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INTRODUCTION

Like most Americans, I have always been struck by the thoughts of the Framers of the American Republic as expressed in the *Declaration of Independence* and the self-evident truth that "all men are created equal." Like others, I have also been attracted to the notion of natural law, as were most of the founders of our Federal republic.

I intend to explore the question about the meaning of equality in the framework of a challenging American political and legal debate that generates passion among participants, i.e., same-sex marriage. I do so with a particular methodology that takes stock of three presuppositions: the first is that the human person is intelligent; the second follows—the reality that surrounds us is intelligible; and, third, this reality that is encountered and understood by human intelligence will impose on individual and, therefore, societal wills, an order that is rational and knowable by the human person and shall be the basis of the norms conducive to human life and the common good.[1] This is the approach taken by the majority of the framers of our basic law, and by those who use the method of legal reasoning that often bears the moniker of *the natural law.* From a Roman Catholic perspective, the natural law has for centuries been a foundational argument regarding the connection between moral theory, the common good, and the development of legal norms.[2] The following paper is intended to present

[1] This methodology emerges from the work of Rev. John Courtney Murray, S.J., developed in his work WE HOLD THESE TRUTHS—CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 109 (1960).

[2] The 1983 Charter of the Rights of the Family (CRF) promulgated by the Holy See on October 22

the natural law approach to particular issues dealing with marriage through a Roman Catholic lens in a way that will be meaningful to both Catholics and those of other faiths or of no faith tradition.

I first consider in Part I the underlying background of equality arguments and the limitations on them dictated by sound and objective human reason. In Part II, I then reconsider the concept of equality within the context of the Framers' understanding of it. Next in Part III, I consider but critique the foundation of contemporary legal arguments for same-sex marriage based on the *Casey* and *Lawrence* decisions. In Part IV, I critically evaluate the extension of *Casey* and *Lawrence* in the Massachusetts Supreme Judicial Court decision of *Goodridge*. I conclude by demonstrating that the equality argument for same-sex marriage substitutes an objective understanding of fact and reason with an exaggerated legal positivism—a virulent form of positivism that ignores the right reason of intelligence perceiving the intelligible world—which is the core of the natural law.

I. THE UNDERLYING BACKGROUND—EQUALITY ARGUMENTS AND SOME LIMITATIONS

Let me begin by suggesting that precision in the use of language is critical to understanding the nature and substantive content of an argument—especially legal argument that constitutes an exercise of human intelligence grasping the intelligible world in order to formulate legal norms. There should be no exception to this proposal when the specific language deals with equality and marriage. Accordingly, many people would likely conclude that the word "equality" has a relatively clear meaning. The same sentiment could well apply to the meaning of the term "marriage." Nonetheless, the meaning of language can be manipulated by anyone who is not so much interested in objectively explaining its import as in trying to convince others to adopt their subjective impression of what is being conveyed. As Lewis Carroll's Humpty Dumpty told Alice, "[w]hen I use a word, it means just what I choose it to mean—neither more nor less."[3] The importance of the meaning of language is evident in the present day when equality and marriage are discussed in the context of

of that year reflect the claims of this paper which are based on the objective right reason of the natural law that take stock of human intelligence knowing the intelligible world and formulating norms for conduct that enter into law.

[3] LEWIS CARROLL, *Through the Looking Glass*, *in* THE COMPLETE WORKS OF LEWIS CARROLL 205 (Philip C. Blackburn & Lionel White eds.,1942), *quoted in* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174, n.18 (1978).

same-sex relationships. The subjective approach of Humpty Dumpty when used to define, explain, and interpret legal meaning is a perilous course to pursue, and I hope to demonstrate this in the context of the present day campaign for legal recognition of same-sex marriage.

I reach the conclusion that the equality argument cannot sustain the legal justification for same-sex marriage, which some lawyers and courts, such as the *Goodridge* majority, offer.[4] By way of supporting my conclusion, I present the argument that the equality of human beings exists at certain fundamental levels—the most basic would be something guaranteed, albeit vaguely, in the essential equality of the multi-faceted right to be born, to live after birth, and to flourish (albeit in a variety of expressions regarding flourishing). My approach is rooted in the *Declaration of Independence's* assertion that "all men are created equal." I believe that the understanding of the framers of the *Declaration* regarding equality is essential for making any equality argument that is legally justifiable in the American context—and most likely beyond this context considering the American influence on other legal systems. While legal interpretation requires some suppleness regarding the meaning of language due to its "open texture,"[5] the equality argument does not possess the elasticity required to substantiate the quest for legal recognition of same-sex unions.

In short, the "equality" argument cannot guarantee that the manifestation or exercise of equivalence is the same for every claimant. Otherwise, the competition for who would be considered the best person in any particular field could never be determined, e.g., who gets hired; who gets selected for the team; who gets the Nobel Prize; or, who gets to be on Dr. House's team.[6] In this context, each claimant who relies on an equality argument with some particular goal in mind should be able to present a coherent case that one is entitled to be the equal of all others in the right to be born, to live, and to seek what is needed to thrive until one's death as reason suggests.[7] Each person can also enjoy the equality to remain free from

4 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

5 H. L. A. HART, THE CONCEPT OF LAW 126–28 (2d ed. 1994).

6 This point reflects, I believe, the distinction between the equality of opportunity versus the equality of condition. It may well be that anyone has a right to apply for a particular post, so this would be the equality of opportunity—the ability to apply on the basis of a claim of equality. But the selection committee must determine that it must hire the best candidate, so the issue of equality of condition surfaces. In this regard, the selection committee objectively evaluates the talents of each applicant, and it finds some lacking and others excelling. Finally, it selects whom it judges to be the best candidate. This person would not be the equal of others because there is not equality of condition even though there may be equality of opportunity. *See* Thomas Fay, *Maritain on Rights and Natural Law*, 55 THE THOMIST 439, 447 (1991).

7 As I argue in this essay, it would be wrong to state that a novice office clerk should receive the same compensation as a seasoned executive secretary and administrative assistant. Nonetheless, both

unwarranted intrusion into one's existence as long as this exercise does not interfere with anyone else's fundamental claims to enjoy a parallel human existence.

But this does not mean that every human claim made by an individual or similarly situated individuals can be sustained. In light of this last point, there are contexts that may enable some claimants a right to pursue certain activities whereas other persons are precluded from doing so. For example, a company that is awarded a government contract to manufacture munitions would be entitled to fabricate explosive devices whereas a cell of anarchists or terrorists would not because they are not the "equal" of the candidates who are regulated government contractors. Intelligence and the intelligible world would suggest that this is the case.

Following this line of thought, an individual claimant cannot expect that societies and their norms must be compromised on every front to reflect or adopt the equality argument advanced by some members of the community in which their claims cannot be factually and rationally supported.[8] This is especially true in the realm of public policy issues that define the meaning of marriage and the arguments advanced for recognizing same-sex relationships as marriages. When Massachusetts Chief Justice Margaret Marshall set the stage for the recognition of same-sex marriage in *Goodridge*, her remarks that marriage is "a vital social institution" and the "exclusive commitment of two individuals to each other nurtures love and mutual support" avoided making, but nonetheless implied, the claim that a same-sex couple is the equal of a heterosexual in all regards, at least insofar as the right to marry is concerned.[9]

There are other important considerations that need to be taken into account as I develop this investigation into the meaning of equality in the marriage context based on my basic assumption that human beings are intelligent and that the world that encompasses them is intelligible. For example, there is a need to consider equality among people to be free to know and enjoy the truths about human nature. There is also the role of equality as the guarantor of expectations, opportunities, and claims, which

have the right to claim a compensation that entitles them to enjoy a fulfilling life—to flourish. This is how I express my caveat "within reasonable bounds."

8 *See* KURT VONNEGUT, JR., *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE 7 (1961). Here Vonnegut tells a tale of a futuristic society of equality wherein, "The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General." *Id.*

9 *Goodridge*, 798 N.E.2d at 948.

each person can have and reasonably expect to be fulfilled. It is crucial to realize, however, that objectivity defines the meaning of equality rather than the subjectively determined definitions that some may assert or demand. In this regard, the objective means for defining equality identified by the drafters in the *Declaration* is the Creator who has endowed each member of the human family with both similarities with and distinctions from other persons.

In the present age, we often hear claims made about "inclusiveness" and "human rights" that are deemed essential by some advocates to make each person "equal" with all others notwithstanding the diversity that differentiates them often in some significant ways.[10] This approach is patent in many arguments advanced in favor of same-sex marriage. The justifications offered contravene the facts surrounding human nature and the objective reasoning that enables us to understand the similarities and differences that exist among people.[11] Here we need to take stock of some fundamental questions. Are we equal in possessing the talents and skills that enable us to pursue the many activities found within human existence? Can the baseball fan assert that he or she is the equal of Babe Ruth when it comes to playing the game based on the fan's and Ruth's mutual love of the sport? In truth, some of us may have to expend a great effort to attain what it might take another person little, if any, exertion, and if this is the case, can it be said that we are equal in all respects? The answer is or should be manifest: no.

The meaning of equality is constrained by certain limits that can be rationally and factually understood. The quests for marriage equality for same-sex couples is unsustainable because they remove from consideration two foundational pillars essential to equality: the first concerns the

10 *See, e.g.*, EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 4 (2001); MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 17–18 (1998).

11 For example, Professors Ian Ayres (with whom I am honored to share the platform of this conference) and Jennifer Brown in their recent book STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS, imply—but do not explain—equality and its meaning in the context of the rights of heterosexual couples versus homosexual couples. They make a fascinating observation in the context of experience with "access and privilege within school systems" that "heterosexual people are more likely than gay men or lesbians to have children." IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 5 (2005). Let's think about this claim: of course both heterosexual and homosexual men and heterosexual and homosexual women can have offspring by using natural means and artificial means of reproduction; however, if we focus on the natural means of reproduction and further assume that this is the reproductive method used between those who are considered the spouses, the heterosexual couple will have children in most cases, but the homosexual couple will not because they cannot. There is no other alternative to this conclusion which intelligent people observing the intelligible world can conclude. This is not a privilege of the heterosexual couple; rather it is their reality that makes them different from, not equal to the homosexual couple.

importance of objective facts (observations of the intelligible world), and the second raises the vital role of right reason and logic in assessing the extent of similarities and distinctions found among people (the exercise of attributes of the intelligent person).[12] When reason and fact are pushed aside, the law becomes a tool of pure positivist—the law is whatever the lawmaker says it is—that grants a license to make "equal" what reason and reality demonstrate and conclude is not.

Knowing that I am entering a topic that bears great sensitivity among many people, I want to express clearly that it is not my intention to insult, demean, or marginalize anyone and the dignity that is inherent to everyone.[13] I think that there must be equal access to the claim of dignity, which does not imply or require the further conclusion that all persons are equal in all respects, nor must their ideas and positions be judged equal in all respects. To disagree with someone with different views on any subject—including same-sex marriage—is precisely that, a disagreement. The nature of disagreement is to enter a debate with reasoned analysis and objective commentary supported by factual analyses. To disagree is not to demean; to debate is not to insult; to contradict with objective reasoning is not to marginalize or unjustly discriminate.

My aim is to demonstrate that for people to be the equal of one another in the context of marriage, there is a compelling need to analyze clearly the nature of marriage, as it has been understood and legally recognized, as the union of a man and woman and why therefore, relationships between two people of the same sex cannot constitute a marriage. A same-sex couple has a private relationship that is protected by the law under *Lawrence v. Texas*,[14] but it would be inappropriate to confer on this relationship the status of marriage. While the associations of two persons of the same sex or opposite sexes are relationships, they lack something essential for the relationship to be a marriage that is constitutive of the family, the basic unit

12 While Professor Carlos Ball does not dismiss the Equal Protection argument, he suggests that the due process argument has new life since *Lawrence* opens "lines of argument in the due process area that were... limited as long as *Bowers v. Hardwick* remained good law." Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1188 (2004).

13 *See* Charles E. Mauney, Jr., *Landmark Decision or Limited Precedent: Does* Lawrence v. Texas *Require Recognition of a Fundamental Right to Same-Sex Marriage?*, 35 CUMB. L. REV. 147, 157 (2005) ("Although the Massachusetts high court based its decision solely on the Massachusetts state constitution, the *Goodridge* decision cited *Lawrence* in its opening paragraphs. Specifically, the court cited *Lawrence* as 'reaffirm(ing) that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support.' Thus, the court discounted any notion of popular support for laws restricting marriage to opposite-sex couples.").

14 539 U.S. 558, 578 (2003).

of society.

There are those who disagree with my position on this point. Professor Mark Strasser has stated in one of his commentaries on marital issues that since "those with a same-sex orientation have a right to privacy with respect to other matters of family life including fundamental rights with respect to the children that they are raising, then they too should be given the right to enter the relationship that is the foundation of the family in our society."[15] While heterosexual and homosexual couples—or for that matter individuals—can raise children, one inevitable question that must be raised as we consider the similarities and differences between heterosexual and homosexual couples is: where do the children come from? A second question follows: when it comes to rearing children, are two adults of different sexes the same as two adults of the same sex when it comes to rearing children?

We also disagree on Strasser's his further assertion that relies on *Loving v. Virginia*.[16] In *Loving*, the Supreme Court concluded that the Commonwealth of Virginia could not deny interracial couples the right to marry. In this respect, the court found the state's position that a person has a right to marry anyone they choose as long as it is not someone of a different race unconvincing. Professor Strasser asserts that the successful argument made by Mr. and Mrs. Loving to overcome the prohibition against their marriage should also apply to a same-sex couple whose marriage is still prohibited in many jurisdictions.[17] But as we shall see, it does not.

When it comes to marriage issues involving the propriety of same-sex relations, it is evident that any man, regardless of his sexual orientation, has the same ability to marry a woman. And similarly, any woman, regardless of her sexual orientation, can marry any man regardless of his orientation. In this they *are* equal. However, Professor Strasser implies that under the rationale of *Loving v. Virginia*, the Supreme Court would have to conclude that no state could deny same-sex couples the right to marry by saying that such individuals had the right to marry, just not someone from the same sex. His argument does not seem to take stock of the fact—a fact of the intelligible world that can be perceived by human intelligence—that the prohibition that has existed about men marrying men and women marrying

15 Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What Is Protected and Why?*, 38 NEW ENG. L. REV. 667, 674 (2004).

16 388 U.S. 1 (1967) (holding freedom to marry cannot be restricted by invidious racial discrimination).

17 Strasser, *supra* note 15, at 674.

women applies equally to all men and to all women regardless of their sexual orientation.

But it is critical to understand that *Loving v. Virginia* does not apply to same-sex relationships, despite what advocates for same-sex unions, such as Professor Strasser, would argue. *Loving* concerns the right of people of one sex to marry a person of the opposite sex regardless of race—or for that matter religion, ethnicity, or socio-economic status. This is a critical distinction that is unfortunately overlooked by those who advance *Loving* as precedent-by-analogy in same-sex marriage advocacy.

Loving is not about marrying someone you want to marry. Rather, it is about marrying a person of the opposite sex that you want to marry.

Under *Loving*, the complementarity of the sexes was understood, respected, and honored by the courts. In the drive for recognition of same-sex versus interracial marriages, the issue of complementarity is not considered in the same fashion—if it is considered at all.

In the consideration of marriage, the race of the partners is immaterial, whereas, their sexual complementarity is of vital concern. This is a crucial element of the intelligible world that surrounds the *Loving* case and the issues involving marriage. It is same-sex, not race, which is the driving force in the present day debate that incorrectly relies on *Loving*, and this factor the Supreme Court has not addressed. Moreover, the reliance and analogy based on *Loving* does not work.

But should the constitutionality of same-sex marriage come before the Supreme Court, it is clear that *Lawrence* may well be an indicator of where the advocacy—but not necessarily the Court—supporting same-sex unions will likely go. As will be demonstrated in Part III, the Court in *Lawrence* suggested that it will not go where same-sex union advocates want it to go, i.e., while private consensual adult sodomy is constitutionally protected under *Lawrence*, same-sex marriage is not.

By insisting through legislation or adjudication that one thing is equal to something else does not in fact make it so (our human intelligence and our understanding of the intelligible world lead us to this conclusion)—because there must be some foundation based on facts and reason that can justify the equality claim (once again, our human intelligence and our understanding of the intelligible world inexorably lead us to this second conclusion). If this factual-rational foundation is lacking, the equality claim must fail unless there is a purely positivist legal mechanism considering the claim. This is patent when the physical differences of male and female and their biological complementarity essential to the continuation of the human race are taken into account. The promotion of a

"legal argument" that attempts to justify same-sex unions as being the equal of opposite-sex marriage is a contradiction of reason and fact which destabilizes the integrity of a legal system and the substantive law that undergirds it. Reliance on an "equality" argument to advance legal schemes to recognize same sex-marriage does not make relations between two men or two women the same as the complementary relation between a man and a women when reason and fact state that they are equal in certain ways, but not in other ways that are crucial to the institution of marriage.[18] While the sexual relations between same-sex couples and opposite-sex couples may both generate physical pleasures through sexual intimacy, these two kinds of sexual relations are substantively different - the latter exemplifies the procreative capacity that is the foundation of the human race based on the ontological reality of the nuclear family (the fundamental unit of society); whereas, the former is sterile from its beginning and cannot achieve this objective.

But let us assume for the moment that I am in error on other pertinent issues regarding same-sex unions and that the relationship between two persons of the same sex is the equal of the marriage between a man and a woman. What conclusions do we then reach as further considerations surrounding the marital context are pursued? These considerations include: equality claims made for other relationships in which proponents argue that these relationships can also be marriages if the relationship of same-sex couples can become a marriage; moreover, by denying the marital status to the partners of these other relationships is there also a violation of equality? A list of such affiliations might include these: a collective of men or women—or a mixture of both sexes—who claim the right to be equal and therefore married in a polygamous context; a sexual affiliation of someone in age-minority and someone in age-majority who claim the right to be equal and therefore married in spite of current prohibitions on age limitations; a sexual relationship of closely related persons who, in spite of legal prohibitions due to degrees of consanguinity, claim the equal right to marriage; or any combinations of human beings who wish to associate with other biological entities who (at least the humans) insist that their relation is or should be considered the equal of a marriage between a man and a woman.

When the state confers the legal recognition of marriage on the

18 This is why Professor Robin West, who is sympathetic to those who campaign for same-sex marriage, has argued elsewhere that it may be desirable to do away with state recognition of marriage and substitute the state's recognition of something else. *See* ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 131–37 (2007).

relationship of a same-sex couple and grants them the state-sanctioned benefits of marriage, are not these other citizens denied equality when their relations are not recognized as marriages? To intelligently address this predicament, we must return to the idea of equality found in the *Declaration of Independence*.

II. EQUALITY RECONSIDERED—THE FRAMERS' PERSPECTIVE

The Framers understood that equality possesses rational and factual conditionings that reinforce the soundness of equality claims, and the law of equality must acknowledge that the world is intelligible by the intelligent being.[19] By way of illustrating an essential contrast pertinent here, the positivist mind may claim that a lump of coal and a flawless diamond are the same since they are both carbon deposits; however, does this assertion about equality of carbon deposits hold when one considers the fact that qualitative and ontological distinctions exist? The natural law lawyer—the intelligent mind contemplating the intelligible world—would likely take a different approach. While there are similarities based on the quiddity (the whatness) of "carbonness," it is impossible to contend that the diamond and the lump of coal are equal in all regards. With the guidance of reason (intelligence) and fact (the intelligible world), one must conclude that these two manifestations of carbon deposits is that they are not equal in all regards—in spite of what the positivist legal mind may assert.

A central question now follows: what about human beings and their equality regarding most issues that they encounter during life, including marriage? I wish to reiterate that when it comes to members of the human family, each person is equal to everyone else in having aspirations for the future and for the justifiable opportunities to fulfill these aspirations, which are held in common. Moreover, all members of the human family have an equal claim to the right to life, although this perspective is not shared by many influential academics, lawyers, and politicians. There must be the ability to make claims to the common stock of the things that are essential to sustaining human existence for individuals and the natural social groups—especially the biological, nuclear family—that emerge from authentic human nature.

The *Declaration* is clear about the similarity of individuals. It speaks of

[19] *See* Robert John Araujo, *What Is Equality? Arguing the Reality and Dispelling the Myth: An Inquiry in a Legal Definition for the American Context*, 27 QUINNIPIAC L. REV. 113, 165 (2009).

each person being endowed by the Creator—not by any human being or institution—to inalienable claims and rights that include "Life, Liberty and the pursuit of Happiness." This endowment is a "self-evident truth" that exceeds human bias and partisanship. It is true and self-evident because its source, its guarantor, is an objective, transcendent, and moral standard that escapes the vagaries of human caprice. Human intelligence can capture the essence of these intelligible facts. With the exercise of right reason, the human being can come to recognize the truth about human equality and the limits that logically apply to it.[20]

An illustration of this latter point would be the contention that the part-time office clerk should receive the same compensation and benefits as the CEO of the organization that employs both. To be clear, the labor of each possesses dignity; but this similarity does necessitate that they should be compensated in precisely the same way. Both of these individuals can make the same claim that they are equal insofar as they have a right to gainful employment, but this does not mean that they must be equal regarding the nature of their work and the compensation to which they are entitled. This is an important point overlooked by the majority opinion in *Goodridge v. Department of Public Health*, which concluded that equality necessitates the acceptance and recognition of same-sex marriage for reasons that do not display intelligence well because the reasons do not reflect intelligible reality. Since the *Goodridge* case rests on the judicial cornerstones of *Planned Parenthood v. Casey*[21] and *Lawrence v. Texas*[22], I shall now turn to these two decisions and examine the durability of their foundations.

III. THE UNSTABLE FOUNDATION: CASEY AND LAWRENCE

The self-evident truth about human equality is based on the human

20 *See* John E. Coons, 19 J.L. & RELIGION. 491, 493 (2003-2004) (book review). In this regard, Professor John Coons has made a noteworthy contribution that helps define the legal meaning of equality not just in the American context but the global, human context. He states, "Now, a countless number of things truly relate to one another as equals; yet among this horde there is one specific relation of equality that can be attributed to humans alone. It is theirs exclusively, because it is a relation based in a uniquely human property—that is, in a capacity shared by us but not by the rest of creation. This 'host property' (my term) is the moral freedom that is peculiar to members of our kind. We are equal to one another precisely because of our shared free individual capacity either to seek the good and the true or, instead, to 'do it my way.' There are correct ideas and correct possible outcomes, and we can choose to give them our allegiance, our intelligence and our energy." *Id.*; *see generally* JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT (1999) (providing an insightful and well-argued explanation of the relational nature of human equality).

21 505 U.S. 833 (1992).

22 539 U.S. 558 (2003).

person's ability to exercise right reason—a reason which takes the thinker beyond self-interest, bias, and the constriction of isolated autonomy endorsed by the problematic dicta from *Casey* that there is "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[23] The liberty of which the *Casey* Court spoke is not ordered; rather, it is self-defined and free from an external and objective definition that inevitably leads to a skewed and untenable conception of equality that defies what intelligence concludes about the intelligible world.

The *Casey* Court invigorated the growing problem of disordered rather than ordered liberty when it concluded that, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[24] The liberty and equality promoted by the dicta of *Casey* regrettably led to disorder and exaggeration about rights entitlement and the inevitable conflict between rights claimants.

In evaluating *Casey* to ascertain the extent of its contribution to *Lawrence* and *Goodridge*, it is essential to keep in mind that anyone who contends that same-sex couples are entitled to be "equal" to opposite-sex couples has failed to take into consideration the physical differences between these two categories of human couples that bear on their inability to replicate the functions of opposite-sex couples. In their joint *Casey* decision, Justices O'Connor, Kennedy, and Souter asserted that their "obligation is to define liberty for all, not to mandate our own moral code."[25] Assuming that this was in fact their goal, they did precisely what they said was *not* their intention or objective by establishing an exaggerated subjective moral code which is at the heart of the strained understanding of equality pronounced in *Goodridge*. The "moral code" they produced emerges from their conclusion that, "It is conventional constitutional doctrine that, where reasonable people disagree, the government can adopt one position or the other . . . That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty."[26]

Reliance on the *Casey-Lawrence* duet provides a tenuous basis for the acceptability of same-sex marriage, and, at the same time, undermines or

23 Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).
24 *Id.* at 851.
25 *Id.* at 850.
26 *Id.* at 851.

trivializes the protection of opposite-sex marriage. The *Casey* decision replaces conventional and genuine morality based on right reason with an artificial one founded on an exaggerated "liberty" contained in "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[27] *Casey* is not a tested recipe for defensible liberty that justifies a legitimate claim to equality, but represents a path to confusion and chaos. *Goodridge* fabricates and imposes a moral decision by overriding tradition and the morality on which the tradition is founded by redefining what is constitutive of marriage and family.

If advocates for consensual same-sex relationships were satisfied with the decriminalization of homosexual acts, which was achieved through *Lawrence*, and not the institutionalization of marriage or civil unions that are intended to be the equivalent of marriage, the equality argument that undergirds the drive for same-sex marriage would disappear. But since the "equality" campaign to redefine marriage has been forcefully promoted, supporters of same-sex marriage demand the imposition of their "moral code" on the rest of society through their quest for redefinition of marriage. And, only by re-defining marriage with the words they choose can their goal be achieved.[28] This is not ordered liberty Americans have come to expect and enjoy but something else not conducive to orderliness in the exercise of liberty.

Moreover, this is not an exercise of the intelligent mind in understanding the intelligible world. The concepts of existence, the meaning of the universe, and the explanations of the mystery of life, which are artificially simulated and do not reflect human biology and anthropological complementarity, become norms that the rest of humanity must accept when the one judicial vote needed for a majority is achieved.

The new standard for liberty and equality judicially crafted for pregnant women who wished to terminate their pregnancies and articulated in *Casey* became the standard for liberty and equality used to redefine acceptable, legally protected sexual relationships in *Lawrence v. Texas*.[29] The principles of equality addressed in *Lawrence* were limited by the majority, and apply *only* to the activities of consenting, same-sex adult couples acting in private.[30] The *Lawrence* majority concluded that the Texas statute

27 *Id.*

28 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003) ("Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries.").

29 *See* 539 U.S. 558, 574 (2003).

30 *Id.* at 577 (relying on *Casey*, 505 U.S. at 847). However, some legal scholarship supports the view that there is a constitutional right to marry that includes the distinct right for state recognition, i.e.,

that prohibited homosexual sodomy violated the fundamental right of consenting adults to engage in *private* sexual conduct.[31] However, the *Lawrence* Court restricted the legal protection to be given to consenting same-sex couples and stated:

The present case. . . *does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.* The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for *their private lives*. . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[32]

In her concurring opinion, Justice O'Connor deliberately placed a limitation on the degree to which the equality principle could be extended in same-sex relations. As she stated:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. *Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.* Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.[33] (emphasis added)

Nevertheless, influential commentators on *Lawrence* have argued that this decision has achieved precisely what the majority said it would not, i.e., justification for the legalization of same-sex marriage.[34] In fact, this is what the *Goodridge* majority did, contrary to the limitation expressed in *Lawrence*. Constitutional proclamations can have life beyond the cases in

public and official, of a couple's—any couple's—family relationship based on *Lawrence*. *See, e.g.*, Ball, *supra* note 12, at 1185–86; David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 898 (2006).

31 *Lawrence*, 539 U.S. at 578.

32 *Id.* (emphasis added). In his dissent, Justice Scalia was skeptical of this as he said, "At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it." *Id.* at 604 (Scalia, J., dissenting) (citations omitted).

33 *Id.* at 585 (O'Connor, J., concurring).

34 *See, e.g.*, Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1184–85 (2006); Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of* Lawrence v. Texas, 14 KAN. J.L. & PUB. POL'Y 687, 688 (2005); *but see*, Mauney, *supra* note 13, at 148 (explaining a different take on *Lawrence* that does not provide the legal foundation for the recognition of same-sex marriage).

which they are developed. In relying on *Eisenstadt v. Baird*,[35] Justices O'Connor, Kennedy, and Souter in *Casey,* contended that judicial precedent respects "the private realm of family life which the state cannot enter."[36] Judicial precedent enabled the state, and its legal mechanisms, to publicly acknowledge the private relationship of a same-sex couple and declare it a marriage. The *Goodridge* decision expressed the view that the state *is* a party to a marriage.

Lawrence adopted an important expression of liberty, as formulated by the *Casey* decision,[37] regarding the protection of "personal decisions relating to marriage . . ."[38] The Massachusetts court had the tools needed to cultivate the seeds of liberty and equality planted in *Casey* and *Lawrence* and, with apologies to *Star Trek* fans, to boldly go where no one had gone before by reconstructing the definition of marriage. The launching point for state recognition and endorsement of same-sex marriage was set. And now, let us consider *Goodridge* and how it metamorphosed the *Casey-Lawrence* duet.

IV. THE GOODRIDGE DECISION

At the outset of the majority opinion in *Goodridge*, Chief Justice Margaret Marshall makes two important points which, by themselves, appear to reflect widely held non-controversial views. The first is that marriage is a "vital social institution."[39] Her second is the recognition that the "exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society."[40] However, a few short phrases later, the majority opinion in *Goodridge* intrepidly declares that Massachusetts "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."[41] This assertion supplies the need to reexamine Marshall's claim regarding the "exclusive commitment of two individuals" in marriage.

By emphasizing the Massachusetts constitution's affirmation of "dignity and equality of all individuals," the majority acknowledges that it was

35 405 U.S. 438 (1972) (expanding the right to acquire and use contraceptives to unmarried couples that was given to married couples in Griswold v. Connecticut, 381 U.S. 479 (1965)).

36 Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (quoting Prince v. Mass., 321 U.S. 158, 166 (1944)).

37 *Casey*, 505 U.S. at 851.

38 Lawrence v. Texas, 539 U.S. 558, 573–74 (2003).

39 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

40 *Id.*

41 *Id.*

engaging in a radical departure from legal norms when it asserted that its "decision marks a change in the history of our marriage law."[42] Indeed, the change was extraordinary. From the very outset, the majority decision of the Massachusetts court does *not*, as the majority contends, foster human dignity and equality so much as it artificially manufactures a rule conferring marital status and its attendant benefits that is a revolutionary alternative to conventional of marriage, i.e., the association of two persons of the opposite sex.

In its novel redefinition of marriage, the majority relies, by way of *Lawrence*, on the *Casey* phrase: "Our obligation is to define the liberty of all, not to mandate our own moral code."[43] In fact, it was not liberty that was defined but the imposition of the court's redefinition of marriage. It replaced the accepted moral code with its own as the Supreme Court had done in *Lawrence*. While the *Lawrence* majority avoided the issue of same-sex marriage, the Massachusetts court concluded that the *Lawrence* decision paved the way for same-sex couples to enter the marital state by asserting the Commonwealth's "exclusion [of same-sex marriage] is incompatible with the constitutional principles of respect for individual autonomy and equality under law."[44]

The *Goodridge* majority defends the *Casey* and *Lawrence* formulations that were crucial to its reasoning. The court concludes that individual liberty and equality are safeguarded thereby protecting citizens from unwarranted government intrusion in "protected spheres of life" and enabling citizens to avail themselves of benefits conferred by the State for the "common good."[45] The *Goodridge* majority contends that both of these expressions of liberty and equality are at the core of justifying same-sex marriage: "Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights."[46] To support its argument, the *Goodridge* majority relies on *Casey's* language that "our law" constitutionally protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and

42 *Id.*

43 *Id.* (quoting *Lawrence*, 539 U.S. at 571).

44 *Goodridge*, 798 N.E.2d at 949. The full paragraph of the Massachusetts court's assertion reads: "Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law." *Id.*

45 *Id.* at 949.

46 *Id.*

education."[47] *Goodridge*, however, ignores Justice O'Connor's caution that the language of *Casey* and *Lawrence* must not be construed to support the redefinition of marriage or the institutionalization of same-sex marriage.[48] If O'Connor's dicta reflected the truth about the intelligible world that can be comprehended by the intelligent human mind, the *Goodridge* majority apparently found it inconvenient and disregarded it.

The reliance on privacy, as promoted by *Casey* and *Lawrence*, was a subterfuge to alter dramatically the *public institution* of marriage and the family life that ensues from marriage. The assertion made by Justices O'Connor, Kennedy, and Souter in *Casey* that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"[49] is an understandable principle, but it is not without limitation—a fact overlooked by advocates of same-sex marriage, as well as the *Goodridge* majority; a fact that the intelligent mind comprehends about the intelligible world.

Thus, by relying on *Casey*, two young people ten years of age may decide that they have a Constitutional right to marry one another.However, the state and its members (especially the families of the couple) can stop this—at least for the time being in that state law would prohibit underage marriage. A biological brother and sister may decide to marry one another, but again the State and others can preclude this on the grounds of consanguinity, at least for the time being.

While the state must not be allowed to dictate who can marry and who cannot (subject to rational requirements and restrictions as I have already suggested), this does not mean that it cannot regulate marriage, which is not exclusively a personal matter, but a social one as well. Surely human intelligence understands this fact, this reality about the intelligible world. While the government and its juridical structures are prohibited from making unwarranted intrusions into marital relations, they are warranted to

47 Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

48 As Justice O'Connor noted,

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations-the asserted state interest in this case-other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

49 *Casey*, 505 U.S. at 851.

intervene by regulation or restriction where the common good and ordered liberty is compromised.

But if personal choice, rather than social norm, is at the core of the right to choose marital partners, then why restrict the equality argument to a single adult person of the opposite or same-sex whose closeness in relationship (consanguinity) should not be a factor? The equality argument that is based on *Casey* and *Lawrence* ultimately brings us to question other views about marriage partners that should be entitled to the same "equality" that same-sex marriage advocates expect and demand.

The equality argument supporting same-sex marriage runs into further difficulty when one considers that heterosexual marriage partners, because of their biological nature, are typically capable of reproducing with one another, but homosexual partners are not. It is absolutely essential to take stock of the indisputable about the physical nature of the human being and its bearing on marriage. A homosexual man and a heterosexual man are equally presumed capable of inseminating any woman, and a lesbian and a heterosexual woman are equally presumed capable of being inseminated by any man. Why? Because intelligence and the intelligible world demonstrate this conclusion to be true. But no man, heterosexual or homosexual, can inseminate any other man. Nor can any woman, heterosexual or homosexual, inseminate another woman without the assistance of artificial means. Neither judicial nor legislative *fiat* can alter this biological reality of human nature. Any man can deposit his semen in another man, but this does not lead to fertilization of human eggs and procreation. No woman can produce sperm-bearing semen and inject it into another woman thereby leading to the fertilization of the second woman's egg. The procreation argument against same-sex unions works, not because of legal fiction or artifice, but because of biological reality that is inextricably a part of human nature that has been a part of the traditional definition of marriage that the majority in *Goodridge* cannot dispute.[50] Again, human intelligence and the intelligible world are working in tandem when these conclusions are reached. Put simply, the *Goodridge* majority clearly ignored these crucial points about reality, and ignoring reality does not make for wise and sound law, except for the steadfast positivist whose will typically overcomes the intellect. The only way to overcome this obstacle to the same-sex marriage campaign is to put aside the natural and

[50] *Goodridge*, 798 N.E.2d at 952. As the *Goodridge* majority stated, "[c]ertainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Id.* at 965.

historical definition of marriage and manufacture a new one that suits the needs of same-sex marriage advocates. This is precisely what *Goodridge* has done.

But do same-sex marriage advocates have something else to offer? Here we need to consider to the extensive work of Professor William Eskridge who has long been identified with the equality argument on behalf of same sex unions.[51] He begins with the assertion that same-sex marriage is good not just for the couple but for American society in that it "civilizes" both.[52] One justification offered to support his contention is that homosexuals are "forced" into a subculture that makes them promiscuous leading to negative consequences including sexually transmitted infections and disease.[53] However, the author overlooks the fact that so-called "straight" people, i.e., heterosexual, can also be promiscuous and, in some cases, have been infected with sexually transmitted disease passed from male to female or from female to male. Human intelligence perceiving the intelligible world demonstrates this to be true time and again. If heterosexual marriage has not arrested this practice amongst opposite-sex couples, why should it arrest the diffusion of sexually transmitted diseases amongst same-sex couples? To argue that homosexuals are forced into promiscuity undermines the argument for a committed relationship like heterosexual partners, for they, too, can be licentious. There is nothing to stop a heterosexual couple or a same-sex couple from any relationship including one of commitment where promiscuity is not practiced—but, again, their relationship does not make a marriage.

Eskridge concedes that homosexual persons are not an ethnic or racial group.[54] However, he still suggests that there is a *parallel* between homosexual persons and ethnic and racial minorities who have suffered various kinds of civil rights discriminations. He contends that homosexual couples that are sexually active have been denied the right to rent an apartment from a landlord who objects to their sexual activity; but, he needs to consider instances in which non-married opposite-sex couples have also been turned away.

As he begins his analysis of the principal case that he believes supports his argument, i.e., *Loving v. Virginia*,[55] he proffers an interesting suggestion about an "intolerable" situation. As he argues: "Gay people

51 Professor Eskridge also assisted in preparing an *amicus curiae* brief in the *Goodridge* case.
52 WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 8 (1996).
53 *Id.* at 9.
54 *Id.* at 10.
55 388 U.S. 1 (1967).

constitute virtually the only group in America whose members are not permitted to marry the partner they love."[56] This assertion is assuredly not true—for, as I have and will point out, in spite of love, other prohibitions such as degrees of consanguinity, age, and the fact that one is already married prohibit persons from "marrying the partner they love." Inevitably, Professor Eskridge must concede, as he later does, that there are others, who are also prohibited from marrying.[57] As pointed out earlier, there are many people, who cannot "marry the partner they love" because of degrees of relationship, age, illness or disease, and existing marital status, i.e., they are already "married" to someone else whom they may not love as much or love at all.[58]

He further states that the "most important argument" for his position is "an argument of formal equality: Gay couples should have the same rights that straight couples do."[59] Of course, if same-sex couples have the same ontology that opposite-sex couples have, why not. But, intelligence and the intelligible world again show why they are not ontologically the same. As I have already pointed out several times, they do have the *same* rights, with one notable exception that has been forbidden to everyone else including heterosexual persons: they cannot marry a partner of the same sex. But, Professor Eskridge further asserts that, "[w]ithout the right to marry, gay Americans are second-class citizens."[60] Of course, they can still vote; they can still run for and be elected to office; they can still campaign on behalf of other candidates and issues; and they can still assemble peacefully on whatever issues are important to them. These are not the only rights they have. The denial of citizenship argument simply does not work. Yet, the marriage issue, from Professor Eskridge's perspective, is the one area where they are "second class." As pointed out before, they, in fact, are not denied the opportunity to marry, but they are, like all others, prohibited from marrying certain persons because of a variety of reasons including but not limited to sharing the same-sex. Therefore, the interesting argument regarding what makes them "second class" dissolves. In his argument, Eskridge posits that, "[s]tates insistent on heterosexuality in marriage is a

56 ESKRIDGE, *supra* note 52, at 12.

57 *Id.* at 63.

58 Professor Eskridge notes that this argument is "a bad form of argument." ESKRIDGE, *supra* note 52, at 63. But is it? He attempts to argue the case for his criticism by stating that if the state were to prohibit Jews from marrying Jews, this would be unlawful discrimination. *Id.* But that is not what the state is doing. Moreover, the parallel between the two circumstances, i.e., two Jews versus two people of the same sex, is not explained.

59 *Id.* at 51.

60 *Id.* at 62–63.

denial of formal equality for gay and lesbian citizens."[61] However, he subsequently offers another concession that will undermine this "equality" argument that homosexuals are the only group discriminated against on marriage grounds, for he has acknowledged that same-sex marriage will "generate new inequalities" by devaluing "cohabiting relationships of all sorts and the lives of people not desiring to form long-term committed relationships."[62]

His equality argument fails on empirical grounds as well. When Professor Eskridge asserts that same-sex marriage is prohibited in the same way interracial marriages were prior to *Loving v. Virginia*,[63] he is mistaken. The basic flaw in his reasoning is this: interracial sex between a man of one race and a woman of another race (as was the case of Mr. and Mrs. Loving) is not analogous to the sexual liaison between two men or between two women. Therefore, the prohibition is not based on the same grounds: in *Loving* it was race. The color of skin does not affect the complementarity of the male-female relationship; however, the pairing of two persons who share the male or the female sex does because there is no biological complementarity that is essential to the survival of the human race and that is and has been vital to institution of marriage. The sexual pairing of a man and a woman can produce a new generation; the pairing of two males or two females cannot. The pairing of Mildred and Richard Loving could produce a new generation of Lovings—as their marriage did; the pairing of a homosexual couple cannot. The state law that led to *Loving* did not deny the physical reality of the male-female relationship as do the recent juridical decisions of Massachusetts and California[64] in "equating" the male-male relationship and the female-female relationship to the male-female bond.[65]

61 *Id.* at 65.

62 *See* WILLIAM N. ESKRIDGE, JR., *The Same-Sex Marriage Debate and Three Conceptions of Equality*, *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 183 (Lynn D. Wardle et al. eds., 2003). Professor Eskridge's cited chapter in this volume was replied to by Professor Lynn Wardle in *Beyond Equality*, at 186–89. Here, Professor Wardle draws a substantive distinction that detracts from Professor Eskridge's argument: "Race is unrelated to any legitimate purpose states could have for regulating marriage, but sexual behavior is directly related to the fundamental purposes of marriage laws." *Beyond Equality*, at 186. As he notes, opposite-sex is vital to the survival of the human race, but same-sex marriage is not. *Beyond Equality*, at 187. This is not only a distinction, but it is an immutable difference that denies the presence of either kind of union being the equal of the other.

63 ESKRIDGE, *supra* note 62, at 77.

64 In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

65 In 1971, the Minnesota Supreme Court had the opportunity to review the denial of an application for a marriage license submitted by two members of the same sex. *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). In sustaining the denial of the application, the Minnesota court referred to the *Loving* case and reiterated the distinction I have made. As the Minnesota court stated, "*Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth

With the issuance of *Lawrence*, it would appear that consenting adults can pretty much do sexually whatever they wish to do in private as long as it is neither lethal nor injurious. The focus of concern in *Lawrence* was the need to preclude the state from entering into one's home, especially one's bedroom. But it is vital to understand that state marriage laws simply do not intrude into private matters because these laws involve a *public institution* that is the subject of protection and regulation by the state and its juridical apparatus.

Of course, same-sex marriage advocates began their campaign with the privacy claim; however, once *Lawrence* was decided, they could abandon the primacy of privacy in order to seek and secure public recognition of same-sex unions and the conferral of state sponsored or state protected benefits. Privacy was not the issue at stake in *Goodridge* as it was in *Lawrence*. But *Goodridge* probably could not have been decided without *Lawrence* first paving the way by removing the criminalization of consensual homosexual acts. Thus, with the privacy status granted, the *Goodridge* majority was able to grant public acknowledgment of these acts.

The *Goodridge* court attempted to subdue the revolutionary nature of their opinion by stating that "for all the joy and solemnity that normally attend marriage, [the statute] governing entrance to marriage, is a licensing law."[66] If that is the case, the license that was granted by the *Goodridge* majority enabled persons to do that which had been previously forbidden under the "licensing" statute since the earliest recognition of marriage law that was adopted by the state in the Anglo-American legal tradition asserting that a marriage was between and man and a woman.[67]

Statutes involving marriage may well be licensing laws in some regards,

Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 186. The United States Supreme Court denied appeal of this decision for lack of substantial federal question. Baker v. Nelson, 409 U.S. 810 (1972). The history of the *Baker* case dispels Professor Eskridge's interesting but wrong hypothesis that, "Chief Justice Earl Warren's opinion in *Loving* eschewed such a narrowly consequentialist approach [i.e., marriage is designed with heterosexual couples in mind] and, instead, focused only on the fairness of excluding different-race couples from an otherwise non-discriminating institution." ESKRIDGE, *supra* note 62, at 116.

66 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003).

67 Charles Donahue Jr., LAW, MARRIAGE, AND SOCIETY IN THE LATER MIDDLE AGES 1 (2008). Charles Donahue states at the outset that beginning with the late twelfth century, the law of marriage specified the following: (1) present consent freely exchanged between a man and a woman capable of marriage; or (2) future consent freely exchanged between a man and a woman capable of marriage. He also takes note of the Christian element of European society and states that, "Any Christian man is capable of any Christian woman so long as: (a) both are over the age of puberty and capable of sexual intercourse; (b) neither was previously married to someone who is still alive; (c) neither has taken a solemn vow of chastity, and the man is not in major orders . . . , and (d) they are not too closely related to each other." *Id.*

but the licenses given publicly signify and protect a vital relationship that is at the heart of human nature and human posterity and serves the benefit of the common good of humanity. Nonetheless, the *Goodridge* majority seized the opportunity to inject into the state's licensing authority an exaggerated understanding of liberty and equality that reconfigured the fundamental marital relation by asserting that the dual freedoms [the freedom *from* "unwarranted government intrusion into protected spheres of life" and the freedom *to* "partake in benefits created by the State for the common good"[68]] required conferral of marriage on same-sex couples. The *Goodridge* majority uses these two dimensions of freedom to confect the thesis that the fundamental liberty and equality of persons and their due process rights include protection of life issues involving: whether and whom to marry; how to express sexual intimacy; and whether and how to establish a family.[69]

It becomes clear that the objective of the *Goodridge* majority was to make marriage an institution of the purely positivist law. As the *Goodridge* majority avowed: "Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution."[70] But the *Goodridge* majority presents an additional problem about this "secular institution" by stating, "In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State."[71] If that is indeed the case and there are three partners to any marriage, why not four? Why not five? Why not as many as can fit in the house or apartment? *Goodridge* has opened the door. Surely the secular institution created by government need not be restrained by tradition, reason, or anything else other than its own caprice? Surely the liberty and equality claims of others cannot be compromised? But if the *Goodridge* majority was concerned with just two parties at the outset, why then declare that there are only three?

The difficulties with this case do not stop here. If the state is a partner to the marital relationship, the first principle of freedom (the freedom *from*) identified by the court, i.e., that marriage concerns "the protected spheres

68 *Goodridge*, 798 N.E.2d at 959.

69 *Id.*

70 *Id.* at 954.

71 *Id.* The majority continues their explication by stating, "While only the parties can mutually assent to marriage, the terms of the marriage—who may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void *ab initio*), the Commonwealth defines the exit terms." *See* M.G.L. c. 208; *see also id.*

of private life" is undermined. Attention then needs to be focused on another point raised by the *Goodridge* majority when they quoted from a 1912 advisory opinion (permitted in Massachusetts) of the Supreme Judicial Court: "central to personal freedom and security is the assurance that the laws will apply equally to persons *in similar situations*. 'Absolute equality before the law is a fundamental principle of our own Constitution.'"[72] I have taken the liberty of italicizing the language "in similar situations" because the *Goodridge* majority quickly passed over the significance and relevance to marriage claims contained in this phrase. Are heterosexual couples and same-sex couples really "in similar situations"? Let me illustrate this point the heterosexual and homosexual couples are dissimilar in an important way with a hypothetical.

Let us assume that two islands which have not yet been inhabited by humans are to be colonized: on Island Alpha, heterosexual couples only are assigned; on Island Beta, only homosexuals. In one hundred years, will both islands be populated? I suggest that Island Alpha will be; but Island Beta will not. Why? The basic answer is to be found in the biological complementarity of the heterosexual couple necessary for procreation that is absent in same-sex couple. Once again, human intelligence observing intelligible reality should confirm this outcome.

The *Goodridge* majority, in fact, avoids responding to the issue about similarity and dissimilarity of heterosexual and homosexual couples. The pressing need to address what they erroneously assume or fail to address takes on further importance when one considers that the *Goodridge* majority noted that until its 2003 decision was issued, marriage in Massachusetts was understood to be the legal union of a man and woman.[73] It is hard to imagine that the court in 1912 would have thought that heterosexual couples and same-sex couples are "in similar situations." Given the historical meaning and definition of marriage goes back hundreds of years to the late twelfth century in England, it is clear that same-sex couples' relationships cannot be viewed "in similar situations" as opposite-sex couples' relationships.

72 *Id.* at 959 (quoting from Opinion of the Justices, 98 N.E. 337 (Mass. 1912)). It is doubtful that the members of the Supreme Judicial Court had same-sex marriage on their minds when they penned this 1912 opinion. My contention is buttressed by the *Goodridge* majority's recognition that "The everyday meaning of 'marriage' is '[t]he legal union of a man and woman as husband and wife,' Black's Law Dictionary 986 (7th ed.1999), and the plaintiffs do not argue that the term 'marriage' has ever had a different meaning under Massachusetts law." *Goodridge,* 798 N.E.2d. at 952.

73 *Id.* at 948.

CONCLUSION

What are we to conclude about the equality justifications for same-sex marriage as they make their current manifestation in *Goodridge*? We have witnessed a remarkable evolution of the rationales advanced for the legalization of same-sex marriage and unions. At first, the proffered justification was the privacy argument that had its basis in *Casey* and *Lawrence*. While the privacy argument may work for the decriminalization of private consensual sexual acts between adults of the same sex under the rationale of *Lawrence v. Texas*, it fails to achieve the goal of same-sex marriage advocates because marriage is a publicly recognized institution. Thus, a substantially different basis for justifying same-sex marriage had to be pursued. The equality argument became the standard bearer for the cause of same-sex marriage.

But for the equality argument to be taken earnestly in the development of marriage jurisprudence in the area of same-sex relations, the physical difficulties of equating same-sex relations with opposite-sex relations must be overcome. The only way to accomplish this task is to rely on an understanding of "equality" that relies not on fact and reason but on exaggerated legal positivism—a virulent form of positivism that ignores the right reason of intelligence perceiving the intelligible world. In short, the crusade for legal recognition of same-sex marriages is founded on a false notion of equality. But when the problematic rationale for justifying same-sex marriage is condoned by the law, the important idea of authentic equality is deprived of its meaning. And that is what *Goodridge* has regrettably accomplished.

For any claim to equality to be authentic, sincere, and just, its content and practice must accurately reflect the nature of the human person—for this is what makes people like one another in some ways and different from one another in other ways. And this is what the drafters of the *Declaration* intended equality to be when they said that all are created equal—in fundamental ways, yes, but in other ways based on the character of the human person, no. Human intelligence confirms this to be so, as does the intelligible world.