

## THE HARM OF SAME-SEX MARRIAGE: REAL OR IMAGINED?\*

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### I. INTRODUCTION

Cultural attitudes toward gay and lesbian sexual intimacy are undergoing radical change. While some people still find such conduct morally wrong, even to the extent of warranting criminalization, our public culture now seems to express tolerance towards private same-sex intimacy between consenting adults. The eye of the hurricane has moved from whether private, adult same-sex intimacy should be protected to whether the law should recognize same-sex marriage.<sup>1</sup> This shift in the focus is striking to anyone observing the evolution of this controversy over the past four decades.<sup>2</sup>

*Lawrence v. Texas*<sup>3</sup> promises to be a turning point in the quest for the equal recognition of same-sex intimacy. By decriminalizing same-sex homosexual sodomy,<sup>4</sup> *Lawrence* has opened the possibility of permitting the extension of marriage to same-sex couples. While the decision itself does not address the question of same-sex marriage without decriminalizing same-sex intimacy, the prospect of such marriages is impossible.<sup>5</sup> Thus, among other things, *Lawrence* is a foundational step on the road to same-sex marriage.<sup>6</sup>

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1. The British philosopher John Finnis, perhaps the most important philosophical opponent of same-sex marriage, asserts that the decriminalization of private, consensual same-sex intimacy should not be confused with granting the right to same-sex intimacy in the “*public realm or environment*.” John Finnis, *Law, Morality, and “Sexual Orientation,”* in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 31, 32 (John Corvino, ed. 1997) (emphasis in original) [hereinafter Finnis]. Finnis concedes that “[s]upervision of truly private adult consensual conduct is now (and rightly) considered to be outside the state’s normally proper role . . . [with some exceptions]. But supervision of the moral-cultural-educational environment is maintained as a very important part of the state’s justification for claiming legitimately the loyalty of its decent citizens.” Some commentators do not find Finnis so conciliatory. See John Culhane, *The Heterosexual Agenda*, 13 WIDENER L.J. 759, 782 (2004) (asserting that Finnis has expressed the wish that gay people would just go away).

2. The shift in focus, nevertheless, has incurred severe hostility toward same-sex marriage.

3. 539 U.S. 558 (2003).

4. See *id.* at 578-79. I use the term “homosexual sodomy” once and only once in this article. I use it *once* to signify how courts generally conceptualize same-sex intimacy. I use it *only* once in recognition of the offensiveness of the term. I thank John Culhane for alerting me to this issue.

5. Justice O'Connor’s concurring opinion carefully avoids commenting on the constitutionality of banning same-sex marriage. See *id.* at 579-85.

6. The Court was wary of fashioning an opinion that “would inevitably raise serious doubts about practices, including the ban on same-sex marriages, that the majority did not want to

The primary objection to permitting same-sex marriage is that doing so would harm traditional marriage and those seeking to engage in the practice of traditional marriage. According to this objection, because marriage is a vital social institution,<sup>7</sup> practices harmful to this institution are inimical to society.<sup>8</sup> Does same-sex marriage harm traditional marriage?<sup>9</sup> If it does, the odyssey of same-sex intimacy from darkness to light might stop short of the legal recognition of same sex marriage.<sup>10</sup>

The aim of this essay is to determine whether, and if so in what sense, same-sex marriage harms the institution of marriage and those individuals participating in the practice of marriage.<sup>11</sup> This essay concludes that same-sex marriage can harm traditional marriage, at least for some participants. However, the commitment to liberty, equality, and community in a democracy precludes harm of this kind from serving as a justification for or against law or social policy.<sup>12</sup> In

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question. For the majority, a central problem was to develop a rationale that would strike down the Texas statute without producing an unintended revolution in the law." Cass R. Sunstein, *What did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, in SUP. CT. REV. 27, 34 (2003).

7. One could argue that government should stay out of the marriage business entirely, and leave the question of same-sex marriage or traditional marriage to religion. Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

8. This, of course, includes adultery and fornication as direct harms and many other practices that indirectly harm marriage.

9. It is unclear just how to describe this potential harm. The basic point seems to be that same-sex marriage would threaten, interfere with, undermine, or destroy the institution of traditional marriage. Perhaps one obvious example of direct harm to the institution of marriage is the possibility of divorce. Permitting the dissolution of marriage makes the practice less permanent. It signals those entering marriage that there is an escape route should the relationship not work out. Moreover, divorce signals prospective participants in marriage that their efforts to succeed may be tempered by the realization that it is unreasonable to try to remedy a broken marriage. My point here is not to suggest that divorce is wrong or immoral, just that it is paradigmatic of a practice that may undermine the institution of marriage.

10. This does not necessarily affect the issue of same-sex unions without the appellation of marriage, as in Vermont.

11. Same-sex marriage might harm either the institution of marriage, individuals engaging in traditional marriage, or both. Although this distinction is important, I focus on the example where individuals engaging in a practice are harmed because the practice is diminished. Not everyone engaged in traditional marriage will regard same-sex marriage as a threat, but some do. The question is whether these individuals are irrational in seeing same-sex marriage as a threat. Why do some people feel threatened while others do not? I suspect the answer lies in the role "marriage" plays in their value systems. That some people do not feel threatened by same-sex marriage does not entail that it is irrational to feel threatened.

12. Most conceptions of "community" stress the collective over the individual. However, alternative conceptions exist. One can embrace individualist values for their instrumental role in creating the appropriate kind of community. In other words, emphasizing the value of individualism may be based on the ideal of a community in which individuals alone and collectively can contribute to the common good. Thus, one may support same-sex marriage on the ground

a democratic society, all sorts of harms must be tolerated if liberty, equality, and community are to be the governing political and legal values.

Before approaching this task, let me enter two important caveats; the first one is a hedge, and the second is a plea for genuine tolerance. First, my argument should be viewed as a sketch of how one might understand the notion of harm and its relationship to the governing values of a democratic society. As such, I do not pretend to offer comprehensive analyses of the conceptions of “liberty,” “equality,” “community,” “democracy,” or “harm.” At most, I can offer only a promissory note of a complete argument designed to establish two propositions: (1) That same-sex marriage *harms* traditional marriage, and (2) This sense of *harm* cannot be the basis for law or social policy in a democracy. In short, I offer an outline of how the argument works, not the full-fledged argument itself. Although this outline suggests the direction of the argument, it nevertheless imposes a burden on the reader by asking her to imagine how the blanks might be filled in later.

The second caveat asks even more of the reader. I call on both sides of this controversy for tolerance. I ask opponents of same-sex marriage simply to consider the possibility that democratic values require the recognition of same-sex marriage. Additionally, I ask the proponents of same-sex marriage to consider the possibility that same-sex marriage does harm traditional marriage. In asking for this reciprocal tolerance, I am sure to incur the wrath of both sides. Opponents of same-sex marriage will condemn my argument as disingenuous, that I do not really understand the harm that same-sex marriage inflicts upon traditional marriage, and that my argument offers them an olive branch only to retract it in the end. By contrast, proponents of same-sex marriage will insist that my conception of “harm” is unintelligible, or in some other way empty. I am willing to incur this wrath with the hope, slim though it may be, that conceptualizing the controversy in this manner will contribute to a greater respect for the genuinely felt sensibilities of both parties. I want to dampen some of the polarization associated with this and other contemporary controversies in American culture and law. We cannot persist, in my view, to simply deny the other side’s point of view. Proponents of same-sex marriage insist that opponents are simply bigots, homophobes, or intolerant partisans of their own arbitrary values. Opponents see proponents as libertines disregarding those sacrosanct values which are an integral part of the foundations of American society. We must do something to end this standoff or at least to redirect the “cross-fire” dimension of our contemporary controversies. The aim here is not designed to resolve the controversy; I am not sure anything can do that. Rather, I want to give credit to what is arguably

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that individual choice in these, and other, matters contribute to creating a diverse, pluralist community. Of course, those who support this type of community cannot endorse the notion that “anything goes.” But restrictions of individuals need to be carefully scrutinized if one wants this type of community to flourish. Therefore, human flourishing and the virtue of community need not be considered incompatible.

plausible in the opposing perspectives so that we can begin to regard one another as opponents, not enemies.

With these qualifications I turn to *Lawrence's* role in the general controversy over the permissibility of same-sex intimacy.

## II. THE SIGNIFICANCE OF *LAWRENCE*

*Lawrence v. Texas* is a long-awaited and remarkable victory for both individual rights and American democracy.<sup>13</sup> *Lawrence* implicitly stands for the proposition that government has no legitimate purpose in prohibiting private consensual sexual conduct even when a majority of individuals regard that conduct as immoral or offensive.<sup>14</sup> The argument here is that a certain class of actions must be left for individual choice, and same-sex intimacy is one of them. This argument is moored in the conviction that the freedom of individuals—what citizens must be permitted to do despite a majority of other citizens thinking differently—is a necessary condition of individual autonomy<sup>15</sup> and self-fulfillment, and individual autonomy and self-fulfillment are necessary conditions of *democratic* citizenship.<sup>16</sup> A democratic citizen cannot adequately deliberate about the

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13. Democracy undoubtedly includes two fundamental elements; the individual's freedom and the freedom of the collectivity to decide the proper direction of society. In this sense, sovereignty over intimate relations is a necessary ingredient of the freedom required for democratic citizens to engage in self-government. The question of whether courts or legislatures should alter social institutions, if desirable, is an important question in itself and relevant to the question of whether *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) was rightly decided. However, given the American practice of judicial review, it is difficult to suggest that courts ought not protect the rights of minorities. Both conservatives and liberals often insist that the court should stay out of politics, though they differ on which rights or powers courts should supervise. Indeed, it is difficult to see a principled answer for determining when a court should, and when it should not, remove an issue from political solutions, though of course many constitutional theorists have tried to provide such answers. In my view, changes in social practices should be privately driven or publicly driven by legislatures. Unfortunately, if we took that view seriously, many issues courts have removed from politics—favorites sometimes of conservatives sometimes of liberals—would again be subject to political debate. For example, the New Federalism, on this ideal view, should revert back to Congress, and perhaps integration in public schools should revert back to state legislatures.

14. Of course the government has a legitimate purpose in prohibiting such conduct if that conduct, in some sense relevant to democracy, harms or otherwise interferes with the interests of others.

15. Autonomy is not the same as egoism. I am acting autonomously when, upon reflection, I decide to sacrifice my interests for the interests of the community.

16. Accordingly, "American rights are not merely the rights of the people against the power of government; they are the rights of individuals against the power of the people themselves." Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1420, 1422 (1999). This notion of rights has a double impact. Its rationale is not just the importance of rights to individuals; rights are also important because they help create the appropriate democratic forum

common good without striving toward autonomy in his or her own life.<sup>17</sup> Consequently, the decision in *Lawrence* should be understood as forming part of the very identity of citizens in American democracy.<sup>18</sup>

The legitimacy of individual choice is not boundless, however. Absent a law burdening a fundamental right or a suspect class, an individual's decision to act may be restricted when the government has a legitimate interest in doing so. The Court did not, in *Lawrence* or in any other case, treat same-sex intimacy as a fundamental right, nor did it treat homosexuals as a suspect, or quasi-suspect classification. Therefore, the criminalization of same-sex intimacy rests on whether the government has a legitimate interest in prohibiting private same-sex intimacy, and *Lawrence* clearly holds that it does not.<sup>19</sup>

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consisting of people who have given some thought to the best way to live. Only people who have done so are prepared to formulate successfully social policy.

17. I am assuming a deliberative conception of democracy. There are, to be sure, other conceptions. One example is majoritarian or simple democracy, in which the common good is simply a function of what the majority of people want. In majoritarian democracy, people may vote for what they want without first examining the relationship between what they want and the common good. Majoritarian democracy is typically aggregative, emphasizing the result of collective choice, not the kind of deliberation or procedures required for deciding on the common good. See IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 11-26 (2003). Here, one should distinguish among three questions: (1) How does deliberative democracy operate in contrast to majoritarian democracy? (2) Just what constitutes good reasons in a democracy? And (3) Who gets to decide what constitutes good reasons? The third question is purely institutional. Among possible answers are: (a) the legislature, (b) the courts, (c) the people, and/or some interbranch entity. Answers to the first two questions are more difficult to specify in advance.

The *sine qua non* of deliberative democracy is providing reasons that everyone, or almost everyone, can accept. Private values are not precluded if they can be reconstructed into a deliberative discourse. See Robert Justin Lipkin, *Reconstructing the Public Square*, 24 *CARDOZO L. REV.* 2025, 2030 (2003). Majority rule is also operative here as the mechanism that ends deliberative debate. However, not attempting to provide deliberative reasons is antithetical to deliberative democracy.

18. Admittedly, this interpretation of *Lawrence* might reflect what the case will come to mean, not what it means today, which more narrowly is the domestication and privatization of same-sex intimacy. See Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *COLUM. L. REV.* 1399, 1400 (2004). Nevertheless, democratic citizenship must presume the legitimacy of intimate decisions about one's life, including sexual relations and marriage, unless there exists a demonstrable harm directly affecting everyone or almost everyone in a society committed to freedom, equality, and self-rule.

19. The *Lawrence* Court overruled *Bowers v. Hardwick*, and with it, the problematic view that absent a fundamental right or suspect class, the majority can enforce its morality against minorities. *Lawrence*, 539 U.S. at 578. In denying the legitimacy of appealing to the morality of the majority as a justification for prohibiting same-sex intimate conduct, the *Lawrence* Court implicitly distinguished between two kinds of "morality." The first kind of morality, call it "social morality" for want of a better term, consists of acts that potentially harm everyone or that are inimical to public order, such as murder, rape, theft, mayhem, and so forth. Morality of this type is more clearly described

The *Lawrence* Court addresses and answers the question of whether liberty includes the freedom to engage in same-sex intimacy. However, the *Lawrence* Court is eager to qualify its answer; such intimacy must be private and consensual conduct. While rejecting the propriety of criminalizing same-sex intimacy, the Court deftly avoids the question of same-sex marriage.<sup>20</sup> However, since it is

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as “social prudence” or “prudential rationality.” Hardly anyone would embrace a polity that did not criminalize this conduct. The harm caused by most of the common law crimes, for example, must be prevented for anyone to live even a minimally decent life. The more controversial the question of whether a particular type of conduct is part of social morality, the less likely it is that any rational person should want to prohibit it. Rather, in cases of controversy, it is more likely that prohibiting certain acts is unique to a particular conception of the good, not the good of the community generally. Morality of this kind consists of those protections necessary for individuals to choose and fulfill their own conception of the good life, whatever that conception might be. Few societies can exist and offer their citizens protection and stability without proscribing crimes against social morality and public order. Thus, it is unreasonable to eschew social morality as the job that the state does best, if it does anything at all. By contrast, morality of the second type, call it “personal morality,” consists of those fundamental values which individuals have and which they seek to satisfy in order to realize their particular conception of the good. By calling this morality “personal,” I make no claim whatsoever about whether it is or is not objectively true.

The claim that every act can be classified as part of social morality or personal morality is not without its opponents. James FitzJames Stephens denies “the fundamental distinction [between self-regarding and other-regarding acts]” upon which the distinction between social and personal morality rests, and contends, instead, that it “is no distinction at all.” JAMES FITZJAMES STEPHENS, *LIBERTY, EQUALITY, FRATERNITY* 29 (1967) [hereinafter JAMES FITZJAMES STEPHENS]. Stephens never explains how his rejection of this distinction squares with his commitment to the existence of “a sphere . . . within which law and public opinion are intruders likely to do more harm than good.” *Id.* at 162. The distinction between social and personal morality is a pragmatic distinction informed by the idea that some acts—whether strictly speaking “self-regarding” or not—are better left to individual choice, while other acts should be subject to social and legal prohibition. Sir Patrick Devlin may be regarded as another opponent of the distinction between social and personal morality when the distinction is cast as a dichotomy exhausting alternatives. Devlin believed that in addition to social and personal morality, there exists the moral fabric of society which itself must be protected by the criminal law. SIR PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS AND THE LAW* 9-23 (1965) [hereinafter SIR PATRICK DEVLIN]. *But see* H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 69-77 (1962) and Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966).

20. The majority clearly stated:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however.

*Lawrence*, 539 U.S. at 571. And Justice O'Connor, concurring, stated:

irrational to prohibit same-sex intimacy, the natural question arises whether it is irrational to prohibit same-sex marriage. If prohibiting private, same sex intimacy is irrational and therefore unconstitutional, shouldn't society legally recognize homosexual unions if marriage law is to be rational at all? After all, the legalization of same-sex marriage will merely benefit a fairly constant<sup>21</sup> percentage

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

*Id.* at 585.

21. This assumes that homosexuality is not a deliberative choice, but a condition that one is either born with or which arises early in a person's psychological development. Acting on a disposition to engage in homosexual conduct is certainly a choice, as is acting on a disposition to engage in heterosexual conduct. This hardly entails that the disposition is also the result of a choice. Not every aspect of our motivational systems can result from choices, or there would be no mechanism responsible for generating choice in the first place. In other words, there must be some unchosen conditions on choice for choice to be possible at all.

Can it be persuasively denied that both heterosexual and homosexual dispositions are unchosen conditions of sexual choices? If one's sexuality were chosen, it is difficult to see upon what such choices would be based. I do not think anyone knows why they are heterosexual. I certainly cannot explain this in my own case, and thus why should we question the absence of an explanation in the case of homosexuality? However, homosexuality seems as deeply embedded in the human psyche as heterosexuality. No one chooses it as a lifestyle in the ordinary way we understand choices. Instead, homosexual preference and its expression

may well be hereditary or congenital but that even if developmental appears to take root early in life and independently of social attitudes. Given the personal and social disadvantages to which homosexuality subjects a person in our society, the idea that millions of young men and women have chosen it or will choose it in the same fashion in which they might choose a career or a place to live or a political party or even a religious faith seems preposterous.

RICHARD A. POSNER, *SEX AND REASON* 296-97 (1992).

Even if some people are influenced by their peers to engage in homosexual conduct, it strains credulity to insist that all such conduct is a matter of choice. Moreover, the argument for a genetic basis of homosexuality is not committed to the view that all genetic predispositions are morally desirable and should not be changed. Alcoholism, some argue, has a genetic origination; yet, reformed alcoholics should be praised anyway. The difference is that the harm alcohol causes is clearly demonstrable across many value systems. While addiction to alcohol may not interfere with every alcoholic's own independent goals, in most cases such interference is obvious. The same cannot be said for homosexual intimacy without proving that despite the absence of interferences, gays and lesbians are harmed nonetheless. It is this attribution of harm, even in the face of personal testimonies by gays and lesbians of its non-existence and no evidence of interference with their independent goals, that opponents of same-sex marriage must justify.

of American citizens without affecting or harming the vast majority of Americans in any significant way at all. If, by contrast, it can be shown that same same-sex marriage causes a cognizable, *bona fide* harm, legislation prohibiting same-sex marriage is rational if it reasonably prohibits such marriages.<sup>22</sup> Alternatively, if same-sex marriage interferes with the interests of others, in this case the interests of individuals embracing heterosexual marriage, then the state can rationally refuse to recognize such marriages. Laws against same-sex marriage will then be adjudged constitutional according to rational basis scrutiny, the most deferential form of judicial review. In order to reach this conclusion, we must determine what sort of harm, if any, the legal recognition of same-sex marriage causes.

### III. THE HARM ISSUE IN THE SAME-SEX MARRIAGE CONTROVERSY

The controversy over same-sex marriage typically arises in the following manner. Proponents of same-sex marriage ask opponents how same-sex marriage harms traditional marriage.<sup>23</sup> Heterosexuals, the argument goes, can still marry just as before; therefore, expanding the cultural practice of marriage to include same-sex couples cannot have any effect, harmful or otherwise, on heterosexual marriage. Opponents reply that despite being able to marry, heterosexuals are nonetheless injured by extending marriage to include same-sex couples.<sup>24</sup>

At the core of the same-sex marriage controversy lie two fundamentally important questions. These can be referred to as “the definitional question” and “the harm question” respectively, though both descriptions refer to a host of further issues. Answers to the first question attempt to delineate what the common practice of marriage is or traditionally has been. The definitional question asks for the meaning of “marriage” or what is marriage’s *essential* purpose? The “harm question” is related to the definitional question in the following way: Whether same-sex marriage harms traditional marriages for some depends upon whether it changes the meaning of marriage or alters its essential purpose.

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Finally, even if homosexual intimacy is a choice, it is difficult to appreciate why that justifies opposition to same-sex marriage. Moreover, insisting that the harm caused by homosexuals is, in part, the effect their relationships might have on non-homosexuals, is question-begging in the extreme. Even if it could be demonstrated that experimenting with homosexuality causes some to adopt it, to label the possibility of increasing the number of homosexuals in this manner harmful is persuasive only if we first establish that homosexuality is harmful.

22. Opponents of same sex marriage consider the distinction between permitting private same-sex conduct and the recognition of same-sex marriage as consisting of vastly different permissions. Here the opponents seem to embrace the distinction between personal and social morality, classifying same-sex intimacy as personal morality while same-sex marriage as social morality.

23. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 173 (2002).

24. *See infra* notes 53-61.

*A. The Definitional Question*

No single uncontested definition of marriage exists.<sup>25</sup> A large consensus defines marriage along the following lines: Marriage is the union of a man and a woman for the purposes of love, intimacy, companionship and mutual care and support, and the harnessing of sexual expression in a narrow and socially predictable manner leading often to procreation. I will call this conception of marriage “the consensus view” simply to indicate that this is a very common way of understanding marriage, not that it is the correct view, or even that it is somehow privileged. Rather, in examining social practices, we inevitably begin with the most common form of that practice. An alternative definition, relevant to the same-sex marriage controversy, which I will call “the gender unspecified view,” is the union of two adults for the purposes of love, intimacy, companionship, mutual care and support, and often raising children.<sup>26</sup>

This latter, “gender-unspecified” definition is precisely the sort of definition that alarms defenders of traditional marriage as the exclusive form of marriage. According to this defense, the definition of marriage defines a social good, and changing the definition risks substantially damaging this social good or even eliminating it entirely. Alternatively stated, changing the definition of marriage entails altering its instantiation as a social practice. Since the present practice of marriage is good,<sup>27</sup> changing the definition directly harms the institution, those who engage in the practice, and those who favor the practice.<sup>28</sup>

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25. Dictionary and legal definitions of ‘marriage’ are often unhelpful. RICHARD D. MOHR, *THE CASE FOR GAY MARRIAGE: THE MORAL AND LEGAL DEBATE* 84, 87 (Robert Baird & Stuart Rosenbaum, eds., 1997).

26. What about adult incestuous marriages? The standard reason against adult incest is the effect on offspring and the further problem of verifying whether an adult incestuous couple is capable of reproducing. The example of incestuous marriage is designed to show that any definition of marriage which departs from the idea of two opposite sex, unrelated adults, has no principled way of precluding extending marriage to this case. Perhaps that’s true, but until the time when these groups make a claim on the definition of marriage which excludes them, so that democratic deliberation can examine the merits of their arguments, it’s not obvious why the present case compels us to formulate a principle which accounts for all possible departures from current practice. Today we deal with same-sex marriage. Let’s leave the question of further extension to another day.

27. The distinction between the present conception of marriage and its present practice is relevant here. Some may argue that the present conception of traditional marriage is good, while its practice with the attendant difficulties—involving divorce, adultery, and bad faith on the part of some spouses—leaves much to be desired.

28. Of course, changing the definition of “marriage” might improve the institution, but defenders of the traditional conception see its good as dedicated, fixed, and exclusively heterosexual. This raises the general question of whether exclusivity in a social practice is justified. Certainly when merit and competence is involved exclusivity is unproblematic. We license

A striking, although often unnoticed, ambiguity afflicts the definitional and harm questions. First, why is an extension in the application of a term a change in its definition? Second, assuming extending the application of “marriage” is a change of definition and a change in the practice, how is anyone harmed by that change? Why is changing a definition or a practice necessarily bad? Answers to these questions require exploring the idea of change.

*B. What Counts as Change?*

What counts as change in a definition or social practice? Two implausible extremes should be rejected as the exclusive standard for identifying change. On one extreme, a *trivial* change occurs when a definition or practice is altered in any way at all. Suppose basketball is defined as a court game with the purpose of putting a ball through a net ten feet from the ground within twenty-four seconds of taking possession of the ball. Does this definition change if the twenty-four second requirement is reduced to twenty-three seconds? In a trivial sense, the definition does change. However, it is difficult to explain how trivial changes are relevant to any important dispute about the character of basketball. Of course, one rule has been changed, but for the most part, this change is unremarkable. It would be astonishing to seriously contemplate this as harming the practice of basketball. Certainly, it would be odd in the extreme to suppose that this *change* causes basketball to cease to exist and a new game to take its place.<sup>29</sup>

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automobile drivers and accept only those qualified into colleges and universities. Thus, everyone embraces exclusivity in some social practices. Similarly, marriage is exclusively adult, and such exclusivity is typically unproblematic. The question examined here is whether gender exclusivity is appropriate in marriage. We cannot reject same-sex marriage on the grounds of merit or competence because the argument that we are examining here is whether same-sex marriage harms traditional marriage not whether same-sex marriage harms its participants. That claim involves a different and decidedly less plausible argument. We may restrict a parent’s prerogative to give psychotropic drugs to their children because of the harm done to the child, not the harm done to parents (and families) avoiding such drugs.

29. College basketball has a thirty-six second time limit. The fact that we refer to this game as “college basketball” suggests that a twelve second difference is not a trivial difference; it changes the tempo of the game. Indeed, teams that excel in a thirty-six second time limit regime may not be competitive in a twenty-four second time limit regime. But if basketball is defined in terms of a twenty-four second time limit, then college basketball is transformed into “college something” but not college *basketball*. Of course, there’s little, if any, reason for restricting the definition of “basketball” in that manner. And so instituting a thirty-six second time limit permits us to retain the term “basketball” in describing the game as “college basketball.” What this example shows is that a twelve second difference in the time limit constitutes a significant change in the game, but does not mean that we have changed the practice from one game to a different one. However, other changes in the time limit might be insignificant or so radical as to change the game from basketball to something else. For example, changing the time limit in professional basketball to twenty-three seconds probably would not warrant any distinction between that game and

For a social change in a practice to be relevant, for it to raise questions of harming the practice, it must have pragmatic benefits or burdens to the participants in the practice and to the greater society. Moreover, these benefits or burdens must affect the society's governing ideals. In the case of American social practices, these governing ideals include, but are not limited to, liberty, equality, and community.

On the other extreme, some changes might radically alter a traditional definition of a term or social practice, sometimes to the extent of abolishing the term or practice. However, radical redefinitions are extremely rare, if they ever occur at all. Most definitional changes fall in between trivial changes and radical changes and can be characterized as significant or substantial changes that render the definition or practice recognizably different but still maintaining its original character.<sup>30</sup> Significant or substantial changes do not harm or abolish the practice, without appealing to some value besides change.

Often, significant or substantial changes improve a practice.<sup>31</sup> For example, the practice of public education prior to 1954 formally prohibited blacks and whites from attending the same schools. Did *Brown v. Board of Education*<sup>32</sup> change the practice of education trivially, radically, significantly or substantially? No one would call this change trivial. At the time, especially in the South, the change was regarded as radical, abolishing education as it was known at the time. Now, most people see the change as significant or substantial. Of course, some might argue that *Brown* made no change in the definition or practice of public education. As this argument goes, public education is the state-sanctioned and supported training of American youth in the arts, sciences, and technical skills. That segregated public education existed does not affect the *definition* of public education—nor does the change toward integration—just its application in concrete circumstances.

Change is an inefficient conceptual tool because it is so easy to consider all change as radical change.<sup>33</sup> Indeed, it is not uncommon for some to insist that

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basketball. By contrast, changing the time limit to ten minutes might, though not necessarily, create a new game.

30. The question of what counts as the same practice rests on the common, but opaque, conception of "sameness." The philosophical question of when X and Y are the same underlies many disputes in law and social policy. For the most important treatment of this concept in the last century see LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953).

31. The reason a good faith change often improves the practice is due to the participants' experience of the practice's defects; however, this cannot always be guaranteed. Indeed, in the case of a practice with participants having very different attitudes toward its goals and purposes, change might result in harming some subset of the participants.

32. 347 U.S. 483 (1954).

33. Some opponents of same-sex marriage insist that traditional marriage is so closely tied to the underlying structure or fabric of society that changing the concept and practice of traditional marriage, as proponents of same-sex marriage wish, threatens society itself. The idea that change

almost any change from the *status quo* is *ipso facto* a radical change involving the elimination of the social practice. A good example of what to avoid can be found in Justice Scalia's dissent in *Virginia v. United States*,<sup>34</sup> where the Court held that excluding qualified women from Virginia Military Institute (VMI) violates the Fourteenth Amendment's Equal Protection Clause. In Justice Scalia's view, prohibiting this exclusion is tantamount to doing away with VMI altogether. Consider Justice Scalia's words: "Today the Court *shuts down* an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half."<sup>35</sup> Remarkably, for Justice Scalia, integrating women into what for a "long tradition, enduring down to the present" consisted of an all-male college, shuts down that institution.<sup>36</sup>

Is this contention even remotely sensible? Of course, Justice Scalia could not seriously mean that the institution standing at a certain location was shut down. He probably means that the character of the institution—or its essential features—was changed, rendering the institution, as it existed excluding women, defunct. In this view, the fact that an institution continues on, at the same location educating men and women, is irrelevant to Scalia's approach to institutional change. Instead, any significant change, such as admitting women into VMI, counts as changing the institution from one institution to another.<sup>37</sup>

Nevertheless, this still appears to be a bizarre conception of institutional change.<sup>38</sup> While in a completely trivial sense the claim that the admission of women changes the institution might be plausible, it is also astonishingly uninteresting. If, for example, requiring a new history text for History 101 changes the college from one institution to another, or if increasing the number of students changes the university, then we live in a world in which institutions

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may threaten the very fabric of society has been advanced by Sir Patrick Devlin. See SIR PATRICK DEVLIN, *supra* note 19, at 12-14.

34. 518 U.S. 515 (1996).

35. *Id.* at 566 (Scalia, J., dissenting) (emphasis added).

36. In a democracy, the people get to decide what counts as trivial in contradistinction to radical change. This choice is typically reflected in the legislature and the courts. Since the judgment that change is trivial or radical depends on one's values and conception of change, these answers will inevitably be controversial.

37. This view is essentially a Burkean conception of institutional change. EDMUND BURKE, REFLECTIONS ON THE FRENCH REVOLUTION (2003). This Burkean pedigree is also expressed in the words of the English jurist James FitzJames Stephens: "The fixed principles and institutions of society express not merely the present opinions of the ruling part of the community, but the accumulated results of centuries of experience, and these constitute a standard by which the conduct of individuals may be tried, and to which they are in a variety of ways . . . compelled to conform." JAMES FITZJAMES STEPHENS, *supra* note 19, at 157.

38. In a majoritarian society, the people or their elected representatives are the ones to decide whether a change in a practice is trivial. However, in a complex democratic society like ours, courts may be the appropriate decision-makers to protect the rights of those people excluded from the practice.

go in and out of existence continuously. No, Justice Scalia cannot embrace the view that any change destroys an institution; only radical change affecting essential and fundamental features of the institution conceivably can do this. For Justice Scalia, limiting enrollment to males only is an essential feature of VMI, just as pre-*Brown* restrictions of southern public schools was an essential feature of public education in the eyes of many Southerners. But that is why the controversy is so unproductive when cast as an argument about which practice defines VMI. Justice Scalia says male-only education defines the institution, others say military training defines it. Rather than getting bogged down in this quagmire, let us cut to the chase: Is there significant enough value in VMI's remaining exclusively male? Or instead, is remaining exclusively male more detrimental than beneficial?

Justice Scalia might insist that, unlike racial segregation, legitimate purposes exist for male-only schools. But two reasons make this reply quite puzzling. First, why is male exclusivity essential to the existence of VMI? Surely the education of civilian-soldiers continues despite the admission of women. Only now, civilian-soldier education is more inclusive, just as admitting African Americans or Jews to the institution made it more inclusive. If VMI's purpose is to train citizen-soldiers, it is far from obvious why admitting women will preclude achieving these goals.<sup>39</sup>

Justice Scalia might mean that some important aspects of student life will change. Privacy regulations will certainly change, and even perhaps some of the requirements for satisfactory achievement. But insisting that these changes represent ineliminable characteristics of education at VMI, without a fairly comprehensive demonstration that no women can be successfully trained as citizen-soldiers, seems unlikely.

It is fundamentally important to note that every time an institution or practice becomes more inclusive, alterations of some kind or another take place. This does not mean that every alteration changes the essential character of the institution or practice or that such alterations count as reasons against the moral attractiveness of the change. Therefore, Justice Scalia is correct that the Court's decision closed down VMI only if any significant change to an institution or practice *ipso facto* eliminates that institution or practice or replaces it with another. But this contention is implausible. VMI is still dedicated to educating citizen-soldiers,<sup>40</sup> which, after all, should be the essential feature of education at VMI.<sup>41</sup>

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39. It might be that admitting women to VMI changes a certain tone or aesthetic, and that change harms those committed to this aesthetic. But that hardly justifies making that aesthetic a reason for excluding a sizeable portion of American citizens from the possibility of being admitted to VMI.

40. Moreover, the admission of women to VMI does not in itself eliminate the adversative method of training citizen-soldiers, although independent reasons might exist for eliminating or modifying this method.

41. When I was a graduate student at Princeton University in the late 1960s and early 1970s, the University, for the first time in its history, permitted women to apply (and be admitted to) the

It is beyond argument that institutions and social practices have defining characteristics. In some sense, these are central to the institution's existence, and elimination would abolish the institution entirely. For example, if VMI altered its curricula to ban any course or activity having to do with war, the defining characteristic would be lost. Such a decision would be tantamount to eliminating VMI, or at least would render VMI a different educational institution. Thus, why can't VMI define its educational mission as producing *male* citizen-soldiers? In some circumstances, this might be a possibility. However, given the historical context of equality in American society, such definitions are usually irrational. For example, defining VMI's educational mission as producing citizen-soldiers, but excluding those students whose academic credentials fall below some reasonable standard, makes sense when that standard is a predictor of an applicant's likely success in completing the program. If gender determined academic success in the same way, then restricting admission to men might be reasonable. But the view that women cannot succeed is historically based on stereotypes and bigotry, and that cannot be the grounds of justifying an all male student body at VMI. Thus, VMI's educational mission cannot be restricted to males only without appealing to irrational dispositive factors.<sup>42</sup>

Is the definition of marriage distorted or changed if the concept of marriage is expanded to include same sex couples? Well, the idea that marriage is a union of one man and one woman would need to be dropped, but does that really distort or even change the definition of marriage? Arguably, it is not the definition of marriage that changes, just its application to same-sex couples. We need concrete answers, if available, to the question of why changing the application of a term changes the defining characteristics of that term, and why changing the application of a term is necessarily bad. If we changed the application of the term "marriage" to people cohabiting for three years, have we changed the definition of the term or merely its application?

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undergraduate and graduate colleges without qualifications due to gender. I recall, somewhat shamefully, that my initial reaction was wary and skeptical. I thought to myself, "Life at Princeton is now changed forever." Returning to Princeton in the mid-seventies, I saw that life at Princeton was significantly changed; however, it was overwhelmingly a change for the better. Even with this change, Princeton's purpose of educating young people for public service in government, science, education, and business remained the same. Of course, I am sure that some alumni felt that Princeton's purpose was to educate males only for public service, and that admitting women radically changed the definition and the educational practice at Princeton. But that has simply proved false, as will a similar prediction about the basic theme at VMI. The question remains whether same-sex marriage will some day be viewed not as an alteration in the definition and practice of marriage, but merely as an extension of this definition and practice to same-sex couples.

42. While the nature of the participants of an institution or social practice can be relevant to its identity, history teaches us that often what kinds of participants are acceptable for inclusion have nothing important to say about the defining characteristics of the institution or practice, and instead are often simply the result of prejudice and bigotry.

Two reasons augur against concluding that such a change is definitional, not merely a change in application. First, same-sex marriage leaves intact the idea of marriage as a committed, loving union. Thus, a heterosexual couple's marriage remains a marriage as long as it is, or is intended to be, a committed, loving union. Suppose, however, one defines marriage as a committed loving union between two heterosexuals. The question here is, why limit the application of marriage in this manner? One needs a normative answer to this question, not just the circular conclusion that that is how marriage has always been defined.<sup>43</sup> The point of the argument is over what marriage means. Is it restricted to heterosexual marriage, or may it include homosexual marriage? One can't answer this question simply by asserting that heterosexuality is an essential element in the meaning of "marriage." The argument that heterosexuality is essential to marriage arguably commits the same mistake that Justice Scalia made in his VMI dissent.

Typically, claims that definitions and practices have changed parade as descriptions, while camouflaging normative commitments.<sup>44</sup> The contention that same-sex marriage significantly changes the definition of marriage is not just a report about the meaning of a word or an alteration in a practice. Instead, such contentions conceal the real import of the claim, namely, marriage should be defined to exclude same-sex marriage, or alternatively, marriage as a practice should not include same-sex couples. What the definition of a term is, and what constitutes the essential features of a practice, are usually never raised until someone seeks an application of the definition or extension of a practice to a controversial case. Camouflaging normative commitments in descriptive inquiries

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43. This effectively tailors one's definition of marriage to reflect the Judeo-Christian form of marriage exclusively. The conservative talk show host, Dennis Prager, argues, "[a]ccepting homosexuality as the social, moral, or religious equivalent of heterosexuality would constitute the first modern assault on the *extremely hard-won, millennia-old battle for a family-based, sexually monogamous society*. While it is labeled as progress, *the acceptance of homosexuality would not be new at all*." Dennis Prager, *Homosexuality, the Bible, and Us—A Jewish Perspective*, 6 *ULTIMATE ISSUES* (1990) (emphasis added). If true, this should put to rest the view that opposite-sex marriage, restricted to one man and one woman, has always been the definition of marriage.

Considerable evidence exists that same-sex unions existed for millennia. See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (Villard Books 1994); *But see* Brent D. Shaw, *A Groom of One's Own?*, *NEW REPUBLIC*, July 18 & 25, 1994, at 33. Shaw criticizes Boswell, *inter alia*, for describing same-sex unions as male homosexual marriages. See also, Ralph Hexter's defense of Boswell against Shaw's criticism and Shaw's reply. Ralph Hexter, "*Same-Sex Unions in Premodern Europe*": *An Exchange*, *NEW REPUBLIC*, Oct. 3 1994, at 39. Some societies approved of an institutionalized ritualistic same-sex union, while not calling it *marriage* in the language of that society.

44. One might insist that changing the definition of "marriage" in the English language from "man and woman" to "adults" clearly changes its definition. This contention fails to distinguish between changing the *meaning* of "marriage" as opposed to extending its application to different participants. I doubt whether a noncircular argument establishing that a change in application is a change in definition is possible.

about same-sex marriage obscures the true issue of what the institution of marriage should include and exclude. Rather than arguing about what the definition is or what the practice has been, candor suggests going directly to the heart of the controversy: Should marriage include same-sex couples?

Moreover, arguments over whether a particular alteration changes a definition or practice often become tedious and unproductive. Typically, disputants differ over the character and purposes of the present practice,<sup>45</sup> but more importantly, they disagree over what they believe the character of marriage should be. Hence, if we directly addressed this normative issue, even if same-sex marriage is a change in definition and practice, such a change might be desirable according to the governing political values of liberty and equality. If either liberty or equality required same-sex marriage, or if it could be demonstrated that same-sex marriage was harmful to children, the normative question would be joined, and we would no longer argue over whether same-sex marriage is harmful merely because it changes the definition or practice of marriage. If the current controversy embraced these normative questions, tired questions about harm due only to changed definitions or practices would have little currency.

Defenders of traditional marriage must present a normative argument in defense of their position. History and tradition cannot do the job.<sup>46</sup> Even if historical arguments could establish normative conclusions, history seems to militate against the traditional conception of marriage.<sup>47</sup> However, even if historical evidence supports traditional marriage, it cannot prove conclusively that marriage necessarily includes the idea of a union between two heterosexuals. At best, it can establish that the burden of proof in the argument over same-sex marriage falls to those proponents of same-sex marriage.<sup>48</sup> This is a rather

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45. This point does not concede that the current meaning of marriage excludes same-sex couples. Often, one's normative commitments determine how one understands the current meaning of a term. However, it is difficult to deny that the current meaning of "marriage" is contested, and rather than conduct lexicographical investigations in current meaning, directing our inquiry to what marriage should mean emphasizes, in my view, the appropriate question. Hume admonishes, "is" does not imply "ought" and even if the current meaning of marriage is heterosexual exclusively, that tells us little about how "marriage ought to be understood." DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978).

46. Indeed, it is not at all obvious that marriage traditionally has been about love or mutual support and nurturing. Such a definition is a recent development.

47. Recent historical scholarship challenges the conventional wisdom that Western society has always condemned same sex intimacy. *See generally*, JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980). For a discussion of same-sex intimacy in China *see* James P. McGough, *Deviant Marriage Patterns in Chinese Society*, in NORMAL AND ABNORMAL BEHAVIOR IN CHINESE CULTURE 171 (1981).

48. Even such burden shifting is implausible if history reveals societies permitting same-sex marriages or their equivalent. *See supra* text accompanying note 48.

quotidian feature of argument, namely, that we must always begin arguments over change from where we are presently situated. If true, the historical facts show that proponents of same-sex marriage must provide normative reasons for overturning history and tradition.<sup>49</sup> The standard reason for overturning history and tradition in this regard is that history and tradition invidiously discriminate against same-sex couples. In short, according to this argument, no persuasive reason exists for insisting that marriage is essentially a loving, procreative union between a man and a woman.

### *C. Finnis' Opposition to Same-Sex Marriage*

Natural law philosopher John Finnis claims that reasons do exist for this conception of marriage. For Finnis, marriage is an intrinsic social good for married individuals as well as for society.<sup>50</sup> The good of marriage is defined as a loving union between a man and a woman. This unity is expressed through the biological act of procreation. Since no one but one man and one woman can biologically produce children, and since no alternative practice of polygamy or polyandry can unite people as realizing their common good, same-sex marriage and plural marriage cannot be marital practices.

Finnis' argument is designed to explicate the essential features of marital conduct. He intentionally conflates the descriptive and prescriptive aspects of marriage—what marriage *is* and what it *ought* to be—to demonstrate the privileged position traditional marriage has in practical conduct. For Finnis, “marriage” involves “[t]he union of the reproductive organs of husband and wife. . . .”<sup>51</sup> This biological unity renders the spouses one biological reality.<sup>52</sup> Accordingly,

their union in a sexual act of the reproductive kind (whether or not actually reproductive or even capable of resulting in generation in this instance) can *actualize* and allow them to *experience* their real *common good*. That common good is precisely *their marriage* with the two goods, parenthood and friendship, which are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union.<sup>53</sup>

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49. The abolition and civil rights movements provided such normative reasons for overturning tradition. Slavery and Jim Crow segregation were historical facts reflecting barbaric traditions. The normative reasons centered on the idea that African Americans were human beings deserving rights equal to whites.

50. Finnis, *supra* note 1, at 34. Thus, changing the definition or practice of marriage harms both individuals engaging in traditional marriages as well as the institution or practice of marriage itself, though not in the same manner or necessarily at the same time.

51. *Id.*

52. *Id.*

53. Finnis, *supra* note 1, at 34 (emphasis in original throughout).

It follows that “the common good of friends who are not and cannot be married (for example man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore a personal) unit.”<sup>54</sup> For Finnis, the fact that such couples cannot be a biological or personal unit has serious implications. For such couples,

their sexual acts together cannot do what they may hope and imagine. Because their activation of one or even each of their reproductive organs cannot be actualizing and experiencing of the *marital* good—as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who *happen* to be sterile—it can *do* no more than provide each partner with an individual gratification. For want of a *common good* that could be actualized and experienced *by and in this bodily union*, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.<sup>55</sup>

Underlying Finnis’ view is an ontological commitment about reality, which “is known in judgment, not in emotion.”<sup>56</sup> This reality, according to Finnis, restricts the possibility of same-sex acts becoming a marital good because,

[i]n reality, whatever the generous hopes and dreams and thought of *giving* with which some same-sex partners may surround their ‘sexual’ acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line.<sup>57</sup>

In Finnis’ view, the moral worth of masturbation and/or having sex with a prostitute (or, I might add, a friend) are indistinguishable. Consider:

Sexual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive—which like Plato and Aristotle and most peoples we call *marriage*.

In short, sexual acts are not unitive in their significance unless they are marital . . . and . . . they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind—actualizations, so far as the spouses

54. Finnis, *supra* note 1, at 34.

55. *Id.* at 34-35.

56. *Id.* at 35.

57. *Id.*

then and there can, of the reproductive function in which they are biologically and thus personally one.<sup>58</sup>

I find this metaphysics of marriage intriguing, though ultimately unpersuasive. Finnis offers a series of terms and definitions that purport to capture how “marriage” must be understood. One might argue that the penis and vagina are reproductive organs and that human reproduction is a good that society should value. If so, Finnis’ argument seems somewhat persuasive. However, only if one demonstrates that these are reproductive organs only, and that reproduction cannot occur successfully unless the reproductive organs are used solely for reproduction, can Finnis’ view prevail. Indeed, Finnis’ argument depends not only on a teleology of bodily organs, but on an exclusive teleology. He fails to demonstrate why the penis and vagina cannot be important organs for the role they play in reproduction as well as their role in bonding, satisfaction, and so forth. In short, the fact that reproduction—the creation of human life—is a good, even perhaps a sacred good for some, does not entail that sexual interactions are impermissible for other reasons. If sexuality and marriage arguably have different purposes for different people, and if they also serve different purposes at different times even in the lives of the same people, restricting them in the manner Finnis proposes is simply a *non sequitur*.

Finnis’ argument is not free from further defects. To say that uniting the sex organs is required to effect a biological and, therefore, a personal unity is, to be blunt, mystifying on several grounds. Why should we care at all whether married parents—or anyone else—achieves *biological* unity or biological *unity*? It is not obvious why biology should be a necessary normative element in a social or moral practice. Biology, to be sure, indicates certain parameters of practical conduct just as physics indicates the parameters of building a bridge. But these parameters matter when we have certain goals. Ordinarily, if you want to procreate, you need to copulate. Hence, biology can strongly suggest the means you should adopt to achieve certain goals. However, it is unlikely that biology can, without circularity, force us to adopt particular goals. Nor, I would argue, can metaphysics dictate such particularized goals as traditional marriage for freedom-committed people. Both biology and metaphysics seem an arbitrary grounding for moral requirements on practical conduct, even if there are such requirements.

Indeed, it is not obvious that intimate relationships require any unity at all. While it may not be irrational to analyze intimacy in terms of unity, it certainly is not obvious that intimacy must include unity in order for an ordinary intelligent person to understand it.<sup>59</sup> I might love my wife or lover and be aware that her

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58. Finnis, *supra* note 1, at 34-35. (Emphasis in original throughout).

59. For my own conception of intimacy see Robert Justin Lipkin, *Intimacy and Confidentiality in Psychotherapeutic Relationships*, 10 THEORETICAL MEDICINE 311, 314 (1989) (defining intimacy as thinking and experiencing the world in terms of one’s intimate partner). This conception of intimacy does not render sexual relationships as a defining feature of intimacy, though it does not exclude sexual relationships from being intimate, either.

psyche is, in important ways, dissimilar to mine, and that these features of her psyche defy integration. Indeed, I might value the fact that our love keeps hidden certain elements of our individual being. Moreover, even if my psyche overlaps with hers in important ways, this does not entail that unity is rationally or morally required in understanding and using the term intimacy correctly. It seems to be descriptively true that intimate relationships include hidden, ineffable, unreachable features of personality, and it seems normatively undesirable to seek to achieve a unity that eliminates these barriers. Why must all barriers be inimical to intimacy? Finnis would, I think, be forced to reject this example as one of true intimacy. However, it seems his rejection could be sound only by begging the very question at issue: what is intimacy? Finnis' conception of intimacy might require unity, but it is far from obvious why every conception of intimacy requires unity or the type of unity to which Finnis' view is committed.<sup>60</sup>

Finnis packs a lot of metaphysical punch in the teleological view of creation and the idea that human body parts have purposes which must be followed as standards for resolving moral controversies. But metaphysical teleology is a contested area of inquiry, and certainly not the way ordinary people understand their lives. For example, that eyes function primarily as the means to see does not preclude their use in other ways. Eyes may be also used to attract mates, to contribute to the beauty of the face, and to convey meaning to others.<sup>61</sup>

That said, even if unity is required, what does it mean to say that reproduction renders the spouses "one reality"?<sup>62</sup> The facts of love and procreation are typically intuitively identifiable to the ordinary person, but what compels us to describe these facts in terms of unity and reality? For example, why would biological unity be a necessary condition of personal or inter-personal unity? Male and female genitals are required for procreation most of the time, but this does not tell us much. Indeed, it is not obvious what the relationship is among sex, love, marriage, and procreation. Nor is it obvious why there must be one conception relating these four aspects of human relationships. Finnis seems to take it as axiomatic that a penis in a vagina unifies biological males and females in some morally illuminating sense. If so, does his system of axioms illuminate the moral aspects of love, sex, marriage, and procreation in a non-circular moral fashion? Common experience seems to belie the fact that biological unity is central to intimacy. If it is not, why should this connection be viewed as a unity in any interesting sense at all? A penis' penetration of the vagina (and subsequent conception) is often a sufficient condition for pregnancy to be sure, but it is not necessary. And why in the world would anyone call this "biological unity"? Why does copulation and conception unify a man and a woman in any way at all? To

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60. See Lipkin, *supra* note 59, at 34-35.

61. In Steven Spielberg's "Minority Report," eyes were used to identify people for criminal and other purposes. MINORITY REPORT (DreamWorks SKG 2002).

62. See *supra* notes 52-53.

be sure, copulation involves the transient physical interaction of males and females. But why describe this as a “unity” in some ethically salient sense?

In Finnis’ view, biological unity is a constituent of a couple’s personal reality and when expressed “in a sexual act of the reproductive kind can *actualize* and allow them to *experience* their real *common good*. That common good is precisely *their marriage* with the two goods, parenthood and friendship.”<sup>63</sup> This seems an arbitrarily structured conception of a couple’s common good. Ordinarily, most people do not think of a couple’s common good in any one sense at all. And even when that term is used, it seldom represents anything more than the satisfaction of the couple’s joint desires. But not for Finnis. In his view, there exists a teleology of sexual and emotional coupling. The purpose of males and females coupling is to achieve friendship, and that friendship provides the only context in which the fruit of the friendship, namely, children, should be born. It immediately follows that only through sexual intimacy as an expression of friendship and (generally in form) for the purpose of reproduction do the partners fulfill their joint or common good. The satisfaction of independent desires, such as the desire to derive sexual pleasure has nothing to do with marriage at all. And such independent desires can never be a reason for engaging in sexual intercourse because one cannot fulfill one’s purpose, let alone the good of the couple, by acting on these desires. Finnis offers this teleology, not merely as a possible conception of marriage, sexuality, and goodness, but as the only such conception backed by reasons. However, if one can reasonably reject this teleology, as one can surely do without incoherence, Finnis fails in his task.

Finnis seems oblivious to the arbitrary and tendentious basis of his argument. Defining marriage as necessarily involving reproductive-type sexual acts conflicts with a common notion that people (male and female) marry and have sex for all sorts of reasons. Further, the common good of the partners cannot, without circularity, be defined as requiring reproductive-type acts. One can consistently embrace the importance of creating human life, yet reject the notion that reproductive-type acts are the only legitimate acts of sexuality. Indeed, arguably the common understanding of marriage and sexuality which many people experience and embrace permits sexuality without reproduction while valuing reproductive sexual acts at the same time. Of course, we are not conducting philosophical analysis by majority vote, but Finnis appeals to the experience of ordinary people, so the limited application of his view is important by way of rebuttal.<sup>64</sup>

Straight jacketing sexual acts, in the manner Finnis does, fails to reflect a common reality. Sexual relations, marriage, and many other social practices have a chameleon nature. Their character changes depending on who engages in them,

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63. Finnis, *supra* note 1, at 34.

64. If instead of using the common experience as a touchstone for his argument, Finnis intends his remarks to reflect an ideal of marriage, then he must explain why this ideal needs to be privileged.

and the circumstances in which they are engaged. Heterosexual spouses engage in sexual relations for different reasons. Some spouses engage in sex as an expression of love, to relieve sexual tension, or to engage in playful interaction. The same couple might engage in sex for each of these reasons at different times. Finnis' constricted view of sexual acts fails to reflect this reality. More importantly, no non-circular argument is given for the normative attractiveness of his architectonic.

Although Finnis' metaphysical teleology restricts heterosexual sexuality,<sup>65</sup> the more important target is homosexuality. According to Finnis, condemning same-sex intimacy as immoral, "need not be a manifestation of mere hostility to a hated minority, of purely religious, theological, and sectarian belief or of prejudice. It can be supported by reflective, critical, publicly intelligible and rational considerations."<sup>66</sup> Yet, requiring biological unity and procreative form in sexual relations imposes an unpersuasive artifice on love and sexuality that common experience now denies, even if "the greatest Greek philosophers" share Finnis' view.<sup>67</sup> Finnis' elaborate defense of the exclusivity of heterosexual sexuality seems to derive from little more than an arbitrary commitment to one form of sexuality as the only moral form. For those not sharing this commitment it's difficult to see how (and why) Finnis' remarks would be persuasive.

Finnis articulates no real argument proving that this elaborate architectonic of concepts and inferences is persuasive to anyone other than those already predisposed to accept it, and perhaps not even to all of them. Rather than bringing us closer to the light, Finnis' view shrouds common experiences in darkness.

Those sharing Finnis' essentialist conclusion, if not his reasoning, often oppose "elevating same-sex unions to the same moral and legal status as marriage will further throw into doubt marriage's fundamental purposes and put at risk a social practice and moral ideal vital to all."<sup>68</sup> According to this view, same-sex marriage harms traditional marriage by obscuring the essential features of a social practice that benefits society.

A number of problems afflict this argument. First, again we must provide reasons for insisting that marriage's essential purpose is procreation. Procreation—the continuation of the species and the joy for some of having and raising children—is, for obvious reasons, an important societal value. However, it doesn't follow that the importance of procreation renders it an essential feature of marriage. Second, it also raises the question of just who is entitled to define

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65. Finnis' argument precludes masturbation, adultery, pre-marital sexuality, extra-marital sex, and non-genital sexuality, including oral and anal sexual relations. With the exception of adultery, it's difficult to believe ordinary people, meaning, I suppose, those not inclined toward metaphysical teleology, would regard these forms of sexuality as immoral.

66. Finnis, *supra* note 1, at 33.

67. *Id.*

68. Editorial, *Marriage's True Ends*, COMMONWEAL, May 17, 1996 at 5.

social institutions. If, as it should be, democratic deliberation resulting in law should be assigned this responsibility, what constraints, if any, should be placed on the majority for not arbitrarily defining an institution to exclude various minorities from receiving certain benefits?

In support of this view, it could be argued that since procreation is important in anyone's view, it is entirely appropriate for society to prescribe marriage as the appropriate context of procreation.<sup>69</sup> Accordingly, some may contend that America rightly disdains out-of-wedlock procreation generally.<sup>70</sup> However, assigning procreation and raising children to marriage ought not to be relevant to the same-sex marriage controversy. Same-sex partners can procreate and can certainly raise children.<sup>71</sup> Indeed, the conviction that loving couples have the

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69. Restricting procreation to marriage might not be rational if the end is simply to promote procreation. However, if the goal is to promote procreation and stability in nurturing and raising children, marriage might be seen as reasonably related to that goal, but not necessarily.

70. Knowing unmarried heterosexual couples, and single heterosexual individuals who have raised wonderful children, I cannot embrace the view that marriage is the only or even the best context for raising children. My point here is that even if marriage is the best context for raising children, this does not inexorably lead to the conclusion that marriage is, or should be, defined in terms of procreation. Many same-sex couples raise fine, well-adjusted children. So if children are somehow part of the definition of marriage, I would suspect that marriage is essentially defined by *raising* children. This is the greater challenge facing couples wanting children, not the procreative part. For the man that's generally simple. The woman has a more difficult role to play in procreation. However, I suspect few women think the gestation period is more demanding than raising children, especially if the woman focuses on adolescence.

71. Of course, defenders of traditional marriage might insist that same-sex marriage is harmful to children. According to this argument, a two parent, man and woman household is necessary for raising children to become psychologically healthy. This argument, which should not be dismissed out of hand, requires empirical verification and it is not clear whether empirical verification is forthcoming. Moreover, the position seems counter-intuitive. Over the course of history, children have been raised successfully in households having opposite sex parents, same-sex parents (or at least two adults of the same sex), one parent, and no parents. It is not obvious that it can be argued empirically that only opposite-sex couples raise children successfully. Moreover, it is unclear whether same-sex parenting is less effective in raising good, healthy, and decent children. What we do know, anecdotally, is that love, patience, and a little common sense are probably required in most cases, though perhaps not in absolutely every case. Even if traditional marriage does a better job than same-sex unions in raising children, we must then determine the reasons for this difference. Indeed, if this is a difference, it might turn out to be true only due to the social antipathy to same-sex unions. The empirical facts are controversial and cannot be the basis of precluding same-sex marriage.

Generally speaking, if opponents of same-sex marriage base their arguments on empirical arguments—on the affects of same-sex parents on child rearing, for example—their claims must be empirically substantiated. Moreover, even if opposition to same-sex marriage is accurately based on empirical factors, a complete ban will inevitably be under- and over-inclusive. Even if some or most same-sex child rearing has deleterious effects on children, prohibiting same-sex marriage is under-inclusive because it will not prohibit the marriages of heterosexual couples unfit to raise

most efficacious relationship for raising children suggests procreation is contingently, not definitionally (or necessarily) related to marriage. Indeed, rather than defining marriage, procreation is assigned to marriage because marriage is the committed, loving union of two individuals whose identity is defined by their mutual commitments, including raising children. In this context of stable intimacy and love, children have the best chance to develop healthy and morally decent<sup>72</sup> characters. If “marriage” is not obviously defined in terms of procreation, but procreation is socially assigned to marriage for its stable intimacy, the lack of procreative sex cannot be a reason to reject same-sex marriage. Stable intimacy between two adults, the most basic element in marriage, is a type of a union in which gays and lesbians can and do engage.<sup>73</sup>

It must be stressed that democrats should be wary of exclusive institutions and social practices. Certainly, some social practices in any society need to be restricted. Driving automobiles excludes those individuals not sufficiently physically and psychologically mature to exhibit sound driving judgment. No one seriously complains about such exclusions, because the reasons for the exclusion are self-evident, and whatever harm affects the excluded class is outweighed by far by the benefits to everyone, even the excluded class. However, when the exclusion is controversial, those seeking the exclusion must reveal legitimate reasons for burdening a class of people by excluding them from a particular benefit.

Opponents of same-sex marriage also contend that if it becomes legitimate at all, it should become so only through the democratic process and not the courts. I now have considerable sympathy for re-examining judicial supremacy in our society. However, under a regime of judicial supremacy, judicial intervention is precisely what is needed to protect the rights of same-sex couples.

Moreover, the following hypothetical, I believe, places a constraint on majorities in our society getting the last word on same-sex marriage. Let us suppose that democracies (the majority in a given polity) can, with reasonable constraints, decide which social practices should be valued as well as the eligibility requirements for engaging in such practices. Let us put to one side for the

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children. It is over-inclusive because even if most same-sex couples fail as parents, some succeed. Putting aside the empirical effects of raising children in a same-sex couple's household, let us explore the possibility that same-sex marriage causes a different kind of harm.

72. A maximalist conception of moral decency might be controversial, but surely this doesn't preclude including certain traits that anyone would include in his or her conception of “moral decency.” For example, honesty, reliability, caring for others, and willingness to criticize and correct one's conduct are surely required minimalist conditions of a morally decent life.

73. Why should marriage be defined in terms of procreation? For those capable of doing so, making babies is not remarkable conduct, at least for men. Raising children is. And, of course, same-sex couples can and do raise children probably as well as heterosexual couples. At any rate, the effect of same-sex marriage on children is an empirical inquiry that does not rest on metaphysical teleology.

moment how to analyze “reasonable constraints.” Suppose in a society somewhat similar to ours, the majority of the population is homosexual, and that same-sex marriage is the only legitimate form of marriage. The majority permits (even encourages) people to engage in heterosexual relations for the purpose of procreating, but does not permit heterosexuals to marry as the practice is defined in our society; nor does the majority permit heterosexuals to receive the benefits—formal, informal, and symbolic—of marriage. Should the majority be permitted to exclude heterosexuals from marriage? One must give, I would think, the same answer to whether the practice of marriage should be extended to those not permitted to marry in this hypothetical as in the real world of our society. If majorities can define non-criminal, social practices and define them as excluding others (outside of the context of such crimes against social morality and public order as murder, rape, and so forth), then in this hypothetical it would be permissible on democratic grounds to forbid heterosexuals from marrying. This is a conclusion I think we must emphatically reject.

Society might encourage marriage because marriage benefits society. But these are deep and murky waters. Sometimes the contention that marriage benefits society is a self-fulfilling prospect. Because marriage should exclude, or so it is argued, other forms of association, the social cost involved with the latter sometimes is very high by placing inordinate stress on these associations. Without this social cost, these unpopular forms of association may be just as beneficial to society as others. The central point, however, is that whether to exclude homosexuals from marriage in our society and heterosexuals in the hypothetical society seem to require the same answer. Democracy should be sensitive to these prospects, because democracy inevitably is committed to diversity. That said, is same-sex marriage so inimical to society that it must be banned? Only if same-sex marriage harms traditional marriage can this contention even begin to be supported. What sort of harm might this involve?

#### IV. WHAT HARM DOES SAME-SEX MARRIAGE CAUSE?

It is necessary to realize that “harm” is a quasi-evaluative concept. That is, it includes both a description and an evaluation. The term “harm” can never be fully explicated in terms of descriptions. For example, if I describe Jones as placing a sharp object in Smith’s chest, you will not know if Smith harmed Jones until you know whether Smith wanted to take Jones’ life, or whether Smith is a surgeon trying to unblock Jones’ arteries. Thus, in constitutional and political matters, “harm” is often a conclusory term used to characterize the results of someone’s behavior for the purpose of at least presumptively condemning that behavior. Accordingly, in the same-sex marriage controversy, opponents insist that same-sex marriage harms traditional marriage because they want to condemn same-sex marriage. Proponents of same-sex marriage deny that it harms traditional marriage because they either approve of it, or think it should be

tolerated.<sup>74</sup> There are no descriptively neutral vantage points from which to carry on this debate.

Nevertheless, each side should try to appreciate, if not fully understand, their opponents' evaluations. In fairness and respect for those conscientiously opposed to same-sex marriage, we should try to identify the nature of the harm they seek to avoid. Indeed, they are our fellow citizens who deserve our attempts at conciliation. In that spirit, consider the following framework for articulating this conception of harm.

We live in physical and psychological environments, including tables, chairs, sunrises, hurricanes, and other people. Some control or influence over our environments is necessary for us to survive in the world and to make our lives meaningful.

More importantly, we also live in a normative environment, including standards, judgments, prescriptions, and values. In this environment, we continually make judgments about value and propriety along a spectrum from trivial judgments to judgments of ultimate value and meaning. Our normative environment supplies the building blocks of our value judgments.<sup>75</sup> It includes, *inter alia*, deliberative values, inherited values, and subliminal values.<sup>76</sup> One's

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74. The term "harm" needs a systematic explication which cannot, of course, be attempted here. One problem such an explication must resolve is just what the relationship is among "harm," "cost," "burden," "offensiveness," and "interference." For our purposes, it should be noted that harm to others or third-party harm is and should be endemic in any diverse and vibrant democratic society. Third-party harm is the price we should gladly pay for the opportunity to live in a society where the possibility of liberty, equality, and community are governing values. Consider a few examples. A public figure might be falsely maligned without recourse. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A public figure is harmed when satirized in vulgar, degrading terms. Yet the Court has clearly stated that such satire is also protected by the First Amendment. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Requiring individuals whose religion prohibits working on Friday night and all day Saturday harms them just as the employer is harmed if he is compelled to permit them leave. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Protesting the War in Iraq conceivably harms our men and women fighting there by extending the duration of the war. Yet, these soldiers are fighting for the very rights the exercise of which may harm them. There are scores of other examples of third-party harms that democratic citizens must accept as the price of freedom. If same-sex marriage harms traditional marriage, it just might be among the harms democratic citizens must endure.

75. Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 129 n.212 (1991) *asserting* ("[a] value-environment consists of the ordinary means for learning about new values. What we see, hear, and read determine our value-environment. If you control what I read, view, and listen to, you control my value-environment, and therefore you control my values.").

76. Deliberative values are expressed in judgments concerning propriety, correctness, the good and the right. One's overarching normative environment consists of an epistemic environment, an aesthetic environment, a political environment, and a moral environment. Each environment may yield fully deliberative judgments of propriety, inherited judgments about

normative environment also includes choices for individual conduct, general strategies for living, and complete life styles through which a person lives his or her life, and through which this life is nourished and refurbished. We interpret the world through this environment, and our decisions to act on these interpretations in turn have the capacity to change this environment. Through our normative environment we experience the world, process information, and form intentions to act. Thus, our normative environment forms the subject matter of our primary and considered intuitions about meaning, value, and propriety.

Sometimes what is most fundamental to an individual's normative environment is unconscious or subliminal. These subliminal elements in our normative environments are deeply entrenched in our psyche and, when disturbed, are fortified by denial and other psychological mechanisms. One's normative environment changes slowly. Thus, disturbing the subliminal elements of one's normative environment is likely to be rejected at least initially. Sometimes challenging the subliminal elements in this environment straightforwardly disrupts our inherited and even our deliberative judgments about political or moral propriety.

No one can function as a person in the world without controlling or influencing, at least to some extent, his or her normative environment. Such control is a necessary condition of owning one's own life. We have a healthy instinct to preserve this control. However, this instinct is subject to abuse when it makes us oblivious or insensitive to the interests of others to preserve their normative environment.

We live and interact with the other people who live in their own normative environments. Some of these interactions are *de minimus* exposures while we are shopping, traveling, and so forth. Other, more significant, exposure is at work, school, and through voluntary organizations. In a democratic society, the public environment, especially the political and moral segments, are contested arenas; many try to remake the public environment in the image of their own normative environments. Often, the public environment dominates the environments of individual persons. For instance, the precise role of religion in the public square affects the environments of both theists and atheists.<sup>77</sup> The public environment constantly affects us by exposing our normative environments to conduct and attitudes of which we sometimes disapprove strenuously. Accordingly, disfavored attitudes and conduct in the public environment threaten our own normative environment in the sense that they make it more difficult for us to preserve its integrity and character. For example, if commercialism thrives in the public environment, this fact harms or interferes with my non-commercialist values.<sup>78</sup>

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propriety, and subliminal impressions of propriety.

<sup>77</sup> Robert Justin Lipkin, *Reconstructing the Public Square*, 24 CARDOZO L. REV 2025, 2028 n.13 (2003).

<sup>78</sup> For an additional example, religion in the public square threatens some atheists just as

Commercialism in the public environment makes it more difficult for me to live according to my non-commercialist values. Commercialism debases my normative environment, especially, though not limited to, the normative environment I wish to bequeath to my children.

Since our normative environment and the public environment consist of the choices we are permitted to make, those who oppose same-sex marriage want to eliminate from our normative environment the possibility of such a choice. Here it does no good to tell these opponents, “so don’t enter a same sex marriage yourself,” because it is precisely the possibility of others entering into such marriages that is a loss for them. In their view, marriage is exclusively between a man and a woman, and anything else is a threat to, and makes a mockery of, a hallowed institution. Same-sex marriage is anathema to the foundational—deliberative, inherited, and subliminal—values of these people, which include an exclusivity provision regarding marriage. Legitimizing the possibility of same-sex marriage in the public environment conflicts with the exclusivity provision, and as a result, debases their own ideas about the saliency of traditional marriages. The relevant sense of “debases” is not easy to explain, but the root idea is that same-sex marriage cheapens, or is a grotesque caricature of, traditional marriage.<sup>79</sup>

Understood in the above way, we can understand the harm some opponents of same-sex marriage express by the prospect of extending the idea of marriage to same-sex couples. The normative environments of these individuals, on every level—deliberative, inherited, and subliminal—exclude same-sex marriage. Opponents of same-sex marriage want to preserve their normative environments, at least pertaining to marriage, without change. The acceptance of same-sex marriage in the public environment harms these people because it interferes with deeply entrenched aspects of their normative environments.

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secularism threatens some theists.

79. For example, a classical music lover might argue that the rock song “A Lover’s Concerto” cheapens Johann Sebastian Bach’s “Notebook for Anna Magdalena Bach, Minuet in G” from which it derives. Similarly, the prospect of the Nobel Prize for literature being awarded to the comic book sensation, Harvey Peckar, for his series *American Splendor* debases the award William Faulkner received. Finally, the honor of being inducted to the Baseball Hall of Fame might be cheapened if journeymen players were inducted. In these examples, excluding certain kinds of candidates is necessary for the conduct to retain its integrity and purity. Consider the true-to-life example of the sixties singer and songwriter, Bob Dylan. The CBS television news magazine has reported that Dylan has been nominated for a Nobel Prize in literature. *60 Minutes* (CBS television broadcast, Dec. 5, 2004). As someone who believes that Dylan’s music is unique, penetrating, and arguably the best rock and folk music of the past sixty years, I nevertheless find his nomination for a Nobel Prize to be inappropriate. By contrast, one could argue that Dylan’s lyrics qualify him as a poet extraordinaire, and thus he should be evaluated for the Prize on that basis. Understood in this manner, Dylan’s nomination is much less suspect. This in itself illustrates how a “gross caricature” can be legitimately redescribed in terms rendering the inclusion more plausible, though not perhaps for everyone.

One might suggest that the normative environments of opponents of same-sex marriage are harmed only if they let themselves think they are harmed. After all, opponents of same-sex marriage need not alter their normative environments or those of their children, family, friends, or if relevant, their churches. This response simply rejects the idea of an exclusive normative environment, and fails to appreciate what opponents to same-sex marriage experience. Opponents of same-sex marriage do not choose to be harmed by the prospect of same-sex marriage; rather, they are harmed.<sup>80</sup> If my normative environment rejects commercialism, the more commercialism is included in the public environment—in popular culture, advertising, and so forth,—the more difficult it is for me to maintain the integrity and character of my non-commercialist attitudes. Any parent committed to non-commercialism can surely understand the harm to his or her normative environment that commercialism causes.

In this sense of harm, same-sex marriage “treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage. . . .”<sup>81</sup> Therefore, legitimizing same-sex marriage insults traditional marriage by making a mockery of the latter’s essential nature.

Homosexual orientation in this sense is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualize and in that sense give expression to the exclusiveness and open-ended commitment of marriage as something good in itself. All who accept that homosexual acts can be humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual ‘self’ who has them. Such an acceptance is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages; it makes nonsense, for example, of the view that adultery is inconsistent with conjugal love, in an important way and *intrinsically*—not merely because it may involve deception. A political community which judges that the stability and protective and educative generosity of family life are of fundamental importance to the whole community’s present and future can rightly judge that it has compelling reasons for judging that homosexual conduct—a ‘gay lifestyle’—is never a valid, humanly acceptable choice and form of life, for denying that same-sex partners are capable of marrying, and for doing whatever it *properly* can, as a community with uniquely wide but still subsidiary functions . . . to discourage such conduct.<sup>82</sup>

If one understands marriage as involving heterosexual intercourse only, then any publicly recognized practice eschewing heterosexual intercourse in the context

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80. In some cases, the alleged harm might be a disguise for prejudice, pure and simple. Such allegations may not deserve respect. I do not believe, however, that a non-circular argument is possible demonstrating that everyone alleging this harm must be disingenuous.

81. Finnis, *supra* note 1, at 36.

82. *Id.* at 37 (emphasis in original). Even if one concedes this, it is unlikely that the existence of same-sex marriages would be more harmful to traditional marriage than adultery.

of a loving union represents a denial of the value of such a union. For Finnis, if we regard the conceptual content of traditional marriage as necessarily involving heterosexual conduct, same-sex marriage rejects this conceptual content, and therefore creates instability in the conception and practice of marriage. Its existence challenges the coherence and sensibility of traditional marriage and paves the way for alternative heterosexual and homosexual unions. This is why the standard liberal reply that one form of practice cannot harm another unless it eliminates or makes it prohibitively difficult to engage in misses the point. Proponents of same-sex marriage need not self-consciously denigrate the practice of traditional marriage; according to the opponents, its existence alone challenges the conception and practice of traditional marriage and traditional marriage's exclusivity, and that is wherein the harm lies.

Opponents of same-sex marriage may very well be harmed by legally and socially extending the institution of marriage to same-sex couples. A practice they exclusively believe to concern gender will no longer maintain that exclusivity. In their eyes, fundamental social practices have integrity and value independent of the people who value them. Opponents asks the question: "Why is it any more rational to embrace current standards of value embraced by some, than the values associated with commendable social practices, such as marriage, which has withstood the ravages of the ages?" Only by insisting that there is one correct standard of rationality or that rationality is committed to one set of values, is this charge of irrationality persuasive.

#### V. WHAT TO DO ABOUT THIS HARM?

Not everyone will accept the argument that including same-sex marriage in our public environment causes harm to the practice of traditional marriage. However, even for those who do accept this type of harm, a fatal problem remains. Has democracy—and the ideals of liberty, equality, and community which drive it—already answered this question for us? Democratic societies committed to liberty and equality cannot countenance this kind of harm as the basis of legal prohibitions. In a democratic society, excluding individuals from traditional social practices and institutions is justified only when inclusion harms the traditional practice or the individuals participating in the traditional practice. However, this harm must eliminate the practice entirely, or prevent those who value the practice from being able to engage in it.

If protecting one's normative environment by eliminating change in the public environment is legitimate, none of the important changes in American society would have been possible. Moving from racism to racial tolerance, sexism to gender equality, and religious intolerance to religious tolerance all involved changes in our public environment that arguably can be said to harm or interfere with the normative environments of those opposed to change. Within certain parameters, each citizen in a democratic society must learn to deal with the harm to his or her normative environments inflicted by others seeking to flourish

according to their own normative environments. Without this patience and tolerance, liberty, equality, and community become illusory.<sup>83</sup> Democracy cannot permit using this harm to justify excluding gays and lesbians from marrying unless the harm affects security and order. The possibility (and actuality) of harming someone's normative environment cannot be grounds for excluding the source of the harm when the source of that harm furthers the concrete liberty, equality, and community of others.<sup>84</sup>

In other words, ideally, individuals embracing communities where liberty and equality thrive would (should) want to multiply or at least tolerate the possibilities of choice in our public normative environment, however abhorrent certain choices may be to any segment of the population, especially however abhorrent these choices may be to the majority.<sup>85</sup> Democratic government, including protecting the rights of disfavored minorities, is messy and disturbing in the sense that it subjects people to the possibility and probability of confronting harm to their normative environments. Indeed, democracy must preserve this possibility if it is to be based on the idea of a national community in which liberty and equality thrive, and where we aspire to full citizenship for everyone.

Thus, the question must be: "Who owns American institutions?" In a democratic republic, the answer should be: "The people." Everyone owns, and is therefore entitled to participate in, education, transportation, and even the military. So why, then, should marriage be different? Why should it exclude large classes of people? If citizens own American institutions, the government may not arbitrarily exclude anyone or any group from participation. The government, of course, can (and should) impose *de minimus* regulations such as age requirements and other regulations designed to protect the individual and society from obvious incapacities in participation. But when it excludes classes of individuals, the government should be required to provide a legislative, compelling interest in doing so. Harm can be such a compelling interest, but not types of harm that result merely from clashing normative environments.

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83. Similarly, although within the appropriate parameters democratic citizens have the prerogative to define their community, this prerogative must not be used to unfairly restrict minorities without fairly credible reasons.

84. Indeed, democracy, including the protection of minorities, can be characterized as a political order in which social practices come and go. The inauthentic exclusion of social change—even radical social change—is antithetical to the deliberative, democratic spirit. "Authenticity" means: (1) the exclusion rests on the pretty obvious need to protect public order and (2) the majoritarian process is the last step in a deliberative process, but this process is also constrained in order to protect minorities and disfavored members of the population. In other words, authenticity rejects the idea that a pure majoritarian democracy accurately captures America's idea of a republic democracy.

85. Thus, although someone may want others to freely renounce commercialist values, as a democrat he or she should not seek the law—through a statute or the Constitution—to prevent others from including commercialist values into their individual normative environments or the normative public environment of society.

## VI. CONCLUSION

Opponents of same-sex marriage gain something by banning it. Their gain is in preserving their own normative environment, a certain normative aesthetic if you will, based on their deliberative, inherited, and subliminal values. However, despite defending their normative environments against a certain kind of harm or intrusion by restricting marriage to one man and one woman, as liberty-seeking, equality-seeking, and community-seeking citizens, they cannot defend it insisting that the public environment reflect their own normative environments unless they can prove a more substantial conception of harm. All talk of tradition, civilization, and thousand year old institutions goes to the question of why *they* want their normative environment to be fashioned in a certain manner. Such talk is largely irrelevant to what justifies fashioning the public environment and the normative environments of others in this way.

It seems to me that a majority of liberty-seeking, equality-seeking, and community-seeking citizens would recognize that these values entail living in a rather messy, pluralistic world where normative environments interact and sometimes collide on a daily basis. That, as they say, is the price we pay for the freedom and equality of the public environment. Indeed, it seems that a truly sensitive, compassionate liberty- equality- and community-seeking citizen would want to think twice before insisting that, relative to a particular issue, no minority normative environments are permissible. This is imperative even when, or especially when, he or she has the power (through majority or supermajority standing) and desire to eliminate that normative environment. Refusing to restrict minority normative environments, even when such environments are perceived as morally wrong, is the hallmark of a deliberative, democratic society.

We are drawn to a set of difficult conclusions. First, same-sex marriage does harm those individuals and couples committed exclusively to the traditional notion of marriage. Second, deliberative democracy, including protection of disfavored minorities, cannot legally countenance banning same-sex marriage just because it harms the normative environment of the majority. Where there are laws, there are courts. And our courts are designed to protect disfavored minorities from exclusion as full citizens.