Montana Law Review

Volume 68
Issue 2 *Summer 2007*

Article 7

7-2007

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Recommended Citation
Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right,* 68 Mont. L. Rev. 335 (2007).
Available at: https://scholarworks.umt.edu/mlr/vol68/iss2/7

PRIVACY AND SAME-SEX MARRIAGE: THE CASE FOR TREATING SAME-SEX MARRIAGE AS A HUMAN RIGHT*

Vincent J. Samar**

Members of the Montana Law faculty, distinguished visiting scholars, students, and guests, let me begin by thanking the members of the *Montana Law Review* for inviting me to speak at this symposium on privacy and same-sex marriage. I am truly honored. Having joined others who have written about this topic in the past, I was wondering, as I prepared this talk, what I could say that might be new. Then it occurred to me that not too much has been said specifically on why marriage generally, or same-sex marriage in particular, ought to be thought of as a human right.

Since the institution of marriage provides a forum for some of the most private and intimate of human actions to occur, perhaps it is not surprising that the private side of the institution should provide the constitutive elements for why the right to marry is a human right. This is the side of the institution of marriage on which I will focus. The perspective I will adopt is from morality and law, but not specifically religion. My argument will defend same-sex marriage as a human right not for any group, but for distinctive individuals. It will also show that efforts to exclude same-sex couples from marriage, as exhibited in a recent New York Court of Appeals decision, may undermine the value of marriage for everyone.

My talk will have four principle parts. Part I explains why I believe the right to marry, including same-sex marriage, should be seen as a human right. Part II then explains why the recent New York Court of Appeals case that limits marriage to only its external attributes demeans human dignity. Next, Part III shows how human rights and, in particular, human dignity, are served by focusing on the internal benefits of marriage as a practice. In part

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* Editors' Note: This Article is an edited, annotated transcript of the author's speech presented at the *Montana Law Review*'s Honorable James R. Browning Symposium, *The Right to Privacy*, held at The University of Montana School of Law on October 11–13, 2006.

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IV, I conclude that denying recognition of a legal right to same-sex marriage is denying a human right.

I. WHY THE RIGHT TO MARRY, INCLUDING SAME-SEX MARRIAGE, IS A HUMAN RIGHT

By a "human right," I mean to reference a right under universal morality that would be applicable everywhere regardless of whether or not it is locally recognized. More specifically, human rights are the rights that all humans have by virtue of being "actual, prospective, or potential agents."[1] Here agency, in the sense of human voluntariness and purposiveness, plays a foundational role, since all moral theories must presuppose humans have these capacities in order to make prescriptive claims.[2] Characteristically, these rights have been recognized in more specific detail by such documents as the United Nations' Universal Declaration of Human Rights, which recognizes a right to privacy, though not specifically a right to marry.[3]

In American constitutional law, most of what has been said positively on the subject of same-sex marriage starts with marriage being recognized as a fundamental right under the Due Process Clause of the Fourteenth Amendment, as in *Loving v. Virginia*,[4] and then proceeds to challenge any limitation of legal marriage to only opposite-sex couples as a denial of equal protection in furtherance of the dominant heterosexual culture.[5] The U.S. Supreme Court followed this argument in *Loving* to strike down a Virginia statute that limited marriage of white people to only members of their own race as a denial of equal protection because it was designed to foster white supremacy.[6]

Alternatively, on the negative side, it has been argued that marriage is by definition a relationship requiring one man and one woman, and the only equal protection claim that can be raised is whether everyone has the same right to enter into such a mar-

1. Alan Gewirth, *Self-Fulfillment* 84 (Princeton U. Press 1998).

2. Moral theories are prescriptive in that they argue for conduct that might otherwise not occur. In this sense, moral theories differ from even such other theories as exist in economics and the social sciences, which take as their object behaviors that are likely to occur and can be predicted given the presence of certain antecedent conditions.

3. Universal Declaration of Human Rights, GA Res. 217(III) art. 12, UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948). It should be noted, however, that the Declaration does not impose obligations by its own force under international law.

4. *Loving v. Va.*, 388 U.S. 1, 12 (1967).

5. *E.g. Hernandez v. Robles*, 855 N.E.2d 1, 22–34 (N.Y. 2006) (Kaye, C.J., dissenting).

6. *Loving*, 388 U.S. at 11–12.

riage so conceived.[7] I want to claim that the issue of marriage doesn't break down quite so simply.[8] Our conception of marriage, especially in regard to the latter view, is too much image-directed and too little criteria-directed. By "image-directed" I mean the view of marriage that is associated more with churches and weddings, gowns and tuxedos, and religious rituals, versus the view of divorce that is associated with courtroom drama and legal debate.[9] In furtherance of my argument, I want to claim that a right to same-sex marriage is difficult for many in our society to recognize because most people conceive of marriage as it appears in popular culture rather than try to understand what legal marriage really is.

So I am not misconstrued on this point: I am not going to argue that marriage has any special metaphysical status, either of a natural kind or as a component to some essentialist claim about human nature.[10] Although I do not hold the view that everything is a social construction, surely marriage is a social construction—of law, culture, and religion.[11] Of course, that does not mean that people do not have a stake in what does or does not constitute marriage. Being a cultural creation does not undermine the investments people have with the particular forms the convention has evolved to take.[12] And although I do not believe that all mar-

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7. *Cf. Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 972–73 (Mass. 2003) (Greaney, J., concurring).

8. Indeed, such arguments have been said to be circular. *E.g. Halpern v. Atty. Gen. of Can.*, 65 O.R. (3d) 161, 181 (Ct. App. Ont. 2003).

9. *E.g.* Bob Thompson, *A Modern Divorce: A Family's Unique Arrangement for Putting the Children First*, Newsday (N.Y.C.) B6 (Jan. 13, 2003) (depicting Americans' image of divorce as "a sharp-edged collage of uncontrolled rage and debilitating pain"). *Contra Good Morning America*'s annual spring wedding broadcast—with all the trappings—from Times Square in New York City. *Good Morning America*, "Happily Ever After: Love in Times Square" (ABC May 18, 2001) (TV broad.).

10. Whether sexual orientation is of a natural kind remains an unresolved scientific issue. *See e.g.* William N. Eskridge, Jr., *From Sexual Liberty to Civilized Commitment: The Case for Same-Sex Marriage* 178 (Simon & Schuster 1996).

11. Vincent J. Samar, *The Right to Privacy: Gays, Lesbians and the Constitution* 68 (Temple U. Press 1991) [hereinafter Samar, *The Right to Privacy*] (noting that the privacy interest in marriage is the individual's basic interest in freedom combined with the social convention of marriage as a means to satisfy that interest); *see also* John Boswell, *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe* 28–34 (Fontana Press 1995) (discussing marriage in the Greco-Roman world).

12.

> The relative status of a group within a social system will affect its attractiveness to actual and prospective members. In this sense, every group operates its own internal prestige market, but each group is also part of a larger market. Although individuals constantly move among different groups and subsystems within society (which is the essence of social mobility), individuals also have strong incentives to

riages need to comport to one style—all religiously blessed or all having to be sexually closed relationships—I do believe that there are certain elements forming the concept of marriage that open the door to a more central, normative conception of what marriage is all about.[13] The elements I have in mind form the institution of marriage as a set of socially recognized practices that operate both to define and benefit the participants, and others who are in various ways associated with the participants. While there have been a number of justifications for legal marriage, including preservation of property, rearing of children, and providing a first building block for wider social structures of community, all of these justifications in effect assign to the parties a socially approved dignity to manage their own affairs as a collective entity.[14] Some examples I have in mind are not disinheriting one's spouse, being free of legal restraints on voluntary sex acts performed between partners in private, and participant demands against the society at large for recognition of their unit in the name of law and etiquette.[15]

This dignity suggests the demarcation of a unique class of permissible behaviors that society is excluded from observing too closely, with exceptions for domestic violence and overt exploitation.[16] It also suggests that the core of the legal marriage concept

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> remain within a particular subsystem and to insulate that system from external penetration. "One of the noneconomic benefits of remaining within one's neighborhood ethnic group or organization is precisely the avoidance of a free social market, that is, the avoidance of unremitting and full-scale competition in courtship and marriage, friendship groups, social clubs, and general esteem." Because prestige varies across social groups, individuals will be motivated to join higher status groups, but this option will be closed to many who do not have the ability to make such a transition.

Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. Pa. L. Rev. 2079, 2118–19 (1996) (footnote omitted) (quoting William J. Goode, *The Celebration of Heroes: Prestige as a Social Control Mechanism* 112 (U. Cal. Press 1978)).

13. In his dissent in *Bowers v. Hardwick*, Justice Blackmun wrote,

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting), *overruled*, *Lawrence v. Tex.*, 539 U.S. 558, 578 (2003).

14. *See* Boswell, *supra* n. 11, at 28–34.

15. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (reciting a very long list of legal responsibilities and benefits that go along with marriage, especially, but not exclusively, as these relate to the raising of children).

16. *See generally* Kristine Soulé, *The Prosecution's Choice: Admitting a Non-Testifying Domestic Violence Victim's Statements under* Crawford v. Washington, 12 Tex. Wes. L. Rev. 689 (2006).

must involve a set of interrelational prerogatives in which the participants can see themselves as advancing their own individual sense of self-worth by setting the relationship first and their more individual interests second.[17] In this sense, marriage can be seen as a dignity-producing institution, just as chess confers a sense of self-esteem to the players of the game, only in a much more substantial way, provided all participants adopt certain rules of behavior, that is, follow the rules of the game.[18] I do not play chess when I merely move my rook, but only when I move my rook in a certain way at my turn in the game.[19] Without rules to define the game, I would not achieve the self-esteem of being able to play chess or the dignity of a chess player. Without marriage, I do not obtain the public respect of being centrally involved in another person's life and well-being, in the sense of being in a publicly recognized relationship in which both participants are committed to each other's mutual, long-term emotional, physical, economic, and social welfare.[20] And so, the question for marriage becomes: What are the necessary conditions for defining a marriage and would these same criteria define a same-sex marriage?

Here history and tradition can be a help, but only if properly understood.[21] Roman marriages were primarily a means to protect property.[22] Such marriages did not serve any internal interest of the parties as a flourishing unit (they did not constitute a

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17. In *Goodridge*, the court noted, "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge*, 798 N.E.2d at 954.

18. *See* Jon Edwards, *Chess Is Fun*, http://www.princeton.edu/~jedwards/cif/intro.html (accessed Feb. 9, 2007).

19. *Id.*

20. *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815, 896 (2005) (showing what distinguishes marriage from cohabitation: "Married couples have chosen obligation; cohabitants have chosen independence.").

21. Here I follow a view of legal interpretation advanced by Ronald Dworkin that he calls "law as integrity."

> Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretative judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.

Ronald Dworkin, *Law's Empire* 225 (Harvard U. Press 1986).

22. Boswell, *supra* n. 11, at 46.

"practice" in Alasdair MacIntyre's sense of the term),[23] but only the more external interests of the parties, which always had to be seen as a game of winners and losers. In contrast, in early Jewish marriages and later Christian marriages, the emphasis was on enhancing the collective well-being of the participants in the relationship, and not on maximizing their individual self-interests.[24] In the case of Christian marriages in particular, one emphasis was bringing new life into the world.[25] It is arguable that not all conceptions of what were essentially seen as Christian marriages—at least in the early church—were focused on procreation, however.[26] This doesn't mean that self-interest played no role for these alternative conceptions, but whatever its role at the beginning of a marriage, it was quickly pushed aside for the mutual benefit that the couple as a whole might achieve from the marriage.[27] And so marriage understood in this pre-modern light can be seen as a practice for supporting a mutually thriving human dignity that ranges over the deepest levels of human intimacy and emotion.

Contrary to what most scholars put forth as the bases for marriage—i.e. relational permanency, financial stability, or child-rearing—I want to claim that these are more the external attributes of marriage.[28] I do not claim that these are unimportant attributes, but rather that, like privacy of information and places, they support a deeper internal structure of private relationships, despite the fact that they may be the first things to come to mind when society attempts to define marriage beyond its visual trappings.[29] The more internal structure or "real" stuff of the marriage relationship is its connection to individual human dignity via the opportunity it provides its participants to achieve levels of human self-fulfillment that are wholly unique and otherwise un-

23. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 187, 190 (2d ed., U. Notre Dame Press 1987).

24. Boswell, *supra* n. 11, at 136 n. 119.

25. *Id.* at 112.

26. *Id.* at 115, 119–20.

27. *Id.* at 121.

28. *E.g.* Mark Strasser, *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections* 3 (Praeger Publishers 1999) (discussing the interests of the state in respect to marriage).

29. Samar, *The Right to Privacy*, *supra* n. 11, at 75 (noting that while legal recognition of a private act was last in time in the order of privacy recognitions that the U.S. Supreme Court had identified, it was prior, logically, to all the others, as it provided the foundation for why the others *ought* to be recognized).

obtainable.[30] Going back to my chess example, I do not have the freedom to play, or much opportunity to develop skill at the game of chess, if I do not have an opponent willing to operate by the same rules of the game that I operate by.[31] That being said, I want to focus on marriage not as a vehicle to an external group-centered value, where the group in this case is primarily the two spouses cooperating in some form of mutually satisfying activity, or even the betterment of some wider community. Instead, I want to suggest that marriage does something very positive for the participants individually who seek it out, something that, absent a marriage, they cannot do very well and in some instances cannot do at all.[32] I have in mind that while a dedicated partner deprived of marriage can provide for her other half's future well-being through innovative use of contracts, wills and trusts, she cannot replace the benefits marriage provides in respect to social security benefits, the right to bring a wrongful death action, and being freed from summons to testify against one's partner, to name a few examples. Such examples show that individuals cannot very well imitate marriage without marriage itself. Even the resourceful individual is cut off in his "ability to communicate his commit-

30. *See* Gewirth, *supra* n. 1, at 143 ("[U]nlike baseball teams and other voluntary associations, [marriage] is formed, as reflecting the partners' mutual love, for purposes of deeply intimate union and extensive mutual concern and support for the participants, purposes that enhance the partners' general abilities of agency and thus contribute to their capacity-fulfillment.").

31. *See* Edwards, *supra* n. 18.

32. The Defense of Marriage Act, 28 U.S.C. § 1738C (2000). The Defense of Marriage Act (DOMA) provides,

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such a relationship.

The statute was passed to allow the federal government and the states to opt out of having to recognize same-sex marriages under section 1 of Article IV of the U.S. Constitution, which requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The ground for the statute follows a further provision in section 1 that Congress may "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. Whether DOMA is constitutional under Article IV or the Fourteenth Amendment's Equal Protection Clause has not yet come before the U.S. Supreme Court for decision. It might be further noted that a number of states have passed "mini-DOMAs" to avoid a similar situation from arising under their state conflict of law rules. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 Wm. & Mary Bill Rights J. 1493, 1524 (2006) (noting that thirty-seven states had passed mini-DOMAs and four had amended their state constitutions to prohibit same-sex marriage).

ment and goal to constitute himself in a certain way, expressive of a certain (and widely shared) view of the good life, including obligations and opportunities."[33] That is why marriage, in my view, should be understood as a human right.

To say that human rights represent a set of norms that arise from one's own point of view as human, I am asserting what I believe is an internal value that must be inter-subjectively affirmed not on its descriptive content of how the possibility of human actions give rise to legitimate rights-claims, but on its normative, self-reflective content that makes these rights-claims valuable as such.[34] In other words, one might say externally that, because human actions presuppose the generic features of voluntariness and purposiveness, no human being can deny equal rights to freedom and well-being to any other human being without contradicting himself.[35] This would be particularly true when the freedom at stake does not interfere with any other person's right or, if it does, only by some assumption of facts or social conventions that would not justify the freedom being overridden.[36] The argument should also be viewed as providing an external, logical justification for believing all humans have certain rights.[37]

What translates this outside justification specifically to an internal evaluation by the agent of his own worth is the awareness that the rights being so-valued come about only because the agent

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33. E-mail from Martha Minow, Prof. at Harvard L. Sch. to Author (Sept. 2006) (copy on file with Author).

34. Here I, like Gewirth, am following in the Kantian tradition that assigns to reason a command authority set by rational requirements of consistency for obtaining universal maxims of action. Gewirth, *supra* n. 1, at 226; *see also* Immanuel Kant, *Foundations of the Metaphysics of Morals and What Is Enlightenment?* §§ 1–2, 9–64 (Lewis White Beck trans., Bobbs-Merrill Co. 1959).

35. *See* Gewirth, *supra* n. 1, at 81–82.

36. *See* Samar, *The Right to Privacy*, *supra* n. 11, at 69, 107–08, 113.

37. Interestingly, though not based specifically on the justification just offered, the *Lawrence* Court noted that,

> the European Court of Human Rights considered a case . . . [where an] adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights.

Lawrence v. Tex., 539 U.S. 558, 573 (2003) (citing *Dudgeon v. U.K.*, 45 Eur. Ct. H.R. ¶ 52 (1981)).

values his own actions simply because they are his actions.[38] Put another way, the dignity she assigns to her own creative capacity to achieve her aspirations is affirmed when the agent recognizes that it is that very capacity, including its reliance on the canons of deductive and inductive logic that she intuits, that makes such rights-claims possible.[39] In this sense, the agent's pro-attitude towards those actions that reflect her own self-interest becomes a sense of self-respect for her ability as a creative creature to engineer actions which systematically advance the interests of all other humans as well.[40] The latter arises only because the possibility of achieving her self-interest, when logically pruned, is a human interest.[41] The agent thus affirms those goods that benefit humans as such, not because some outside moral principle sets them, but because, from her own understanding of what it is to be human, those goods are constitutive of that understanding.[42]

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38. "Effective possession of the rights to freedom and well-being is an essential part of capacity-fulfillment," which "sit[s] in reasoned judgment over aspiration-fulfillment." Gewirth, *supra* n. 1, at 93, 101.

39. Here it might be claimed that my argument is internally inconsistent if self-fulfillment is viewed as an egoistic-teleological concept whose goal for human action is to promote personal happiness, while human rights are generally justified on some universal deontological basis that may place restrictions on how personal happiness can be obtained. For example, if I were to gain self-fulfillment from engaging in genocide, human rights may require that I not do so. But this is to suggest an inconsistency where none exists. For by self-fulfillment I do not mean that the agent's values emerge from his idiosyncratic aspirations alone, but rather from his ability to reason through the canons of deductive and inductive logic first to those aspirations he holds *qua* human and only after that to more individual or group-based aspirations (like being a Catholic, for example), provided they also violate no one else's rights. Because the rights-claim the agent asserts is logically the same claim others can assert, there can be no special privilege for the agent's own position. The range of the agent's self-fulfillment is thus not unbounded, but constrained by the very constituting reasons that justify its centrality as a human right. *See id.* at 215–16.

40. "In self-respect what one values is one's moral qualities, including one's dignity as a moral person who is worthy of the respect of other persons." *Id.* at 94.

41. "Since the generic rights are rights had equally by all agents, and since all humans are actual, prospective, or potential agents, the generic rights are now seen to be human rights." *Id.* at 84.

42. In effect, we have a situation analogous to the Prisoner's Dilemma in which two prisoners who cannot communicate with each other are both told by the prosecutor, "if you turn state's witness against the other prisoner, I will let you go free and the other prisoner will receive three years confinement." It also turns out that if both prisoners confess, they each get two years for making the court's job easier. However, if neither confesses, they will only be convicted of a lesser offense and each get one year. Both prisoners are highly motivated to confess to receive the lesser penalty. Yet, if they rationally assess their situation they will see that their best choice in terms of fewer years' confinement would be for neither to confess. *See e.g.* Stanford Ency. of Phil., *Prisoner's Dilemma*, http://plato.stanford.edu/entries/prisoner-dilemma/ (updated Aug. 11, 2003).

In saying this, I do not suggest that all human actions need necessarily form a consistent and mutually beneficial practice. The condition of these actions being human and engendering their appeal to self-respect is that they can be undertaken without violating any other human being's rights. In this sense, the attribution of dignity that the agent assigns to her own actions is necessarily supervenient on her being a voluntary, purposive human agent.[43] I use the word "necessarily" here to indicate that the connection between the agent's purpose for acting, her assignment of worth to that purpose, and her assignment of dignity and preservation to herself and all other purposive agents, is logical and not contingent.[44] Still, such actions may serve a more narrow purpose of advancing, without harm to anyone else, more particular idiosyncratic interests of some narrowly defined group—such as doctors, lawyers, teachers, etc.—or even just the individual herself.[45] Especially, or in those situations where a person's actions advance the collective interests of some group without harming others, they may become part of a mutually beneficial practice such as medicine, law, or education, to name just a few.[46] Still, even at this narrower construal of the worth afforded some actions, the freedom and well-being to perform the acts can be seen to advance the interests of all other persons by providing others a precedent for seeking their own self-fulfillment *qua* human.[47]

To say that marriage allows the individual to set the end of his own personhood into the mind and the heart of the other in a singular way, is to suggest that marriage gives rise to a "corporate person" whose interests are not merely the summation of the interests of the parties involved. The interests of the couple *qua*

43. Gewirth, *supra* n. 1, at 173. "Properties of type *A* are supervenient on properties of type *B* if and only if two objects cannot differ with respect to their *A*-properties without also differing with respect to their *B*-properties." *The Cambridge Dictionary of Philosophy* 778 (Robert Audi ed., 2d ed., Cambridge U. Press 1995). It is only limited by the agent standing in the same shoes as all other prospective purposive agents.

44. Gewirth, *supra* n. 1, at 173.

45. *See id.* at 142.

46. *See infra* nn. 83–86 and accompanying text. Here I am following Alasdair MacIntyre's definition of a practice.

47. The point being that within the constraints of universal morality is the freedom to further restrain oneself to obtain specific goods either systematically as a group (called "particularist morality"), like joining a community of ascetic monks, or individually (called "personalist morality"), like living the austere life of the artist. The only proviso is that the choice must be real or, at least, not coerced by social, political or economic conditions that could otherwise be avoided. When the latter occurs, those who have the power to alleviate the conditions are not following the requirements of universal morality. *See generally* Gewirth, *supra* n. 1, at ch. 4.

couple are not only the interests of the group constituted by the duo in any given marriage, but also the interests of the group constituted by those committed to a marriage both as a publicly recognized and celebrated institution.[48] Let me explain more fully what I mean. Because part of what I want to say here involves the usual legal bundle of rights and obligations we assign to marriage, it is only natural to focus on these rights and privileges as the primary interests of the parties to the marriage.[49] But in the

48. *See* Robert Justin Lipkin, *The Harm of Same-Sex Marriage: Real or Imagined?* 11 Widener L. Rev. 277, 308 (2005) (arguing that legal recognition of same-sex marriage might harm "those individuals and couples committed *exclusively* to the traditional notion of marriage" as one man and one woman, while at the same time benefiting those seeking through such deliberative democratic norms as liberty and equality, a place where all minorities obtain full citizenship (emphasis added)).

49. One example of these rights and obligations is found in Vermont's statutes, Vt. Stat. Ann. tit. 15, §§ 1204(e)(1) to 1204(e)(24) (2005), which extend the same legal rights as apply to marriage to the following non-exclusive list of legal areas:

> (1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety . . . ;
> (2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;
> (3) probate law and procedure, including nonprobate transfer;
> (4) adoption law and procedure;
> (5) group insurance for state employees . . . and continuing care contracts;
> (6) spouse abuse programs . . . ;
> (7) prohibitions against discrimination based upon marital status;
> (8) victim's compensation rights . . . ;
> (9) workers' compensation benefits;
> (10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights . . . and the Nursing Home Residents' Bill of Rights . . . ;
> (11) advance directives . . . ;
> (12) family leave benefits . . . ;
> (13) public assistance benefits under state law;
> (14) laws relating to taxes imposed by the state or a municipality;
> (15) laws relating to immunity from compelled testimony and the marital communication privilege;
> (16) the homestead rights of a surviving spouse . . . and homestead property tax allowance . . . ;
> (17) laws relating to loans to veterans . . . ;
> (18) the definition of family farmer . . . ;
> (19) laws relating to the making, revoking and objecting to anatomical gifts by others . . . ;
> (20) state pay for military service . . . ;
> (21) application for earlier voter absentee ballot . . . ;
> (22) family landowner rights to fish and hunt . . . ;
> (23) legal requirements for assignment of wages . . . ; and

more fundamental sense, the status of marriage for the individual participants is itself a new creation.[50] After marriage, the couple assumes a new ontological identity, in which the participants see themselves as "us" rather than "me," just as they see their property as "ours" rather than "mine."[51] I do not suggest the creation of just another legal fiction, for the most important feature of marriage is not that the law should treat the parties and their property as a collective, though certainly it should.[52] The most salient feature is that the parties actually come to see themselves as a collective unit operating for their mutual benefit, and also as part of a still larger set of similarly situated persons.[53] This is why, to quote the old song, "[b]reaking up is hard to do."[54] For the language we adopt as a corporate legal couple is a language of the plural; the interests at stake are the couple's interests which are often balanced in various ways to achieve different levels of satisfaction at different times depending on the emotional importance each party attaches to the interests. This is why it is hard—after

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(24) affirmance of relationship.

50. *See* Joshua K. Baker, *Status, Substance, and Structure: An Interpretative Framework for Understanding the State Marriage Amendments*, 17 Regent U. L. Rev. 221 (2005).

51. Professor Eskridge has noted that any discussion of marriage would be incomplete without a complete understanding of the obligations it entails that do not exist among single people. Eskridge, *supra* n. 10, at 70–74.

52. *See generally* Goutam U. Jois, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 Harv. Civ. Rights-Civ. Libs. L. Rev. 509, 509–10 (2006) (arguing that there is a property right in the status of marriage itself that should be recognized under the Takings Clause).

53. In Plato's *Symposium*, we find the following speech on the mythological origins of love. Originally, human beings were giants composed of four arms and four legs and two sets of genitalia, either two male, or two female, or a combination of male and female. Once the god Zeus cuts them in half to create gay, lesbian and heterosexual persons, the following is said,

> [W]hen this boy lover—or any lover, for that matter—is fortunate enough to meet his other half, they are both so intoxicated with affection, with friendship, and with love, that they cannot bear to let each other out of sight for a single instant. It is such reunions as these that impel men to spend their lives together, although they may be hard put to it to say what they really want with one another, and indeed, the purely sexual pleasures of their friendship could hardly account for the huge delight they take in one another's company. The fact is that both their souls are longing for a something else—a something to which they can neither of them put a name, and which they can only give an inkling of in cryptic sayings and prophetic riddles.

Plato, *Symposium*, in *The Collected Dialogues of Plato Including the Letters* 526, 545. (Edith Hamilton & Huntington Cairns eds., Michael Joyce, trans., Princeton U. Press 1980).

54. The Carpenters, *Breaking Up is Hard to Do*, in *A Kind of Hush* (A&M 1976) (33 rpm record) (cover version of Neil Sedaka, *Breaking Up is Hard to Do*, in *Neil Sedaka Sings His Greatest Hits* (RCA 1962) (33 rpm record)).

one has gotten used to seeing oneself as part of a couple—to convert back to a language of self, in which the only interest to be primarily concerned with, at least once one's general obligations to society and others are taken into account, is self-interest.[55]

But notice nothing in what I have said has evoked as its starting point the external attributes of permanency, financial stability, or child rearing that society teaches should be sought from marriage.[56] Instead, I have focused solely on the individual self-fulfillment that attends being part of a corporate entity that shares both intimacy and identity. In this sense, society's teaching only supports what *appears* that humans will externally want if given the opportunity, and not what they *really* want internally because they truly understand their own self-interest. This, more than anything else, is why marriage is important, why it's a human right and not just a utilitarian cost/benefit solution to a certain set of collective, external problems, and further, why same-sex marriage is fundamentally no different from opposite-sex marriage. Indeed, it is for just the reason that a unique kind of human self-fulfillment can be achieved by marriage that the claimed right of same-sex couples to marry can be justified as a fundamental human right. Put another way, the right to marry is a unique human right fulfilling a significant route to human self-fulfillment by allowing the parties to the marriage to achieve an identity that significantly adds to their human dignity. Thus, not to recognize this right, even if just in the same-sex context, is to deny an important avenue of human self-fulfillment that is a foundation of human rights in general. This denial of human rights has happened in several recent state court decisions, one of which I will turn to now.[57]

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55. *Supra* n. 29 and accompanying text. Mark Strasser has noted that society could not prevent divorce because it provides the opportunity for one to "be able to meet someone else and eventually have an enduring, fulfilling, successful marriage." Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* 129 (Cornell U. Press 1997).

56. *E.g. Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

57. While I will be primarily discussing *Hernandez*, other recent cases also fail to recognize same-sex marriage as a human right. *Andersen v. King Co.*, 138 P.3d 963, 994 (Wash. 2006); *Standhardt v. Super. Ct. ex rel. Co. of Maricopa*, 77 P.3d 451, 464 (Ariz. App. 2003). *But see Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (holding that individuals have a state right to same-sex marriage under the Massachusetts Constitution's equal protection clause, but not under its due process clause); *Baker v. Vt.*, 744 A.2d 864, 912 (Vt. 1999) (holding that the Vermont Legislature must adopt an equivalence for marriage for same-sex couples under the Vermont Constitution's common benefits clause—Vermont doesn't have an equal protection clause—as opposed to its due process clause). *Cf.* Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage versus Unions*, 54 DePaul L. Rev. 783, 785 (2005) (arguing that Vermont-styled civil union statutes, while

II. WHY LIMITING MARRIAGE ONLY TO ITS EXTERNAL ATTRIBUTES DEMEANS HUMAN DIGNITY

The recent majority decision by New York's high court in *Hernandez v. Robles*[58] illustrates why an external perspective on a right to marriage is demeaning of human dignity. In that case, petitioners brought suit against the administrator of the New York City Marriage License Bureau claiming the law authorizing the clerk to issue marriage licenses either permitted issuance of such licenses to same-sex couples or was unconstitutional as a violation of the due process and equal protection clauses of the New York Constitution.[59]

Like the federal Constitution, New York's constitutional law recognizes marriage, at least between opposite-sex couples, as a fundamental right.[60] Indeed, the New York high court noted that "[i]n general, we have used the same analytical framework as the [U.S.] Supreme Court in considering due process cases, though our analysis may lead to different results."[61] Furthermore, "we have held that our [state] Equal Protection Clause 'is no broader in coverage than the Federal provision.' "[62] In order to first say same-sex marriage was not contemplated by the statute governing issuances of marriage licenses, the court cited provisions in the statute using the terms "husband and wife," " 'the groom' and 'the bride.' "[63]

The court then began its state constitutional analysis noting that for a fundamental right to be founded on the basis of due process, it must have been part of a longstanding tradition and history of the country.[64] However, in order to avoid the challenge that its interpretation of the state's due process clause might be

granting all the legal rights and benefits of marriage under state law, still fail to provide true equality insofar as they allow a normative distinction to exist between same-sex unions and opposite-sex marriage).

58. *Hernandez*, 855 N.E.2d 1.

59. *Id.* at 5–6.

60. *Id.* at 14–15.

61. *Id.* at 9.

62. *Id.* (quoting *Under 21, Catholic Home Bur. for Dependent Children v. City of N.Y.*, 482 N.E.2d 1 (N.Y. 1985)).

63. *Id.* at 6; *see also id.* at 13, 15 (Graffeo, J., concurring) (noting that despite "scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a woman and a man").

64. *Hernandez*, 855 N.E.2d at 14; *but see id.* at 26 (Kaye, J., dissenting) (noting "[t]he claim that marriage has always had a single and unalterable meaning is a plain distortion of history" (citing Br. of Profs. of History and Fam. L. as Amici Curiae in Support of Pls. at 1–3, *Hernandez*, 855 N.E.2d 1)).

too narrow when focused on just same-sex marriage as opposed to marriage in general, the court had to make an incredible policy argument.[65] The court held that because unexpected pregnancies can result in opposite-sex relationships, the legislature could have found that "unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples . . . ."[66] The court was unable to merely say that marriage was necessary to secure procreation or various protections of children born to opposite-sex couples because, as the court even admitted, many same-sex couples in New York are able to raise children legally either by artificial insemination or adoption.[67] As a result, the court had to suggest, for purposes of New York constitutional law, that the legislature could view opposite-sex couples as too emotionally unstable to handle intimate relationships without the government affording the opposite-sex couple a right to marry, especially when children might be involved.[68]

The New York high court next considered the plaintiffs' equal protection claim. Since the court had already determined that same-sex marriage was not a due process right, this meant that the state denying the right to same-sex couples would not be reviewed with strict scrutiny under an equal protection analysis unless the regulated group itself was a protected class warranting either strict or intermediate scrutiny.[69] The plaintiffs had not argued that strict scrutiny should apply in an equal protection argument, since the plaintiffs did not allege the traditionally protected classifications of race, color, ethnicity, or national origin or offer any new argument for treating same-sex couples as a similarly situated class warranting strict scrutiny protection.[70] And since the court had already rejected the plaintiffs' claim that same-sex marriage was a fundamental right, the only question the court

65. In his dissent, Judge Kaye noted that "fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *Id.* at 22–23 (Kaye, J., dissenting).

66. *Id.* at 7 (majority).

67. *Id.*

68. *Id.*

69. *Id.* at 10; *see also id.* at 19 (Graffeo, J., concurring) (explaining his analysis of the level of scrutiny that applies—strict, intermediate, or rational relation—to the state's marriage classification scheme).

70. *Hernandez*, 855 N.E.2d at 10 (majority). This too is an interesting point because the general criteria traditionally thought to determine when a classification becomes suspect for equal protection purposes were not followed by the court. *See id.* at 23–24 (Kaye, J., dissenting).

faced was whether intermediate scrutiny applied, either because the marriage statute discriminated based on gender or because sexual orientation itself deserved heightened scrutiny.[71]

Race, color, ethnicity, and national origin are reviewed under a strict scrutiny standard under both federal and New York state constitutional law because such classifications are considered suspect, resulting from historical discrimination and stereotyping based on an immutable or hard-to-remove trait that the group did not have the political power to overcome.[72] Gender and illegitimacy are afforded intermediate scrutiny because while not all forms of discrimination against these groups were thought to be improper, much of the discrimination these groups have suffered was based on stereotyping and prejudice.[73] Since obviously neither race, color, ethnicity, nor religion (also deserving strict scrutiny)[74] were issues in the present case, the court was free to consider the question of gender at the intermediate level of scrutiny once it had determined a fundamental right was not involved.

The *Hernandez* court noted that the marriage statute treated men and women alike in that neither could marry a person of the same sex and that the distinction was not a kind of "sham equality" as was the distinction in *Loving v. Virginia*,[75] where the U.S. Supreme Court struck down miscegenation statutes because the statutes were " 'designed to maintain White Supremacy.' "[76] As for the question of whether sexual orientation itself warranted heightened scrutiny after the New York court's earlier decision in *Under 21 v. City of New York*[77]—where the level of scrutiny question was left open—the court stated: "We resolve this question in this case on the basis of the [U.S.] Supreme Court's observation that no more than rational basis scrutiny is generally appropriate

71. *Id.* at 11.

72. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (reaffirming that racial and ethnic classifications are subject to strict scrutiny); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (identifying what constitutes a suspect class).

73. *U.S. v. Va.*, 518 U.S. 515, 533 (1996) (A statutory scheme that distinguishes between males and females is subject to heightened scrutiny, and must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives.").

74. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Sts. v. Amos*, 483 U.S. 327, 339 (1987) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)); *Catholic Charities of the Diocese of Albany v. Serio*, 28 A.D.3d 115, 122 (N.Y. App. Div. 3d Dept. 2006).

75. *Hernandez*, 855 N.E.2d at 11.

76. *Id.* at 8 (quoting *Loving v. Va.*, 388 U.S. 1, 11 (1967)).

77. *Under 21, Catholic Home Bur. for Dependent Children v. City of N.Y.*, 482 N.E.2d 1 (N.Y. 1985).

'where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement.' "[78] The *Hernandez* court held that the legislature could distinguish between opposite-sex and same-sex couples on the basis of protecting children.[79] In effect, because the court held that same-sex couples were not members of a protected class invoking strict or intermediate scrutiny, the contested government action need only meet rational basis review, a decidedly low hurdle.[80] Consequently, the court only considered whether the statute was rationally related to a legitimate governmental purpose. In effect, this meant that the statute would be upheld, at least so long as the statute was not supported by mere animus against a specific group.

The question of animus arises because in *Romer v. Evans*, the U.S. Supreme Court held that Colorado's constitutional amendment prohibiting the state legislature and its municipalities from granting any protections against discrimination to gays and lesbians was based on mere animus towards the group and was therefore not a legitimate governmental interest.[81] The U.S. Supreme Court implied that, because the Colorado amendment was so overbroad, it constituted on its face a *per se* violation of equal protection.[82] Although the *Hernandez* majority never cited *Romer*, the majority of New York's high court probably had *Romer* in mind when it took the rather odd approach of justifying the legislature's limitation of marriage to only opposite-sex couples to correct an infirmity that supposedly only opposite-sex couples might suffer: an inability to handle the consequences of their intimate relationships.[83]

This is an odd approach because it demeans opposite-sex couples while at the same time affirming their exclusive right to marry. Yet, it bespeaks the extremes to which a court will go to maintain what is in reality an animus by some in society toward lesbian and gay people and their relationships. Moreover, what is particularly insidious about the *Hernandez* decision is its limited

78. *Hernandez*, 855 N.E.2d at 11 (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)).

79. *Id.*

80. *Id.* at 10.

81. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

82. *Id.*

83. I emphasize the infirmity that the court associates as the legislature's stand towards opposite-sex couples because it seems hard to otherwise understand why a "legitimate" legislative purpose should be framed in this way. *Hernandez*, 855 N.E.2d at 11.

account of the equal interests in stability and support that children of same-sex couples have in comparison to their opposite-sex couple counterparts, not to mention the interests of the parties themselves in seeking to marry.[84] The latter is illustrated by the court's disjunctive language of the interests surveyed between opposite-sex and same-sex relationships. The interests of both types of relationships could more easily have been compared along dimensions of dignity and individual commitment to undertake obligations, which constitute a family.

III. How Human Rights and, in Particular, Human Dignity Are Served by Focusing on the Internal Benefits of Marriage as a Practice

Here I would begin by adopting Alasdair MacIntyre's definition of a practice:

> By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.[85]

Important to the definition is the distinction MacIntyre sets out between internal and external goods. The latter are identified as the property of some person such that the more one has, the less remains available for others.[86] The former are goods arising within the practice whose achievement through competition benefits "the whole community who participate in the practice."[87] Consequently, the internal goods of a practice can be seen as a set of values that enrich the group as a whole without loss or diminish-

84. *See id.* at 7–8; *see also* Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. Am. Acad. Matrimonial Laws. 255, 256 (2005) (arguing that "[e]nding the ban on same-sex marriage would be in the best interest of children of same-sex couples both legally and psychologically"); *see also* Justin R. Pasfield, *Confronting America's Ambivalence towards Same-Sex Marriage: A Legal and Policy Perspective*, 108 W. Va. L. Rev. 267, 299–304 (2005) (arguing that much policy evidence shows that children suffer when same-sex marriage rights are denied). *But see* Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 Am. U. J. Gender Soc. Policy & L. 415, 499 (2005) (noting that some non-libertarian, social conservatives argue that children's interest in having opposite-sex parents far outweighs the same-sex marriage choice).

85. MacIntyre, *supra* n. 23, at 175.

86. *Id.* at 178.

87. *Id.*

ment to anyone else.[88] The goods of marriage fit well within this definition of internal goods.

Marriage can be conceived as a practice in which the individual participants engage in an obviously complex form of socially cooperative human activities in which the aim is to make possible for both spouses opportunities to enhance for each other their non-conflicting mutual benefits and psychological well-being.[89] In this sense, marriage clearly adds to the participants' capacities as agents to participate in each others' mutual benefit. In some cases, this may mean joint cooperation towards achieving certain family, economic, or social goals such as deciding where to live, whether to raise children, what employment opportunities to pursue, how to aid each other's efforts to achieve further formal education, how to develop a family retirement plan, what means should be chosen to provide for family finances, how to oversee and maintain personal and real property, and what methods should be adopted for deciding matters involving ill health or death.[90] In other cases, and these may be related to the more overt economic and social advantages, marriage means providing for each other a sense that each is not alone in confronting life's joys and difficulties on an ongoing, at least semi-permanent, basis, and in knowing that whatever important choices the individual participants face, their importance to the other cannot be without significance.[91] The latter is even more significant when the actions directly or indirectly affect the other, or persons to whom

88. MacIntyre noted that one might induce a bright child to develop the analytic and strategic skills (internal goods) associated with chess by initially bribing them with candy bars (an external good) in the hope that the child will eventually take solace in the rewards that skill at the game itself provides. *Id.* at 175.

89. In *Lawrence v. Tex.*, the Court struck down a Texas statute criminalizing same-sex sodomy between consenting adults in private, and held:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Lawrence v. Tex., 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

90. *See* Ryan Nishimoto, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 B.C. Third World L.J. 379, 384–85 (2003).

91. *See* Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. Pub. L. 371, 417–18 (2004) (arguing that what matters most in producing a committed marriage is whether two people are physically and emotionally attracted to each other).

both have obligations, such as the participants' children.[92] It may also matter in the sense that, because one party is so engaged by an action, the other's mere presence provides some solitude and peace of mind that at least everything else is okay.[93]

Obviously, these benefits of marriage are truly internal insofar as their possession by one couple does not limit their availability to others outside that marriage. That is why claims that allowing same-sex couples to marry will undermine the meaning and significance of marriage for opposite-sex persons are ludicrous.[94] Does anybody really expect that their opposite-sex spouse will leave him or her if the same-sex couple down the street gets married? If that were to happen, it would not be because the same-sex couple got married, but because the opposite-sex couple had not obtained or was no longer obtaining enough of the internal rewards of marriage that made the practice worthwhile for them.[95]

In saying this, it is important to recognize a legitimate constraint on what benefits, mutual or not, a society needs to recognize. Just because a practice is claimed to benefit the parties concerned does not in itself mean the practice should be endorsed, especially when it is controversial whether the practice benefits the well-being of its participants.[96] For example, while the so-called "drug culture" may, at least when followed to excess, reflect a practice that adversely affects the well-being of both partici-

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92. *See e.g.* Edward Egan Smith, *The Criminalization of Belief: When Free Exercise Isn't*, 42 Hastings L.J. 1491 (1991) (discussing a case upholding the criminal conviction of a mother who prayed instead of seeking out medical help when her child suffered for seventeen days with diagnosed meningitis).

93.

> At its best, love is a deep desire to be unified with the beloved; it includes intense pleasure both in the other's company and in the hope for its continuation and perpetuation. It is strongly concerned with the other's happiness; it is wishing of good for her for her own sake, in a way that goes far beyond general benevolence, for it includes a special feeling of responsibility for the other's fate as linked with your own.

Gewirth, *supra* n. 1, at 146.

94. *See e.g.* John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 Am. J. Juris. 97, 100 (1997) (arguing that same-sex marriage diminishes the institution of marriage). For a broader discussion of this topic from a religious perspective see generally Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 Wake Forest L. Rev. 449 (2001).

95. *See e.g.* Karl Augustine, *Reasons for Divorce: What Constitutes Viable Reasons for Thinking about or Wanting a Divorce?* http://www.selfgrowth.com/articles/Augustine8.html (accessed Feb. 3, 2007).

96. *See* Gewirth, *supra* n. 1, at 154.

pants and non-participants, some contend that criminal sanctions against users of illegal drugs creates a still-greater harm to all concerned.[97] But what differentiates this cultural practice from other cultural practices that might justify imposing sanctions is that the so-called "internal benefits" of the practice are masquerading over what are really just seductions to suffer greater personal or social harms. In contrast, denial of the right to legally marry a same-sex partner, as opposed to its recognition, represents a detriment to *all* those who would be served by marriage but—because of their sexual orientation, over which they have no choice, and law, for which society has choice—cannot participate.[98]

What principle then should govern the choice of which practices to recognize or at least tolerate and which not to recognize, when arguably many practices might add to individual self-fulfillment? The answer must be connected to a full disclosure of all known potential risks and assurance that the human rights of others are not violated in the process.[99] In other words, from a human rights point-of-view, practices that add to human self-fulfillment are morally justified when they enhance the mutual dignity of all involved in the practice without denying dignity to those

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97. *Id.*; *see also* Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. Intl. L. & Pol. 555 (2005) (encouraging state opportunities to explore alternatives to criminalization); MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 Loy. L.A. L. Rev. 979 (2004) (questioning whether punitive sentencing creates more social problems than a relatively free market in drugs); Joshua C. LaGrange, *Law, Economics, and Drugs: Problems with Legalization under a Federal System*, 100 Colum. L. Rev. 505, 506–13 (2000) (highlighting economic difficulties applying the neo-classical legalization arguments in a federal system). *See generally* Douglas Husak & Peter de Marneffe, *The Legalization of Drugs* (Cambridge U. Press 2005).

98. In his dissent, Judge Kaye noted: "Solely because of their sexual orientation, however—that is, because of who they love—plaintiffs are denied the rights and responsibilities of civil marriage." *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, J., dissenting).

99.

> [T]hrough the universal right to freedom, persons have rights to form families and to have the concomitant preferential concerns. This justification does not extend to violations of other persons' rights as upheld by universalist morality, and it also prohibits the nepotism whereby a family member who holds an official position, such as judge or teacher, uses it to favor another family member by giving him a lighter sentence or a higher grade than the rules of his position require. For in such cases to act against the impartiality required by the respective rules is to violate the moral rights of other persons upheld by universalist morality.

Gewirth, *supra* n. 1, at 143.

whose relation to the practice is not a matter of choice.[100] Hence, state-mandated racial segregation in public schools would not be justified, even if it were possible to provide equal facilities, because abundant social science research shows that such segregation produces a sense of inferiority in members of one race in their relation to the other.[101] A similar sense of inferiority may accompany restricting the marital relationship to only opposite-sex couples, for even the very limited purpose of protecting the children of opposite-sex couples, if the society reads that validation as legitimating the relationship itself. In that instance, the external justification is likely to bear negatively on the internal valuation of the participants themselves.[102]

In contrast, restrictions on arranged marriages or marriages between minors do not encounter the same difficulty. For minors, there is a serious question at what age minors have developed the capacity of choice with sufficient knowledge of relevant circumstances to be able to enter the marriage relationship. Similarly, in the case of arranged marriages, the parties to the marriage and the beneficiaries of the internal rewards have no real choice. As freedom serves as the foundation of the right to marry, it follows

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100.

> [T]wo general normative relations [emerge] between cultural pluralism and the moral universalism of human rights. Negatively, moral universalism sets the outer limits of the legitimacy of the various practices of cultural pluralism. Affirmatively, within these limits moral universalism encourages and upholds the diverse practices of cultural pluralism, the differences between human beings with regard to values and ways of life, as diverse paths to capacity-fulfillment.

Id. at 157.

101. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that state-mandated, separate-but-equal education violates the Fourteenth Amendment's guarantee of equal protection, as it creates a sense of inferiority in children of minority families that they carry the rest of their lives); *see also U.S. v. Va.*, 518 U.S. 515, 535–46 (1996) (holding that Virginia Military Institute's exclusion of women violates the federal and state constitutional requirement to afford equal protection of the laws). Note the same condition may not be true when a school is established specifically to provide a safe and welcoming environment for young people coming to grips with a homosexual orientation. *See* Louis P. Nappen, *Why Segregated Schools for Gay Students May Pass a "Separate But Equal" Analysis but Fail Other Issues and Concerns*, 12 Wm. & Mary J. Women L. 101 (2005); Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. Pa. J. Const. L. 183 (2004).

102. Here the issue is

> not with the ways in which cultural groups may treat their individual members by violating their human rights, but rather with the ways in which diverse cultural groups may themselves be treated by the state or society at large. . . . What [universal morality] requires here is that cultural pluralism be affirmatively protected: the right to cultural pluralism is an affirmative as well as a negative right.

Gewirth, *supra* n. 1, at 155.

that such marriages violate the human right to freedom that all people have *qua* human.[103] Moreover, arranged marriages may violate the human right to well-being, as emotional concerns may be too personal to be adequately provided in advance, even by well-meaning parents.

This then raises the troubling question of polygamous marriages. The issue is troubling not because the social standard is for two-person marriages, but because where polygamous marriages have been allowed, in the context of opposite-sex relationships, they usually support patriarchic relationships.[104] In instances where, on the one hand, only men are allowed more than one companion or where the economics of the relationship provide an artificial domination by one party (usually a male) over the other parties, the freedom component that must attend any truly universal system of human rights is not satisfied.[105] On the other hand, providing for marriage between same-sex couples in no way diminishes this universal human rights component because the choice to marry is still with the individual and no one is prevented from accessing the institution of marriage provided they meet the essential conditions of voluntariness and purposiveness that such freedom necessarily presupposes (such as the requirement that they not be too closely related by family bond or blood) to either negate voluntariness or affect the well-being of offspring.[106]

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103. *Id.* at 143.

104. Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions after* Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?* 43 Cath. Law. 409, 440–41 (2004); Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. Contemp. Leg. Issues 811, 861 (2001). *But see* Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 Cap. U. L. Rev. 439, 440–44 (2003).

105.

> It may not always be easy to draw the line between [universal morality's] mandatory-negative and permissive-affirmative applications to various cultural practices. Especially where the practices are controversial the applications require both detailed empirical scrutiny of the practices in question, including their causal backgrounds and effects, and careful analysis of how [universal morality's] contents bear on these practices.

Gewirth, *supra* n. 1, at 154.

106. All states and most foreign countries that recognize legal marriage do justifiably set conditions of age and mental awareness to guarantee that the parties seeking to marry are truly acting voluntarily. For an example of state differences, *compare* N.M. Stat. Ann. § 40-1-7 (Lexis 2007) ("All marriages between relations and children, including grandfathers and grandchildren of all degrees, between half brothers and sisters, as also of full blood; between uncles and nieces, aunts and nephews, are hereby declared incestuous and absolutely void. This section shall extend to illegitimate as well as to legitimate children.") *with* Ohio Rev. Code Ann. § 3101.01(A) (Lexis 2006) ("Male persons of the age of eighteen

Still, some might challenge this argument on the ground that it could create too wide an assortment of rights for society to recognize on the basis of self-fulfillment even with the caveat that no one else's freedom or well-being is otherwise impaired. Even assuming that self-fulfillment might be limited to allow only those life aspirations that benefit one's capacity to discover truth, justice, and beauty, whether in one's own life or that of another, this would still create quite a few rights to be recognized. Yet, in most instances, this would not be a problem, since the rights being recognized are handled by the negative privacy right of non-interference with whatever may be the good life sought.[107]

What sets marriage in need of special attention is that the state has already upset the equilibrium established by negative privacy-right claims by recognizing only opposite-sex couples as eligible to marry.[108] This, for reasons already discussed *supra*, ignores the similar capacity fulfillment that same-sex couples would likely obtain if allowed to marry.[109] Thus, the burden on the state to actually do something, as opposed to contraception and abortion rights cases, where the burden is to not interfere, arises only because the state has chosen to arbitrarily afford the special marital status to certain individuals' private actions based on their gender.[110] Were the state to have left marriage unclassified and not

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years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage.").

107. In *The Right to Privacy: Gays, Lesbians and the Constitution*, I identify the range of the privacy right's protection to encompass all those actions that on examination do not run afoul of a compelling state interest founded on protecting autonomy in general or violate another right that will better foster maximal autonomy in the long run. Samar, *The Right to Privacy*, *supra* n. 11, at 116–17.

108. *See* Ala. Code § 30-1-19 (West 2006); Alaska Stat. § 25.05.013 (Lexis 2007); Ariz. Rev. Stat. § 25-101 (Lexis 2007); Ark. Code Ann. §§ 9-11-208, 9-11-109 (Lexis 2006); Del. Code Ann. tit. 13 § 101 (Lexis 2006); Fla. Stat. Ann. § 741.212 (2006); Ga. Code Ann. § 19-3-3.1 (2006); Haw. Rev. Stat. Ann. § 572-1 (Lexis 2006); Idaho Code Ann. § 32-209 (Lexis 2006); 750 Ill. Comp. Stat. 5/213.1, 5/212 (2007); Ind. Code Ann. § 31-11-1-1 (Lexis 2006); Ky. Rev. Stat. Ann. §§ 402.005, 402.045, 402.040 (Lexis 2006); La. Civ. Code Ann. art. 89 (2006); 19-A Me. Rev. Stat. Ann. § 701 (2006); Md. Fam. Code Ann. § 2-201 (2006); Mich. Comp. Laws § 551.1 (2006); Minn. Stat. Ann. § 517.03 (West 2005); Miss. Code Ann. § 93-1-1 (Lexis 2006); Mo. Rev. Stat. Ann. § 451.022 (West 2007); Mont. Code Ann. § 40-1-401 (2005); Neb. Const. art. I, § 29; N.C. Gen. Stat. § 51-1.2 (Lexis 2006); N.D. Cent. Code § 14-03-01 (2006); Ohio Rev. Code Ann. § 3101.01 (Lexis 2006); Okla. Stat. tit. 43, § 3.1 (2006); 23 Pa. Consol. Stat. Ann. § 1704 (2006); S.C. Code Ann. § 20-1-10 (2006); S.D. Codified Laws § 25-1-38 (2006); Tenn. Code Ann. § 36-3-113 (Lexis 2006); Utah Code Ann. § 30-1-2 (Lexis 2006); Va. Code Ann. § 20-45.2 (Lexis 2006); Wash. Rev. Code § 26.04.020 (2007); W. Va. Code Ann. § 48-2-603 (Lexis 2006); Wyo. Stat. Ann. § 20-1-101 (2006).

109. *Supra* nn. 89–93 and accompanying text.

110. *Griswold v. Conn.*, 381 U.S. 479, 485–86 (1965) (recognizing a right of married couples to use contraceptives and of doctors to advise in their use); *Eisenstadt v. Baird*, 405

attempted its regulation, this issue would not have resulted.[111] But as that is not the case, this argument must deal with the inequity that the state's action has created.

A corollary to the New York high court's decision is the question: Why can the state not just afford special recognition in the name of protecting children that heterosexual couples are able to produce naturally? Here it seems to me that the answer is twofold. First, recognition of marriage involves a much wider traffic of rights and privileges than would be the case if only the interests of children were concerned.[112] Second, no state requires couples to have a child or pledge to have a child in order to have a valid

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U.S. 438, 454–55 (1972) (extending the right to obtain and use contraceptives to unmarried persons); *Carey v. Population Servs. Intl.*, 431 U.S. 678, 694–96 (1977) (extending the right to obtain and use contraceptives to minors); *Roe v. Wade*, 410 U.S. 113, 164–66 (1973) (upholding a woman's right, within some constraints, to choose abortion); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (upholding *Roe*'s recognition of a woman's right, within some constraints, to choose abortion but replacing the *Roe* Court's trimester analysis with an undue burden test).

111. Other issues, however, might arise. For example, in *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), the U.S. Supreme Court noted, "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." The argument for extending the right to marry to same-sex couples is bolstered by the Supreme Court's recent decision in *Lawrence v. Tex.*, 539 U.S. 558, 567 (2003), where it struck down a state sodomy statute prohibiting adult consensual sexual relations involving intimate relationships between same-sex persons. This reversal of *Bowers v. Hardwick* after only seventeen years suggests that the comment in *Zablocki* might now be interpreted to include same-sex relationships. *Lawrence*, 539 U.S. at 578 (reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Note Justice Scalia's dissent in *Lawrence*:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"?

Id. at 604–05 (Scalia, J., dissenting) (quoting majority, citations omitted, brackets added by Scalia, J.).

112. In his dissent, Judge Kaye stated:

> The record is replete with examples of the hundreds of ways in which committed same-sex couples and their children are deprived of equal benefits under New York law. Same-sex families are, among other things, denied equal treatment with respect to intestacy, inheritance, tenancy by the entirety, taxes, insurance, health benefits, medical decisionmaking, workers' compensation, the right to sue for wrongful death, and spousal privilege.

Hernandez v. Robles, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, J., dissenting); *see also* Vt. Stat. Ann. tit. 15, §§ 1204(e)(1) to (24) (2006) (showing the range of the rights and privileges a state marriage law may engage).

marriage, and many same-sex couples do have children through various means.[113]

Finally, one might ask why—even if same-sex marriage is part of the human right to marry—should that make it a legal, let alone a constitutional right? The answer is that the Constitution itself needs justification if it is to produce a duty of obedience that is not all together *sui generis* and seemingly without justification. Such a duty comes about only if the Constitution is itself morally justified as laying out a scheme of government that protects fundamental human rights properly understood.[114] To this extent at least, the courts are obliged to interpret the Constitution and the scheme of government it creates so as not to violate universal human rights and to maximize individual self-fulfillment whenever possible.[115] Extending the right to marry to same-sex couples is just one example of how courts can interpret the Constitution to satisfy its justificatory foundation to preserve and maximize individual human rights.

IV. CONCLUSION

Our society is in the middle of a debate. But it is not a debate between two different views of reality, but rather between a fiction and a reality. On the one side is the view that marriage must be maintained as a relationship between one man and one woman. On the other side is the view that same-sex couples can marry. Mediating the former view is the idea that the external goods of marriage are necessary for stability and protection of offspring. But this is a fiction unless at the same time one maintains the erroneous assumption that opposite-sex couples are not capable of handling such matters on their own. On the other side of the debate is the argument that the internal goods of marriage are gender neutral but sufficiently self-fulfilling that, when practiced against a background in which individual freedom is protected, all participants to the relationship gain and no one outside the relationship loses. Given that the state already recognizes a right to

113. Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 Fam. L.Q. 683, 683 (2005) (noting that "[a]ccording to the 2000 United States Census data, one out of three lesbian couples and one out of five gay couples are raising children in the United States.").

114. By "properly understood" I mean understood as deriving out of the essential conditions of voluntariness and purposiveness that all moral theories must necessarily presuppose. *See* Gewirth, *supra* n. 1, at 79–80.

115. Vincent J. Samar, *Justifying Judgment: Practicing Law and Philosophy* (U. Press of Kan. 1998) (arguing this point extensively; thus I will not belabor the matter here).

marry for opposite-sex couples, if this is not a sufficient basis to extend that right to same-sex-couples, I do not know what would be. It is then almost a self-evident truth that same-sex couples ought to be afforded the same legal right to marry in the name of human dignity that is afforded to opposite-sex couples.