WHAT IS MARRIAGE?

SHERIF GIRGIS,* ROBERT P. GEORGE,** & RYAN T. ANDERSON***

* Ph.D. Candidate in Philosophy, Princeton University.
** McCormick Professor of Jurisprudence, Princeton University.
*** Ph.D. Candidate in Political Science, University of Notre Dame.

What is marriage?

Consider two competing views:

Conjugal View: Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it.[1]

Revisionist View: Marriage is the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable. The state should recognize and regulate marriage because it has an interest in stable

1. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066 (1994); John Finnis, *"Marriage: A Basic and Exigent Good,"* THE MONIST, July–Oct. 2008, 388–406. *See also* PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 176–97 (2008).

romantic partnerships and in the concrete needs of spouses and any children they may choose to rear.[2]

It has sometimes been suggested that the conjugal understanding of marriage is based only on religious beliefs. This is false. Although the world's major religious traditions have historically understood marriage as a union of man and woman that is by nature apt for procreation and childrearing,[3] this suggests merely that no one religion invented marriage. Instead, the demands of our common human nature have shaped (however imperfectly) all of our religious traditions to recognize this natural institution. As such, marriage is the type of social practice whose basic contours can be discerned by our common human reason, whatever our religious background. We argue in this Article for legally enshrining the conjugal view of marriage, using arguments that require no appeal to religious authority.[4]

Part I begins by defending the idea—which many revisionists implicitly share but most shrink from confronting—that the nature of marriage (that is, its essential features, what it fundamentally is) should settle this debate. If a central claim made by revisionists against the conjugal view, that equality requires recognizing loving consensual relationships,[5] were true, it would also refute the revisionist view; being false, it in fact refutes neither view.

Revisionists, moreover, have said what they think marriage is not (for example, inherently opposite-sex), but have only rarely (and vaguely) explained what they think marriage is. Consequently, because it is easier to criticize a received view than to construct a complete alternative, revisionist arguments have had an appealing simplicity. But these arguments are also vulnerable to powerful criticisms that revisionists do not have the resources to answer. This Article, by contrast, makes a positive case, based on three widely held principles, for what makes a marriage.

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2. *See* Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 279 (1995).

3. Even in traditions that permit or have permitted polygamy, each marriage is between a man and a woman.

4. *See infra* Part II.E.

5. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1424 (1993).

Part I also shows how the common good of our society crucially depends on legally enshrining the conjugal view of marriage and would be damaged by enshrining the revisionist view—thus answering the common question, "How would gay civil marriage affect you or your marriage?" Part I also shows that what revisionists often consider a tension in our view—that marriage is possible between an infertile man and woman—is easily resolved. Indeed, it is revisionists who cannot explain (against a certain libertarianism) why the state should care enough about some relationships to enact any marriage policy at all, or why, if enacted, it should have certain features which even they do not dispute. Only the conjugal view accounts for both facts. For all these reasons, even those who consider marriage to be merely a socially useful fiction have strong pragmatic reasons for supporting traditional marriage laws. In short, Part I argues that legally enshrining the conjugal view of marriage is both philosophically defensible and good for society, and that enshrining the revisionist view is neither. So Part I provides the core or essence of our argument, what could reasonably be taken as a stand-alone defense of our position.

But many who accept (or at least grant) our core argument may have lingering questions about the justice or consequences of implementing it. Part II considers all of the serious concerns that are not treated earlier: the objections from conservatism (Why not spread traditional norms to the gay community?), from practicality (What about partners' concrete needs?), from fairness (Doesn't the conjugal conception of marriage sacrifice some people's fulfillment for others'?), from naturalness (Isn't it only natural?), and from neutrality (Doesn't traditional marriage law impose controversial moral and religious views on everyone?).

As this Article makes clear, the result of this debate matters profoundly for the common good. And it all hinges on one question: *What is marriage?*

I

A. Equality, Justice, and the Heart of the Debate

Revisionists today miss this central question—*what is marriage?*—most obviously when they equate traditional marriage laws with laws banning interracial marriage. They argue that people cannot control their sexual orientation any more than

they can control the color of their skin.[6] In both cases, they argue, there is no rational basis for treating relationships differently, because the freedom to marry the person one loves is a fundamental right.[7] The state discriminates against homosexuals by interfering with this basic right, thus denying them the equal protection of the laws.[8]

But the analogy fails: antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally relevant to the latter question. Because every law makes distinctions, there is nothing unjustly discriminatory in marriage law's reliance on genuinely relevant distinctions.

Opponents of interracial marriage typically did not deny that marriage (understood as a union consummated by conjugal acts) between a black and a white was possible any more than proponents of segregated public facilities argued that some feature of the whites-only water fountains made it impossible for blacks to drink from them. The whole point of antimiscegenation laws in the United States was to prevent the genuine possibility of interracial marriage from being realized or recognized, in order to maintain the gravely unjust system of white supremacy.[9]

By contrast, the current debate is precisely over whether it is possible for the kind of union that has marriage's essential features to exist between two people of the same sex. Revisionists do not propose leaving intact the historic definition of marriage and simply expanding the pool of people eligible to marry. Their goal is to abolish the conjugal conception of marriage in our law[10] and replace it with the revisionist conception.

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6. *See, e.g.*, *id.*

7. *See, e.g.*, *id.*

8. *Id.*

9. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

10. Throughout history, no society's laws have explicitly forbidden gay marriage. They have not explicitly forbidden it because, until recently, it has not been thought possible. What is more, antimiscegenation laws, at least in the United States, were meant to keep blacks separate from whites, and thus in a position of social, economic, and political inferiority to them. But traditional marriage laws were not devised to oppress those with same-sex attractions. The comparison is offensive, and puzzling to many—not least to the nearly two-thirds of black voters who voted to uphold conjugal marriage under California Proposition Eight. *See* Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks are Divided on Prop. 8*, L.A. TIMES, Nov. 8, 2008, at A1.

More decisively, though, the analogy to antimiscegenation fails because it relies on the false assumption that any distinction is unjust discrimination. But suppose that the legal incidents of marriage were made available to same-sex as well as opposite-sex couples. We would still, by the revisionists' logic, be discriminating against those seeking open, temporary, polygynous, polyandrous, polyamorous, incestuous, or bestial unions. After all, people can find themselves experiencing sexual and romantic desire for multiple partners (concurrent or serial), or closely blood-related partners, or nonhuman partners. They are (presumably) free not to act on these sexual desires, but this is true also of people attracted to persons of the same sex.

Many revisionists point out that there are important differences between these cases and same-sex unions. Incest, for example, can produce children with health problems and may involve child abuse. But then, assuming for the moment that the state's interest in avoiding such bad outcomes trumps what revisionists tend to describe as a fundamental right, why not allow incestuous marriages between adult infertile or same-sex couples? Revisionists might answer that people should be free to enter such relationships, and all or some of the others listed, but that these do not merit legal recognition. Why? Because, the revisionist will be forced to admit, marriage as such just cannot take these forms, or can do so only immorally. Recognizing them would be, variously, confused or immoral.

Revisionists who arrive at this conclusion must accept at least three principles.

First, marriage is not a legal construct with totally malleable contours—not "just a contract." Otherwise, how could the law get marriage wrong? Rather, some sexual relationships are instances of a distinctive kind of relationship—call it *real marriage*—that has its own value and structure, whether the state recognizes it or not, and is not changed by laws based on a false conception of it. Like the relationship between parents and their children, or between the parties to an ordinary promise, real marriages are *moral realities* that create moral privileges and obligations between people, independently of legal enforcement.[11]

11. For a brief defense of this idea, and the implications for our argument of denying it, see *infra* Part I.F.

Thus, when some states forbade interracial marriage, they either attempted to keep people from forming real marriages, or denied legal status to those truly marital relationships. Conversely, if the state conferred the same status on a man and his two best friends or on a woman and an inanimate object, it would not thereby make them really married. It would merely give the title and (where possible) the benefits of legal marriages to what are not actually marriages at all.

Second, the state is justified in recognizing only real marriages as marriages. People who cannot enter marriages so understood for, say, psychological reasons are not wronged by the state, even when they did not choose and cannot control the factors that keep them single—which is true, after all, of many people who remain single despite their best efforts to find a mate.

Any legal system that distinguishes marriage from other, nonmarital forms of association, romantic or not, will justly exclude some kinds of union from recognition. So before we can conclude that some marriage policy violates the Equal Protection Clause,[12] or any other moral or constitutional principle, we have to determine what marriage actually *is* and why it should be recognized legally in the first place. That will establish which criteria (like kinship status) are relevant, and which (like race) are irrelevant to a policy that aims to recognize real marriages. So it will establish when, if ever, it is a marriage that is being denied legal recognition, and when it is something else that is being excluded.

As a result, in deciding whether to recognize, say, polyamorous unions, revisionists would not have to figure out first whether the desire for such relationships is natural or unchanging; what the economic effects of not recognizing polyamory would be; whether nonrecognition stigmatizes polyamorous partners and their children; or whether nonrecognition violates their right to the equal protection of the law. With respect to the last question, it is exactly the other way around: Figuring out what marriage is would tell us whether equality requires generally treating polyamorous relationships just as we do monogamous ones—that is, as marriages.

Third, there is no general right to marry the person you love, if this means a right to have any type of relationship that you desire recognized as marriage. There is only a presumptive right

12. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

not to be prevented from forming a real marriage wherever one is possible. And, again, the state cannot choose or change the essence of real marriage; so in radically reinventing legal marriage, the state would obscure a moral reality.

There is a tension here. Some revisionists say that marriage is merely a social and legal construct, but their appeals to equality undermine this claim. The principle of equality requires treating like cases alike. So the judgment that same-sex and opposite-sex unions are alike with respect to marriage, and should therefore be treated alike by marriage law, presupposes one of two things: Either *neither* relationship is a real marriage in the above sense, perhaps because there is no such thing, marriage being just a legal fiction (in which case, why not justify apparent inequities by social-utility considerations?[13]), or both relationships are real marriages, *whatever* the law says about them. The latter presupposition entails the belief, which most revisionists seem to share with advocates of the conjugal view, that marriage has a nature independent of legal conventions. In this way, the crucial question—the only one that can settle this debate—remains for both sides: What is marriage?

B. Real Marriage Is—And Is Only—The Union of Husband and Wife

As many people acknowledge, marriage involves: first, a comprehensive union of spouses; second, a special link to children; and third, norms of permanence, monogamy, and exclusivity.[14] All three elements point to the conjugal understanding of marriage.

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13. This point requires elaboration: Some revisionists might deny that there is a "real marriage" from which any relationship might deviate, and instead maintain that marriage is purely conventional. Those who think marriage is a useless or unjustifiable fiction have no reason to support any marriage law at all, while those who think it is a useful and legitimate fiction must explain why the state should keep even the restrictions on marriage that they support. On this latter point, see *infra* Part II.B. On the implications of regarding marriage as pure construction, see *infra* Part I.F.

14. Among revisionists, see, for example, Jonathan Rauch, *For Better or Worse? The case for Gay (and Straight) Marriage*, THE NEW REPUBLIC, May 6, 1996, at 18, *available at* http://www.jonathanrauch.com/jrauch_articles/gay_marriage_1_the_case_for_marriage; Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225, 229 (1999); Jonathan Rauch, *Not So Fast, Mr. George*, INDEP. GAY F. (Aug. 2, 2006), http://igfculturewatch.com/2006/08/02/not-so-fast-mr-

1. Comprehensive Union

Marriage is distinguished from every other form of friendship inasmuch as it is comprehensive. It involves a sharing of lives and resources, and a union of minds and wills—hence, among other things, the requirement of consent for forming a marriage. But on the conjugal view, it also includes organic bodily union. This is because the body is a real part of the person, not just his costume, vehicle, or property. Human beings are not properly understood as nonbodily persons—minds, ghosts, consciousnesses—that inhabit and use nonpersonal bodies. After all, if someone ruins your car, he vandalizes your property, but if he amputates your leg, he injures you. Because the body is an inherent part of the human person, there is a difference in kind between vandalism and violation; between destruction of property and mutilation of bodies.

Likewise, because our bodies are truly aspects of us as persons, any union of two people that did not involve organic bodily union would not be comprehensive—it would leave out an important part of each person's being. Because persons are body-mind composites, a bodily union extends the relationship of two friends along an entirely new dimension of their being as persons. If two people want to unite in the comprehensive way proper to marriage, they must (among other things) unite organically—that is, in the bodily dimension of their being.

This necessity of bodily union can be seen most clearly by imagining the alternatives. Suppose that Michael and Michelle build their relationship not on sexual exclusivity, but on tennis exclusivity. They pledge to play tennis with each other, and only with each other, until death do them part. Are they thereby married? No. Substitute for tennis any nonsexual activity at all, and they still aren't married: Sexual exclusivity—exclusivity with respect to a specific kind of bodily union—is required. But what is it about sexual intercourse that makes it uniquely capable of creating bodily union? People's bodies can touch and interact in all sorts of ways, so why does only sexual union make bodies in any significant sense "one flesh"?

Our organs—our heart and stomach, for example—are parts of one body because they are coordinated, along with other

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george. Among supporters of the conjugal view, see, for example, ST. THOMAS AQUINAS, SUMMA THEOLOGICA Supp., Q. 44, Art. 1.

parts, for a common biological purpose of the whole: our biological life. It follows that for two individuals to unite organically, and thus bodily, their bodies must be coordinated for some biological purpose of the whole.

That sort of union is impossible in relation to functions such as digestion and circulation, for which the human individual is by nature sufficient. But individual adults are naturally incomplete with respect to one biological function: sexual reproduction. In coitus, but not in other forms of sexual contact, a man and a woman's bodies coordinate by way of their sexual organs for the common biological purpose of reproduction. They perform the first step of the complex reproductive process. Thus, their bodies become, in a strong sense, one—they are biologically united, and do not merely rub together—in coitus (and only in coitus), similarly to the way in which one's heart, lungs, and other organs form a unity: by coordinating for the biological good of the whole. In this case, the whole is made up of the man and woman as a couple, and the biological good of that whole is their reproduction.

Here is another way of looking at it. Union on any plane—bodily, mental, or whatever—involves mutual coordination on that plane, toward a good on that plane. When Einstein and Bohr discussed a physics problem, they coordinated intellectually for an intellectual good, truth. And the intellectual union they enjoyed was real, whether or not its ultimate target (in this case, a theoretical solution) was reached—assuming, as we safely can, that both Einstein and Bohr were honestly seeking truth and not merely pretending while engaging in deception or other acts which would make their apparent intellectual union only an illusion.

By extension, bodily union involves mutual coordination toward a bodily good—which is realized only through coitus. And this union occurs even when conception, the bodily good toward which sexual intercourse as a biological function is oriented, does not occur. In other words, organic bodily unity is achieved when a man and woman coordinate to perform an act of the kind that causes conception. This act is traditionally called the act of generation or the generative act;[15] if (and only

15. *See, e.g.*, THOMAS WALTER LAQUEUR, MAKING SEX, BODY AND GENDER FROM THE GREEKS TO FREUD 48 (1990).

if) it is a free and loving expression of the spouses' permanent and exclusive commitment, then it is also a marital act.

Because interpersonal unions are valuable in themselves, and not merely as means to other ends, a husband and wife's loving bodily union in coitus and the special kind of relationship to which it is integral are valuable whether or not conception results and even when conception is not sought. But two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies can coordinate, reproduction being the only candidate.[16] This is a clear sense in which their union cannot be marital, if marital means comprehensive and comprehensive means, among other things, bodily.

2. Special Link to Children

Most people accept that marriage is also deeply—indeed, in an important sense, uniquely—oriented to having and rearing children. That is, it is the kind of relationship that by its nature is oriented to, and enriched by, the bearing and rearing of children. But how can this be true, and what does it tell us about the structure of marriage?

It is clear that merely committing to rear children together, or even actually doing so, is not enough to make a relationship a marriage—to make it the kind of relationship that is by its nature oriented to bearing and rearing children. If three monks agreed to care for an orphan, or if two elderly brothers began caring for their late sister's son, they would not thereby become spouses. It is also clear that having children is not necessary to being married; newlyweds do not become spouses only when their first child comes along. Anglo-American legal tradition has for centuries regarded coitus, and not the conception or birth of a child, as the event that consummates a marriage.[17] Furthermore, this tradition has never denied that childless marriages were true marriages.

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16. Pleasure cannot play this role for several reasons. The good must be truly common and for the couple as a whole, but pleasures (and, indeed, any psychological good) are private and benefit partners, if at all, only individually. The good must be bodily, but pleasures are aspects of experience. The good must be inherently valuable, but pleasures are not as such good in themselves—witness, for example, sadistic pleasures. For more on this philosophical point, see LEE & GEORGE, *supra* note 1, 95–115, 176–97.

17. The Oxford English Dictionary charts the usage of "consummation" as, among other definitions not relating to marriage, "[t]he completion of marriage by sexual intercourse." OXFORD ENGLISH DICTIONARY III, at 803 (2d ed. 1989). The

How, then, should we understand the special connection between marriage and children? We learn something about a relationship from the way it is sealed or embodied in certain activities. Most generically, ordinary friendships center on a union of minds and wills, by which each person comes to know and seek the other's good; thus, friendships are sealed in conversations and common pursuits. Similarly, scholarly relationships are sealed or embodied in joint inquiry, investigation, discovery, and dissemination; sports communities, in practices and games.

If there is some conceptual connection between children and marriage, therefore, we can expect a correlative connection between children and the way that marriages are sealed. That connection is obvious if the conjugal view of marriage is correct. Marriage is a comprehensive union of two sexually complementary persons who seal (consummate or complete) their relationship by the generative act—by the kind of activity that is by its nature fulfilled by the conception of a child. So marriage itself is oriented to and fulfilled[18] by the bearing, rearing, and education of children. The procreative-type *act* distinctively seals or completes a procreative-type *union*.

Again, this is not to say that the marriages of infertile couples are not true marriages. Consider this analogy: A baseball team has its characteristic structure largely because of its orientation to winning games; it involves developing and sharing one's athletic skills in the way best suited for honorably winning (among other things, with assiduous practice and good sportsmanship). But such development and sharing are possible and inherently valuable for teammates even when they lose their games.

Just so, marriage has its characteristic structure largely because of its orientation to procreation; it involves developing and sharing one's body and whole self in the way best suited for honorable parenthood—among other things, permanently and exclusively. But such development and sharing, including the

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earliest such usage recorded in law was the 1548 Act 2–3 Edw. VI, c. 23 § 2: "Sentence for Matrimony, commanding Solemnization, Cohabitation, Consummation and Tractation as becometh Man and Wife to have." *Id.* In more modern usage, "consummation of marriage" is still regarded in family law as "[t]he first post-marital act of sexual intercourse between a husband and wife." BLACK'S LAW DICTIONARY 359 (9th ed. 2009).

18. That is, made even richer as the kind of reality it is.

bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive children.[19]

Therefore, people who can unite bodily can be spouses without children, just as people who can practice baseball can be teammates without victories on the field. Although marriage is a social practice that has its basic structure by nature whereas baseball is wholly conventional, the analogy highlights a crucial point: Infertile couples and winless baseball teams both meet the basic requirements for participating in the practice (conjugal union; practicing and playing the game) and retain their basic orientation to the fulfillment of that practice (bearing and rearing children; winning games), even if that fulfillment is never reached.

On the other hand, same-sex partnerships, whatever their moral status, cannot be marriages because they lack any essential orientation to children: They cannot be sealed by the generative act. Indeed, in the common law tradition, only coitus (not anal or oral sex even between legally wed spouses) has been recognized as consummating a marriage.[20]

Given the marital relationship's natural orientation to children, it is not surprising that, according to the best available sociological evidence, children fare best on virtually every indicator of wellbeing when reared by their wedded biological parents. Studies that control for other relevant factors, including poverty and even genetics, suggest that children reared in intact homes fare best on the following indices:[21]

> *Educational achievement*: literacy and graduation rates;
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> *Emotional health*: rates of anxiety, depression, substance abuse, and suicide;
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> *Familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse; and

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19. For more on this point, see *infra* Part I.D.

20. For more on the difference between infertile and same-sex couples, see *infra* Part I.D.

21. For the relevant studies, see *Ten Principles on Marriage and the Public Good*, signed by some seventy scholars, which corroborates the philosophical case for marriage with extensive evidence from the social sciences about the welfare of children and adults. THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 9–19 (2008), *available at* http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf.

> *Child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration.

Consider the conclusions of the left-leaning research institution Child Trends:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children 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. . . . There is thus value for children in promoting strong, stable marriages between biological parents. . . ."[I]t is not simply the presence of two parents, . . . but the presence of *two biological parents* that seems to support children's development.[22]

According to another study, "[t]he advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."[23] Recent literature reviews conducted by the Brookings Institution, the Woodrow Wilson School of Public and International Affairs at Princeton University, the Center for Law and Social Policy, and the Institute for American Values corroborate the importance of intact households for children.[24]

Note, moreover, that for a relationship to be oriented to children in this principled as well as empirically manifested way, sexual orientation as such is not a disqualifier. The union of a husband and wife bears this connection to children even if, say, the husband is also attracted to men. What is necessary in this respect is rather sexual complementarity. Two men, even if they are attracted only to women, cannot exhibit this kind of biological complementarity. In this sense, it is not individuals as such who are singled out—as being less capable of affection-

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22. Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RESEARCH BRIEF, June 2002, at 1–2, 6, *available at* http://www.childtrends.org/files/MarriageRB602.pdf.

23. Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003).

24. *See* Sara McLanahan, Elisabeth Donahue & Ron Haskins, *Introducing the Issue*, 15 THE FUTURE OF CHILD. 3 (2005); Mary Parke, *Are Married Parents Really Better for Children?*, CLASP POLICY BRIEF, May 2003; W. BRADFORD WILCOX ET AL., 2 WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (2005).

ate and responsible parenting, or anything else. Instead, what are systematically favored as bearing a special and valuable link to childrearing are certain arrangements and the acts that complete or embody them—to which, of course, particular individuals are more or less inclined.

3. Marital Norms

Finally, unions that are consummated by the generative act, and that are thus oriented to having and rearing children, can make better sense of the other norms that shape marriage as we have known it.

For if bodily union is essential to marriage,[25] we can understand why marriage is incomplete and can be dissolved if not consummated, and why it should be, like the union of organs into one healthy whole, total and lasting for the life of the parts ("till death do us part"[26]). That is, the comprehensiveness of the union across the dimensions of each spouse's being calls for a temporal comprehensiveness, too: through time (hence permanence) and at each time (hence exclusivity). This is clear also from the fact that the sort of bodily union integral to marriage grounds its special, essential link to procreation,[27] in light of which it is unsurprising that the norms of marriage should create conditions suitable for children: stable and harmonious conditions that sociology and common sense agree are undermined by divorce—which deprives children of an intact biological family—and by infidelity, which betrays and divides one's attention and responsibility to spouse and children, often with children from other couplings.

Thus, the inherent orientation of conjugal union to children deepens and extends whatever reasons spouses may have to stay together for life and to remain faithful: in relationships that lack this orientation, it is hard to see why permanence and exclusivity should be, not only desirable whenever not very costly (as stability is in *any* good human bond), but inherently normative for anyone in the relevant kind of relationship.[28]

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25. For more on this point see *supra* Part I.B.I.
26. BOOK OF COMMON PRAYER 220 (Oxford 1815).
27. For more on this point see *supra* Part I.B.I.
28. *See infra* Part I.E.3.

C. How Would Gay Civil Marriage Affect You or Your Marriage?

At this point, some revisionists abandon the philosophical project of attacking the conjugal conception of marriage and simply ask, "what's the harm?" Even if we are right, is implementing our view important enough to justify the emotional and other difficulties that some may experience as a result of being denied recognition of the sexual partnerships they have formed? Why should the state care about some abstract moral principle?

Revisionists often capture this point with a question: "How would gay marriage affect you or your marriage?"[29] It is worth noting, first, that this question could be turned back on revisionists who oppose legally recognizing, for example, polyamorous unions: How would doing so affect anyone else's marriage? If this kind of question is decisive against the conjugal view's constraints on which unions to recognize, it cuts equally against the revisionist's. In fact it undermines neither since, as even many revisionists implicitly agree, public institutions like civil marriage have wide and deep effects on our culture—which in turn affects others' lives and choices.

Thus, supporters of the conjugal view often respond to this challenge—rightly, we believe—that abolishing the conjugal conception of marriage would weaken the social institution of marriage, obscure the value of opposite-sex parenting as an ideal, and threaten moral and religious freedom. Here is a sketch of how.

1. Weakening Marriage

No one deliberates or acts in a vacuum. We all take cues (including cues as to what marriage is and what it requires of us) from cultural norms, which are shaped in part by the law. Indeed, revisionists themselves implicitly concede this point. Why else would they be dissatisfied with civil unions for same-sex couples? Like us, they understand that the state's favored conception of marriage matters because it affects society's understanding of that institution.

In redefining marriage, the law would teach that marriage is fundamentally about adults' emotional unions, not bodily un-

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29. *See, e.g.*, Editorial, *A Vermont Court Speaks*, BOSTON GLOBE, Dec. 22, 1999, at A22 ("[Gay marriage] no more undermine[s] traditional marriage than sailing undermines swimming.").

ion[30] or children,[31] with which marital norms are tightly intertwined.[32] Since emotions can be inconstant, viewing marriage essentially as an emotional union would tend to increase marital instability—and it would blur the distinct value of friendship, which is a union of hearts and minds.[33] Moreover, and more importantly, because there is no reason that primarily emotional unions any more than ordinary friendships in general should be permanent, exclusive, or limited to two,[34] these norms of marriage would make less and less sense. Less able to understand the rationale for these marital norms, people would feel less bound to live by them. And less able to understand the value of marriage itself as a certain kind of union, even apart from the value of its emotional satisfactions, people would increasingly fail to see the intrinsic reasons they have for marrying[35] or staying with a spouse absent consistently strong feeling.

In other words, a mistaken marriage policy tends to distort people's understanding of the kind of relationship that spouses are to form and sustain. And that likely erodes people's adherence to marital norms that are essential to the common good. As University of Calgary philosopher Elizabeth Brake, who supports legal recognition of relationships of any size, gender composition, and allocation of responsibilities, affirms, "marriage does not simply allow access to legal entitlements; it also allows partners to signal the importance of their relationship *and to invoke social pressures on commitment*."[36]

Of course, marriage policy could go bad—and already has—in many ways. Many of today's public opponents of the revisionist view—for example, Maggie Gallagher, David Blankenhorn, the U.S. Catholic bishops—also opposed other legal changes detrimental to the conjugal conception of marriage.[37] We are focusing

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30. *See supra* Part I.B.1.

31. *See supra* Part I.B.2.

32. *See supra* Part I.B.3.

33. *See infra* Part II.C.

34. *See infra* Parts I.E.2–3.

35. Stanley Kurtz, *The End of Marriage in Scandinavia*, THE WKLY. STANDARD, Jan. 23, 2004, at 26, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp.

36. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 332 (2010) (emphasis added).

37. RICHARD DOERFLINGER, FAMILY POLICY IN THE UNITED STATES (1980), *available at* http://www.usccb.org/prolife/tdocs/FaithfulForLife.pdf; MAGGIE GALLAGHER, THE

here on the issue of same-sex unions, not because it alone matters, but because it is the focus of a live debate whose results have wide implications for reforms to strengthen our marriage culture. Yes, social and legal developments have already worn the ties that bind spouses to something beyond themselves and thus more securely to each other. But recognizing same-sex unions would mean cutting the last remaining threads. After all, underlying people's adherence to the marital norms already in decline are the deep (if implicit) connections in their minds between marriage, bodily union, and children. Enshrining the revisionist view would not just wear down but tear out this foundation, and with it any basis for reversing other recent trends and restoring the many social benefits of a healthy marriage culture.

Those benefits redound to children and spouses alike. Because children fare best on most indicators of health and wellbeing when reared by their wedded biological parents,[38] the further erosion of marital norms would adversely affect children, forcing the state to play a larger role in their health, education, and formation more generally.[39] As for the adults, those in the poorest and most vulnerable sectors of society would be hit the hardest.[40] But adults more generally would be harmed insofar as the weakening of social expectations supporting marriage would make it harder for them to abide by marital norms.

2. Obscuring the Value of Opposite-Sex Parenting As an Ideal

As we have seen in Part I.B, legally enshrining conjugal marriage socially reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children—an ideal whose value

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ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996); PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996); THE BOOK OF MARRIAGE: THE WISEST ANSWERS TO THE TOUGHEST QUESTIONS (Dana Mack & David Blankenhorn eds. 2001); THE FATHERHOOD MOVEMENT: A CALL TO ACTION (Wade F. Horn et al. eds., 1999); UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, MARRIAGE AND FAMILY LIFE (1975), *available at* http://www.usccb.org/prolife/programs/rlp/Marriage&FamilyLife75.pdf; Maggie Gallagher & Barbara Dafoe Whitehead, *End No-Fault Divorce?*, 75 FIRST THINGS 24 (1997).

38. *See supra* Part I.B.2.

39. *See* THE WITHERSPOON INSTITUTE, *supra* note 21.

40. They are clearly the primary victims of the erosion that has already taken place. *See* W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFFAIRS 81, 88–93 (2009).

is strongly corroborated by the best available social science.[41] Note, moreover, that the need for adoption where the ideal is practically impossible is no argument for redefining civil marriage, a unified legal structure of incentives meant precisely to *reinforce* the ideal socially and practically—to minimize the need for alternative, case-by-case provisions.

If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways.

In that case, to the extent that some continued to regard marriage as crucially linked to children, the message would be sent that a household of two women or two men is, as a rule, *just as appropriate* a context for childrearing, so that it does not matter (even as a rule) whether children are reared by both their mother and their father, or by a parent of each sex at all.

On the other hand, to the extent that the connection between marriage and parenting is obscured more generally, as we think it would be eventually,[42] *no* kind of arrangement would be proposed as an ideal.

But the currency of *either* view would significantly weaken the extent to which the social institution of marriage provided social pressures and incentives for husbands to remain with their wives and children. And to the extent that children were not reared by both parents, they would be prone to suffer in the ways identified by social science.[43]

3. Threatening Moral and Religious Freedom

Because the state's value-neutrality on this question (of the proper contours and norms of marriage) is impossible if there is to be any marriage law at all, abolishing the conjugal understanding of marriage would imply that committed same-sex and opposite-sex romantic unions are equivalently real marriages. The state would thus be forced to view conjugal-marriage supporters as

41. *See supra* Part I.B.2.
42. *See supra* Part I.C.1.
43. *See supra* Part I.B.2.

bigots who make groundless and invidious distinctions. In ways that have been catalogued by Marc Stern of the American Jewish Committee and by many other defenders of the rights of conscience, this would undermine religious freedom and the rights of parents to direct the education and upbringing of their children.[44]

Already, we have seen antidiscrimination laws wielded as weapons against those who cannot, in good conscience, accept the revisionist understanding of sexuality and marriage: In Massachusetts, Catholic Charities was forced to give up its adoption services rather than, against its principles, place children with same-sex couples.[45] In California, a U.S. District Court held that a student's religious speech against homosexual acts could be banned by his school as injurious remarks that "intrude[s] upon the work of the schools or on the rights of other students."[46] And again in Massachusetts, a Court of Appeals ruled that a public school may teach children that homosexual relations are morally good despite the objections of parents who disagree.[47]

The proposition that support for the conjugal conception of marriage is nothing more than a form of bigotry has become so deeply entrenched among marriage revisionists that a *Washington Post* feature story[48] drew denunciations and cries of journalistic bias for even implying that one conjugal-marriage advocate was "sane" and "thoughtful." Outraged readers compared the profile to a hypothetical puff piece on a Ku Klux Klan member.[49] A *New York Times* columnist has called proponents of conjugal marriage "bigots," even singling an author of this Article out by

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44. Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 11–14 (Douglas Laycock et al. eds., 2008). This collection of essays includes the views of scholars on both sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable where marriage is extended to same-sex couples.

45. Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, THE WKLY. STANDARD, May 5, 2006, at 20, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

46. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1122 (S.D. Cal. 2004).

47. *See, e.g.*, Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).

48. Monica Hesse, *Opposing Gay Unions With Sanity & a Smile*, WASH. POST., Aug. 28, 2009, at C01.

49. Andrew Alexander, *'Sanity & a Smile' and an Outpouring of Rage*, WASH. POST, Sept. 6, 2009, at A17.

name.[50] Meanwhile, organizations advocating the legal redefinition of marriage label themselves as being for "human rights" and against "hate."[51] The implications are clear: if marriage is legally redefined, believing what every human society once believed about marriage—namely, that it is a male-female union—will increasingly be regarded as evidence of moral insanity, malice, prejudice, injustice, and hatred.

These points are not offered as arguments for accepting the conjugal view of marriage. If our viewpoint is wrong, then the state could be justified in sometimes requiring others to treat same-sex and opposite-sex romantic unions alike, and private citizens could be justified in sometimes marginalizing the opposing view as noxious. Rather, given our arguments about what marriage actually is,[52] these are important warnings about the consequences of enshrining a seriously unsound conception of marriage. These considerations should motivate people who accept the conjugal view but have trouble seeing the effects of abolishing it from the law.

In short, marriage should command our attention and energy more than many other moral causes because so many dimensions of the common good are damaged if the moral truth about marriage is obscured. For the same reason, bypassing the current debate by abolishing marriage law entirely would be imprudent in the extreme. Almost no society that has left us a trace of itself has done without some regulation of sexual relationships. As we show in Part I.E.1 (and the data cited in Part I.B.2 suggest), the wellbeing of children gives us powerful prudential reasons to recognize and protect marriage legally.

D. If Not Same-Sex Couples, Why Infertile Ones?

Revisionists often challenge proponents of the conjugal view of marriage to offer a principled argument for recognizing the

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50. Frank Rich, Op-Ed., *The Bigots' Last Hurrah*, N.Y. TIMES, Apr. 19, 2009 (Week in Review), at 10.

51. *See, e.g.*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org (last visited Nov. 8, 2010) (self-identifying the organization as a 501(c)(4) advocacy group "working for lesbian, gay, bisexual, and transgender equal rights"); Annie Stockwell, *Stop the Hate: Vote No on 8*, ADVOCATE.COM (Aug. 20, 2008), http://www.advocate.com/Arts_and_Entertainment/People/Stop_the_Hate (framing opposition to California's Proposition Eight, which provides that "only marriage between a man and a woman is valid or recognized in California," as a struggle against hate).

52. *See supra* Part I.B.

unions of presumptively infertile couples that does not equally justify the recognition of same-sex partnerships. But this challenge is easily met.

1. Still Real Marriages

To form a real marriage, a couple needs to establish and live out the kind of union that would be completed by, and be apt for, procreation and child-rearing.[53] Since any true and honorable harmony between two people has value in itself (not merely as a means), each such comprehensive union of two people—each permanent, exclusive commitment sealed by organic bodily union—certainly does as well.

Any act of organic bodily union can seal a marriage, whether or not it causes conception.[54] The nature of the spouses' action now cannot depend on what happens hours later independently of their control—whether a sperm cell in fact penetrates an ovum. And because the union in question is an organic bodily union, it cannot depend for its reality on psychological factors. It does not matter, then, if spouses do not intend to have children or believe that they cannot. Whatever their thoughts or goals, whether a couple achieves bodily union depends on facts about what is happening between their bodies.[55]

It is clear that the bodies of an infertile couple can unite organically through coitus. Consider digestion, the individual body's process of nourishment. Different parts of that process—salivation, chewing, swallowing, stomach action, intestinal absorption of nutrients—are each in their own way oriented to the broader goal of nourishing the organism. But our salivation, chewing, swallowing, and stomach action remain oriented to that goal (and remain digestive acts) even if on some occasion our intestines do not or cannot finally absorb nutrients, and even if we know so before we eat.[56]

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53. *See supra* Parts I.B.1–3.

54. *See supra* Part I.B.1.

55. Whether bodily union is truly marital depends on other factors—for example, whether it is undertaken freely to express permanent and exclusive commitment. So bodily union is necessary but not sufficient for marital union.

56. Professor Andrew Koppelman has argued that "[a] sterile person's genitals are no more suitable for generation than an unloaded gun is suitable for shooting. If someone points a gun at me and pulls the trigger, he exhibits the behavior which, as behavior, is suitable for shooting, but it still matters a lot whether the

Similarly, the behavioral parts of the process of reproduction do not lose their dynamism toward reproduction if non-behavioral factors in the process—for example, low sperm count or ovarian problems—prevent conception from occurring, even if the spouses expect this beforehand. As we have argued,[57] bodies coordinating toward a single biological function for which each alone is not sufficient are rightly said to form an organic union.

Thus, infertility is no impediment to bodily union and therefore (as our law has always recognized) no impediment to marriage. This is because in truth marriage is not a mere means, even to the great good of procreation.[58] It is an end in itself, worthwhile for its own sake. So it can exist apart from children, and the state can recognize it in such cases without distorting the moral truth about marriage.

Of course, a true friendship of two men or two women is also valuable in itself. But lacking the capacity for organic bodily union, it cannot be valuable specifically *as a marriage*: it cannot be the comprehensive union[59] on which aptness for procreation[60] and distinctively marital norms[61] depend. That is why only a

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gun is loaded and whether he knows it." ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 87–88 (2002).

Professor Koppelman's objection is mistaken and misses an important point. Natural organs and organic processes are unlike man-made objects and artificial processes, which retain their dynamism toward certain goals only so long as we use them for those goals—which in turn presupposes that we think them capable of actually realizing those goals. That is, the function of man-made objects and processes is imposed on them by the human beings who use them. Thus, a piece of metal becomes a knife—an artifact whose function is to cut—only when we intend to use it for cutting. When it is no longer capable of cutting and we no longer intend to use it for cutting, it is no longer really a knife.

The same does not hold for the union between a man and a woman's human bodies, however, because natural organs are what they are (and thus have their natural dynamism toward certain functions) independently of what we intend to use them for and even of whether the function they serve can be brought to completion. Thus, in our example, a stomach remains a stomach—an organ whose natural function is to play a certain role in digestion—regardless of whether we intend it to be used that way and even of whether digestion will be successfully completed. Something analogous is true of sexual organs with respect to reproduction.

57. *See supra* Part I.B.1.

58. On the conjugal view, spouses pledge to form a union that is comprehensive and thus bodily, and thus procreative by nature. They do not and cannot pledge to form a union that results in procreation.

59. *See id.*

60. *See supra* Part I.B.2.

61. *See supra* Part I.B.3.

man and a woman can form a marriage—a union whose norms and obligations are decisively shaped by its essential dynamism toward children. For that dynamism comes not from the actual or expected presence of children, which some same-sex partners and even cohabiting brothers could have, and some opposite-sex couples lack, but from the way that marriage is sealed or consummated:[62] in coitus, which is organic bodily union.

2. Still in the Public Interest

Someone might grant the principled point that infertility is not an impediment to marriage, and still wonder what public benefit a marriage that cannot produce children would have. Why, in other words, should we legally recognize an infertile marriage?

Practically speaking, many couples believed to be infertile end up having children, who would be served by their parents' healthy marriage; and in any case, the effort to determine fertility would require unjust invasions of privacy. This is a concern presumably shared by revisionists, who would not, for example, require interviews for ascertaining partners' level of affection before granting them a marriage license.

More generally, even an obviously infertile couple—no less than childless newlyweds or parents of grown children—can live out the features and norms of real marriage and thereby contribute to a healthy marriage culture. They can set a good example for others and help to teach the next generation what marriage is and is not. And as we have argued[63] and will argue,[64] everyone benefits from a healthy marriage culture.

What is more, any marriage law at all communicates some message about what marriage is as a moral reality. The state has an obligation to get that message right, for the sake of people who might enter the institution, for their children, and for the community as a whole. To recognize only fertile marriages is to suggest that marriage is merely a means to procreation and childrearing—and not what it truly is, namely, a good in itself.[65] It may

62. *See supra* Part I.B.2.
63. *See supra* Part I.C.
64. *See infra* Part I.E.1.
65. *See supra* Parts I.B.1–2

also violate the principle of equality to which revisionists appeal,[66] because infertile and fertile couples alike can form unions of the same basic kind: real marriages. In the absence of strong reasons for it, this kind of differential treatment would be unfair.

Finally, although a legal scheme that honored the conjugal conception of marriage, as our law has long done, would not restrict the incidents of marriage to spouses who happen to have children, its success would tend to limit children to families led by legally married spouses. After all, the more effectively the law teaches the truth about marriage, the more likely people are to enter into marriage and abide by its norms. And the more people form marriages and respect marital norms, the more likely it is that children will be reared by their wedded biological parents. Death and tragedy make the gap impossible to close completely, but a healthier marriage culture would make it shrink. Thus, enshrining the moral truth of marriage in law is crucial for securing the great social benefits served by real marriage.

E. Challenges for Revisionists

Although the conjugal view is, despite its critics, not only inferable from certain widely accepted features of marriage and good for society, but also internally coherent, no version of the revisionists' view accounts for some of their own beliefs about marriage: namely, that the state has an interest in regulating some relationships, but only if they are romantic—presumptively sexual—and only if they are monogamous.

Though some unsatisfactory efforts have been made, revisionists are at a loss to give principled reasons for these positions.[67] Unless something like the conjugal understanding of marriage is correct, the first point becomes much harder to defend, and a principled defense of the second and third becomes impossible.

1. The State Has an Interest in Regulating Some Relationships?

Why does the state not set terms for our ordinary friendships? Why does it not create civil causes of action for neglecting or even betraying our friends? Why are there no civil ceremonies for forming friendships or legal obstacles to ending them? It is simply

66. *See supra* Part I.A.1.

67. Note that only sound arguments based on true *principles* can be inherently decisive.

because ordinary friendships do not affect the political common good in structured ways that justify or warrant legal regulation.

Marriages, in contrast, are a matter of urgent public interest, as the record of almost every culture attests—worth legally recognizing and regulating.[68] Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.[69]

Although some libertarians propose to "privatize" marriage,[70] treating marriages the way we treat baptisms and bar mitzvahs, supporters of limited government should recognize that marriage privatization would be a catastrophe for limited government.[71] In the absence of a flourishing marriage culture, families often fail to form, or to achieve and maintain stability. As absentee fathers and out-of-wedlock births become common, a train of social pathologies follows.[72] Naturally, the demand for governmental policing and social services grows. According to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.[73] Sociologists David Popenoe and Alan Wolfe have conducted research on Scandinavian countries that supports the conclusion that as marriage culture declines, state spending rises.[74]

This is why the state has an interest in marriages that is deeper than any interest it could have in ordinary friendships: Marriages

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68. *See* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 51–52 (2004).

69. *See supra* Part I.B.2.

70. *See, e.g.*, David Boaz, *Privatize Marriage: A Simple Soution to the Gay-Marriage Debate*, SLATE (Apr. 25, 1997), http://slate.com/id/2440/.

71. This is because, if the State failed to recognize the institution of marriage altogether, social costs would be imposed, in large part on children, due to the breakdown of traditional family structures which lend stability.

72. *See supra* Part I.B.2.

73. Isabel V. Sawhill, *Families at Risk*, *in* SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., 1999); *see also* THE WITHERSPOON INSTITUTE, *supra* note 21, at 15.

74. DAVID POPENOE, DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES, at xiv-xv (1988); ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 132–42 (1989).

bear a principled and practical connection to children.[75] Strengthening the marriage culture improves children's shot at becoming upright and productive members of society. In other words, our reasons for enshrining any conception of marriage, and our reasons for believing that the conjugal understanding of marriage is the correct one, are one and the same: the deep link between marriage and children. Sever that connection, and it becomes much harder to show why the state should take any interest in marriage at all. Any proposal for a policy, however, has to be able to account for why the state should enact it.

2. Only if They Are Romantic?

Some argue simply that the state should grant individuals certain legal benefits if they provide one another domestic support and care. But such a scheme would not be marriage, nor could it make sense of the other features of marriage law.

Take Joe and Jim. They live together, support each other, share domestic responsibilities, and have no dependents. Because Joe knows and trusts Jim more than anyone else, he would like Jim to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, inherit his assets if he dies first, and so on. The same goes for Jim.

So far, you may be assuming that Joe and Jim have a sexual relationship. But does it matter? What if they are bachelor brothers? What if they are best friends who never stopped rooming together after college, or who reunited after being widowed? Is there any reason that the benefits they receive should depend on whether their relationship is or even could be romantic? In fact, would it not be patently unjust if the state withheld benefits from them on the sole ground that they were *not* having sex?

Someone might object that everyone just knows that marriage has some connection to romance. It requires no explanation. But that is question-begging against Joe and Jim, who want their benefits. And it prematurely stops searching for an answer to why we tend to associate marriage with romance. The explanation brings us back to our central point: Romance is the kind of desire that aims at bodily union, and marriage has much to do with that.

Once this point is admitted, we return to the question of what counts as organic bodily union. Does hugging? Most

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75. *See supra* Part I.B.2.

think not. But then why is sex so important? What if someone derived more pleasure or felt intimacy from some other behavior (tennis, perhaps, as in our earlier example)? We must finally return to the fact that coitus, the generative act, uniquely unites human persons, as explained above.[76] But that fact supports the conjugal view: The reason that marriage typically involves romance is that it necessarily involves bodily union, and romance is the sort of desire that seeks bodily union. But organic bodily union is possible only between a man and a woman.

3. Only if They Are Monogamous?

Go back now to the example of Joe and Jim, and add a third man: John. To filter the second point out of this example, assume that the three men are in a romantic triad. Does anything change? If one dies, the other two are coheirs. If one is ill, either can visit or give directives. If Joe and Jim could have their romantic relationship recognized, why should not Joe, Jim, and John?

Again, someone might object, everyone just knows that marriage is between only two people. It requires no explanation. But this again begs the question against Joe, Jim, and John, who want their shared benefits and legal recognition. After all, it is not that each wants benefits as an individual; marriage is a union. They want recognition of their polyamorous relationship and the shared benefits that come with that recognition.

But if the conjugal conception of marriage is correct, it is clear why marriage is possible only between two people. Marriage is a comprehensive interpersonal union that is consummated and renewed by acts of organic bodily union[77] and oriented to the bearing and rearing of children.[78] Such a union can be achieved by two and only two because no single act can organically unite three or more people at the bodily level or, therefore, seal a comprehensive union of three or more lives at other levels. Indeed, the very comprehensiveness of the union requires the marital commitment to be undivided—made to exactly one other person; but such comprehensiveness, and the exclusivity that its orientation to children demands, makes sense only on

76. *See supra* Part I.B.1.
77. *See supra* Part I.B.1.
78. *See supra* Part I.B.2.

the conjugal view.[79] Children, likewise, can have only two parents—a biological mother and father. There are two sexes, one of each type being necessary for reproduction. So marriage, a reproductive type of community, requires two—one of each sex.

Some may object that this is a red herring—that no one is clamoring for recognition of polyamorous unions. Aren't we invoking an alarmist "slippery slope" argument?

It should be noted, to begin with, that there is nothing inherently wrong with arguing against a policy based on reasonable predictions of unwanted consequences. Such predictions would seem quite reasonable in this case, given that prominent figures like Gloria Steinem, Barbara Ehrenreich, and Cornel West have already demanded legal recognition of "multiple-partner" sexual relationships.[80] Nor are such relationships unheard of: *Newsweek* reports that there are more than 500,000 in the United States alone.[81]

Still, this Article does not aim to predict social or legal consequences of the revisionist view. The goal of examining the criteria of monogamy and romance (Part I.E.2) is to make a simple but crucial conceptual point: Any principle that would justify the legal recognition of same-sex relationships would also justify the legal recognition of polyamorous and non-sexual ones. So if, as most people—including many revisionists—believe, true marriage is essentially a sexual union of exactly two persons, the revisionist conception of marriage must be unsound. Any revisionist who agrees that the state is justified in recognizing only real marriages[82] must either reject traditional norms of monogamy and sexual consummation or adopt the conjugal view—which excludes same-sex unions.

University of Calgary's Professor Elizabeth Brake embraces this result and more. She supports "minimal marriage," in which "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves deter-

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79. *See supra* Part I.B.3.

80. *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), http://beyondmarriage.org/full_statement.html.

81. Jessica Bennett, *Only You. And You. And You: Polyamory—relationships with multiple, mutually consenting partners—has a coming-out party*, NEWSWEEK (July 29, 2009), http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

82. *See supra* Part I.A.

mining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each."[83] But the more that the parties to a "minimal marriage" determine on a case-by-case basis which rights and duties to exchange—as they must if a greater variety of recognized unions is available—the less the proposed policy itself accomplishes. As we deprive marriage policy of definite shape, we deprive it of purpose. Rigorously pursued, the logic of rejecting the conjugal conception of marriage thus leads, by way of formlessness, toward pointlessness: It proposes a policy of which, having removed the principled ground for any restrictions, it can hardly explain the benefit. Of course, some revisionists will base their support for their preferred norms instead on contingent calculations of prudence or feasibility, which we address next. But we challenge the many revisionists who support norms, like monogamy, as a matter of moral principle to complete the following sentence: *Polyamorous unions and nonsexual unions by nature cannot be marriages, and should not be recognized legally, because . . .*

F. Isn't Marriage Just Whatever We Say It Is?

Of those who do base marriage policy on contingent calculations of prudence or feasibility, some are what we might call "constructivists."[84] They deny that there is any reality to marriage independent of custom—any set of objective conditions that a relationship must meet to ground the moral privileges and obligations distinctive of that natural kind of union which we have called real marriage.[85] For constructivists, rather, marriage is whatever social and legal conventions say that it is, there being no separate moral reality for these conventions to track. Hence it is impossible for the state's policy to be wrong about marriage: different proposals are only more or less feasible or preferable.[86]

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83. Brake, *supra* note 36, at 303.

84. *See, e.g.*, Eskridge, *supra* note 5, at 1421–22 ("A social constructivist history emphasizes the ways in which marriage is 'constructed' over time, the institution being viewed as reflecting larger social power relations.").

85. *See id.* at 1434 ("[M]arriage is not a naturally generated institution with certain essential elements. Instead it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away.").

86. *See* Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting) ("Civil marriage is an institution created by the state . . . ."); Andersen v. King Cnty., 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting)

This view is belied by the principled distinction between the whole spectrum of ordinary friendships on the one hand, and on the other hand those inherently valuable relationships that first, organically extend two people's union along the bodily dimension of their being; second, bear an intrinsic orientation to childbearing and rearing; and third, require a permanent and exclusive commitment. Marriage's independent reality is only confirmed by the fact that the known cultures of every time and place have seen fit to regulate the relationships of actual or would-be parents to each other and to any children that they might have.

Even if marriage did not have this independent reality, our other arguments against revisionists would weigh equally against constructivists who favor legally recognizing same-sex unions: They would have no grounds at all for arguing that our view infringes same-sex couples' natural and inviolable right to marriage, nor for denying recognition to unions apparently just as socially valuable as same-sex ones, for marriage would be a mere fiction designed to efficiently promote social utility. The needs of children would still give us very strong utility-based reasons to have a marriage policy in the first place.[87] And the social damage that we could expect from further eroding the conjugal view would more than justify preserving it in the law.[88] This justification would only be strengthened by the possibility of meeting other pragmatic goals in ways that do not threaten the common good as redefining marriage would.[89] So even constructivists about marriage could and should oppose legally recognizing same-sex partnerships.

II

A. Why Not Spread Traditional Norms to the Gay Community?

Abstract principles aside, would redefining marriage have the positive effect of reinforcing traditional norms by increasing the number of stable, monogamous, faithful sexual unions to include many more same-sex couples? There are good reasons to think not.

("[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.").

87. *See supra* Part I.B.2.

88. *See supra* Parts I.C, I.D.2.

89. *See supra* Part II.B.

First, although the principles outlined above are abstract, they are not for that reason disconnected from reality. People will tend to abide less strictly by any given norms the less those norms make sense. And if marriage is understood as revisionists understand it—that is, as an essentially emotional union that has no principled connection to organic bodily union and the bearing and rearing of children—then marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense. In other words, those making this objection are right to suppose that redefining marriage would produce a convergence—but it would be a convergence in exactly the wrong direction. Rather than imposing traditional norms on homosexual relationships, abolishing the conjugal conception of marriage would tend to erode the basis for those norms in *any* relationship. Public institutions shape our ideas, and ideas have consequences; so removing the rational basis for a norm will erode adherence to that norm—if not immediately, then over time.

This is not a purely abstract matter. If our conception of marriage were right, what would you expect the sociology of same-sex romantic unions to be like? In the absence of strong reasons to abide by marital norms in relationships radically dissimilar to marriages, you would expect to see less regard for those norms in both practice and theory. And on both counts, you would be right.

Consider the norm of monogamy. Judith Stacey—a prominent New York University professor who testified before Congress against the Defense of Marriage Act and is in no way regarded by her academic colleagues as a fringe figure—expressed hope that the triumph of the revisionist view would give marriage "varied, creative, and adaptive contours . . . [leading some to] question the dyadic limitations of Western marriage and seek . . . small group marriages."[90] In their statement "Beyond Same-Sex Marriage," more than 300 "LGBT and allied" scholars and advocates—including prominent Ivy League professors—call for legal recognition of sexual relationships involving more than two partners.[91] Professor Brake thinks that we are obligated in justice to use such legal recognition to "denormalize[] heterosexual monogamy as a

90. *See* Gallagher, *supra* note 68, at 62.

91. *Beyond Same-Sex Marriage*, *supra* note 80.

way of life" for the sake of "rectifying past discrimination against homosexuals, bisexuals, polygamists, and care networks."[92]

What about the connection to children? Andrew Sullivan says that marriage has become "primarily a way in which two adults affirm their emotional commitment to one another."[93] E.J. Graff celebrates the fact that recognizing same-sex unions would make marriage "ever after stand for sexual choice, for cutting the link between sex and diapers."[94]

And exclusivity? Mr. Sullivan, who extols the "spirituality" of "anonymous sex," also thinks that the "openness" of same-sex unions could enhance the relationships of husbands and wives:

> Same-sex unions often incorporate the virtues of friendship more effectively than traditional marriages; and at times, among gay male relationships, the openness of the contract makes it more likely to survive than many heterosexual bonds. . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman. . . . [S]omething of the gay relationship's necessary honesty, its flexibility, and its equality could undoubtedly help strengthen and inform many heterosexual bonds.[95]

Of course, "openness" and "flexibility" here are Sullivan's euphemisms for sexual infidelity.

Indeed, some revisionists have positively embraced the goal of weakening the institution of marriage. "[Former President George W.] Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage."[96] Victoria Brownworth is no right-wing traditionalist, but an advocate of legally recognizing gay partnerships. She continues: "It most certainly will do so, and that will make marriage a far better concept than it previously has been."[97] Professor Ellen

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92. Brake, *supra* note 36, at 336, 323.

93. Andrew Sullivan, *Introduction*, *in* SAME-SEX MARRIAGE: PRO AND CON: A READER, at xvii, xix (Andrew Sullivan ed., 1st ed. 1997).

94. E.J. GRAFF, *Retying the Knot*, *in* SAME-SEX MARRIAGE: PRO AND CON, *supra* note 93, at 134, 136.

95. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (1996).

96. Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, *in* I DO/I DON'T: QUEERS ON MARRIAGE 53, 58–59 (Greg Wharton & Ian Philips eds., 2004).

97. *Id.* at 59.

Willis, another revisionist, celebrates that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart."[98]

Michelangelo Signorile, a prominent gay activist, urges same-sex couples to "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution."[99] Same-sex couples should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely[, because t]he most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."[100]

Some revisionist advocates, like Jonathan Rauch, sincerely hope to preserve traditional marriage norms.[101] But it is not puzzling that he is severely outnumbered: other revisionists are right to think that these norms would be undermined by redefining marriage.

Preliminary social science backs this up. In the 1980s, Professors David McWhirter and Andrew Mattison, themselves in a romantic relationship, set out to disprove popular beliefs about gay partners' lack of adherence to sexual exclusivity. Of 156 gay couples that they surveyed, whose relationships had lasted from one to thirty-seven years, more than sixty percent had entered the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years.[102] Professors McWhirter and Mattison concluded: "The expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals."[103] Far from disproving popular beliefs, they confirmed them.

On the question of numbers of partners, it is important to avoid stereotypes, which typically exaggerate unfairly, but also to consider the social data in light of what is suggested in this Article about the strength, or relative weakness, of the rational *basis* for permanence and exclusivity in various kinds of relationships. A

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98. Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION, July 5, 2004, at 16, 16.

99. Michelangelo Signorile, *Bridal Wave*, OUT, Dec.–Jan. 1994, at 68, 161.

100. *Id.*

101. *See generally* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2005).

102. DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252–53 (1984).

103. *Id.* at 3.

1990s U.K. survey of more than 5,000 men found that the median numbers of partners for men with exclusively heterosexual, bisexual, and exclusively homosexual inclinations over the previous five years were two, seven, and ten, respectively.[104] A U.S. survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was over 2.5 times as many as the average for heterosexual men.[105]

So there is no reason to believe, and abundant reason to doubt, that redefining marriage would make people more likely to abide by its norms. Instead, it would undermine people's grasp of the intelligible basis for those norms in the first place. Nothing more than a Maginot line of sentiment would be left to support belief in sexual fidelity and hold back the change of attitudes and mores that a rising tide of revisionists approvingly expect same-sex marriage to produce.

Nor is legal regulation the answer; the state cannot effectively encourage adherence to norms in relationships where those norms have no deep rational basis. Laws that restrict people's freedom for no rational purpose are not likely to last, much less to have significant success in changing people's behavior by adherence. On the other hand, traditional marriage laws merely encourage adherence to norms in relationships where those norms already have an independent rational basis.[106] Preliminary evidence suggests that same-sex couples in jurisdictions that legally recognize their unions tend to be sexually "open" by design. The *New York Times* reported on a San Francisco State University study: "[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that . . . ."[107] The argument from conservatism is very weak indeed.

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104. C.H. Mercer et al., *Behaviourally bisexual men as a bridge population for HIV and sexually transmitted infections? Evidence from a national probability survey*, 20 INT'L J. STD & AIDS 87, 88 (2009).

105. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 314–16 (1994).

106. *See supra* Part I.B.3.

107. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 29, 2010, at A17, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us.

B. What About Partners' Concrete Needs?

Andrew Sullivan questions one of the authors of this Article:

> It also seems to me to be important to ask George what he proposes should be available to gay couples. Does he believe that we should be able to leave property to one another without other family members trumping us? That we should be allowed to visit one another in hospital? That we should be treated as next-of-kin in medical or legal or custody or property tangles? Or granted the same tax status as straight married couples? These details matter to real people living actual lives, real people the GOP seems totally uninterested in addressing.[108]

First, the benefits cited have nothing to do with whether the relationship is or could legally be romantic or sexual. But treating essentially similar cases as if they were radically different would be unfair. So these benefits would need to be available to all types of cohabitation if they were made available to any.[109] If the law grants them to a cohabiting male couple in a sexual partnership, surely it should grant them, say, to two interdependent brothers who also share domestic responsibilities and have similar needs. The two brothers' relationship would differ in many ways from that of two male sexual partners, but not in ways that affect whether it makes sense to grant them domestic benefits.

But a scheme that granted legal benefits to any two adults upon request—for example, romantic partners, widowed sisters, or cohabiting celibate monks—would not be a marriage scheme. It would not grant legal benefits on the presumption that the benefitted relationship is sexual. So we have no objection to this policy in principle. It would not in itself obscure the nature and norms of marriage.

Still, there are questions to answer before such sexually-neutral benefits packages are granted. What common good would be served by regulating or so benefitting what are essentially ordinary friendships? Why would that good be served only by relationships limited to two people? Can three cohabiting celibate monks not do as much good for each other or society as two? And whatever common good is at stake, does it really depend on, and

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108. Andrew Sullivan, *Only the Right Kind of Symbolic Sex*, THE DAILY DISH (Aug. 4, 2009, 11:11 AM), http://andrewsullivan.theatlantic.com/the_daily_dish/2009/08/only-the-right-kind-of-symbolic-sex.html.

109. *See supra* Part I.E.1.

justify, limiting people's freedom to form and dissolve such friendships, as legal regulation would inevitably do? Does it justify diluting the special social status of real marriages, as generic schemes of benefits would inevitably do?

The value of such a policy—at least for individuals who share the responsibilities of living together—seems to lie in its benefits to the individuals themselves, like hospital-visitation and inheritance rights. But these could be secured just as well by distinct legal arrangements (like power of attorney), which we think that anyone should be free to make with anyone else. Why create a special legal package for generic partnerships? There may be an argument for this in some jurisdictions where, for example, people would otherwise lack the education or resources to make their own legal arrangements. But if such a scheme is not susceptible to the powerful (and, we think, decisive) objections that apply to legal redefinitions of marriage, that is because it is not a redefinition of marriage at all.

C. Doesn't the Conjugal Conception of Marriage Sacrifice Some People's Fulfillment for Others'?

Some might be unmoved by our arguments because, as they see it, we treat homosexually oriented people as if they were invisible, leaving them no real opportunity for fulfillment. After all, they might say, human beings need meaningful companionship, which involves sex and public recognition. This objection is rooted in a misunderstanding not only of the nature of marriage, but also of the value of deep friendship.

Our view about marriage, like most people's views about any moral or political issue, is motivated precisely by our concern for the good of all individuals and communities—that is, for the common good. We have offered reasons for thinking that this good is served, not harmed, by traditional marriage laws; and harmed, not served, by abolishing them in favor of the revisionist understanding.

But to see a few of the problems with this objection, consider some of its hidden assumptions:

> *First*: Fulfillment is impossible without regular outlets for sexual release.
>
> *Second*: Meaningful intimacy is impossible without sex.
>
> *Third*: Fulfilling relationships are impossible without legal recognition.

> *Fourth*: Homosexual orientation is a basic human identity, such that any state that doesn't actively accommodate it necessarily harms or disregards a class of human beings.

Some of these assumptions are radically new in the history of ideas, and themselves depend on further significant, often uncritically accepted assumptions. More to the point, though, all four are either dubious or irrelevant to this debate.

Because bodies are integral parts of the personal reality of human beings,[110] only coitus can truly unite persons organically and, thus, maritally.[111] Hence, although the state can grant members of any household certain legal incidents, and should not prevent any from making certain private legal arrangements,[112] it cannot give same-sex unions what is truly distinctive of marriage—i.e., it cannot make them actually comprehensive, oriented by nature to children, or bound by the moral norms specific to marriage.[113] At most the state can call such unions marital, but this would not—because, in moral truth, it cannot—make them so; and it would, to society's detriment, obscure people's understanding about what truly marital unions do involve. In this sense, it is not the state that keeps marriage from certain people, but their circumstances that unfortunately keep certain people from marriage (or at least make marrying much harder). This is so, not only for those with exclusively homosexual attractions, but also for people who cannot marry because of, for example, prior and pressing family obligations incompatible with marriage's comprehensiveness and orientation to children, inability to find a mate, or any other cause. Those who face such difficulties should in no way be marginalized or otherwise mistreated, and they deserve our support in the face of what are often considerable burdens. But none of this establishes the first mistaken assumption, that fulfillment is impossible without regular outlets for sexual release—an idea that devalues many people's way of life. What we wish for people unable to marry because of a lack of any attraction to a member of the opposite sex is the same as what we wish for people who can-

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110. *See supra* Part I.B.1.

111. Again, we do not think all acts of coitus even within marriages are marital. Unloving coitus between spouses, especially where it is based on coercion or manipulation, is not truly marital—it fails to embody and express true (comprehensive) spousal communion.

112. *See supra* Part II.B.

113. *See supra* Parts I.B.1–3.

not marry for any other reason: rich and fulfilling lives. In the splendor of human variety, these can take infinitely many forms. In any of them, energy that would otherwise go into marriage is channeled toward ennobling endeavors: deeper devotion to family or nation, service, adventure, art, or a thousand other things.

But most relevantly, this energy could be harnessed for deep friendship.[114] Belief in the second hidden assumption, that meaningful intimacy is not possible without sex, may impoverish the friendships in which single people could find fulfillment—by making emotional, psychological, and dispositional intimacy seem inappropriate in nonsexual friendships. We must not conflate depth of friendship with the presence of sex. Doing so may stymie the connection between friends who feel that they must distance themselves from the possibility or appearance of a sexual relationship where none is wanted.[115] By encouraging the myth that there can be no intimacy without romance, we deny people the wonder of knowing another as what Aristotle so aptly called a second self.[116]

The third assumption is baffling (but not rare) to find in this context. Even granting the second point, legal recognition has nothing to do with whether homosexual acts should be banned or whether anyone should be prevented from living with anyone else. This debate is not about anyone's private behavior. Instead, public recognition of certain relationships and the social effects of such recognition are at stake. Some have described the push for gay marriage as an effort to legalize or even to decriminalize such unions. But you can only de-criminalize or legalize what has been banned, and these unions are not banned. (By contrast, bigamy really is banned; it is a crime.) Rather, same-sex unions are simply not recognized as marriages or granted the benefits that we predicate on marriage. Indeed, recognizing

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114. Many same-sex attracted people who do not support legally recognizing same-sex unions have explored the special value for themselves of deep friendships. *See, e.g.*, John Heard, *Dreadtalk: 'Holy Sex & Christian Friendship' John Heard-Life Week 2009 At The University of Sydney-Remarks*, DREADNOUGHTS (May 4, 2009, 3:33 PM), http://johnheard.blogspot.com/2009/02/dreadtalk-holy-sex-christian-friendship.html.

115. For more on the effects of a sexualized culture on friendship, see Anthony Esolen, *A Requiem for Friendship: Why Boys Will Not Be Boys & Other Consequences of the Sexual Revolution*, 18 TOUCHSTONE MAGAZINE, Sept. 2005, at 21, *available at* http://www.touchstonemag.com/archives/article.php?id=18-07-021-f.

116. *See* ARISTOTLE, NICOMACHEAN ETHICS 260 (Terrence Irwin trans., Hackett Pub. Co. 1985).

same-sex unions would limit freedom in an important sense: it would require everyone else to treat such unions as if they were marriages, which citizens and private institutions are free to do or not under traditional marriage laws.

The fourth assumption draws an arbitrary distinction between homosexual and other sexual desires that do not call for the state's specific attention and sanction. It often leads people to suppose that traditional morality unfairly singles out people who experience same-sex attractions. Far from it. In everyone, traditional morality sees foremost a person of dignity whose welfare makes demands on every other being that can hear and answer them. In everyone, it sees some desires that cannot be integrated with the comprehensive union of marriage. In everyone, it sees the radical freedom to make choices that transcend those inclinations, heredity, and hormones; enabling men and women to become authors of their own character.

D. Isn't It Only Natural?

The discussion in the last section of whether homosexual orientation is a basic human identity relates to another objection, the answer to which may be inferred from the structure of arguments until this point. Some people on both sides of this debate are concerned with whether same-sex attractions are innate—and therefore, some theists conclude, intended by God—or merely a result of outside factors.[117] If homosexual desire is innate, they suppose, then same-sex unions should be legally recognized. After all, how could anything natural or intended by God be an impediment to a good such as marriage?

We do not pretend to know the genesis of same-sex attraction, but we consider it ultimately irrelevant to this debate. On this point, we agree with same-sex marriage advocate Professor John Corvino:

> The fact is that there are plenty of genetically influenced traits that are nevertheless undesirable. Alcoholism may have a genetic basis, but it doesn't follow that alcoholics ought to drink excessively. Some people may have a genetic predisposition to violence, but they have no more right to attack their neighbors than anyone else. Persons with such

117. Phyllis Zagano, *Nature vs. Nurture*, NATIONAL CATHOLIC REPORTER (Sept. 30, 2010), http://ncronline.org/blogs/just-catholic/nature-vs-nurture.

> tendencies cannot say "God made me this way" as an excuse for acting on their dispositions.[118]

Neither we nor Professor Corvino mean to equate same-sex attraction with diseases like alcoholism or injustices like violence against one's neighbor. The point is simply that whether same-sex unions can be marriages has nothing to do with what causes homosexual desire. Surely the fact that something is natural in the sense that it isn't caused by human choice proves nothing: Disabilities or pressing special obligations can be natural in that sense, and yet they may prevent some people from getting married.

Similarly, if we discovered (plausibly) a genetic basis for male desire for multiple partners, that would not be an argument for polygamy; and if we discovered (implausibly) that no sexual desire had a genetic basis, that would not be an argument against marriage in general. There is simply no logical connection between the origin of same-sex desire and the possibility of same-sex marriage.

E. Doesn't Traditional Marriage Law Impose Controversial Moral and Religious Views on Everyone?

This objection comes at the end for a reason. By now, as promised in the introduction, this Article has made a case for enshrining the conjugal view of marriage and addressed many theoretical and practical objections to it, without appeals to revelation or religious authority of any type. This reflects a crucial difference between marriage and matters of purely religious belief and practice, such as the doctrines of the Trinity and Incarnation, the enlightenment of the Buddha, baptisms, bar mitzvahs, and rules concerning ritual purification, fasting and prayer. Unlike these matters, the human good of marriage, and its implications for the common good of human communities, can be understood, analyzed, and discussed without engaging specifically theological issues and debates.

Of course, many religions do have ceremonies for recognizing marriages and teach the conjugal view of marriage (or

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118. John Corvino, *Nature? Nurture? It Doesn't Matter*, INDEPENDENT GAY FORUM (Aug. 12, 2004), http://igfculturewatch.com/2004/08/12/nature-nurture-it-doesnt-matter/. Professor Corvino's piece deals specifically with the morality of same-sex relations, which is not our topic here. But the same points apply.

something much closer to it than to the revisionist view). And many people are motivated to support the conjugal view for reasons that include religious ones. But none of these facts settles the debate about which view of marriage should be embodied in public policy. After all, some religions today teach, and motivate people's advocacy of, the revisionist view. Thus, religious motivations must disqualify both the conjugal and the revisionist views from policy debates, or neither.

Even so, some would say, enshrining the conjugal view of marriage involves privileging a controversial moral belief. Again, such an argument would equally exclude the revisionist view. Both would involve claims about which types of relationship we should publicly honor and encourage—and, by implication, which we should not. The revisionist view, at least in the version described above, would honor and privilege monogamous same-sex unions but not, for example, polyamorous ones. As we have pointed out,[119] our law will teach one lesson or another about what kinds of relationship are to be encouraged, unless we abolish marriage law, which we have strong reasons not to do.[120] In this sense, there is no truly neutral marriage policy.

Finally, it is important to realize that there is nothing special in these respects about marriage. Many other important policy issues can be resolved only by taking controversial moral positions, including ones on which religions have different teachings: for example, immigration, poverty relief, capital punishment, and torture. That does not mean that the state cannot, or should not, take a position on these issues. It does mean that citizens owe it to one another to explain with candor and clarity the reasons for their positions, as we have tried to do here.

CONCLUSION

A thought experiment might crystallize our central argument. Almost every culture in every time and place has had some institution that resembles what we know as marriage. But imagine that human beings reproduced asexually and that human offspring were self-sufficient. In that case, would *any* culture have

119. *See supra* Part I.D.2.
120. *See supra* Parts I.B.2, I.E.2.

developed an institution anything like what we know as marriage? It seems clear that the answer is no.

And our view explains why not. If human beings reproduced asexually, then organic bodily union—and thus comprehensive interpersonal union—would be impossible, no kind of union would have any special relationship to bearing and rearing children, and the norms that these two realities require would be at best optional features of any relationship. Thus, the essential features of marriage would be missing; there would be no human need that only marriage could fill.

The insight that pair bonds make little sense, and uniquely answer to no human need, apart from reproductive-type union merely underscores the conclusions for which we have argued: Marriage is the kind of union that is shaped by its comprehensiveness and fulfilled by procreation and child-rearing. Only this can account for its essential features, which make less sense in other relationships. Because marriage uniquely meets essential needs in such a structured way, it should be regulated for the common good, which can be understood apart from specifically religious arguments. And the needs of those who cannot prudently or do not marry (even due to naturally occurring factors), and whose relationships are thus justifiably regarded as different in kind, can be met in other ways.

So the view laid out in this Article is not simply the most favorable or least damaging trade-off between the good of a few adults, and that of children and other adults. Nor are there "mere arguments" on the one hand squaring off against people's "concrete needs" on the other. We reject both of these dichotomies. Marriage understood as the conjugal union of husband and wife really serves the good of children, the good of spouses, and the common good of society. And when the arguments against this view fail, the arguments for it succeed, and the arguments against its alternative are decisive, we take this as evidence that it serves the common good. For reason is not just a debater's tool for idly refracting arguments into premises, but a lens for bringing into focus the features of human flourishing.