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SAME-SEX MARRIAGE: OUR FINAL ANSWER?

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In the 1988 edition of his treatise on *The Law of Domestic Relations*, Homer Clark wrote that marriage "is being transformed from a clearly defined relationship" to one whose "incidents are either uncertain or left largely to the control of the parties."[1] Clark's "incidents" were a large and eclectic lot. They included basic elements of marriage (that it is, or until recently was, the principle of sexual morality[2]), along with secondary attributes and legal effects (such as the property relations of spouses and ex-spouses).[3] Clark opined that the uncertainty and privatization of marriage emerged suddenly, and "without, so far as it appears, any general consideration by either courts or legislatures of the total effect which the judicial decisions will have on the institution of marriage."[4] He wrote ten years, by his count, after a time when "it would have been inconceivable to deal seriously with the question of the validity" of same-sex "marriage."[5]

It is conceivable now. Vermont recently became the first American jurisdiction to legally recognize same-sex "marriages," calling them (chiefly for political reasons) "civil unions." The Vermont Constitution, as interpreted by the state's highest court in *Baker v. State*,[6] requires an *identity* of legal benefits and protections for *all* couples—opposite and same-sex—who wish to be married. The court called for legislative action to implement this requirement. The decision held out, however, the possibility that *all* the incidents of marriage could be extended to same-sex couples without calling them *married*. The Vermont legislature, in other words, had to treat them exactly as it treated married people. But it could still *say*, if it wished, that it was not recognizing same-sex couples as, legally, "married." The legislators chose this option.[7]

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1. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 31 (2d ed. 1988).
2. *See id.* at 27.
3. *See id.* at 29.
4. *Id.* at 31.
5. *Id.* at 75.
6. 744 A.2d 864 (1999).
7. 1999 Vt. Acts and Resolver 847 (enacted April 26, 2000).

Some observers say that by calling same-sex relationships "civil unions," the legislature forestalled the national day of reckoning which would be thrust upon us by an express same-sex marriage law: whether states which do not recognize same-sex marriages must give "full faith and credit" to marriages from states that do.

This observation is surely mistaken, the product of naivete in some, and of disingenuousness in others. For among the *most* valuable legal benefits and protections of marriage is interstate portability. As Supreme Court Justice Robert Jackson said in 1948:

> If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. . . . [T]he uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relatins such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals.[8]

Jackson wrote, it is true, when it mattered more than it does today with whom one spends the night. But even now, the difference between bigamy and lawful marriage can be how well a divorce decree travels. And the many benefits of marriage provide enough incentive for Vermont same-sex couples to *seek* marital status in states to which they migrate, either temporarily or for the long haul.

Sometime soon a same-sex couple "uni[ted]" in Vermont will seek to be treated in some destination state as they are treated in Vermont. In that vast majority of jurisdictions which will, for the foreseeable future, maintain *one* legal status for couples—opposite-sex *marriage*—Vermonters will have to be assimilated to it, or endure discrimination. Upon discrimination by the first state, our disappointed Vermonters will return to their state's highest court, accurately alleging an *inequality* of benefits and protections: Vermonters Joe and Jill are treated as married elsewhere, but not plaintiffs Joe and Jack. The Vermont legislature will then have no choice but to assimilate same-sex partnerships to the legal status occupied by all other "married" couples in the Green Mountain state. At that point, the Full Faith and Credit question will be inevitable.

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8. Estin v. Estin, 334 U.S. 541 (1948) (Jackson, J., dissenting).

All of this may occur before the year is out. It is a near-term certainty. Have we had yet that "general consideration" of the effects upon the "institution of marriage," oddly missing when Clark wrote? What would such a consideration look like? This article examines those two questions.

I. NEUTRALITY

Many people believe that marriage is a union of a man and a woman. Many such people are married to persons of the opposite sex, and cannot really imagine the attraction some persons have for others of the same sex. They would be vastly disappointed if one of their children decided that he or she wanted to marry someone of the same-sex. They often also say, however, that it would be wrong, perhaps even a grave injustice, for the state to base its law of marriage on a controversial moral judgement, including the judgment—in fact, theirs and that of most people—that marriage is the union of one man and one woman. The thought is that the state ought to be *neutral* as between competing understandings of what marriage is. It would be wrong, these persons say, for the state to impose *anyone's* moral code for marriage, to make my, or your, morality the template impressed upon all.

Sometimes this viewpoint is elaborated along the following lines. Marriage is, in truth, the union of a man and a woman, as Scripture teaches. Marriage is a sacrament (or an analogous sacred relationship) in many religions. But, although it is the truth about marriage, the religious provenance of this definition makes it an inappropriate basis for civil law. Along these lines, one could say that marriage really is permanent and that divorce is impermissible or even, strictly speaking, impossible. But one could also coherently say that civil law ought not to track this view by making no provision for divorce.

About this way of viewing the relationship of the truth about marriage and the civil law, I make the following three preliminary points. First, on no one's account of it (as far as I know) is the civil law supposed to simply reproduce the moral truth about marriage. Much of what is truly good in and about marriage is beyond effective legal assistance. The endless self-giving that is required of spouses could be scarcely legally enforced. Everyone is a bad spouse sometimes, and some persons are bad spouses most of the time. Still, no one suggests that there should be legal penalties for being a bad spouse. Men who see more of professional football than they do their wife and children will have a lot to answer for on Judgment Day—in the hereafter, not here.

The most that anyone proposes is that the civil law ought to reflect some basic or defining features of marriage, and only where that serves political society's common good.[9] To what extent the law ought to make provision for civil divorce is, it seems to me, a question permitting a range of answers consistent with the moral truth that a valid marriage is indissoluble. A legal regime of "no-fault divorce," though, seems outside that range. But one need not take a strong view of the permanence of marriage to hold that no-fault divorce has worked great harm to innocent people in our society, and that some type of fault regime would be a great benefit.[10]

I propose this interpretation of *Griswold.* Assume that a majority of the Court believed there was no right to use contraceptives, even for married couples, because contraception is intrinsically immoral and that there cannot be a moral right to do a moral wrong, nor should there be a legal (or constitutional) right specified by an immoral act. The *Griswold* decision could still be written in about the same terms. That is, not only did the Court expressly decline to find a right to use contraceptives, such a finding is not necessary to explain its opinion. This interpretation of *Griswold* supposes, as the Justices repeatedly indicated, that there are many goods of marital intimacy (including non-contraceptive sexual intimacy) which are damaged by exposure to others. These goods are damaged particularly by involuntary exposures to public authority. Suppose further, as the Justices seem to have, that a criminal prohibition upon contraceptive use affect marital privacy as it should be understood.

Second, the common mindset described above suffers from what I call the "transparency" problem. When speaking of one's judgment that, for example, same-sex marriage is wrong or

9. It is important to note here that "common good" should not be understood along the utilitarian lines. The common good of political society includes a decent concern for public morality and, as we shall see, maintenance of conditions which help people to understand what marriage is and to succeed in the marriages they enter into.

10. An example of how the truth about marriage fits with the common good may be *Griswold v. Connecticut,* 381 U.S. 479 (1968). *Griswold* did not state a right to use contraceptives, even within marriage. Justices White and Goldberg came close to saying as much, but the center of gravity of the case is something quite distinct. Marital privacy, comprised of the confidentiality which marital friendship requires for its enjoyment, joined to spatial privacy in one's home, is at the core of *Griswold.* The opinion of the Court refers to the "intimate relation of husband and wife"; "privacy surrounding the marriage relationship"; and, finally, this understanding of marriage: "a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 480-83.

impossible, one is often heard to say that it is "my" view, or part of "my moral code." This way of speaking is often an innocent locution for the proposition, "same-sex marriage is simply wrong, objectively." This way of speaking is harmful, however, when casually (often unthinkingly) joined to ambient notions of moral subtectivism or emotivitism. Then, when one says that coercion based upon "my" morality would be an unfair imposition, one is *right.* For the *fact* that a judgment is *mine* is not a *reason* for the state to act in a certain way, perhaps especially to the detriment of others who do not share *my* view. That one feels repulsed by what homosexuals do is not a reason for public policy. It is not a reason at all. It is just a feeling.

But no one really thinks that the fact of holding a view is a reason for action, apart from the *reasons* why one holds the view to be true. Thus, in contrast to the opaque or intransitive quality of moral judgment evident in the common view expressed above, conclusions about the morality of same-sex marriage usually are, and should generally be seen as, *transparent* for the reasons *why* the view is held. Some people may be able to give no account of their reasons. They will make uninteresting conversation partners. Some people really are moral emotivists or relativists, and *would* be unfairly imposing upon others if they caused the state to act coercively on the basis of their feelings. But these facts about some people do not support the proposition that opposition to same-sex marriage is necessarily, or even commonly, subjective, or emotivist.

Most people believe and mean to say that same-sex marriage is simply wrong for everyone, that it is objectively and categorically immoral. This view could be false. If it is, its falsity is sufficient reason to discard it. Then doctrines about political "neutrality" or unjust imposition are unnecessary. If the view is true, then such doctrines are either inapposite, or require argument in their favor.

Third, the common mindset asserts or implies that certain truths about marriage (such as its permanence or heterosexuality) can be known *only* due to revelation or because of the authority of a sacred text or religious personality. The view asserts or implies that they are *not* knowable by reason alone. Some defenses of legal recognition of same-sex marriage, notably the Hawaii Supreme Court decision examined below, appear to take this view. If this account is true, I agree that the civil law should not be founded upon such esoteric truths. But the Hawaii court baldly *asserted* the non-rational, and (evidently) the sectarian, province of the heterosexuality of marriage. Assertions will not do; nor will simple dismissals.

Now, note well: the claim that the law *ought* to be morally neutral about marriage, or anything else for that matter, is itself a moral claim. It—the claim that the law *ought* to be neutral—is not morally neutral. As Professor Robert George points out, anyone who holds that the civil provisions governing marriage (or any other institution or practice) ought to be morally neutral does not assert, nor does the position presuppose, that the law ought to be neutral as between the view that the law ought to be neutral and competing moral views.[11] It is "obvious," he says, "that neutrality between neutrality and non-neutrality is logically impossible."[12]

That a deep moral neutrality, between the view that the law ought to prescind from the truth of the matter about marriage, and the view that the law should not prescind, is logically impossible, does *not* mean that all possible types of neutrality must be rejected. It simply means that the correctness of the view in favor of a *practical* neutrality must be argued for. And sophisticated proponents of moral neutrality do argue that the best understanding of political morality for our society requires that the law be morally neutral with respect to marriage. They argue that "alternative understandings of political morality, insofar as they fail to recognize the principle of moral neutrality, are, they say, mistaken and ought, as such, to be rejected."[13]

What might this (revised) argument in favor of neutrality say? Stephen Macedo has made probably the best (revised) argument for moral neutrality.[14] He defends the proposition that even if the inherited definition of marriage as a union of one man and one woman is true, the state cannot justly recognize it as such. For if disagreements about the nature of marriage "lie in . . . difficult philosophical quarrels, about which reasonable people have long disagreed, then our differences lie in precisely the territory that John Rawls rightly marks off as inappropriate to the fashioning of our basic rights and liberties."[15] And from this it follows that government must remain neutral as between conceptions of marriage as intrinsically heterosexual (and monogamous), and conceptions according to which "marriages" may be contracted not only between a man and a woman, but also between two men, two women (and, presumably, a man or a

11. *See* Robert P. George, *"Same-sex Marriage" and "Moral Neutrality"*, (unpublished paper on file with author). Much of the next few paragraphs follows Professor George's argument.

12. *Id.* at 23.

13. *Id.*

14. Stephen Macedo, *Reply to Critics*, 84 GEO. L.J. 329 (1995).

15. *Id.* at 335.

woman and multiple male and/or female "spouses"). Otherwise, according to Macedo, the state would "inappropriately" be "deny[ing] people fundamental aspects of equality based on reasons and arguments whose force can only be appreciated by those who accept difficult to assess (metaphysical and moral] claims."[16]

There is good reason to hold, however, that the meaning and significance of marriage are available, in any effective and widespread way, only where the host culture, including its law, embodies and encourages a sound understanding of marriage. As Professor George states:

> [Where] ideologies and practices which are hostile to a sound understanding and practice of marriage in a culture tend to undermine the institution of marriage in that culture, thus making it difficult for large numbers of people to grasp the true meaning, value, and significance of marriage, it is extremely important that government eschew attempts to be "neutral" with regard to competing conceptions of marriage and try hard to embody in its law and policy the soundest, most nearly correct conception.[17]

The positive law, even in societies like ours in which people often profess "neutrality," is still a potent teacher. The law will inevitably teach *some* lesson about what marriage is, and what parties to marriage can or should expect from it. It may *seem* that the law is innocent of such aspirations, and bereft of such presuppositions. It may *seem* that marriage, viewed legally, is all form without substance. It may *seem* that the law teaches only the lesson articulated by Homer Clark: marriage is tailor-made to suit the parties to it, and that the function and purpose of marriage law is to facilitate the choices of the individuals who are getting married. It may *seem* that Justice Brennan captured our notions when he stated:

> Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform.[18]

All these expressions suggest that the state can, and should, recognize and endorse marriage—if only by bestowing some

16. *Id.*

17. George, *supra* note 11, at 23.

18. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989).

three hundred or so incidental benefits—without *any* specific definition of the relationship, and evidently without using evaluative criteria.

It is impossible to imagine an institution, however, with as many legal benefits as marriage, having (or proponents of the institution and its concomitant benefits, having) no self-understanding, no parameters, no extra-legal presuppositions or commitments. It would be bizarre, and very likely unjust, to impose the costs of such benefits and protections upon society's members without an answer to the question, Why? How is the cost justified? What is marriage, and why is it so special? No answer is possible without *some* definition of marriage, and without *some* theory of *that* relationship to its parties, and to political society.

We find, unsurprisingly then, that legal stories about marriage always contain *some* specification of marriage's value. Homer Clark said: "the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is a refuge from the coldness and impersonality of contemporary existence."[19] Maybe so. But upon what basis is *this* particular property of marriage picked out from among all its properties, held up as especially salient to deliberation by public authority, and deemed sufficient to justify the regime of special treatment we accord marriage? Mark Strasser, in *Legally Wed: Same-sex Marriage and the Constitution*, argues that the state has "a responsibility to recognize" the "intensely personal bonds" between committed homosexuals.[20] Again, why should "intensely personal bonds" be the *sine qua non* of marriage, and upon what basis does the state have a "responsibility" to endorse them? Why not the "intensely personal bonds" between siblings? Close, but not sexually involved, friends?

Joseph Raz, who does not take the negative view of same-sex marriage that I do, nevertheless correctly states the relation between marriage the law of and the real-world possibilities for participation in the good of marriage: "[M]onogamy, assuming that it is the only valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."[21] Raz does not suppose that, in a culture whose law and public morality do not support monogamy, someone who happens to believe in it somehow will be unable to

19. Clark, *supra* note 1, at 28.
20. Mark Strasser, *Legally Wed: Same-sex Marriage and the Constitution*, at
21. JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986).

restrict himself to having one wife or will be required to take additional wives.[22] His point, rather, is:

> [E]ven if monogamy is a key element of a sound understanding of marriage, large numbers of people will fail to understand that or why that is the case—and will therefore fail to grasp the value of monogamy and the intelligible point of practicing it—unless they are assisted by a culture which supports, monogamous marriage. Marriage is the type of good which can be participated in, or fully participated in, only by people who properly understand it and choose it with a proper understanding in mind; yet people's ability properly to understand it, and thus to choose it, depends upon institutions and cultural understandings that transcend individual choice.[23]

II. EQUALITY

Some arguments for legal recognition of same-sex marriage, though phrased in terms of equality, actually depend upon the validity of (presupposed) neutrality claims. Stephen Macedo says that the law of marriage denies "fundamental aspects of equality" by embodying the moral judgment that marriage is inherently heterosexual.[24] But this is sound only if it is false that marriage is inherently heterosexual. If that view is false, the reason for recognizing same-sex marriages is that such unions are as a matter of moral fact indistinguishable from marriages of the traditional type. If the moral judgment is true, then Macedo's claim that the recognition of this truth by government "denies fundamental aspects of equality" is simply mistaken.[25]

In *Bowers v. Hardwick*[26] Justice Harry Blackmun suggested a intriguing argument, based in equality, for legal recognition of same-sex marriage. The context in *Bowers*, of course, was not same-sex marriage but homosexual sexual acts. Blackmun's notion of equal respect for the foundation of a person's identity and essential acts in conformity therewith nevertheless seems—if sound—potent enough to carry the case for recognition of same-sex marriage.

The Court resolved in *Bowers* that Georgia could, consistent with the Constitution, make the sodomitical acts of homosexuals a crime. In the course of his dissent from that holding, Justice

22. *See* George, *supra* note 11, at 24.
23. RAZ, *supra* note 21, at 162.
24. Macedo, *supra* note 14, at 335.
25. *See* George, *supra* note 11, at 23.
26. 478 U.S. 186 (1986).

Blackmun referred to "homosexual orientation" as "the very fiber of an individual's personality," a fiber not "simply a matter of deliberate personal election."[27] In other words, at least some homosexuals find themselves inescapably, but fundamentally, attracted to persons of the same sex. And if marriage is considered the setting in which sexual acts are appropriate, then (as Blackmun said in *Bowers*) the homosexual "is given no real choice but a life without physical intimacy."[28] *This*, Blackmun left to inevitable inference, was both cruel and unequal, more than anyone should be asked to bear, more than heterosexuals are asked to bear.

Blackmun seems to be assuming that everyone is entitled to regular (albeit "harmless") satisfaction of the sexual urge. On all these assumptions, then, there *is* a denial of some sort of "equality" where, at least as far as formal legal treatment is concerned, the state recognizes no legitimate sexual outlet for homosexuals.

Blackmun's argument is question-begging. He deployed an equivocal notion of "identity" to sustain his argument that equal respect for "identity" somehow requires a legally recognized form of sexual expression for persons who are homosexual. Here "gay" as an "identity" has two very different meanings. Its "involuntary condition" connotation evokes moral blamelessness, and generates support for approving attitude towards homosexuals. But its "lifestyle choices" connotation—that is, the choice to perform same-sex sexual acts—then slips into view as the subject of support. In other words, one is *invited* to approve "identity" in the former sense, and then is told one has, or must have approved "identity" in the latter sense.

This bait and switch will not do. Persons do constitute their identities. But they do not do so by identifying some sub-rational drive (like "sexual orientation"), but through free choices. Some homosexuals may not choose to be homosexual. But they can and do choose to be "gay" or "lesbian"; that is, they choose to identify themselves as not only persons with a same-sex attraction but as "gay": homosexual *and* approving of same-sex sexual activity.

Blackmun's argument fails for another reason, too. To expect others to "respect" or in any way endorse someone as "gay" is to *require* them to give sodomy a positive moral value. *This* expectation, often expressed as a demand, indicates a lack of respect for all others who regard sodomy as immoral. Thus "homophobia" is treated as racism deserves to be treated.

27. *Id.* at 202-03 n.2 (Blackmun J., dissenting).
28. *Id.*

In truth nothing in opposition to legal recognition of same-sex marriage intends or implies insult to homosexuals or a denial of equality of respect and concern towards them. The equality of all persons is an equality of dignity, which means that each one's good is as good as everyone else's. And one shows respect and concern for homosexuals precisely by declining to accord sodomy a moral value it simply does not possess.

Was not the holding in *Bowers*, in any event, based upon an animus towards homosexuals? Did not the Court there narrow a statute which outlawed sodomy, without limitation to homosexuals or all unmarried persons, to homosexual sexual acts? Yes. The Supreme Court narrowed the statute so that it applied to the homosexual liaison of Michael Hardwick. Though it was not a holding of the Court, the *Bowers* majority limited its ruling to the latter question—to the question of homosexual sodomy—even though the relevant Georgia statute did not expressly distinguish sodomy within marriage from sodomy without. Whether this narrow reading was justified, I do not know. But, for reasons similar to those advanced in support of my interpretation of *Griswold*,[29] one *could* favor legally treating homosexual sodomy different from sodomy between persons who are married. One *could* hold that oral and anal intercourse are objectively wrong for everyone, married or unmarried, heterosexual or homosexual. *And* one could coherently hold that sodomy within marriage should be put beyond legal interference (and in that sense, "private"), but that sodomy outside of marriage should be subject to legal restraint. Is there a good reason to treat sodomy between unmarried homosexuals worse than sodomy between unmarried heterosexuals? I think not. The ground of different treatment within marriage is the moral value and legal fragility of marriage. Where marriage and its requirements are no longer in view, the simple immorality of all sodomitical acts, seems to call for identical legal treatments.

III. ARBITRARINESS

Another type of equality argument has much appeal, and it is time to examine it. The examination is especially important because the structure of this argument, though not all its material content, persuaded the high courts of Vermont and Hawaii to (all but in name) recognize same-sex marriage.

The argument, in outline form, is this. What most heterosexual couples seek and obtain from marriage—and thus what

29. *See supra* note 10 and accompanying text.

they consider marriage to be—depends in no significant way upon their heterosexuality; same-sex couples can and do obtain the same things from their committed relationships. Many same-sex couples consider their relationships to be marital, and desire legal recognition of their relationships as marriage. This desire includes but is not limited to the attraction and utility of tangible benefits legally available to married couples. Like most opposite-sex couples, same-sex couples find the state's recognition an endorsement of sorts, a welcome perfection of, or intangible supplement to, their unions. The conclusion: it is *arbitrary* to deny recognition to same-sex relationships. Lacking as it does a reasonable basis, denial of recognition probably rests upon some irrational prejudice towards homosexuals. Either way—as arbitrary or as hateful—exclusion of same-sex couples from the legal regime inhabited by opposite-sex couples is unconstitutional.

There is *much* to be said in favor of this argument. After all, this far down the road of "transformation" charted by Homer Clark, what *do* many (most?) men and women assent to when they say "I do." Many (most?) mean to set up and manage a household, more or less throwing their financial lots together. They agree to try hard at an emotionally intimate, sexually-active relationship, hopefully lasting and, ideally, sexually exclusive. Children? Maybe, eventually. But for now, sodomitical acts and acts of contracepted intercourse make for a mutually agreeable, pleasurable sex life.

Homer Clark is once again a reliable witness:

> It seems to be that contemporary marriage cannot be legally defined any more precisely than as some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, a relationship which may be formed by consent of both parties and dissolved at the will of either.[30]

On this common view, men and women entering marriage intend principally personal benefits to themselves: sexual satisfaction, emotional intimacy and support, mutual sharing of household duties, and (perhaps) children. But same-sex couples can and do obtain these same benefits. They can even have children, though not of their own union. They can adopt, sometimes the natural children of one partner from a marriage which went bad after the partner discovered his or her homosexuality. Or, if the couple is male, they can contract with a woman friend or acquaintance or stranger to bear the child of one of them. If the

30. Clark, *supra* note 1, at 28.

couple is female, one can impregnate herself, either through the services of a sperm bank or of a more intimate donor.

This argument is that it is not coherent with marriage as it is really *practiced* by the American people for the people—and their representatives exercising public authority—to say that committed homosexual relationships are not, and cannot be, marriages. One obvious counter-argument is that opposite-sex couples can express or actualize something in their sexual acts which same-sex couples do not: marriage. Since same-sex couples cannot marry they cannot be doing the same thing that married couples do, insofar as married couples experience in their marital acts, in addition to pleasure and emotional benefits, the intelligible good of their marriage itself. It simply is the case, the counter-argument holds, that same-sex couples *cannot*, and *never* will be able to, engage in the reproductive type acts—sexual intercourse, open to the gift of new life—that married couples can perform.

This counter-argument is question-begging. *Why* cannot same-sex couples marry, where marriage is not, as it seems not to be in our legal culture, tied to openness to children? After all, sterile couples are permitted to marry, and many fertile couples with no present interest in having children get married too.

A full response to this challenge requires careful elaboration of precisely how marriage is a reproductive communion of persons, a two-in-one flesh lifetime friendship which, as such, is available only to persons of the opposite sex. That elaboration is to be found in Part VI of this article. In advance of that full discussion, however, we can see that this argument from coherence is not as persuasive as it first appears. Indeed, it is unsuccessful.

There is nothing unbecoming in arguments, like the one just sketched, which identify an apparent arbitrariness in "straight" monopolization of marriage. But the picture just presented is only part of the story. Additional pertinent facts include that, at least for male homosexuals, "committed" relationships are very rarely lasting, and almost never sexually exclusive. There is abundant evidence that neither permanence nor sexual exclusivity are considered norms even by those (perhaps relatively few) male homosexuals who are in a committed relationship. There appears to be very little support, at least among male homosexuals, for *monogamy* even as a norm, as heterosexuals and our law understand it.

It is true, as the incoherence argument form same-sex marriage alleges, that many married couples today are ambivalent about having children. Many married couples today do, in fact,

engage in completed sexual acts other than intercourse. But even these couples recognize the difference, not just in the physical performance, but in the way in which their marriage is experienced between sodomy and sexual intercourse, especially where the couple do nothing to impede whatever procreative possibilities inhere in that act of intercourse. Simply put, marital acts in which the couple places hopes of having a baby are experienced by that couple as different, especially fulfilling acts, just from the point of view of allowing them to experience their marriage.

Moreover, sterility is not considered a blessing upon a couple's marriage. To a greater or lesser degree, it is experienced by the vast majority of sterile couples as a loss, as a deprivation. Children do not "complete" a marriage in the sense that a marriage is not official or valid until children are born. (Otherwise, everyone of us who is a firstborn would have been conceived out of wedlock.) Childless couples are really married. But compared to a sterile couple who have adopted children, the couple which conceives and brings forth children from its own marital acts perfects their marriage in an unsurpassable way.

The *massive* discordant fact simply is this: most Americans do not believe that people can marry a person of the same sex. That means that most Americans think that gender complementarity is, somehow, essential to marriage. If that does not indicate a popular conviction at odds with the arbitrariness argument, I cannot imagine what would.

The practical predicate to the incoherence argument is faulty. There is also a logical flaw in the argument; people do not accept all that is entailed by their premises. Few are aware of where their premises lead, and many do not know much of what is entailed. Now is their opportunity to see what premises are necessary to defend what they still hold to be true—that marriage is the more or less permanent and exclusive union of one man and one woman, and that this relationship is the principle of all sexual morality. Once the two coherent accounts of sexual morality are fully sketched—and only then—can the American people actually *decide* whether they wish to conform their practices to the true nature of marriage, or to release the law's understanding of marriage from its foundation in gender complementarity.

IV. COURTS

The argument from popular or cultural arbitrariness is overdrawn. A structurally similar argument nevertheless persuaded the Vermont Supreme Court that discrimination against same-

sex couples was inconsistent with that state constitution's "common benefits" clause. The argument advanced by the court aimed to show that Vermont maintains no *coherent* legal view of marriage which same-sex couples from its benefits. The rejoinder is also similar to that proposed against the cultural argument from inequality: the law of marriage may, up to a significant point, be incoherent. But this fact of incoherence makes the *question* of what the law of marriage should be all the more acute. It does not *settle*, by force of logic, what the law is. We can see in the Vermont court's opinion the effects of Clark's observations: the law of marriage stands at a dangerously high precipice, pushed there by proponents of same-sex marriage. *Now* is the time for that consideration, already overdue when Clark wrote in 1988.

The Vermont court held that all legal benefits must be uniformly distributed, save where the exclusion of some persons "bears a reasonable and just relation to the governmental purpose" of the benefit program.[31] The court observed that "the benefits and protections incident to a marriage license under Vermont law have never been greater,"[32] and that therefore that "any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."[33] Notice the starting point: equality concerns dictate that everyone, at least presumptively, is eligible to recieve the benefits of marriage. It looks, then, like the benefits are *prima facie* constitutive of the class of beneficiaries: anyone who would be (or thinks he would be) better off with the benefits is presumptively entitled to get married.

The state was on the right track in its justification for limiting marital benefits to opposite sex couples. Its interest was the link between marriage, procreation, and child rearing. In probably the court's most sympathetic statement of this interest, the stated aim was to promote a "permanent commitment between couples who have children to ensure that their offspring are considered legitimate," receive "ongoing parental support[34]", and that there be a sustained public message that child rearing is "intertwined" with the procreative acts of man and woman married to each other.

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31. Baker v. State, 744 A.2d 864, 879 (1999).
32. *Id.* at 883
33. *Id.* at 884
34. *Id.* at 881

The court responded along the lines of the arbitrariness argument. "It is equally undisputed that many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children.[35] If the purpose of the statutory exclusion of same-sex couples is to "further[ ] the link between procreation and child rearing," it is significantly under-inclusive.[36] The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.[37] Therefore, "the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objective."[38]

The state also argued that "because same-sex couples cannot conceive a child on their own, their exclusion promotes a "perception of the link between procreation and child rearing." The court responded: "Indeed, it is undisputed that most of those who utilize nontraditional means of conception are infertile *married* couples."[39] Hence the law's acceptance of certain reproductive technologies making conception independent (in some way) of marital intercourse, undermined the case against same-sex marriage. But as the last quoted sentence suggests, the non-prohibition of such acts as artificial insemination probably owes much to a desire by those responsible for the law to *extend* the reproductive meaning of marriage to couples unable to generate children from their own acts of intercourse, not, as the court seems to have concluded, to obliterate the (central) reproductive meaning of marriage.

The state's remaining claims were undone by another concession, this time to same-sex couples themselves. "The Legislature could conclude," wrote the court, "that opposite-sex partners offer advantages" in the area of "childrearing." After noting "that child-development experts disagree and the answer is decidedly uncertain," the court moved on to the "fundamental flaw": the "legislature's endorsement of a policy diametrically at odds with the State's claim." That policy was the removal, in 1996, of all legal barriers to the adoption of children by same-sex couples.[40]

Taken as a straightforward proposition, that same-sex couples may adopt, implies that the particular two people are

35. *Id.*
36. *Id.*
37. *See id.* at 881.
38. *Id.* at 882.
39. *Id.*
40. *Id.* at 884 (for all quotations in paragraph).

acceptable parents. It does not imply that they can marry. Many single persons adopt children, and that implies nothing about marriage. That same-sex couples may adopt, moreover, implies *nothing* positive or favorable about their sexual identity and activities. Two persons of the same sex, though not a sexually involved "couple," could probably serve as adoptive parents, too. This is very likely the description under which "same-sex couples" are permitted to adopt, in Vermont, and elsewhere. It is doubtful, in other words, that Vermont accepted adoption by sexually involved same-sex couples *because* of their sexual relationship. One simply cannot deduce from the fact that same-sex couples may adopt that *as gay* they are thought to be fit parents, or that they can marry their same-sex partner.

Finally, but most important, *if* accepting adoption by same-sex couples *entailed* same-sex marriage, those who accepted same-sex couples adoption very likely did not think so. *Now* they should be given the opportunity to decide whether, if *that* is what is entailed, they wish to retract the permission to adopt. Instead the Vermont Supreme Court made sure that the issue of same-sex marriage was never really decided: there is no alternative *now*,—because of decisions *then*,—to recognition of same-sex marriage. But, there is no evidence, and certainly none was adduced by the Vermont court, that *then* anyone was expressing any view, much less a favorable one, about same-sex marriage.

A continent away, and a few years before *Baker*, the Hawaii Supreme Court engaged in another evasive validation of same-sex marriage. What did the Hawaii Supreme Court, in the case of Ninia Baehr (who wanted to marry Genora Dancel) versus John Lewin (the state official responsible for denying Baehr a marriage license), say?[41] Probably not what you think it did. One would expect from all that was reported about this decision that Hawaiian same-sex marriage is "gay marriage," with its implicit approval of homosexual sexual activity. Hawaiian same-sex marriage turns out to be no-sex marriage. "'Homosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is, in theory, not oxymoronic. . . . Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could be either homosexuals or heterosexuals."[42] The court later said that "it is immaterial" whether "the plaintiffs [that is, the same-sex couples, including Baehr and Doncel] are homo-

41. *See* Baehr v. Lewin, 852 P.2d 44 (1993).

42. *Id.* at 51 n.11.

sexuals."[43] The court also pointed out that nowhere did the plaintiffs say they were homosexual (or, heterosexual, for that matter).[44]

The Hawaii Supreme Court discussed at length what most people have in mind when they speak of marriage. But this marriage the court associated with the right of privacy located somewhere in the federal constitution, and called it the "federal construct" of marriage. It, the court correctly reported, "presently contemplates unions between men and women," and is associated with or defined by the "fundamental rights of procreation, childbirth, abortion, and child rearing."[45] (Yes, the court *did* say that "abortion" is part of the definition of marriage, a proposition which would surprise most people. And, what the court meant by its assertion of this heterogeneous bundle and the "federal" right to marry as "the logical predicate[s]" of each other is anyone's guess.)

We can see that Hawaiian marriage swings free of the "federal construct," and of the idea that one essential feature of marriage is that it is a sexual, indeed reproductive, union. Let's call this, simply, marriage. Hawaiian "marriage" is radically divorced from it. The estrangement is most vividly illustrated in the court's response to arguments advanced on behalf of Miike. The state, as the court related the point, "contends that 'the fact that homosexual [sic—actually, same-sex] partners cannot form a state-licensed marriage is not the product of impermissible discrimination' implicating equal protection considerations, but rather 'a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire.'"[46] The argument is, in other words, that given what marriage really—metaphysically, morally, pre-legally—is, persons of the same gender cannot marry. "We believe," said the court, that the argument is "circular and unpersuasive," "an exercise in tortured and conclusory sophistry."[47]

The court's "behal[f]" amounted to a simple declaration that it would not hear, in a case raising the legal recognition of same-sex marriages, arguments about what marriage *is*. And so the Hawaii Supreme Court articulated and imposed upon the people of that state an unsurpassably positivistic definition of marriage, one which could be related to the moral reality of the

43. *Id.* at 53 n.14.
44. *See id.*
45. *Id.* at 60.
46. *Id.*
47. *Id.* at 61.

matter by, evidently, only a sadistic sophist. The court's marriage was, in principle, sexless, and almost all about money. Calling it revealingly at one point a "legal partnership," the court listed fourteen specific benefits to which this "legally conferred status" is the gatekeeper. Twelve of them were clearly economic advantages; the other two—easier name changing and the evidentiary privilege for spousal communication—were relatively minor.

V. GETTING THE QUESTION RIGHT

The Hawaii court got the fundamental question backwards. One should not imagine—as the court did—that the law attaches certain benefits to the status of "marriage" without *first* determining *that* there is a specific relationship which *deserves* such beneficial treatment. One should not imagine that lawmakers ever decided to create an entitlement program and called it (for some reason) "marriage," with the idea of making eligibility (to be "married") functionally related to the benefits: *If* you can enjoy the benefits, you can get married. On this view, "marriage" is an empty placeholder in a social welfare scheme.

There is no room to doubt that the legal regime—of benefits, protections and duties—which has surrounded marriage since our founding got it precisely the other way around. Marriage has regularly been said to be subject to legal regulation. But the central thrust of the many political, especially judicial, testimonies to the value of marriage has been the salutary effects this pre-political (and thus natural) institution has upon the fortunes of political society, and upon the happiness of people. For these reasons marriage has been thought worthy of extensive social and legal support.

Two examples of judicial testimony will have to suffice. In *Maynard v. Hill*,[48] the U.S. Supreme Court said that marriage creates "the most important relation in life" and has "more to do with the morals and civilization of a people than any other institution."[49] Marriage also, the Court said, "is the foundation of the family and of society, without which there would be neither civilization of progress."[50]

Why? In 1961, Justice Harlan explained, though in a summary way, *why* marriage—the union of one man and one woman—occupies this central vote:

> [T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its

48. 125 U.S. 190 (1888).
49. *Id.* at 211.
50. *Id.*

> objects only to the physical well-being of the community, but has traditionally concerned it self with the moral soundness of its people as well. . . . The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, a pattern [ ] deeply pressed into the substance of our social life form[s]."[51]

Here are the two features of marriage which lawmakers from time out of mind have picked out of that complex open-ended relationship as *critically* important to the political common good: marriage as the principle of sexual morality, and as the only legitimate setting in which children should come to be, and be raised. It has surely been the undoing of marriage that, as a society, we have so detached both sex and marriage from children.

VI. Getting the Answer Right

Contemporary common sense, as well as our legal and moral traditions, point us to the existence of some decisive relation among marriage, children and how children come to be.[52] The practical insight that marriage has its own intelligible point, and that it is a one-flesh communion of persons consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood. For this reason, whatever undermines the sound understanding and practice of marriage in a culture—including ideologies that are hostile to that understanding and practice—makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse.

Although much in our culture has tended in recent years to undermine the institution of marriage and the moral understandings upon which it rests, longstanding features of our legal and religious traditions testify to the intrinsic value of marriage as a two-in-one-flesh communion. Consummation has traditionally (though, perhaps, not universally) been recognized by civil as well as religious authorities as an essential element of mar-

51. Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

52. Much of this part is based upon Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 Geo. L.J. 301 (1985).

riage. Physical defects and incapacities which render a party unable to consummate the marriage, existing at the time of the marriage, and which are incurable are, under most statutes, grounds for annulment. This requirement for the validity of a marriage, where in force, has never been treated as satisfied by an act of sodomy, no matter how pleasurable. Nothing less (or more) than an act of genital union consummates a marriage; and such an act consummates even if it is not particularly pleasurable. Unless otherwise impeded, couples who know they are sterile can lawfully marry so long as they are capable of consummating their marriage by performing such an act. By the same token, a marriage cannot be annulled for want of consummation on the ground that one of the spouses turned out to be sterile. A marriage can, however, be annulled on the ground that impotence (or some other condition) prevents the partners from consummating it.

The law, in its rules regarding consummation, embodies an important insight into the nature of marriage as a bodily—no less than spiritual and emotional—union that is actualized in reproductive type acts. Some people, however, may well consider the law simply to be misguided on this point. Marriage, they may argue, is a one-flesh union only in a metaphorical sense. It is, in realty, they may say, an emotional union that is served in various ways by the mutually satisfying orgasmic acts of spouses. Consummation, they may contend, ought not to be a requirement for the validity of marriage, or, if it is to be a requirement, it should be considered to have been satisfied by a wider range of possible sexual behaviors.

In the end, one either understands that spousal genital intercourse has a special significance as instantiating a basic, non-instrumental value, or something blocks that understanding and one does not perceive correctly. For the most part, proponents of same-sex marriage honestly do not see any special point or value in such intercourse. For them, spouses have no reason, apart from purely subjective preference, ever to choose genital intercourse over oral and anal intercourse. And because oral and anal intercourse are available to same-sex couples, such couples have as much interest in marriage and as much right to marry as couples of opposite sexes.

By contrast, many other people perceive quite easily the special value and significance of the genital intercourse of spouses, and see that this value and significance obtains even for spouses who are incapable of having children, or any more children. They are therefore confident that sodomitical acts cannot be marital (though they divide over the question whether con-

tracepted intercourse retains its marital quality). Thus, as a matter of common sense, they deny that marriage, as a moral reality, is possible for couples of the same sex.

In my view, children conceived in marital intercourse participate in the good of their parents' marriage and are themselves noninstrumental aspects of its perfection; thus, spouses rightly hope for and welcome children, not as "products" they "make," but rather, as gifts, which if all goes well, supervene on their acts on marital union. This understanding of children as gifts to be accepted and valued for their own sake—rather than as objects that may be willed and brought into being for one's own purposes—obviously coheres well with certain theistic metaphysical views, including Jewish and Christian views. It can, however, also be accommodated by Buddhist and certain other nontheistic views. Some understanding along these lines of the moral relationship of parents to the children they may conceive is essential to the rational affirmation of the dignity of children as *persons*: i.e., as *ends in themselves*, and not mere *means* of satisfying desires of their parents; as *subjects* of justice (including fundamental and inviolable human rights), rather than objects of will. Alternative understandings run into sever difficulties in explaining why children may not properly be understood—and rightly treated—as the property of their parents.

Some people are puzzled by the tendency of moral traditionalists to object on moral grounds to the production of human beings by *in vitro* fertilization. After all, moral tradition strongly affirms the goodness of transmitting life to new persons. Why, then, should couples who are incapable of begetting children in acts of marital intercourse not resort to *in vitro* processes in order to become parents? The short answer is that the manufacturing of children is inconsistent with respect for their basic equality and human dignity.

Children are to be desired under a description that does not reduce the child to the status of a product to be brought into existence at its parents' will and for their ends. Children rather are to be treated as *persons*—possessing full human dignity—which the spouses are eager to welcome (and take responsibility for) as a perfective participant in the community established by their marriage (i.e., their family). (It is in this sense that one speaks of children as "gifts" that "supervene" on marital acts.) This is not to suggest that there is anything wrong with spouses engaging in marital intercourse because they "want" a child. It is merely to indicate the description under which the "wanting" of the child is consistent with his or her dignity as a person, and to highlight the fact that the marital significance of properly moti-

vated spousal intercourse obtains whether or not conception is hoped for, results, or is even possible. Importantly, however, the intrinsic worth and dignity of a child is in no way diminished by any moral defect in the act that brings that child into existence.

VII. HOMOSEXUALITY AND THE COMMON GOOD

Homosexuality is irrelevant to almost every question pertaining to the common good of political society. That is partly because the most important civil rights are human rights. Human rights attach to everyone because they are human persons. These rights do not acquire their sense, and vary not at all in their precise content, according upon one's "sexual orientation," or, for that matter, on the state of one's character in regard to other matters, such as justice.

Homosexuality is almost entirely irrelevant partly because people are to be morally judged on the basis of their conduct not their condition. Simply being homosexual is not, and should not be, the basis of criminal liability because being homosexual is not an act. Similarly, it is wrong to think of "punishing" (a moral category) anyone for being homosexual, or for any other unjust attitude or desire.

Finally, homosexuality is almost entirely irrelevant because most of the particular rights and duties of political and civil life do not implicate one's sexual activity, habits or orientation—whatever it is. Eligibility for drivers licenses, for library privileges, to sit as jurors, duties to pay taxes, observe the speed limit, and to avoid harms to others have their sources in skills, opportunities and moral norms which do not include sexual inclination or activity in any way, for anyone. "Heterosexuals" (as such) are no more, and no less eligible, for jury service than "homosexuals" (as such) are.

The law does not condemn homosexuals to loneliness, nor does it discriminate against same-sex friendship. The law has always regarded genuine friendship, apart from family ties and sexual intimacy, as good grounds for some legal relations. Any two people can sign a lease or take out a loan. Anyone may be given power of attorney, be appointed guardian ad litem, executor of an estate. The law presumes that trusted others—friends—will fill such important legal slots. Friendship therefore has a vital place in the good life, a place recognized and facilitated by our law.

Marriage, it is true, is a type of friendship. The argument of Part VI is that marriage is a *unique* type of friendship, specified by

the capacity to engage in reproductive type acts, which is simply unavailable to same-sex couples.

CONCLUSION

Have we had that "general consideration" of marriage which Homer Clark called for in 1988? No. The "transformation" he describes now is its climactic stage. The conclusive separation of marriage from its millennia-old identification with reproductive-type acts—and thus with gender complementarity—is the question acutely by same-sex marriage. Yet the argument has not really been joined. The arguments for revolutionary change either beg the question, or treat the conclusion as settled by deduction from established premises. It is true that discordant elements have been introduced, as Clark testified, into marriage, but (as he further says) without really thinking about it. Now that incoherence is said to preclude deliberation. The question was settled, in other words, without anyone actually asking—much less answering—it. On a matter so fundamental as this, that should not be our final answer.