.<sup>83</sup>

Many women's rights supporters, in particular, have strongly opposed covenant marriage laws and laws that require mandatory pre-divorce waiting periods or counseling.<sup>84</sup> Notably, in opposite-sex marriages, it is the woman who initiates divorce two-thirds of the time.<sup>85</sup> With the fault requirements of covenant marriage laws, the party seeking a divorce is encouraged to paint him- or herself as the victim—a position that society has historically encouraged women to fill.<sup>86</sup> Opponents contend that “[t]hrough its paternalistic assumption that the state must save women from men, ‘covenant marriage laws are anti-feminist in their conception and application. Indeed, they are infantilizing to women and cast them into a place of perpetual subordination.’”<sup>87</sup> Citing the limited grounds available for divorce, opponents of covenant marriage have also argued “that the [covenant marriage] system reinforces patriarchal marriage by limiting women’s ability to leave marriages with power imbalances.”<sup>88</sup> Moreover, since it is women and children more often than men who are the victims of abuse in the home, limited grounds for obtaining divorce, mandatory waiting periods, and mandatory pre-divorce counseling requirements disproportionately harm women who wish to leave harmful marital situations.<sup>89</sup> This is because even though physical and sexual abuse are grounds for divorce under the covenant marriage laws, proving such abuse can be very difficult, time-consuming, and costly,<sup>90</sup> and emotional abuse is not a recognized ground for divorce under two of the three existing state covenant marriage laws.<sup>91</sup>

## 2. Recent Efforts by Same-Sex Marriage Opponents to Protect the Permanence Requirement of Traditional Marriage

Many of today’s leading same-sex marriage opponents have also been at the forefront of the movement to protect the permanence requirement of traditional marriage, attempting to severely restrict the ability of individuals to leave marriages in which they no longer wish to exist.<sup>92</sup> For example, Maggie Gallagher, co-founder of the National Organization for Marriage and president of the Institute for Marriage and Public Policy,<sup>93</sup>

<sup>83</sup> Astle, *supra* note 38, at 749.

<sup>84</sup> See *infra* note 87 and accompanying text.

<sup>85</sup> Vicki Larson, *Why Women Walk Out More Than Men*, HUFFINGTON POST (Jan. 24, 2011, 2:58 AM), [http://www.huffingtonpost.com/vicki-larson/why-women-want-out-more-t\\_b\\_792133.html](http://www.huffingtonpost.com/vicki-larson/why-women-want-out-more-t_b_792133.html).

<sup>86</sup> White, *supra* note 53, at 878.

<sup>87</sup> *Id.*

<sup>88</sup> Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 291 (2009).

<sup>89</sup> See White, *supra* note 53, at 877.

<sup>90</sup> See generally Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, J. AM. JUDGES ASS’N CT. REV., Summer 2002, at 12, available at <http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2AikenMurphy.pdf>.

<sup>91</sup> See *supra* note 61 and accompanying text.

<sup>92</sup> CELELLO, *supra* note 5, at 151.

<sup>93</sup> *About NOM*, NATIONAL ORGANIZATION FOR MARRIAGE, [http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About\\_NOM.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm) (last visited Mar. 4, 2012); *Same-Sex Marriage*, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, <http://www.marriagedebate.com/ssm.php> (last visited Mar. 4, 2012).

two organizations that have long led the charge to ban same-sex marriage, has undertaken significant efforts to protect the permanence requirement of traditional marriage.<sup>94</sup> The Institute for Marriage and Public Policy counts divorce law reform as one of its most important issues.<sup>95</sup> The Institute has been a strong supporter and promoter of covenant marriage laws and, in fact, has model covenant marriage legislation available on its website.<sup>96</sup> In addition to its strong support for covenant marriage legislation, the Institute also seeks to restore marital permanence by changing current laws to make divorce more difficult. In its “Statement of Principles,” for example, the Institute calls for one- or two-year waiting periods for unilaterally sought divorces and the introduction of legal requirements that couples who wish to divorce “show ‘good faith’ efforts or ‘due diligence’ to save their marriages by taking responsible steps to reconcile.”<sup>97</sup>

Similarly, the Family Research Council, another leading organization in the movement to ban same-sex marriage,<sup>98</sup> has since its inception worked to protect the permanence requirement of traditional marriage by making the divorce process more difficult throughout the United States.<sup>99</sup> The Family Research Council has “consistently called for the repeal of no-fault divorce laws in all 50 states”<sup>100</sup> and works to promote legislation requiring the mutual consent of both spouses before a divorce is granted.<sup>101</sup> The organization also advocates for longer pre-divorce waiting periods.<sup>102</sup> The Family Research Council has also been a strong supporter of covenant marriage laws and has worked to have them passed across the United States.<sup>103</sup> In fact it was Family Research Council President Tony Perkins, a former Louisiana State Representative, who introduced the Louisiana covenant marriage legislation.<sup>104</sup> Initially, Perkins, “after consulting with [a group of pastors in his district] . . . drafted a bill that only allowed for divorce in what they saw as the biblically licit cases of adultery and abandonment.”<sup>105</sup> A

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<sup>94</sup> See *infra* notes 95–97.

<sup>95</sup> *Divorce Law Reform*, INSTITUTE FOR MARRIAGE AND POLICY, <http://www.marriedebate.com/dlr.php> (last visited July 4, 2011).

<sup>96</sup> *Model Marriage Obligations Statute*, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, [http://www.marriedebate.com/ml\\_marriage/cat03-ml01.php](http://www.marriedebate.com/ml_marriage/cat03-ml01.php) (last visited July 4, 2011).

<sup>97</sup> Inst. for Am. Values & Inst. for Marriage and Pub. Policy, *Marriage and the Law: A Statement of Principles*, 29 (2006), <http://www.marriedebate.com/pdf/imapp.mlawstmnt.pdf>.

<sup>98</sup> *FAQs*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/faqs> (last visited July 4, 2011) (follow “Answer” hyperlink to the second question of the “Policy Inquiries” section) (“With our limited resources and staff number and considering the fact that our nation is seriously threatened by the legalization of same-sex ‘marriage,’ this is our current priority when it comes to public policy about marriage.”).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Anti-Gay Groups Active in Massachusetts: A Closer Look*, NATIONAL GAY & LESBIAN TASK FORCE, 16–17 (2004), <http://www.thetaskforce.org/downloads/reports/reports/AntiGayGroupsMA.pdf>.

<sup>102</sup> *Id.*

<sup>103</sup> *Covenant Marriage*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/content/covenant-marriage-1> (last visited July 4, 2011); *Covenant Marriage Act*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/content/covenant-marriage-act> (last visited July 4, 2011).

<sup>104</sup> Olivas, *supra* note 77, at 777.

<sup>105</sup> *Witherspoon Lecture*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=WT02G2> (last visited July 4, 2011).

few additional grounds for divorce, such as physical and sexual abuse, were added during the subsequent legislative process.<sup>106</sup>

A number of the other leading anti-same-sex marriage organizations also undertake significant efforts to protect the permanence requirement of traditional marriage by restricting an individual's freedom to end his or her marriage. For example, leading anti-same-sex marriage organizations Focus on the Family, the American Family Association, Concerned Women for America, and Liberty Counsel all work to end no-fault divorce and reintroduce fault-based divorce laws.<sup>107</sup> Focus on the Family also supports legislation requiring parents seeking a divorce to undergo education regarding the effects of divorce on children and legislation requiring both spouses to consent before a divorce can be granted.<sup>108</sup> The Massachusetts Family Institute, another leader of the anti-same-sex marriage movement, has proposed legislation requiring couples to undergo pre-divorce counseling and lengthy waiting periods.<sup>109</sup> Thus, a close look into the other activities of the organizations leading the movement to ban same-sex marriage makes it clear that many of these organizations also continue to undertake serious efforts to maintain the permanence requirement of traditional marriage by severely limiting the ability of people to end marriages in which they no longer wish to exist.

## B. Gender Roles

### 1. The History of the Gender Roles Requirement of Traditional Marriage

Early laws in the United States reflected the gender roles requirement of traditional marriage. The law of coverture, derived from English common law, set forth the rights of married women in the American colonies.<sup>110</sup> The law of coverture mandated that upon marriage, a husband and wife became one legally recognized person—the husband.<sup>111</sup> The wife had no independent legal existence.<sup>112</sup> “The very being or legal existence of the woman [was] suspended during the marriage, or at least incorporated or consolidated into

<sup>106</sup> See *supra* note 61 and accompanying text.

<sup>107</sup> Anne Downey, *January 2010*, CONCERNED WOMEN FOR AMERICA (2010), <http://www.cwfa.org/articledisplay.asp?id=18237&department=FIELD&categoryid> (Concerned Women for America); Eartha Jane Melzer, *McManus Pushes to End 'No Fault' Divorce*, MICH. MESSENGER (Feb. 22, 2010, 7:02 AM) <http://michiganmessenger.com/35028/mcmanus-pushes-to-end-no-fault-divorce> (American Family Association); Mathew D. Staver, *Preserving Marriage*, LIBERTY COUNSEL, <http://www.lc.org/media/9980/attachments/preservingmarriage.html> (last visited July 4, 2011) (Liberty Counsel); Bernard A. Drew, *What God Hath Joined Together: No-Fault Divorce Laws Challenged in Michigan*, FIRST AMENDMENT INSTITUTE, <http://www.publiceye.org/ifas/fw/9607/divorce.html> (last visited March 22, 2012) (Focus on the Family).

<sup>108</sup> Focus on the Family Issue Analysts, *Our Position (Marriage)*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/socialissues/marriage-and-family/marriage/our-position.aspx> (last visited July 4, 2011).

<sup>109</sup> Glen Johnson, *Report Focuses on Fatherlessness*, SOUTHCOASTTODAY.COM (June 13, 1997, 12:00 AM) <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/19970613/NEWS/306139961&emailAFriend=1>.

<sup>110</sup> Sandra R. Zagier Zayac & Robert A. Zayac, Jr., *Georgia's Married Women's Property Act: An Effective Challenge to Coverture*, 15 TEX. J. WOMEN & L. 81, 83–84 (2005).

<sup>111</sup> *Id.* at 84.

<sup>112</sup> Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460–61 (2002).

that of the husband.”<sup>113</sup> In other words, a wife’s legal identity ceased to exist and literally became covered by that of her husband upon marriage.<sup>114</sup>

Under the law of coverture, a husband had exclusive control over the property his wife brought into the marriage as well as any property she acquired during the marriage.<sup>115</sup> The husband was legally responsible for providing for his wife and family, while the wife was “obligated to give all her service and labor to her husband.”<sup>116</sup> Married women could not execute contracts, bring lawsuits, or convey property.<sup>117</sup> In addition, married women were not allowed to serve as legal guardians, administrators, or executors of estates.<sup>118</sup> The husband alone had control over the couple’s finances.<sup>119</sup> He also controlled the custody of the children.<sup>120</sup> There was no legal remedy for a wife who had been forced by her husband to have sexual relations, as “a husband could not rape his wife because she, as his ‘property,’ had consented to sex with him as a function of their marriage.”<sup>121</sup> In sum, a wife’s personal and real property, as well as her person, belonged to her husband.<sup>122</sup>

The law of coverture remained widespread until the latter half of the nineteenth century, when, during the Industrial Revolution, “the preeminence of commerce and the stable transition of wealth became highly desirable social values.”<sup>123</sup> To further these values, Married Women’s Property Acts were passed in every state, generally granting married women the ability to own and convey property, contract, engage in litigation, join the workforce, and control personal finances, among other things.<sup>124</sup>

As the twentieth century began, although married women began to be considered independent legal persons, society still viewed husbands and wives as operating in separate spheres.<sup>125</sup> Women were responsible for the children and household, operating within the private sphere of the home, while men were responsible for all outside relationships and public activities.<sup>126</sup> The legal system reflected and reinforced these norms.<sup>127</sup> Although women were allowed to earn and keep their wages, they were typically only hired for certain types of low-paying jobs and were not protected from

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<sup>113</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 430.

<sup>114</sup> *Id.*; Zaher, *supra* note 112, at 461.

<sup>115</sup> Zayac & Zayac, *supra* note 110, at 84.

<sup>116</sup> COTT, *supra* note 6, at 12.

<sup>117</sup> Zayac & Zayac, *supra* note 110, at 84; HARRY KRAUSE & DAVID MEYER, FAMILY LAW IN A NUTSHELL 96 (2007).

<sup>118</sup> *See supra* note 117.

<sup>119</sup> Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 77 (2003).

<sup>120</sup> *Id.*

<sup>121</sup> Henry F. Fradella & Kegan Brown, *Withdrawal of Consent Post-Penetration: Redefining the Law of Rape*, 41 CRIM. LAW BULL. 1 (2005).

<sup>122</sup> Zaher, *supra* note 112, at 460.

<sup>123</sup> *Id.* at 462.

<sup>124</sup> Amy D. Ronner, *Husband and Wife Are One—Him: Bennis v. Michigan as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 134 (1996).

<sup>125</sup> COTT, *supra* note 6, at 157; Zaher, *supra* note 112, at 461.

<sup>126</sup> COTT, *supra* note 6, at 157; Zaher, *supra* note 112, at 461.

<sup>127</sup> COTT, *supra* note 6, at 157–59, 174–79.

wage or employment discrimination.<sup>128</sup> Thus, if it was necessary for one person in the marital unit to stay home, it generally made greater sense for it to be the wife.<sup>129</sup>

By 1930, only twelve percent of wives were in the labor force,<sup>130</sup> and the courts “jealously guarded the right of the husband to the wife’s services in the household as part of the legal definition of marriage.”<sup>131</sup> New Deal legislation, which sought to remedy the economic ills of the period, “assumed the male earner to be primary and granted entitlements of social or economic citizenship to women as their loyal dependents.”<sup>132</sup> Although women increasingly entered the workforce in the 1940s, this movement was largely born out of necessity due to the large-scale involvement of men in World War II.<sup>133</sup> When the war ended, Congress passed laws that worked to further the reinstatement of traditional gender roles.<sup>134</sup> For example, the GI Bill, passed in 1944, provided veterans (ninety-eight percent of whom were male) with higher education and job training opportunities, pensions, loans, mortgage funds, and preference for civil service jobs.<sup>135</sup>

During the 1950s and the early 1960s, as many married women left their jobs in wartime industries, society and the legal system alike seemed to maintain the early view that a married woman’s primary role was caretaker of her husband, children, and home.<sup>136</sup> To this end, in many states only husbands could bring loss of consortium claims because, in the view of the law, it was only husbands who lost their spouses’ domestic and caretaking services in the event of death.<sup>137</sup> Further, women generally still could only secure certain types of low-wage work, and tax incentives encouraged couples to remain in the traditional gendered provider/dependent model of marriage.<sup>138</sup>

Beginning in the mid- to late-1960s, however, attitudes began to shift. The women’s rights movement gained significant traction, “deeply inflecting the trends in work and family life.”<sup>139</sup> Women’s rights activists began to publicly criticize traditional marriage and to demand “equal rights and equal access in the public sphere.”<sup>140</sup> Public awareness about sex discrimination was raised, and the concept of sexism became part of

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<sup>128</sup> *See id.* at 167, 172.

<sup>129</sup> *See id.* at 173.

<sup>130</sup> *Id.* at 167.

<sup>131</sup> *Id.* at 167 (quotation omitted).

<sup>132</sup> *Id.* at 178.

<sup>133</sup> *Id.* at 185.

<sup>134</sup> *See infra* note 135 and accompanying text.

<sup>135</sup> COTT, *supra* note 6, at 190–91.

<sup>136</sup> CELELLO, *supra* note 5, at 76.

<sup>137</sup> *See, e.g.*, *Kronenbiter v. Washburn Wire Co.*, 4 N.Y.2d 524, 527 (1958).

<sup>138</sup> CELELLO, *supra* note 5, at 87; Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 124 (2010); Brief for Appellant at 37, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (“Current tax law presents a significant disincentive to the woman who contemplates combining a career with marriage and a family. If a wife’s earnings approach those of her husband, the Internal Revenue Code counsels divorce, for the couple will retain more if they live together without benefit of a marriage license. And if a father or mother goes off to work as a divorcee, he or she may be entitled to a child care deduction regardless of income. For a married pair, both working, however, the deduction is available only if joint adjusted gross income of the couple remains close to the subsistence level.”) (internal citations omitted).

<sup>139</sup> COTT, *supra* note 6, at 204.

<sup>140</sup> *Id.*

the public discourse.<sup>141</sup> The term “sexual politics” also came to fruition, expressing “the new sensitivity to power asymmetries between men and women, husbands and wives.”<sup>142</sup> Such consciousness-raising efforts helped convince many married and unmarried women that their subordination was not the product of personal failings but rather the result of a system based upon sexual inequality.<sup>143</sup>

Feminists decried the devaluation of wives’ unpaid household work and protested oppressing and “demeaning women by confining their talents to housekeeping, childminding, and personal services to men.”<sup>144</sup> Some feminists analogized wives to slaves, pointing out that wives did not receive pay for their work within the home, were denied freedom of movement, and lacked control over their own bodies.<sup>145</sup> As the public became more attuned to the harms presented by adherence to traditional marital gender roles, “[r]emaining legal constraints on wives in the business world unraveled.”<sup>146</sup> Federal laws prohibiting employment and wage discrimination based upon sex, such as Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, came into existence, making it more feasible for married women to reject traditional gender roles and join the workforce.<sup>147</sup> With this legislation, “[t]he massive shift in the official view of women workers toward equality and individual rights was well under way.”<sup>148</sup>

In the 1970s, opposition to traditional gender roles continued to increase, providing women with greater ability to choose not to adhere to traditional gender roles within their marriages. In 1972, Title IX of the Higher Education Amendments was passed, prohibiting educational programs receiving federal funding from discriminating on the basis of sex and advancing women’s educational opportunities. By 1981 the majority of students enrolled in higher education programs were female.<sup>149</sup> In addition, during the 1970s, eighteen states (in addition to the three states that had already done so) amended their constitutions to prohibit the denial of equal rights on the basis of sex.<sup>150</sup> Then, in 1976, the United States Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment to require a higher degree of scrutiny than that previously imposed for sex-based classifications, and lawsuits succeeded in dismantling sex-based distinctions across many areas of the law such as employment, education, jury service, social security, and military benefits.<sup>151</sup> In 1978, the Pregnancy Discrimination Act was passed, amending Title VII to prohibit discrimination on the basis of pregnancy in all

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 205.

<sup>145</sup> CELELLO, *supra* note 5, at 109.

<sup>146</sup> COTT, *supra* note 6, at 205.

<sup>147</sup> *Id.*

<sup>148</sup> DOROTHY McBRIDE-STETSON, *WOMEN’S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES* 280–81 (3d. ed. 2004)

<sup>149</sup> *Id.* at 153, 156.

<sup>150</sup> Leslie W. Gladstone, *CRS Report for Congress, Equal Rights Amendments: State Provisions 3–6*, CONGRESSIONAL RESEARCH SERVICE (2004), <http://www.policyarchive.org/handle/10207/bitstreams/3292.pdf>.

<sup>151</sup> COTT, *supra* note 6, at 205.

aspects of employment and providing many married and unmarried women with more protection in the workforce.<sup>152</sup>

The Supreme Court itself acknowledged the demise of traditional marital gender roles during the 1970s, stating that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>153</sup> Moreover, with the advent of no-fault divorce, women gained greater control over their marital situations and became more empowered to leave marriages with power imbalances.<sup>154</sup> In addition, while child custody had traditionally been awarded to the wife upon divorce, states revised their laws so that joint custody and child support obligations for both parents became the default.<sup>155</sup> Divorce reforms such as this “intended to see the roles of both husband and wife more gender-neutrally, with both able to be earners and caring parents.”<sup>156</sup>

These changes, however, did not come without significant backlash from certain groups. With the rising frequency of divorce and the strengthening of the women’s rights movement, including the increasing legal protection for women from education, employment, and wage discrimination, “a burgeoning group of social conservatives . . . argued that only a return to ‘traditional’ pre-feminist marital roles could save American marriage.”<sup>157</sup> The New Right, explicitly intent on protecting the traditional family unit through the maintenance of traditional gender roles, successfully blocked the ratification of the federal Equal Rights Amendment (a proposed amendment to the United States Constitution prohibiting the denial of equal rights on the basis of sex).<sup>158</sup>

Despite the efforts of the New Right, however, the visibility of women in the workforce grew significantly in the 1980s.<sup>159</sup> More women landed positions in the higher-paying careers traditionally reserved for men.<sup>160</sup> In 1989, the Supreme Court granted greater protections to women in the workforce, expanding previous interpretations of Title VII and concluding that it protected women from discrimination based upon sex stereotyping.<sup>161</sup> In addition, states began to eliminate the final remaining legal feature of coverture, the marital rape exemption, with all states eradicating laws providing a full exemption for spousal rape by the early 1990s.<sup>162</sup> This reflected society’s rejection of the legal notion that a husband had control over his wife’s body and “announced a new norm of the wife’s self-possession, with the potential to reframe the roles of both marriage partners.”<sup>163</sup>

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<sup>152</sup> MCBRIDE-STETSON, *supra* note 148, at 283.

<sup>153</sup> *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975).

<sup>154</sup> *See supra* note 88 and accompanying text.

<sup>155</sup> COTT, *supra* note 6, at 206

<sup>156</sup> *Id.*

<sup>157</sup> CELELLO, *supra* note 5, at 128.

<sup>158</sup> COTT, *supra* note 6, at 213–14.

<sup>159</sup> CELELLO, *supra* note 5, at 137.

<sup>160</sup> *Id.*

<sup>161</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>162</sup> Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN’S J. LEGAL COMMENT. 535, 554 (2010).

<sup>163</sup> COTT, *supra* note 6, at 211.

In the early 1990s, social conservatives renewed their criticisms of American marriage.<sup>164</sup> “One of the foundations of the conservative stance on the family was a defense of ‘traditional’ marriage, characterized by clearly defined gender roles.”<sup>165</sup> Conservatives maintained that the career goals of wives, and especially mothers, should consist primarily of caring for their families.<sup>166</sup> Nevertheless, the legal system and society continued to move toward full recognition of equal rights for women and the eradication of traditional marital gender roles.

For example, legislation such as the Family and Medical Leave Act of 1993 (FMLA) was passed “to address gender inequities in employment and maintenance of the family in contemporary society.”<sup>167</sup> The FMLA is gender neutral and requires qualifying employers to grant up to twelve weeks of leave within a twelve-month period for the birth or adoption of a child or the employee’s caretaking of a child, spouse, or parent.<sup>168</sup> When the employee returns post-leave, the employer is required to place the employee in the same or an equivalent position to the one held pre-leave, with the same benefits and pay.<sup>169</sup> The FMLA makes it easier for both men and women to reject traditional marital gender roles by giving both husbands and wives the ability to undertake caretaking functions without sacrificing their careers.

In 1993, around twenty-two percent of wives earned more than their husbands.<sup>170</sup> By 2007, this number had risen to thirty-three percent, as legal advancements such as the FMLA made it easier for women to achieve and maintain positions with higher earning potential.<sup>171</sup> Rejecting their traditional marital gender roles as dependents and homemakers, over sixty percent of married women who lived with their husbands worked outside the home in 1998.<sup>172</sup> Moreover, in the late 1990s research indicated that husbands were taking on more housework and childcare responsibilities than at any previous time in the country’s history.<sup>173</sup> As of 2009, women constituted approximately forty-seven percent of the workforce.<sup>174</sup> In addition, in every year since 1981 more women than men have enrolled in higher education programs, and as of 2010 women accounted for fifty-seven percent of all college enrollments.<sup>175</sup> In 2010, the traditional marital situation—in which the husband was employed and the wife did not work outside the home—existed in

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<sup>164</sup> CELELLO, *supra* note 5, at 151.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 152..

<sup>167</sup> Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policies*, 1 DUKE J. GENDER L. & POL’Y 119, 138 (1994).

<sup>168</sup> MCBRIDE-STETSON, *supra* note 148, at 289. There are some exceptions; for example, “state-elected officials and high-ranking executives in private firms are excluded from this benefit.” *Id.*

<sup>169</sup> *Id.* at 288–89.

<sup>170</sup> CELELLO, *supra* note 5, at 139.

<sup>171</sup> Allison Linn, *Rising Number of Women Earn More than Mates*, MSNBC.COM (Nov. 2, 2009), <http://www.msnbc.msn.com/id/33196583/ns/business-careers/t/rising-number-women-earn-more-mates/>.

<sup>172</sup> Ben Wattenberg, *The First Measured Century*, PBS.ORG, <http://www.pbs.org/fmc/book/2work8.htm> (last visited July 5, 2011).

<sup>173</sup> CELELLO, *supra* note 5, at 160.

<sup>174</sup> *Quick Stats on Women Workers*, U.S. DEPT. OF LABOR, WOMEN’S BUREAU (2009), <http://web.archive.org/web/20110721035422/http://www.dol.gov/wb/stats/main.htm>.

<sup>175</sup> MCBRIDE-STETSON, *supra* note 148, at 156; Alex Williams, *The New Math on Campus*, N.Y. TIMES, Feb. 5, 2010, <http://www.nytimes.com/2010/02/07/fashion/07campus.html>.

only nineteen percent of marriages.<sup>176</sup> Today, while a few remaining laws in areas such as welfare, social security benefits, and income tax still encourage the traditional/dependent marital model in certain situations,<sup>177</sup> laws that overtly mandate traditional marital gender roles have become obsolete.<sup>178</sup>

## 2. Recent Efforts by Same-Sex Marriage Opponents to Protect the Gender Roles Requirement of Traditional Marriage

Many of the leading anti-same-sex marriage organizations also work to reinstate the gender roles requirement of traditional marriage. Maggie Gallagher, president of two of the leading anti-same-sex marriage organizations,<sup>179</sup> explicitly seeks to “renew a woman’s status as wife,” claiming that “[i]n spite of the sexual revolution, the outlines of the identity men assume in becoming husbands remain clear: husbands are men who have sworn to protect and provide for their wives and children.”<sup>180</sup> The Family Research Council supports controversial welfare law provisions that further traditional gender roles by encouraging low-income women to marry and depend upon their husbands for financial support.<sup>181</sup>

Another leading anti-same-sex marriage organization, Concerned Women for America, continues to fight the adoption of equal rights amendments to state constitutions.<sup>182</sup> Concerned Women for America opposes equal rights amendments because, among other things, such amendments would require states to provide women with equal pay for equal work and “would pave the way for state subsidized daycare for

<sup>176</sup> *Families by Presence and Relationship of Employed Members and Family Type, 2009–10 Annual Averages*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/famee.t02.htm> (last visited July 5, 2011).

<sup>177</sup> COTT, *supra* note 6, at 223.

<sup>178</sup> Deborah A. Widiss, *Reconfiguring Sex, Gender, and the Law of Marriage* 31 (Sept. 2010) (working paper), *available at* [https://www.law.indiana.edu/centers/lawsociety/documents/Sex\\_Gender\\_and\\_Marriage.pdf](https://www.law.indiana.edu/centers/lawsociety/documents/Sex_Gender_and_Marriage.pdf) (“The law of marriage is already sex neutral.”); *see also* MCBRIDE-STETSON, *supra* note 148, at 225 (“Nevertheless, gender-neutral approaches and the rhetoric of shared equal partnerships are becoming dominant.”). There are some state laws on the books, however, that encourage traditional gender roles. For example, there are state laws that assume the domicile of the family is that of husband, penalize the husband only for abandonment, desertion, and nonsupport, and allow only husbands to sue for loss of consortium claims. *Id.* at 196–201.

<sup>179</sup> *See supra* note 94 and accompanying text.

<sup>180</sup> Maggie Gallagher, *If Marriage Is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and in the Public Square*, 4 AVE MARIA L. REV. 409, 428 (2006).

<sup>181</sup> Patrick F. Fagan, *Perception Correction for Congress: New Study Indicates Poor Parents Want to Marry*, FAMILY RESEARCH COUNCIL (Oct. 23 2001), <http://www.frc.org/pat-fagan/perception-correction-for-congress>. For discussion of these controversial provisions, *see* Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 80 (2001); Jyl Josephson, *Coercive Visibility: Gender Deviance, TANF Reauthorization, and State Control of Low-Income Women and Men* 4 (unpublished manuscript), (2003), *available at* [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/6/2/1/8/pages62189/p62189-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/6/2/1/8/pages62189/p62189-1.php); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 461 (2007).

<sup>182</sup> *The “Equal Rights” Amendment*, FAM. CONCERNS (Concerned Women for Am. of Kan., Shawnee Mission, Kan), Dec. 18, 2008, *available at* <http://www.cwfa.org/images/content/fc2008-21.pdf>.

children.”<sup>183</sup> Taking these concerns together, it becomes clear that Concerned Women for America fears that equal rights amendments would lead to the displacement of gender roles by providing incentives and making it easier for married and unmarried women to work instead of staying home with their children. The organization clearly sets forth its position on maintaining traditional marital gender roles on its website, wherein married women are explicitly urged to stay home with their children and prioritize caretaking over their professional goals.<sup>184</sup>

Other leaders of notable anti-same-sex marriage organizations, such as Gary Bauer, former president of the Family Research Council and current president of American Values, and Paul Weyrich, founder of the Heritage Foundation, are signatories<sup>185</sup> to a manifesto seeking to restore the “natural family.”<sup>186</sup> The manifesto seeks to end what it describes as the “aggressive state promotion of androgyny.”<sup>187</sup> Although the manifesto states that “nothing in our platform would prevent women from seeking and attaining as much education as they want,” it decries the imposition of the “full gender equality” that “destroyed family wage systems” and seeks to reinstate a “family wage for fathers.”<sup>188</sup> It describes the “family wage” as a system “through which the industrial sector could claim only one adult per family, the father, who in turn had the natural right to a living wage that would also sustain a mother and children at home in decency.”<sup>189</sup> The manifesto contends that women should become “wives, homemakers, and mothers,” and men should become “husbands, homebuilders, and fathers,” and promotes “husbandry” and “housewifery.”<sup>190</sup>

Focus on the Family seeks to maintain the gender roles requirement of traditional marriage in a slightly different manner. Focus on the Family has a section of its website dedicated to teaching parents about how to raise a boy who is not a “sissy” and a girl who is not a “tomboy.”<sup>191</sup> It instructs, for example, that it is the father’s job to “pull the boy toward masculine play and interests” and “gender-aligned behavior.”<sup>192</sup> In order to pull the children away from non-gender-aligned behavior, the parents must perform in accordance with their traditional marital gender roles.<sup>193</sup>

<sup>183</sup> *Id.*

<sup>184</sup> Jessica Anderson, *Myths of Motherhood*, CONCERNED WOMEN FOR AMERICA (Aug. 29, 2005), <http://web.archive.org/web/20090203193026/http://www.cwfa.org/articles/8806/BLI/family/index.htm>; Rachel Mahaffey, *The Symptoms of Parent-Withdrawal*, CONCERNED WOMEN FOR AMERICA (Dec. 17, 2004), <http://web.archive.org/web/20060220053253/http://www.beverlylahayeinstitute.org/articledisplay.asp?id=7054&department=BLI&categoryid=commentary>.

<sup>185</sup> *Featured Endorsements*, THE NATURAL FAMILY: A MANIFESTO (2005), <http://familymanifesto.net/fm/endorsements.asp>.

<sup>186</sup> ALLAN C. CARLSON & PAUL T. MERO, THE NATURAL FAMILY: A MANIFESTO (2005), *available at* <http://www.familymanifesto.net/fm/manifesto.asp>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Glenn Stanton, *Answering Parents’ Questions on Gender Confusion in Children*, FOCUS ON THE FAMILY (2009), [http://www.focusonthefamily.com/parenting/articles/gender\\_confusion\\_in\\_children.aspx](http://www.focusonthefamily.com/parenting/articles/gender_confusion_in_children.aspx).

<sup>192</sup> *Id.*

<sup>193</sup> In addition, “[o]pponents of same-sex marriage . . . see the expansion of marriage to same-sex couples not as societal progress, but rather as societal degeneration, because it robs children of their primary place

Indeed, opponents of same-sex marriage often cite the maintenance of traditional marital gender roles as a primary reason for their opposition to same-sex marriage, as same-sex couples by definition would not be able to fulfill traditional marital gender roles.<sup>194</sup> The Family Research Council, for example, in opposing same-sex marriage states that:

If same-sex civil marriage is institutionalized, our society would take yet another step down the road of de-gendering marriage. There would be more use of gender-neutral language like "partners" and—more importantly—more social and cultural pressures to neuter our thinking and our behaviors in marriage. But marriages typically thrive when spouses specialize in gender-typical ways and are attentive to the gendered needs and aspirations of their husband or wife. For instance, women are happier when their husband earns the lion's share of the household income. Likewise, couples are less likely to divorce when the wife concentrates on childrearing and the husband concentrates on breadwinning.<sup>195</sup>

Likewise, Liberty Counsel opposes same-sex marriage on the grounds that it would “make gender roles irrelevant.”<sup>196</sup> Overall, many of the leading opponents of same-sex marriage also are working to protect the gender roles requirement of traditional marriage.

### C. Procreation

#### 1. The History of the Procreation Requirement of Traditional Marriage

During the early years of the United States, society viewed procreation as a core requirement of marriage, and the legal system reflected this view.<sup>197</sup> Historically, the most explicit laws in this context were those that banned the use of contraceptives by married couples,<sup>198</sup> prohibited sexual acts that could not result in procreation (“sodomy laws”), and prohibited sexual intercourse outside of marriage (“fornication laws”). In conjunction, these laws were used to maintain procreation as a requirement of traditional marriage. Laws such as these expressed the sentiment that the state had a strong interest in procreation as a fundamental aspect of marriage<sup>199</sup> and worked together to significantly

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to learn appropriate gender roles.” Ruth Butterfield Isaacson, *“Teachable Moments”: The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 135 (2010).

<sup>194</sup> Widiss et al., *supra* note 181, at 500.

<sup>195</sup> *Ten Arguments from Social Science Against Same-Sex 'Marriage,'* FOCUS ON THE FAMILY, <http://web.archive.org/web/20090623032905/http://frc.org/get.cfm?i=IF04G01> (last visited July 5, 2011).

<sup>196</sup> Mathew D. Staver, *Preserving Marriage*, LIBERTY COUNSEL, <http://www.lc.org/media/9980/attachments/preservingmarriage.html> (last visited Apr. 22, 2012).

<sup>197</sup> John Tuskey, *The Elephant in the Room—Contraception and the Renaissance of Traditional Marriage*, 18 REGENT U. L. REV. 315, 315–18 (2005); *see also* Heup v. Heup, 172 N.W.2d 334, 336 (Wis. 1969) (stating that procreation is a primary purpose of marriage); Baker v. Baker, 13 Cal. 87, 103 (1859) (same); Zoglio v. Zoglio, 157 A.2d 627, 628 (D.C. 1960) (same); Ramon v. Ramon, 34 N.Y.S.2d 100, 108 (N.Y. Fam. Ct. 1942) (same).

<sup>198</sup> Such as the law overturned by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>199</sup> WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* 2 (2008) (“From the sixteenth to the twentieth century, the norm reflected in [the Anglo-American legal

limit the meaningful choice of married couples (as well as unmarried couples) with regard to their child-bearing decisions.

In terms of the laws banning contraception, the Comstock Laws, which defined contraceptives as obscene and criminalized their dissemination through the mail or across states lines,<sup>200</sup> were “the first of [their] kind in the Western world.”<sup>201</sup> The federal Comstock Act was passed in 1873, and twenty-four states subsequently passed similar laws banning or restricting the dissemination, advertisement, or use of contraceptives.<sup>202</sup> In the early 1900s, however, the modern birth control movement began.<sup>203</sup> Women started to challenge the notion that their only purpose was to procreate and become mothers.<sup>204</sup> As attitudes about sex changed, birth control became more widely accepted, and in the 1930s and 1940s, some states began to distribute birth control in their health clinics.<sup>205</sup> In addition, in the early 1960s the FDA approved the birth control pill,<sup>206</sup> and women across the country began to use it.<sup>207</sup> At the same time, however, around twenty-eight states still banned the use of contraception by married couples.<sup>208</sup> In 1965, the Supreme Court, in *Griswold v. Connecticut*, finally declared laws banning the use of contraception by married couples unconstitutional, holding that such laws violated the privacy rights of married couples protected under the Due Process Clause of the Fourteenth Amendment.<sup>209</sup>

Fornication laws, which prohibited sexual relations outside of marriage, were first enacted in the United States by the colonists.<sup>210</sup> Twenty-nine states have had fornication laws on the books at some point.<sup>211</sup> In the eighteenth century, with changing attitudes

regime regulating sexuality] was procreative marriage. Adultery and fornication laws insisted that sexual activities occur only within marriage; sodomy and seduction laws insisted that the sex be procreative”); *see also*, *Martin v. Zihlerl*, 269 Va. 35, 42 (2005) (identifying the state’s interest furthered by fornication laws as “encouraging that children be born into a family consisting of a married couple”) (internal citation omitted); Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 234 (2010) (“In this way, anti-sodomy laws were not solely about defining marriage as a heterosexual enterprise; they also were intended to clarify marriage’s procreative purpose.”).

<sup>200</sup> *People & Events: Anthony Comstock’s “Chastity” Laws*, PBS.ORG,

[http://www.pbs.org/wgbh/amex/pill/peopleevents/e\\_comstock.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html) (last visited July 5, 2011).

<sup>201</sup> *Id.*; Alana Chazan, Note, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 271 (2009).

<sup>202</sup> Chazan, *supra* note 201, at 271–72.

<sup>203</sup> *Id.* at 273; Judith G. Waxman, *Privacy and Reproductive Rights: Where We’ve Been and Where We’re Going*, 68 MONT. L. REV. 299, 301 (2007).

<sup>204</sup> Chazan, *supra* note 202, at 273.

<sup>205</sup> Waxman, *supra* note 203, at 301, 302.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Seven years later, the Supreme Court struck down laws prohibiting unmarried individuals from obtaining contraceptives for the purpose of avoiding pregnancy, stating that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>210</sup> Traci Shallbetter Stratton, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 769 (1998).

<sup>211</sup> Amanda Connor, *Is Your Bedroom a Private Place? Fornication and Fundamental Rights*, 39 N.M. L. REV. 507, 519 (2009).

about sexual relations, the enforcement of fornication laws began to decrease.<sup>212</sup> With the significant changes in sexual attitudes and the greater acceptance of sex outside of marriage in the latter half of the nineteenth century and the twentieth century, “fornication laws gradually lapsed into desuetude.”<sup>213</sup> Over the years, many state fornication laws have been repealed or deemed unconstitutional by judicial decree.<sup>214</sup> Many members of the legal community believe that the Supreme Court’s 2003 decision in *Lawrence v. Texas*, which struck down anti-sodomy laws as unconstitutional infringements on the liberty rights afforded by the Due Process Clause of the Fourteenth Amendment, makes fornication laws unconstitutional.<sup>215</sup> Today, only thirteen states have fornication laws on the books, and, due in part to their questionable constitutionality and the fact that “society accepts fornication,” such laws are rarely, if ever, enforced.<sup>216</sup>

Sodomy laws, which were enacted to prohibit any type of non-procreative sex,<sup>217</sup> worked in conjunction with the laws that prohibited the use of contraception by married couples and the fornication laws that prohibited sexual relations outside of marriage to protect the procreation requirement of traditional marriage by maximizing the chances that married couples would procreate. At common law, sodomy was a criminal offense, and each of the original thirteen states had laws criminalizing sodomy.<sup>218</sup> Originally, all sodomy laws proscribed non-procreative sexual conduct between members of the same sex and members of the opposite sex, although some of these laws were later amended to punish conduct only between members of the same sex.<sup>219</sup> However, in the nineteenth century,<sup>220</sup> although all fifty states had sodomy laws on the books, the significant changes in attitudes about sex resulted in increasingly rare enforcement of sodomy statutes against consenting adults.<sup>221</sup>

In 1955, the American Law Institute (ALI) recommended doing away with all laws that penalized consensual, private sexual relations between adults.<sup>222</sup> The ALI justified its recommendation on the grounds that such laws undermined respect for the law by penalizing conduct that a significant portion of the population engaged in, punishing private action that was not harmful to others, and encouraging blackmail.<sup>223</sup> In 1961, Illinois became the first state to repeal its sodomy law.<sup>224</sup> During the 1970s, nineteen

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<sup>212</sup> Stratton, *supra* note 210, at 769.

<sup>213</sup> *Id.*

<sup>214</sup> Connor, *supra* note 211, at 520.

<sup>215</sup> See, e.g., Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1151 (2010) (“Many lower federal courts have since interpreted *Lawrence* to protect only a narrow right to be free from criminal prosecution for . . . ‘fornication’”); Henry F. Fradella, *Lawrence v. Texas: Genuine or Illusory Progress for Gay Rights in America?*, 39 CRIM. LAW BULL. 597 (2003) (“Scalia is probably right that *Lawrence* is the death knell for fornication laws.”).

<sup>216</sup> Connor, *supra* note 211, at 519–20.

<sup>217</sup> *Lawrence v. Texas*, 539 U.S. 558, 568 (2003); BARCLAY ET AL., *supra* note 1, at 9.

<sup>218</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

<sup>219</sup> *Lawrence*, 539 U.S. at 573.

<sup>220</sup> *Id.* at 569.

<sup>221</sup> *Bowers*, 478 U.S. at 193.

<sup>222</sup> *Lawrence*, 539 U.S. at 572.

<sup>223</sup> *Id.*

<sup>224</sup> *History of Sodomy Laws and the Strategy that Led Up to Today's Decision*, ACLU (June 16, 2003), [http://www.aclu.org/lgbt-rights\\_hiv-aids/history-sodomy-laws-and-strategy-led-todays-decision](http://www.aclu.org/lgbt-rights_hiv-aids/history-sodomy-laws-and-strategy-led-todays-decision).

more states repealed their sodomy laws.<sup>225</sup> By 1986, only twenty-four states prohibited sodomy,<sup>226</sup> and this number had dwindled to thirteen by 2003.<sup>227</sup> Among the thirteen states that still prohibited sodomy as of 2003 (four of which proscribed sodomy only between members of the same sex),<sup>228</sup> all had a history of non-enforcement for private consensual sexual activity between adults.<sup>229</sup> In its 2003 decision, *Lawrence v. Texas*, the Supreme Court struck down sodomy laws as unconstitutional infringements on the right to liberty guaranteed under the Due Process Clause of the Fourteenth Amendment.<sup>230</sup> The Court reasoned that the Due Process Clause protects the rights of adults to engage in private, consensual sexual activity.<sup>231</sup>

While the contraception, fornication, and sodomy laws, working in conjunction, were perhaps the most explicit reflection of the procreation requirement of traditional marriage, other laws maintained this requirement in more subtle ways. For example, beginning in the 1970s, a number of states passed “spousal notification laws” requiring married women to notify their husbands before obtaining an abortion.<sup>232</sup> Other states passed more onerous laws, which required spousal consent in order for an abortion to be performed.<sup>233</sup> One of the main justifications for such laws was the state’s interest in the procreative potential of marriage.<sup>234</sup> The practical effects of such laws enhanced the possibility that procreation would occur within the marriages at issue, and, in some instances, likely mandated procreation within such marriages.<sup>235</sup>

Spousal consent and notification laws received a great deal of criticism. Experts claimed that such laws produced great stress and anxiety for married women, and, in many cases, caused them to undergo physical harm.<sup>236</sup> A woman who, for whatever reason, felt that she could not notify her husband about her decision, could be forced to resort to more risky means of aborting the fetus.<sup>237</sup> Critics also argued that such requirements put women at an increased risk of physical or emotional abuse at the hands of husbands who did not approve of their wives’ intended course of action.<sup>238</sup> Such requirements could be especially dangerous where the husband was not the father of the fetus.<sup>239</sup> Others pointed out that under spousal consent laws, the husband would have complete veto power over his wife’s decision to have an abortion,<sup>240</sup> and in marriages

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<sup>225</sup> *Id.*

<sup>226</sup> *Bowers*, 478 U.S. at 193.

<sup>227</sup> *Lawrence*, 539 U.S. at 573.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 578.

<sup>231</sup> *Id.*

<sup>232</sup> Helaine F. Lobman, *Spousal Notification: An Unconstitutional Limitation on a Woman’s Right to Privacy in the Abortion Decision*, 12 HOFSTRA L. REV. 531, n. 4 (1984).

<sup>233</sup> Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 41 (1989).

<sup>234</sup> Lobman, *supra* note 232, at 546.

<sup>235</sup> For example, for wives who would rather have the child than face the reactions of their husbands or wives whose husbands, upon notification, prevented them from having abortions.

<sup>236</sup> Lobman, *supra* note 232, at 538.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 538–39.

<sup>240</sup> *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976).

with traditional power dynamics, spousal notification laws also meant the abortion decision would unjustly be taken completely out of the wife's hands.<sup>241</sup> Finally, many critics have argued that women should have the right to make such personal decisions about their bodies without consulting their husbands.<sup>242</sup>

In 1976, the Supreme Court declared spousal consent laws unconstitutional in *Planned Parenthood v. Danforth*.<sup>243</sup> Subsequently, in its 1992 decision in *Planned Parenthood v. Casey*, the Supreme Court declared spousal notification laws unconstitutional.<sup>244</sup> Citing the many criticisms of the laws discussed above, the Court reasoned in each case that the laws unconstitutionally infringed upon a woman's fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment.<sup>245</sup> The Court further explained in *Casey* that the idea that women are the center of the home and family life with "special responsibilities that precluded full and independent legal status" was no longer consistent with the country's understanding of families, individuals or the Constitution and referred to such statutes as embodying a "view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."<sup>246</sup>

Finally, the legal system's early failure to recognize spousal rape provides another manner through which procreation's status as a requirement of traditional marriage was reflected.<sup>247</sup> As one scholar has noted, "[i]mmunity from legal liability for forcible intercourse was a kind of implicit, albeit morally offensive, remedy of 'self-help,' where the failure of procreative expectation [implicit in the marriage contract] grew out of the partner's withholding of intercourse."<sup>248</sup> The failure to provide criminal penalties for spousal rape not only increased the likelihood of procreation in marriages where husbands took advantage of the lack of legal protections or wives agreed to have sex because, as a legal matter, they had no choice, but it also sent the message to society that sex and the resulting procreation constituted fundamental aspects of marriage. As discussed earlier,<sup>249</sup> such laws, which reflected the notion that the wife and her body were the property of her husband, became the subject of widespread criticism and were eventually eradicated in every state.<sup>250</sup>

Since the emergence of a movement toward the acceptance of married couples' choices to be voluntarily childless (or "childfree") in the early 1970s, the number of married couples who reject procreation as a requirement of marriage has increased

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* (noting that "spousal notification requirements directly interfere with a woman's autonomy in making the abortion decision").

<sup>243</sup> *Id.*

<sup>244</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

<sup>245</sup> *Id.* at 892–98; *Danforth*, 428 U.S. at 67–71.

<sup>246</sup> *Casey*, 505 U.S. at 897–98.

<sup>247</sup> See *supra* note 121 and accompanying text.

<sup>248</sup> William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 82 (1990).

<sup>249</sup> See *supra* note 162 and accompanying text.

<sup>250</sup> See *id.*

significantly.<sup>251</sup> Moreover, the number of married couples choosing to remain without children is expected to increase in the coming years.<sup>252</sup> One researcher estimates that by the mid-2020s, ten to fifteen percent of women who are or have been married will have made the decision not to have children.<sup>253</sup> A number of reasons have been set forth for the changes in attitudes towards procreation within marriage, such as the emerging view of marriage as a union for the purpose of personal happiness as opposed to childbearing, economic and environmental concerns,<sup>254</sup> increasing career opportunities for women, society's growing acceptance of married couples who choose not to procreate,<sup>255</sup> and Americans' increased placement of value on personal freedom and independence.<sup>256</sup> Overall, changes in the laws over the years have given married individuals significantly greater freedom to choose not to procreate, and research indicates that many of these individuals are exercising their freedom to make such choices. However, although most laws that seek to deny either or both spouses a meaningful ability to make the decision not to procreate have been repealed,<sup>257</sup> today the legal notion of procreation as a marital requirement does live on explicitly in one form—through legislation and court decisions that deny same-sex couples the right to enter into legally recognized marriages on the grounds that same-sex marriage bans further states' interests in promoting marital procreation.<sup>258</sup>

<sup>251</sup> Laurie Chancey, Voluntary Childlessness in the United States: Recent Trends by Cohort and Period, 18 (2006) (unpublished M.A. thesis, Louisiana State University), *available at* [http://etd.lsu.edu/docs/available/etd-04032006-173356/unrestricted/Chancey\\_Thesis.pdf](http://etd.lsu.edu/docs/available/etd-04032006-173356/unrestricted/Chancey_Thesis.pdf) (“Overall, 5.7 percent of ever-married women in 2002 were voluntarily childless—a figure that has nearly tripled since 1976.”).

<sup>252</sup> *Id.* at 32; *Childless by Choice—Childless Couples an Emerging Demographic—Statistical Data Included*, AM. DEMOGRAPHICS (Nov. 1, 2001), [http://findarticles.com/p/articles/mi\\_m4021/is\\_2001\\_Nov\\_1/ai\\_79501204/](http://findarticles.com/p/articles/mi_m4021/is_2001_Nov_1/ai_79501204/).

<sup>253</sup> Chancey, *supra* note 251, at 32.

<sup>254</sup> Vincent J. Schodolski, *More Married Couples Choosing Not to Have Children, and Are Proud of It*, SAN DIEGO UNION-TRIB. (Jan. 7, 2006), [http://www.signonsandiego.com/uniontrib/20060107/news\\_lz1c07nokids.html](http://www.signonsandiego.com/uniontrib/20060107/news_lz1c07nokids.html).

<sup>255</sup> *Id.*

<sup>256</sup> KRISTA BARTZ & LAURA CARROLL, FAMILIES OF TWO: INTERVIEWS WITH HAPPILY MARRIED COUPLES WITHOUT CHILDREN BY CHOICE 14 (2000).

<sup>257</sup> In addition to laws that encourage married couples to procreate, there have been a number of laws that discourage procreation outside of marriage. Although an analysis of such laws is outside the scope of this Article, some examples are common law criminal penalties for childbearing out of wedlock, laws that provided penalties to children born outside of marriage, laws providing federal funding for abstinence only/abstinence until marriage education programs, and welfare reforms that discouraged single mothers from having more children and provided incentives for single mothers to marry. *See generally* Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. 1 (1995); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); *The History of Federal Abstinence-Only Funding*, ADVOCATES FOR YOUTH, 1 (2007), <http://www.advocatesforyouth.org/storage/advfy/documents/fshistoryabonly.pdf>; *see also* Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, n. 70 (2001).

<sup>258</sup> *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (noting that “encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”); *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding the Defense of Marriage Act on the grounds that “[b]ecause

## 2. Recent Efforts by Same-Sex Marriage Opponents to Protect the Procreation Requirement of Traditional Marriage

Many of the leading anti-same-sex marriage organizations are also working to protect the procreation requirement of traditional marriage. Some of the most direct statements aimed at protecting this requirement come from the Family Research Council. This organization has suggested that perhaps the benefits of civil marriage should be restricted to those individuals who marry during their time of natural, procreative potential.<sup>259</sup> Maggie Gallagher suggests that the law should state that “[m]arriage is created by the freely-given consent of a man and woman, witnessed by church and/or state, to enter into a permanent sexual, financial, emotional, and *parenting* union,” and that couples who wish to marry should be required to sign an affidavit stating they understand these principles of marriage.<sup>260</sup> Gallagher also has advocated for the introduction of policies that would encourage marital procreation by granting special benefits to marital families based upon the number of children in the family.<sup>261</sup>

The manifesto, discussed earlier and signed by, among others, Gary Bauer, former president of the Family Research Council and current president of American Values, and Paul Weyrich, founder of the Heritage Foundation, advocates giving a variety of legal benefits to marital families based upon the number of children such families produce in order to “reward the birth of children and build true family patrimonies.”<sup>262</sup> It also seeks to “end existing social insurance incentives toward childlessness.”<sup>263</sup> With regard to other efforts to protect the procreation requirement of traditional marriage, Focus on the Family and the Family Research Council filed an amicus brief in *Planned Parenthood v. Casey*,<sup>264</sup> urging the Court to uphold an abortion statute’s controversial spousal notification provision that the Court went on to declare unconstitutional.<sup>265</sup> Finally, in 2008, the Massachusetts Family Institute submitted testimony in opposition to a bill to repeal the crime of fornication, urging lawmakers to keep laws that punish sexual relations outside of marriage on the books.<sup>266</sup>

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procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest”); In the Matter of the Marriage of J.B. and H.B., 326 S.W.3d 654, 674 (Tex. App. 2010) (upholding Texas’s same-sex marriage ban on the grounds that “[t]he persons singled out and favored by Texas’s marriage laws, namely opposite-sex couples, have such a distinguishing and relevant characteristic: the natural ability to procreate.”).

<sup>259</sup> Allan C. Carlson, *Marriage and Procreation: On Children as the First Purpose of Marriage*, FAMILY RESEARCH COUNCIL (Oct. 20, 2004),

<http://web.archive.org/web/20050308030520/http://www.frc.org/get.cfm?i=PL04J01>.

<sup>260</sup> Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law*

*Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225, 240 (2004) (emphasis added).

<sup>261</sup> Gallagher, *supra* note 180, at 432.

<sup>262</sup> CARLSON & MERO, *supra* note 186.

<sup>263</sup> *Id.*

<sup>264</sup> Brief for Focus on the Family et al. as Amici Curiae Supporting Respondents and Cross-Petitioners, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006412.

<sup>265</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

<sup>266</sup> Evelyn T. Reilly, Mass. Family Inst., Testimony in Opposition to HI709, Which Would Repeal the Laws Setting Standards for Sexual Ethics and Other Laws Protecting Public Safety (March 4, 2008) (on file with author).

Often, however, these kinds of efforts to encourage or require opposite-sex married couples to procreate are not the marital procreation-related efforts publicized by the leading anti-same-sex marriage organizations. Instead of alerting the public to such efforts, these organizations mainly publicize their efforts to maintain procreation as a core requirement of traditional marriage through the argument often used in anti-same-sex marriage campaigns that same-sex marriage must not be legally recognized because, since same-sex couples cannot “naturally” procreate, these marriages would destroy traditional marriage.<sup>267</sup> Overall, it is clear that many of the leading anti-same-sex marriage organizations continue to make concerted efforts to protect the procreation requirement of traditional marriage.

#### D. Monogamy

##### 1. The History of the Monogamy Requirement of Traditional Marriage

The monogamy requirement of traditional marriage was reflected in early U.S. laws and societal beliefs.<sup>268</sup> The U.S. legal system protected the monogamy requirement of traditional marriage by, among other things, providing criminal and civil penalties for adultery. Such laws were often justified as necessary to protect the institution of marriage.<sup>269</sup>

##### i. Criminal Penalties

The Puritan colonists of New England, concerned with what they considered to be the moral corruption of England after it ceased providing criminal sanctions for adultery, were the first to reinstate the crime of adultery with a married woman.<sup>270</sup> The crime was punishable by death.<sup>271</sup> A number of other colonies followed New England’s lead and reinstated adultery as a crime.<sup>272</sup> As the states developed, almost all created statutes criminalizing adultery.<sup>273</sup> These laws varied widely.<sup>274</sup> In a number of states, only married individuals could commit criminal adultery.<sup>275</sup> Statutes such as this were based

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<sup>267</sup> See, e.g., Jane Shaw Crouse, *Five Myths About Same Sex ‘Marriage,’* CONCERNED WOMEN FOR AMERICA (July 5, 2011), <http://www.cwfa.org/articledisplay.asp?id=18578&department=BLI&categoryid=commentary&subcategoryid=blifam>; Focus on the Family Issue Analysts, *supra* note 108; Press Release, National Organization for Marriage, National Organization for Marriage Files Amicus Brief Defending Californians’ Right to Vote for Marriage (Sept. 27, 2010), *available at* <http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.5075687/apps/s/content.asp?ct=8716847>; Peter Sprigg, *The Top Ten Harms of Same-Sex “Marriage,”* FAMILY RESEARCH COUNCIL ONLINE, 18–19 (2011), <http://downloads.frc.org/EF/EF11B30.pdf>.

<sup>268</sup> See *infra* notes 270–273 and accompanying text.

<sup>269</sup> Siegel, *supra* note 6, at 87.

<sup>270</sup> Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 841 (2006).

<sup>271</sup> *Id.*

<sup>272</sup> Siegel, *supra* note 6, at 48–49.

<sup>273</sup> *Id.* at 48.

<sup>274</sup> Viator, *supra* note 270, at 841

<sup>275</sup> *Id.*

on the notion that adultery constituted a breach of the marital vow.<sup>276</sup> Criminal adultery laws in other states, however, punished both the married individual and the unmarried participant.<sup>277</sup> Finally, in some states adultery was a crime only if the married participant was female.<sup>278</sup> This was premised on the assumption, reflected by the laws in place at the time, that a husband had a property interest in his wife and that laws criminalizing sexual relations with a married female protected that property interest.<sup>279</sup>

Criminal prosecutions for adultery were common in the eighteenth and nineteenth centuries.<sup>280</sup> During the twentieth century, however, enforcement decreased significantly.<sup>281</sup> The ALI declared adultery laws “dead-letter statutes” in 1955, citing the lack of enforcement throughout the country and the belief that respect for the law is undermined when the law targets behaviors engaged in by a wide segment of the public.<sup>282</sup> Reasoning that the penal law should not punish private immorality and that criminal adultery laws were ineffective and a waste of law enforcement resources, the ALI removed adultery from the Model Penal Code in 1962 and recommended that states follow suit and repeal their adultery laws.<sup>283</sup> In the years following the ALI’s recommendation, many states decriminalized adultery.<sup>284</sup>

As of 2011, adultery is not a crime in the majority of states.<sup>285</sup> In the twenty-one states that still have the crime of adultery on the books, enforcement of these statutes has become exceedingly rare.<sup>286</sup> Criminal adultery statutes have been criticized on a number of grounds. Such laws have been referred to as “archaic” and “difficult to enforce.”<sup>287</sup> Many legal scholars maintain that by punishing consensual sex between adults, criminal

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 841–42.

<sup>279</sup> *Id.* at 842.

<sup>280</sup> Viator, *supra* note 270, at 842.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*; Robert M. Weaver, *Queer Law for the Straight Guy: The Effect of Lawrence on Fornication and Adultery Statutes* 32–33 (Dec. 15, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1523702](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523702).

<sup>283</sup> Viator, *supra* note 270, at 842; Siegel, *supra* note 6, at 49.

<sup>284</sup> Viator, *supra* note 270, at 842.

<sup>285</sup> *Id.* at 843, n. 6. The Kansas adultery statute was repealed by the state legislature in 2010. KAN. STAT. ANN. § 21–3505 (2008), *repealed by* 2010 Kansas Laws Ch. 136 (H.B. 2668). The West Virginia adultery statute was also repealed by legislative action in 2010. W. VA. CODE §§ 61–8–3, 61–8–4 (2008), *repealed by* 2010 West Virginia Laws S.B. 457.

<sup>286</sup> Katherine Annuschat, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1169 (2010) (“Even though the crime of adultery still exists in more than twenty jurisdictions, one will be hard-pressed to find a state that will pursue adultery prosecutions.”); Melissa Murray & Alice Ristroph, *Disestablishing the Family*, 119 YALE L.J. 1236, n.159 (2010) (“Although laws criminalizing adultery continue on the books in a number of states, actual prosecutions are quite rare.”); Viator, *supra* note 270, at 860 (“Despite statistics revealing that an overwhelming percentage of spouses commit adultery, those states that retain the prohibition almost never enforce it.”). Adultery prosecutions do still occasionally occur, though. *See, e.g.*, Eamon McNiff, *Woman Charged with Adultery to Challenge New York Law*, ABC NEWS (June 8, 2010), <http://abcnews.go.com/TheLaw/woman-charged-adultery-challenge-york-law/story?id=10857437>.

<sup>287</sup> *New Hampshire Eyes Repealing Law on Adultery*, CNN JUSTICE (Jan. 12, 2010), [http://articles.cnn.com/2010-01-12/justice/adultery.vote\\_1\\_adultery-law-new-hampshire-house-repealing?\\_s=PM:CRIME](http://articles.cnn.com/2010-01-12/justice/adultery.vote_1_adultery-law-new-hampshire-house-repealing?_s=PM:CRIME).

penalties for adultery improperly infringe upon the constitutional right to privacy that the Supreme Court relied upon in *Lawrence v. Texas* to strike down sodomy laws.<sup>288</sup> Others claim that because of the widespread prevalence of adultery—some studies indicate that as many as forty percent of wives and fifty percent of husbands will have sexual relations outside of their marriages,<sup>289</sup> while other studies suggest the number is closer to twenty to twenty-five percent of all spouses<sup>290</sup>—it would be impossible to find impartial jurors for such prosecutions.<sup>291</sup> Finally, while many people view adultery as morally wrong, “modern society . . . does not view extramarital sex as a crime against the citizenry.”<sup>292</sup> Proponents of adultery laws in the holdout states have stated that the threat of legal penalties for engaging in adultery helps protect the sanctity of marriage.<sup>293</sup>

## ii. Civil Penalties

Throughout history, a variety of civil laws have reflected the status of monogamy as a core requirement of traditional marriage. For example, before World War II, the fault-based divorce system “threatened the adulterous spouse either with loss of financial support or punitively high support obligations [and] [a] wife’s adultery was also likely to be punished by the denial of custody of the children upon divorce.”<sup>294</sup> Indeed, until states abolished the fault-based divorce system, the inclusion of adultery as one of the few grounds upon which divorce could be granted acted to discourage adultery.<sup>295</sup> The early state statutes that labeled a husband’s murder of an individual caught in the act of

<sup>288</sup> *Id.* (“Roughly two dozen other states also have laws that criminalize adultery, said Jonathan Turley, a Georgetown University law professor, who views the laws as ‘clearly . . . unconstitutional.’”); Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 *FORDHAM L. REV.* 605, 631 (2010) (“Several commentators agree that adultery is properly characterized as falling within a broad right to sexual privacy recognized by *Lawrence*.”).

<sup>289</sup> Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 *GEO. WASH. L. REV.* 165, 215, n.296 (2007); Jennifer A. Herold, Note, *A Breach of Vows but Not Criminal: Does Lawrence v. Texas Invalidate Utah’s Statute Criminalizing Adultery?*, 7 *J. L. & FAM. STUD.* 253 (2005) (“[S]tudies suggest that nearly fifty percent of married men and women have engaged in adultery.”); Siegel, *supra* note 6, at 55 (“Most American marriages include extramarital sex by at least one of the partners. Half of all husbands report having committed adultery. . . . Somewhere between a third to forty percent of all wives say they have been unfaithful . . .”).

<sup>290</sup> Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. REV. L. & SOC. CHANGE* 277, 299 (2004) (discussing adultery research and stating that the lowest estimates of the prevalence of lifetime adultery are around twenty percent); Nehal A. Patel, Note, *The State’s Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin’s Faded Adultery Torts*, 2003 *WIS. L. REV.* 1013, 1015 (“The most reputable social science surveys reveal that at least twenty to fifty percent of American adults admit to committing adultery”); Denene Millner & Bill Phelps, *Surviving the Affair*, *ESSENCE*, Sept. 2004, at 224 (“Though adultery statistics are hotly debated, even the most conservative studies estimate that about 25 percent of men and 15 percent of women have had sex outside their marriage”).

<sup>291</sup> CNN JUSTICE, *supra* note 287.

<sup>292</sup> Terri L. Mascherin, Andrew Vail & Jennifer L. Dlugosz, *Reforming the Illinois Criminal Code: Where the Clear Commission Stopped Short of Its Goals*, 41 *J. MARSHALL L. REV.* 741, 750 (2008).

<sup>293</sup> Wayne Drash, *Beware Cheaters: Your Lover’s Spouse Can Sue You*, CNN LIVING (Dec. 8, 2009), <http://www.cnn.com/2009/LIVING/12/08/cheating.spouses.lawsuits/index.html>.

<sup>294</sup> Siegel, *supra* note 6, at 49.

<sup>295</sup> See *supra* notes 27–29 and accompanying text.

adultery with his wife justifiable homicide provides another example of the civil law's promotion of the monogamy requirement of traditional marriage.<sup>296</sup>

The civil laws that most directly reflected the monogamy requirement of traditional marriage, however, were based in tort law. Tort law remedies for the victims of adultery came into existence in the early years of the United States.<sup>297</sup> The two major tort law causes of action for adultery were criminal conversation and alienation of affections.<sup>298</sup> Both torts provided to the victim of adultery a cause of action against the person who engaged in sexual relations with his or her spouse.<sup>299</sup> These torts were created for the express purpose of protecting the institution of marriage.<sup>300</sup>

Criminal conversation protected an individual's interest in exclusive sexual relations with his or her spouse.<sup>301</sup> To succeed in an action for criminal conversation, the plaintiff had to prove that: (1) a valid marriage existed between the plaintiff and the unfaithful spouse, and (2) adulterous relations occurred between the plaintiff's spouse and the defendant.<sup>302</sup> Criminal conversation was basically a strict liability tort<sup>303</sup>—the only defense available was that the plaintiff consented to the adulterous relationship between his or her spouse and the defendant.<sup>304</sup>

The tort of alienation of affections was created to address injury to an adultery victim's property, personal rights, person, or feelings.<sup>305</sup> To succeed in this action, a plaintiff had to prove that: (1) at some point in the marriage true affection existed, (2) the affection that once existed had been destroyed, and (3) the defendant caused the destruction or impairment of the marital relationship.<sup>306</sup> The plaintiff also had to demonstrate that the defendant actively and aggressively, with actual malice or improper motives, lured his or her spouse away from the marriage.<sup>307</sup> Unlike the requirements of criminal conversation, adulterous relations between the spouse and the defendant were not necessary for an alienation of affections claim.<sup>308</sup> Rather, any third party who in some way alienated the affections of the non-plaintiff spouse could be sued under this cause of action.<sup>309</sup> Alienation of affections usually was harder to prove than criminal conversation, and a number of defenses were available to the defendant.<sup>310</sup>

<sup>296</sup> See Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 195, 229–37 (1986).

<sup>297</sup> William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L. J. 985, 1005 (2001).

<sup>298</sup> See generally Jill Jones, Note, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61 (1999).

<sup>299</sup> *Id.* at 67–69.

<sup>300</sup> *Id.* at 63.

<sup>301</sup> *Id.* at 67.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Jones, *supra* note 298, at 68.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 68–69. For example, even family members who cause the alienation of affections (by criticizing the plaintiff or in some other way) can be sued under this tort.

<sup>310</sup> *Id.* at 67–69.

Alienation of affections was first recognized as a tort action within the United States by a New York court in 1866.<sup>311</sup> Soon after, every state except one recognized the tort of alienation of affections and a majority of states recognized the tort of criminal conversation.<sup>312</sup> These early tort actions were available only to husbands.<sup>313</sup> This was based on the historical view that wives (including their minds, bodies, and affections) were the property of their husbands and a husband's property interest was violated when another person had sexual or otherwise intimate relations with his wife.<sup>314</sup> Following the passage of the Married Women's Property Act in 1882, some, but not all, states recognized a wife's cause of action in tort for either alienation of affections or criminal conversation.<sup>315</sup> In continuing to allow these causes of action even after wives were no longer considered the property of their husbands, courts explained that the torts played an important role in protecting the institution of marriage.<sup>316</sup>

In the early 1930s, the torts of alienation of affections and criminal conversation began to decrease in popularity.<sup>317</sup> In 1935, Indiana became the first state to abolish these torts.<sup>318</sup> By 1981, thirty-two states had abolished the tort of alienation of affections and twenty-two states had abolished the tort of criminal conversation.<sup>319</sup> Today, only eight states recognize causes of action for alienation of affections or criminal conversation.<sup>320</sup>

Opponents of the adultery torts have offered a number of reasons for their abolition. Many claim that these torts, grounded in property notions that spouses (particularly wives) were chattel, are out of date with society's views of sexual morality and the status of women and represent antiquated notions of people as property.<sup>321</sup> Others point out that history indicates these torts are often misused for extortion and blackmail, as many individuals do not wish for allegations of adultery, even if untrue, to be a matter of public record.<sup>322</sup> Finally, many opponents of the adultery torts have noted the failure of these tort actions to achieve their intended purpose of protecting marriage.<sup>323</sup> Specifically, opponents claim that these torts negatively affect possible reconciliation efforts of the married couples involved, hurt children by bringing additional tension,

<sup>311</sup> Corbett, *supra* note 297, at n.80.

<sup>312</sup> *Id.* at 1005; Jones, *supra* note 298, at 67.

<sup>313</sup> Corbett, *supra* note 297, at 1005.

<sup>314</sup> See, e.g., Michele Crissman, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 518–19 (2002); Jones, *supra* note 298, at 75.

<sup>315</sup> Corbett, *supra* note 297, at 1006.

<sup>316</sup> Crissman, *supra* note 314, at 521.

<sup>317</sup> Jones, *supra* note 298, at 69.

<sup>318</sup> Corbett, *supra* note 297, at 1007.

<sup>319</sup> *Id.* at 1009.

<sup>320</sup> These states are: Illinois, South Dakota, Hawaii, Mississippi, New Mexico, North Carolina, and Utah. See 740 ILL. COMP. STAT. ANN. 5/1 (West 1993); S.D. CODIFIED LAWS § 20–9–7 (2002); *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979); *Kirk v. Koch*, 607 So.2d 1220, 1222 (Miss. 1992); *Birchfield v. Birchfield*, 217 P. 616, 618–19 (N.M. 1923); *Hutelmyer v. Cox*, 514 S.E.2d 554, 560 (N.C. Ct. App. 1999); *Heiner v. Simpson*, 23 P.3d 1041, 1042 (Utah 2001); see also, Corbett, *supra* note 297, at n.77. Pennsylvania recognizes the tort of alienation of affections, but only where “where the defendant is a parent, brother or sister or a person formerly in loco parentis to the spouse of plaintiff.” 23 PA. STAT. ANN. § 1901(b) (West 2010).

<sup>321</sup> Crissman, *supra* note 314, at 529; Jones, *supra* note 298, at 75–77.

<sup>322</sup> Crissman, *supra* note 314, at 521, 530.

<sup>323</sup> *Id.* at 530; Jones, *supra* note 298, at 73–75.

publicity, and embarrassment to the already strained familial situation,<sup>324</sup> and, as evidenced by the significant number of married individuals estimated to have sexual relations outside of their marriages,<sup>325</sup> have no deterrent effect.<sup>326</sup>

## 2. Recent Efforts by Same-Sex Marriage Opponents to Protect the Monogamy Requirement of Traditional Marriage

Some of the leading anti-same-sex marriage organizations are also leading the charge to maintain, reinstate, or expand upon severe criminal and civil penalties for adultery in order to protect traditional marriage. For example, with regard to criminal penalties for adultery, in 2010 the Family Research Council reiterated its argument that adultery should remain a crime in order to “protect the institution of marriage.”<sup>327</sup> The Family Research Council not only works to advance criminal anti-adultery measures that apply to general society but also works to advance anti-adultery laws within the military justice system.<sup>328</sup> The Massachusetts Family Institute also strives to protect traditional marriage through efforts to maintain the criminalization of adultery. In 2008, the Institute submitted testimony in opposition to a bill to repeal the crime of adultery.<sup>329</sup> The Institute argued that adultery laws “were put in place for good reason, and the good reasons still stand . . . [m]arriage deserves legal protection from outside seduction, and the sexual instinct of the young should be channeled into the constructive outlet of marriage.”<sup>330</sup> In addition, other leading state-based anti-same-sex marriage organizations, such as Colorado Family Action, also work to maintain criminal punishments for adultery.<sup>331</sup>

Many of the leading anti-same-sex marriage organizations also seek to protect traditional marriage through the maintenance of anti-adultery tort actions. For example, the Institute for Marriage and Public Policy’s website provides proposed model legislation establishing civil actions for adultery for a number of different states.<sup>332</sup> The organization maintains that “[t]he proposed tort of adultery . . . permits an action to protect one of the gravest threat[s] to marriage, that being adultery by a spouse.”<sup>333</sup> In addition, Maggie Gallagher has proposed that the adultery torts be updated to allow for lawsuits against “commercial enterprises that intentionally and explicitly attempt to profit from acts of adultery.”<sup>334</sup> She has further suggested that the commercial solicitation of

<sup>324</sup> Crissman, *supra* note 314, at 521, 530.

<sup>325</sup> See *supra* notes 289-290 and accompanying text.

<sup>326</sup> Jones, *supra* note 298, at 84 n.175; Bergelson, *supra* note 289, at 215, n.296.

<sup>327</sup> Video: Peter Sprigg on Fox News, FAMILY RESEARCH COUNCIL (Mar. 17, 2010), <http://www.frc.org/frcinthenews/17mar2010/peter-sprigg-on-fox-news>.

<sup>328</sup> Robert L. Maginnis, 'Family Values' Make Good Soldiers, N.Y. TIMES (July 23, 1998), <http://www.nytimes.com/1998/07/23/opinion/1-family-values-make-good-soldiers-032468.html?pagewanted=1>.

<sup>329</sup> Reilly, *supra* note 266.

<sup>330</sup> *Id.*

<sup>331</sup> Tim Hoover, *Panel Votes to Keep Colorado Adultery Law on the Books*, DENVER POST (May 6, 2011), [http://www.denverpost.com/breakingnews/ci\\_18011528?source=rss](http://www.denverpost.com/breakingnews/ci_18011528?source=rss).

<sup>332</sup> See, e.g., *Model Legislation: Tort of Intentional Interference (Adultery)*, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, [http://www.marriedebate.com/ml\\_marriage/cat04-ml01.php](http://www.marriedebate.com/ml_marriage/cat04-ml01.php) (last visited July 4, 2011).

<sup>333</sup> *Id.*

<sup>334</sup> Maggie Gallagher, *The Right to Adultery?*, TOWNHALL.COM (Mar. 17, 2010), [http://townhall.com/columnists/maggiiegallagher/2010/03/17/the\\_right\\_to\\_adultery](http://townhall.com/columnists/maggiiegallagher/2010/03/17/the_right_to_adultery).

adultery be treated as a crime.<sup>335</sup> A number of the leading state-based organizations that work to ban same-sex marriage, such as the North Carolina Family Policy Council and New Hampshire's Cornerstone Policy Research, also attempt to defeat bills aimed at repealing the adultery torts.<sup>336</sup> Overall, it appears that the maintenance and reinstatement of criminal and civil penalties for adultery in order to protect traditional marriage remains an important goal among many of the leading anti-same-sex marriage organizations.

### III. ADDING THE PROPOSED PRO-SAME-SEX MARRIAGE FRAME TO THE DEBATE

It has become clear that the popular vote will play a significant role in the same-sex marriage movement. The right to marriage for same-sex couples has been,<sup>337</sup> and for the foreseeable future will continue to be, put to the popular vote.<sup>338</sup> While significant advances in the same-sex marriage movement have occurred through court decisions and state legislative action, the results have been dismal for same-sex marriage proponents when the issue has been put to a popular vote. Ballot measures amending state constitutions to ban same-sex marriage have been passed in thirty-one states.<sup>339</sup> The six states that have legalized same-sex marriage (as well as the District of Columbia) have done so through legislative action or court decision, not the popular vote.<sup>340</sup> Thus, it is essential that same-sex marriage proponents do a better job of persuading voters.

The success of a social justice movement, especially with regard to issues upon which the public will be voting, depends in significant part on how the issues are defined or framed.<sup>341</sup> Often, each side sets forth multiple frames for an issue when a controversial policy question is being debated.<sup>342</sup> Decisions about how to frame an issue, both initially and throughout the lifespan of a movement, can be critical, as “[i]ssue framing influences not only agenda access but also the issue dimensions that become the boundaries of choice and the evaluation of the problem,” and “[s]hifts in the issue dimensions understood to be important regarding a policy issue have the potential to produce [significant] changes in the public opinion.”<sup>343</sup> Based on the results to date of the public

<sup>335</sup> *Id.*

<sup>336</sup> *Abolishing Torts Would Expose Marriages to Interference and Adultery*, NORTH CAROLINA FAMILY POLICY COUNCIL (July 4, 2010), <http://www.ncfpc.org/issuebriefs/20070319-IB-AlienAffectionCrimConv.pdf>; CNN JUSTICE, *supra* note 287 (“Smith said his group will propose an amendment to repeal the measure making it clear that adultery remains a civil offense and can be cited as a reason for divorce.”).

<sup>337</sup> See *infra* note 338 and accompanying text.

<sup>338</sup> See, e.g., Patrick Condon & David Crary, *Minnesota to Vote on Gay Marriage*, DURANGO HERALD (June 28, 2010), <http://durangoherald.com/article/20110628/NEWS03/706289954/-1/s#>; Katie Worth, *Same-Sex Marriage Backers Consider New Ballot Measure as Prop. 8's Fate Is Decided*, S.F. EXAMINER (May 26, 2011), <http://www.sfexaminer.com/local/2011/05/same-sex-marriage-backers-consider-new-ballot-measure-prop-8s-fate-decided>; *Wyoming Same-Sex Amendment Inches Towards the 2012 Ballot*, BALLOT NEWS (Jan. 26, 2011), <http://ballotnews.org/2011/01/26/wyoming-same-sex-amendment-inches-towards-the-2012-ballot/>.

<sup>339</sup> Condon & Crary, *supra* note 338.

<sup>340</sup> *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 27, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>.

<sup>341</sup> BARCLAY ET AL., *supra* note 1, at 208–210, 229–30.

<sup>342</sup> *Id.* at 210–11, 214, 234, 247.

<sup>343</sup> *Id.* at 210, 229–30.

votes on this issue, it is clear that the frames set forth by same-sex marriage proponents need to be adjusted in order to reach a wider variety of voters.<sup>344</sup>

This Part advances the argument that same-sex marriage proponents should add a new frame to their campaigns. Specifically, they should add a frame that educates the public about the true meaning of traditional marriage and exposes the efforts that anti-same-sex marriage organizations are making to protect and advance the other requirements of traditional marriage—the traditional marriage agenda. It is important to note that the proposal does not involve using the new frame to replace the other frames set forth by same-sex marriage proponents, as many of the existing frames have been successful in reaching certain classes of voters (such as younger voters).<sup>345</sup> Rather, the proposal involves adding another frame to the debate to engage voters who the other frames have thus far been less successful in reaching.

#### A. *The Protection Frame and Same-Sex Marriage Opponents*

The protection frame is one of the primary frames used by same-sex marriage opponents.<sup>346</sup> The message to voters is that one type of marriage, traditional marriage, has existed throughout history and forms the foundation of society because it yields the greatest benefits.<sup>347</sup> Thus, the protection frame posits that it is essential that traditional marriage be protected from redefinition.<sup>348</sup> The protection frame also sets forth the related narrative that voters' current or future traditional opposite-sex marriages need to be protected from same-sex marriage because opposite-sex marriages will be devalued or disadvantaged if same-sex couples are allowed to marry.<sup>349</sup> The protection frame, encompassing these interrelated messages, has proven successful for same-sex marriage opponents in persuading a substantial number of voters, including voters who may not have had strong feelings about the issue initially but were influenced by how the issue was framed by each side.<sup>350</sup>

<sup>344</sup> See *supra* note 339 and accompanying text.

<sup>345</sup> Sandhya Somashekhar, *Same-Sex Marriage Gains GOP Support*, WASH. POST (Aug. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082705614.html>.

<sup>346</sup> BARCLAY ET AL., *supra* note 1, at 214, 220. See also *infra* note 348.

<sup>347</sup> See *supra* note 3 and accompanying text; see also *Same Sex Marriage*, MASSACHUSETTS FAMILY INSTITUTE, <http://www.mafamily.org/issues/marriage-and-family/same-sex-marriage/> (last visited July 5, 2011) (“MFI is dedicated to restoring marriage to its natural definition. The costs to family, children and culture are too great to concede this battle to those who would see marriage and family redefined to the point of irrelevancy.”).

<sup>348</sup> See *supra* note 347.

<sup>349</sup> See, e.g., BARCLAY ET AL., *supra* note 1, at 214 (counting the number of times the frame that same-sex marriage is a threat to opposite-sex marriage was used in various same-sex marriage campaigns); Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriage*, 20 BYU J. PUB. L. 275, 303–04 (2006); *The Slippery Slope of Same-Sex 'Marriage'*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=BC04C02> (last visited July 5, 2011) (“How Does Gay Marriage Harm Your Marriage? One might as well ask, ‘How does my printing counterfeit \$20 bills hurt your wallet?’”); *Talking Points on Traditional Marriage*, CONCERNED WOMEN FOR AMERICA, <http://states.cwfa.org/images/content/TalkingPoints.pdf> (last visited July 4, 2011) (“Homosexual marriage will devalue traditional marriage. Offering a counterfeit in exchange for the real thing always devalues the genuine”).

<sup>350</sup> See Hsu, *supra* note 349, at 300–06; *Marriage Talking Points*, NATIONAL ORGANIZATION FOR MARRIAGE (July 5, 2011),

There likely are two related reasons for why the protection frame has resonated so well with voters: (1) it sets forth a cultural argument that is accessible and easily understandable to the general public, and (2) it gives voters a sense of personal stake in the issue. With regard to the first reason for the frame's success in reaching voters, accessibility and understandability, the marriage the vast majority of the population have or anticipate having will fit within the more narrow understanding of traditional marriage that opponents overwhelmingly stress within the context of same-sex marriage campaigns—it will consist of one man and one woman.<sup>351</sup> (“One man, one woman” is a slogan often used by same-sex marriage opponents).<sup>352</sup> The protection frame “reinforces this *self-evident production of truth* [regarding how a marriage should look] and the ahistorical idea that civilized marriage has always been as it is now.”<sup>353</sup>

Thus, for most people, the protection frame is an easily understandable cultural frame. The argument is based on a cultural, albeit incomplete,<sup>354</sup> understanding of how U.S. society has historically viewed marriage—an understanding that also happens to reflect most people's everyday experiences. The frame is not based on a purely legal argument, which may be less accessible to voters (such as, for example, that there is no fundamental right to same-sex marriage under the Constitution). While legal arguments are obviously of great importance when presenting controversial issues before the courts, cultural arguments are often essential to the success of social justice movements in shaping public opinion.<sup>355</sup>

The second reason for why this frame has resonated so well with voters is that it provides many people with a personal stake in the issue. As noted above, voters are told that their current or future opposite-sex marriages will be devalued and disadvantaged by same-sex marriages and thus that voting in favor of same-sex marriage runs counter to their personal interests.<sup>356</sup> The idea that perceived self-interest often plays a part in voters' decisions is certainly not a novel one.<sup>357</sup> Although it has been examined and

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[http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage\\_Talking\\_Points.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm) (“Extensive and repeated polling agrees that the single most effective message is: ‘Gays and Lesbians have a right to live as they choose, they don't have the right to redefine marriage for all of us.’”).

<sup>351</sup> An estimated four percent of the U.S. population identifies as gay, lesbian, or bisexual. See Susan Donaldson James, *Gay Americans Make Up 4 Percent of Population*, ABC NEWS (Apr. 8, 2011), <http://abcnews.go.com/Health/williams-institute-report-reveals-million-gay-bisexual-transgender/story?id=13320565>.

<sup>352</sup> See, e.g., Harry Jackson, Jr., *One Man, One Women—Only*, WASH. POST, May 10, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902323.html>; *Summer for Marriage Tour 2010*, NATIONAL ORGANIZATION FOR MARRIAGE, <http://www.marriagetour2010.com/> (last visited July 5, 2011); Robert H. Knight & Peter Sprigg, *Marriage: One Man, One Woman*, ORTHODOXYTODAY.COM, <http://www.orthodoxytoday.org/articles2/KnightOneManWoman.php> (last visited July 5, 2011).

<sup>353</sup> BARCLAY ET AL., *supra* note 1, at 246 (emphasis added).

<sup>354</sup> See *supra* Part II for a detailed description of the requirements of traditional marriage.

<sup>355</sup> ELLEN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 12 (2006); BARCLAY ET AL., *supra* note 1, at 230, 283–85.

<sup>356</sup> See *supra* note 349 and accompanying text.

<sup>357</sup> Carolyn L. Funk & David O. Sears, *The Role of Self-Interest in Social and Political Attitudes*, 24 ADV. IN EXP. SOC. PSYCH. 1, 1–2 (1991), available at <http://www.issr.ucla.edu/sears/pubs/A101.pdf>; LIBBY RITTENBERG & TIMOTHY TREGARTHEN, PRINCIPLES OF MICROECONOMICS Chap. 15.3 (2009) (“Public

discussed in great detail in research and scholarship across the disciplines,<sup>358</sup> the idea that perceived self-interest plays a role in peoples' decisions also rests upon practical, everyday observations about human behavior. While it is beyond the scope of this Article to enter the debate regarding the precise amount of influence perceived self-interest plays in different types of voting decisions and it is important to acknowledge that many other things can affect voting decisions,<sup>359</sup> it is hard to dispute the wide body of scholarly research that indicates perceived self-interest plays, or has the potential to play, a significant role in many peoples' voting decisions.<sup>360</sup> Overall, due to the protection frame's accessibility, its clear connection to many voters' lives, and its ability to provide a significant number of voters with a personal stake in the issue, same-sex marriage proponents have had difficulty responding to it in a direct and effective manner.<sup>361</sup>

### B. *The Protection Frame and Same-Sex Marriage Proponents*

As researchers have noted, participants in same-sex marriage campaigns have spent a great deal of time and effort creating and advancing frames that respond to the various frames set forth by the other side.<sup>362</sup> Same-sex marriage proponents have responded directly to many of the frames set forth by same-sex marriage opponents. For example, in response to the frame that same-sex couples already have enough protection and do not

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choice theory argues that individuals in the public sector make choices that maximize their utility—whether as voters, politicians, or bureaucrats, people seek solutions consistent with their self-interest.”).

<sup>358</sup> See Funk & Sears, *supra* note 357, at 1–4.

<sup>359</sup> See generally *id.* (discussing the role of ideology in voting decisions); Jonathan Baron, *Cognitive Biases in Moral Judgments that Affect Political Behavior*, SYNTHÈSE (2008), available at <http://www.sas.upenn.edu/~baron/papers/synthese.pdf> (discussing the role of moral judgment in voting behavior).

<sup>360</sup> See, e.g., Jonathan Baron, *The “Culture of Honor” in Citizens’ Concepts of Their Duty*, 24 RATIONALITY & SOC. 37, 45, 63 (2012) (“[Studies] show that a norm of self-interest voting exists and can even be seen as a moral obligation. The last two studies ask about the particular sorts of policies that are supported when people see themselves as defending their self-interest.”); Richard D. Dixon et al., *Self-Interest and Public Opinion Toward Smoking Policies: A Replication and Extension*, 55 PUB. OPINION Q. 241, 241 (1991) (finding in a study that self-interest played a significant role in political attitudes toward public smoking restrictions); Funk & Sears, *supra* note 357, at 76 (reviewing a number of studies and finding that although self-interest played only a small role in political attitudes in many situations, it played a significant role where there were substantial and clear stakes or when there were “ambiguous and dangerous threats”); Larry D. Schroeder & David L. Sjoquist, *The Rational Voter: An Analysis of Two Atlanta Referenda on Rapid Transit*, 33 PUB. CHOICE 27, 27 (“The regression results strongly support the hypothesis that individual voters act in their own economic self-interest.”); Allyson Holbrook et al., *Political Behavior of the Individual*, in ENCYCLOPEDIA OF PSYCHOLOGY 226 (Alan E. Kazdin ed., 2000) (describing beliefs about self-interest as playing a role in voting decisions); Justin Esarey et al., *What Motivates Political Preferences? Self-Interest, Ideology, and Fairness in a Laboratory Democracy 1*, 23 (Feb. 2011), available at <http://myweb.fsu.edu/tsalmon/bes.pdf> (“Our general finding is that votes for a redistributive tax are almost entirely in accordance with self-interest” and “that any preferences for fairness or inequality that our subjects possessed were not strong enough to overcome self-interest in this context.”). Moreover, in exit polling, many people claim that self-interest played a strong role in their decisions. Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 51, 63 (1998).

<sup>361</sup> See *infra* notes 367–372 and accompanying text.

<sup>362</sup> BARCLAY ET AL., *supra* note 1, at 219–29.

need the right to marry,<sup>363</sup> same-sex marriage proponents have highlighted many of the important rights that come with marriage, such as hospital visitation.<sup>364</sup> Same-sex marriage proponents also have directly responded to one aspect of the protection frame—the idea that same-sex marriage will hurt people’s current or future opposite-sex marriages—by denying that any harm would occur and calling on their opponents to identify a specific harm.<sup>365</sup> Same-sex marriage proponents have not, however, responded to this aspect of the frame, which serves to provide many voters with a sense of personal stake in *opposing* same-sex marriage, with a counter-frame that would give voters a personal stake in *supporting* same-sex marriage.<sup>366</sup> Moreover, same-sex marriage proponents have rarely responded to the protection frame’s primary contention that traditional marriage is the foundation of society and thus needs to be protected from redefinition.<sup>367</sup>

Instead of responding directly to the argument that traditional marriage is the foundation of society and needs to be protected, same-sex marriage proponents have largely ignored this argument.<sup>368</sup> In the limited instances where same-sex marriage proponents have responded to this contention, they have done so only indirectly through the broad argument that same-sex families are just as valid as traditional families.<sup>369</sup> Crucially, however, they have not challenged the use or meaning of the term “traditional marriage.”<sup>370</sup> More specifically, same-sex marriage proponents have not sought to expose what protecting traditional marriage from redefinition really means to the leaders of anti-same-sex marriage campaigns or how truly protecting or restoring traditional marriage would affect voters’ lives.<sup>371</sup> Because issue framing is of such great importance in same-sex marriage campaigns, failing to fully and effectively respond to a primary frame set forth by same-sex marriage opponents has likely come at a significant detriment to same-sex marriage proponents.<sup>372</sup>

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<sup>363</sup> *Id.* at 214, 218; *Challenging Opposition Arguments*, ACLU, <http://gbge.aclu.org/relationships/challenging-opposition-arguments> (last visited July 5, 2011) (discussing how to respond to the argument that LGBT people do not need more rights); Ron Prentice et al., *Ballot Arguments*, PROTECTMARRIAGE.COM <http://www.protectmarriage.com/about/ballot-arguments> (last visited July 5, 2011) (“Some will try to tell you that Proposition 8 takes away legal rights of gay domestic partnerships. That is false. Proposition 8 DOES NOT take away any of those rights and does not interfere with gays living the lifestyle they choose.”).

<sup>364</sup> See, e.g., *Legal and Economic Benefits of Marriage*, RELIGIOUS TOLERANCE, [http://www.religioustolerance.org/mar\\_bene.htm](http://www.religioustolerance.org/mar_bene.htm) (last visited July 5, 2011); *Questions About Same-Sex Marriage*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/5517.htm> (last visited July 5, 2011); *Equal Marriage NOW: Talking Points*, NATIONAL ORGANIZATION FOR WOMEN, <http://www.now.org/issues/marriage/points.html#benefits> (last visited July 5, 2011).

<sup>365</sup> BARCLAY ET AL., *supra* note 1, at 221.

<sup>366</sup> *Id.* at 214.

<sup>367</sup> *Id.* at 214, 223 (showing the results of a study indicating that while the same-sex marriage proponents had used the protection of the institution of marriage frame eighty-four times in the campaigns studied, same-sex marriage proponents had only responded within this frame once).

<sup>368</sup> *Id.* at 214, 223.

<sup>369</sup> *Id.* at 223.

<sup>370</sup> *Id.* at 214, 223.

<sup>371</sup> *Id.* at 214, 223.

<sup>372</sup> *Id.* at 227.

Instead of spending time and resources responding to the protection frame, same-sex marriage proponents have focused primarily on the following three frames: (1) same-sex marriage should not be banned because same-sex couples deserve equal legal rights and benefits; (2) discrimination against same-sex couples is wrong; and (3) same-sex marriage is a civil rights issue.<sup>373</sup> Whereas the protection frame is an easily accessible, purely cultural frame, the frames most often used by same-sex marriage proponents are rooted in mixed legal and cultural notions of equal rights and non-discrimination— notions that might not be as accessible to some voters.<sup>374</sup> As noted above, purely cultural frames often have the greatest influence on voters.<sup>375</sup> In addition, whereas the cultural and accessible protection frame has been used to give voters a personal stake in the issue by telling them that their current or future opposite-sex marriages will be harmed by same-sex marriage, the main frames set forth by same-sex marriage proponents rely on broad legal notions of equality for “others” and do not provide voters with a personal stake in the issue.<sup>376</sup> Overall, same-sex marriage proponents have not only failed to respond fully and directly to the protection frame but have also failed to come up with a frame that provides an equally accessible cultural argument or gives voters a personal stake in the issue equal to that provided by the protection frame. Because of asymmetries such as these, same-sex marriage opponents have had far greater success in defining the issues and setting the frames of the same-sex marriage debate.<sup>377</sup>

### C. *A Proposal for Addressing the Protection Frame*

To date, neither the same-sex marriage opponents’ definition of traditional marriage nor the traditional marriage agenda has been exposed by same-sex marriage proponents on any significant level during same-sex marriage campaigns.<sup>378</sup> As it is currently used and understood in same-sex marriage campaigns, traditional marriage simply means a marriage between a man and a woman, which makes sense since the measures at issue aim only to define marriage as between a man and a woman.<sup>379</sup> The other requirements of traditional marriage are largely ignored, except in the limited contexts where they are used to explain why the opposite-sex requirement of traditional marriage is important—i.e., marriage must be restricted to opposite-sex couples because same-sex couples cannot procreate.<sup>380</sup> Otherwise, efforts to maintain the traditional

<sup>373</sup> See BARCLAY ET AL., *supra* note 1, at 214.

<sup>374</sup> See *supra* note 373 and accompanying text.

<sup>375</sup> See *supra* note 355 and accompanying text.

<sup>376</sup> See *supra* note 356 and accompanying text.

<sup>377</sup> See BARCLAY ET AL., *supra* note 1, at 230.

<sup>378</sup> See *supra* notes 368–370 and accompanying text.

<sup>379</sup> See Patti Brown, *Minnesota Legislature Passes Constitutional Amendment Banning Same-Sex Marriage*, THE IOWA REPUBLICAN, May 23, 2011, <http://theiowarepublican.com/home/2011/05/23/minnesota-legislature-passes-constitutional-amendment-banning-same-sex-marriage> (“Thirty states have defined marriage in their constitutions as a union between a man and woman . . .”).

<sup>380</sup> See *supra* note 267 and accompanying text; see also Robert Sokolowski, *The Threat of Same-Sex Marriage*, AM. MAG., June 7, 2004, [http://www.americamagazine.org/content/article.cfm?article\\_id=3627](http://www.americamagazine.org/content/article.cfm?article_id=3627) (“Those who argue against the legalization of same-sex marriages insist that marriage is ordered toward the procreation of children and that the legal supports given to marriage are given with that end in view.”).

marriage requirements of opposite-sex spouses, permanency, monogamy, gender roles, and procreation are not framed by anti-same-sex marriage campaigns as a package deal aimed at protecting traditional marriage.<sup>381</sup> For example, anti-same-sex marriage organizations have not introduced measures to restore traditional marriage by banning same-sex marriage *and also* banning no-fault divorce, making adultery a felony, reinstating the law of coverture, and limiting marriage to only those couples who can and will procreate.<sup>382</sup> Explicit measures to protect the other traditional marriage requirements—permanency, monogamy, gender roles, and procreation—are simply not emphasized in anti-same-sex marriage campaigns.<sup>383</sup>

Instead, the efforts by anti-same-sex marriage organizations to maintain permanency, monogamy, gender roles, and procreation within marriage are often undertaken separately and through different, less public channels than the efforts to maintain the opposite-sex requirement.<sup>384</sup> This is likely because with the significant changes to societal beliefs that have occurred over the years with regard to the law's regulation of marital permanence, monogamy, gender roles, and procreation, the opposite-sex requirement of traditional marriage is the requirement that traditional marriage supporters have the most realistic chance of maintaining through the popular vote. It is, in essence, the last traditional marriage requirement still standing.<sup>385</sup>

As the previous Part discussed, the broader traditional marriage agenda, although largely ignored in anti-same-sex marriage campaigns, is alive and well.<sup>386</sup> There have been, and continue to be, significant efforts undertaken by the leading anti-same-sex marriage organizations to maintain the other requirements of traditional marriage.<sup>387</sup> These organizations are, among other things, undertaking efforts to ban no-fault divorce and promote covenant marriage, working to reinstate or maintain civil and criminal penalties for adultery, encouraging wives to stay at home and concentrate on their caretaking responsibilities, working in opposition to legislation aimed at promoting gender equality, and advocating efforts to use procreation as a basis for rewarding or penalizing married couples and to limit married individuals' meaningful choice with regard to procreative issues.<sup>388</sup> Since these other efforts are not often stressed or even referred to during same-sex marriage campaigns,<sup>389</sup> the vast majority of voters likely are

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<sup>381</sup> See *supra* note 379 and accompanying text.

<sup>382</sup> See Brown, *supra* note 379, for language of proposed ballot measures.

<sup>383</sup> See *id.*

<sup>384</sup> See *supra* Part II (detailing historical and recent efforts to maintain these other requirements of traditional marriage).

<sup>385</sup> See *id.* (tracing the history of the other requirements of traditional marriage); see also *infra* Part IV (discussing the current status of the other requirements of traditional marriage).

<sup>386</sup> See *supra* Part II.

<sup>387</sup> See *id.*

<sup>388</sup> See *id.*

<sup>389</sup> See *supra* note 368. Even when procreation or gender roles are offered explicitly as arguments for why same-sex marriage should be banned, same-sex marriage proponents have generally not responded directly to this criticism and exposed the implications that these requirements would have for opposite-sex married couples. See BARCLAY ET AL., *supra* note 1, at 214 (listing the commonly used frames in same-sex marriage campaigns). See generally Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, STAN. L. & POL'Y REV. 97 (2005).

unaware of what the leading anti-same-sex marriage organizations are doing to protect the other requirements of traditional marriage.

As previously noted, the protection frame has been so successful for same-sex marriage opponents because it has not yet been effectively challenged by same-sex marriage proponents, it is easily understandable and culturally accessible, and it gives many voters a sense of personal stake in opposing same-sex marriage.<sup>390</sup> It follows that same-sex marriage campaigns would have greater success were they able to: (1) respond effectively to the protection frame, (2) create an accessible cultural frame to supplement the primarily legal frames they are currently using, and (3) construct a frame that provides voters with a greater sense of personal stake in the issue. Educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda could further all three of these goals. If traditional marriage was understood by the general public to encompass more than the singular requirement of opposite-sex spouses, this frame likely would be viewed differently by many individuals and, instead of hurting the same-sex marriage movement, could actually be used to help it.

First, by exposing the traditional marriage agenda, same-sex marriage proponents finally would be responding fully to the protection frame, thereby rectifying the detrimental asymmetry that has resulted from the failure to respond directly and effectively to this important frame.<sup>391</sup> Specifically, in educating voters about the true meaning of traditional marriage and the efforts currently being undertaken by the leading anti-same-sex marriage organizations to maintain or restore the other requirements of traditional marriage, same-sex marriage proponents would be directly responding to the protection frame by raising the important question of whether traditional marriage is really something voters would like to protect. The protection frame likely would take on a whole new meaning were voters to associate protecting traditional marriage with mandated marital permanence, monogamy, gender roles, and procreation.<sup>392</sup> For many voters, the protection frame would not only take on a new connotation, but a negative one, were it associated with these other requirements of traditional marriage. This is because one or more of these requirements are out of step with many voters' views of marriage, and, further, the reinstatement of such requirements would have the potential to negatively affect the lives of a significant number of voters.<sup>393</sup> In addition to setting forth a direct and effective response to the protection frame, educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda could also provide pro-same-sex marriage campaigns with a new frame of their own that is culturally accessible and gives voters a greater sense of personal stake in opposing the efforts of the leading anti-same-sex marriage organizations.

Second, educating voters about the same-sex opponents' definition of traditional marriage and exposing the traditional marriage agenda would provide same-sex marriage proponents with a cultural frame that is easily accessible to voters. As noted above,

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<sup>390</sup> See *supra* subparts III.1.A & III.1.B.

<sup>391</sup> See *supra* notes 367–368, 372.

<sup>392</sup> See *supra* Part II (detailing the historical and current efforts to maintain the other requirements of traditional marriage).

<sup>393</sup> See *infra* Part IV (identifying likely classes of individuals who may be negatively affected by the restoration of traditional marriage).

whereas the primary frames set forth by same-sex marriage proponents rely in significant part on broad legal notions, such as equality and non-discrimination,<sup>394</sup> the protection frame advanced by same-sex marriage opponents is a purely cultural frame.<sup>395</sup> Dismantling the culturally accessible protection frame crafted by same-sex marriage opponents could provide same-sex marriage proponents with their own effective cultural frame. Educating voters about the true meaning of traditional marriage would demonstrate to voters that the way our culture and society view marriage has changed dramatically over the years.<sup>396</sup> Voters would learn that U.S. society and culture have chosen repeatedly to reject traditional marriage by, among other things, allowing individuals to choose to end their marriages, removing legal penalties for adultery, granting women and wives equal rights and opportunities, repealing laws that mandate traditional marital gender roles, and removing restraints on married couples' choices regarding procreation.<sup>397</sup> Exposing the traditional marriage agenda would demonstrate to voters that the leading anti-same-sex marriage organizations are working towards a definition of marriage that our culture has in many ways rejected.<sup>398</sup> In addition, many voters would see that they too have rejected many aspects of traditional marriage and would not favor a return to it.<sup>399</sup> Thus, the cultural argument set forth by same-sex marriage opponents would quite possibly be turned on its head, resulting in an effective new cultural frame for same-sex marriage proponents—a frame through which proponents could show the widespread cultural rejection of traditional marriage.

Finally, educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda would provide many voters with a greater personal stake in voting against same-sex marriage bans. One question that seems to have continually vexed same-sex marriage proponents is how to give voters who do not anticipate themselves or someone close to them wanting to enter into a same-sex marriage the type of personal stake in the issue that would lead them to vote in favor of same-sex marriage.<sup>400</sup> Same-sex marriage proponents should take note of the success their opponents have had in using the protection frame to give voters a sense of self-interest in opposing same-sex marriage and respond with a frame of their own that shows voters how supporting the traditional marriage agenda may actually undermine their personal interests. Alerting voters to the other requirements of traditional marriage and the efforts undertaken by the leading anti-same-sex marriage organizations to restore such requirements could be a helpful strategy in accomplishing this goal, since many of the requirements would affect certain classes of voters more directly and negatively than the opposite-sex requirement stressed in anti-same-sex marriage campaigns.<sup>401</sup> Specifically, if voters were educated about the true meaning of traditional marriage and the traditional marriage agenda, a significant number of them would discover that they

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<sup>394</sup> See *supra* notes 373–374 and accompanying text.

<sup>395</sup> See *supra* notes 351–354 and accompanying text.

<sup>396</sup> See *supra* Part II (detailing the history of the traditional marriage requirements).

<sup>397</sup> See *id.*

<sup>398</sup> See *id.*

<sup>399</sup> See *infra* Part IV.

<sup>400</sup> See BARCLAY ET AL., *supra* note 1, at 214 (setting forth the main frames used by same-sex marriage proponents).

<sup>401</sup> See *infra* Part IV.

actually oppose the protection of traditional marriage because the restoration of one or more of the traditional marriage requirements is undesirable to them due to its potential effects on their daily lives. Thus, if same-sex marriage proponents were able to change the dimensions of the same-sex marriage debate such that the discussion focused on whether to support or oppose the traditional marriage agenda, a significant number of voters likely would feel a greater sense of personal stake in opposing efforts to ban same-sex marriage.

Determining the specific wording used to introduce the proposed frame to the general public will likely depend in part upon the circumstances surrounding the proposed measure, including its timing and location, as well as the voter demographics and political climate of the area in which it is being introduced. However, regardless of the particular circumstances surrounding the measure, there are certain core aspects of the basic message that should remain the same. Educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda must be done through a political message that is both concise and persuasive in order to effectively reach voters. As an initial, basic matter, voters need to understand that restricting marriage to a man and a woman is just one small part of a larger plan to protect traditional marriage by severely limiting marriage-related freedoms and turning back the clock to a form of marriage in which people lack freedoms that have been determined to be essential over the years—a form of marriage which our society has in many ways resoundingly rejected. Specifically, the message should educate people about the true meaning of traditional marriage by stressing that, as a comprehensive matter, supporting the concept of “traditional marriage” lauded by the anti-same-sex marriage campaigns means supporting a marital structure where men and women have to adhere to traditional marital gender roles and exist in separate spheres, people are severely limited with regard to their ability to leave unhealthy or unhappy marriages, those who engage in sex outside of marriages face severe criminal prosecutions and civil penalties, and married couples’ meaningful choice with regard to procreation is limited.<sup>402</sup> In addition, while it would be impractical within the basic message initially advanced to educate voters as to every effort the traditional marriage proponents are currently taking to limit marital freedoms in order to protect traditional marriage, voters should be given concrete examples of the most significant and controversial efforts to reinstate the other requirements of traditional marriage. Subsequent messages advanced after voters have had a chance to absorb the initial message could then identify additional examples of efforts undertaken by the traditional marriage proponents to protect traditional marriage.

Setting forth an initial message such as this that addresses the broad overall goals of the traditional marriage agenda is optimal for reaching the greatest amount of voters through one basic message. It is likely that many voters receiving this initial message regarding the litany of freedoms the traditional marriage agenda is working to limit in order to protect traditional marriage will focus on and remember the traditional marriage

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<sup>402</sup> The goals of the traditional marriage agenda involve limiting the *meaningful* choice of married couples with regard to procreation by, among other things: institutionalizing a system that rewards married couples who engage in greater procreation and penalizes those who cannot, or choose not to, procreate; requiring spousal notification in the abortion context; and creating an environment where marriage without procreation is socially unacceptable. *See supra* notes 259–267.

agenda's work with regard to a specific requirement or requirements that, based upon their personal interests, they deem to be the most undesirable. This means that even if the efforts of the traditional marriage agenda with regard to one of the traditional marriage requirements does not register with a particular voter as something to which he or she is strongly opposed, there is still a good chance that the efforts with regard to one or more of the other three traditional marriage requirements will resonate with that voter. Sending a message regarding the comprehensiveness of the traditional marriage agenda in restricting marriage-related freedoms across the board thus seems like the best strategy in terms of maximizing the number of voters reached through one initial message.

After setting forth the initial message, however, in many cases it will make sense for subsequent messages to hone in on the traditional marriage agenda's efforts with regard to just one or two of the traditional marriage requirements. This type of strategic decision would be made based upon voter demographics in the jurisdiction in which the vote is to occur and other relevant factors. For example, in a part of the country where relatively large numbers of women are attending college and graduate school and attaining success in the workforce and marital gender roles are widely viewed as a discriminatory relic of the past, same-sex marriage proponents could give extra attention to the gender role requirement of traditional marriage and the efforts of the traditional marriage agenda with regard to this requirement in setting forth the proposed message. Regardless of whether certain traditional marriage requirements are emphasized more than others in subsequent messages, however, the core underlying message advanced throughout the campaign with regard to the traditional marriage agenda will remain the same. Namely, that we as a country have decided that a form of marriage that grants the two individuals involved basic freedoms with regard to how they structure and exist within their marriage is not only optimal, but essential. The traditional marriage agenda, however, is trying to change this in a way that would affect many voters, including those who do not anticipate entering into a same-sex marriage, in specific concrete ways. For this reason, the traditional marriage agenda presents a threat that is much greater and more encompassing than most people realize, and therefore voters should be extremely wary of supporting it in any way.

#### IV. IDENTIFYING POTENTIAL CLASSES OF VOTERS WHO WOULD BE INFLUENCED BY THE PROPOSED FRAME

As the previous Part discussed, educating the public about the true meaning of traditional marriage and exposing the traditional marriage agenda would be an effective strategy for same-sex marriage proponents, in part because it would give many voters a greater personal stake in opposing the efforts of the traditional marriage agenda. More specifically, many voters would find that, based upon their personal interests, they actually oppose the protection of traditional marriage because the restoration of one or more of the traditional marriage requirements is undesirable to them due to its potential effects on their daily lives. This Part looks at each of the core requirements of traditional marriage discussed above, identifying specific classes of voters who are likely to oppose the traditional marriage agenda due to its effort with regard to that particular requirement.

##### *A. Classes of Voters Who Would Oppose the Traditional Marriage Agenda Due to Its Efforts to Protect the Permanence Requirement of Traditional Marriage*

There are multiple classes of voters who would potentially feel a personal stake in opposing the traditional marriage agenda because of its attempts to maintain the permanence requirement of traditional marriage through efforts to repeal no-fault divorce, introduce pre-divorce waiting periods and mandatory counseling, require mutual consent for a divorce, and require couples to “show ‘good faith’ efforts or ‘due diligence’” to save their marriages.<sup>403</sup> One such class of voters consists of married individuals considering divorce. It is estimated that at least forty percent of married individuals have considered leaving their spouses.<sup>404</sup> People who have considered ending their marriage presumably have a personal stake in opposing legislation that makes it significantly more difficult, complicated, and costly to do so. In addition, the many individuals who anticipate getting married someday and who value the freedom that they would have to end their marriages, if necessary, without having to prove fault, obtaining their spouse’s consent, or undergoing waiting periods and mandatory counseling, would also likely have a personal stake in opposing this aspect of the traditional marriage agenda. The significant value placed on the freedom to divorce by individuals across the country is reflected by the failure of all but three states to adopt covenant marriage laws and the extremely low percentage of couples who have chosen to enter into covenant marriages in the states where they are available.<sup>405</sup>

Another likely class of voters who would have a personal stake in opposing efforts to protect the permanence requirement of traditional marriage consists of individuals who have initiated or mutually agreed upon divorces with their former spouses. Today, roughly one in five adults has already undergone a divorce.<sup>406</sup> Individuals who have made the decision to obtain a divorce most likely place great value on the freedom they had to do so and would not want to limit such freedoms in the future for themselves or their loved ones. Individuals who have been victims of emotional or physical abuse within marriage and have subsequently divorced abusive spouses seemingly would be especially likely to oppose efforts to require mutual consent, waiting periods, or proof of fault in order to divorce. Since over one-third of all adults between the ages of fifty and sixty-nine have undergone a divorce,<sup>407</sup> stressing the efforts of the leading anti-same-sex marriage organizations to protect the permanence requirement of traditional marriage could be an effective way for same-sex marriage proponents to reach older generations of voters. This is important because, as a class, older voters have been much more likely than younger voters to vote in favor of same-sex marriage bans.<sup>408</sup>

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<sup>403</sup> See *supra* subpart II.A.2.

<sup>404</sup> Brent A. Barlow, *Marriage Crossroads: Why Divorce Is Often Not the Best Option (Rationale, Resources, and References)*, 2 (2003), <http://highplainscoalition.com/uploads/divorcemaynotbethebestoption.pdf>.

<sup>405</sup> See *supra* note 74 and accompanying text.

<sup>406</sup> See *supra* note 73 and accompanying text; Rose M. Kreider & Renee Ellis, *Number, Timing, and Duration of Marriages and Divorces: 2009*, U.S. CENSUS BUREAU, 12 (May 2011), <http://www.census.gov/prod/2011pubs/p70-125.pdf>.

<sup>407</sup> Kreider & Ellis, *supra* note 406, at 13.

<sup>408</sup> See Paul Steinhauser, *CNN Poll: Generational Gap on Gay Marriage*, CNN POLITICS (May 4, 2009), <http://politicalticker.blogs.cnn.com/2009/05/04/cnn-poll-generational-gap-on-gay-marriage/> (noting that, according to the CNN/Opinion Research Corporation poll, “[a]mong those 18 to 34 years old, 58 percent said same-sex marriages should be legal. That number drops to 42 percent among respondents 35 to 49

*B. Classes of Voters Who Would Oppose the Traditional Marriage Agenda Due to Its Efforts to Protect the Gender Roles Requirement of Traditional Marriage*

There are likely a significant number of individuals who would have a personal stake in opposing the traditional marriage agenda's efforts to maintain the gender roles requirement of traditional marriage. The traditional marriage agenda's work in this context has included, among other things, opposing legal reforms that promote equality for women and wives, supporting legislation that casts husbands and wives into traditional gendered provider/dependent marital roles, and generally promoting and speaking out in favor of such roles.<sup>409</sup> As Susan Appleton has noted, same-sex marriage campaigns have done little in terms of pointing out the connection between same-sex marriage rights and gender equality, even as same-sex marriage opponents have specifically cited the maintenance of traditional gender roles as part of the reason for their opposition to same-sex marriage.<sup>410</sup> Exposing the traditional marriage agenda's approach to gender roles could help same-sex marriage proponents to draw this connection for voters.

The first likely class of voters who would have a personal stake in opposing the traditional marriage agenda's efforts to protect the gender roles requirement of traditional marriage consists of married people who have chosen not to adhere to such roles. As current employment statistics demonstrate, today the vast majority of married couples do not adhere to the gender roles requirement of traditional marriage. The traditional marital situation—in which the husband is employed and the wife does not work outside the home—exists in only nineteen percent of marriages, and for the first time in decades, husbands are actually more likely than wives to be unemployed.<sup>411</sup> Research indicates both that the majority of husbands believe “spouses should share breadwinning” and that in fact, husbands are taking on more housework than ever before.<sup>412</sup> In most marriages both spouses work, and in 2009, working wives on average brought home about half of their families' earnings.<sup>413</sup> Whether their family structures are dictated by preference or necessity, married individuals who do not adhere to traditional marital gender roles would likely have a significant personal stake in opposing efforts to penalize or limit their choice to exist in such family structures. Moreover, certain research indicates that African-Americans are especially likely to exist outside of traditional marital gender roles, and thus a significant number of African-American voters may feel a sense of personal stake in opposing the traditional marriage agenda's efforts to restore traditional

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years old, and to 41 percent for those 50 to 64 years of age. The poll indicates that only 24 percent of Americans 65 and older support recognizing same-sex marriages as valid.”)

<sup>409</sup> See *supra* subpart II.C.2

<sup>410</sup> See generally Appleton, *supra* note 389.

<sup>411</sup> U.S. DEPT. OF LABOR, *supra* note 176; Heather Boushey, *Not Working: Unemployment Among Married Couples*, CENTER FOR AMERICAN PROGRESS, <http://www.americanprogress.org/issues/2011/05/pdf/maritalunemployment.pdf> 1 (last visited July 5, 2011).

<sup>412</sup> CELELLO, *supra* note 5, at 160; *Gender Roles and Marriage: A Fact Sheet*, NATIONAL HEALTHY MARRIAGE RESOURCE CENTER, 1, 3, <http://www.healthymarriageinfo.org/docs/genderroles.pdf> (last visited July 5, 2011).

<sup>413</sup> See Boushey, *supra* note 411, at 1–2.

gender roles.<sup>414</sup> Since opposition to same-sex marriage has been comparatively high among African-American voters, drawing attention to the traditional marriage agenda's efforts to maintain marital gender roles could help same-sex marriage proponents to engage voters who they have previously been unsuccessful in reaching.<sup>415</sup>

Another large class of voters likely to have a personal stake in opposing the traditional marriage agenda's efforts to restore traditional gender roles is men and women who anticipate possibly getting married but who do not anticipate subscribing to traditional marital gender roles. With more women than men entering institutions of higher education and women currently constituting about half of the overall workforce and more than half of all workers in high-paying management, professional, and related occupations, many unmarried women likely anticipate being employed during their marriages.<sup>416</sup> Moreover, many unmarried men likely anticipate that their future wives will work outside of the home. In fact, research indicates that today most men and women disapprove of traditional marital gender roles<sup>417</sup> and approve of wives earning more than their husbands.<sup>418</sup>

In addition, the gender role-related efforts of the traditional marriage agenda, if successful, would affect not only husbands and wives, but also unmarried men and women (regardless of whether they anticipate getting married) by, for example, keeping men and women from being protected by equal rights legislation and sending the message to society that traditional gender roles and separate spheres for men and women are optimal.<sup>419</sup> Thus, women and men who in some way do not adhere to traditional gender roles would feel a sense of personal stake in opposing the gender role reinforcing efforts of the traditional marriage agenda. Overall, there it is likely that a wide variety of individuals would feel a significant sense of personal stake in opposing the traditional marriage agenda due to its efforts to protect the gender roles requirement of traditional marriage.

### *C. Classes of Voters Who Would Oppose the Traditional Marriage Agenda Due to Its Efforts to Protect the Procreation Requirement of Traditional Marriage*

Alerting the public that the traditional marriage agenda is not just paying lip service to the procreation requirement of traditional marriage by relying on it to oppose same-sex marriage but instead actively pursuing the protection of this requirement through other, non-related avenues would likely provide many individuals with a personal stake in

<sup>414</sup> *Gender Roles and Marriage*, *supra* note 412, at 4; Bahira Sherif Trask, *Traditional Gender Roles*, SLOAN WORK & FAMILY RESEARCH NETWORK ENCYCLOPEDIA (2006), [http://wfnetwork.bc.edu/encyclopedia\\_entry.php?id=3816&area=All](http://wfnetwork.bc.edu/encyclopedia_entry.php?id=3816&area=All).

<sup>415</sup> William Saletan, *Original Skin: Blacks, Gays, and Immutability*, SLATE (Nov. 13, 2008), <http://www.slate.com/id/2204534/> (reporting that seventy percent of African-American voters voted in favor of the same-sex marriage ban in California in 2008); Shelby Grad, *70% of African Americans Backed Prop. 8, Exit Poll Finds*, L.A. TIMES (Nov. 5, 2008), <http://latimesblogs.latimes.com/lanow/2008/11/70-of-african-a.html>.

<sup>416</sup> U.S. DEPT. OF LABOR, *supra* note 174.

<sup>417</sup> Sharon Jayson, *Gender Roles See a 'Conflict' Shift in Work-Life Balance*, USA TODAY, Mar. 26, 2009, [http://www.usatoday.com/news/health/2009-03-26-work-life-balance\\_N.htm](http://www.usatoday.com/news/health/2009-03-26-work-life-balance_N.htm).

<sup>418</sup> Linn, *supra* note 171.

<sup>419</sup> *See supra* subpart II.C.2.

opposing the traditional marriage agenda. The most obvious class of voters who would feel a sense of personal stake in opposing the traditional marriage agenda's efforts to maintain the procreation requirement consists of married individuals who have decided to remain childless. As noted earlier, married couples are increasingly making the decision not to have children.<sup>420</sup> Although societal acceptance of voluntary childlessness is increasing,<sup>421</sup> couples who have made the decision to remain childless report feeling stigmatized and devalued by society.<sup>422</sup> The traditional marriage agenda's efforts likely result in greater stigmatization for such individuals, as the agenda continually engages in efforts to send the message that procreation is the core purpose of marriage and the duty of married couples, promotes legislation that would reward families for procreating by disseminating benefits based upon the number of children a married couple has, and supports limitations on the rights of married individuals to choose not to procreate.<sup>423</sup> Thus, married individuals who are voluntarily childless likely would feel a significant sense of personal stake in opposing the traditional marriage agenda's efforts to encourage or mandate that married couples procreate.

A similar class of voters who would likely have a personal stake in opposing the traditional marriage agenda's efforts to protect the procreation requirement of traditional marriage consists of unmarried individuals who anticipate possibly getting married but do not plan to have children. Like married couples who have decided to remain childless, unmarried individuals who anticipate possibly getting married and who plan to remain childless likely would feel a sense of personal stake in opposing the traditional marriage agenda's efforts to protect the procreation requirement of traditional marriage by, among other things, granting benefits to married couples based upon the number of children born to the marriage.

Unmarried individuals who have children and individuals who anticipate possibly having children while unmarried also likely would feel a sense of personal stake in opposing the traditional marriage agenda's efforts to protect the procreation requirement of traditional marriage. In recent years, around forty-one percent of all births in the United States were to unmarried mothers,<sup>424</sup> and thirty-six percent of women who gave birth were separated, widowed, divorced, or never married.<sup>425</sup> As noted above, the traditional marriage agenda has advocated rewarding married couples based upon the number of children they bear in order to encourage marital procreation.<sup>426</sup> Unmarried individuals with children presumably would feel a strong sense of personal stake in opposing policies that disadvantage their families, by rewarding their married counterparts, but not them, for engaging in exactly the same behavior—bearing children.

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<sup>420</sup> See *supra* notes 251–253.

<sup>421</sup> Chancey, *supra* note 251, at 2.

<sup>422</sup> Eddy Sass, Re-constructing the Image of the Voluntarily Childfree: An Ethnographic Exploration of Media Representation and the Childless by Choice, 5 (June 1, 2004) (unpublished M.A. thesis, University of South Florida), available at scholarcommons.usf.edu/cgi/viewcontent.cgi?article=2236&context=etd.

<sup>423</sup> See *supra* subpart II.D.2.

<sup>424</sup> *FastStats: Unmarried Childbearing*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2011), <http://www.cdc.gov/nchs/fastats/unmarry.htm>.

<sup>425</sup> Katie Zezima, *More Women Than Ever Are Childless, Census Finds*, N.Y. TIMES, Aug. 18, 2008, <http://www.nytimes.com/2008/08/19/us/19census.html>.

<sup>426</sup> See *supra* notes 261–262 and accompanying text.

Moreover, the traditional marriage agenda's strong messages regarding procreation as the purpose of marriage, the duty of married individuals to procreate, and the marital husband-wife family structure as the optimal family form, likely add to the stigmatization faced by unmarried individuals who have children.<sup>427</sup>

Another possible class of voters who would have a personal stake in opposing the traditional marriage agenda's efforts with regard to procreation would consist of married couples and individuals who plan to marry but are involuntarily childless as a result of infertility or age. It is estimated that approximately seven percent of married couples are infertile.<sup>428</sup> Research indicates that individuals who are involuntarily childless often report feeling stigmatized, alienated, and isolated.<sup>429</sup> While some leaders of the traditional marriage agenda have expressed disagreement with the notion that since procreation is a requirement or purpose of marriage, couples who cannot have children should not be allowed to marry,<sup>430</sup> at least one of these organizations has suggested the possibility of restricting marriage to couples in their procreative years<sup>431</sup> and has stated that "society's interest in marriages that do not produce children is less than its interest in marriages that result in the reproduction of the species."<sup>432</sup> Moreover, it is likely that the messages sent by the traditional marriage agenda touting the necessity of marital procreation and promoting policies that reward families based upon the number of children they have, add

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<sup>427</sup> Shirley H. Liu & Frank Heiland, *Should We Get Married? The Effect of Parents' Marriage on Out-of-Wedlock Children*, ECON. INQUIRY (forthcoming 2011) (manuscript at 6, 17), available at [http://mailer.fsu.edu/~fheiland/marriage\\_appendix.pdf](http://mailer.fsu.edu/~fheiland/marriage_appendix.pdf). Although it is beyond the scope of this Article, there also have been significant efforts by the traditional marriage agenda to provide disincentives for non-marital procreation, which, if exposed, would likely give many unmarried parents a sense of personal stake in opposing the traditional marriage agenda. See, e.g., Patrick Fagan, Perspective, *A Rerum Novarum for Our Time*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/op-eds/a-rerum-novarum-for-our-time> (last visited July 6, 2011) (raising the possibility of enacting tax legislation that significantly favors "always-intact" marital families and requiring the needy to adhere to "just norms" of the traditional family in order to receive financial assistance); Maggie Gallagher, *The Age of Unwed Mothers: Is Teen Pregnancy the Problem?*, INSTITUTE FOR AMERICAN VALUES, 44 n.184, 45 (1999), <http://www.americanvalues.org/Teen.PDF> (suggesting that Title IX should be reformed so that schools can treat pregnant students differently and in accordance with community norms regarding unwed childbearing by, for example, sending pregnant students to separate schools or making them ineligible for extra-curricular activities); Moira Gaul & Tony Perkins, Perspective, *Spending Too Little on Abstinence*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=PV07E01> (last visited July 5, 2011) (promoting abstinence only sex education programs). Historically, the law has also worked in various ways to discourage non-marital childbearing. See *supra* note 257 (listing a few examples of how the law has discouraged non-marital childbearing).

<sup>428</sup> *Key Statistics from the National Survey of Family Growth*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/nchs/nsfg/abc\\_list\\_i.htm](http://www.cdc.gov/nchs/nsfg/abc_list_i.htm) (last visited July 5, 2011).

<sup>429</sup> TOM MASON, STIGMA AND SOCIAL EXCLUSION IN HEALTHCARE 218–19 (2001).

<sup>430</sup> See, e.g., Maggie Gallagher, *Maggie: Why Don't We Ban Infertile Couples from Marriage?*, NOM BLOG (Dec. 3, 2010), <http://www.nomblog.com/2365/> (explaining that marriage should not be limited to couples who are capable of procreation "because doing so would almost surely decrease the likelihood that children are born to and raised by married couples" since "[m]ore people attracted to the opposite sex would be refused marriage, and so would be more likely to create out of wedlock children as a result of alternative sexual relationships.").

<sup>431</sup> See *supra* note 259 and accompanying text.

<sup>432</sup> *What's Wrong with Letting Same-Sex Couples Legally "Marry?"*, FAMILY RESEARCH COUNCIL, <http://web.archive.org/web/20101219014723/http://www.frc.org/whats-wrong-with-letting-same-sex-couples-marry> (last visited July 6, 2011).

to the sense of isolation experienced by many married couples who cannot procreate. Consequently, many individuals who are involuntarily childless may feel a personal stake in opposing the traditional marriage agenda due to its efforts to maintain procreation as a requirement of marriage.

*D. Classes of Voters Who Would Oppose the Traditional Marriage Agenda Due to Its Efforts to Protect the Monogamy Requirement of Traditional Marriage*

There are also certain classes of voters who likely would feel a sense of personal stake in opposing the traditional marriage agenda due to its efforts to maintain the monogamy aspect of traditional marriage through the promotion of criminal and civil penalties for adultery.<sup>433</sup> It is estimated that a substantial percentage of spouses engage in sexual relations outside of their marriages.<sup>434</sup> Based on the prevalence of such conduct, it is unsurprising that most Americans do not believe adultery should be criminalized.<sup>435</sup> It seems unlikely that individuals who have engaged in sexual relations outside of marriage would vote in favor of criminal or civil penalties for such behavior; rather, such individuals presumably would have a significant personal stake in ensuring that such practices were not penalized.

In addition, some married couples agree to structure their marriages to permit outside sexual relationships.<sup>436</sup> Research has indicated that as many as five to six percent of married couples have such arrangements.<sup>437</sup> Individuals who are in these kinds of marriages or who anticipate possibly having such an arrangement with a spouse in the future likely would feel a sense of personal stake in opposing criminal or civil penalties against married individuals for engaging in sexual relations outside of their marriage.

In sum, if voters are educated about the true meaning of traditional marriage and the traditional marriage agenda is exposed, the leading anti-same-sex marriage organizations will seemingly have two options: (1) acknowledging the full definition of traditional marriage and standing behind their efforts to maintain the other requirements of traditional marriage, thereby changing voters' understanding of the protection frame and providing more voters with a sense of personal stake in opposing the traditional marriage agenda,<sup>438</sup> or (2) abandoning their efforts to maintain the other requirements of

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<sup>433</sup> See *supra* subpart II.B.2.

<sup>434</sup> Some studies indicate that as many as forty percent of wives and fifty percent of husbands will have sexual relations outside of their marriages, while other studies suggest the number is closer to twenty to twenty-five percent of all spouses. See *supra* notes 289–290 and accompanying text.

<sup>435</sup> Melanie C. Falco, Note, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 746 (2004); Siegel, *supra* note 6, at 56.

<sup>436</sup> Russell Goldman, *Are Open Marriages More Successful than Traditional Couplings?*, ABC NEWS (Aug. 10, 2007), <http://abcnews.go.com/US/LifeStages/story?id=3464575&page=1>.

<sup>437</sup> *Id.*; Falco, *supra* note 435, at 743 (“In addition, five percent of Americans have had ‘open marriages,’ in which extramarital intercourse is explicitly permitted.”); Viator, *supra* note 270, at n.147; see also Curtis Bergstrand & Jennifer Blevins Williams, *Today's Alternative Marriage Styles: The Case of Swingers*, ELECTRONIC J. HUM. SEXUALITY (Oct. 10, 2000), <http://www.ejhs.org/volume3/swing/body.htm> (“Hunt (1975) and Weiss (1983) estimate that two to four percent of married couples have engaged in swinging at least on an occasional basis.”).

<sup>438</sup> Others have suggested (although how serious they are is unclear) the possibility of putting same-sex marriage opponents in a similar position by introducing ballot measures that ban divorce or require married

traditional marriage, telling voters that they do not seek to maintain all of the requirements of traditional marriage—only the opposite sex requirement, and ceasing to use the protection frame. Either option benefits same-sex marriage proponents. If the first option is pursued, pro-same-sex marriage campaigns benefit because same-sex marriage opponents' primary frame will take on a negative connotation for many voters, and more voters will have a personal stake in opposing the traditional marriage agenda. Same-sex marriage proponents also would benefit under the second option, because the primary frame set forth by same-sex marriage opponents, which has proven so effective in the past, would disappear along with some of the most frequently used arguments against same-sex marriage: the necessity of maintaining the traditional marriage requirements of gender roles and procreation.

## V. CONCLUSION

In order for the same-sex marriage movement to attain greater success, it must do a better job of swaying public opinion on the issue and engaging voters it has struggled to reach in the past. The issue of same-sex marriage has been, and will continue to be, put to a popular vote. Educating the public about the true meaning of traditional marriage and the full scope of the traditional marriage agenda will provide an effective response to one of the primary frames set forth by anti-same-sex marriage campaigns and inject pro-same-sex marriage campaigns with an accessible cultural frame that gives a wider variety of voters a sense of personal stake in the issue.

Even those in the feminist and queer communities who disfavor marriage as a legal category should not be opposed to the strategy set forth here. As Suzanne Kim recently noted, advances in marriage equality work to dismantle the characteristics of traditional marriage, such as gender hierarchy, that are often critiqued by those who oppose marriage as a legal category.<sup>439</sup> The particular strategy advanced here, exposing the traditional marriage agenda, helps to do this work as well—it challenges and works toward the explicit societal rejection of many of the objectionable traditional marriage requirements.

Overall, it is time to challenge the notion of protecting traditional marriage. In today's society most people exist in marriages that are a far cry from the true traditional marriages of the past. The definition of marriage advanced by U.S. society and the legal system has changed drastically over the years. Acknowledging these changes will pave the way for a new, more inclusive definition of marriage. It will also lead to a societal reevaluation of the kinds of relationships that should be deemed worthy of legal recognition. Even if state legislatures and courts continue to advance marriage equality, the movement will not achieve full success, either as a matter of legal recognition or societal acceptance, until it does a more effective job of reaching the public.

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couples to procreate. *See, e.g.*, Laura Fishman, *John Marcotte in California Tries to Ban Divorce*, PHOENIX FAM. L. NEWS BLOG (July 19, 2010), <http://phoenixfamilylawnews.com/2010/07/john-marcotte-in-california-tries-to-ban-divorce.html>; Lornet Turnbull, *Initiative Ties Marriage, Procreation*, SEATTLE TIMES (Feb. 6, 2007), [http://seattletimes.nwsources.com/html/localnews/2003558717\\_nokids06m.html](http://seattletimes.nwsources.com/html/localnews/2003558717_nokids06m.html).

<sup>439</sup> Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J. L. & GENDER 37, 40–45 (2011).