

Articles

Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation

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In his dissent in the 2003 case *Goodridge v. Department of Health*, Justice Robert Cordy of the Massachusetts Supreme Court introduced a novel argument in support of state bans on same-sex marriage: that marriage is an institution designed to create a safe social and legal space for accidental heterosexual reproduction, a space that is not necessary for same-sex couples who, by definition, cannot accidentally reproduce. Since 2003, every state appellate court considering a same-sex marriage case has adopted Justice Cordy's dissent until the recent California Supreme Court decision *In Re Marriage Cases*. In case after case, courts have held that marriage allows states to send a message to potentially irresponsible procreators that "marriage is a (normatively) necessary part of their procreative endeavor" and that same-sex couples do not need marriage because they only procreate after considerable effort and forethought. This article examines the accidental procreation argument through the lenses of anthropological theory, history, literature, and constitutional law. We conclude that marriage has sometimes been used to channel male heterosexuality into reproduction, but to argue that this goal is the *sine qua non* of marriage is to vastly oversimplify its history in both law and culture. We then undertake a genealogy of the accidental procreation argument and speculate about its possible effects on the institution of marriage. We suggest that if courts continue to insist upon a definition of marriage that is so distinct from the actual practice of the institution, the law may actually be less and less influential in regulating intimate behavior.

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INTRODUCTION

The more American courts, and the American people, weigh in on same-sex marriage, the more problematic the very concept of “marriage” becomes. On May 15, 2008, in *In re Marriage Cases*, the California Supreme Court declared that California’s ban on same-sex marriage violated the California constitution.¹ The presidential election of 2008, however, provided the occasion for a well-funded California ballot initiative, Proposition 8, which claimed to amend the California constitution and thereby reverse the state Supreme Court decision.² The 18,000 same-sex couples married between the decision of the California Supreme Court and the passage of Proposition 8 currently occupy a legal limbo that points to the curious status of marriage itself: an institution and an existential condition experienced over the centuries by vast numbers of people from cultures around the globe, and the subject of much discourse, ritual, and legal process, yet strangely resistant to definition.³ The movement for same-sex marriage has so far had only limited success, but it has had the effect of eliciting attempts to define, and legislate, the nature of marriage, most notably from those who insist that it is the union of one man and one woman, making the question of what constitutes “marriage” more ambiguous than ever.

Despite its contested status, *In re Marriage Cases* remains important because of the reasoning advanced by the court’s majority: it is one of only three decisions to reject the argument that states may rationally restrict marriage to straight couples because gay people are too responsible to need it. Unlike heterosexual couples, state court after state court has argued, same-sex couples cannot accidentally procreate (at least not together), and the institution of marriage was designed to create a social safeguard for accidental procreation. As the California Supreme Court elaborated when rejecting this argument:

1. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). In October, the Connecticut Supreme Court followed suit, in *Kerrigan v. Commissioner of Health*, 289 Conn. 135 (Conn. 2008).

2. The status of Proposition 8 is itself in doubt as we write: is it an *amendment* to the California Constitution, or does it represent a *revision* of such substance in basic rights that the change would need ratification by a two-thirds majority of the legislature? See *Editorial: California’s Legal Tangle*, N.Y. TIMES, November 25, 2008 at A30. The California Supreme Court has agreed to hear three cases offering legal challenges to Proposition 8: *Strauss v. Horton*, *Tyler v. State of California*, and *City and County of San Francisco v. Horton*. Oral argument took place on March 5, 2009, and the Court must reach a decision within 90 days of oral argument. See *Supreme Court of California, Oral Argument Calendar, San Francisco Session, March 3, 4, and 5, 2009*, available at <http://www.courtinfo.ca.gov/courts/calendars/documents/SMARA09.PDF> (last accessed Feb. 16, 2009); Judicial Council of California, Administrative Office of the Courts, *News Release No. 8: Supreme Court to Hear Oral Arguments in Prop. 8 Cases on March 5, 2009* (Feb. 3, 2009), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR08-09.PDF> (last accessed Feb. 16, 2009).

3. On the 18,000 same-sex couples, see Jesse McKinley, *Top Lawyer Urges Voiding California Proposition 8*, N.Y. TIMES, Dec. 20, 2008 at A11.

These decisions have explained that although same-sex couples can have or obtain children through assisted reproduction or adoption, resort to such methods demonstrates, in the case of a same-sex couple, that parenthood necessarily is an *intended* consequence because each of these two methods requires considerable planning and expense, whereas in the case of an opposite-sex couple a child often is the *unintended* consequence of the couple's sexual intercourse. These courts reason that a state plausibly could conclude that although affording the benefits of marriage to opposite-sex couples is an incentive needed to ensure that *accidental* procreation is channeled into a stable family relationship, a similar incentive is not required for same-sex couples because they cannot produce children accidentally.⁴

In other words, in order to have children, same-sex couples must do so not unadvisedly or lightly, but deliberately, reverently, and often at great financial cost. The rationale adopted by these courts, which essentially pays a back-handed compliment to gay and lesbian couples by deeming them too responsible for marriage, is a relatively new one, and a dramatic shift from the rhetoric that appeared just a few years ago in opinions concerning same-sex marriage (and has continued to appear in a watered-down version along side the new rhetoric of accidental procreation). Gay people, these previous opinions held, were excluded from marriage because they could *not* procreate, not because they procreated more responsibly than straight folks. If they did have children, through adoption or artificial reproductive technologies or turkey basters or old-fashioned heterosexual intercourse with someone external to the couple, then courts worried about their ability to parent—perhaps they wouldn't teach their children appropriate gender roles, or perhaps they would “recruit” their children into a dissolute life, or perhaps having more than two parents would be confusing for the child—but courts were certainly not saying that same-sex couples made *superior* parents.

This all changed in 2003, with a dissenting opinion in *Goodridge v. Department of Public Health* authored by Justice Robert Cordy of the Massachusetts Supreme Judicial Court.⁵ Justice Cordy's dissenting opinion presented marriage as a necessary channeling of male sexuality to useful and policed reproduction. For Justice Cordy, marriage is an institution designed to create a safe social and legal space for accidental heterosexual reproduction, a space that is not necessary for same-sex couples who, by definition, cannot accidentally reproduce.⁶ Following the publication of *Goodridge*, Cordy's rationale was taken up by the majority in every other state supreme court (saving the California court in *In re*

4. *In re Marriage Cases* at 431 (emphasis in original).

5. *Goodridge v. Department of Health*, 798 N.E.2d 941 (Mass. 2003).

6. *Id.* at 995.

Marriage Cases and Connecticut in *Kerrigan*), and many state district and appellate courts, that heard a same-sex marriage case.⁷ Without marriage, these opinions suggest, heterosexual people would labor under the misimpression that reproduction is acceptable without a long-term commitment to parenting. By limiting marriage to opposite-sex couples—people who might accidentally reproduce through their sexual relations—the state can send a message that marriage is the proper space for reproduction and constrain an unwieldy and dangerous male (hetero)sexuality that would otherwise cause social chaos.

Courts have long struggled to define marriage. Is it a status or a contract? A public means of allocating wealth and providing for the social welfare, or a private agreement between two intimates? But never before have courts so truncated the possible purposes of marriage to assign it one goal: here, the policing of accidental procreation. The enthusiasm with which other state supreme courts have adopted Justice Cordy's rationale made us curious about its origins and logic. This article considers the issue through a variety of lenses—anthropological theory, history, literature, and constitutional law—to test the idea that marriage's *sine qua non* is the policing of accidental procreation. We conclude that marriage has meant many very different things at different times, but never has it been solely—or even primarily—a protection against accidental reproduction by heterosexuals. Except in very limited circumstances, the primary purpose of marriage was not to constrain *men's* sexuality, but rather to allocate women among men, and to ensure the legitimacy of children whom men wanted to be considered legitimate.

Toward the end of his *Goodridge* dissent, Justice Cordy asserted that by limiting marriage to “opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation.”⁸ The argument reminds us a bit of a 1960s bumper sticker: “Love safely, too many people are caused by accidents.” Ultimately, Justice Cordy, and those who espouse his views, see marriage as a message. In his view, it is of course a message of necessary socio-sexual discipline, the exercise of the state's repressive

7. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Morrison v. Sadler*, 821 N.E. 2d 15, 24-26 (Ind. Ct. App. 2005); *Andersen v. King County*, 138 P.3d 963, 981 (Wash. 2006); *Stanhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. 2003); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 188 N.J. 415, 458 (2005). Another case, *Varnum v. Brien*, has yet to produce a written opinion. Oral argument occurred in *Varnum* before the Iowa Supreme Court on December 9, 2008. See http://www.judicial.state.ia.us/Supreme_Court/Varnum_v_Brien/Oral_Argument_Live_Stream/ (last accessed Feb. 16 2009).

8. *Goodridge*, 798 N.E. 2d at 1002.

power over a potentially anarchic sexuality. But if that is the message, it clearly has many discontents—it has had them for centuries—and leaves many readers wanting to read an alternative text. We conclude that limiting the purpose of marriage to this singular goal may actually result in exactly the opposite of what Justice Cordy and others intend. The more courts insist on a reproductive definition of marriage, the more the marriage message will end up in the “dead letter office.”

We wish in this article to reflect on those definitions: the ways in which they characterize marriage, their apparent cultural contexts, and the messages they seem to send. To this end, we will draw on diverse materials: legal, literary, historical and anthropological sources. For marriage is by no means exclusively the province of the law—in fact, where marriage is concerned one could probably say that culture was there before the law. Or perhaps more accurately: marriage needs to be thought of as one of the first steps toward the creation of law, one of the first instances of societal rules. To the extent that marriage as cultural artifact intertwines with, and even possibly trumps marriage as a legal concept, the recourse to “law and humanities”—and more broadly, law and the cultural imaginary—seems a necessity. It is an example of an area where law not only would profit from interaction with culture, but really cannot intelligently do without such interaction. To claim to know what marriage is in an exclusively legal context misses the point, and those who would use marriage to send social and cultural messages by no means confine themselves to the law — so neither do we.

This Article proceeds as follows. Part I gives a snapshot of the multifarious and shifting cultural meanings that marriage has embodied, and considers the accidental procreation rationale in light of these meanings. This Part concludes that disciplining male sexuality and reproductive capacity has sometimes been a goal of marriage, but that marriage as an institution has been much richer and more complex than the “accidental procreationists” claim. Part II examines the constitutional jurisprudence of marriage: what have courts, especially the United States Supreme Court, said about the nature of marriage before the onset of the current same-sex marriage debate, and how closely did the Court link marriage to procreation in defining substantive due process rights for each? This Part concludes that although marriage as discussed by the Court has always been related to procreation, the new argument that the *purpose* of marriage is solely to facilitate responsible procreation vastly oversimplifies the history of marriage and the Court’s previous jurisprudence. Part III undertakes a genealogy of recent same-sex marriage cases, tracing the shifting rationales that eventually spawned the accidental procreation rationale of Justice Cordy’s dissent. Finally, Part IV concludes with thoughts about the importance of the accidental procreation argument for marriage. We suggest that if courts continue to

insist upon a definition of marriage that is so distinct from the actual practice of the institution, the law may actually be less and less influential in regulating intimate behavior.

I. MARRIAGE IN CULTURE

It is not easy to say what is common to the different forms that have characterized the practice and institution of marriage—to find what is of essence in marriage—and its histories often suggest contrary meanings of the institution. What marriage is remains a cipher. As Lawrence Rosen has noted, it is impossible “[t]o take . . . an individual example of marital arrangements or familial forms and use it to prove (or disprove) a universal proposition about all marriages or all families.”⁹ Our undertaking here is much more modest: we explore some of the shifting meanings of marriage merely to show that Justice Cordy’s definition somewhat arbitrarily pulls from some strands of the history of marriage while ignoring other, far more common and important goals. Marriage has sometimes functioned as a check on (male) (hetero)sexual impulses, but it has also functioned in many other ways. We undertake this admittedly oversimplified retelling of the history of marriage both to demonstrate what a difficult job it is for a judge to say what marriage “is” and also to demonstrate how contradictory, confused, and just plain messy the institution is.

The accidental procreation argument has three strands that deserve scrutiny from an anthropological and historical perspective: the claim that the state may have “created” the institution of marriage, the claim that the reason behind the creation of marriage was the prevention of accidental procreation, and the claim that accidental procreation is bad because it harms children. All three claims make little sense when we examine the institution of marriage, either cross-culturally or in the western legal tradition.

The claim that states “created” marriage in order to deal with accidental procreation is either overtly or tacitly endorsed in the judicial opinions using the accidental procreation rationale. Some courts have actually claimed that the state *created* opposite-sex marriage, complete with all of the legal benefits of marriage, “to discourage unplanned, out-of-wedlock births resulting from casual intercourse.”¹⁰ Others have implied as much with more subtlety. Justice Cordy’s *Goodridge* dissent, for example, states: “[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse [between a man and a woman] commonly results in pregnancy and childbirth. The institution of marriage is that

9. Lawrence Rosen, *Anthropological Perspectives on the Abolition of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006) 161-62.

10. *Morrison*, 821 N.E. 2d at 24.

mechanism.”¹¹ Both opinions miss what most anthropologists take as a given: that marriage is not the result of legal action by the state, but actually *predates* the state. As Justice Douglas admitted in *Griswold v. Connecticut*, marriage is “older than the Bill of Rights”;¹² indeed, it is older than law itself. Marriage *created* the state by ordering society in a way that leads to the rule of law, not because it was imposed by law. Or, one might say, marriage is one of the first instances of “the law,” conceived as a culture’s rules for conduct and survival.

Perhaps the most famous modern anthropologist, and the person most commonly credited with explaining the near-universal existence of organized kinship relationships across cultures is the French structuralist Claude Lévi-Strauss. Lévi-Strauss argued that marriage had nothing to do with the regulation of sexuality or procreation but rather with the creation of alliances among different kinship groups—alliances that created complex patterns of relationship that dictated whom one could, and especially whom one could *not*, marry.¹³ Marriage came into being not because men and women had sexual intercourse that resulted in children (they had already been doing this successfully for millennia) but because unless small kinship groups attempted to reach out to other groups, creating tribes (and ultimately nations), they were vulnerable to attack and extinction.¹⁴ As Lévi-Strauss famously put it, humans in society must “marry out or be killed.”¹⁵ To the extent that marriage involves sex and procreation, then, it is not to contain the procreative impulse, or to channel sexual activity into certain relationships, but rather to use one’s offspring as a means of alliance building and self-protection—a very different goal, indeed. It is marriage that makes us civilized human beings, not because it chastens us sexually, but because it creates alliances between families that in turn create communities, governments, and organizations of membership and belonging. For Lévi-Strauss, this need for exogamy is the reason behind the incest taboos that seem to exist in almost all cultures. Sex and procreation with members of one’s own family prevents a person from using sex and procreation as tools of alliance building—prevents the development of culture, law, the state.

Not every modern anthropologist agrees with the details of Lévi-Strauss’s theory, but most would agree that human beings created kinship structures before they were organized into states or governments, and that these kinship structures played an important role in the development of cultures and law. The legal fiction that the state “created” the benefits of marriage in order to induce wayward straight people into responsible

11. *Goodridge*, 798 N.E.2d at 995.

12. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

13. CLAUDE LÉVI-STRAUSS, *THE VIEW FROM AFAR* 17 (Basic Books 1985).

14. *Id.*

15. *Id.*, citing Edward Burnett Tylor.

procreation is a bit of an anachronism. It would make more sense to say that kinship relationships were one of the first—perhaps *the* first—way in which people organized themselves into what eventually became governments.

So if the state did not “create” marriage, could there nevertheless be something to the idea that the reason marriage developed was to prevent accidental procreation? Here, too, the bulk of the historical record points in another direction. Lévi-Strauss argued that the role played by women in marriage was that of gift—and the most precious of gifts, at that, because only women (and not animals or objects) could create the alliances that would result in the mixing of the blood of kinship groups.¹⁶ In feminist theorist Gayle Rubin’s gloss on Lévi-Strauss, marriage is responsible both for compulsory heterosexuality (women must be available to be given as gifts) and for gendered division of labor (women and men must be interdependent on each other so that they will perceive a need to marry and perpetuate the system).¹⁷ Thus the sexuality most constrained by marriage is female sexuality, and it should come as no surprise that many cultures punish female sexual transgression more harshly than similar misbehavior by men. Marriage, far from chastening male sexuality, was a way of enabling men to exchange women for sexual and reproductive use.

It is one thing to say that marriage has provided a way for men to engage in the orderly exchange of women in traditional cultures, but this does not tell us anything about marriage’s function in western legal thought. But a close look at the development of marriage law in the West shows that, if anything, with the emergence of modern societies and the modern legal system, the subordination of women in marriage became more visible. Upon reflection this is hardly surprising: a system that takes private property very seriously will likely take the ownership of women and children seriously as well, and marriage has been an exemplary facilitator of this kind of ownership.

During the time in which American marriage was being shaped, women in marriage not only were not equal to men but essentially lost their independence and their very identity through coverture. Coverture as a legal matter reflects the objectification of women through marriage: under coverture a married woman lost her legal identity, which became subsumed with the identity of her husband.¹⁸ One might say that she became the property of her husband; indeed, the law of “domestic relations” at common law included the law of husband and wife, father

16. Gayle Rubin, *The Traffic in Women: Notes on the Political Economy of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 173 (Rayna Reiter ed., Monthly Review Press 1975).

17. *Id.* at 180.

18. See 1 WILLIAM BLACKSTONE, COMMENTARIES 442.

and child, and master and servant, all hierarchical status relationships in which one half of the dyad performed some degree of authority and control over the other.¹⁹ The history of marriage, in legal cases and in imaginative literature from *Madame Bovary* to *Anna Karenina* to *Middlemarch*, largely displays women as oppressed, exploited, abused, and suffocated by marriage. Men may also have felt constricted by its bonds, but they have traditionally been freer to participate in marriage (or not) to their advantage.

In the English legal tradition, the exchange of women through marriage served not only the function of creating alliances for purposes of survival but also for maintaining control over private property. Marriage can be seen as an efficient method of determining which children would become heirs, and would therefore be legally entitled to inherit property. Children born outside marriage—bastards—were not able to inherit, although their fathers in some circumstances might provide for them.²⁰ That the wife in this particular legal system was a “gift” in the Lévi-Straussian sense can be seen from the property law consequences to her of marriage—her husband became responsible for any property she brought to the marriage, and in fact could make use of rents from lands owned by her in any way he wished. He was responsible to leave her in the event of his death with a life estate in one third of his property (“dower”), presumably not to compensate her for any income lost because of marriage but to ensure that she was adequately provided for.²¹ Marriage provided not only a way to transmit wealth inter-generationally but more specifically a way for men to determine how to transmit wealth *independent* of accidental procreation.²² Men could procreate, whether intentionally or accidentally, and widely, but it was only those children born within marriage or those children a man chose to legitimate who could become heirs. Marriage thus functioned not as a check on the wildness of male heterosexuality but as a way for men to maintain sexual freedom without adverse financial consequences to themselves or their (official) families.²³

19. See, e.g., JAMES SCHOUER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT (2d ed., Little, Brown 1874).

20. See BLACKSTONE, *supra* note 18, at 458-59.

21. See *id.* at 445; Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 65 (1979).

22. Indeed, one historian found that one out of every three women who gave birth in an English town between 1270 and 1348 did so outside of marriage. G.C. Homans, *English Villagers of the Thirteenth Century* (1942), cited in STEPHANIE COONTZ, MARRIAGE, A HISTORY 112 (2005). According to Coontz, richer peasants tended to avoid bearing children out of wedlock because they had more to lose in inheritance disputes. *Id.* at 113.

23. Thus, in the opening line of Jane Austen's *Pride and Prejudice* we are told “It is a truth universally acknowledged that a single man in possession of a good fortune, must be in want of a wife.” Why does he need a wife? To have legitimate children to inherit that large fortune. The tone of Austin's opening may be worldly irony, but the idea expressed is nonetheless held to be true.

Marriage's disproportionately disciplining effect on women can also be detected in the law of adultery. Until the last 200 years (or so), adultery in much of the western world was the crime of having intercourse with a married woman.²⁴ Sex between an unmarried woman and a married *man* did not qualify, as sex with a married man would not pollute his family's blood lines and would not result in the attendant disruption of the transmittal of property from one generation to the other. Sex with a married *woman*, on the other hand, might result in a child who was unrelated to her husband becoming that husband's legal heir.²⁵ The sexual activity being channeled by marriage here is that of the married woman and her potential sexual partners, not the married man. Married men appear to have frequently visited brothels, harbored mistresses, and engaged in extensive extra-marital activity with little social or legal consequence.

Historians have observed a marked difference in the cultural purpose of marriage in the past two centuries: the rise of companionate marriage, in which spouses are expected to satisfy each others' emotional needs. This is a highly personal, individualistic view of marriage where the couple's personal desires take precedence over the needs of the individuals' fathers to control their property, their extended families to create alliances, or the community's need to discipline sexuality. These historians describe the twentieth century family as an "encounter group,"²⁶ or a private sphere where couples can "express creatively . . . individuality . . . shared identity, and . . . changing commitments . . . love."²⁷ This most recent version of family life puts particular pressure on marriage to be fulfilling. As John Demos puts it, "[m]onogamous marriage is liable to become boring and stultifying; in other things, after all, variety is 'the spice of life' . . . 'spice' and 'space': these are, in fact, the qualities for which we yearn most especially. And the family severely limits our access to either one."²⁸ Lawrence Friedman is careful to insist that this emphasis on the individual does not mean that the family has declined, fallen, or dissolved.

24. See Marvin M. Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1962) (stating that the Puritans used the Biblical definition of adultery as sex with another's wife (*Leviticus* 20:10 and *Deuteronomy* 22:22), but after the revolutionary war, most states adopted the canon law definition, where wives and husbands could be guilty of adultery); see also ROLLIN M. PERKINS, *CRIMINAL LAW* 329 (1957) (noting that English common law defined adultery as illicit intercourse with a married woman); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 5 (1997, 2d Ed.) (during the Puritan era, "church and society dealt more harshly with women who engaged in pre- or extramarital sexuality than with male transgressors, for female chastity and fidelity assured men of the legitimacy of their children").

25. See Moore, *supra* note 24, at 219-20, 227 (explaining English common law rule as justified because "if the female party to illicit intercourse was married this might tend to introduce spurious offspring into the home, but this could not result if the only married party was a man").

26. JOHN DEMOS, *PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 58 (1986).

27. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 312 (2000).

28. DEMOS, *supra* note 26, at 58.

Rather, it has “changed and broadened . . . become more elastic.”²⁹ Certainly it has become less tethered to procreation and more bound up in fulfillment.

Michel Foucault has suggested another way of thinking about the shift from community-oriented marriage to individualistic marriage. Aristocratic marriage in traditional societies assured purity of descent, of the patrilineal bloodline: the antiquity and the glory of alliances created, the clear tracing of inheritance rights defined one’s identity. The advent of the bourgeoisie in modern times tends to increase the importance of sexuality in marriage: instead of the bloodline, what counts is the projection of self, family, and property into the future, through one’s descendants: sperm rather than blood. Marriage becomes the guarantee of future descendants, of a kind of symbolic immortality through the passing on of one’s genetic material, and one’s cultural identity. Hence the emphasis on bodily health, on the protection of sperm (no masturbation), and the anxiety of venereal disease as seen in its hereditary consequences (a theme, not surprisingly, in a number of nineteenth-century novels).³⁰

So does the idea of marriage as an institution that channels men’s sexuality ever erupt in the western tradition? Yes, in the history of the Catholic Church and its offshoots. Beginning with the Apostle Paul, we see the rise of the idea that sexuality is dangerous and best cabined by an institution designed to contain it (“is it better to marry than to burn”).³¹ The rise of marriage in pre-modern Europe seems to have been driven by the Church’s desire to see the European peasantry clean up its act, and to get sexuality under the yoke of marriage.³² The introductory words of the wedding liturgy of the Anglican Church, for example, stated: “One cause [of God’s institution of marriage] was the procreacion of children, to be brought up in the feare and nurture of the Lord, and prayse of God. Secondly it was ordeined for a remedie agaynst sinne, and to avoide fornicacion, that suche persones as bee married, might live chastlie in matrimonie, and kepe themselves undefiled membres of Christes bodye.”³³ But note that here marriage is first of all seen as the fostering rather than

29. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: INDIVIDUALS, FAMILIES, AND THE LAW* 11 (2004).

30. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, vol. 1 (1978). For a striking example of a child undone by a syphilitic inheritance, see the figure of Jacques de Mortsauif in HONORÉ DE BALZAC, *LE LYS DANS LA VALL’ÉE* [THE LILY OF THE VALLEY] (1836); and toward the end of the nineteenth century, there is a proliferation of such figures.

31. 1 *Corinthians* 7:9.

32. See in particular canons concerning marriage from the Fourth Latran Council, convoked by Pope Innocent III in 1215; see also *THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT* 194 (J. Waterworth ed. and trans., Dolman Press 1848) (available at <http://history.hanover.edu/texts/trent/ct24.html>) (documenting Church’s decision to declare marriage a sacrament at the Council of Trent in 1545-47).

33. THOMAS CRANMER, *BOOK OF COMMON PRAYER* (1549), available at http://justus.anglican.org/resources/bcp/1549/Marriage_1549.htm (repeated in every revision until 1789 in the U.S.).

the policing of procreation (and this seems to be true in most religious marriage ceremonies still today), and then as a preservative against extra-marital fornication, which has been defined as sin. This of course touches on a long history of Christian unease with sexuality and the body that has been well expounded by Elaine Pagels.³⁴ Justice Cordy's social safeguard argument offers a secularized and utilitarian version of "chastie" living.

Marriage, then, came before law. Marriage functioned to create alliances, distribute women among men, and maintain lines of property and inheritance. And in some traditions, the Christian tradition being the dominant one, it has functioned to tame heterosexuality. All of these functions were about both the individual and the group, the place of a person within a kinship system, a wealth system, and a society at large. Today, as we have seen, marriage is increasingly focused on the individual (or the couple) rather than the group. And to the extent that marriage *was* about protecting women and children from rampant male heterosexuality (and as we have seen, this was only one piece of a complex institution), the de-linking of sex and procreation and the de-linking of marriage from responsibility for procreation has decreased the need for marriage as a disciplining institution. Three developments in particular have had a major impact on why we are now able to think about marriage as an individual act of personal fulfillment: effective contraception, legal abortion, and child support statutes. Despite the myriad problems with enforcement of child support statutes, they still provide a method of regulating male reproductive sexuality much more broadly than marriage ever could. Whereas marriage put men in the driver's seat, allowing them to determine which children they fathered would be legal children, the presumption behind child support statutes is that any child fathered by a particular man has a financial claim for support from that man, regardless of the father's intention at the time of conception.³⁵ Access to abortion and contraception have further decreased the need for a disciplining institution, at least for those people who are willing to use them; it is no longer self-evident that the only result of heterosexual intercourse will be procreation.

There remains the third claim of the accidental procreation argument: that the purpose of marriage, ultimately, is to protect children by providing them with a family. Cross-culturally, this is both true and false. Every culture has some sort of kinship system, and one function of these kinship systems is to allocate the responsibility for children to certain people. But the idea that this responsibility should be taken by heterosexual, nuclear families is a product primarily of the last few hundred years, and mostly

34. ELAINE PAGELS, ADAM, EVE, AND THE SERPENT (1988).

35. Ira Mark Ellman, *Thinking about Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 70-71.

the twentieth century. The history of the family includes a wide variety of structures, most often including extended families and polygamous families, where care of children is shared by many. In an important sense, the idea that marriage is necessary to channel men into being good fathers gives men not enough and too much credit. Men have always supported children, including children who are not their own but the children of relatives or the children of their wives' other sexual partners. On the other hand, men have not usually been the primary caretakers of children.

Indeed, the understanding of children as fragile, emotional selves in need of extensive parenting and nurturance is the most modern of all of the views we have so far discussed. Contemporary discourses about the importance of two-parent families so that children can become acquainted with representatives of different gender roles would be incomprehensible to a pre-nineteenth-century ear, when children were thought of not as individuals with a special moral claim to nurturance but the property of their fathers to be used for labor as needed—and sometimes even hired out as laborers to *other* families.³⁶ So too would the idea of “accidental procreation” have been an anomaly: in an era of high infant mortality, it was the accidental *death* of infants and children that struck fear into the heart of parents and the broader community alike.³⁷ And in an era before reliable contraception, what exactly were the “unintended consequences” of sexual intercourse? People knew that women often found themselves pregnant, and many women, no doubt fully comprehending the threat to their very lives that repeated pregnancies and childbirth posed, tried to prevent pregnancy, but without reliable birth control, procreation was the norm, not the exception. *Unwanted* procreation, perhaps, but hardly accidental.

This broad-brushed summary, while vastly oversimplified, should make clear that marriage has been an enormously varied, internally inconsistent, and even mysterious institution. It developed before law, but was shaped by both legal and religious forces. It has been linked culturally to procreation throughout the ages, but in ways far different from what the accidental procreation rationale would suggest. It has shifted in the last two centuries from being fundamentally concerned with community and the individual's role within the community to being concerned with the individual's self-actualization through the creation of family ties. And marriage has almost always policed women's sexuality and reproductive

36. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 484 (1996). Indeed, tort law gave parents a cause of action for the loss of their child's services in the event of the child's injury. See SCHOULER, *supra* note 19, at 351.

37. See D'EMILIO & FREEDMAN, *supra* note 24, at 5, 26 (high infant and child mortality rates in the American colonies “encouraged frequent pregnancies in order to produce living heirs”; colonist women used folk remedies and fertility medicines “to encourage conception and avoid miscarriage rather than to avoid pregnancy”).

capacity more than it has men's, and did so, at least in Western legal culture, in a world in which women and children were treated as property. Although there are strands in the history of marriage supportive of Justice Cordy's idea of marriage as a disciplinary institution, these strands are only one piece of a much larger puzzle, a puzzle courts may be ill-equipped to solve.

II. MARRIAGE IN LAW

Most state court cases upholding same-sex marriage bans have cited to the United States Supreme Court for the proposition that marriage and procreation are linked,³⁸ and indeed, as in culture, marriage in United States constitutional law has been linked to procreation. But a close reading of the leading Supreme Court cases on marriage reveals that the Court has had a much richer, more nuanced, and, some might argue, more confused, notion of the purpose of marriage than that it is a mechanism for channeling male sexuality and accidental procreation. The Court has consistently conceived of marriage as having myriad functions, as diverse as efficiently determining property rights, ensuring "proper" division of labor and sex roles for men and women, providing a stable foundation for and microcosmic example of constitutional democracy, creating a legal space for sexual activity, and holding oneself out as emotionally and publicly tied to another. The accidental procreation rationale is nowhere to be seen, and even where variations on it might be glimpsed (through, for example, the argument that marriage for most elevates the morality of all), it has never been the *only* basis for marriage. Instead, the Court has struggled to define the meaning of an institution whose existence it has taken for granted.

The earliest Supreme Court cases concerning marriage were not about the right to enter into the institution but rather about how marriage affected other rights; these cases nevertheless required the Court to say something about what marriage is (or was). In *Maynard v. Hill*, for example, the Court proclaimed that "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."³⁹ Somewhat ironically, the import of this "moral relation" was that the legislature could grant a unilateral legislative divorce to a husband without his wife's notice or consent, divesting the wife of property rights she was entitled to only if married.⁴⁰ Similarly, in

38. See *Conaway*, 932 A.2d at 630; *Standhardt*, 77 P.3d at 462; *Morrison*, 821 N.E.2d at 33; *Andersen*, 138 P.3d at 978.

39. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

40. *Id.* at 214-16 (holding that property rights under Donation Act did not vest until husband had worked property for four years, and since he divorced his wife before four years had expired, she had

Bradwell v. Illinois, marriage functioned as the Court's excuse for refusing to require the State of Illinois to allow a woman to practice law: because a married woman had "no legal existence separate from her husband," a married woman could not enter into contracts, and therefore could not have an independent career. Unmarried women were described by Justice Bradley as "exceptions to the general rule" and therefore also excludable from legal practice. Presumably this rule would encourage women to engage in their "paramount destiny and mission to fulfil the noble and benign offices of wife and mother."⁴¹ In *Reynolds v. United States*, a case upholding a criminal ban on polygamy, the Court used the occasion to make a claim about the value of monogamous marriage to society, famously stating that "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties," and connecting the form of marriage—monogamous or polygamous—with attendant forms of government, whereby monogamy leads to democracy, and polygamy "to the patriarchal principle, and . . . fetters the people in stationary despotism."⁴² In each of these cases, the Court recognized that there was something important and fundamental about marriage, but could not articulate exactly what that fundamental thing was.

It was not until the early twentieth century that the Supreme Court began to explicitly link marriage and procreation. Early substantive due process cases concerned procreative and parenting rights, not marriage rights, but these cases invoked marriage as a right analogous to procreative rights in that it was personal and fundamental. In *Skinner v. Oklahoma*, the Court struck down a statute allowing involuntary sterilization by characterizing the issue as involving "one of the basic civil rights of man" and linking the right to marriage: "Marriage and procreation are fundamental to the very existence and survival of the race."⁴³ Similarly, in *Pierce v. Society of Sisters*, a case about parents' constitutional liberty interest in directing the upbringing and education of their children,⁴⁴ and *Meyer v. Nebraska*, in which the Court upheld the right of parents to allow their children to learn German,⁴⁵ the Court linked marriage and procreation as rights essential to the pursuit of happiness.

Marriage and procreation were once again coupled by the Court in *Griswold v. Connecticut*, a case about the constitutional right to birth control, but in a new way, by framing the issue of reproductive freedom as

no property interest in the land).

41. *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring).

42. *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878).

43. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

44. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that the fundamental theory of liberty "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only").

45. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

a sub-species of marital privacy. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?” Justice Douglas asked. “The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁴⁶ The *Griswold* opinion contains one of the Court’s most famous pronouncements on marriage, and one that once again reveals the limitations of law in explaining the social purpose of marriage:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁴⁷

This excerpt from the *Griswold* opinion devotes much description to what marriage does, but not much to what it is (perhaps because marriage is what marriage does?). It acknowledges that marriage is “as noble” as procreation, even in a marriage where the partners choose not to procreate.

In cases that explicitly addressed the question of the right to marry, a closer link between marriage and procreation became clear. Marriage, as the only institution where sex was legally permitted, was also the institution in which procreation was allowable, for, at least then, procreation ineluctably followed sex. To deny marriage to an individual, then, was to deny him or her the opportunity for sex and children—perhaps even the “pursuit of happiness” as implied by the *Meyer* court or a “noble purpose” as explained in *Griswold*. In *Loving v. Virginia*, the case that overturned Virginia’s anti-miscegenation statute, the freedom to marry was once again linked to “the orderly pursuit of happiness by free men.”⁴⁸ Next, the opinion taught that “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” (citing *Skinner*, the sterilization case).⁴⁹ Once again, there may be an implicit link here between marriage and procreation, the implication being that procreation (and sex?) cannot occur (or cannot occur in an “orderly” way?) without marriage. Marriage is doing a lot of work in *Loving*, working to make sex and procreation legitimate. Even in *McLaughlin v. Florida*, the Supreme Court case striking down cross-racial extra-marital sex that came down two years before *Loving*, the Court conceded that fornication and adultery laws are necessary “to prevent breaches of the basic concepts of sexual decency; and we see no reason to quarrel with the State’s characterization of this statute, dealing as it does with illicit

46. *Griswold*, 381 U.S. at 485.

47. *Id.* at 485-86.

48. *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

49. *Id.*

extramarital and premarital promiscuity.”⁵⁰ The purpose here was not to provide stable homes for children but to police *all* sexual activity, procreative or not.

This link between marriage, procreation, and sex was made more explicit in the landmark case of *Zablocki v. Redhail*, which concerned a constitutional challenge to a Wisconsin law that denied marriage licenses to parents who were in arrears on their child support payments.⁵¹ Justice Marshall’s opinion reveals ambivalence about the connection between marriage and procreation. On one hand, the Court’s opinion was skeptical that a serious link existed. One of Wisconsin’s purported state interests in defending the law was that it would prevent “dead-beat dads” who refused to pay for previously fathered children from continuing to “incur new obligations”—presumably marital obligations to the new spouse, as well as additional children born into the new marriage.⁵² The statute, the Court held, was “grossly underinclusive” in meeting this goal, for new support obligations to new children could develop regardless of whether a father remarried or not.⁵³ (In fact, Mr. Redhail’s girlfriend was pregnant with his child when they initially sought a marriage license.)

Despite this delinking of marriage and procreation in its analysis of the state’s interest, Justice Marshall’s opinion re-linked marriage and procreation in its holding concerning the source of the right to marry. *Zablocki* turned not only to *Skinner*, *Pierce*, *Meyer*, and *Loving* for the proposition that marriage, like procreation, was a fundamental right, but also made a new move by incorporating the marital privacy right from *Griswold*. Why should the protection of marital *privacy* (protection from outside intervention in an already-existing marriage) serve as a basis for a right to *enter* the institution of marriage? Because, according to Justice Marshall, the institution of marriage is the legal space in which one can exercise one’s familial privacy rights:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom [Redhail] desired to marry had a fundamental right to seek an abortion of their expected child . . . or to bring the child into life to suffer the myriad social, if

50. *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964).

51. *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978).

52. *Id.* at 390.

53. *Id.* (“although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.”)

not economic, disabilities that the status of illegitimacy brings . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.⁵⁴

Marriage, then, is the legal institution whereby individuals exercise their right to procreate and their right to engage in sexual relations. And the Court recognized not only the *legal* but the *social* importance of marriage: even if illegitimacy caused no legal harm to Redhail's child, the social harm caused by the child's birth outside of wedlock was enough to protect Redhail's right to marry.

After *Zablocki*, court-watchers might have assumed that the right to marry was dependent on laws making extra-marital sex illegal. But this idea was challenged in *Turner v. Safley*, where the Court examined the right of female prisoners to marry. A prison regulation allowed inmates to marry only with the permission of the superintendent of the prison, and provided that permission should be given only when there were "compelling" reasons to do so.⁵⁵ Prison officials testified at trial that only a "pregnancy or the birth of an illegitimate child" would be considered "compelling."⁵⁶ The Court, while emphasizing courts are "ill equipped" to deal with "complex and intractable" problems of prison management, nevertheless struck down the regulation as a violation of the inmates' constitutional right to marry.⁵⁷ Even in the prison context, where an individual's constitutional rights may be abridged in the interest of penological objectives, "many important attributes of marriage remain." These attributes included, according to Justice O'Connor's opinion, many attributes that are not explicitly tied to sex or procreation, including "expressions of emotional support and public commitment . . . [and] spiritual significance."⁵⁸ In fact, the opinion explicitly separates marriage from sex, at least sex in the here-and-now, noting that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated."⁵⁹ Even if, in other words, a prison can legitimately deny an inmate the right to have sex with her romantic partner for penological reasons, it cannot likewise deny her the right to marry that partner. Marriage means something above and beyond the exercise of sexual and reproductive rights. In fact, one aspect of the rule that may

54. *Id.* at 386 (citations omitted).

55. *Turner v. Safley*, 482 U.S. 78, 82 (1987).

56. *Id.*

57. *Id.* at 84, 99-100.

58. *Id.* at 96.

59. *Id.*

have been especially troubling to the Court was that exceptions to the “no marriage” rule were made *only* in cases of pregnancy or childbirth.⁶⁰

This view—that Constitutional privacy has more to do with sexual autonomy than actual procreative rights—is supported by *Lawrence v. Texas*. *Lawrence* can be read as the nail in the coffin of *Zablocki*, for it breaks down the distinction between married, illicit sex, and the other, less savory kinds. By declaring bans on homosexual sodomy unconstitutional, *Lawrence* challenges the idea that marriage can be a proxy for legal sex, and strengthens the notion that constitutional privacy rights concern not the relationship of marriage but instead the sexual autonomy to enter into many kinds of relationships.⁶¹ *Lawrence* (as well as the abortion cases, *Roe* and *Casey*) gives us a window on a world in which marriage has been replaced by sex as the organizing category when we speak of sexual and reproductive privacy rights.⁶² We used to protect marriage because it was the legal place for sex and reproduction. Now we protect sexual autonomy, and do not punish people for their reproductive choices by conscripting them into procreation.⁶³

After *Lawrence*, we are left with two competing and perhaps irreconcilable views about marriage and procreation. *Lawrence* and *Turner* would de-link marriage from sex and procreation, focusing instead on the protection of relationships. *Zablocki* would give protection to marriage in order to facilitate legal sex and procreation. But note that in neither of these views is accidental procreation the primary reason for marriage. In *Turner*, any necessary link to procreation is specifically abjured; in *Zablocki* the difference is more subtle. *Zablocki* identifies marriage as a civil right because procreation is a civil right and marriage is facilitative of procreation; the accidental procreation rationale rather seeks to deny marriage to some in order to protect the state’s ability to chasten and discipline others.

60. *Id.* at 82.

61. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring . . . [t]he liberty protected by the Constitution allows homosexual persons the right to make this choice”).

62. Cf. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L. J. 756, 763 (2006) (arguing that marriage historically was the “sine qua non of licit sex and nonmarriage necessarily marked sex as illicit” and that “*Lawrence* turns that construct on its head by linking the licit nature of same-sex sex to its location outside of legal marriage”).

63. See *Lawrence*, 539 U.S. at 575 (homosexuals have a right to autonomy just as heterosexuals have); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (state may not intervene in abortion decision during first trimester); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (woman has right to choose abortion before fetal viability without undue interference from the State).

III. MARRIAGE AND "ACCIDENTAL PROCREATION"

The changing messages sent by the Supreme Court are reflected in early lower court and state court decisions concerning same-sex partners. These cases uniformly linked marriage to procreation, either by "perpetuation of the race" as the purpose of marriage⁶⁴ or simply because the United States Supreme Court had often linked the right to procreate with the right to marry.⁶⁵ These cases did not argue that marriage was intended to channel male sexuality and prevent accidental procreation; the very examples courts chose, in fact, would have contradicted this claim. Consider *Baker v. Nelson*, in which the court stated with no irony: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁶⁶ Sarah's handmaiden Hagar, who gave birth to Abraham's children because of Sarah's infertility, would be quite surprised to discover that marriage was the institution designed to police Abraham's sexual impulses; and the sisters Rachel and Leah, both married to Jacob, knew that marriage facilitated, rather than constricted, Jacob's access to multiple sexual partners.⁶⁷

In the disputes over same-sex marriage, marriage was seen as an institution designed to *encourage* procreation, not one intended to ensure that irresponsible procreators have a legal incentive to procreate responsibly. Gay people were not only biologically unfit to this task, but, as Jesse Helms put it, "weak, morally sick wretches."⁶⁸ By the time the Massachusetts Supreme Court decided the *Goodridge* case in 2003, the argument that marriage was necessary for propagation of the species was beginning to lose traction, perhaps in light of abundant evidence that the species was continuing to reproduce in adequate numbers, with or without marriage. Instead of the argument seen in early same-sex marriage cases—that same-sex partners are incapable of reproducing together, and therefore fall outside of marriage's ambit altogether—a new argument emerged. Same-sex couples *could* have children, and in fact *were* having children, whether through sperm donation, egg donation, surrogacy contracts, adoption, or heterosexual intercourse with friends or former

64. See *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (in denying visa to same-sex partner of U.S. citizen, court held that "propagation of the race is basic to the concept of marriage and its legal attributes"); see also *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974) ("The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union").

65. *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) (in denying marriage license to same-sex couple, court held that "we cannot overlook the fact that the Supreme Court has deemed marriage a fundamental right substantially because of its relationship to procreation").

66. *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971).

67. *Genesis* 16, 29-30.

68. Mark Hosenball, *Jesse's World*, NEWSWEEK, Dec. 5, 1994, at 24.

partners, and these families sought recognition as such, in part through marriage. The popular anti-gay response to this new turn of events was to disparage same-sex couples' ability to parent.⁶⁹ The rhetoric of the late 1990s and early 2000s was one that assumed that marriage had something to do with children. The fight was over whether same-sex parents deserved to be given the marriage label. If children were really better off with married parents, an argument on the pro-same-sex marriage side went, then why not let *all* parents marry their partners of choice, rather than leave the children of same-sex couples in legal limbo?

Those against same-sex marriage found themselves caught in a logical and linguistic bind: marriage, they argued, makes parents better parents, but gay people should not be allowed to be better parents for the sake of . . . children. Of course, anti-gay folks believed that gays were bad parents, but the facts were at best ambiguous. Studies showing that children of unmarried couples—straight or gay, but mostly straight—did worse on a variety of metrics only reinforced that marriage was good thing for everyone. And studies showing that the children of same-sex couples in particular had poorer outcomes begged the question of how much the legal and social refusal to recognize these relationships affected the parenting environment for these children.⁷⁰ Indeed, by the time of *Goodridge*, even Justice Cordy in articulating the reasons why the state should limit marriage to heterosexuals conceded that “there is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to do so.”⁷¹ As the simple knee-jerk response that “gay people make bad parents” became untenable, a new rationale was necessary, and “accidental procreation” fit the bill.

The accidental procreation rationale is first fully articulated in Justice Cordy's *Goodridge* dissent, where it takes a front seat to arguments about tradition, morality, and social science data about the efficacy of gay parenting. Although Cordy appears to find these other arguments persuasive as well,⁷² much of his opinion is focused on defining with great particularity the link, as he sees it, between marriage and procreation:

69. See, e.g., *Bottoms v. Bottoms*, 444 S.E.2d 276, 279-80 (Va. App. 1994) (reversing trial court decision that denied custody due to lesbian mother's “unfitness” as a parent); *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 283-85 (Mo. Ct. App. 1989) (finding mother's lesbian relationship harmful to her children); *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339-40 (Mo. 1998) (holding that mother's homosexual relationship had a negative impact on children and finding her unfit); *Pulliam v. Smith*, 501 S.E.2d 898, 904-905 (N.C. 1998) (holding father to be unfit parent for practicing homosexuality with children in the house).

70. For a summary of the key studies, see WILLIAM N. ESKRIDGE, JR. & NAN K. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1182-88 (2d. ed. 2004).

71. *Goodridge*, 798 N.E. 2d at 1003.

72. See *id.* at 998.

Civil marriage is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of marriage has existed as one of the fundamental organizing principles of civil society . . . Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated and socialized . . . [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse [between a man and a woman] commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.⁷³

While acknowledging that marriage has served “many important functions,” Cordy’s argument focuses on only one strand in the history of marriage ideology: the strand emphasizing the potential of marriage to discipline and regulate heterosexual behavior. Cordy reaches for his characterization of marriage back to 1810, to the Massachusetts case *Milford v. Worcester*, which found that the purpose of marriage is “to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species.”⁷⁴ Certainly he is right that marriage has been one of the ways in which society deals with the possibility of procreation. But Cordy’s gloss on the history of marriage adds a dark twist: through marriage, society is *coping* with a potentially unfortunate fact; sex and the resultant children are seen as an unfortunate problem in need of taming. Without marriage, Cordy insinuates, men would refuse to be responsible fathers:

[A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriages fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.⁷⁵

Again, the language of discipline: marriage *binds*, *imposes*, and makes otherwise irresponsible men responsible; it is for the benefit of innocent women and children that it “fills the void” that in a state of nature would leave them bereft. Or is the “chaos” to which Cordy refers the chaos that results when property is held primarily or solely by men, to be transferred to other men, and that property includes women, but there is no means of

73. *Id.* at 995.

74. *Id.*

75. *Id.* at 996.

transmitting the property intergenerationally? Without a mechanism for delineating ownership of women and ties to children, consolidation and control of property would be very difficult indeed. Even though we have no doubt lost our belief in the improvement of “the species” in marriage, the capacity of marriage to “regulate” and “chasten” retains a cultural and legal force.

So the purpose of marriage, or if not *the* purpose, one of the functions it serves for Cordy, is the channeling of male sexuality into domesticity. But why shouldn't homosexuality also be so channeled? The answer for Cordy is that marriage is a message directed at the potentially irresponsible heterosexual procreator:

As long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur.⁷⁶

In other words, including same-sex couples in marriage would dilute the message that the purpose of marriage is the channeling of heterosexual procreative urges.

Justice Cordy's dissent proved to have remarkable traction. After *Goodridge*, every state appellate court hearing a same-sex marriage case upheld, contra *Goodridge*, their state's ban on same-sex marriage, until the California Supreme Court reversed this trend in *The Marriage Cases*. The majority and concurring opinions in these cases tracked Cordy's accidental procreation argument, sometimes even quoting his dissent by the paragraph. Some even went a step or two further in branding the regulation of accidental procreation as the *sine qua non* of marriage, translating Cordy's skeptical neutrality regarding the parenting ability of same-sex couples into a back-handed compliment of innate superiority. It seems that attacking the abilities of gay people to parent is no longer in vogue, at least among the judicial set; instead, courts try to distinguish between the accidental procreation argument and the previous “only straights can do it” argument and “straights are better parents” argument.

76. *Id.* at 1002.

Court after court insists that one does not have to be “bigoted” in order to oppose same-sex marriage; that “homosexual parents understandably decry” the idea that the heterosexual couple is the optimal partnership for raising children, and that voters and legislators were not motivated by “anti-gay sentiment” in passing same-sex marriage bans.⁷⁷ Instead, these courts point to the accidental procreation argument as the “real” reason for the legislation. In Indiana in 2005, for example, the Court of Appeals claimed that same-sex couples were by definition more prepared parents than most heterosexuals:

[There is a] key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction. Becoming a parent by using “artificial” reproduction methods is frequently costly and time-consuming. Adopting children is much the same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.⁷⁸

In essence, same-sex couples are *better* parents—more stable, more thoughtful, and wealthier—than opposite-sex couples (at least the fertile ones). Furthermore, they are incapable of engaging in the dangerous activity of heterosexual intercourse that could result in an unexpected pregnancy. Thus, they do not *need* chastening effects of the institution of marriage. It is this insight that led Kenji Yoshino, after the publication of the New York Court of Appeals decision in *Hernandez v. Robles*, to the conclusion that the accidental procreation argument sees same-sex couples as “too good for marriage.”⁷⁹

In making the argument that the purpose of marriage is to prevent heterosexual couples from the negative effects of accidental procreation, the Indiana court engaged in a remarkable act of re-narrating the origins of marriage. After listing the difficult and expensive decisions a same-sex couple must engage in to reproduce, it provided an explanation of how and why heterosexual marriage might have come about. The State, it explained, may “legitimately *create the institution of opposite-sex marriage*, and all the benefits accruing to it, in order to encourage male-

77. *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 867 (9th Cir. 2006) (emphasis added); see also *Andersen*, 138 P.3d at 981 (insisting that Washington state legislators “were not motivated by antigay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples”).

78. *Morrison*, 821 N.E. 2d at 24.

79. Kenji Yoshino, *Too Good for Marriage?* N.Y.TIMES, July 14, 2006 at A19.

female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse.”⁸⁰ Excluding same-sex couples from marriage did not result from discrimination. Nor did marriage result from the gradual imposition of law onto a non-legal institution with origins in the primordial ooze. Rather, marriage developed as a way to make heterosexual couples better—to encourage heterosexual *men* in particular to enter into a legal relationship that would bind them to their future children. Given the tortured and ancient history of marriage in both law and culture, the idea that the modern state “created” the institution of marriage to serve a singular, particular purpose seems far-fetched. In another recent same-sex marriage case, the New York Court of Appeals similarly took the accidental procreation rationale out of Cordy’s mouth and left everything else behind, claiming that “marriage *was instituted* to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth.”⁸¹

In developing the “accidental procreation” argument, the Indiana court explicitly distinguished between this argument and its predecessor, the “natural is better” argument. It is not that procreation through natural intercourse is better than assisted procreation, the court explained, but instead that we need an institution that will encourage “the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.”⁸² In distinguishing these two arguments, the court insulated itself from accusations that it was discriminating against same-sex couples, or that it ignored studies indicating that same-sex couples are “at least as successful at raising children as opposite-sex couples.”⁸³ Instead, these studies became “irrelevant,” because the State’s real purpose in limiting marriage to heterosexual couples was to direct their “biological drives” into “channels of socially accepted activity.”⁸⁴

This argument is all the more extraordinary given the drumming that homosexual people, and gay men in particular, have taken historically over their imagined irresponsibility and promiscuity. In the accidental procreationist view, gay people are simply incapable of making rash or foolish decisions, at least when it comes to having kids. Although the Indiana court does in a footnote acknowledge that a lesbian couple could enlist the aid of a sperm donor rather cheaply should they desire to reproduce (it never seems to dawn on the court, or any of these courts for that matter, that one partner in a lesbian couple might actually become

80. *Morrison*, 821 N.E. 2d at 24.

81. *Hernandez*, 855 N.E.2d at 21.

82. *Morrison*, 821 N.E. 2d at 25.

83. *Id.*

84. *Id.*

pregnant through sex with a man!),⁸⁵ the prototypical procreational decision envisioned by the court is quite labored and expensive. The Indiana court even goes so far as to note that the average cost of in-vitro fertilization is \$12,400. Which leads one to wonder, if the average cost of a wedding in the United States is over \$25,000, and many couples-to-be (or brides?) spend innumerable hours planning their weddings, why do we still have divorce?⁸⁶ Perhaps the couples with the big, expensive weddings are so much more stable than those who go to City Hall that they don't need marriage, either.

At the heart of the argument is a paradox: gay couples are seen as hyper-responsible, and yet what they are doing is disturbingly unnatural. On one hand, same-sex couples are seen as purposefully going about the process of conception or adoption, often at great personal expense. On the other hand, they are seen as stealing from a child his or her birthright entitlement to biological parentage. (Or, as the dissenting opinion by Justice Corrigan in *The Marriage Cases* puts it, "What is unique about this case is that plaintiffs seek both to join the institution of marriage and at the same time to alter its definition").⁸⁷ It is all well and good, Justice Cordy explains, that we allow same-sex couples to adopt children, because in those cases, "society has 'lost' the optimal setting in which to raise that child—it is simply not available."⁸⁸ For Cordy and others, there was a moment in time—presumably when egg met sperm—when parentage was "set" and any deviation from this set of parents is a "loss," even if the people who intended to act as that child's parents bore no relationship to the people who provided egg and sperm. Same-sex couples may receive the back-handed compliment of being more responsible than the rest of society, but they are always a second-best option.

In presenting the accidental procreation argument, courts can appear unbiased toward same-sex couples; judges can sleep at night knowing that they haven't really denied same-sex couples anything they didn't already have. But the accidental procreation argument isn't so benign. Its origins, which appear to be not in the primordial time when "the state" first invented marriage but instead in the minds of a few conservative law professors and fellows of think tanks in the late 1990s, are as one piece of

85. Indeed, the overwhelming majority of about 2 million parents who are gay are raising children from earlier heterosexual marriages. Caryle Murphy, *Gay Parents Find More Acceptance*, WASH. POST, June 14, 1999, at A1; see also Kate Kendell, *Lesbian and Gay Parents in Child Custody and Visitation Disputes*, ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES HUMAN RIGHTS MAGAZINE, 2003, available at <http://www.abanet.org/irr/hr/summer03/custody.html> (last accessed November 25, 2008).

86. See "Ask Carley" on *TheKnot.com*, who claims that the average wedding costs \$27,800. http://www.theknot.com/ch_qaarticle.html?Object=A1980914200822&keywordID=156&keywordType=2&parentID=527.

87. *Marriage Cases*, 183 P.3d 384, 402.

88. *Goodridge*, 798 NE. 2d at 1000.

an ideological, explicitly Christian, view of marriage that goes far beyond limiting marriage to same-sex couples but also espouses traditional gender roles, bans birth control, and limits divorce.

The first articulation of anything approaching Justice Cordy's accidental procreation argument in the legal literature occurred in a 2001 law review article authored by Lynn Wardle of Brigham Young University Law School entitled *Multiply and Replenish*. Wardle's article—which is cited in nearly every court decision rejecting the right to same-sex marriage—used a new phrase to describe the state's interest in marriage: “responsible procreation.”⁸⁹ But responsible procreation was not limited to preventing accidental procreation; it also encompassed the need for *more* procreation, and included language of “complementarity”—the idea that men and women inhabit very different roles as parents, that these roles are each necessary and complementary to each other, and that the roles should not be blurred.⁹⁰ Another proponent of this view, Daniel Cere, gives the insistence on traditional sex roles a softer edge: marriage's twin purposes are to “attempt to bridge sex differences” and to “struggle with the generative power of opposite-sex unions”—that these differences are “natural” and beneficial is never questioned.⁹¹ Indeed, this is the view of the current Roman Catholic Church, which in 2004 declared that “[s]exuality characterizes man and woman not only on the physical level, but also on the psychological and spiritual, making its mark on each of their expressions,” going on to say that only through sex difference can “spousal love” be experienced.⁹² The creators of the accidental procreation argument do not view the prevention of accidental procreation as the only purpose of marriage, but part and parcel of a particular view of society that is heavily gendered.

For the accidental procreationists, marriage is just as much about enforcing a patriarchal role for fathers as it is about preventing their abandonment of mothers; *responsible* procreation is all about masculine control of the family. Or, as one article puts it, a desirable “culture of marriage” must encourage not only “the birth and rearing of children” and “bonding between men and children” but also a “healthy form of masculine identity,” a trait that is at risk now that women have “entered the public realm” and men are no longer given the role of “provider and

89. Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. of Law & Pub. Pol'y 771, 781 (2001).

90. *Id.* at 793-94, 802.

91. DANIEL CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 8 (2005).

92. Joseph Card. Ratzinger [now Pope Benedict XVI] & Angelo Amato, “Letter To The Bishops Of The Catholic Church On The Collaboration Of Men And Women In The Church And In The World,” available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html (last accessed November 24, 2008).

protector.”⁹³ Other sources quoted by the opinions in these cases shed further light on the place of the accidental procreation argument alongside other, now less popular ones. According to Monte Neil Stewart, quoted in the *Morrison v. Sadler* decision, the “central and probably preeminent purpose of the civil institution of marriage (its deep logic) is to regulate the *consequences* of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter.”⁹⁴ Marriage wasn’t invented just to encourage co-parenting, it was invented to make men pay so the state won’t have to. If the issue were simply earning capacity, one would think that two gay parents would be better than one. But if men and women are fundamentally different, if men are bread-winning, protective, disciplinary fathers and women are nurturing, warm, stay-at-home mothers, then marriage becomes the scaffolding giving social credence to the male role.

The judges who adhere to the “marriage-as-reproductive-good-housekeeping” argument do not always admit to subscribing to a belief in the importance of gender difference, an opposition to contraception or abortion, or a belief in abstinence before marriage. But the accidental procreation argument makes little sense without these other pieces in place. If a person genuinely believes that it is possible to prevent pre- or extra-marital sex, that sex within marriage should be exclusively procreative, and that men and women perform very different parenting functions and that these functions should be encouraged by law, then the accidental procreation rationale makes a lot of sense: sex outside of marriage would be dangerous indeed. But our suspicion is that many of the judges who invoke the accidental procreation argument would be quite uncomfortable with it if they believed it required them to endorse the rest of the package, as would many citizens affected by judicial pronouncements about marriage. And even if they do mean it, we might question whether this vision of marriage is up to the task of dealing with modern life, where because of prolonged education, people are often in their late 20’s or early 30’s by the time they feel financially responsible enough to take on a parental role. Are these people really going to abstain from sex until marriage? The evidence would suggest that they are not.

In their recent study, *Red Families, Blue Families*, Naomi Cahn and June Carbone argue that two very different visions of the family exist in different parts of America: that many people in so-called “red states,” especially Evangelical Christians, adhere to an ideal in which people abstain from sex before marriage, eschew abortion, and marry at an early

93. Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT* 47-48 (Daniel Cere & Douglas Farrow ed., 2004).

94. Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 13, 132 (2004).

age (often because of their desire to experience sex or because of an unplanned pregnancy). Many people in so-called “blue states” have a different normative vision of the ideal family: sex is fine before marriage as long as it’s done responsibly, but children should be planned for, and both marriage and children postponed until a person has achieved financial and emotional maturity. Either approach to the family has its own internal logic, but, Carbone and Cahn warn, the “red-state” approach to family has an important inconsistency: “while blue families have prospered, red families are in crisis on their own terms—red states have the nation’s highest teen pregnancy and divorce rates, and the growing separation between the beginning of sexual activity and marriages makes abstinence increasingly untenable.”⁹⁵ The accidental procreation argument may not only be inseparable from other arguments about the family that are unappealing to many people, but this set of arguments may itself be such a relic of the past that it no longer works even for those who subscribe to it.

IV. MARRIAGE AS A MESSAGE

The rhetoric of accidental procreation, and more particularly, the claim that it creates a “rational basis” for the legislature to outlaw same-sex marriage, cannot help but be driven back to a portrait of marriage that is wholly unappealing for many people. It sets terms for itself that preclude any discussion of the recent evolution of marital (and non-marital) sex, child-bearing, and child-rearing. It seems like a kind of last-stand argument for an unattractive institution that, like police and prisons, can’t be done without. It makes one wonder if this particular defense of marriage won’t turn out to be the final death knell of the institution.

Yet of course the issue addressed in these cases arises because (some) same-sex couples have decided the married condition is an enviable one, and indeed that granting all the rights, privileges, and responsibilities of marriage through “civil unions” doesn’t quite fill the bill. Marriage, they claim, is not just a contract but a status, and one that they should not be excluded from. Justice Barry T. Albin of the Supreme Court of New Jersey wrote for the majority in *Lewis v. Harris* (granting same-sex civil unions, but leaving it to the legislature to decide if these should be called marriages): “Raised here is the perplexing question, ‘What’s in a name?’—and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples?”⁹⁶ What’s in a name? Evidently, everything and nothing. The debate is reminiscent of the theological controversies that led to schisms and crusades and purges, such as the *filioque* controversy, the principal

95. Naomi Cahn & June Carbone, *Red Families v. Blue Families*, abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008544.

96. *Lewis v. Harris*, 188 N.J. 415, 458 (2005).

cause of the schism between the Roman Catholic and Greek Orthodox churches.⁹⁷ But here, the *everything* and the *nothing* are indistinguishable. Marriage may hold its mystical estate and its mirage-like desirability to those excluded from its bonds because it is nothing in itself. Its *mysterium* and hence its symbolic desirability directly depends on its surfeit of meaning; marriage is a floating signifier with no clear referent. This does not mean that the reality of couplings and couples is not factual enough, or that in the lived experience of multitudes marriage isn't a central experience of life, for better or for worse. It probably does mean, though, that judicial rhetoric will never be able to come to terms with marriage in any convincing way. It could be that the extra provided by the title marriage, rather than civil union, its *mysterium*, is a kind of sacredness associated with religious marriage—in which case one should evoke the Establishment Clause of the First Amendment to say that the state has no business sponsoring and regulating marriage at all. Let the state provide civil unions, and let those who want the “extra” consecrate their unions through the addition of a church wedding—the practice in France, for instance, since the Revolution.⁹⁸

Toward the end of his *Goodridge* dissent, Justice Cordy asserts that by limiting marriage to “opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor.”⁹⁹ Allowing same-sex couples to marry would communicate a different message: “[Recognition of] marriages between same-sex couples who cannot procreate . . . could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation.”¹⁰⁰ It is not only same-sex couples who see marriage as a message, but those espousing the rhetoric of accidental procreation as well. For some same-sex couples, using the name “marriage” is part of the politics of recognition; for Cordy and others, the name marriage sends a message of the normative desirability of a particular attitude to sex and reproduction.¹⁰¹ For whom is this latter

97. “*Filioque*” is a Latin phrase meaning “and from the Son” that was added to the Nicene Creed to clarify that the Holy Spirit proceeds from both Father and Son and not just the Father. See entry for “*filioque*” in THE CATHOLIC ENCYCLOPEDIA, available at <http://www.newadvent.org/cathen/06073a.htm>.

98. For some of the more well-known iterations of this conclusion, see MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) and NANCY D. POLIKOFF, *BEYOND STRAIGHT (AND GAY) MARRIAGE* (2008).

99. *Goodridge*, 798 N.E. 2d at 1002.

100. *Id.*

101. Courtney Cahill has identified a variant on this message, the idea that same-sex marriage is “counterfeit” because it pretends to be the real thing but is not, and will ultimately devalue the “real currency.” See Courtney Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist View of Marriage*, 64 WASH. & LEE L. REV. 393, 420-21 (2007) (compiling instances of “counterfeit” language by lawmakers and policy advocates).

message intended, and how is it disseminated? The “irresponsible procreators” the courts have in mind are clearly heterosexuals of child-bearing age who engage in procreative sex. We are talking about men who, absent state intervention, would have unprotected heterosexual intercourse that would result in children, and who will be unlikely to stick around to financially support the children and unlikely to remain in relationships with the children’s mothers. We are talking about women who, absent state intervention, will have unprotected intercourse with men without first negotiating the terms of the deal should a baby result. And we are talking about men and women who engage in protected intercourse with no plan for children, find themselves or their partners “accidentally” pregnant, and are unwilling to undergo an abortion. The existence of state-sponsored marriage is supposed to convince each of these “irresponsible procreators” that the sex they have should occur within marriage instead of outside it. How does the state do this? It offers a package of goodies to those who marry that makes marriage more attractive than non-marriage; in other words, it offers a bribe. The question is then: is this bribe likely to be attractive enough to send the message that Cordy and others think it sends to potentially irresponsible procreators?

Some of the rights and privileges of marriage could indeed be construed as a bribe. Access to a spouse’s social security pension and the tax-free transfer of property upon a spouse’s death, for example, are both clear benefits of marriage over non-marriage that could be translated into a dollar figure. Essentially the government might be saying to a particular couple, “get married, and one of you gets \$100,000 that you otherwise won’t get.”¹⁰² But other incidents of marriage are more ambiguous. For couples with similar incomes, being forced to pay federal taxes as a married couple is actually a financial loss. For individuals with substantial income, having the state get involved upon divorce will likely result in a loss of assets that would not have been incurred if no marriage had happened. It’s far from clear that a potentially irresponsible procreator contemplating marriage would look at the package of goodies offered by the state and conclude that marriage is a good idea. (It’s also worth asking whether this libidinous beast would even take the time to think through the decision before taking part in the activities that might lead to an unplanned pregnancy—our hunch is no.)

Many of the benefits of marriage actually have very little to do with bribing the parties into taking part in the institution. Rather, they have to do with providing long-term stability of either party should they divorce,

102. For an in-depth analysis of the economic benefits of marriage, see Terence Dougherty, *Economic Benefits of Marriage under Federal and Connecticut Law* (2005), available at <http://www.thetaskforce.org/downloads/reports/reports/EconomicBenefitsCT.pdf>.

and providing long-term stability to their children. In terms of what is offered by state law, marriage is good for kids not because it keeps their parents together by bribing them into staying but because it provides the kids with state intervention if the parents split up in the form of a divorce and custody hearing, a presumption that children born into the marriage are the legal children of both spouses, and access to adoption by step-parents. There is a deep inconsistency between the idea that a state's interest in marriage is in tricking heterosexuals into staying with each other and the actual benefits and burdens offered by the institution. One would think, based on what the state actually offers, that the state's interest in marriage is in giving thoughtful, responsible procreators (like the same-sex couples and infertile straight couples caricatured in the various judicial opinions) the ability to protect their children and their spouses from their *own* potentially irresponsible behavior down the line.

Even if Justice Cordy is right, and the message sent by the state in limiting marriage to opposite-sex couples is that marriage is the institution designed to foster "responsible procreation," how will otherwise flighty heterosexuals respond? Will they take a hard look at the benefits and burdens of marriage and decide that marriage is a good deal? Will they ask themselves whether marriage would make them seem more respectable? Or will they ask whether marriage will allow *them* to send a message to society that they have made a serious commitment to another person? Many people today marry once they think they have found the person they want to procreate with, not because they have decided to have sex for the first time and want to insure themselves against "accidents," but because they have been (irresponsibly?) engaging in sex for quite some time and only now are ready to settle down and have a child. For these people marriage is certainly a disciplining institution, but not in the way Justice Cordy imagines. Marriage does not force the accidental procreator to stick around so much as it encourages an *intentional* procreator to make a commitment. Most people decide to marry not because it will give them access to a gym membership or health insurance (although certainly some do) but because they think that it is the "right thing to do" if they want to have children—that it sends signal to the rest of their community about the seriousness of their relationship. (The norms of their community therefore matter a lot—if their peers are having children without marriage, they are unlikely to think marriage is necessary.) Why do they think it is the "right" thing to do? Not because of any benefits or burdens the state has doled out, but because of the long-term social meaning of marriage. The state's reliance on accidental procreation as a legitimate state interest thus masks the real interest here—in recognizing some relationships as more worthy than others, and committed heterosexual relationships as the ones that merit state involvement. The idea that the state could have an independent interest in

promoting the prevention of accidental procreation absent a normative, moral view of marriage is belied by the content of the goods offered by the state.

We must also consider what the refusal to admit same-sex partners into marriage says to the potentially irresponsible procreator. Post-*Lawrence*, the Supreme Court recognizes a zone of privacy for sexual activity outside of marriage. We've come a long way since *Zablocki* in 1978, when fornication was still illegal. After *Lawrence*, fornication statutes have been struck down, even in states with strong stances against same-sex marriage.¹⁰³ In this legal climate, excluding gay people from marriage essentially says "go ahead, have sex all you want as long as you aren't going to reproduce." In an age of birth control, how does this encourage heterosexuals to confine sex to marriage? Contrast this with the message that (might) be heard by the irresponsible procreator if same-sex couples could marry: "the state expects anyone, regardless of sexual orientation, who is in a sexual relationship to marry." Or perhaps, depending on *which* same-sex couples chose to marry—the ones who had kids versus the ones who didn't—: "the state expects anyone who plans to have children together or might have children together to marry." We might or might not be happy about this kind of state intervention in personal relationships, but if the state's real interest is in creating stable homes for children, wouldn't the best idea be to harness the energy of same-sex couples who want to be "respectable" citizens and use them as an example for the less responsible, more "impulsive" straights?

If historians in fifty years are asking themselves "who killed marriage," they might look not to same-sex marriage proponents, who wanted desperately to be included in an institution that has meant many things to many people, but to the Justice Cordys of the world, who shrunk marriage to some essential elements that were not appealing enough to most folks to hold the institution together. One must wonder, of course, whether courts really have much power over the public's perception of marriage. (A multi-billion dollar wedding industry may have much more power than a few state supreme court justices). After all, Justice Cordy, as well as the majorities in the Indiana, New York, and other cases, made the accidental procreation argument in the context of considering whether limiting marriage to opposite-sex partners was a legitimate state interest for purposes of rational basis review. This exceedingly forgiving form of constitutional review allows the court to consider *any* argument the state might make to support its law, even if this argument is not the real reason for the law and even if other, impermissible arguments exist. No trained lawyer would think that just because some courts say that particular states

103. See *Martin v. Zihel*, 607 S.E. 2d 367 (Va. 2005) (striking down Virginia's fornication statute as contrary to holding of *Lawrence*).

might have created marriage law in order to encourage otherwise irresponsible heterosexuals to procreate responsibly that this was really what these states believed. But does the public know this? And even if lawyers and judges “know” what rational basis review is, don’t they also learn what abstract and evanescent concepts like “marriage” mean through the reification that occurs when courts make attempts to textually define the undefinable? Indeed, some of the opinions reach conclusions about the state interest in marriage that are not qualified by the usual “the legislature *might* have thought. . .” language. In her concurrence in the New York case, for example, Justice Victoria Graffeo states flat-out that “marriage *was instituted* to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth” before stating that the Legislature’s focus on opposite-sex couples is therefore “understandable” and “not irrational.”¹⁰⁴ Regardless of what standard of review is being used, these opinions introduce a new definition of marriage as if this definition had existed from time immemorial and as if it so exists today.

Much ink has been spilled poking fun at Justice Kennedy’s moments of seeming fancy in substantive due process decisions, where he claims, for example, in *Planned Parenthood v. Casey* and again in *Lawrence v. Texas* that “a[t] the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁰⁵ But perhaps Kennedy is onto something. By defining what can’t be defined, and by defining it in a way that will make many people respond with aversion or alienation, the accidental procreationists may have begun the process of transforming marriage from an institution that can be imbued, chameleon-like, with whatever characteristics an individual feels or needs to use to fill it into a mere regulatory device that people engage in out of a sense of obligation, duty, or access to health insurance. Given the choices people now have—indeed, in the era after *Lawrence v. Texas*, now that marriage is no longer necessary for a publicly and legally acceptable sexuality—it remains an open question whether this rigid and disciplinary view of marriage will have very many takers.

In *The Marriage Cases*, the California Supreme Court re-reads the history discussed by Cordy and others in a different way. In *Loving v. Virginia*, Chief Justice Warren wrote that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.¹⁰⁶ Justice Cordy’s jurisprudence emphasizes the *orderly* aspect of the pursuit of happiness, and suggests that orderliness requires distinct gender roles to send a message to irresponsible

104. *Hernandez*, 855 N.E. 2d at 21.

105. *Casey*, 505 U.S. at 851; *Lawrence*, 539 U.S. at 571.

106. *Loving*, 388 U.S. at 12.

heterosexuals about the legal and cultural meaning of their reproductive capacity. In contrast, the California court reads *Loving* as implying that the pursuit of happiness includes the freedom to marry the person of your choice: “None of the past cases discussing the right to marry—and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution—contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally.”¹⁰⁷ This “new” view of marriage is just as historically unmoored as Cordy’s accidental procreationist view but seems more consonant with the understanding of people who enter into the status of marriage today. In particular, the language of “freedom” and “right” and, implicitly, *choice* in marriage is precisely what marriage was *not* according to structural anthropologists and church historians; Lévi-Strauss, for example, would say that the purpose of marriage is precisely to *limit* choices so that people will marry only outside their clans. But clearly, contemporary American marriage has come to be seen culturally as a right, a matter of free choice, and a key element in the pursuit of happiness. The view of marriage as a guard-rail against irresponsible procreation promoted by Cordy and those who cite him evokes a very different image, one of marriage as designed to “regulate” and “chasten” “the intercourse between the sexes,” in the 1810 language he finds appropriate to the present moment. This image, one that is unlikely to resonate with most people, and one that is, indeed, deeply unappealing for many, is unlikely to influence the behavior of the “irresponsible procreator.” Upon marrying following the Massachusetts Supreme Court ruling in *Goodridge*, one resident was quoted as saying, “I feel kind of like my bones filled out somehow . . . I felt thin and shaky this morning, and I feel fortified and amazed.”¹⁰⁸ If the historians are right, and we no longer think of marriage as alliance-building but instead consider it as a step on the path to personal self-fulfillment, can the law alone limit the institution by insisting that it exists to spread a message about self-denial and channeling of urges? We seriously doubt it.

107. *Marriage Cases*, 183 P.3d at 432.

108. Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004 at A1.