

**IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND**

**GITANJALI DEANE & LISA POLYAK;  
ALVIN WILLIAMS & NIGEL SIMON;  
TAKIA FOSKEY & JOANNE RABB;  
JODI KELBER-KAYE & STACEY KARGMAN-KAYE;  
DONNA MYERS & MARIA BARQUERO;  
JOHN LESTITIAN;  
CHARLES BLACKBURN & GLEN DEHN;  
STEVEN PALMER & RYAN KILLOUGH;  
PATRICK WOJAHN & DAVID KOLESAR; and  
MIKKOLE MOZELLE & PHELICIA KEBRAU,**

**Plaintiffs,**

**v.**

**Case No. 24-C-04-005390**

**FRANK CONWAY, in his official capacity as  
Baltimore City Court Clerk;  
ROSALYN PUGH, in her official capacity as  
Prince George's County Circuit Court Clerk;  
EVELYN ARNOLD, in her official capacity as  
St. Mary's County Circuit Court Clerk;  
DENNIS WEAVER, in his official capacity as  
Washington County Circuit Court Clerk; and  
MICHAEL BAKER, in his official capacity as  
Dorchester County Circuit Court Clerk,**

**Defendants.**

**BRIEF OF *AMICUS CURIAE* CITIZENS FOR TRADITIONAL FAMILIES**

C. Paul Smith  
110 North Washington Street, Suite 402  
Rockville, MD 20850  
301-762-0033 (office)

Marriage Law Foundation  
Monte N. Stewart  
William C. Duncan  
251 River Park Drive, Suite 175  
Provo, Utah 84604  
801-227-7878 (office)

## TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>1</b>
<b>ARGUMENT</b>	<b>2</b>
<b>I. THE SOCIAL INSTITUTIONAL REALITIES OF MARRIAGE SHOW THE MEMO'S BASIC PREMISE – THAT MARRIAGE IS NOTHING MORE THAN A CHOICE MADE BY TWO ADULTS TO PUBLICLY EXPRESS MUTUAL COMMITMENT – TO BE FALSE.</b>	<b>3</b>
<b>II. THE MEMO IGNORES THE SOCIAL INSTITUTIONAL REALITIES OF THE REDEFINITION IT URGES.</b>	<b>11</b>
<b>III. THE MEMO IS DEFECTIVE IN ITS TREATMENT OF THE STATE'S INTEREST IN MARRIAGE RELATIVE TO PROCREATION.</b>	<b>15</b>
<b>IV. THE MEMO'S RELIANCE ON THE ANTI-MISCEGENATION CASES IS MISPLACED.</b>	<b>22</b>
<b>CONCLUSION</b>	<b>31</b>

## INTRODUCTION

In this case, plaintiffs are asking this court to redefine marriage from the union of a man and a woman (man/woman marriage) to the union of any two persons (genderless marriage). Their position is that Maryland's Constitution does not allow this State, after having done so since its beginning, to continue sustaining and nurturing a vital social institution of betterment defined at its core as the union of a man and a woman and authoritatively called *marriage*. In order to press their case, plaintiffs have had to adopt a shrunken view of marriage profoundly at odds with marriage's institutional logic and purposes. It seems that shrunken view is advanced in order to avoid a discussion of the social institutional realities that undercut the entire redefinition project.

*Amicus curiae* is Citizens for Traditional Families (CTF), a Maryland-based citizens' organization that promotes the welfare of families and children. CTF does this by working to preserve and strengthen the vital social institution of man/woman marriage. CTF believes that a decision redefining marriage in Maryland will change the social institution of marriage in ways that will prevent the institution from performing its vital functions, with consequent harm to society and, particularly, children.

While the Memorandum in Support of Defendants' Motion for Summary Judgment focuses on the proper legal standards applicable in this matter, we will focus on the social institutional realities of marriage and the implications of those realities for this case.

## ARGUMENT

Plaintiffs' Memorandum in Support of their Motion for Summary Judgment (the Memo) begins with a catalog of their individual interests in securing a redefinition of marriage. Memo at 2-20. Then the Memo proceeds on the view that marriage is *nothing* more than an ever-changing legal construct based on and serving adult choices. Indeed, the Memo's conclusion characterizes marriage as "when a couple makes a commitment of the highest order to each other." Memo at 78. Thus, the Memo presupposes to be "valid" a socially contested theory of marriage known in the literature as "the close personal relationship" theory or model. That theory views the marriage relationship as, and only as, an "adult dyadic [two-person] relationship characterized by interdependence, mutuality, intimacy, and endurance" and therefore as a relationship "stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved."<sup>1</sup> The profound error of the Memo's presupposition (that the close personal relationship theory must be accepted as "valid") is explained elsewhere<sup>2</sup>; for our limited purposes here, what is important to understand is this: Only by deploying this radically constricted notion of what marriage "is" can the Memo carry off its argumentation, including its attempt to smear the institution of man/woman marriage by equating it with racist, antimiscegenation laws.

The Memo has another and related fatal flaw. It assiduously ignores the social institutional realities of marriage, that is, the uncontroversial realities flowing from the bedrock

---

<sup>1</sup> Monte N. Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 95-96 (2004), available at [www.manwomanmarriage.org](http://www.manwomanmarriage.org) (hereafter Stewart).

<sup>2</sup> *Id.* at 60-61, 85-86, 95-99; Dan Cere, *The Future of Family Law: Law and the Marriage Crisis in North America* (Council on Family Law 2005), available at [http://www.marriagedebate.com/pdf/future\\_of\\_family\\_law.pdf](http://www.marriagedebate.com/pdf/future_of_family_law.pdf).

reality that marriage is a social institution. These social institutional realities counsel this court to reject plaintiffs' redefinition project – which is probably why the Memo ignores the realities. To understand the uncontroversial social institutional realities is to understand Maryland's profoundly rational and compelling interests in using its law to continue to sustain and nurture, as it has always done, the vital social institution of man/woman marriage.

**I. THE SOCIAL INSTITUTIONAL REALITIES OF MARRIAGE SHOW THE MEMO'S BASIC PREMISE – THAT MARRIAGE IS NOTHING MORE THAN A CHOICE MADE BY TWO ADULTS TO PUBLICLY EXPRESS MUTUAL COMMITMENT – TO BE FALSE.**

As already noted, the Memo's pervasive premise is that marriage is nothing more than a choice made by two adults to publicly express mutual commitment. As a consequence, the Memo has a stubborn blind spot as to what Maryland's interests in marriage are. In fact, the only statement addressing that question comes late in the Memo, in the context of arguing that the State's interest in protecting children has no relevance to marriage. This statement describes marriage in and only in individualistic and adult-centered terms: “[T]he State's interest in marriage is to support couples and their children (if any), whether or not their children were brought into their families through ‘traditional’ procreation.” Memo at 73.

Marriage, however, is much more than a state ratification or celebration of an individual choice – it is a vital social institution with broad and important social purposes.<sup>3</sup> Those purposes constitute the rational and compelling governmental interests at play here. But to fairly understand those purposes requires engagement with what we call “the social

---

<sup>3</sup> *E.g.*, *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“[T]he marriage relation [is] an institution more basic in our civilization than any other.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Marriage is a vital social institution.”).

institutional realities” of marriage, that is, the realities flowing from the bedrock truth that marriage is a vital social institution. And that is where we now turn.

Because marriage is a social institution, it shares with all other social institutions certain salient features.<sup>4</sup> One of the most important features is this: social institutions are constituted in large measure by shared public meanings. An institution is “constituted by complex webs of social meaning.”<sup>5</sup> John Searle explains this social reality using the example of another social institution, money:

[W]e can say, for example, in order that the concept ‘money’ apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, *marriages*, buying and selling, political offices, and so on.<sup>6</sup>

The shared meanings that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others. “An institution is a *web of interrelated norms* –formal and informal—governing social relationships.”<sup>7</sup>

Social institutions shape and guide individuals’ identities, perceptions, aspirations, and conduct. An institution “supplies to the people who participate in it what they should aim for,

---

<sup>4</sup> What follows in this section tracks in part the work set out in Monte N. Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving* 2005 BYU L. REV. 555, 560-67 (2005), available at [www.manwomanmarriage.org](http://www.manwomanmarriage.org) (hereafter Stewart & Duncan).

<sup>5</sup> Stewart at 75.

<sup>6</sup> JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995) (emphasis added).

<sup>7</sup> Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998).

dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside.”<sup>8</sup> This profound influence ought not be underestimated; institutions “shape[] what those who participate in [them] think of themselves and of one another, what they believe to be important, and what they strive to achieve.”<sup>9</sup> Thus, “an institution guides and sustains individual identity in the same way as a family, forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual’s possibilities depend on the opportunities opened up within the institution to which the person belongs.”<sup>10</sup>

But inasmuch as human societies create and sustain social institutions, a society can change its social institutions. “Institutions can be changed in the sense that they will necessarily change if sufficiently many individuals try to change them.”<sup>11</sup> And because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.

An individual may withdraw his deposit from a bank, or break the law, or the rules [of] a game, without causing the change or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective [without causing that change or collapse]. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this.<sup>12</sup>

---

<sup>8</sup> Stewart at 111.

<sup>9</sup> *Id.*

<sup>10</sup> HELEN REECE, *DIVORCING RESPONSIBLY* 185 (2003).

<sup>11</sup> EERIK LAGERSPETZ, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* 28 (1995).

<sup>12</sup> Eerik Lagerspetz, *On the Existence of Institution*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Eerik Lagerspetz et al. eds., 2001).

Just as social institutions can be changed or reinforced, social institutions can be entirely dismantled.

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.<sup>13</sup>

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is magnified by its authoritative voice.<sup>14</sup> And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution. Regarding the reinforcing function, Joseph Raz observes:

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.<sup>15</sup>

Use of the law to reinforce or alter or extinguish the shared public meanings that constitute a social institution is a political act. As Edward Schiappa notes, "Definitions put into

---

<sup>13</sup> *Id.* at 117.

<sup>14</sup> *E.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 162 (1986) ("Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 69-71 (1996).

<sup>15</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 161 (1986).

practice a special sort of social knowledge—a shared understanding among people about themselves, the objects of their world, and how they ought to use language.”<sup>16</sup> He continues: “If we look hard enough, all definitions serve some sort of interests. . . . Defining what is or is not part of our shared reality is a profoundly political act. The establishment of authoritative definitions by law or custom requires a political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.”<sup>17</sup>

To alter a social institution by altering the shared public meanings that constitute it (whether by use of the law or otherwise) is to alter—if not immediately then certainly soon—the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution being changed, the greater the changes in the individual.<sup>18</sup>

Almost universally, a shared, public, and core meaning (constituting the social institution of marriage) is that marriage is the union of a man and a woman.<sup>19</sup> That meaning has been a constitutive core of the institution in the Maryland experience. That core meaning has been and

---

<sup>16</sup> EDWARD SCHIAPPA, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003).

<sup>17</sup> *Id.* at 69–70 (citation omitted).

<sup>18</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 392 (1986).

<sup>19</sup> As put by Justice Blair in the Ontario Divisional Court decision in *Halpern v. Toronto*, 60 O.R.3d 321 (Ont. Div. Ct. 2002), *aff'd in part, rev'd in part*, 65 O.R.3d 161 (Ont. 2003) (“Anthropological, sociological and historical studies reveal that from time immemorial ‘marriage’ has *almost* universally been viewed as a monogamous union between a man and a woman.”).

continues to be influential in forming individual identity, perceptions, aspirations, and conduct in a way and to an extent that common sense readily comprehends.

[M]arriage is an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide. It negotiates a stable partnership of life and property. It seeks to manage the procreative process and to establish parental obligations to offspring. It supports the birthright of children to be connected to their mothers and fathers.

.....

Michael Foucault contends that marriage has fostered a particular type of human identity, namely, the “conjugal self.” Be that as it may, marriage has always been the central cultural site of male-female relations. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have been generated by the institution of marriage, which encodes a unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.<sup>20</sup>

Man/woman marriage is deemed to provide well, and even uniquely, a number of social goods besides those just identified. It is the only institution that can confer the status of *husband* and *wife*.<sup>21</sup> In particular, it is the only effective means to socialize and acculturate and thereby transform males into husbands — a process the institution sustains both before and after the wedding.<sup>22</sup> The institution performs the same transformative role in the creation of husband/fathers, another identity beneficially different than that of a mere male.<sup>23</sup> It also promotes (by privileging) that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>24</sup>

---

<sup>20</sup> Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE* at 11, 14.

<sup>21</sup> See F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625-26 (2003).

<sup>22</sup> See Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE* at 41, 47-48.

<sup>23</sup> See, e.g., DAVID POPENOE, *LIFE WITHOUT FATHER* 139-88 (1996).

<sup>24</sup> Stewart at 52-57.

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution.<sup>25</sup>

Much has been said and can be said about public meanings influencing, [or] constituting, social institutions, which in turn influence, even define, the human participants. All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes and activities) will intend and sustain “the social understandings, the practices, the goods, and the social selves” in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.<sup>26</sup>

The difference in constitutive meanings of necessity means that what the new institution teaches relative to individual identity, perceptions, aspirations, and conduct is substantially different from the formative instruction of the current institution of man/woman marriage. That does not mean, of course, that there is no overlap in formative instruction; the significance is in the divergence. One important divergence centers on the normativeness of married heterosexual relations and the normative exceptionality of all other forms of intimate human conduct. Another centers on the relative pre-eminence or subordination of the interests and desires of adults, on one hand, and of the interests and needs of children, on the other hand.<sup>27</sup>

---

25. Observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of these differences between the two possible institutions of marriage. This is so regardless of the observers’ own sexual, political, or theoretical orientation or preference. *See, e.g.*, LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 125 (1999); Joseph Raz, *THE MORALITY OF FREEDOM* 393 (1986); Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE* at 11–18; Douglas Farrow, *Canada’s Romantic Mistake*, in *DIVORCING MARRIAGE* at 1-5; Young & Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE* at 48-56.

26. Stewart at 77 (footnote omitted).

27. *See* Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE* at 66–67, 78; Seana Sugrue, *MARRIAGE: INSIDE AND OUT* 14–15 (paper presented at Illuminating Marriage Conference, Kananaskis, Alberta, Canada, May 18–20, 2005) (“Hence, same-sex marriage as

This repetition seems merited: These realities regarding social institutions in general and the social institution of marriage in particular are not controversial in the literature on the nature of institutions. And these social institutional realities present a starkly different picture of marriage from the one the Memo must paint in order to make its arguments. To repeat, the Memo's arguments require acceptance of an unsubstantiated assumption; the Memo requires acceptance of a false presupposition: that marriage is nothing more than a choice made by two adults to publicly express mutual commitment.<sup>28</sup> But, of course, marriage is something more,

---

well as a number of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults.”).

28 For a court to accept and then proceed on the basis of this false presupposition and thereby order the redefinition of marriage is an exercise in “vicious circularity,” as explained by Professor Douglas Farrow:

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

This argument is obviously circular, and viciously so. Certainly there can be nothing wrong with saying that, if marriage is simply a union of two persons, two persons of the same sex must not be denied a marriage license. Nor is it necessarily wrong (though it may be foolish) to write into law that marriage is, or rather will be, simply a union of two persons. It is wrong, however, to claim that we *must* write this new definition into law in order to avoid unconstitutional discrimination and equality-rights violations,

much more, than public recognition of private commitment. It is a social institution with its own logic and broad social purposes.

To give the social institutional realities of marriage their due is to reveal the error of the Memo's arguments in at least three areas: (1) the consequences of the proposed radical redefinition of marriage; (2) the rationality and importance of the marriage institution's role relative to procreation; and (3) the supposed "analogy" between laws sustaining man/woman marriage and the old racist, antimiscegenation laws. We so show in the following sections.

## **II. THE MEMO IGNORES THE SOCIAL INSTITUTIONAL REALITIES OF THE REDEFINITION IT URGES.**

The Memo ignores the relevant social institutional realities. One is this: Our society can sustain one and only one marriage institution. Society cannot, at the same time, tell the people (and especially the children) that marriage is the union of any two persons and that marriage is the union of a man and a woman. Two "coexisting" social institutions known society-wide as *marriage* is a factual impossibility. Thus, redefinition will in the process of time necessarily displace the institution of man/woman marriage and necessarily deprive society of the social goods provided, sometimes uniquely, by the old institution. So, although one may by selective reference to social institutional realities tout genderless marriage as the way to a more just and equal society, the full panoply of relevant institutional realities compels acknowledgment of the awesome price that must be paid for entry into such a radically new and different world.

---

when in fact no such discrimination or violation is possible until after the new definition [or, more accurately, the new characterization of marriage as merely a close personal relationship] is in place.

Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE* AT 98-99.

How large the price is suggested by a listing of what must of necessity be lost with the deinstitutionalization of man/woman marriage:

First, husbands and wives. Man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband (a social identity quite different from “partner”),<sup>29</sup> and thus that can transform males into husband/fathers (a category of males particularly beneficial to society).<sup>30</sup>

Second, an effective bridge over the male-female divide. “[M]arriage has always been the central cultural site of male-female relations”<sup>31</sup> and society’s primary and most effective means of bridging the male-female divide—that “massive cultural effort of every human society at all times and in all places.”<sup>32</sup>

Third, the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling.<sup>33</sup> The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security. (This important social good is discussed in more detail in Section III below.)

---

<sup>29</sup> See F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625-26 (2003)

<sup>30</sup> See, e.g., DAVID POPENOE, *LIFE WITHOUT FATHER* 139-88 (1996).

<sup>31</sup> Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE* 14.

<sup>32</sup> See Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE* at 41, 47-48.

<sup>33</sup> Stewart at 44-52.

Fourth, the effective means to make real the child's right to know and to be brought up by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult).

[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a prima facie right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.<sup>34</sup>

Fifth, authoritative encouragement of the child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute<sup>35</sup>) with the optimal outcomes deemed crucial for a child's (and hence society's) well being. These outcomes

---

<sup>34</sup> Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE* at 67.

<sup>35</sup> As Justice Sosman said in her dissenting opinion in *Goodridge*:

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

*Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 979-80 (Mass. 2003) (Sosman, J., dissenting) (citation omitted).

include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.<sup>36</sup>

Sixth, the power to officially endorse that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>37</sup>

Here is another social institutional reality ignored by the Memo:

The very act of redefinition will radically transform (not all at once, of course, but over time and probably quickly) the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Same-sex couples look to the law to let them into the privileged institution, and the law (as in [the lower court decision] ...) may want to, but it cannot; it can only give them access to a different institution of different value. Thus, the [lower court decision and others like it] ... proceed on an assumption not easily defended, that they can do what they most probably cannot do; just so, any magnanimity motivating those cases' holdings is fundamentally false. And there is another aspect of this same consequence, one affecting already married opposite-sex couples. Redefinition and no act of their own removes them from the institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our societies now know it but to pull married man/woman couples into what the media calls imprecisely “gay marriage” and this article calls genderless marriage.<sup>38</sup>

In sum, to give uncontroversial social institutional realities their due is to reveal the Memo's argumentation as profoundly misguided.

---

<sup>36</sup> Stewart at 64-70.

<sup>37</sup> Id. at 54-57. Because the redefinition occurs by judicial mandate, assertedly compelled by constitutional norms—this being the context in which the *Perez/Loving* argument is deployed—*any* official or “state action” acknowledgment of marriage as the union of a man and a woman is Constitution-taboo.

<sup>38</sup> Stewart at 84-85.

The New Jersey Appellate Division’s recent decision in *Lewis v. Harris*, --- A.2d ----, 2005 WL 1388578 (N.J.Super.A.D.) is instructive in this regard. Two of the judges honestly acknowledged the social institutional realities summarized above and gave those realities their due.<sup>39</sup> On that basis they held that New Jersey’s constitution allowed that State to continue sustaining man/woman marriage. But the third judge’s project rather clearly was to “unconstitutionalize” man/woman marriage so as to achieve judicially mandated genderless marriage. Because the social institutional realities, when given their due, stand as an insurmountable barrier to such a project, the dissenting judge used this tactic: he ignored those realities. Despite his colleague’s express engagement with those realities, the dissenting judge walked down a path of willful disregard, which, we respectfully submit, is not an intellectually defensible path.

### **III. THE MEMO IS DEFECTIVE IN ITS TREATMENT OF THE STATE’S INTEREST IN MARRIAGE RELATIVE TO PROCREATION.**

A profound defect appears in the Memo’s argument that Maryland has no interest in a social institution of betterment defined at its core as the union of a man and a woman. Continuing its reductionist approach, the Memo asserts that the State’s only interest in marriage “is to support couples and their children (if any), whether or not their children were brought into their families through ‘traditional’ procreation.” Memo at 73. The Memo then proceeds, intolerably, to mischaracterize the State’s interest in marriage in the context of children; the

---

<sup>39</sup> The opinion of the court and the concurring opinion reference the institutional nature of marriage several dozen times. For example, the opinion of the court notes how *Goodridge’s* redefinition of marriage “significantly alters the nature of this social institution.” Slip op. at 32. And the concurring opinion, referencing the work of Monte N. Stewart and Daniel Cere, examines the social institutional realities at length, coming to the unexceptional conclusion that the proposed radical alteration of a core meaning constituting the institution would render it “non-recognizable and unable to perform its vital function.” Slip op. at 6.

Memo falsely asserts that the State's asserted interest in marriage is to *encourage* a greater number of births through traditional means. The Memo then easily demolishes this "straw man" by pointing out that children are born without marriage and that marriage does not necessarily lead to procreation. Memo at 72-73.

The honest characterization of the State's actual interest in marriage relative to procreation is clearly and abundantly set forth in the literature. Marriage is "society's mechanism for the regulation and amelioration of the consequences of passionate and procreative heterosexual intercourse (children)."<sup>40</sup> In other words, since the sexual relationship between men and women consists of compelling passions that often result in children, its effects must be socially channeled into beneficial forms or, more accurately, into a social institution. Another way to state this point is that "[t]he public legal union of a man and a woman is designed . . . to protect the children that their sexual union (and that type of sexual union alone) regularly produces."<sup>41</sup> Specifically, marriage ensures that children born to that relationship will have legally enforceable ties to their biological parents and that fathers will have legally enforceable obligations to the mother and the child. The particular vulnerability of children and mothers to the consequences of an "unintended" pregnancy are particularly relevant. As will be discussed below, this vulnerability is different in kind from a situation in which two adults must intend and plan to bring a child into the world with the help of third parties. This amelioration of the consequences of intercourse between a man and a woman (children) is the real governmental

---

<sup>40</sup> Stewart at 62.

<sup>41</sup> Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law* 62 LA. L. REV. 773, 782 (2002).

interest that the Memo elides when it substitutes in “the silly view of marriage as a mechanism mandating procreation.”<sup>42</sup>

The Memo’s defective approach to the interest in marriage relative to procreation is further illustrated by a recent decision of the Indiana Court of Appeals.<sup>43</sup> This decision makes clear the rationality of marriage defined as the union of a man and a woman. The real and relevant state interest is a component of what can be referred to as society’s *deep logic of marriage*, a component that the government briefs in this and other cases generally refer to as “the government’s interest in ‘furthering the link between procreation and child rearing.’”<sup>44</sup> The phrase *deep logic of marriage* encompasses the complex of purposes and values that inheres in the social institution of marriage as now experienced in our society. The relevant “procreative” component is a response to two essential realities of man/woman intercourse: its procreative power and its passion. The component’s purpose is understood as the provision of adequate private welfare to children. (The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child-bearing, has important implications for society. Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the

---

<sup>42</sup> Stewart at 62.

<sup>43</sup> *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

<sup>44</sup> *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999).

former. That is because passion, not rationality, may well dictate the terms of the encounter.<sup>45</sup> While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. This purposive component of society's deep logic of marriage can be called the *private welfare purpose*. Although the immediate objects of the protective aspects of the private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.

Against this background, what is irrational is most certainly not the societal regulation of marriage as the union of a man and a woman but the conferral of "marital" status on same-sex couples, whose passion is not and simply cannot be procreative. Same-sex couples cannot establish a relationship with a child without intending to do so and implementing that intent through a lengthy and deliberate process. Thus, the State can rationally conclude that the essential private welfare purpose in those circumstances is assured without inclusion of such couples in the social institution of marriage.<sup>46</sup>

The fact that some man/woman marriages are childless, whether or not by choice, does not defeat the governmental interest in promoting marriage as the ideal institution to ameliorate the consequences of man/woman intercourse. First, the Memo makes an unsound argument

---

<sup>45</sup> The most recently reported data indicates that "49% of pregnancies in 1994 were unintended." John Santelli, et al., *The Measurement and Meaning of Unintended Pregnancy* 35 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 94 (2003).

<sup>46</sup> *Morrison v. Sadler*, *supra*, 821 N.E.2d at 23-31; *see also* Stewart at 41-52.

when it points to the reality of non-procreative married couples or, more relevant, to the reality that government, when issuing marriage licenses to men and woman, does not inquire into procreative intentions and capacities. Memo at 73. That reality is not at all inconsistent with the reality of society's deep logic of marriage and its private welfare purpose. That is because the absence of governmental inquiry at the time of licensure and thereafter flows from our society's long-standing sensibility against personalized governmental intrusion into marital procreative intentions and capacities.<sup>47</sup> Second, in yet another way legal allowance of non-procreative married couples is fully consistent with society's deep logic of marriage. The marital norm of exclusivity (sexual exclusivity) assures that the individuals comprising non-procreative marriages are not—with anyone—procreating outside of the institution of marriage and, in that way, actually furthers society's private welfare purpose.<sup>48</sup>

Likewise, the reality of same-sex couple adoption in no way is inconsistent with or undermines the rationality of society's deep logic of marriage, with its private welfare purpose. That is because adoption is not a means of procreation; rather it is a way of placing children who have already been born.<sup>49</sup>

The defects in the Memo's treatment of Maryland's interests in the marriage institutions regulation of procreation go even further. The Memo argues that redefining marriage "would not diminish the welfare of the children of heterosexual couples; rather, it would only enhance the welfare of their own children." Memo at 75. The argument is that if marriage were redefined to

---

<sup>47</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); Stewart at 44-52.

<sup>48</sup> See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788 (2002).

<sup>49</sup> Stewart at 49.

include same-sex couples, then Maryland’s “real” interest relative to marital procreation would be promoted because children raised by same-sex couples would be the beneficiaries of benefits associated with marriage.<sup>50</sup> But both the Indiana decision and the scholarly literature reveal the flaws in this argument. The Indiana court understood that the right question for sound constitutional analysis is “whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation.”<sup>51</sup> If redefining marriage did not promote the State’s interest relative to marital procreation (that is, the interest advanced by the private welfare purpose of man/woman marriage), that uniquely advanced (and important) state interest alone justifies the law’s limitation of marriage to the union of a man and a woman and preserves that limitation against any constitutional challenge.

The Indiana court understood that the state interest relative to procreation was different in kind from the interest in providing certain kinds of benefits to people with children in their homes. The state interest relative to procreation (centered on the private welfare purpose) is

---

<sup>50</sup> The Memo also says that “[t]he social science research and the child welfare community are monolithic in their conclusion that lesbian and gay parents are as fit as heterosexual parents.” Memo at 75 note 18. The Memo does not note, however, that the relevant question is not child outcomes based on parental orientation, but whether children will be benefited by being denied the right to be reared by one or both biological parents (as a matter of intention, rather than because of some exceptional circumstance based on the child’s needs rather than adult desires). Not addressed in the Memo is the recent finding of a Child Trends research brief: “Research clearly demonstrates that family structure matters for children, and the family structure that helps most is a family headed by two biological parents in a low-conflict marriage. . . . There is thus value for children in promoting strong, stable marriages between biological parents.” Kristin Anderson Moore, Susan M. Jeielek, & Carol Emig, *Marriage From a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief (June 2002) available at [www.childtrends.org/files/MarriageRB602.pdf](http://www.childtrends.org/files/MarriageRB602.pdf).

<sup>51</sup> *Morrison v. Sadler*, *supra*, 821 N.E.2d at 23.

advanced by limiting potentially procreative sexual relations to a social institution that commits the couples engaging in those relations to each other and the resulting children. In the light of that reality, the mere presence of children in a household does not rationally justify making eligible for marriage whoever in the household are the providers of child-care. If it did, given the variety of household arrangements across our society, “marriage” would radically change into an institution far different from what it now is and would play a far different societal (including educative) role than it now does. And as a consequence of that radical transformation, society would literally lose the vital institution that now advances the crucial private welfare purpose of marriage.<sup>52</sup>

The scholarly literature also recognizes the meaningful difference between the state interest genuinely relevant in this case and the different state endeavor of providing present benefits to children regardless of the marital status of their care-givers. For example, Stewart at 66-69 analyzes the tactic of the *Goodridge* plurality in shifting “the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to ‘[p]rotecting the welfare of children.’”<sup>53</sup> This shift, of course, “is valid to the extent that protecting the optimal child-rearing mode ... is the same governmental endeavour as ‘protecting the welfare of children’ ....” But, as the article demonstrates, “the different governmental protective endeavours are just that, different.”<sup>54</sup> “[T]he endeavour to protect [marriage as such] ..., with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the

---

<sup>52</sup> Stewart at 75-85.

<sup>53</sup> *Id.* at 67.

<sup>54</sup> *Id.* at 68.

personalized protective endeavour ... is an exercise in the present provision of public welfare.”<sup>55</sup>

And to advance the “personalized protective endeavour” by supposedly providing present benefits through the redefinition of marriage is actually to radically transform the very social institution that, in its present form, serves the state interest genuinely relevant in this case and, in so doing, thwart that vital state interest.<sup>56</sup>

Maryland’s interest in linking marriage and procreation – honestly and fairly stated and not elided or substituted by a straw man or conveniently “transformed”—in and of itself, without reference to the other societal interests uniquely advanced by man/woman marriage, sustains the constitutionality of marriage limited to the union of a man and a woman. That interest is profoundly rational, and limiting the core meaning of the institution of marriage to the union of a man and woman rationally advances that interest. Indeed, to alter that core meaning as the Memo urges is to radically alter the institution itself in a way inimical to Maryland’s compelling interest.

#### **IV. THE MEMO’S RELIANCE ON THE ANTI-MISCEGENATION CASES IS MISPLACED.**

The Memo’s misapprehension of the nature of marriage leads to another flaw in its argumentation. The Memo spends significant space trying to draw parallels between the decisions invalidating racist anti-miscegenation laws and the Maryland marriage law now challenged. One section of the Memo describes the historical existence of these racist laws in Maryland. Memo at 20-22. This history is raised later in the brief to argue that historical practice is irrelevant (Memo at 40-41) and to buttress the assertion that marriage is a form of sex

---

<sup>55</sup> *Id.* at 68-69.

<sup>56</sup> *Id.* at 75-85.

discrimination (Memo at 46).<sup>57</sup> The cumulative effect of this use of the deservedly famous cases of *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), is to create the impression that Maryland's marriage law can be equated with the justly repudiated anti-miscegenation laws.

Because this analogy, like the Memo's other arguments, depends on a radically constricted view of marriage, it also breaks down. But that break-down does not end there. The Memo provides no evidence that the anti-miscegenation precedents (*Perez* and *Loving*) relied on a definition of marriage as merely the close personal relationship of two persons. Rather, the Memo merely assumes that this must be so because those precedents speak of limitations on the choice of whom to marry. Memo at 42. But, in fact, nothing in *Loving* and *Perez* supports the view that those cases see marriage as no more than the impoverished and narrow construct posited by the close personal relationship model. Only by ignoring this fact can the Memo make its racial analogy "work," but in the process the Memo necessarily does violence to the broader, more realistic understanding of marriage shared by *Loving*, *Perez*, and Maryland's marriage law. The Memo's argument assumes that the evil the *Loving* and *Perez* decisions sought to eradicate was historical deference to limitations on choice. The history of anti-miscegenation laws and the *Perez* and *Loving* decisions themselves counter this assumption.

---

<sup>57</sup> We have responded to this claim elsewhere. See William C. Duncan, "*The Mere Allusion to Gender*": Answering the Charge that Marriage is Sex Discrimination 46 ST. LOUIS U. L. J. 963 (2002).

The existence of anti-miscegenation laws at the time of the *Loving* and *Perez* decisions was not a function of mere historical continuation. “Under the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage.”<sup>58</sup> In fact, while some anti-miscegenation laws date to colonial times, a number of Southern states had no anti-miscegenation laws until the post-Civil War period.<sup>59</sup> Rather than being a mere historical relic, anti-miscegenation laws were conscious attempts to use the powerful educative force of marriage laws to promote a theory of white supremacy. Thus, a 1912 treatise on Georgia constitutional law described anti-miscegenation laws as “erect[ing] a barrier behind which legitimate home life should be sheltered from African admixture.”<sup>60</sup> A 1931 treatise said: “racial prejudice, social or ethnological considerations, or the dogma of white superiority, have resulted in the prohibition of inter-racial marriages.”<sup>61</sup> This same treatise commented on the fact that most such laws were confined to Western and Southern states by the early twentieth century:

The peculiarly geographic distribution of statutes prohibiting racial intermarriage forces one to conclude (all logical justification to the contrary, notwithstanding) that such legislation is not based primarily upon physiological, psychological, or

---

<sup>58</sup> Robert Kovach, Note, *Miscegenation Statutes and the Fourteenth Amendment*, 1 CASE W. RES. L. REV. 89 (1949). The rest of this sub-section in part tracks Stewart & Duncan at 567-75.

<sup>59</sup> Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 372 & 389 (1994); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1345 (1998).

<sup>60</sup> Emily Field Van Tassel, “*Only the Law Would Rule Between Us*”: *Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 905 (1995) (quoting WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 145 (1912)).

<sup>61</sup> CHESTER G. VERNIER, 1 AMERICAN FAMILY LAWS 204 (1931).

other scientific bases, but is for the most part the product of local prejudice and of local efforts to protect the social and economic standards of the white race.<sup>62</sup>

Anti-miscegenation laws were also tied to eugenic theories as evidenced by their minute rules governing what constituted a “white” or “colored” person.<sup>63</sup>

In summary, the anti-miscegenation laws were a consequence of racial dogma and not of the purposes and logic of marriage as understood for many centuries before.<sup>64</sup> In David Wagner’s phrasing, the anti-miscegenation laws must be seen as a logical extension of racial law, not of marriage law.<sup>65</sup>

The *Loving* court stated: “Under our Constitution, the freedom to marry or not to marry a person of *another race* resides with the individual and cannot be infringed by the State.” *Loving v. Virginia*, 388 U.S. at 12 (emphasis added). In the context of *Loving*’s own facts, this language identifies the evil against which the Court acted; that evil was not a restriction on some generalized freedom of choice; rather the evil was a racially based restriction imposed to further white supremacist dogma. In *Loving*, a white man and black woman were indicted on criminal charges for marrying, pled guilty, and were given a suspended sentence on condition they leave the state for twenty-five years. 388 U.S. at 2-3. In reviewing their conviction, the Supreme Court framed the relevant question as “whether a statutory scheme adopted by the state of Virginia to prevent marriages between persons *solely on the basis of racial classifications* violates the Equal

---

<sup>62</sup> *Id.* at 204-205.

<sup>63</sup> Stewart & Duncan at 569-570.

<sup>64</sup> As to those “purposes and logic,” see Stewart & Duncan at 559 note 8; Stewart at 44-52, 64-67.

<sup>65</sup> David Wagner, *Why Goodridge Isn’t Loving*, Address at the Conference on State Marriage Amendments at Georgia State University (Apr. 16, 2005).

Protection and Due Process Clauses of the Fourteenth Amendment.” *Id.* at 2 (emphasis added). The Court noted both the historical roots of anti-miscegenation laws “as an incident of slavery” and the eugenic trappings of the challenged law, such as a requirement of “certificates of ‘racial composition’ to be kept by both local and state registrars.” *Id.* at 6-7. The Court concluded that Virginia’s law rested “solely upon distinctions drawn according to race” and that there was “patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification.” *Id.* at 11. For the Court, the unconstitutional restriction was not a restriction of some generalized right of choice in marriage but a restriction of “the freedom to marry *solely because of racial classifications.*” *Id.* at 12 (emphasis added).

The analysis was the same in the earlier *Perez* decision. There a clerk refused to issue a marriage license to a couple because of their answers to questions about their race on an application form. *Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948). The clerk relied on a statute which prohibited marriages between white persons and those of other races. *Id.* at 18. As in the later *Loving* decision, the California Supreme Court asked “whether the state can restrict” the right to marry “on the basis of race alone.” *Id.* at 19. The court noted that “[r]ace restrictions must be viewed with great suspicion,” and that “[a]ny state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption [against such discrimination] inherent in this constitutional policy.” *Id.* at 21. The court also noted that the challenged laws had been enacted along with other racial restriction and that cases upholding the laws had been replete with prejudiced statements about nonwhite races.” *Id.* at 21-22. The court suggested that the law was “based upon the theory that the progeny of a white person and a Mongolian or Negro or Malay are inferior or undesirable, while the progeny of other different races are not.” *Id.* at 23. The court concluded that the laws violated equal protection guarantees

“by impairing the right of individuals to marry *on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.*” *Id.* at 29 (emphasis added).

For both *Perez* and *Loving* then, the existence of a racial restriction on marriage was the unconstitutional evil. The Memo’s argument gets those two decisions all wrong when it tries to transform them into something they were not and did not purport to be: creators of a generalized right to compel State sanction of what one wants to call “marriage,” even if that compulsion requires a radical alteration of a core constitutive meaning of the institution.

The following “definition of marriage” cases reject the “racial” analogy urged by the Memo: *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1972), *dismissed for lack of substantial federal question*, 409 U.S. 810 (1973); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. App. 1974), *re’vw denied*, 84 Wash. 2d 1008 (1974); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. App. 2003); *In re Kandu*, 315 B.R.123, 143 (Bankr. W.D. Wash. 2004); *Lewis v. Harris*, --- A.2d ---, 2005 WL 1388578 (N.J.Super.A.D. 2005) at slip op. at 28-30.

But the Memo’s mistreatment of *Perez* and *Loving* does not end there. That Memo is actually an invitation to this court to betray an historic achievement of those two cases, as we now show.

Because marriage has a powerful educative role in our society—a power reinforced by the supporting law’s authoritative voice—the marriage institution is a tempting target for those seeking to advance the sociopolitical purposes of an ideology unrelated to marriage. If those so seeking can appropriate the institution and bend it to their purposes, they have gone far in assuring the triumph of their agenda.<sup>66</sup>

---

<sup>66</sup> Stewart & Duncan at 557.

In the American past, two social movements temporarily succeeded in using marriage as a means to achieve ulterior ends: the white supremacist movement and the eugenics movement. In fact, the anti-miscegenation laws were often found in the same legislative package as the laws calling for the sterilization of “idiots” and other so-called “genetic undesirables.” Central to the white supremacists’ project was the alteration of a core meaning of marriage from the union of a man and a woman to the union of a man and a woman of the same “race.” Laws that prohibited blacks from marrying whites were an ugly feature grafted onto the marriage institution—the very logic of which makes the graft a foreign object. The voice of those laws, however, greatly magnified by social institutional power, subtly but effectively inculcated throughout society the core dogma of white supremacy. The courts that gave us the *Perez* and *Loving* decisions apprehended the white supremacists’ marriage project for what it was and rightly used constitutional equality norms to dismantle it. In the process, those courts restored to marriage the integrity of its institutional purposes and logic,<sup>67</sup> an historic achievement.<sup>68</sup>

But to use *Perez* and *Loving* as the Memo urges—not to strike down a redefinition made to advance sociopolitical ends unrelated to marriage but to impose just such a redefinition—is to betray that historic achievement. For the probative evidence points rather clearly to this: The goal of the gay/lesbian rights movement’s marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to marriage.<sup>69</sup> Stated slightly differently, for the gay/lesbian rights movement, the institution of

---

<sup>67</sup> See Stewart & Duncan at 559; Stewart at 44-52, 64-67.

<sup>68</sup> Stewart & Duncan at 557, 567-75.

<sup>69</sup> *Id.* at 581-88.

marriage is not really a destination but rather a powerful tool for the achievement of a broader cultural, social, and political agenda. This appropriative strategy entails an alteration in a core, constitutive meaning: from the union of a man and a woman to the union of any two persons. Certainly the respective objectives of the old and the new marriage projects are very different; still the projects in their appropriative strategy are of a kind.<sup>70</sup> Thus, because *Perez* and *Loving* refused to allow the marriage institution to be appropriated for nonmarriage ends, to use those two cases to advance just such an appropriative project is to betray them. In other words, to use *Perez* and *Loving* as the Memo suggests is to advance a superficial analogy that masks a deep disanalogy. That disanalogy is between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation.

Nor is this betrayal cured by an appeal to *Perez*'s and *Loving*'s vindication of constitutional equality norms—that is, by the argument that whereas the white supremacist marriage project fostered inequality by the *exclusiveness* of the antimiscegenation laws, the new marriage project fosters equality by the *inclusiveness* of its different redefinition of marriage. This, of course, is an argument that the ends justify the means, but the argument steadfastly ignores certain realities regarding those means. Section II above makes clear that those means cannot be “justified”: for a court to redefine marriage is to set in motion a process that soon must deinstitutionalize (that is, unmake or destroy) man/woman marriage. To deinstitutionalize man/woman marriage is to deprive society of the valuable social goods uniquely provided by that vital social institution, social goods on which Maryland society is so thoroughly dependent.

---

<sup>70</sup> *Id.*

Certainly nothing in Maryland's constitution requires such radical and destructive consequences. Rather, Maryland's constitution is sanely read as allowing Maryland, as it has since its beginning, to continue using its laws to sustain and nurture the vital social institution of man/woman marriage.

## CONCLUSION

For the foregoing reasons, *amicus* Citizens for Traditional Families respectfully urges this court to grant defendants' motion for summary judgment.

Respectfully submitted,

---

C. Paul Smith  
110 North Washington Street, Suite 402  
Rockville, MD 20850  
301-762-0033 (office)

Marriage Law Foundation  
Monte N. Stewart  
William C. Duncan  
251 West River Park Drive, Suite 175  
Provo, UT 84604  
801-227-7878

Lawyers for *amicus* Citizens for Traditional Families

## CERTIFICATE OF SERVICE

I CERTIFY that on 12 July 2005 copies of the foregoing brief were served as follows:

By hand delivery:

J. Joseph Curran, Jr., Attorney General  
Margaret Ann Nolan, Assistant Attorney General  
Steven M. Sullivan, Assistant Attorney General  
Office of the Attorney General  
200 St. Paul Place, 20<sup>th</sup> Floor  
Baltimore, MD 21202

Andrew H. Baida  
Caroline D. Ciruolo  
Rosenberg Proutt Funk & Greenberg, LLP  
2115 Allfirst Building  
25 South Charles Street  
Baltimore, MD 21201

By first class mail, postage prepaid:

Arthur B. Spitzer  
American Civil Liberties Foundation of the National Capitol Area  
1400 20<sup>th</sup> Street N.W., #119  
Washington, DC 20036

Kenneth Y. Choe  
James D. Esseks  
American Civil Liberties Union Lesbian and Gay Rights Project  
125 Broad Street  
New York, NY 10004

David R. Rocah  
American Civil Liberties Union Foundation of Maryland  
3600 Clipper Mill Road, Suite 350  
Baltimore, MD 21211

---

C. Paul Smith