2004

The Heterosexual Agenda, in The Right to Marry: Making the Case to Go Forward Symposium

John G. Culhane

THE HETEROSEXUAL AGENDA

John G. Culhane*

If the 15 words "Marriage in the United States is exclusively a union of one man and one woman" are placed in our Constitution, we can point with confidence to those who claim civil unions are marriages and say with confidence, "Not in the United States."[1]

Reach the level above your fears![2]

I. INTRODUCTION

The opposition to same-sex marriage is boiling over. As advocates continue their increasingly successful slog of progress through the courts, the push-back response has grown ever more desperate. When the Supreme Court of Hawaii intimated that denial of marriage benefits to same-sex couples might violate that state's constitution,[3] Congress meddled in what has long been a

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[1] Maggie Gallagher, *Massachusetts vs. Marriage*, WKLY. STANDARD, Dec. 1, 2003, *available at* http://www.weeklystandard.com/Content/ Public/Articles/ 000/000/003/408utwyh.asp (last visited June 9, 2004).

[2] THE B-52'S, *Tell it Like it T-is, on* GOOD STUFF (1992).

[3] In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii ruled that barring same-sex couples from marriage constituted sex discrimination and therefore placed a heavy burden on the state to justify such discrimination. *Id.* at 68. The lower court subsequently ruled that the state had not met its burden. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). But before the Supreme Court of Hawaii decided the state's appeal, the Hawaii electorate granted the legislature the power to amend the state constitution to define marriage as the union of "a man and a woman." Thereafter, the Supreme Court of Hawaii ordered entry of judgment against the plaintiffs. Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (unpublished table decision). For the full opinion, see Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

matter for the individual states by passing the so-called Defense of Marriage Act ("DOMA").[4] Now that the Supreme Judicial Court of Massachusetts has required the state legislature to allow same-sex couples into the institution of marriage,[5] fresh calls are heard for an amendment to the United States Constitution that would explicitly deny marriage rights to same-sex couples.[6] In a particularly ungracious act, the President renewed his support for such an amendment on May 18, 2004: just one day after same-sex couples in Massachusetts became legally empowered to marry.[7] In the unlikely event that the amendment effort succeeds, it will mark a singular triumph in which advocates can take a special pride—

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[4] *See* Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2003); 28 U.S.C. § 1738C (2003)). DOMA provides, in relevant part:

> No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship . . . . In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id.

[5] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003). Because the *Goodridge* majority required the legislature to provide same-sex couples with the benefits of marriage, some state legislators had hoped that it would be possible to create a parallel institution, such as the civil union, that would confer the benefits of marriage without using the term "marriage" itself. But the court would have none of it. On February 4, 2004, the court issued its response to the state senate's inquiry as to whether the civil union alternative would suffice. Noting that history has shown that "separate is seldom, if ever, equal[,]" Opinions of the Justices to the Senate 802 N.E.2d 565, 569 (Mass. 2004), the court concluded that the answer to the senate's question was "No." *Id.* at 572. On May 17, same-sex marriage became legal in Massachusetts. *See infra* note 7 and accompanying text. There remains the possibility, dim in my view, that the Massachusetts State Constitution will be amended to ban same-sex marriages. *See infra* note 54.

[6] *See, e.g.*, David D. Kirkpatrick, *Conservatives Using Issue of Gay Unions as a Rallying Tool*, N.Y. TIMES, Feb. 8, 2004, §1, at 1.

[7] Joanna Grossman, *Legal Wrangling Continues in Massachusetts Over Marriage, at* http://www.cnn.com/2004/LAW/05/18/grossman.mass.marriage/ (last visited June 19, 2004).

never before has the Constitution been amended to *deny* rights to a group of people.[8]

It is no surprise that the civil rights struggle for same-sex marriage has been more successful in courts than in legislatures. As the debate over the DOMA comprehensively demonstrated, legislatures do not need logical reasons for what they do. The clamor of constituents and the exigencies of political accountability will suffice. Courts, by contrast, are in principle checks on the legislative tendency to make bad policy that results in the denial of basic rights.[9]

What is more revealing than the predictable actions of legislators is the almost complete lack of sustained arguments *against* same-sex marriage in legal and popular journals. Justice Scalia and others who complain of the "law-profession culture"[10]—whatever that is—might assert that the one-sidedness of the debate is an unsurprising precipate of that culture; but his complaint is not an explanation for the weakness of opposing arguments. Indeed, the relatively few articles that do argue against same-sex marriage are themselves the best evidence of the poverty of discourse on that side of the issue.

The recent example of a symposium in this very journal makes the point well enough. Of the six submissions opposing same-sex marriage (and civil unions, which was the ostensible topic for the symposium), only one makes any sincere effort to even argue

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[8] One commentator has aptly referred to this possibility as "defac[ing] the Constitution with anti-gay graffiti." Hendrik Hertzberg, *Unsteady State*, NEW YORKER, Feb. 2, 2004, at 25, 26.

[9] This conflict between the two branches of government is to an extent bred into the constitutional design; but some have argued that the assumption that constitutional interpretation is for the judicial branch alone is open to question. If Congress and the executive branch took more seriously their own roles in considering what the Constitution permits—and what it does not—fewer conflicts might arise, and the relationship between the branches might become more civil. For a good discussion of these points (and examples of the cynical attempts to "stack" the judiciary), see Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

[10] Lawrence v. Texas, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting).

against the merits of same-sex marriage.[11] The others range from gauzy paeans to the "unique" nature of marriage as restricted to opposite-sex couples;[12] to an unsuccessful attempt to demonstrate that same-sex couples do not enjoy fewer benefits than married couples;[13] to a list of the possible effects of alternative family structures on existing law;[14] to the worst kind of *ad hominem* attack on gay people.[15] Thus, the volume consists largely of articles opposing same-sex unions that do not argue the most basic point at issue—whether there is any principled ground for opposing such unions.

The one article that does mount any kind of argumentative defense of "traditional marriage" only demonstrates the weakness of that position.[16] The piece is little more than a retread of essentialist arguments about the supposedly intrinsic definition of marriage;[17] arguments that commentators, myself included, have

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[11] Lynne Marie Kohm, *The Collateral Effects of Civil Unions on Family Law*, 11 WIDENER J. PUB. L. 451 (2002). For other articles in this symposium, see *Civil Unions in Vermont: Where to Go from Here? A Symposium Addressing the Impact of Civil Unions*, 11 WIDENER J. PUB. L. 353 (2002).

[12] *See, e.g.*, Randy Lee, *A Tribute to my Friend David Orgon Coolidge*, 11 WIDENER J. PUB. L. 353, 360 (2002).

> [I]n spite of the lessons that one may learn from people in other relationships, the relationship shared by [a couple known to the author], a relationship designed as 'a partnership of the whole of life,' ordered for children, created to endure, and intended to grow in community, is and will always be unique.

Id. (citation omitted).

[13] Teresa Stanton Collett, *Benefits, Nonmarital Status, and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379, 385-97 (2002) (dual strategy of minimizing the number of same-sex couples who would gain benefits from same-sex marriage and ignoring those benefits, such as state (as opposed) to federal estate tax and the right to sue in tort that vitiate her argument).

[14] *See generally* Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401 (2002) (article appears indirectly to support same-sex marriage by cataloguing the "problems" caused by valuing other relationships besides marriage, since it provides no argument against same-sex marriage itself).

[15] Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 506-12 (2002) (comparing a male persecuted for displaying a female sexual identity to a man with an appetite for prepubescent boys).

[16] Kohm, *supra* note 11.

[17] *Id.* at 468-73.

already decisively refuted.[18] No serious effort to engage these refutations is anywhere in evidence in article, or anywhere else in this volume.

By now, the reason for this failure is all-too-obvious. In his apoplectic dissent in *Lawrence v. Texas*,[19] Justice Scalia was candid both about his own justification for opposing same-sex marriage (should it come before the Supreme Court) and about the lack of other arguments against it.[20] As to the first, the legislature should be able to prohibit such marriages simply because it finds them immoral.[21] As to the second, if legislatures are compelled to give actual *reasons* for their opposition (besides unspecified dislike), they will come up short.[22]

Nonetheless, pointing out the incurable deficiencies of arguments against same-sex marriage has not resulted in victory. In this article, I want to advance the debate by taking a new tack. Instead of relying, yet again, solely on legal or formal arguments favoring same-sex marriage, I approach the issue situationally.

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[18] *See, e.g.*, JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004); William N. Eskridge, Jr., The Case For Same-Sex Marriage (1996); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1202-09 (1999); Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, *in* SEX, PREFERENCE AND FAMILY 227 (David M. Estlund & Martha C. Nussbaum eds., 1996). This refutation is no longer limited to academics. Both the Vermont and Massachusetts supreme courts have similarly exposed the weakness of the arguments against same-sex marriage. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999).

[19] 123 S. Ct. 2472 (2003).

[20] *Id.* at 2488-98 (Scalia, J., dissenting).

[21] *Id.* at 2495 (Scalia, J., dissenting).

[22] *Id.* at 2498 (Scalia, J., dissenting). Justice Scalia stated:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos . . . , "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring" . . . ; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

Id. (Scalia, J., dissenting) (citations omitted).

Thus, Part II consists of a discussion of four sets of hypothetical couples. Each couple is given a short life story, containing details about their relationship and their family that one might expect, save one: I do not reveal the sex of any members of these couples. I ask the reader—thus hampered—to decide which of these couples "deserves" the right to marry.

Part III then uses the discussion in Part II to advance the argument for same-sex marriages and for initiatives that move in that direction. 'In doing so, I question the apparently incoherent approach that welcomes piecemeal legal accommodation of same-sex couples as long as such accommodation falls short of full marriage. This discussion lays the groundwork for Part III by suggesting that the inconsistency of approach and result is explainable by the deeper fear that extending marriage to gay couples exposes.

Part IV discusses what I call "the heterosexual agenda" and its intractable opposition to any changes to marriage that would reflect the reality of that institution as lived. Many of those arguing against same-sex marriage really have a much bolder agenda—a "Holy War" against gays—that the marriage debate occludes.[24] This discussion contains a refutation of these arguments against same-sex marriage, and concludes with a call to undertake a *serious* debate about marriage and its incidents.

Part V concludes the article with what can only be preliminary thoughts about desirable changes to the institution of marriage. These changes include the recognition of same-sex marriages as just one part of an overdue consideration of how best to rehabilitate an institution in crisis.

II. FOUR COUPLES

1. Sam and Pat have been together for sixteen years. Within two years of meeting, they were married in their church, in the

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[24] *See, e.g.*, John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 949, n.172 (2001) (citing Robert Dreyfuss, *The Holy War On Gays*, ROLLING STONE, Mar. 18, 1999, at 38, 39).

presence of more than 100 supportive witnesses. They own a home together, are sole beneficiaries on each other's pensions and life insurance policies, have mutual powers of attorney, and commingle their funds completely. Sam is a salesperson who works about fifty hours per week. Pat is employed by the local school district on a part-time basis and has primary responsibility for the couple's two children, Bob and Barbara, ages five and eight, respectively.

2. Chris, age forty-eight, is a serial monogamist, who has never remained in one relationship for more than two years. Chris has often discussed with friends a life philosophy: "Why tie yourself down with one person for life. When the attraction fades, I'm outta there. And kids? There are six billion people in the world—why add to the total? And adoption? Sorry, but I'm not altruistic enough for that. I'll send money."

Last year, Chris met J.C. at a mutual friend's party. The two were instantly attracted to each other, and have been a mostly monogamous couple ever since, although they have an "open relationship." J.C., age forty-five, shares Chris's lack of interest in children. The two live in separate apartments and spend several nights together per week. Their finances are strictly separate, and neither has so much as broached the subject of adjusting their estate planning documents to name the other as beneficiary. Recently, they discussed getting married "for the fun of it." Both have expressed a willingness to do so, provided that "nothing changes" as a result. Accordingly, if they do marry, they will enter into a prenuptial agreement designed to maintain their status quo to the extent possible, and to ensure that either party can obtain a divorce without giving up any property obtained during marriage. They also plan to continue living in separate dwellings.

3. Fran and Leslie are both seventy-two years old. They met at a senior hostel several months ago. Fran is financially secure, having retired with a generous pension and substantial real estate holdings. However, Fran suffers from heart disease and is not physically self-sufficient. Leslie, on the other hand, lives on social security benefits alone, but is in excellent health.

Last month, Leslie moved out of a modest apartment in a high-crime section of the city and moved in with Fran, who owns a large condominium in the financial and cultural heart of that same

city. Fran's income provides for virtually all of the couple's financial needs, while Leslie takes care of most of the daily details of their lives together. The couple enjoys good sexual relations, and both are "happier than they've ever been," as Fran recently stated to a long-time friend.

4. To their friends, George and Renee are "Ozzie and Harriet." They were legally married in a traditional religious wedding ceremony almost ten years ago in New Jersey, and now have three children, ages seven, six, and two. The oldest, Scott, is often described as "little George" because of his unusually strong resemblance to George, his biological father.

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Which of these couples should be able to marry? One can imagine a fanciful scenario in which such a choice might be forced upon an individual—at gunpoint, for example. So, what decision would one make? In important ways, the question cannot be answered without deciding what an answer to this question should entail. Is the issue simply the benefits (and attendant legal obligations) of marriage?[25] Are we instead concerned about the meaning of marriage and how allowing a given couple into the institution might change or threaten that meaning? If so, we need to decide on a definition of marriage that can be defended on two kinds of grounds. First, it must meet minimal requirements of fairness to all citizens, particularly to those we might decide to exclude from membership.[26] Second, qualifications for membership should at least roughly reflect the realities of people's lives. If it turns out that a blanket prohibition on same-sex marriage

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[25] The obligation piece of the marriage debate has been underemphasized. Marriage confers substantial benefits, but exacts substantial obligations in return. Thus, the charge that same-sex couples who seek entry into the institution are somehow "selfish" has a hollow sound. *See, e.g.*, Maggie Gallagher, *Massachusetts vs. Marriage*, WKLY. STANDARD, Dec. 1, 2003, *available at* http://www.weeklystandard.com/Content/ Public/Articles/000/000/003/408utwyh.asp (last visited Apr. 25, 2004).

[26] *See generally* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). I have discussed the application of Rawls' approach to the issue of same-sex marriage and to the question of fairness more generally in Culhane, *supra* note 18, at 1199-1201.

has undesirable social effects, then that would be good reason to question it (and such a result might also reinforce the conclusion that the exclusion was unfair).

Although many conservatives also oppose extending even the benefits of marriage to same-sex couples,[27] their objection is the deeper one, namely that marriage means (and should continue to mean) only the union of a man and a woman.[28] Thus, a conservative would be expected to oppose marriage in the first three cases, standing on principle. If I don't know the sex of the couple, I won't risk "undermining the institution of marriage" by possibly guessing wrong. The fourth case would likely be seen as an easy "yes," since (seemingly against the rules I laid out at the start), I "gave away" the sex of the couple. Since they've already "legally married," there's nothing further to discuss. The remainder of the facts, while interesting, become gilt, in a fundamental sense. Only the opposite-sex issue counts.

Someone already committed to same-sex marriage might well argue for marriage rights in all cases, although commitment to that position might be stronger in some cases than in others. One might ask, pointedly, why the second couple is bothering to marry at all, since none of the usual reasons impelling such a decision seem to be present: no financial interdependence, no interest in raising children, no desire to cohabitate, and not even a commitment of monogamy. What, besides the bare legal fact of its existence, would such a marriage *mean*? In an important sense, it may be that advocates of same-sex marriage are, by reason of the reflection needed for such advocacy, more likely to think critically about the meaning of marriage. This point will be expanded upon later.

Once we move away from these two poles and approach the cases with fresh eyes, how do they appear? Case one sounds like a traditional marriage in every way. Apart from broader objections to the institution of marriage itself, why would anyone oppose allowing this couple to form a legal union? If this couple were permitted to marry, and it were subsequently discovered that both

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[27] *See, e.g.*, Gallagher, *supra* note 25 ("I believe that creating legal alternatives to marriage is counterproductive and wrong. . . . [C]ivil unions are one unwise step down a path away from a marriage culture.").

[28] *See infra* Part IV.

parties were, say, female, would it be of great urgency to *undo* such a marriage (when the coercive gun was withdrawn)? It surely would not be if marriage is primarily defined as a set of benefits. If the concern is with the meaning of marriage, the argument is more complex; however, we shall see that the argument pulls more powerfully in the direction of marriage rights.

As suggested above, case two is pitched at the other end. Many called upon to decide this case would at least have strong misgivings about calling it "marriage" at all, because it has been systematically stripped of what, for most, are its defining or at least common incidents—long-term commitment, financial interdependence, cohabitation, fidelity, and openness to children.[29] Whether the parties happen to be of the same or opposite sexes will seem relatively unimportant compared to these other vertiginous facts. The couple doesn't seem interested in the benefits of marriage' either, so it is at least worth asking how this couple's marriage reflects on the institution's meaning.

Case three likely engenders a good deal of sympathy for this couple and calls forth practical considerations, too. This couple is better able than other entities to provide each other with what the partner most needs. In Leslie's case, Fran will provide more support and financial security than the state has been doing; in Fran's case, Leslie furnishes care that even the best private commercial entities might be unable to match. If allowing them to marry supports this arrangement, why not permit it? Note that the couple is extremely unlikely to bring children into the marriage—too old to procreate and highly unlikely to adopt children, even if eligible to do so. But this case emphasizes that not all marriages need or want children. At least preliminarily, we might therefore conclude, with Justice Scalia, that marriage is not solely about children.[30] But then, what is it about?

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[29] In his recent book, Jonathan Rauch focuses on commitment as the "essential core" of marriage: "[M]arriage is two people's lifelong commitment, recognized by law and by society, to care for each other . . ., and to do so within a community which expects both of you to keep your word." RAUCH, *supra* note 18, at 24.

[30] *See* Lawrence v. Texas, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting). The weakness of the marriage-means-children argument was also exposed in both *Goodridge v. Department of Public Health*, 798 N.E.2d 941,

To a particularly reflective "voter," case three might also occasion some creative thought on whether the full package of marital benefits is what this couple needs or wants. Might there be a way of securing the mutual benefits they seek—benefits which, remember, also relieve others of a burden—without entering into marriage itself? The answer may be yes. California and New Jersey now permit older couples to register as domestic partners,[31] a status that brings many of the benefits of marriage but avoids the economic hardship that marriage between seniors can otherwise create. In short, an open-minded approach might result in new forms of state-sanctioned relationships.[32]

Case four is a "trick question." George and Renee were legally married, but Renee is a transgendered woman who underwent a complete sex change before the two married. I placed the case in New Jersey, because such a marriage is valid there.[33] In other places, it is not[34]—even if the birth sex of the transsexual partner is

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961-64 (Mass. 2003) and *Baker v. State*, 744 A.2d 864, 884-86 (Vt. 1999). As discussed in *infra* Part IV however, judicial and academic refutations of the argument have not even been acknowledged by some opponents of same-sex marriage. *See infra* Part IV.

[31] CAL. FAM. CODE § 297(b)(6)(B) (West Supp. 2004) (at least one partner must be sixty-two years of age or older); 2003 N.J. Laws 246 (both partners must be at least sixty-two years old).

[32] A conservative impulse disfavors such marriage alternatives, as they might "send a message" that there is nothing special about marriage. While opponents of same-sex marriage use this concern to argue against same-sex marriage, Jonathan Rauch shows that defending the uniqueness of marriage counsels allowing same-sex couples to participate in marriage. Otherwise, courts and legislatures, faced with the reality of same-sex couples, will continue to succumb to the pressure to create parallel structures that at least approximate marriage. RAUCH, *supra* note 18, at 29-54. And if no such accommodations are made, then same-sex couples will simply cohabitate openly, thereby even more strongly enforcing the message that marriage is not unique. *Id.* at 51-54. While Rauch's concerns are legitimate, they are perhaps overstated. It seems that allowing couples over a certain age, for example, to enter into a state-sanctioned arrangement other than marriage could be understood as responsive to particular concerns, and not a hallmark of marriage erosion.

[33] M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

[34] *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (surviving spouse brought wrongful death claim and the court held that marriage had never been valid because sex was to be determined solely by genetic/chromosomal identity). As I have written elsewhere, "[t]he decision in this case . . . [is]

not discovered until after one member of the couple has died. Of course, in most cases the marriage is not challenged after death, so the couple *was*, as a practical matter, legally married from the date of the wedding until the death of one partner.

Now that the facts of case four have been enriched to show that the couple contains a transgendered partner, should a re-vote be ordered? The "practical" voter might or might not demand such a reconsideration. He or she may be so discomfited by transgendering that a change of vote would be the only way of dealing with this new fact. But our lay voter might also think differently and vote to let the marriage stand, new information notwithstanding. First, the couple was legally married. (To a non-lawyer, this question-begging conclusion might nonetheless be compelling.) The couple is well-known and supported in the community, and—perhaps most important to such a voter—the couple has children that would be adversely affected if their parent's marriage were legally "undone." As the above statement of the law relating to transsexual marriage makes clear, such a possibility is real in some states.

The doctrinaire conservative would surely demand to re-vote. But such reconsideration should only be granted if I breached a "duty to disclose" Renee's sex change. But that duty arises only if the omitted fact is material. Is it? If so, why? Again, this question gets to the meaning of marriage. I will later demonstrate that such a fact should be considered immaterial. In so doing, I will highlight a principal deficiency of the typical arguments against same-sex marriage.

III. TWO DEBATES ABOUT MARRIAGE

The legal proscription against same-sex marriage is sometimes tackled directly. These frontal attacks have garnered most of the news coverage over the past years, as decisions from state courts in

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willfully false and exceptionally cruel, because of the extent to which the court went in denying the reality of the couple's life, thereby depriving the survivor of financial support—and only to protect an allegedly negligent defendant." Culhane, *supra* note 24, at 967, n.271. Still more disturbing is *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002), in which the court can be taken to imply that a transgendered person has no legal right to marry *anyone*. *Id.* at 136-37.

Hawaii,[35] Alaska,[36] and Vermont[37] moved ever closer to holding that denying same-sex couples the right to marry constitutes an unconstitutional infringement of their basic rights. Massachusetts recently took the final step, becoming the first state high court to squarely hold that denying same-sex couples the right to marry violates constitutional guarantees.[38] Courts confronted with such

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[35] In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii ruled that denying same-sex couples the right to marry amounted to sex discrimination and remanded the case to the trial court to determine whether the state could meet its heavy burden (under a strict scrutiny analysis) of showing that the state had a compelling reason for this denial of rights. *Id.* at 67-68. The trial court said that no such showing had been made, Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), and the case went back up to the state supreme court. While the case was pending, the legislature amended the state constitution to restrict marriages to opposite-sex couples. HAW. CONST. art. I, § 23. The compromise that grew out of these events resulted in the creation of what was, at the time, the most comprehensive bestowal of rights on same-sex couples. Reciprocal Beneficiaries Act, HAW. REV. STAT. ANN. §§ 527C-1 to -7 (Michie 1999).

[36] In *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI., 1998 WL 88743, at **5-6 (Alaska Super. Ct. Feb. 27, 1998), the court held that the Alaska state constitution granted every person a fundamental right to choose a life partner, and that the state could not define that right to exclude same-sex coupling. The court's order for a new trial at which the state would be forced to show a compelling interest for its ban lasted one day. The next day, the legislature proposed a constitutional amendment to recognize only marriages between men and women. *See* Kevin G. Clarkston et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 215 (1999) (citing S.J. Res. 42, 20th Leg., 2d Legis Sess. (Alaska 1998)). The amendment subsequently was passed by the voters. *Id.*; ALASKA CONST. art. I, § 25.

[37] In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Supreme Court of Vermont did not wait for further judicial proceedings before declaring that same-sex couples were entitled to the same rights and benefits as married couples. *Id.* at 886, 889. But the court left for legislative determination the means for accomplishing this end. *Id.* at 867, 889. The legislature quickly responded by creating an entity called the "civil union," which confers all of the state benefits of marriage, withholding only the name. VT. STAT. ANN. tit. 15, § 1204(a) (2002).

[38] In *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts took the final step, requiring the Massachusetts legislature to provide for the issuance of marriage license to same-sex couples within 180 days. *Id.* at 969-70. Even though the whole tenor of the opinion, as well as the assumptions made by the dissenting

challenges cannot avoid engaging in a deep debate about the institution of marriage and its evolving purposes. These on-going arguments constitute the substance of what is typically thought of as the gay marriage debate. In response, state legislators are once again revving up the anti-gay-marriage machinery. Ohio recently became the thirty-eighth state to enact a so-called Defense of Marriage Act; and its version is the most far-reaching, since it also denies financial benefits to the same-sex partners of state employees, thereby sanctioning wage discrimination against its own workers.[39]

Simultaneously, another less grand debate is occurring. But this debate is better thought of as a number of discussions about how to solve (or not solve) real problems that couples face when their relationships are deprived of the sanction of marriage. Indeed, most of the litigation involving same-sex couples involves efforts by such couples to obtain specific legal protections that would

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judge, seemed to leave little doubt that marriage itself would be required, the remedy the court ordered opened a fissure of ambiguity: "We declare that barring an individual from *the protections, benefits, and obligations of* civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." *Id.* at 969 (emphasis added). This might have meant that some other legislative creation (such as a civil union) that conferred such "protections, benefits, and obligations" would have satisfied the mandate. But the court recently made clear that the legislature may not grant anything less than marriage. Opinions of the Justices to the Senate, 802 N.E.2d 565, 571-72 (Mass. 2004).

[39] H.R. 272, 125th Gen. Assemb., Reg. Sess. (Ohio 2004), begins with the following statement of purpose:

> To amend sections 3101.01 and 3105.12 of the Revised Code to specifically declare that same-sex marriages are against the strong public policy of the state, to declare that the recognition or extension by the state of the specific statutory benefits of legal marriage to nonmarital relationships is against the public policy of the state, and to make other declarations regarding same-sex marriages.

Id.

Developments in Massachusetts have set off a fresh round of initiatives to ban same-sex marriage through state constitutional amendments. As of this writing, none has yet taken hold, but several are likely to, and the landscape is shifting fast. For a good, up-to-date account of state marriage initiatives, see Kavan Peterson, *50-State Rundown on Gay Marriage Laws, at* www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=false (last visited June 19, 2004).

routinely be available if the couple were married. These cases do not challenge the marriage laws directly, but target particular injustices that the denial of marriage rights enables. Thus, courts and litigants engage in an effort to solve real-world problems that sometimes arise in the lives of couples, sex of partner aside. Legislatures have recently begun to move in the same direction, perhaps because such piecemeal solutions are more palatable to their constituents than same-sex marriage. These "players" are often more interested in just and workable outcomes of particular problems than in deeper discussions about marriage, much less the broader question of its meaning. The results achieved under this less comprehensive approach are instructive.

Much has been written about the law's treatment of same-sex couples in a host of contexts, but a simple example from the law of torts will make the point well enough for present purposes. In wrongful death cases, surviving members of same-sex couples whose partners were killed by the culpable acts of third parties have sought recovery even in the face of statutes that seem facially to restrict recovery to legal spouses.[40] The few reported cases brought by survivors of same-sex relationships have shown some success despite this daunting obstacle. A recent and remarkable decision came in the pending case of *Langan v. St. Vincent's Hospital*.[42] There, the trial court denied a motion to dismiss a wrongful death claim by Langan, the surviving member of a same-sex couple, for the alleged medical malpractice that led to the death of Neal Spicehandler, his life partner.[43] The court pieced together a just decision by focusing on the couple's deeply intertwined life together,[44] the stark fact that couples cannot avoid the disqualification that the wrongful death laws create,[45] and—most

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[40] Wrongful death statutes typically enumerate the class of persons eligible to recover for the death. *See* Culhane, *supra* note 24, at 971-72. These statutes, quite apart from their effect on same-sex couples, no longer reflect reality. *Id.* Why not grant standing to anyone who can prove loss, or (at least) to anyone named in the decedent's will?

[42] 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003).

[43] *Id.* at 412, 422.

[44] *Id.* at 412-13.

[45] *Id.* at 420-21. The court made this point implicitly, and relied, in part, on *Smith v. Knoller*, No. 01-319532, (Cal. Super. Ct. 2001), in which the point was made more explicitly, and *Solomon v. District of Columbia*, No. 94-2709, (D.C.

significantly—the couple's Vermont civil union.[46] Using these ingredients, the court created the holding that, at least for purposes of the wrongful death laws, Langan indeed qualified as a spouse.[47]

A similar result was achieved a few years earlier in *Solomon v. District of Columbia*,[48] in which a trial judge declared that a surviving same-sex partner should be considered "next of kin," thereby qualifying for recovery under the wrongful death law.[49] In this case, the lesbian couple had two children who clearly qualified as wrongful death plaintiffs, and the court recognized the absurdity that would have flowed from recognizing the children, but not the dependent partner: "It is clear that the two children are eligible to receive remedy . . . . Since [plaintiff] also relied on her for support and maintenance, logic dictates that she is also entitled to remedies . . . ."[50] The court can be faulted for a questionable reading of the intestacy laws on which eligibility for wrongful death recovery depends,[51] but the problem-solving impulse is easy to understand. Had the surviving spouse not been permitted to recover, the children would likely have suffered, because the money "earmarked" for the plaintiff could have been expected to benefit the entire family unit.

Recently, states have begun to amend their statutory law to permit wrongful death suits by surviving members of same-sex couples. Vermont and Hawaii are two such states,[52] and California recently became the third.[53] Whatever the ultimate result on the

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Super. Ct. 1995), summary of decision available at 21 Fam. L. Rep. (BNA) 1305, 1316. *See also* Raum v. Rest. Assocs., Inc., 675 N.Y.S.2d 343, 346 (N.Y. App. Div. 1998) (Rosenberger, J., dissenting).

[46] *Langan*, 765 N.Y.S.2d at 416-18.

[47] *Id.* at 415, 422. The court only considered the issue in the context of a wrongful death action. *Id.* at 415. Accordingly, the court found that the "plaintiff . . . is included within the meaning of spouse as it is used under [the wrongful death laws]." *Id.* at 422.

[48] No. 94-2709 (D.C. Super. Ct. 1995).

[49] *Id.*; 21 Fam. L. Rep. (BNA) 1305, 1316.

[50] 1994 Lesbian/Gay L. Notes 83, (quoting *Solomon*, No. 94-2709 (D.C. Super. Ct. 1995)).

[51] *See* D.C. CODE ANN. §§ 19-301 to -316 (2001); *see also* Lewis v. Lewis, 708 A.2d 249, 251-52 (D.C. 1998).

[52] HAW. REV. STAT. § 663-3 (Michie 2002); VT. STAT. ANN. tit. 15, § 1204(e)(2) (2002).

[53] CAL. CIV. PROC. CODE § 377.60(a) (West Supp. 2004).

marriage question in Massachusetts,[54] marriage-like benefits, including wrongful death standing, are likely to be achieved.

This movement reflects the reality that courts and legislatures are under pressure to devise solutions to actual problems confronting same-sex couples, much as the reader of this article was asked to decide whether the four couples introduced in Part II should be able to marry. This problem-solving approach did not begin with same-sex couples. Courts have long been called upon to grant at least some of the benefits of marriage to couples whose unions offended the state's own marriage laws. Thus, New York's high court granted letters of administration to a woman who had married her uncle—a marriage that was recognized in the state of celebration but not in New York.[55] The court was solving the practical problem of protecting the surviving spouse's financial expectations, and could do so without significantly compromising New York's own view of marriage. Even polygamy has been overlooked in this spirit of problem-solving.[56] Thus, if benefits are the concern, a piecemeal approach, while clumsy, can ultimately result in an approximation of marriage by same-sex couples. As I have argued elsewhere, tort law has been underutilized in this regard, because recognizing the relational interests of same-sex couples can propel the arguments supporting same-sex marriage in a fairly direct way.[57]

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[54] It now appears that only a constitutional amendment (at either the state or federal) level can prevent same-sex marriage in Massachusetts. At the state level, the amendment would need to be passed by two consecutive sessions of the legislature, and then approved by a simple majority of the voters. MASS. CONST., art. XLVIII. This means that such an amendment could not take effect until 2006, at the earliest. On March, 2004, the legislature did pass such an amendment for the first time. *See* W. James Antle III, *Bay-State Barometer*, NAT'L REV. ONLINE, April 13, 2004, *at* http://www.nationalreview.com/comment/antle_200404130908.asp (discussing view that the amendment is designed to fail by substituting civil unions, with all of the legal incidents of marriage, for marriage; compromise will not please either proponents or opponents of same-sex marriage).

[55] *In re* May's Estate, 114 N.E.2d 4 (N.Y. 1953).

[56] *See In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (allowing deceased Hindu's two wives to share his estate).

[57] Culhane, *supra* note 24, at 980.

Further, as the discussion of *Solomon* suggests, another obvious case of necessary problem-solving that may one day lead to same-sex marriage takes place in cases involving the welfare of children. In the areas of adoption, support, custody, and visitation, courts have increasingly overcome their reluctance to value same-sex relationships.[58] Where children are involved, courts have applied the "best interest of the child" standard in a way that increasingly honors gay and lesbian parents[59]—even, as is often the case in support and in custody and visitation disputes—where the relationships of those parents have dissolved.

The conservative response to these and other progressive legal developments has been mixed. At one extreme are those who fear that the extension of any relational rights to same-sex couples will lead, inexorably, to same-sex marriage.[60] So any accommodation is opposed. What, then, are same-sex couples supposed to do? The choices are dismal. As discussed in Part IV, some would favor a "return to the closet."[61] Others, perhaps slightly more realistic, argue that same-sex couples can rearrange their affairs through contracts, to the extent possible.[62] But, according to those holding this position, the *state* should confer no rights on same-sex couples. Thus, deep opposition to same-sex marriage also grounds

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[58] Indeed, one of the most powerful arguments in favor of extending marriage (or its benefits) to same-sex couples in both *Goodridge* and *Baker* was that the courts and legislatures had already recognized same-sex couples as fit parents. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003); Baker v. State, 744 A.2d 864, 869-70 (Vt. 1999).

[59] *See, e.g.*, *In re* C.M.A., 715 N.E.2d 674, 680 (Ill. App. Ct. 1999) (Justice Zwick wrote glowingly of parents who wished to adopt "children with whom they had already formed a loving relationship . . . . A higher purpose cannot be imagined."). *See generally* Culhane, *supra* note 24, at 934-36.

[60] *See, e.g.*, Pam Belluck, *Massachusetts Weighing Deal on Gay Unions*, N.Y. TIMES, Feb. 11, 2004, at A1. The article quotes Tony Perkins, President of the Family Research Council: "We couldn't support putting into the [Massachusetts] Constitution a constitutional right for homosexual couples to have civil unions." *Id.*

[61] *See* John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1076 (1994) (supporting restrictions on "education and public media" and on "the maintenance of places of resort" where gay people might meet).

[62] *See* Collett, *supra* note 13.

arguments against benefits, whether from a marriage-like equivalent or a piecemeal approach.

This kind of response is both cruel, and frankly, out of touch with reality, but it has at least the following virtue of consistency: gay relationships are to be discouraged, as are any laws that support them.[63] But a much broader range of commentators, judges, and politicians favor the piecemeal approach. Indeed, as I suggested in reference to case three, an answer to the four fictional cases[64] is that a practical approach to the problems they present would entail granting some, most, or perhaps even *all* the benefits of marriage. But, this line of reasoning continues, if they are same-sex couples they should not be permitted to enter the institution of marriage itself. Similarly, issues ranging from tort liability to inheritance to immigration to compensating victims of terrorism can be dealt with as they arise.

If marriage were just about benefits, the piecemeal approach would be difficult to understand. In case one, discussed above, at least some conservative commentators would be willing to extend whatever ordinarily available benefits the couple might need, but would likely draw a hard line at marriage unless they knew the sex of the parties. Why doesn't the more comprehensive solution commend itself? Why are courts and legislatures being called upon to solve countless problems that the recognition of marriage rights would render moot?

Another look at case two enables us to see that the opposition really is not about benefits, but something deeper. There, the couple's disavowal of many of the common reasons for entering into a marital relationship might make conservatives as uncomfortable as anyone else in granting the couple benefits. But if the couple were revealed to be of the opposite sex, this squeamishness would presumably give way to (perhaps uncomfortable) support for the couple's legal right to wed. This position reaches a kind of *reductio ad absurdum* with the recent antics of Britney Spears, who married a high school friend and

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[63] *See* Finnis, *supra* note 61, at 1052.
[64] *Supra* Part II.

filed for annulment within a few hours.[65] The voices that condemn same-sex marriage have not been heard to suggest that the law should be changed to prevent such a cavalier approach to marriage. Even if they disapprove of Spears' actions, their steadfast commitment to this bright line makes such marriages a price they are willing to pay in order to maintain their definition of marriage.

In sum, eligibility for marriage is to be determined solely by the opposite-gender requirement. That is why some who oppose same-sex marriage do not as strongly oppose granting marriage-like benefits to same-sex couples.[66] Taking this point to its logical stopping place, some have argued that even a civil union law that confers *all* of the benefits of marriage is permissible.[67] Those supporting civil unions range from conservatives who believe that this compromise may be necessary to avert same-sex marriage—which they regard as the ultimate defeat—to those who honestly believe that same-sex couples should be able to order their lives with the confidence and legal sanction that opposite-sex couples take for granted. Even for the more sympathetic voices of opposition, though, marriage itself is off limits.

So, what is the deep objection behind same-sex marriage? Given the simplicity and streamlining that would result from allowing same-sex couples to marry, those who oppose this efficient problem-solving method should have compelling reasons to "defend" marriage from same-sex couples. When judged by the requirements for successful arguments set forth earlier, it is clear that no such reasons are in evidence.

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[65] Adam Goldman, *Britney Spears Wedding Began as a Joke, Source Says*, HERALD ONLINE, Jan. 5, 2004, *at* www.heraldonline.com/24hour/entertainment/music/news/story/1104433p-7724803c.html (last visited June 6, 2004) (discussing marriage to childhood friend and almost an immediate annulment).

[66] *See, e.g.*, Gallagher, *supra* note 25 (willing to support a constitutional amendment that would prohibit same-sex marriage while allowing for civil unions). For a thoughtful but ultimately unsuccessful effort to ground civil union (but not marriage) recognition in principles of political liberalism, see Susan M. Shell, *The Liberal Case Against Gay Marriage*, PUB. INT., Summer 2004, at 3.

[67] *See generally* Belluck, *supra* note 60 (describing various compromise proposals being floated in Massachusetts, including one that would recognize same-sex civil unions but constitutionally ban same-sex marriage).

IV. THE HETEROSEXUAL AGENDA

Certain right-wing political groups refer disparagingly to the "Homosexual Agenda." What is this awful agenda? According to Craig Osten, author of a book entitled "*The Homosexual Agenda*," it is "to change America from . . . looking down on homosexual behavior, to the affirmation and societal acceptance of homosexual behavior."[68] This statement represents a sleight-of-hand effort to equate gay people with certain sexual practices that many find distasteful. But the "Homosexual Agenda" is really about the acceptance of gay and lesbian *people*—people whose sexual practices are varied and who are, like everyone else, properly understood only as whole human beings.[69] I would define the goals of the GLBT movement—the "Homosexual Agenda"—as the achievement of full legal and social equality for these groups of sexual minorities.

But it is well past time to start discussing the "Heterosexual Agenda." By this term, I refer to the efforts of the radical right to remove the gay presence from public life. I recognize that most straight people do not subscribe to this view, but I have chosen this term as a sort of counterweight to the term "Homosexual Agenda." Doing so is a way of emphasizing the danger of mischaracterization and overgeneralization.

This attempted erasure of gay people from public life is the grail sought by some of the opponents of same-sex marriage. Of

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[68] This definition was offered during a question and answer session with one Pete Winn, associate editor of CitizenLink, July 25, 2003, *at* www.family.org/cforum/feature/a0027070.cfm (last visited Apr. 25, 2004). Citizen Link is a publication tied to the right-wing group Focus on the Family.

[69] Religious taboo aside, it is difficult to understand why sex between members of the same sex is problematic in the first place. As one commentator stated: "Sexual activity [between two men or two women] might be occasions for partners to know one another with great emotional intimacy by showing their feelings to one another, by developing their feelings with one another, and by sharing their vulnerabilities." Weithman, *supra* note 18, at 239. Some have argued that sex is (or should be) for procreation only. *See generally* Finnis, *supra* note 61. But the widespread availability and use of contraception are enough to show that such a view has few adherents. Indeed, not even animals have sex solely for procreative purposes. *See* Dinitia Smith, *Love That Dare Not Squeak Its Name*, N.Y. TIMES, Feb. 7, 2004, at B7.

course, the events of the recent past strongly suggest that the effort is doomed, but its death throes will continue to be fierce.[70] Since the tide of people coming out has risen in recent years, and increasingly sympathetic portrayals of gay and lesbian lives have fissured themselves into daily life, those who have signed on to the "Heterosexual Agenda" continue to try discouraging healthy gay self-expression in less direct ways. Thus, among other positions, these partisans oppose efforts to discuss gay identity in the schools[71] (but then feign surprise at acts of unspeakable violence against gay people);[72] support the "don't ask, don't tell" military policy, despite its demonstrated contribution to homophobia in the military[73] and its detrimental effect on military readiness;[74] oppose simple anti-discrimination laws protecting GLBT people from being fired simply because of their sexual orientation[75] (those who don't have legal protection are less likely to 'come out,' so the closet's walls are fortified); oppose granting legal asylum to gays who are persecuted, even tortured, in their country of origin;[76] and, above all, oppose any legal recognition of same-sex relationships, especially marriage.

To see the connection between the opposition to same-sex marriage and the desire to stuff gay people back into the closet,

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[70] *See* Paul Starobin, *The Angry American*, THE ATLANTIC, Jan. 2003, at 132, 136 ("We're probably going to get where the liberal secularists want to take us, but at a more measured, more deliberate pace.").

[71] An organization entitled Religious Tolerance summarizes the views of those who oppose gay-straight alliances at schools on a user-friendly web site at www.religioustolerance.org/hom_psgr4.htm (last visited June 6, 2004).

[72] For a good discussion of this phenomenon, see Morris Floyd, *The Church and Anti-Gay Violence*, AFFIRMATION, Mar. 15, 1999, *at* www.umaffirm.org/gaither.html (last visited June 6, 2004).

[73] The justifications for the policy are discussed and rejected in an article by Human Rights Watch, *U.S. Military's "Don't Ask, Don't Tell" Policy Panders to Prejudice*, Jan. 23, 2003, *at* http://www.hrw.org/press/2003/01/us012303.htm (last visited Apr. 25, 2004).

[74] *Id.* (noting "[b]etween October 2001 and September 2002, the Army discharged ten trained linguists—seven of them proficient in Arabic" under the policy).

[75] *See* Timothy J. Dailey, *S. 1284: The Employment Non-Discrimination Act*, FAMILY RESEARCH COUNCIL, *at* http://www.frc.org/get.cfm?i=IF01G1 (last visited June 6, 2004).

[76] *See generally* Scaperlanda, *supra* note 15.

one need look no further than the arguments presented by Maggie Gallagher. Consider this remarkable statement:

Does marriage discriminate against gays and lesbians? Formally speaking, no. There are no sexual-orientation tests for marriage; many gays and lesbians do choose to marry members of the opposite sex, and some of these unions succeed. Our laws do not require a person to marry the individual to whom he or she is most erotically attracted, so long as he or she is willing to promise sexual fidelity, mutual caretaking, and shared parenting of any children of the marriage.[77]

This statement is nothing short of incredible. Some—hardly "many"—gays and lesbians marry people of the opposite sex, but using the word "choice" to describe that action is semantic torture. It is hardly revealing at this point to note that those of a same-sex orientation only marry members of the opposite sex because of oppressive pressure to do so. Many of these unhappy spouses seek sexual comfort outside of marriage. In the past—the era of the closet for which Gallagher pines—this kind of underground behavior was one's only option, but almost everyone—except those who subscribe to the Heterosexual Agenda—recognizes that the still-incomplete movement towards greater openness has been a positive development. Gallagher, however, is quite willing to consign untold numbers of people to emotional oblivion, to "protect" the institution of marriage.

Gallagher is also willfully blind to the public health implications of such a reactionary view. Recent press on the "down low" culture, in which African-American males lead a sexual double life and thereby expose their female sexual partners (often wives) to the risk of infectious disease, has revealed a holdover of the "good old days" when gay men commonly lived double lives.[78] Even today such self-abnegating behavior is not limited to any particular ethic group. Such dishonesty and attendant compromise

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[77] Maggie Gallagher, *What Marriage is For*, WKLY STANDARD, Aug. 4, 2003, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/002/939pxiqa.asp (last visited June 6, 2004).

[78] *See* Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES, Aug. 3, 2003, § 6, (Magazine) at 28.

to self-esteem create a breeding ground for unhealthy emotional and physical outcomes.[79]

John Finnis has also expressed this wish that gay people would just go away. He has stated that the state has a legitimate interest in discouraging both "homosexual conduct and 'orientation,'"[80] and has commented favorably on laws that impede the promotion of homosexuality "by any form of invitatory activity other than between consenting adults and in a truly private milieu."[81] Later providing specifics for his prescription, Finnis supports various restrictions—including laws barring "the maintenance of places of resort" where gays might meet, stifling bans on "education and public media," and (of course) laws against same-sex marriage—designed to resurrect the days when gay people were driven into a demimonde of furtive sexual behavior.[82]

Why devote so much effort to this cause? Same-sex marriage taps into fears about the proper roles of men and women, and uncomfortably challenges assumptions so deeply felt that they often lie beneath the realm of conscious articulation.[83] Indeed, as the following analysis of Gallagher's work demonstrates, they are sometimes taken as a given.[84] Opponents of same-sex marriage have brought these assumptions into the open, but their efforts have unwittingly advanced the arguments for same-sex marriage rather than defeating them. As stated earlier, the natural law

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[79] *See* John G. Culhane, *Equality Has Nothing to Do With a Disease*, WILMINGTON NEWS J., Mar. 19, 2001.

[80] Finnis, *supra* note 61, at 1049.

[81] *Id.* at 1050.

[82] *Id.* at 1076. One might question why a ban, possibly through a constitutional amendment, on same-sex marriage would reconstruct the closet, inasmuch as gay people do not currently have the right to marry their partners. I have addressed this issue elsewhere:

> While it was possible not to dwell on the denial of marriage rights before, the opening of the question has removed this choice . . . . [D]efeat on the same-sex marriage issue would cement the reality for gay men and lesbians that our lives are indeed considered less than [others]. Our very citizenship would be denied . . . .

Culhane, *supra* note 18, at 1210-11.

[83] I have explored this point in much greater depth in Culhane, *supra* note 18, at 1171-75. *See also* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994).

[84] *See infra* notes 99-102 and accompanying text.

arguments and their supposed corollaries have already been decisively refuted, so little is gained by spending more time on them. Here, I will do no more than sketch out these positions and their weaknesses to lay the groundwork for consideration of the new variants of these old arguments, particularly as raised by Maggie Gallagher[85] and Sam Schulman.[86] These newer attempts combine resort to the arguments already refuted with faulty logic and reliance on unsupported assumptions. Once these errors have been exposed, it becomes clear that Gallagher (at least) should be a supporter, not an opponent, of same-sex marriage.

The natural law argument connects marriage to the "teleology" of the body. Since only a coupling of the male and female bodies can result in the begetting of children, only such a union can be called a marriage.[87] The circularity of this argument is apparent: marriage is simply defined as the institutional instantiation of this design of sexual complementarity. Sometimes, natural law proponents concede that their position begs the question: "The truth is banal, circular, but finally unavoidable: by definition, the essence of marriage is to sanction and solemnize that connection of opposites which alone creates new life."[88] But why? Should a seriously disabled male be able to marry a woman even though they will be incapable of such "coupling"? What about less dramatic cases involving a sterile couple or a marriage involving a post-menopausal woman? The union described above is not possible in that case. If (as I assume), marriage would still be permissible in such a situation, is it because "people . . . want the form observed even when the practice varies"?[89] Perhaps, but at this point we are well outside the realm of argument and instead

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[85] *See infra* notes 93-106 and accompanying text.

[86] *See infra* notes 107-121 and accompanying text.

[87] *See Defense of Marriage Act: Hearing on H.R. 3396 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (testimony of Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College).

[88] Sam Schulman, *Gay Marriage—And Marriage*, Nov. 2003, *at* http://www.orthodoxytoday.org/articles2/ schulmangaymarriage.shtml (last visited Apr. 25, 2004).

[89] James Q. Wilson, *Against Homosexual Marriage*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 137, 140 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

discussing emotion and aesthetics. While such considerations may direct popular views, they cannot justify the deprivation of a fundamental civil right—and marriage is such a right. The argument fails the test of basic fairness. Moreover, the statement fails to explain *why* people want the form observed, if indeed they do.

These natural law arguments, although traced down to their roots and defeated repeatedly, have served to ground other, less abstruse efforts to oppose same-sex marriage. First, since the "purpose" of marriage is to recognize the complementarity of the sexes, sex is said to be *for* procreation and the raising of children.[90] But this does not account for couples who choose to remain childless, are sterile, or who adopt children. Such couples can be either same-sex or opposite sex. Indeed, the absurdity of the argument has been recognized by the highest courts in both Vermont and Massachusetts. As the court noted in *Goodridge*, "[i]f procreation were a necessary component of civil marriage, our [laws] would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means."[91]

Another argument is that marriage "domesticates" men, but this too is based on unexplored (and often unquestioned) assumptions about the "essential natures" of men and women. Such assumptions ignore the substantial role of social constructions in grounding opinion.[92]

Schulman and Gallagher attempt to advance the arguments against same-sex marriage beyond the discredited efforts briefly revisited above. For different reasons, they are unsuccessful. Gallagher, President of the Institute for Marriage and Public Policy, describes the "benefits of marriage" as "the good things that happen when husbands and wives are joined in permanent, public, sexual, emotional, financial, and parenting unions."[93] Since all of the positive adjectives used to describe such unions are equally applicable to same-sex couples, the only reason to deny

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[90] For a fuller statement and a refutation of this argument, see Culhane, *supra* note 18, at 1194-98.

[91] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

[92] *See* Culhane, *supra* note 18, at 1192-94.

[93] Gallagher, *supra* note 25.

marriage to same-sex couples would appear to be that they are not "husbands and wives." Gallagher attempts to avoid the snare of tautology here, grounding her statement in social science literature. But her analysis misses a crucial step. She quotes favorably from this summary of the research: "Family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes."[94]

This might be research worth trumpeting in the President's effort to encourage marriage,[95] but it has nothing to do with same-sex couples. Note the family structures of concern: single-parent families, kids with unwed mothers, stepchildren, and unmarried cohabitants. Where are the same-sex couples in this picture? Stability is the issue—*not* the gender of the parents. The research compares families with two stable, dependable parents to the family structures set forth in the second quoted sentence. Same-sex parents form no part of this equation.[96] Gallagher misses this point entirely and uses the fruits of this lapse repeatedly. Thus, she finds civil unions less objectionable than same-sex marriage. Traditional "[m]arriage is important because children need mothers and fathers," and "[t]o lose the word 'marriage' is to lose the core idea any civilization needs to perpetuate itself and to protect its children."[97] Nowhere does Gallagher show any signs of recognizing that showing that some family structures are not good for children says nothing about other family structures, such as

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[94] *Id.* (quoting unspecified work from organization called Child Trends).

[95] *See* James Gerstenzang, *President Bush's Budget Plan*, L.A. TIMES, Feb. 3, 2004, at A15 (noting that 79% of those surveyed believed that government should stay out of encouraging people to marry).

[96] In response to an e-mail inquiry for clarification, Gallagher conceded the point, noting that "only a handful of studies even purport to compare children raised by two same-sex parents to children in married families." E-mail from Maggie Gallagher, President of the Institute for Marriage and Public Policy, to John Culhane, Professor of Law, Widener University School of Law (Feb. 5, 2004) (on file with the author).

[97] *Id.*

same-sex households, that were not challenged.[98] How could she have made such an obvious error?

The answer is not surprising. She has simply misread the literature to support her own version of the discredited natural law argument. Why does marriage exist? "Because sex between men and women makes babies, that's why . . . . Marriage is our attempt to reconcile and harmonize the erotic, social, sexual, and financial needs of men and women with the needs of their partner and their children."[99] This road has already been traveled. Sex between men and women makes babies sometimes, but, to be blunt, so what? And what about when it cannot? As Jonathan Rauch points out, the emphasis on procreation "defines marriage when homosexuals are involved, but not when heterosexuals are involved. . . . [S]terlity disqualifies *all* homosexuals from marriage, but . . . *no* heterosexuals."[100] Procreation is a stealthy stand-in for an antigay viewpoint.

Further, Gallagher's argumentative sleight of hand fails because no connection has been established between the biological ability to reproduce and good parenting. What of couples who cannot bear children? Do they make less apt adoptive parents? If not, why differentiate between same and opposite-sex couples? Why shouldn't the second sentence in the above quotation be rewritten from the needs of "men and women" to the needs of "two people"? Same-sex couples have needs that are every inch as acute as "husbands and wives." Only Gallagher's inability to see past the "biological divide" disables her from recognizing the value of same-sex marriage.

To cement this point, consider again—from both the point of view of benefits and of our concern with the meaning of

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[98] I had hoped that Gallagher might have explored the point further in a law review article, in which space limitations never seem to be an issue. But the error is repeated there. *See* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002). In another piece, she even more clearly reveals that this assumption is nothing more than an article of faith. Maggie Gallagher, *The Message of Same-Sex Marriage, at* www.townhall.com/columnists/maggiegallagher/printmg20040108.shtml (last visited Apr. 25, 2004).

[99] Gallagher, *supra* note 77.

[100] RAUCH, *supra* note 18, at 112.

marriage—whether the couple in case one should be permitted to marry. Once we remove Gallagher's unwarranted leap from the research suggesting the importance of two-parent households to the assumption that these households must have a "husband and wife," the answer should be obvious. Let us assume that Pat and Chris are same-sex partners, and that their children are adopted (the case did not specify whether the children were the couple's biological children, or adopted). Will these children not fare better if their parent's relationship carries with it the heft of approbation, to say nothing of the sobering commitment, that marriage entails? The couple is then more likely to remain together, so the children are more likely to be cared for than if the relationship is treated as nothing more than cohabitation. Another expected benefit to the kids is peer acceptance, which is obviously more likely (at least in the long run) if their parents' relationship is recognized by the state. In short, "the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."[101] The irony, of course, is that states know that gay parents are good parents, since almost all states permit gay adoption.[102] But they deprive those same families of the protections of marriage.

If case one turned out to involve a same-sex couple, Gallagher would not allow them to marry; but she would allow, and even encourage, the marriage of the opposite-sex couple in which at least one member had a gay sexual orientation. Even if such a couple married with intentions of fidelity, failure is predictable. Even in Victorian times, sexual self-obliteration was hard work. As the conservative classicist and closeted A.E. Housman tells the liberated Oscar Wilde in *The Invention of Love*, "my life was not

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[101] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003).

[102] Only three states have laws that limit gay adoptions. The best known of these is in Florida, where the statute expressly prohibits adoptions by "homosexuals." FLA. STAT. ANN. § 63.042(3) (West 2004). The statute survived constitutional challenge in Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004). A statute in Mississippi prohibits adoption by "couples of the same gender." MISS. CODE ANN. § 93-17-3(2) (2004). The statute contains no definition of "couple," however, and there are no cases construing the law. Utah prohibits adoption by any couple that is "cohabitating." UTAH CODE ANN. § 78-30-1(3)(b) (2004). Elsewhere, gay adoption is permitted, and often routine.

short enough for me to not do the things I wanted to not do."[103] Such a marriage is hardly likely to result in the "low conflict" level that the research Gallagher quotes deems essential to the welfare of children. But such marriages continue in a society that still bestows second-class citizenship on gay people.

Thus is the danger of over reliance on abstract, essentializing assertions made manifest. Gallagher, who presumably does care about the welfare of children,[104] allows the confusion of biological function and good parenting to blind her to an alternative—same-sex marriage—that may, in the event, serve the goal of good parenting as well as the tradition she battles to maintain. Given this abstracted view, it is quite possible that no evidence could ever count against her claim—not data showing healthy outcomes for children raised by same-sex parents,[105] not a high success rate for same-sex marriages, not positive outcomes from other nations that permit same-sex marriage. Her approach forecloses discussion. One might by now have noticed that her position also fails to address the well-being of gay and lesbian people. If marriage is a good thing for people even absent children, then one has a right to expect more than misread social science literature and a vague uneasiness to trump gays' interests in taking part in such a valuable institution. Jonathan Rauch is devastating on this point:

> [N]o one can make decent social policy without considering both sides of the equation. To assume that "we" (the

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[103] TOM STOPPARD, THE INVENTION OF LOVE 95 (1997).

[104] Of course, many marriages have nothing to do with children. As I suggested earlier, there may be good reason to modify the rights and obligations of couples who choose to bring children into the family. But such a nuanced approach forms no part of Gallagher's catechism.

[105] The few studies that have been done on the issue strongly suggest that children do quite well in same-sex households. In writing after writing, Gallagher relies on those—one social scientist in particular—who question the validity of *all* of these studies. A serviceable example of this approach is Maggie Gallagher & Joshua K. Baker, *Do Mothers and Fathers Matter?*, Feb. 27, 2004, pdf file *available at* www.marriagedebate.com (last visited June 9, 2004). While it would be inaccurate to claim that the studies conclusively establish anything, surely the absence of reliable studies suggesting poor outcomes for children raised by gay parents should give pause to those predicting, without *any* evidence, the apocalypse that same-sex marriage will cause.

> heterosexual majority) should deny millions of Americans any chance to marry if allowing them to marry would cause "us" any harm or inconvenience at all is to account gay welfare as essentially worthless. . . . [G]ay lives and welfare deserve to be taken as seriously as nongay lives and welfare. A one-eyed utilitarian is a blind utilitarian.[106]

In sum, Gallagher fails to make her case on grounds of fairness, efficiency, or logic.

Sam Schulman admits that Gallagher and others who make similar arguments "fail to satisfy completely."[107] He also concedes that the case for same-sex marriage is "compelling," anchored as it is in basic notions of fairness and equality.[108] But he believes he has found an answer to the argument in a stew of natural law and historical pronouncements, more or less closely tied to what he sees as basic truths about the relationship between men and women. Schulman at least advances the debate by discussing the historical (and, for him, still compelling) reasons for marriage. His argument, though, is constructed on a foundation of questionable and unsupported assumptions about the reasons for, and foundations of, marriage.

His central premise is simple, if idiosyncratic, enough: Marriage is primarily for the benefit of women. Married women are able to control the entry of children into their lives in a way that is not possible without it. Marriage, he argues, represented an advance from concubinage.[109] From this boldly-stated assertion, Schulman spins out a number of what he apparently believes are self-evident corollaries. Chief among them are these: (1) advances in reproductive freedom notwithstanding, women's sexual relations with a man can lead only to marriage or to termination; (2) men who crave marriage are somewhat strange; (3) same-sex marriage is a kind of burlesque, or parody, of marriage; and (4) the union of same-sex couples is a matter of indifference to society.[110] Then, somehow convinced that he has demonstrated the *illogic* (as

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[106] RAUCH, *supra* note 18, at 69.
[107] Schulman, *supra* note 88.
[108] *Id.*
[109] *Id.*
[110] *Id.*

opposed to the irrelevance) of same-sex marriage, he classes it with assorted semantic anomalies, such as being "a father to a pebble" or being "a brother to a puppy."[111]

Moreover, Schulman quaintly identifies the "gathering-in of a woman's sexuality" as the *only* purpose, the "essence," of marriage.[112] Excluded, by fiat, are "love and monogamous sex and establishing a home, fidelity, childbearing and childrearing, stability," and the legal and financial incidents of marriage.[113] Thus, "the monogamy and durability" of same-sex relationships are "matters of complete indifference."[114]

It's hard to know where to begin dismantling Schulman's position. The central problem is not his view of *same-sex* marriage, but his peculiar take on marriage itself, which is unlikely to find many adherents. First, while the establishment of the institution may have represented an advance over concubinage, historically it has hardly been an unmixed blessing "for" women. Husbands were long permitted to "chastise" (read: beat) their wives,[115] and—until only a generation ago—there was no legal recourse for women who had been "coerced" (read: raped) into having sex with their husbands.[116] Thus, one might begin by questioning whether the institution of marriage—as practiced, as opposed to as theorized—is the only, let alone best, means of dealing with the sexual differences between men and women.

Today, of course, laws and (to a lesser extent) social norms afford far greater protection to women in marriages, but the meaning of marriage has also changed in ways that Schulman

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See* Guevin v. Manchester St. Ry., 99 A. 298, 301 (N.H. 1916) (noting that the husband's right to chastisement had disappeared before the married women's acts gave married women independent legal status).

[116] *See* Warren v. State, 336 S.E.2d 221 (Ga. 1985). This case has a good discussion of the issue, including the discredited theories that enabled this abhorrent rule. As recently as 1980, the Model Penal code offered a qualified defense of excluding marital rape from the otherwise applicable criminal law. MODEL PENAL CODE § 213.1 cmt. 8(c) (1980). *See generally* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

attempts to deny by explaining away. For example, he acknowledges that reproductive freedom has changed matters between the sexes forever, but for some reason concludes that marriage is still needed for women to be legitimated in their sexual relations with men. He makes no similar statement about men, instead becoming a strange bedfellow to Catherine MacKinnon in emphasizing women's lack of consent in the sexual act.[117]

Schulman fails to see that the meaning of "marriage" is fluid, in a way that (metaphor aside) "pebble" and "dog" are not. What is needed is an assessment of the goals and purposes of marriage *today*. Many men and women are in long-term, monogamous sexual relationships with members of the opposite sex or the same sex, with no intention of marrying their sexual partners. Marriage is no longer needed to regulate the sexual behavior of men and women. But what, then, is it for? Schulman's list of what marriage is not for would make a better starting point for discussing what marriage is and what it *means* today: "love and monogamous sex and establishing a home, fidelity, childbearing and childrearing, [and] stability. . . ."[118]

Consider a same-sex couple with children, and how both society and the family would benefit from the marriage of that couple. Can Schulman really believe that the monogamy and durability of that couple's relationship is "a matter[ ] of complete indifference"?[119] Even without children, the stability of the marital unit—same-sex or opposite-sex—is likely, as in our earlier case three, to constitute a benefit to the society. People in marriages have longer, healthier lives than those not in such relationships;[120] this should turn out to be true of same-sex couples, too. As one commentator stated: "Marriage is a powerful creator and sustainer of human and social capital for adults as well as children, about as important as education when it comes to promoting the health,

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[117] Schulman, *supra* note 88.

[118] *Id.*

[119] *Id.*

[120] Maggie Gallagher, *Why Marriage Is Good for You*, CITY J., Autumn 2000, *available at* http://www.city-journal.org/html/10_4_why_marriage_is.html (last visited June 6, 2004).

wealth, and well-being of adults and communities."[121] This commentator's name is Maggie Gallagher.

The same-sex marriage movement has had the useful effect of raising the issue of the meaning of marriage starkly; indeed, the push for same-sex marriage has been shadowed by a more radical call for the abolition of the institution. This fear of the slippery slope is one reason for the vociferous opposition to the call for basic marriage equality.

But a re-examination of the current justifications for marriage is healthy, and overdue. In the final part of this article, I advance a few preliminary ideas for the reimagination and reinvigoration of marriage. These tentacles are put forth to stimulate discussion only. Far more thought, space, and energy must be devoted to the broader question of marriage in the next several years. As we shall see, I am hopeful that the institution will flourish, not wither.

V. REINVIGORATING MARRIAGE: PRELIMINARY THOUGHTS

Marriage should be serious business. There is really nothing funny about *Who Wants to Marry a (Multi)Millionaire*, or Britney Spears' inane experiment. Less dramatically, any two people can meet and marry very quickly without having any idea whom they are marrying. One obvious way to allow for the reflection that the decision to marry should entail is to require premarital education and counseling. Proposals have been introduced in several state legislatures to do just that.[122] Such counseling should be required of all couples'. Marriage education programs would stress financial issues, conflict resolution, and (more controversially) parenting skills. The instruction need not be lengthy, and the state

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[121] *Id.*

[122] Some statutes currently require pre-marital counseling for teens. *See, e.g.*, CAL. FAM. CODE § 304 (West 2004); UTAH CODE ANN. § 30-1-9(3)(b) (Supp. 2003). Given the states' additional interest and authority in the regulation of minor marriage, *see* Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982), such statutes are easy to defend. Requiring counseling before marriage might be seen as overly intrusive and paternalistic (but probably not a sufficient barrier to raise constitutional issues), in which case a recommendation of counseling and perhaps a brief waiting period between seeking a license and the marriage ceremony would at least bring home the seriousness of the endeavor.

could signal its willingness to provide on-going education, counseling, and other appropriate support for couples once married. Payment for all such counseling could be income-based, or simply provided by the state at taxpayer expense. No one without means should be—or, constitutionally could be—denied the right to marry because of inability to pay for expensive counseling.[123]

The rationale for requiring such counseling is that the "health" and success of the couple, both as spouses and as parents, is of importance beyond the couple. Where children are present or (as is more usual) come into the marriage later, their welfare could be improved by knowledgeable parents.[124] Even where there are no children, the state certainly has an interest in reducing the chances for the upheaval that conflict and divorce create for the couple and others in their lives. The Supreme Court would be unlikely to regard a modest counseling requirement as imposing an impermissibly "substantial" burden on the right to marry.

Should counseling be required of couples who wish to divorce? Yes, but only if there are minor children in the household. If not, the state should again make counseling available to those couples who cannot afford it, and should encourage such counseling. This proposal is not as "radical" as might be supposed: Judges in some states already have the power to require counseling as a condition of divorce.[125] However, if the couple is convinced that divorce is inevitable, requiring couples therapy at this point seems unduly intrusive and disrespectful of a couple's decision-

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[123] *See* Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (A statute that required parents, who were delinquent in their child support payments, to obtain a court order as a condition precedent to marriage was found unconstitutional in part because some parents would never be able meet their support obligations and would therefore be barred from marrying.).

[124] One of the great anomalies of family life is that a couple who wishes to adopt is subject to rigorous scrutiny, to raise the odds that they will make good, stable parents for their children, but—because of biology and tradition—parents who bring children into the family the "natural way" are subject to no such scrutiny. Premarital counseling would ensure that potential parents hear, at least once, some sound advice about child-rearing. Such a burden would be much less than that imposed on potential adoptive parents.

[125] *See* 23 PA. CONS. STAT. § 3301(d)(2) (2004).

making.[126] Where children are involved, though, I believe the balance shifts. Here, Gallagher and I find some common ground, although it must be emphasized that *some* divorces are good for children. Thus, upon a showing that the well-being of children (or spouses) is imperiled, the counseling requirement could be waived. Otherwise, a minimum number of sessions in which the couple is challenged to think of ways to "save this marriage" seems like a bargain price for the possibility of advancing kids' welfare with an intact marriage. Also, a counselor should be able to identify cases in which the children would actually be better served by their parents' separation.[127] Counseling could also prepare the parents for healthy ways of dealing with each other and their children in the event that the divorce does go through.

A serious counseling requirement would also be preferable to the tentative return to fault-based divorce represented by covenant marriage. In those states that recognize covenant marriage, parties may decide, in advance of marriage, to make divorce more difficult.[128] But since the parties may have little idea about what

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[126] Anticipating the response that my call for mandatory counseling before marriage, but optional counseling at divorce, is inconsistent, I offer a brief defense. A couple contemplating marriage may have little information about the challenges they are about to face in an institution from which exit remains difficult. A modicum of paternalism here might be helpful, and might even result in reconsideration by couples who have not seriously considered what they are getting into. By contrast, once a couple has gone so far as to decide on divorce, they have information that might well be sufficient to convince them that the marriage cannot work, counseling aside.

[127] One issue is how insistent the state should be in "sharing" with the parents the statistics on the children of divorce. My position is that such statistics should not be emphasized. Presented with such information, parents might be less inclined to undertake a sober assessment of whether saving the marriage is advisable. The counseling requirement is already coercive, so any tilt towards making it more so should be regarded warily. And the statistics may say little about the particular couple in question; divorce may actually be the best solution in that couple's case.

[128] This movement was born in Louisiana in 1997. For a succinct account of covenant marriage, see D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAM. L. 590-91 (2002). As the statement in the text indicates, covenant marriages do not in fact signal a return to no-fault divorce; in Louisiana, for example, a two-year separation will also serve as a ground for divorce. LA. REV. STAT. ANN. § 9:307 (2004), *cited* in Weisberg & Appleton, *supra* note 128, at 590.

they are about to enter into, they may naively choose covenant marriage. Even a previous marriage (as well as the parties' own observations of their parents' marriages) might not reveal significant problems with a particular spouse. High divorce rates and their effect on children notwithstanding, the move to no-fault divorce was smart policy.[129] Critics tend to forget the mess that fault-based divorce entailed.[130]

The emphasis on counseling also speaks, if obliquely, to the purposes of marriage. Good counseling can prepare couples for at least the predictable vicissitudes of married life, and therefore strengthen and protect, in advance, the couple's mutual commitment. The value of the marital vow is evident where children are involved, but it also has consequence even to a childless couple. It makes sense for a society to encourage such commitments for practical reasons, including support, emotional health, and plain happiness. The statistics indicating that married people do better in measures of health and happiness than their single counterparts is not surprising; a healthy marriage is a built-in support system. It should be evident that this is no less true for same-sex couples.

Once this obvious conclusion is recognized, other problems—routinely ignored by opponents of same-sex marriage, but real nonetheless—disappear. For example, we no longer need worry about whether to "label" transgendered people according their sex of birth or their sex as lived. Then states such as Texas would not find themselves in the embarrassing position of permitting what most would see as same-sex marriages.[131] Any two *people* would be able to marry.

As the Supreme Judicial Court of Massachusetts recently stated:

> If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace

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[129] For a well-developed argument on this score, see Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (1997).

[130] *See generally id.*

[131] *See supra* note 34 and accompanying text.

> marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[132]

Of course, stating that society ought to value commitment does not answer many subsidiary questions concerning the proper level of governmental support and involvement. As one obvious example, many have questioned the impact of the tax laws on married and unmarried people. Are these laws fair? What are they trying to achieve? A healthy re-examination of the purposes of marriage should occasion a hard look at these questions.

In a related way, one can sensibly question whether financial advantages given to married couples (even the deduction for children) are always justified. From the point of view of distributive justice, they may not be. An interesting nod in the direction of recognizing this problem appears in the *Goodridge* decision. The department argued that "limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources."[133] In response, the court noted: "Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support."[134]

But should marriage continue in this one-size-fits-all mold? More broadly, should the financial circumstances of the couple be taken into account in distributing the limited benefits the state has to offer? Do the multi-millionaire and the game show contestant who married him need child tax credits, the right to file joint tax returns, or the right to participate in tax-free college savings programs?

Answering these questions is well beyond the scope of my effort here. But they must be asked, despite apocalyptical warnings that raising any issue about marriage is tantamount to pulling down

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[132] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003).
[133] *Id.* at 964.
[134] *Id.*

the whole edifice. Thus, same-sex marriage could have a salutary collateral effect, by forcing re-examination of the entitlements and burdens of marriage that have too long been beyond question.

VI. CONCLUSION

Commentators such as Gallagher and Schulman are right to ask the hard questions about the meaning of marriage, an issue often lost in the debate over same-sex marriage. But their unsupported conclusions are anchored in assumptions that bear little resemblance to the way the world works. Indeed, their arguments, shorn of illogical leaps and unsupported assumptions, end up supporting same-sex marriage. Through use of practical examples, this article has attempted to advance the debate by focusing on the true costs of exclusion, and the true benefits of marriage.