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# On the Legal Validation of Sexual Relationships

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**The Jurisprudence of Marriage  
And Other Intimate Relationships**

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## Chapter 6

# On the Legal Validation of Sexual Relationships

RICHARD STITH<sup>1</sup>

Working within a liberal political paradigm, one that privileges freedom and equality while eschewing the inculcation of moral excellence for its own sake, this essay will make two proposals: first, that certain same-sex unions should be legally validated, and second, that certain different-sex unions should no longer be legally valid. The former would seem fairly unproblematic, while the latter may be useful as a political compromise despite its possible costs. More important than either proposal, however, will be the conceptual clarity (regarding the public interest in marriage) achieved en route to them.

### Non-Validation Is Not Prohibition

In order to prepare the ground for these two proposals, a fundamental misunderstanding needs to be cleared up: the idea that same-sex marriages are currently forbidden by law. This issue must be dealt with in advance because within liberalism all laws limiting freedom are suspect, and a heavy burden of proof lies upon anyone who wishes to leave them in place. The starting point for the forthcoming proposals is, however, that no limits are now placed on freedom to marry, in that same-sex unions are already

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completely legal. Like almost all other human relationships<sup>2</sup>, they are simply ignored by the state, and the burden of proof weighs instead upon those who advocate government registration and regulation of them.

[144]Getting and staying married to someone of one's own sex is not punishable conduct in any modern jurisdiction, as far as research for this article has been able to uncover.<sup>3</sup> True, homosexual sex acts were traditionally penalized, and that perhaps amounted to a kind of indirect prohibition on same-sex marriage, but even then religious or non-religious marriage vows were not themselves necessarily sanctioned. In any event, courts or legislatures throughout the developed world have largely eliminated prohibitions on such sex acts and have not replaced them with legal duties not to make religious or other vows and live together as married. Thus lack of legal recognition of gay marriage does not in any way limit conduct, as does ordinary legal prohibition. To say "gay marriage is prohibited" because its duties are not enforced in court is as incorrect as saying "gambling is prohibited" because gambling debts are not enforced in court.

Indeed, it is marriage recognition that limits future behavioral freedom: Entering into a concurrent marriage now becomes punishable as bigamy; having sex with someone else may become adultery; divorce may involve onerous supervision by the state; and the like.<sup>4</sup>

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<sup>2</sup> "Relationship" here encompasses all ongoing human relations of closeness, support, and cooperation. But nothing turns on terminology; words such as "friendship," "partnership," and the like may be substituted without change of meaning, and are often so substituted in the course of this article.

<sup>3</sup> Although the Human Rights Campaign Foundation states that 42 states have "anti-gay marriage" statutes, in none of the listed statutes is there a penalty, such as imprisonment or a fine, for homosexuals living together in a marriage or marriage-like relationship (or attempting to do so). *Human Rights Campaign Foundation*, HRC FamilyNet, States with anti-gay marriage laws, [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) The only punishment in any state constitution or statute is in Oklahoma where "Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor. Ok. Const. Art. II § 35. But this penalizes the clerk who legally validates a marriage, not the couple or the relationship itself. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), would seem to nullify any U.S. law (if there were one) that prohibited homosexuals from making private marriage vows, because such a ban would "seek to control a personal relationship." *Id.* at 567, 2478. A few state statutes might arguably fall into this category. For example, Arizona law states "Marriage between persons of the same sex is void and prohibited." ARIZ. REV. STAT. ANN. § 25-101(C) (Westlaw current through the end of the Forty-Ninth Legislature effective Apr. 24, 2009). However, the lack of any attached penalty would seem to turn this "prohibition" into little more than a redundant statement of non-recognition.

<sup>4</sup> Marriage recognition may obstruct a participant's ability to separate by imposing divorce proceedings, property division, and alimony; it may limit an individual's freedom to bequeath property upon death; it may make an individual liable for spousal debts; and

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[145] This point may seem so obvious as not to be worth juristic comment. Media sound-bites referring to gay marriage “prohibitions” may be the product of lay misunderstandings, or perhaps attempts to fortify the political arguments in favor of same-sex marriage by making current laws seem (incorrectly) to attack liberty. But it is an error into which no less a jurist than United States Supreme Court Justice Antonin Scalia has fallen. He imagines that non-validation of same-sex unions amounts somehow to a prohibition against them. Dissenting in the *Lawrence v. Texas* case that struck down criminal laws against homosexual sodomy, Scalia lists laws not recognizing same-sex marriage right along with laws limiting sexual conduct:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are ... called into question by today’s decision ... See *ante*, at 2480 (noting “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*” (emphasis added [by Justice Scalia])).<sup>5</sup>

Scalia adds that it is impossible to distinguish homosexual sodomy from same-sex marriage and “other traditional ‘morals’ offenses.”<sup>6</sup> However, same-sex marriage cannot be a criminal offense as long as it has absolutely no existence in the eyes of the law. Where the state wholly ignores what gays and lesbians do with their liberty—e.g. making and maintaining vows of fidelity—the state is unable to restrict that liberty. Mere behavioral

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it may restrict a member’s sexual partners through social and even criminal norms. (For instance, adultery—an offense only when a married person is involved—is punishable in various states. *See, e.g.*, ALA. CODE § 13A-13-2 (1992, Westlaw current through the 2009 Reg. Sess.); COLO. REV. STAT. § 18-6-501 (1992, Westlaw current through laws effective Mar. 25, 2009); FLA. STAT. ANN. § 798.01 (Westlaw current through 2009 First Reg. Sess.); MASS. GEN. LAWS ANN. ch. 272, § 14 (1993, Westlaw current through the 2009 1st Annual Sess.); MICH. COMP. LAWS ANN § 750.30 (1991, Westlaw current through 2009 Reg. Sess.); N.Y. PENAL LAW § 255.17 (1993, Westlaw current through 2009).) *See also* Patricia A. Cain, *Imagine There’s No Marriage*, 16 QLR 27 (1996) (arguing that marriage is more aptly defined by its benefits to government rather than to the married couple).

<sup>5</sup> *Supra* note 3, at 589, 2490 (Scalia, J., dissenting).

<sup>6</sup> *Id.* By contrast, the majority opinion in *Lawrence* supports the view of this essay that liberty may require non-punishment of an ongoing personal relationship that preexists any state action without requiring state validation thereof: “The statutes [banning homosexual sodomy] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” *Id.* at 567, 2478. Given Scalia’s ordinary acuity, one cannot but wonder whether he made his obviously fallacious argument in order to draw the majority out onto the record with the correct distinction just cited.

liberty may, of course, not be full social liberty. If I am allowed to go through the motions of voting, but for some reason am not eligible to have my vote counted, it seems a joke to tell me my freedom has not been restricted. When a legislature is disabled from passing unconstitutional legislation, its liberty is at least as effectively curtailed as would be the case if it were punished for passing such laws.<sup>7</sup> Where the only social point [146]of an act is to achieve legal validity, the law's refusal to validate that act amounts to a legal prohibition of it.

Yet as H.L.A. Hart has pointed out, denial of legal recognition need not have a suppressive intent or effect.<sup>8</sup> It would be very strange to see the rules for wills or contracts as draconian means of making testation-without-two-witnesses and promises-without-reciprocity impossible. No modern state seeks to put an end to deathbed requests to one listener, or to stop unilateral promising, or to eliminate more solemn extralegal acts such as clerical ordinations or monastic vows. The law does not validate such acts, but it has nothing against their having social force.

The difference here is between full "invalidation" and what may be called mere "non-validation." The first deprives the non-recognized act of virtually all significance; the second simply fails to add legal recognition to what remains a significant social act.<sup>9</sup>

On which side of the line does non-recognition of committed same-sex relationships lie? Except for the presumably miniscule number of such relationships whose only purpose is to obtain some legal benefit not otherwise obtainable privately<sup>10</sup>, e.g. a tax break, these friendships surely carry great weight for those in and around them, quite apart from whether they achieve legal recognition. They are more like extralegal promises that matter a great deal than they are like legislation that has been nullified by a

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<sup>7</sup> For an argument that invalidation may be a more absolute curtailment of liberty than punishment, because invalidation makes the act in question impossible rather than just costly, see R. Stith, *Punishment, Invalidation, and Nonvalidation: What H.L.A. Hart Did Not Explain*, 14 *LEGAL THEORY* 219, 221–26 (2008).

<sup>8</sup> H.L.A. HART, *THE CONCEPT OF LAW* 26–41 (Oxford: Clarendon Press, 2d ed. 1994).

<sup>9</sup> See article cited *supra* note 7, where the distinction between invalidation and non-validation is explored in greater detail.

<sup>10</sup> A great many of the legal responsibilities/benefits of marriage may be already available to unmarried couples, and may even be imposed on them in the absence of any explicit contract, regardless of their sexual orientation. See American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, Chapter 6, Domestic Partners (2002). For critiques of this new tendency, see Shahar Lifshitz, *Spousal Rights and Spousal Duties, The liberal case for privileging marriage*, *infra*, at Ch. 7, p. 177, and Helen M. Alvaré, "You Can't Get There From Here": *A Reply to Proposals to Disestablish Marriage as the Path to Care*, *infra* at Ch. 4, p. 71.

constitution or court. In this they are similar to most committed human relationships. Our friendships are not generally recognized, registered, or otherwise validated by the law, but it would be odd to say that the law “invalidates” them. Though they remain non-validated by the law, they are not debilitated by it.

No humane polity, least of all a liberal one, would want it otherwise. Only a totalitarian state would seek to regulate, or even to take note of, all human relationships—be they sexual or non-sexual. The loss of privacy, freedom, and flexibility, and the cost of the bureaucracy that would acquire and keep such records, would be too great.

[147] Before the state reaches down into private life to pluck out and regulate any friendship or other relationship, it should have to show something unusual about the relationship in question, something that calls especially for public supervision. In a liberal polity, it is submitted that such state intervention is justified only when the relationship either conduces strongly to the common weal or woe, or else endangers vulnerable individuals too weak to protect themselves. It is by this yardstick that we now proceed to measure first heterosexual and then homosexual sexual relationships.

## **Is There a Public Need for Legal Validation of Sexual Relationships between Heterosexuals?**

Every modern state maintains a registry of regulated different-sex unions, i.e. of marriages. At first sight, this may seem odd. Marriage law may appear to be some hangover from an earlier moral paternalism, rather than like an instrument of individual freedom; it is so regarded by some contemporary thinkers.<sup>11</sup> It makes no sense, however, to think that liberal, secular states would go out of their way to restrict freedom for the sake of an antiquated morality. And if governments were somehow strongly interested in preserving ancient, quasi-religious customs, why would they always stop at marriage? Why not officially certify and reinforce the limitations that result from other spiritually significant relationship events, such as the

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<sup>11</sup> See, e.g., Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994) (arguing that marriage lacks legal as well as experiential coherence and is a place-holder for a series of idealized value judgments about our intimate lives).

aforementioned ordination of priests and ministers or the monastic vow of stability?<sup>12</sup> But no modern state does these things.

Why, then, do governments continue to register and structure heterosexual marriages, if not for the sake of morals or religion? Is there some compelling reason that could account for state interest in sexual friendship between women and men, and only in that sort of friendship? Everyone knows the answer: Sexual relations between women and men may generate children, beings at once highly vulnerable and essential for the future of every human community. The good of those children as well as the common good thus require that the state do all it can to channel such relations into stable and secure relationships. Vows of lasting monogamy receive public [148]recognition and reinforcement because they help produce human beings able to practice ordered liberty.

To the degree that the state is successful in allowing procreation only within marriage, it furthers at least three important secular purposes: It enables children to know who their true father is and thus to know on whom they have a legal and moral claim for support. (The advent of DNA testing may weaken this reason for faithful marriage, however, by making fathers easier to identify quite apart from marital vows.) It enables children to have that true father at home, where he can do them the most good. (Here the advent of DNA testing may strengthen the need for fidelity in marriage, in that such testing may overcome old presumptions of paternity and reveal which husbands are not the true fathers of their wives' children.) Perhaps most importantly, limiting procreation only to married couples stabilizes long-term coordination between the child's two parents, who (if not bound to one another) might otherwise pull the child in different directions.

Note that the state interest in marriage begins at the point where potentially fertile persons first engage in intercourse, not at the point when conception is known to have occurred. By that later time, the father may have wandered away. He needs to be bound to mother and child from the beginning. Put another way, heterosexual sexual relationships, without any outside help or knowledge and without a conscious decision by either partner, are able to engender children. So there is a public interest in stabilizing them as soon as intercourse may occur.

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<sup>12</sup> The Rule of St. Benedict states that when a man or woman is to be received into a monastery, he or she "promises before all in the oratory *stability*, fidelity to monastic life and obedience" (Chapter 58, emphasis added). The Rule requires that someone be punished "who would presume to leave the enclosure of the monastery and go anywhere or do anything, however small, without an order" from the abbot or abbess (Chapter 67).

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This secular interest could in theory be implemented through legal punishment for intercourse outside of monogamous marriage, i.e. penalties for fornication and adultery. However, in practice legitimate concern for privacy militates against protecting marriage by penalties for extramarital sex, except indirectly where a public act is involved (i.e. penalties for bigamy). But it clearly remains rational for the liberal state to encourage community moral disapproval of heterosexual sexual acts out of wedlock, at least as long as contraception is not practiced by almost everyone with high success.

In any event, as far as the law is concerned, marriage today is strengthened primarily by reward rather than by punishment. The public weal requires special benefits for marriage in order to attract as many as possible potentially fertile couples publicly to undertake those commitments that are best for children. Some couples would not be willing to accept public involvement (and even control, through support and divorce laws, for example) in their most intimate concerns if they had no strong incentives to do so. Furthermore, being sexually faithful and raising children obviously involve burdens still heavier than putting up with public intrusion in one's intimate life. Since bearing these burdens of time and effort eventually benefits the whole community, by producing educated and disciplined [149] citizens, it makes sense for the community to provide concrete rewards in the form of special tax, social security, and other legal benefits.<sup>13</sup> This is especially true where one spouse—usually the woman, but sometimes the man—gives up much or all of a career for the sake of raising children. Such a parent voluntarily shares the vulnerability of her or his children by becoming a dependent. Justice, the good of the children, and the common good all demand that the community at least lessen the financial cost of such self-sacrifice.<sup>14</sup>

The greatest moral reward of legal marriage remains, even today, the achievement of full legitimacy for sexual intercourse through the removal of any remnant of legal or moral disapprobation. Even in communities where most people do not judge sex outside marriage to be immoral, there is a minority that still makes this judgment. And, as we have seen, there is a state

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<sup>13</sup> Included among the benefits married persons enjoy are spousal privilege under the Federal Rules of Evidence, Social Security survivors' benefits based upon the spouse's work history, pension benefits, immigration preferences, immunity from Federal Estate and Gift Taxes on transfers between spouses, health insurance benefits, tort rights in each other, intestate succession preferences, and conjugal visits. Steven K. Homer, *supra* note 11, at 515.

<sup>14</sup> Thus the Internal Revenue Code adds a special income tax benefit (joint return) for such households. *See* I.R.C § 1(a) (2003).

interest in encouraging this negative evaluation, in order to minimize the number of children born out of wedlock, so this moral judgmentalism should never disappear completely. But once a woman and man are married, no one today, not even the most traditionally-minded person, thinks sexual intercourse between them to be immoral.

Note that, in the absence of some unusual community desire for an increase in population, neither procreation, nor marriage, nor sex within marriage receive special community moral approval. If we think that parenthood, marriage or sexual intercourse brings happiness, we may well feel sorry for those who remain childless, single or chaste. But we do not think them to be immoral or to be second-class citizens. There is little or no positive moral or civic benefit to getting married or to engaging in marital sex in the modern world. There is only the complete removal of any prior community moral disapprobation of sexual intercourse.

Because of the needs of children and the supports for parenting offered by marriage law and morality, the reasons for getting married become stronger as the likelihood of children increases. It may be possible for a different-sex couple very skilled at contraception never to think about marriage. But once they decide to raise a child together, they will at the least seriously consider a wedding.

So far, then, modern society's linkage between fertility and marriage seems sensible and consistent. However, if the argument of this essay is [150]right—that a liberal regime should get into the business of validating sexual relationships only when necessary to protect children—why would we permit a marriage begun in the years of youth to last far beyond child-bearing age and even permit elderly and other infertile heterosexuals to begin a new marriage?

Letting marriage last a lifetime is easy to justify. Even adult children often need their parents for guidance and security in raising the grandchildren. It would also be intrusive and disruptive of ongoing family life, as well as often unfair to a dependent, non-working spouse, to terminate marriage automatically as soon as the wife became infertile, thus freeing the still-fertile husband to get married to a younger woman. Moreover, the law should do nothing to facilitate an elderly man switching partners and then begetting children, since he is relatively likely to die before those children reach adulthood.

Perhaps we could screen people for infertility before letting them marry. But such screening would probably be a burdensome and politically

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unpalatable search into a private domain.<sup>15</sup> And there would sometimes remain at least a slight chance of a child emerging from heterosexual relations believed to have been infertile.<sup>16</sup>

However, where infertility is easy to determine with near certainty in a non-intrusive way, then the argument so far does indeed cut against new marriages for infertile heterosexual couples. Where one of the elderly partners in a sexual relationship is a woman of clearly post-menopausal age, what possible interest could the state have in their sex life? And if it has no such interest, why would it offer to marry them? Just to make them privately happy? That is surely not a special interest of the state in their friendship as opposed to its interest in the happiness of participants in other non-fertile relationships. Moreover, the absence of legal marriage would not preclude religious marriage, or other forms of private mutual commitment, that could secure their emotional wellbeing and make sexual relations seem morally permissible and appropriate to them and their peers. Anti-fornication statutes (should any remain on the books) could nominally be applied to such legally unrecognized unions, but those laws are rarely if ever enforced. In the United States they could be held invalid under *Lawrence* (for here, as in [151]*Lawrence* itself, a “personal relationship” would be injured by enforcement of such statutes).<sup>17</sup>

The only non-religious explanation for granting elderly couples the right to get married may be pre-liberal: Even where they are infertile, males and females can be said to be in their natures (as shown, e.g., by their anatomy) to be designed for heterosexual reproduction. Every woman is the proper *kind* of being to engage in fertile sexual relations: Her body is designed to conceive a child when fully functioning, even if through age or illness it has become disabled in part.<sup>18</sup> We honor that womanhood in letting her legally marry, as opposed to insisting that she is now gender-imperfect.

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<sup>15</sup>There could even be constitutional problems with imposing burdensome conditions on a right to marry.

<sup>16</sup> See *Miller v. Rivard*, 585 N.Y.S.2d 523 (N.Y. App. Div. 1992) (male begat child three months after a fertility test found him sterile) and *Lefkowitz v. Nassau County Med. Ctr.*, 94 A.D.2d 18 (N.Y. App. Div. 1983) (upholding appellant’s right to refuse a fertility test on the ground of potential danger, while noting evidence that the test might not produce conclusive results on the patient’s fertility).

<sup>17</sup> Under *Lawrence*, *supra* note 3 at 567, 2478, a state may not “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”

<sup>18</sup> Robert P. George and Gerard V. Bradley summarize the natural law tradition on this point: “The marital quality of spousal intercourse is not vitiated ... [by] the permanent loss of fertility with age.” *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 n.4, at 301–02 (1995).

Is a person's "nature" (kind, essence, type, design, and the like) an impermissibly overbroad standard for his or her legal treatment? Is one's current functioning the only valid legal criterion? If so, how can we continue to consider seriously disabled persons to possess equal human dignity under the law?

We cannot proclaim human equality at all unless we focus on kind rather than on the quality of current functioning, for human beings are equal only in being human beings. That is, we need a fixed category of being before we can insist that all beings in that category be treated equally. The fundamental liberal rights to freedom and equality require a pre-liberal assessment of the kind of being that has to be accorded those rights.<sup>19</sup> Not

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<sup>19</sup> The liberal political theorist John Rawls, for example, turns to a human being's nature (using the words "capacity," "realization," "developed," "potentiality," and "could") rather than to his or her current functioning in order to discern the reach of human rights. Rawls writes that

the minimal requirements defining moral personality refer to a *capacity* and not to the *realization* of it. A being that has this *capacity*, whether or not it is yet *developed*, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights ..., this interpretation of the requisite conditions seems necessary to match our considered judgments. Moreover, regarding the *potentiality* as sufficient accords ... with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who *could* take part in the [social contract], were it not for fortuitous circumstances, are assured equal justice" (emphasis added).

A THEORY OF JUSTICE 509 (Cambridge: Harvard University Press, 1971).

Immanuel Kant also relies on humanity as an inner essence or nature, present long before it is fully realized, to indicate who has rights to autonomy. The child is "a being endowed with freedom" long before it can act freely:

[T]here follows from *procreation* in [the marital] community a duty to preserve and care for its *offspring*.... For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation.... They cannot destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be a product of this kind) or as if he were their property, nor can they even just abandon him to chance, since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them even just according to concepts of right" (emphasis in original).

IMMANUEL KANT, *Parental Right*, in THE METAPHYSICS OF MORALS (Cambridge Texts in the History of Philosophy. Mary Gregor ed. & trans., University of South Carolina, Cambridge University Press, 1996).

For further elaboration of the idea of nature or capacity, in the context of disability as well as infancy, by means of a contrast between developing and making, see R. STITH, *Construction, Development, and Revelopment*, XVII LIFE AND LEARNING 243 (2007), <<http://www.uffl.org/vol17/STITH07.pdf>>. For a more extensive discussion of political fundamentals, see R. Stith, *The Priority of Respect: How Our Common Humanity Grounds Our Individual Dignity*, 44 INT'L PHIL. Q. 165 (2004).

[152]letting elderly women marry may tend to discredit the thinking in terms of natural kinds that is essential to a liberal polity.<sup>20</sup>

## **Is There a Public Need for Legal Validation of Sexual Relationships between Homosexuals?**

The child-centered reasons for channeling heterosexual intercourse into exclusive and stable unions do not apply to sexual acts between persons of the same sex, since such acts can never generate children.<sup>21</sup> Unless some other characteristic of same-sex couples merits special treatment,<sup>22</sup> requires them to be lifted out of the myriad other sorts of friendships and human [153]relationships that do not receive legal validation and support, a liberal state should let their relationships remain wholly private and unregulated.<sup>23</sup>

This is good and bad news for same-sex couples. The lack of any child-related reason to confine homosexual acts to committed relationships means that there is no obvious basis in liberal society for the control of such acts. Since they are always infertile, gay or lesbian relationships (regardless of the number or sequence of partners) should not be in any way legally limited in order to drive and contain such conduct inside stable partnerships. In line

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<sup>20</sup> Some contemporary philosophers have contended that there are certain “natural kinds” to which our concepts conform. See S. KRIPKE, *NAMING AND NECESSITY* (Cambridge: Harvard University Press, 1980). Philosophers of law have also disagreed with the contention that our concepts are indeterminate. See, e.g., Michael Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert George ed., Oxford: Clarendon Press 1992).

<sup>21</sup> See *infra* for discussion of adoption by same-sex couples.

<sup>22</sup> There might, of course, be some other important public good especially furthered by committed same-sex friendships. One that comes immediately to mind is the containment of sexually transmitted diseases. If special civil unions for gays could be shown empirically to be necessary in order significantly to lessen the incidence of AIDS, restructuring our law to officially support such unions would make some sense.

<sup>23</sup> Such was the finding of the very significant French National Assembly report of 25 January 2006 and the ruling by New York’s highest court on 6 July 2006. Both, of course, used only non-religious reasons in coming to this conclusion. *Parliamentary Report on the Family and the Rights of Children*, 12th Legislature of the French National Assembly No. 2832 Vol 1, 91 (Jan. 25, 2006), [http://www.preservemarriage.ca/docs/France\\_Report\\_on\\_the\\_Family\\_Edited.pdf](http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf) (English version), <http://www.assemblee-nationale.fr/12/rap-info/i2832.asp> (original French version) (arguing that sexuality of inherently infertile relationships is exclusively a private matter, in contrast to the state interest in fertile relationships); *Hernandez v. Robles*, 7 N.Y.3d 338, 374 (2006) (agreeing with the concept we have seen in *Lawrence* that consensual relations between same-sex couple are an exclusively private matter, but where children may be involved a sexual relationship becomes a legitimate interest to the government).

with *Lawrence*, same-sex couples should be liberated from any state restrictions. Though not equivalent to prohibitions, homosexual marriage registries could have negative consequences. After all, some gun owners find simple registration schemes ominous. Ironically, gays and lesbians may turn out to be better off if they live in traditionally-minded states, where they are not tempted or pressed<sup>24</sup> into surrendering their flexibility and freedom.<sup>25</sup>

The bad news is of a piece with the good: There is no child-centered public need to reward fidelity or long-term commitment when it comes to gay or lesbian sex. There is no special reason for tax subsidies or social security privileges, for example, to make up for the risk to her career that marriage often entails for a potentially fertile woman.

Above all, there is no newly appropriate moral approval of sexual intercourse for those entering into a same-sex partnership. In other words, there is no reason at all to attempt to draw a line among gay or lesbian sex acts, disapproving them outside a committed monogamous relationship but accepting them once they occur inside such a relationship. And in fact, almost no one makes this distinction. Some persons say homosexual acts are [154]always morally legitimate; some say they are never legitimate. But few if any say they are morally permissible only inside a marriage, civil union, or something similar.

Same-sex commitments thus do not, cannot, and should not, entail the same sense of new-found moral approval for sexual intercourse as does traditional marriage. The strong connotation of sexual approval that the word “marriage” carries is for this reason inappropriate and misleading when it is applied to same-sex unions. Labeling them “marriages” begs the fundamental question animating public debate at least *sub rosa*, namely whether homosexual sex itself is morally good or bad. The label “marriage” says “these sex acts take place within a committed union, so they must be unobjectionable.”<sup>26</sup> But this is a non-sequitur. Only acts that were illegiti-

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<sup>24</sup> See *supra* note 10.

<sup>25</sup> See Laurie Essig, *Same-Sex Marriage: I Don't Care if It Is Legal, I Still Think It's Wrong—And I'm a Lesbian*, SALON, July 10, 2000 (suggesting that marriage is an institution founded in the oppression of women and therefore will also oppress homosexuals) and Paula Ettlebrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q. (Fall 1989), reprinted in SEXUAL ORIENTATION AND THE LAW, at 723 (William B. Rubenstein ed., 1996) (distrusting of state regulation of sexuality and possessiveness of marriage), and also articles cited *supra* notes 4 & 11.

<sup>26</sup> “From their point of view, same-sex partnership or marriage is a state stamp of approval for homosexuality, which most traditionalists consider deeply immoral.” WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 132 (Oxford 2006) (arguing in favor of same-sex marriage). “Permitting homosexual marriage would be widely interpreted as

mate because they might in the end harm children become more acceptable in a relatively secure and child-friendly environment. Sex acts among persons of the same sex have nothing to do with children and so their morality is properly a private matter, or at most a cultural issue to be discussed gently within civil society, without regard to marital status.

## **A Proposal for Civil Unions in the Case of Joint Adoption**

A counter-argument: Are not gay and lesbian unions also potentially fertile, in that same-sex couples may jointly adopt children in some communities? Such a question is on the right track in attempting to discern a public interest in such unions. But the answer to it is “no.” Different-sex unions, without any outside help or knowledge and without a conscious decision by either spouse, are able to engender children. So there is a public interest in stabilizing them as soon as they exist. Same-sex unions in themselves are absolutely infertile, so there is no possible child-related reason why the public community should care when they are formed or dissolved, though it would wish to know if they were to adopt children. If a state decides to permit same-sex partners jointly to adopt,<sup>27</sup> then the point<sup>28</sup> at which such [155]adoptions take place is the moment when such unions need to be stabilized. In other words, adoption by same-sex couples is a good reason to grant legal recognition to their unions, but only at the time of each adoption—not before.<sup>29</sup>

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placing a stamp of approval on homosexuality, while decriminalizing sodomy would not, or at least not to anywhere near the same extent.” Richard A. Posner, *SEX AND REASON* 309 (1992).

<sup>27</sup> For some of the policy issues here, see Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 *DUKE J. GENDER L. & POL’Y* 191 (1995) (arguing for homosexual adoption through the use of social science data), and Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 *UILLR* 833 (1997) (arguing that the social impact on children of such radical changes in the form and structure of the family and in the institution of marriage that is the basis of the family, and of society, have not been carefully considered).

<sup>28</sup> Adoption may also occur by gradual operation of law, *e.g.* as proposed by the American Law Institute, *supra* note 10, section 2.03. If so, a legally recognized bond between the adopting partners should mature at the same time.

<sup>29</sup> Besides protection of potential children and potential caregivers, another reason to reinforce heterosexual unions *ab initio* is to make the ascription of paternity more plausible, as previously discussed. This problem cannot arise in a homosexual union. If one partner there has a child—*e.g.*, by artificial insemination or other consciously chosen process—it is known with absolute certainty that the other partner is not the biological parent. Even if two gay men mix their semen before inseminating a female friend, one of them can be shown by DNA testing to be the only biological father. The parenthood of

Put another way: In the case of same-sex couples, it is not the joint sexual act but the joint adoptive act that is a matter of public interest, because that is where parenthood may begin. This paper takes no position on the question of whether or when such joint adoption should take place.<sup>30</sup> But if it does occur, if we decide as a community to entrust the same child to two adults of the same sex, then we must do everything possible to encourage those two adults to stay together. The word “marriage” should not be used, because of its inaccurate and misleading moral meaning in this context, as discussed above. But strong civil unions should be available, unions with all the positive supports for stability that are granted to marriage.

Because these adoption-related unions would have nothing directly to do with the intimate sex lives of the couples concerned, they should be much less controversial than the more commonly proposed civil unions that have same-sex sexual activity as an assumed basis. Even those who think gay or lesbian sexual activity to be morally wrong should agree that a child should [156]not be pulled in two directions, which is more likely to occur if joint adoption is permitted without a civil union between the two adopting adults. This child-centered need, plus the fact that the number of couples eligible for unions at adoption is likely to be relatively small, assuming that most same-sex partnerships do not decide to adopt, would help overcome any qualms conservatives might have if they still discerned some indirect and mild public approbation for same-sex acts implied by such legal recognition.

Furthermore, such unions ought to be open to any other two unmarried adults whom the state decides to entrust with a joint adoption, regardless of their sexual preference and independent of whether they have any sex at all with each other—say, two sisters caring for a much younger sibling after their parents have died. Again, no position is taken here on whether unmarried heterosexual adults should be able jointly to adopt. But if they can, a civil union between them would be called for.

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the second partner is adoptive and is within the joint control of the partners and the state. Therefore, the state need not be concerned about reinforcing the bond between a child’s potential same-sex parents until the adoption becomes legally effective.

<sup>30</sup> One reason for hesitation is this: All agree that at most only a small minority of persons are genetically predisposed to homosexuality. So the chances are overwhelming that any child placed with a same-sex couple is going to turn out to be a heterosexual in a family where the only sexual role models are homosexual. This extremely likely incongruity does not mean that every adoption by a same-sex couple is worse than any possible adoption by a different-sex couple, but it is at least a negative factor, possibly a strong one. Of course, the homosexual child growing up with heterosexual parents may be in a similar plight, but this will happen far less often. (If a “gay gene” or the like could be identified in an infant before adoptive placement, this objection would clearly disappear, for in that case each child could be matched with the appropriate sort of parents.)

Indeed, either marriage or a civil union ought ordinarily to be required, not just optional, for any sort of joint adoption. We cannot without excessive social cost stop unattached men and women from conceiving and bearing children out of wedlock, but there is little reason for the law itself to create two legally unrelated parents for a single child.

## **The Continuing Problem of Perceived or Real Inequality**

Yet extending civil unions to jointly adopting same-sex couples may not be enough for many in the homosexual community. Consider the following report: In 2007, *The New York Times* ran a story about parents who had organized to obtain birth certificates for their stillborn children. They wanted the state to certify that their children had once existed. “It’s about dignity and validity. It’s the same reason why we want things like marriage licenses...,” declared a leader.<sup>31</sup> The newspaper report does not go into detail, but one imagines that this movement’s motivation includes an element of perceived unfairness: Other children get birth certificates, so why not ours? Or at least there would not be a demand for stillbirth recognition if there had not first been a practice of live birth recognition. We all tend to think we need what others have.

Such pleas tempt the state to extend its power. It would require great self-restraint on the part of the state for it to resist this offer to let the state be the ultimate arbiter of truth and being. After all, if government officials do nothing, they will be blamed and punished politically, so (unless they would [157]incur large costs in doing so) they might as well extend legal recognition to stillborn children, even though it serves no public purpose.

Another example: Seeing the way military heroes receive medals and moral approval, a civilian might well ask for something similar: “If a soldier gets a medal for rescuing his buddy from an icy lake, why shouldn’t my brother get one for rescuing me? There should be official ‘Family Hero’ awards. If there aren’t any, it means the government thinks only soldiers can be heroic.” Surely the right response would be to explain that military courage is rewarded because of the special public interest in it, not because it is thought morally superior to civilian courage. And one might recall that illiberal polities that officially reward civilian heroism, or other forms of

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<sup>31</sup> Tamar Lewin, *Out of Grief Grows an Advocacy for Legal Certificate of Stillborn Birth*, NEW YORK TIMES, May 22, 2007, p. A16 (quoting the woman “who started the movement”).

moral excellence for its own sake, would in the end not be ones most of us would wish ours to emulate.

So it should be for same-sex couples who feel slighted by not being offered legal validation. A liberal state should explain that the law is in no way against their union; there is just no special public interest in its recognition, control, or support. And, to the extent possible, it is a good idea to keep friendship unregulated.

Such explanations will ring hollow, however, if there are large and obvious groups who are rewarded with medals or marriages despite the fact that they serve no obvious public purpose. If bullfighters get bravery badges, why not brothers? If aged heterosexuals are permitted to marry, why not homosexuals?

True, as was argued above, new marriages for the elderly can be supported for a wholly secular reason: as a way to maintain the pre-liberal foundation of liberal society, its necessary basis in natural law thinking. However, this response has two strikes against it: First, the argument for letting infertile different-sex people marry because their “natures” are still the right kind for marital sex is subtle; it may not convince everyone. Second, and more important, natural law arguments are something the gay rights movement is seeking to counter. Natural law thinking is the main non-religious support for the claim that homosexual sex is wrong, i.e. that it is in the nature of men and women to have sexual relations only with one another. Thus the pejorative label of “unnatural acts” was long attached to sex between persons of the same sex.<sup>32</sup> An appeal to our sexual natures is likely to carry little weight in the homosexual community.

[158]With an appeal to the wisdom of human nature closed off, there remain only two ways to eliminate the apparent unfairness in the law’s disparate treatment of homosexuals and equally infertile heterosexuals: Either same-sex couples can be granted the right to marry or infertile different-sex couples can have that right taken away from them. It will be contended below that the former alternative would greatly harm society and so the latter should be chosen despite its own costs.

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*Sexual union (commercium sexuelle)* is the reciprocal use that one human being makes of the sexual organs and capacities of another (*usus membrorum et facultatum sexualium alterius*). This is either a *natural* use (by which procreation of a being of the same kind is possible) or an *unnatural* use, and unnatural use takes place either with a person of the same sex or with an animal of a nonhuman species.... [S]uch transgressions ... called unnatural (*crimina carnis contra naturam*) ... do wrong to humanity in our own person...” (emphasis in original)

Kant, *Marriage Right*, *supra* note 19, at 61–62.

## **Negative Consequences of the Legal Validation of Sexual Relationships between Homosexuals**

This article has not yet contended that validation of same-sex marriage is worse for society than any other sort of unnecessary government intervention, e.g., the issuing of certificates for stillbirths. Arguments in favor of validation have been countered, but no claim has yet been made that legal recognition of same-sex marriage is especially damaging.

However, the harms caused by such recognition are in fact quite significant. Perhaps most obviously, it is unjust to the community as a whole that the public purse be used to subsidize couples that do not, as couples, equally serve the common good. Those subsidies were set up to encourage and support unions that are apt to generate children. It is not right to siphon these benefits off and pass them on to people to use largely for their private benefit.

Furthermore, to reward some private relationships would be unjust to many remaining unsubsidized relationships. If providing emotional security (or division of labor or economies of scale or some other such private benefit) were considered a sufficient reason to recognize same-sex couples, why not groups of three, four or fourteen? And why limit official unions to those based on sex? In fact, how could any sort of important human relationship fairly remain unregistrable?

David Chambers of the University of Michigan Law School, in an article favoring same-sex marriage, has written:

[W]e should respect the...claims made against the hegemony of the two-person unit...If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two...By [159]ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more...and to units composed of two people of the same sex but who are bound by friendship alone.<sup>33</sup>

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<sup>33</sup> David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490–91 (1996). Another proposal to use gay marriage as a stepping stone to the validation of sexual and non-sexual group marriages can be found, signed by important leaders such as Gloria Steinem, Barbara Ehrenreich, and Cornell West, in “Beyond Same-Sex Marriage: A New Strategic Vision for All our Families and Relationships” at <http://www.beyondmarriage.org> (last visited 9 March 2009). See also Kees Waaldijk, *Taking Same-Sex Partnership*

What would happen if we took Professor Chambers' advice and offered generous public benefits to every emotionally satisfying, long-term relationship? Would not the direct and indirect costs rise so high that they could no longer be paid? And consider again not only the economic costs, but also the quality of civil society. Do we really want a Rhode Island Relationship Registry? Even if the government used mainly positive incentives, rather than penalties, to support its scheme, would there not be too great an intrusion into private life? Would we not have lost too much freedom and flexibility in our personal relationships? Would we not have created an excessive bureaucracy?

Besides its unfairness to taxpayers and to other sorts of friendships, the validation of same-sex marriage would be deeply unjust in another way that stillbirth certificates and bravery badges would not be: The state would have weighed in unnecessarily on one side of a profound moral controversy about sexual identity and the meaning of sexual activity. Traditional natural law morality argues that our sexual fulfillment lies in engaging in only the sort of sex acts for which we are designed in mind and body, namely intercourse within committed different-sex marriage. Only there are the normal consequences of intercourse benign and beneficial for all concerned; going against our marital nature leads to harm all around. Same-sex relations, by contrast, assume a different purpose for sex acts, namely mutual enjoyment [160]and any bond of friendship that they may strengthen. No sort of orgasmic pleasure is more appropriate than another. Gender itself is a facet not of our dual-sexed common human nature but of each separate individual.<sup>34</sup>

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*Seriously: European Experiences as British Perspectives*, INT'L FAMILY LAW 14 (June 2003), <https://openaccess.leidenuniv.nl/dspace/handle/1887/5229> (stating that same-sex couples who are non-sexual should be permitted to participate in civil unions).

Some conservatives have also welcomed (at least as a compromise) an expansion of legal recognition and support to many sorts of non-sexual friendships despite its obvious costs, apparently because (along with the absence of the word "marriage") the removal of sexuality from the definition of such unions would lessen any implication of approval for the sort of sex acts practiced within them. See Ryan T. Anderson & Sherif Girgis, *A Real Compromise on the Same-Sex Marriage Debate: An Invitation to Rauch and Blankenthorn*, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD (Feb 24, 2009), <http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2009.02.24.001.pdart>.

<sup>34</sup> The common but contrary argument that homosexuality is genetically predetermined is an anomaly in post-modern thought. If gender is otherwise entirely flexible, why would same-sex identity alone be fixed? If our genetic status as men or women does not limit our sexuality, why would our same-sex genetic predispositions do so? Without in any way seeking to judge the empirical validity of the claims here on either side, one can easily discern political reasons for the argument for irrevocable genetic predetermination

*On the Legal Validation of Sexual Relationships*

It is wrong for a liberal state to intervene in debates concerning natural right and wrong, except insofar as may be necessary to secure the foundations of equal liberty. Decisions on the meaning of sexual intercourse ought in principle to be handled in private, or in civil society (books, movies, school debates, church teachings, and the like). It is unfair for the liberal state to use force to settle a merely cultural controversy, no matter how much it is pressed to do so.<sup>35</sup> And the mandatory fiat of the state makes it less likely that the outcome will be determined only by the most appropriate reasons.

Moreover, if the claim made earlier is correct, that natural law thinking (thinking in terms of kinds or natures) is a necessary pre-liberal basis for the liberal commitment to human dignity and equality, then there is a public interest in seeing that this sort of thinking (at least in that context) does not disappear. But sex is one of the places where the word “natural” is most at home, where it comes most easily to the minds of many. To appear legally to endorse the view that nothing is more sexually natural or unnatural than anything else could endanger the pre-liberal foundation of liberalism.

Furthermore, by validating one side of a moral argument for which there exists no consensus and for which empirical proof of superiority may be difficult, the state does what is functionally equivalent to establishing a controverted religion. The problem here is not just unfairness but tyranny. [161]Without sufficient basis in public reason to convince those who do not believe in the new doctrine, the state must inevitably resort to propaganda and force.

If gays can get married, there must be nothing wrong with gay sex, and so those adoption agencies, hospitals, schools, radio stations, and the like that act upon (or even simply teach) other premises are just bigoted and

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of same-sex orientation: The argument operates within the natural law paradigm, asserting that gay and lesbian people simply have a different nature, are a different kind of being from heterosexuals. Thus their sexual orientation should be seen not as a genetic deficiency to be overcome or limited, like an inborn tendency to alcoholism, but as something to be supported and perfected. If this argument were able to convince the opponents of same-sex relations, then the state might indeed be able to license same-sex civil unions without appearing to take sides against natural law morality.

<sup>35</sup> Kathleen E. Hull writes that in her interviews with those who favor same-sex marriage, “[a]lthough rights and equality were important ways of talking about the value of same-sex marriage, study participants were just as likely to talk about it in the language of social legitimacy and validation.” She quotes one person saying “I think [legal recognition] would go a long way to legitimizing our relationships, in the eyes of other people” and another saying “I want the government to do it, so all these people, they can just shut up!” *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 126–27 (Cambridge University Press, 2006).

entitled to no public support, and perhaps not even to toleration.<sup>36</sup> Religious exemptions could mitigate this tendency to statist domination of civil society,<sup>37</sup> but non-religious persons and institutions responding only to their understanding of what is naturally good for men, women, and children, could still be pressed to violate their consciences.

The difficulty here lies in the very idea of validation. Legal “recognition” in the sense used in this article is not just the notice of a fact. It is a communal *imprimatur*. It may not go so far as to make the act in question mandatory, but it does aver that there is nothing significantly wrong with it.

True tolerance, by contrast, takes no position in favor or against the act or relationship in question. It leaves others with full behavioral liberty to engage in the conduct, without endorsing what they do in any way. Gamblers may be left at liberty without affirming that what they are doing is a good thing. But the legal validation of gambling debts affirms that public policy supports them.

It is of utmost importance for peace in a liberal polity that same-sex activity remain not prohibited but also not legally validated. Almost all citizens rejoice in the freedom and equality of a liberal *political* order. But many could not accept the establishment and enforcement of a contested *moral* order, even if it were a liberal one.

The great political problem is that toleration alone may no longer satisfy the gay rights movement. John Noonan has reflected upon how slavery and abortion became polity-shattering only when advocates for each cause escalated their demands from simple toleration to universal legal approval. Yet he also recognizes their difficulty in moderating those demands: “[I]n a moral question of this kind, turning on basic concepts of humanity, ... you cannot be content with the practical toleration of your [162]activities. You want, in a sense you need, actual acceptance, open approval, ... the moral surrender of [your] critics.”<sup>38</sup>

It behooves us all to find a way out of the impasse described by Noonan, a way generously to accommodate both sensibilities, in order to

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<sup>36</sup> See the important book by legal scholars both for and against same-sex marriage: SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds. 2008) (arguing that legal recognition of same-sex marriage may lead to limits on speech at work and in school, to restrictions on licenses and conscience in the professions, and to a widespread intolerance for a different ethical vision).

<sup>37</sup> This is the tack taken by conservative David Blankenhorn and liberal Jonathan Rauch in *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11.

<sup>38</sup> JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 82–83 (The Free Press, 1979).

avoid yet another sort of civil war. Is there something more than “practical toleration” that traditionalists can offer, something less than “moral surrender” that can satisfy same-sex marriage advocates?

## **A Proposal for the Non-Validation of New Marriages of Elderly Couples**

The disestablishmentarian position of this essay requires an obvious second step: The application of natural law morality to marriage, which now appears to many to be gratuitously endorsed by the state, must be excised in some dramatic way from our law. Even though, as I believe, current marriage law can in fact be justified on premises necessary for a liberal polity, those secular arguments are insufficiently convincing to many reasonable persons. Simple toleration of what gays and lesbians do privately with their liberty, even with the addition of public validation for same-sex unions that adopt, may not be adequate to avert “civil war.” In order to persuade those who favor same-sex marriage that they are being treated fairly, contrary natural law marriage principles may need to be significantly removed from our law.

More specifically: as long as every major sort of infertile heterosexual can get legally married, no matter how obvious and permanent that infertility may be, current law will seem arbitrarily to establish the moral or religious judgment that homosexual activity is bad. This sense of official unfairness among persons and among moralities may require that marriages of obviously infertile heterosexuals no longer be legally recognized.

As previously discussed, the one sort of infertility which is already a matter of public record, and which therefore would require no great invasion of privacy to use as a legal criterion for infertility, is age. Past a certain age, women become overwhelmingly infertile. The proposal made here is for the law to choose some age (50?, 60?, 70?—let us decide) beyond which marriage would not be recognized for any couple, on grounds of infertility.<sup>39</sup>

**[163]**In order not to discriminate against women in the course of undoing discrimination against homosexuals, the law should treat both sexes equally: Only when *both* the would-be husband and the would-be wife are

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<sup>39</sup> Conservative thinker Allan Carlson postulates that if people were given civil marriage benefits only during their ‘natural’ time of procreative potential, there would be a possible reconnect of procreation with marriage. He proposes the age of forty-five or younger for women, as their ‘natural’ age, while approximating an age in men, due to Viagra and the like, would be more difficult. See ALLAN C. CARLSON, CONJUGAL AMERICA: ON THE PUBLIC PURPOSES OF MARRIAGE 18–19 (Transaction Pub, 2006).

above the officially set age should their vows have no legal significance. (The other sort of equal treatment of sex would be a mistake: To say that if *either* the male or the female were above the set age they could not marry would leave those children engendered by an older man and a younger woman without the protection of a marriage bond between their parents.)

It is true that a post-menopausal (and thus presumptively infertile) woman could still marry a younger man under this proposal, which would leave marriage law imperfectly mapped onto potential fertility, but there is no other acceptable solution that does not give older men more rights than older women.

There is one other way in which marriage law should not be quite absolute in its exclusion of legal matrimony for elderly women. Whatever age is chosen, it is possible in theory for some very unusual woman to remain fertile after that age. Therefore, the elimination of heterosexual marriage after some certain age should be subject to an exception. Where the female partner is already pregnant, marriage should be permitted, as in the shotgun marriages of old, so that the child will at least be born in wedlock.<sup>40</sup>

Would this age-based proposal be politically sufficient (along with the proposal for civil unions joining any same-sex couples who adopt) to overcome the common sense of legal unfairness toward homosexuals? One cannot know, but its enactment would at least be a significant step on the part of the law to tailor marriage more closely to fertility. Same-sex people would no longer feel alone in not having their sexual relationships validated by the state.

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<sup>40</sup> If IVF treatments continue to advance, it could even become common for post-menopausal women to become pregnant. Once again, this paper takes no position on whether such impregnations should or should not be allowed by law or morality. But if they are ever permitted, the protection of children requires that marriage be made available once they successfully occur.

