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## BAD ARGUMENTS AGAINST GAY MARRIAGE

Dale Carpenter\*

The debate over gay marriage has been marred by bad arguments on both sides of the issue. This essay refutes the three worst arguments against gay marriage.

A few preliminary disclaimers, qualifications, and definitions are in order. First, I support gay marriage as a policy matter, so perhaps I am biased about what makes an argument against gay marriage especially bad, and therefore run the related risk of making bad arguments against bad arguments. But I am familiar enough with the arguments on both sides of this controversy that I think I know a stinker when I smell one. There are some credible—though ultimately unpersuasive—arguments against gay marriage, dealing mostly with respect for long-standing traditions,<sup>1</sup> empirical uncertainty about the effect of gay couples on their children,<sup>2</sup> and the possibility of unintended cultural consequences.<sup>3</sup> These types of arguments have to be addressed carefully by advocates of gay marriage. But that is not my purpose here. In this essay, I pick the low-hanging fruit.

Second, I address only the *common* bad arguments against gay marriage, the kind that many people find persuasive. Of course, there are many *uncommon* bad arguments against gay marriage. For example, I recently heard someone say that we have to prevent gay marriage so that we can win the war in Iraq. This strikes me as involving an awfully long causal chain.

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\* Associate Professor of Law, University of Minnesota Law School. I would like to thank the participants in this symposium, who listened politely while I disparaged their dearest ideas. For their comments on this paper, I would like to thank Stephen Clark, Mary Lou Fellows, Brett McDonnell, Jon Rauch, Daria Roithmayr, Mark Strasser, and Eugene Volokh. I would also like to thank my research assistant, Kari Bomash, for her invaluable help and comments on this paper.

<sup>1</sup> See, e.g., *Lewis v. Harris*, 875 A.2d 259, 268-69 (N.J. Super. Ct. App. Div. 2005).

<sup>2</sup> See, e.g., Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2112 (2005).

<sup>3</sup> See, e.g., Maimon Schwarzschild, *Editor's Symposium: The Meaning of Marriage: Marriage, Pluralism, and Change: A Response to Professor Wax*, 42 SAN DIEGO L. REV. 1115, 1120 (2005).

Third, I do not disparage the smarts of anyone who has made these bad arguments. Smart people sometimes make bad arguments. Indeed, many gay-marriage opponents have been very skilled at putting the best possible face on these arguments. But a pig wearing lipstick is still a pig.

Fourth, what makes a bad argument bad? I have in mind three types of flaws that make an argument bad. An argument may suffer only one of these flaws, from two of them, or in the case of a truly atrocious argument, from all three. The first type is the *logical flaw*, which is characterized by an internal incoherence. For example, a logical flaw exists where a conclusion does not follow from the asserted premise(s), as in “blue is the color of the sky, so Shakespeare really did write those plays,” or where the argument asserts the conclusion as the argument, as in “the flat tax is a good idea, so we should have a flat tax.”

The second type of flaw is the *experiential flaw*. This type of flaw relies on claims or premises that either do not match up with common real-world experience, such as “three-year-olds are mature enough to vote,” or that make claims that may be true but that are highly contestable and are without adequate justification within the argument itself, as in “intelligent design as an explanation for human development is true, so it should be taught in science classes.”

The third type of flaw is the *political flaw*. An argument suffering a political flaw is counter-productive in that making the argument actually undermines the case in the eyes of many people who will evaluate it. This type of argument, whether right or wrong on its own merits, urges people to reach what they already agree is the correct result for *a reason they dislike*. This may actually cause them to doubt whether the result they thought was right is indeed right. For example, “blacks and whites should be separated in a prison race riot *because blacks are inferior*.”

Finally, I am addressing what I think are bad *policy* arguments. This is not necessarily the same as saying that these arguments would be unsuccessful if made in the context of constitutional litigation challenging the exclusion of gay couples from marriage. Consider that a good deal of policy drivel will satisfy the rational-basis test in constitutional law. If the

rational-basis test is the appropriate standard of review for gay-marriage claims, some or all of the bad arguments discussed here may prove successful. For example, under rational-basis review, the fact that existing marriage laws allow non-procreative heterosexual couples to marry might not be fatal, even where procreation is the state's claimed purpose for excluding gay couples.<sup>4</sup> But I am not interested here in making constitutional arguments about marriage. Even if the arguments I rebut could satisfy constitutional scrutiny, they are still bad arguments as a policy matter.

With all that out of the way, let's wade into the "Big Muddy" of bad arguments against gay marriage: the definitional argument, the procreation argument, and the polygamy slippery-slope argument.

## I. THE DEFINITIONAL ARGUMENT AGAINST GAY MARRIAGE<sup>5</sup>

### A. *The Argument and its Variants*

The definitional argument generally takes this form: "Marriage is *only* the union of one man and one woman. What same-sex couples are asking for is not marriage. Therefore, same-sex couples cannot be married."

There are some slight variations on this form of argument that are really only the definitional argument masquerading as something else. First, there is the consummation argument, which goes something like this: "A marriage does not exist unless consummated, which necessarily (that is, definitionally) involves the penis-meets-vagina sexual act of a man and a woman." *The New York Times* reported that a version of this argument turned up recently: "During debate over whether Massachusetts should ban same-sex marriage by state constitutional amendment, state representative

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<sup>4</sup> Compare *Standhart v. Super. Ct. of Ariz.*, 77 P.3d 451 (Ariz. App. Div. 2003) (procreation justification satisfies rational-basis review), with *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (procreation justification fails rational-basis review).

<sup>5</sup> The proceeding section is an expanded version of a blog entry by the author, which is available at The Volokh Conspiracy website, <http://volokh.com/posts/1130939774.shtml> (Nov. 5, 2005, 08:56 EST).

Philip Travis, a Democrat who opposes gay marriage, argued, ‘The union of two women and two men can never consummate a marriage. It’s physically impossible. We can’t get around that.’”<sup>6</sup> This consummation variation of the definitional argument is another way of saying that each marriage requires a functioning penis and a vagina, or that marriage *is* only the union of a man and a woman.<sup>7</sup>

A second variation of the definitional argument involves some analogy to species-confusion. A common example is: “Gay marriage is like trying to call a cat a dog. A cat will never be a dog no matter how much you try to call it a dog, or treat it like a dog, or pretend it’s a dog.” One can substitute an infinite variety of species combinations for “cat” and “dog” here, resulting in the same variation of the definitional argument. The species-confusion variation is another way of saying that marriage is, definitionally, male-female. It is saying, without further argument, that same-sex couples cannot be married just as dogs cannot be cats.

The third variation of the definitional argument involves an analogy to a government benefits program. For example: “Allowing gay marriage is like allowing non-veterans to get veterans’ benefits. Non-veterans are not part of the veterans’ program, just like gay couples are not part of marriage. The marriage program is not for gay couples, just like the veterans’ program is not for non-veterans.” Or, as one commentator put it: “Two people of the same-sex cannot ‘marry’ any more than a man can claim a right to ‘maternity’ leave.”<sup>8</sup> One can easily substitute young adults

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<sup>6</sup> Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

<sup>7</sup> The consummation variation of the definitional argument has the advantage of apparent legal support in the form of state statutes that provide for annulling a marriage that goes unconsummated. “Physical defects and incapacities which render a party unable to consummate the marriage, and which are incurable are, under most statutes, grounds for annulment . . . .” 4 AM. JUR. 2D *Annulment of Marriage* § 30 (1962) (footnote omitted). However, this apparent legal support for the consummation argument is just another manifestation of the very policy being challenged by supporters of gay marriage – the limitation of marriage to male-female couples. So it is a restatement of the controversy, not a support for one side.

<sup>8</sup> E.g., Stephen C. Whiting, *Same-sex Marriage Pros and Cons: ‘Gay Marriage’ is an Oxymoron*, 19 ME. B.J. 79, 83 (2004); *id.* at 85 (“It is not a denial of equal protection to

seeking retirement benefits from Social Security, or renters seeking a home-buyer's mortgage-interest deduction from their taxes, to achieve the same result. The variations are as numerous as the government benefits programs that inspire them. This variation of the definitional argument, too, is another way of arguing that marriage is definitionally male-female. It says, without further argument, that same-sex couples simply cannot qualify for marriage, just as non-veterans cannot qualify for veterans' benefits.

What is distinctive about the definitional argument is that it makes no attempt to defend the male-female definition of marriage as a normative matter. The definition itself is asserted unadorned as an argument against gay marriage. As soon as a normative defense of the male-female definition is attached to the argument (for example, "the male-female definition of marriage is right *because children need mothers and fathers*"), the argument is no longer the pure definitional argument, as I use that term here, and thus is not one of the bad arguments I am addressing.

### ***B. Why the Argument is Attractive***

The definitional argument was once among the most common responses to claims for gay marriage. When the idea of gay marriage first gained some currency in the aftermath of the gay "Stonewall Riots" of 1969 in New York City,<sup>9</sup> the idea of two men or two women marrying was so outlandish that the definitional argument was the most immediate expression available for sheer collective astonishment. When people hear an idea that they have never heard before and that seems outrageous, the best they can often do is to respond, "*Of course not.*" Culturally and politically, this is accepted as a sufficient response, at first. An articulated defense of the male-female definition of marriage was unnecessary prior to the modern gay-rights movement because hardly anyone supposed marriage could ever be anything other than a male-female union.<sup>10</sup>

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limit a government program to those who are physically capable of participating in the program.").

<sup>9</sup> See Ken Harlan, *Stone Wall and Beyond: Lesbian and Gay Culture*, [www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html](http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html).

<sup>10</sup> Some commentators seem miffed even to have to address arguments for gay marriage. See, e.g., Whiting, *supra* note 9, at 79 ("When I grew up, everyone knew what marriage

If the definitional argument retains any appeal today it is chiefly for two reasons. First, if it is right, the definitional argument is devastating to the cause of gay marriage. Saying the words “gay marriage” would be akin to saying table-chair.<sup>11</sup> It makes no sense. Yes, one could try to pass off a table as a chair, and one could even use a table as a chair, but we know these are simply different things. Consider that for the definitionalist “same-sex marriage” is as alien to the basic definition of the institution as “one-person marriage.”<sup>12</sup>

Second, the definitional argument is alternative because it does not entail making any normative claims about gay people or gay couples. We do not exclude gay couples from marriage because gays are bad, sinful, pathological, too promiscuous, or too unstable to deserve the institution. We need not make contestable empirical claims about gays, gay couples, or marriage. We exclude gay couples because what they want does not exist. They are asking us to do the impossible. Indeed, to say they have been “excluded” from anything makes no sense because one cannot be excluded from the nonexistent. The definitional argument, above all, is clean.

### C. *Who Makes the Argument*

Who makes the definitional argument? Certainly, common citizens’ first reaction to the idea of gay marriage is often the definitional

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was. Unfortunately, in the past ten years, thanks to some ‘more enlightened’ state supreme courts, no one is quite sure what marriage is anymore.”).

<sup>11</sup> Jeffrey Ventrella, an attorney for the anti-gay-marriage Alliance Defense Fund who tours the country speaking against gay marriage, prefers “square circle,” though he also likes “onion-less onion rings” and “married bachelors.” Jeffrey J. Ventrella, *Square Circles?!! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 724 (2004-05).

[T]o advocate same-sex “marriage” is logically equivalent to seeking to draw a “square circle”: One may passionately and sincerely persist in pining about square circles, but the fact of the matter is, one will never be able to actually draw one. . . . The public square has no room for square circles, because like the Tooth Fairy, they do not really exist.

*Id.* at 682-83.

<sup>12</sup> Thanks to Stephen Clark for this formulation.

one. Only after this initial reaction do people begin to think of other reasons why only opposite-sex couples should be allowed to marry.

Early on, courts routinely made the definitional argument when confronted with gay couples who initiated legal challenges against state laws limiting marriage to opposite-sex couples.<sup>13</sup> To some extent these early courts seem to have been defining marriage for purposes of positive law. They were construing state statutes that did not explicitly limit marriage to one male and one female. But, faced with various federal and state constitutional claims, these early courts' use of the definition seems normative as well. For example, consider the reasoning of the Washington State Appeals Court in *Singer v. Hara*, which rejected a state constitutional claim for same-sex marriage based on a state constitutional provision guaranteeing the equality of the sexes.<sup>14</sup> The court reasoned:

[t]here [was] no analogous sexual classification involved in the instant case because [the] appellants [were] not being denied entry into the marriage relationship because of their sex; rather, they [were] being denied entry into the marriage relationship *because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.*<sup>15</sup>

A Kentucky appeals court similarly responded to a same-sex marriage claim: “[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license *because what they propose is not a marriage.*”<sup>16</sup> Both of these statements are classic examples of the definitional argument: an assertion of the definition unaccompanied by any substantive argument in defense of the definition.<sup>17</sup>

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<sup>13</sup> See *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super. Ct. Law Div. 2003).

<sup>14</sup> *Singer*, 522 P.2d at 1197.

<sup>15</sup> *Id.* at 1192 (emphasis added).

<sup>16</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (emphasis added).

<sup>17</sup> See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500-01 (1971) (citing the definition of marriage from BLACK'S LAW DICTIONARY 1123 (4th ed. 1951)). “Marriage is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose



Academics have generally avoided the pure definitional argument, especially of late. But there are glimpses of it in some academic commentary, especially from natural-law theorists.<sup>18</sup> Professor Gerard Bradley asserts that “[t]he law has never recognized any same-sex couples as married because notwithstanding their subjective hopes, dreams, and beliefs, *marriage between a man and another man, or between two women, is objectively impossible.*”<sup>19</sup> Professor Bradley wrote this statement after “the law” recognized gay marriages in Belgium and the Netherlands, and before “the law” recognized gay marriage in Spain, Canada, and Massachusetts.<sup>20</sup> Saying that there is an “objective” male-female reality to marriage that cannot be changed is like saying that there is a single definition of marriage and that is that. Gay marriage is like table-chair in this view; it literally makes no sense. So Professor Bradley appears to be making something akin to the definitional argument.

However, Professor Bradley, like other natural-law theorists, has a complicated-sounding explanation for why marriage can only be between a man and a woman: “Marriage, being a two-in-one-flesh communion oriented toward procreation, is available only to couples comprised of man and woman.”<sup>21</sup> Thus, he does attempt argumentative support for the “objective” reality of male-female marriage, and to the extent he does, he is not making the simple definitional argument. His argument for the male-female definition, like that of other natural-law theorists, rests heavily on the idea that marriage “is consummated and actualized by acts of the reproductive type.”<sup>22</sup> Though he might deny it, this argument is closely related to the procreation argument discussed in Section II of this article. So this natural-law argument may be closer to the bad procreation

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association is founded on the distinction of sex.” BLACKS LAW DICTIONARY 1123 (Revised 4th ed. 1968).

<sup>18</sup> See Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 194 (2004).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.* at 194.

<sup>21</sup> *Id.* at 194-95.

<sup>22</sup> Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995).

argument discussed below than to the bad definitional argument now under consideration.

But at the end of the day, many modern natural-law theorists seem to rest on a kind of because-I-say-so reasoning that closely resembles, if it does not replicate, the definitional argument.<sup>23</sup> Professors Bradley and Robert George argue that male-female marriage, and no other kind of marriage, is a good in itself; it is not a good because it is instrumental to the attainment of other goods, like pleasure, expressing feelings, or even procreation.<sup>24</sup> Male-female marriage, and only male-female marriage, has an “intrinsic value” that “cannot, strictly speaking, be demonstrated.”<sup>25</sup> Hence, “if the intrinsic value of marriage . . . is to be affirmed, it must be grasped in noninferential acts of understanding.”<sup>26</sup> Some natural-law theorists argue that this “noninferential understanding” that “cannot be demonstrated” is simply unavailable to some people.<sup>27</sup> They conclude that “[i]n the end, one either understands that spousal genital intercourse has a special significance as instantiating a basic, non-instrumental value, or something blocks that understanding and one does not perceive correctly.”<sup>28</sup> This amounts to saying: “Same-sex marriage is not ‘marriage’ because only male-female marriage can be ‘marriage.’ Trust me.” The natural-law argument against same-sex marriage thus appears to rest on the revelation of some pre-cognition reality to the initiate and only to the initiate. This seems to me very close to saying that marriage is *only* the union of one man and one woman and cannot, no matter the arguments, be defined any other way.

#### D. *Why the Argument is Bad*

The obvious problem with the definitional argument, and the reason it is rarely heard in intellectual circles, is that it suffers a very

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 301-02.

<sup>25</sup> *Id.* at 307.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729, 749 (2000).

serious logical flaw: it is circular and conclusory.<sup>29</sup> In the gay-marriage debate, it is the definition of marriage that is being challenged. Gay-marriage advocates are saying, in effect, that the definition of marriage as the union of one man and one woman is wrong, that it should be expanded to include couples of the same sex, and that we have good reasons for this expansion of the definition of marriage.<sup>30</sup>

Given this challenge to the definition of marriage, the definition alone cannot be offered in its own defense. It must be accompanied by reasons that show why the male-female definition is the right or best one. Unless the definition is defended with reasons that go beyond simply asserting the definition itself, the defense suffers a fatal circularity. It asserts the conclusion (the proper definition of marriage) as the argument. It is the equivalent of saying, "I'm right because I say so." That reasoning may work in a parent-child relationship, but it cannot suffice in a public-policy debate.<sup>31</sup>

Let's apply this lesson to the species-confusion analogies so popular among gay-marriage opponents. Consider the dog-cat analogy introduced above. Gay-marriage opponents argue that gay marriage is like calling a "cat" a "dog," and that simply can't be, no matter how much we want it to be. This misses the point of the gay marriage argument, which is that gay couples, for multiple reasons, sufficiently meet the purposes of marriage (properly understood) such that they should be permitted to marry. To use the analogy, gay-marriage advocates argue that gay marriage is indeed a "dog" that we have unfairly been calling a cat, refusing to recognize it as a species of a dog. On this view, gay-marriage advocates are not trying to get the world to accept cats as dogs, but to

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<sup>29</sup>See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1183-84 (1999).

<sup>30</sup>*Id.*

<sup>31</sup>The Hawaii Supreme Court has dismissed the definitional argument as "tautological and circular" and an "exercise in tortured and conclusory sophistry." *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (concluding that the state marriage law excluding gay couples must be subjected to strict scrutiny under the state constitution's equal rights provision). Modern courts rejecting gay marriage have dropped the definitional argument, preferring public-policy-based arguments against it. See *e.g.*, *Lewis v. Harris*, 875 A.2d 259, 270 (N.J. Super Ct. App. Div. 2005).

accept dogs as dogs. It is those persons who refuse to call this dog a dog who are in error.

Maybe gay-marriage advocates are wrong on substance: perhaps gay couples cannot meet the properly understood purposes of marriage, and thus are like cats trying to pass as dogs. But that conclusion has to be debated, with reasons offered for why gay couples can or cannot meet the properly understood purposes of marriage. The conclusion cannot simply be asserted once the existing definition is challenged.

A similar response applies to the various government benefits analogies offered against gay marriage. Consider the analogy to veterans' benefits, where gay-marriage opponents claim that gay couples are like non-veterans trying to get veterans' benefits. Gay-marriage advocates are arguing that, for multiple reasons, gay couples are "veterans," and that denying them veterans' benefits is therefore wrong.

Similarly, when one side of the debate asserts that its conclusions are justified by premises that "cannot be demonstrated" or that arise from "noninferential understanding," we confront a dilemma. We cannot really argue against these propositions because they are not arguments at all. Rather, they are conclusions parading as arguments, thereby insulating themselves from critique.<sup>32</sup> Moreover, in debates, one often hears the complaint from gay-marriage opponents that gays are trying to change the definition of marriage. While this is true, it is hardly a decisive objection, just as it would not be a decisive objection to any proposed change in existing practices or laws.

I do not argue here that gay-marriage opponents are necessarily wrong about what is the best definition of marriage. Nor do I argue that marriage should be left undefined. There should be a definition of marriage. But it must be debated. Perhaps the man-woman definition is

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<sup>32</sup> Others have given a much fuller reply to the natural-law versions of the definitional/procreation arguments against gay marriage than I will attempt to do here. See Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

the best one; but to reach that conclusion we need substantive arguments supporting the definition (e.g., arguments about the welfare of children, tradition, religion, etc.), not simply the definition itself.

## II. THE PROCREATION ARGUMENT AGAINST GAY MARRIAGE<sup>33</sup>

### A. *The Argument and its Variants*

The procreation argument has both a crude form and a more sophisticated form, but both forms reach the same demise. The crude form can be stated this way: “Procreation is indispensable to human survival. Marriage is for procreation. Procreation is the one essential attribute of marriage, supplying the male-female definition. Gay couples cannot procreate as a couple, so gay couples should not be allowed to marry.”<sup>34</sup>

The more sophisticated form of the procreation argument can be put this way:

Well, what can man and woman do that man and man can never do? . . . persons of the same sex can never form a mated pair, be the originators of human reproduction, engage in sexual acts open to new life, have children who are, literally, the embodiment of their two-in-one-flesh union. . . . The procreative orientation of marriage makes possible the awesome web of valuable relationships we call the family.<sup>35</sup>

This list of four things that “a man and a man can never do” all address the same thing: they cannot procreate. The argument in this more sophisticated form is softer: on this understanding, procreation is not an absolute *requirement* of marriage, but an *orientation* of marriage.

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<sup>33</sup> The proceeding section is an expanded version of a blog entry by the author, which is available at The Volokh Conspiracy website, [http://volokh.com/archives/archive\\_2005\\_10\\_30-2005\\_11\\_05.shtml#1131027198](http://volokh.com/archives/archive_2005_10_30-2005_11_05.shtml#1131027198) (Nov. 3, 2005, 09:13 EST).

<sup>34</sup> Whiting, *supra* note 9, at 82-83 (“Needless to say, two people of the same sex cannot procreate with each other. Consequently, the phrase ‘gay marriage’ is an oxymoron.”).

<sup>35</sup> Gerard V. Bradley, *Stand and Fight: Don’t take gay marriage lying down*, 55 NAT’L REV. 14 (2003).

### **B. *Why the Argument is Attractive***

The procreation argument is appealing because it rings true intuitively and experientially: procreation *is* indispensable to human survival; encouraging procreation to occur within marriage *has* been a primary purpose of marriage; and marriage *is* the normative situs for procreation for many very good reasons, and ought to remain so. The procreation argument makes the true factual claim that, given the present state of technology,<sup>36</sup> same-sex couples cannot procreate as a couple. While we may argue about the relative durability of gay and straight relationships, about the fitness of gay couples to serve as parents, and about the correct religious view on gay marriage, there is no argument that all gay couples, as couples, are barren. The ability to procreate is the one thing that indisputably separates same-sex couples from many opposite-sex couples.<sup>37</sup>

Thus, the argument is attractive because its premises are either indisputably true (e.g., human survival depends on procreation and only a male-female couple can procreate) or find plausible support in empirical research (e.g., children do best when they grow up with their married biological parents). If the procreation argument is indeed right, it is devastating to the cause of gay marriage.

### **C. *Who Makes the Argument***

The procreation argument enjoys great currency in academic and legal discussions of gay marriage. Indeed, it is probably *the* most common argument against gay marriage in these circles.<sup>38</sup> Having long since

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<sup>36</sup> This is an interesting but unimportant qualification. It is interesting because one may wonder in the abstract what would happen to this argument if gay couples could procreate as a couple, becoming the two-in-one-flesh of natural law. It is unimportant because we are nowhere near having the technology to allow two persons of the same sex, and them alone, to produce a child.

<sup>37</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (making the point that procreation is the one "unbridgeable gap" between homosexual and many heterosexual couples).

<sup>38</sup> See sources cited *infra* note 41.

abandoned the definitional argument, all courts upholding the exclusion of gay couples from marriage have relied to some extent on the procreation argument, usually as the rational, though imperfect, state interest that allows the state to exclude same-sex couples from statutory definitions of marriage.<sup>39</sup>

The procreation argument is most common of all among academic opponents of gay marriage.<sup>40</sup> Indeed, it is difficult even to find a law review article opposing gay marriage, on either constitutional or policy grounds, that does not make the procreation argument.<sup>41</sup>

#### ***D. Why the Argument is Bad***

Justice Scalia has rebutted the procreation argument as an adequate constitutional defense of traditional male-female marriage.<sup>42</sup> As he wrote in his dissent in *Lawrence v. Texas*, “[w]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’ Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”<sup>43</sup> This dismissal of the procreation argument will undoubtedly be quoted for years to come in the briefs of gay-marriage advocates. Though Justice Scalia was addressing the question of the adequacy of the

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<sup>39</sup> Standhardt v. Super. Ct. Ariz., 77 P.3d 451, 641 (Ariz. Ct. App. 2004); Lewis v. Harris 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005).

<sup>40</sup> See sources cited *infra* note 41.

<sup>41</sup> Following is a partial list of articles making the procreation argument, by some of the most prominent opponents of gay marriage: Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653 (2004-05); Ventrella, *supra* note 11, at 691; Bradley, *supra* note 20, at 196-200; William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154-58, 165-71 (2004); Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations*, 18 BYU J. PUB. L. 479, 526-27, 529-41 (2004); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001); Teresa Stanton Collett, 47 CATH. U. L. REV. 1245, 1257-63 (1998); Robert P. George & Patrick Lee, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 12 AM. J. JURIS. 135, 142-48 (1997); John Finnis, *Law, Morality, and “Sexual Orientation”*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 25-30 (1995).

<sup>42</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>43</sup> *Id.* at 605 (Scalia dissenting).

procreation argument for constitutional purposes,<sup>44</sup> his succinct rebuttal applies with even more force when the procreation argument is used in policy debates. The procreation argument is a mix of true claims, false claims, and *non sequiturs*. It suffers logical flaws, experiential flaws, and possibly political flaws.

The procreation argument, being the most common academic argument against gay marriage, has generated many responses from gay-marriage advocates. The back-and-forth over the procreation argument between advocates and opponents of gay marriage follows a familiar and somewhat tedious pattern. It goes something like this:

*Thrust (by gay-marriage opponents):* Marriage is for procreation. Gay couples cannot procreate. Thus, gay couples should not be allowed to marry.

*Parry (by gay-marriage advocates):* Procreation has never been required for marriage, so the premise that “Marriage is for procreation” is wrong, or at least incomplete. Sterile couples, old couples, and couples who simply do not want to procreate are all allowed to marry. Nobody objects to their marriages, so nobody should on this ground object to same-sex marriages.

Let’s see if we can take the procreation argument beyond this familiar thrust-and-parry. The procreation argument starts with the proposition that procreation is indispensable to human survival. It then posits that marriage exists to encourage this indispensable act to occur within a lasting union. The procreationists may concede that marriage has other purposes, for example, providing the married person with a primary caretaker and channeling sexual activity into monogamous commitments. Still, the procreationists maintain that these other purposes serve mainly to help sustain the overarching marital purpose of encouraging procreation and stabilizing family life for the resulting children.

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<sup>44</sup> *Id.*



Individual gay persons can procreate, of course, through means such as artificial insemination and surrogacy arrangements. But, as noted by procreationists, they cannot procreate as a couple. According to the procreationist argument, it is the unique procreative capacity of male-female couples that justifies the unique status of marriage itself. It is the one essential attribute of marriage, supplying its historic male-female definition.

1. *Practical Consequences to Procreation of Admitting Gay Couples to Marriage*

But what are the practical consequences to human procreation of admitting gay couples to marriage? I can think of two possible fears. One fear is that procreation itself would slow down, perhaps below the replacement rate, the level at which humans must reproduce in order to stay ahead of deaths. This slowdown would eventually imperil the species.<sup>45</sup> The other fear is that, as the connection between marriage and procreation is loosened, procreation may increasingly occur outside of marriage.<sup>46</sup> Both could happen at once, and both would be bad.<sup>47</sup>

What do we make of these fears? If gay marriage would doom human life on earth and/or result in significantly more children born to unwed heterosexual couples, it should be resisted no matter how much gay

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<sup>45</sup> This has been a favorite argument of Maggie Gallagher. Gallagher, *Does Sex Make Babies?*, 23 QLR 447, 456-65 (2004) (warning of the danger of a population implosion for Western civilization). See also Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225 (2004); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 789 (2002) (one purpose of marriage is to create children for the survival of the species). Professor Doug Kmiec has also noted declining world population growth rates in connection with the procreation argument against gay marriage. Kmiec, *supra* note 41, at 658 ("The potential procreative harm of recognizing same-sex marriage is also magnified because the rate of world population growth has declined by more than 40% since the late 1960s.").

<sup>46</sup> Gallagher, *Does Sex Make Babies?*, *supra* note 45, at 465-71 (stating that traditional marriage encourages a link between procreation and marriage).

<sup>47</sup> *Id.* (traditional marriage encourages a link between procreation and marriage); William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119, 125 (2002-03) (gay marriage "would automatically remove the link between marriage and procreation").

couples want or need marriage. The cost would simply be too high for the expected benefit.

But neither of these consequences seems plausible. Start with the fear of a population implosion. How would allowing gay couples to wed cause a decline in rates of procreation? It is not clear why straight couples would stop procreating, or even procreate less, if gay couples could marry. The factors driving people to reproduce, such as religious obligations, the instinct to propagate one's genes, and the need to be loved and to love another, would all still exist if Adam and Steve could marry. That is, procreation will likely continue unaffected by whether gay couples are permitted to marry. If Western civilization is truly facing a population implosion, as some suggest, that is attributable to many factors other than gay marriage.<sup>48</sup>

Here is one possible mechanism arising from gay marriage that might lead to population decline. Professor Douglas Kmiec, quoting Robert Bork, has argued that gay marriage ““will lead to an increase in the number of homosexuals.””<sup>49</sup> More homosexuals means less procreation, the theory goes. But even if it is true that increasing the number of homosexuals would result in significantly less procreation, the idea that the incidence of homosexuality in a society varies with the degree of legal repression or acceptance of homosexuality has no empirical support.<sup>50</sup> Homosexual preference appears to be no more common in tolerant societies than in repressive societies.<sup>51</sup> The reason for this is clear. “The formation of homosexual preference, at least in males, appears to be deeply rooted in genetic, hormonal, and (or) developmental factors unlikely to be offset by purely social influences.”<sup>52</sup>

In support of the idea that gay marriage will increase the number of homosexuals, Professor Kmiec notes that the Census Bureau reported a large increase of same-sex households during the 1990s, a period of

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<sup>48</sup> Declining infant mortality and rising costs of having and raising children are significant factors. RICHARD POSNER, *SEX AND REASON* 195 (1992).

<sup>49</sup> Kmiec, *supra* note 41, at 661.

<sup>50</sup> See POSNER, *supra* note 48, at 163, 296-97.

<sup>51</sup> See *id.* at 296.

<sup>52</sup> *Id.* at 163.

increasing acceptance for homosexuals.<sup>53</sup> But this statistic does not support his claim that the incidence of homosexuality is actually increasing. Some of this increase is due to a change in the way the Census Bureau counted same-sex couples. In 2000, any same-sex couple in which the partner was identified as either a “husband/wife” or “unmarried partner” was coded as an “unmarried partner” to account for mistakes. But in 1990, same-sex “husbands” and “wives” had their sex changed so that the couple was counted as a heterosexual married couple. This means that same-sex partners included in the 2000 Census (same-sex “married” couples) were not included in the 1990 Census. These and other differences in counting same-sex couples have led the Census Bureau to conclude that “estimates of same-sex unmarried partners are not comparable between the 1990 and 2000 Census (sic).”<sup>54</sup> Additionally, the jump in the number of reported same-sex households likely reflects a greater willingness of gay couples to report their cohabitation (an effect of easing anti-gay stigma), an effort by gay groups to encourage such reporting, and a larger number of homosexuals who live as couples, rather than an increase in the number or proportion of individual homosexuals.

Perhaps, the procreationist might conjecture, there are some “waverers”—people who stand somewhere between homosexuality and heterosexuality—who will be brought toward more homosexual behavior by the stigma-easing effect of permitting gay marriage. These waverers might then engage in less procreative sex than they otherwise would. I have three responses to the possibility of waverers as a cause of population implosion.

First, we have no evidence that there are serious waverers who are brought into homosexual or heterosexual orientation by government policy.<sup>55</sup> It is

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<sup>53</sup> Kmiec, *supra* note 41, at 661.

<sup>54</sup> U.S. CENSUS BUREAU, POPULATION DIVISION, FERTILITY & FAMILY STATISTICS BRANCH, TECHNICAL NOTE ON SAME-SEX UNMARRIED PARTNER DATA FROM THE 1990 AND 2000 CENSUSES (2001), available at <http://www.census.gov/population/www/cen2000/samesex.html>.

<sup>55</sup> Posner writes:

No one as far as I know has suggested, let alone presented evidence, that the removal of legal disabilities to homosexuality in countries such as Sweden and the Netherlands, and the growth of social tolerance to which that removal must in large part have been due, caused the number of homosexuals to increase.

POSNER, *supra* note 48, at 297; see also *id.* at 297-99.

true that there are people for whom homosexual activity is an adequate substitute for heterosexual sex under certain conditions and circumstances.<sup>56</sup> When gay marriage is permitted, they will probably engage in more homosexual activity. But, there is no reason to believe their basic orientation will change or that they will give up all heterosexual activity.<sup>57</sup> Homosexuals are not created by recruitment, seduction, example, or propaganda.<sup>58</sup> Second, even if there are serious waverers whose basic orientation is sensitive to government and social incentives, some of these waverers would have ended up in gay relationships anyway. Third, it is doubtful there are enough waverers to make any difference in rates of reproduction. At any rate, there is no evidence to support that fear.

Thus, since homosexual orientation seems invariant to legal sanction, gay marriage should not affect the number of homosexuals in a society. What seems more likely is that when gay marriage is allowed more homosexuals will be open about their homosexuality, resulting in the *appearance* that there are more homosexuals. Further, closeted homosexuals will be less likely to enter unhappy and unstable marriages with partners of the opposite sex. While a lower number of marriages between closeted homosexuals and their heterosexual spouses may mean fewer children from such marriages, it will also free up their heterosexual spouses to seek marriageable partners with whom they can procreate and form more lasting relationships. The resulting reduction in the number of sham marriages has the potential to be good for procreation rates and good for marriage as a whole, not bad.

Moreover, gay marriage may actually encourage *more* net procreation in two ways. It is true that gay couples cannot procreate as a couple, so they are less likely than a heterosexual couple to fulfill the state interest in encouraging procreation.<sup>59</sup> However, gay couples in a marriage may be more likely to seek surrogacy and artificial means of procreating than gay couples who cannot marry.<sup>60</sup> Because the higher degree of legal

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<sup>56</sup> *Id.* at 298.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 299.

<sup>59</sup> Duncan, *supra* note 41, at 154-57.

<sup>60</sup> See Anne M. Burton, *Gay Marriage--A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil and Political Rights*, 3 IND. J. GLOBAL LEGAL STUD.

protection and social acceptance accompanying marriage may make such couples feel more secure about the durability of their relationship and about their ability to raise children in a secure legal and social environment, gay marriage may fuel the already growing baby boom among gay parents, sometimes called the “gayby boom.”<sup>61</sup> Additionally, heterosexuals freed from sham marriages may also procreate more than they would have with closeted gay spouses; presumably, truly heterosexual spouses will enjoy procreative sex more than closeted gay partners would have, and so will engage in it more often.

I do not claim that this additional amount of procreation (from gay couples and heterosexual spouses spared sham marriages) will reverse, much less offset, the many complex factors that are leading to lower rates of reproduction in the West. My only claim is that gay marriage will not intensify those trends, and may perhaps even put a small dent in them.

Even if gay couples do not procreate, however, same-sex marriage may enrich society in other ways, such as by causing the individuals who marry to settle down and by assisting them in raising children they acquire through adoption, surrogacy, or artificial insemination of one of the partners. Furthermore, rather than severing the link between procreation and marriage as a normative matter, gay marriage might help reinforce the idea that the proper environment for raising children—something that at least 162,000 gay couples in the United States are doing<sup>62</sup>—is within marriage.<sup>63</sup>

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177, 183 (1995).

<sup>61</sup> Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children*, 11 CARDOZO WOMEN'S L.J. 1 (2004).

<sup>62</sup> Census 2000 Special Reports, *Married-Couple and Unmarried-Partner Households: 2000*, at 11 (Feb. 2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>. Even this number probably undercounts the real number, since gay-couple respondents to the 2000 Census had to self-report their status as “unmarried partners” rather than as “roommates” or “boarders” in order to be counted. Additionally, it does not count the numbers of gay couples raising children who do not live in the same household.

<sup>63</sup> JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004).

It is also not clear why gay marriage would drive more straight couples to reproduce outside of marriage. After all, the benefits of marital procreation would still be available to them and the problems of non-marital procreation (e.g. less likelihood of support from a partner) would still be there to discourage it. Professor Kmiec suggests that gay marriage might encourage non-marital procreation by bolstering “public acceptance of heterosexual cohabiting relations outside of marriage which independently have exploded in number.”<sup>64</sup> However, there is no reason to believe that heterosexual couples model themselves on what homosexual couples do or do not do. To the extent that heterosexual couples look to homosexual role models at all, allowing their homosexual role models to marry—rather than simply to cohabit, as they do now because they cannot marry—would seem to strengthen the norm of marriage. A married homosexual couple is a rebuke to the idea that simply cohabiting is the optimal way to structure a relationship.<sup>65</sup>

But fortunately there is no need to guess at the probability of these cataclysmic consequences because society already has much experience with a world in which there is no requirement to procreate within marriage.<sup>66</sup> No couple has ever been required to procreate in order to marry. Nor has any couple ever been required *to be able to procreate* in order to marry. Sterile couples and old couples can marry. Couples physically able to procreate, but who do not want to procreate, can get married.

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<sup>64</sup> Kmiec, *supra* note 41, at 661.

<sup>65</sup> Stanley Kurtz has argued that “gay marriage” has led to a number of social pathologies in Scandinavia, including more out-of-wedlock births. Stanley Kurtz, *The End of Marriage in Scandinavia*, WEEKLY STANDARD, Feb. 2, 2004. This thesis has been carefully rebutted. See M. V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriages? Evidence From Scandinavia and the Netherlands* (July 2004) (discussion paper prepared for the Council on Contemporary Families and Institute for Gay and Lesbian Studies), available at <http://www.iglss.org/media/files/briefing.pdf>; William N. Eskridge, Darren R. Spedale & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, ISSUES IN LEGAL SCHOLARSHIP (2004), available at [www.bepress.com/ils/iss5/art4/](http://www.bepress.com/ils/iss5/art4/).

<sup>66</sup> See, e.g., Dale Carpenter, *Gay Marriage and Procreation*, BAY AREA REPORTER (Mar. 18, 2004), available at <http://www.indegayforum.org/authors/carpenter/carpenter43.html>.

Millions of married opposite-sex couples already fit into one of these non-procreative categories. According to the National Center for Health Statistics, “[a]bout 2.3 million married couples with wives aged 15-44 years were infertile in 1988—7.9 percent or slightly less than 1 in 12 [of such married couples].”<sup>67</sup> About 1.1 million married couples with wives aged 15-44 were *childless* and had “impaired fecundity”—impossibility or near impossibility of conception. That represents 3.9% of all married couples with wives 15-44 years old.<sup>68</sup> An additional 636,000 couples with the wife in the age 15-44 range were *childless* and were surgically sterile—via tubal ligation, hysterectomy, and/or vasectomy.<sup>69</sup> That represents 2.2% of all married couples with wives in that age range.<sup>70</sup> Thus, *just over 6% of all married couples of child-bearing age have no children and are incapable or practically incapable of having children.* This figure does not include those among the remaining married couples of child-bearing age who are childless, do not wish to have children, and take precautions, like using contraceptives, to avoid it. Together, these non-procreative categories of childless married couples already constitute a much larger segment of the married population than gay married couples ever could. Yet despite these childless married couples’ inherent or explicit rejection of the putative marital duty to procreate, humans continue to procreate and marriage continues to be the normative situs for procreation.

## 2. *The Sterility Objection: Three Responses and Counter-Responses*

The procreationists have three potential responses to the “sterility objection,” the argument that marriage is not limited to couples who procreate and this cannot be the basis for excluding gay couples from marriage. First, they say that laws are made for the general rule, not the

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<sup>67</sup> WILLIAM D. MOSHER & WILLIAM F. PRATT, U.S. DEP’T HEALTH & HUMAN SERVS., *FECUNDITY AND FERTILITY IN THE UNITED STATES, 1965-88*, 1 (1990), available at <http://www.cdc.gov/nchs/data/ad/ad192.pdf>. “Infertility” is defined by physicians as “inability to conceive after 12 months or more of” unprotected intercourse. *Id.*

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* An astonishing 42.4% of all married couples where the wives’ ages range from 15-44 are surgically sterile. *Id.* This figure includes married couples who have already had children and have elected, for various reasons, to surgically prevent further conception.

<sup>70</sup> *Id.*

exceptions.<sup>71</sup> Most opposite-sex couples can reproduce, but no gay couple can. Second, they argue that the failure to require married couples to procreate is only a concession to the impracticality and intrusiveness of imposing an actual procreation requirement.<sup>72</sup> The procreationists claim that there has been no abandonment of the procreation principle itself, but contend that it would be unthinkable, on privacy grounds alone, to subject couples to fertility tests as a requirement for marriage.<sup>73</sup> In contrast, the procreationists observe, no such intrusive test is necessary with same-sex couples to determine that they cannot reproduce.<sup>74</sup> Third, some procreationists argue that even sterile male-female couples can engage in sexual acts of a *reproductive type* (penile-vaginal sex), even if the acts themselves are not reproductive.<sup>75</sup> Again, in contrast, same-sex couples cannot engage in reproductive-type acts because their sexual activity lacks either a participating penis or vagina.

The first response to the sterility objection—that laws are made for the general rule—is an evasion. Laws often state general rules while providing exceptions where appropriate and just. Gay marriage, like non-procreative straight marriage, might be an appropriate and just exception to the procreationists' general rule that marriage exists for procreation. Whether gay marriage is an appropriate and just exception to the general rule that marriage is for procreation depends upon arguments extrinsic to the procreation argument, e.g., whether encouraging stable gay coupling through marriage would benefit society.

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<sup>71</sup> See Ventrella, *supra* note 11, at 704 (quoting *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 608 (7th Cir. 2001)).

<sup>72</sup> E.g., Kmiec, *supra* note 41, at 656 (“It would be highly intrusive of privacy for the state to inquire of heterosexual couples to determine if they are disinclined toward procreation or infertile . . . .”); Jay Allen Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 *BYU J. PUB. L.* 309, 317 (arguing that it would be an “incredible intrusion into a couple’s legitimate privacy” to require that couple to prove their fertility before their marriage will be recognized).

<sup>73</sup> Sekulow & Tuskey, *supra* note 72, at 317.

<sup>74</sup> *Id.* at 326.

<sup>75</sup> E.g., George & Lee, *supra* note 41, at 150.



Society already has experience with making exceptions to the general rule of procreation, and gay marriage may be just one more such exception to the general rule. Besides allowing non-procreative couples to marry, two states (Wisconsin and Arizona) allow certain classes of people (first cousins) to marry *only if they cannot procreate*.<sup>76</sup> In these states the law not only does not require procreation in marriage, but it actually dictates to some people that they must *not* procreate in order to marry. Obviously those states have an overriding state interest in this regulation: the prevention of any birth defects that might result in the children of first-cousin marriages.<sup>77</sup> The danger of birth defects is not an objection to same-sex marriages; but if the state has interests in recognizing non-procreative opposite-sex marriages that outweigh the societal interests in marital procreation, why wouldn't other overriding state interests apply to the recognition of the non-procreative marriages of gay couples?

The second response to the sterility objection—that a procreation requirement for straight couples would be unduly intrusive—is equally unavailing. If society was serious about the procreationist project, prospective married couples could be required to sign an affidavit stating that they are able to procreate and intend to do so.<sup>78</sup> No fertility test would be needed. If, say, in ten years a couple had not procreated, it could be presumed that they are either unable or unwilling to bear children, and the marriage could be dissolved as unworthy of that unique institution. That would be neither impractical nor require invasive fertility examinations.

Yet society would never require opposite-sex couples to fill out such fertility forms. Most people would scoff at the idea. But why? They would scoff at the idea because marriage today is not understood to be essentially about procreation, although procreation within marriage is important. Marriage is understood today to have other important functions

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<sup>76</sup> ARIZ. REV. STAT. ANN. § 25-101(B) (2004); WIS. STAT. § 765.03(1) (2005).

<sup>77</sup> *But see* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 352 (2004) (noting that the risk of birth defects in first-cousin marriages is very low). The states have a variety of approaches to first-cousin marriages, and some do not prohibit such marriages at all. *E.g.*, ALA. CODE § 13A-13-3 Commentary (2005) (noting that first cousin marriages are forbidden in some states, but are not forbidden by Alabama law).

<sup>78</sup> Under this approach, couples in which the woman was past child-bearing age would be barred from marrying altogether.

and purposes, such as recognizing a couple's mutual love and supporting their commitment to one another.<sup>79</sup> Here the procreation argument suffers an experiential flaw; it is like an argument from another world, not the world we inhabit in which procreation is an important but not an essential attribute of marriage. This may also expose a potential political flaw in the procreation argument: by repeatedly emphasizing the importance of procreation in marriage, opponents of gay marriage run the risk of demeaning the many married couples for whom procreation is either unwanted or physically impossible.

That no one opposed to gay marriage has proposed this simple expedient of a fertility form, or anything remotely like it, suggests that even they do not take the narrow procreationist vision of marriage very seriously. Marriage is not *essentially* about procreation because procreation is not essential to any marriage, or to anyone really concerned about marriage as an institution.

Furthermore, this second response to the sterility objection suggests that the general rule of procreation must bend, first to the overriding needs and interests of society in helping individuals to settle down, and second, to the interests of the couples unable or unwilling to live by the procreation purpose. If that exception exists for non-procreative straight couples, why does it not exist for non-procreative gay couples? If there is an answer to this question it cannot be found in the procreation argument.

The third response to the sterility objection—that even non-procreative straight couples can engage in “reproductive-type” sexual acts<sup>80</sup>—is associated with the natural-law arguments against gay marriage.

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<sup>79</sup> See Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 310 (2001) (stating that people marry for “love and commitment,” not only for legal benefits).

<sup>80</sup> E.g., John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 126-29 (1997) (noting that sterile married couples can engage in acts “of the reproductive kind,” while homosexual couples cannot); George & Lee, *supra* note 41, at 150 & n.29. The authors assert:

It is form over substance. At bottom it amounts to the truism that a male-female couple is anatomically different from a male-male or female-female couple, and therefore, the couples differ in terms of the sexual acts the partners can perform on one another. An opposite-sex couple can have penile-vaginal sex, while a same-sex couple cannot. This is true, but it is irrelevant for purposes of the procreation argument if the opposite-sex couple is just as sterile as the same-sex couple. Simply asserting the anatomical difference by dressing it up as “reproductive-type” sex is to rest on the definitional argument discussed above. Natural-law theorists who claim that penile-vaginal sexual acts are superior to other sexual acts, and therefore they alone merit marriage, whether or not the acts are even capable of resulting in procreation, are asserting a conclusion rather than making an argument.

My friend Professor Teresa Stanton Collett has an interesting variation on this third response to the sterility objection. She argues that even a sterile opposite-sex union “joins intrinsically different individuals,”—“a male and a female.”<sup>81</sup> She continues, “[w]hile same-sex unions contain some diversity, in that they involve two unique and distinctive persons, the differences are individual rather than inherent.”<sup>82</sup> This lack of “intrinsic” difference between same-sex partners “weaken[s] the union in the same manner that similarly formed pieces joined by adhesive are less durably connected than interlocking pieces of the same material joined by the same adhesive.”<sup>83</sup>

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If a married couple become sterile, this does not change what they have been doing in bed: they still perform the same kind of act they have been doing perhaps for years. . . . The heterosexual couple who engage in a reproductive-type act truly become one body, one organism. . . . [H]omosexual partners cannot form the kind of personal communion with each other which is embodied by reproductive-type acts; nor can they perform with each a reproductive-type act, that is their sexual acts do not unite them biologically.

*Id.* See also Ventrella, *supra* note 11, at 715 (“even absent fertility, the intimate acts of opposite sex couples remain reproductive in type, thereby reinforcing the pedagogical function of law”).

<sup>81</sup> Collett, *supra* note 41, at 1261-62.

<sup>82</sup> *Id.* at 1262.

<sup>83</sup> *Id.*

This jigsaw puzzle analogy is creative, but ultimately unpersuasive. First, it is unclear why marriage must necessarily join important differences. Marriages between people who share important common characteristics may be the most durable of all and may still contribute not only to the health of society, but also to the well-being of the married couple and any children they raise. Second, it is unclear why the differences joined by marriage must be “intrinsic” rather than contingent or “individual.” Men and women are different from each other in myriad ways. However, as Professor Collett recognizes, so are any two men or any two women.<sup>84</sup> Two men from different racial, ethnic, geographic, or economic backgrounds may have much less in common than a man and a woman from the same racial, geographic, and economic background. Third, it is unclear why the differences between two men or two women joined in marriage cannot be considered “inherent” differences, arising from inborn variations that affect thought, emotion, and behavior just as deeply as gender does. Fourth, to the extent two men or two women are *inherently* less “different” from each other than a man and a woman, it is unclear why this fact would weaken their union rather than strengthen it. Perhaps their common outlook on life will give them a bond that no opposite-sex couple could have. Fifth, and finally, even if the inherent commonality of same-sex couples would weaken their union in some way, this would appear to be an argument *for* gay marriage rather than against it. After all, a weaker bond has greater need for the “adhesive” marriage provides than does a relatively stronger bond.

Thus, the responses to the sterility objection to the procreation argument fail as a matter of logic, or experience, or both. The procreation argument, refined in light of actual experience, amounts to this: nobody is required to procreate in order to marry, except gay couples, who unfortunately cannot procreate, and so cannot marry. This is a rule made to reach a predetermined conclusion, rather than for good reasons.

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<sup>84</sup> *Id.*

### III. THE POLYGAMY SLIPPERY-SLOPE ARGUMENT AGAINST GAY MARRIAGE<sup>85</sup>

#### A. *The Argument and Its Variants*

Slippery-slope arguments offer a parade of horrors that might be brought about by gay marriage, but they always take this form: “If we allow gay marriage, we will also have to allow [policy X], which would unquestionably be bad.”<sup>86</sup> The usual bad destination claimed to await us after gay marriage is polygamy, but one occasionally hears that gay marriage will also bring incestuous marriages, bestial marriages (humans marrying dogs, horses, or other animals), adult-child marriages, and marriages between humans and inanimate objects.<sup>87</sup> Here only the polygamy variant of the slippery-slope argument is discussed, but the analysis applies equally to the other variants.

Slippery slopes can be initiated in one of two ways: 1) the *logic* of the proposed step entails a slide down the slope; or 2) the *politics* of the proposed step, e.g., in terms of the way in which the step might change public attitudes about further reform, risks a slide down the slope. This article addresses only the logical slide to polygamy because this is how most gay-marriage opponents present the slippery-slope argument.

The political, or attitude-altering, slide has been addressed in some detail by Professor Eugene Volokh.<sup>88</sup> Briefly, I think the political slide to polygamy is very unlikely. There would simply be no political coalition for

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<sup>85</sup> The preceding section is an expanded version of a blog entry by the author, which is available at The Volokh Conspiracy website, <http://volokh.com/posts/1130982815.shtml> (Nov. 2, 2005, 20:53 EST).

<sup>86</sup> See Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 LAW & SEXUALITY 187, 197 (2001).

<sup>87</sup> Note that opponents of gay marriage sometimes warn that gay marriage will lead to more than recognition of another, and undesirable, type of marriage. One opponent, George Dent, has argued that gay marriage will lead to baby-selling, polygamy, endogamy, bestiality, and child marriage. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 633-37 (1999).

<sup>88</sup> See Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 34 HOFSTRA L. REV. \_\_\_\_ (forthcoming 2006) (draft on file with author).

polygamy after gay marriage. As Volokh notes, the right would not like it; the left would be split over the issue by concern for sex equality. Overall, polygamy has very dim prospects, especially in the West, where liberal individualism, sex equality, the loss of religious adherents, and the opposition by Christianity, all combine to make it a very rare and dying practice.<sup>89</sup>

Slippery-slope arguments must be scrutinized with care because the public often believes them and because they divert attention from the core issue: whether gay marriage itself would be a good or bad thing.

### ***B. Why the Argument is Attractive***

The slippery-slope argument is attractive for three reasons. First, it takes the focus off gay people, so it appeals to those uncomfortable with attacking gays. One does not have to believe anything bad about gay people to think polygamy is a bad idea and so one may, by accepting a polygamy slippery slope argument, oppose gay marriage for the neutral reason that polygamy is bad. Second, it is an argument of last resort, available when all other arguments have failed. Even if the gay-marriage opponent has been unsuccessful in persuading the listener to fear that something bad will happen if same-sex marriages are recognized, only a tiny minority of people think polygamy is a swell idea. Third, the slippery-slope argument makes some gay-marriage advocates uncomfortable because it puts them in the position of either accepting the destination that awaits following the slide down the slippery slope (in this case, polygamy) or arguing that other people, like polygamists, are not entitled to marry. The first response is politically untenable for the gay-marriage movement, but some gay-marriage advocates have opted for it.<sup>90</sup> The second response

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<sup>89</sup> See David R. Dow & Jose I. Maldonado, Commentary, *How Many Spouses Does the Constitution Allow One to Have?* 20 CONST. COMMENT. 571, 572 (2004).

<sup>90</sup> See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 489-91 (1996) (cautioning that gay-marriage advocates, in challenging the "romantically linked man-woman couple," should respect those who argue against the hegemony of the two person marital unit). Professor Chambers also finds no logical reason why marriage laws cannot equally serve units of more than two persons. *Id.* See also JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 126, 127 (1996).

seems contrary to the strong egalitarian and individualistic impulses of many in the gay civil rights movement. Although the polygamy slippery-slope argument is one of the worst arguments against gay marriage on logical and experiential grounds, it is often the most effective on rhetorical and political grounds.

### C. *Who Makes the Argument*

The polygamy argument is a staple of anti-gay-marriage arguments. Sometimes it is a featured argument, at other times it is added on toward the end of a longer series of arguments, almost as an afterthought. Either way, it is hard to find an opponent of gay marriage who has not heaved polygamy on the table.<sup>91</sup>

### D. *Why the Argument is Bad*<sup>92</sup>

To see why the slippery-slope argument is so bad, it is necessary to attempt to understand some possible bases for it. Slippery-slope arguments warning of a logical slide take the following form: "Proposal X contains within it a principle. That principle not only supports Proposal X but would also support Proposal Y. An honest person supporting Proposal X must therefore also support Proposal Y. While Proposal X may or may not be bad in itself, Proposal Y would surely be very bad. So to avoid adopting Proposal Y, we must not adopt Proposal X." Substitute "gay

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<sup>91</sup> See generally Bradley, *supra* note 18, at 198, 208-10; George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 441-42 (2004); Duncan, *supra* note 41, at 125; Finnis, *supra* note 41, at 132-33; Gallagher, *What is Marriage For?*, *supra* note 47, at 775; Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat From Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 760 (1998); Whiting, *supra* note 8, at 84.

<sup>92</sup> Professor Eugene Volokh dealt with the various slippery-slope arguments against gay marriage and concluded, "Slippery slope risks are real risks, in this area as well as in others. We shouldn't exaggerate them but neither should we pooh-poo them." Volokh, *supra* note 88, at 18. He also concluded that gay marriage will make the possibility of polygamous marriage increase from "minuscule to merely very small." *Id.* at 40. Perhaps a more accurate statement of the risk identified by Professor Volokh is that gay marriage would make the likelihood of polygamy increase from minuscule to almost minuscule.

marriage” for Proposal X and “polygamous marriage” for Proposal Y and you have a slippery-slope argument against gay marriage.

There are three possible stock responses to every slippery-slope argument. First, one might argue that the supposedly horrible destination(s) at the bottom of the slope are not so bad, so there is no need to fear the slide. Second, one could argue that the slope slides both ways, so that if the proposed step is not taken, there is a danger of sliding down the other side of the policy hill, which would be equally bad. Third, one could argue that there will be no slide down the slippery slope if the proposed step is taken because the proposed reform does not require embracing an idea that leads to slippage, and thus there is a principled stopping point that prevents a slide to the bottom of the slope.

In the gay-marriage debate, the first stock response would involve arguing that polygamy is unobjectionable. This is an unattractive reply for political reasons—polygamy enjoys no popular support—and for experiential/historical reasons that are explained below in connection with the third response.

The second stock response would involve claiming that if gay marriage is rejected, there is nothing to stop the prohibition of other marriages, such as those involving people of different races or infertile people. This second response is the kind of argument lawyers love to make, but is not likely to impress many people as a reason to support same-sex marriage. It seems very unlikely that rejecting gay marriage will send us back to the days of anti-miscegenation laws.

It is the third response—that there is a principled stopping point preventing the slide toward polygamy—that best refutes the slippery-slope argument. The argument for gay marriage is indeed an argument for liberalization of marriage-entrance rules. But it is not necessarily a call to open marriage to anyone and everyone, any more than the fight against anti-miscegenation laws was a call to open marriage to anyone and everyone. So in formulating the principled stopping point, it is necessary to question why the recognition of a new form of monogamous marriage would lead to the revival of polygamous marriage, which has been rejected



in most societies that once practiced it. What is “the principle” supporting gay marriage that would lead to acceptance of multi-partner marriage?

1. *Non-Procreation as the Principle Logically Uniting Gay Marriage and Polygamous Marriage*

One principle possibly seen as uniting gay marriage and polygamous marriage is that gay marriage, like polygamous marriage, extends marriage beyond partners who may procreate as partners. By removing the gender requirement from marriage, this argument goes: gay marriage would sever the link between marriage and procreation. If there is no link between marriage and procreation, then all non-procreative arrangements, like polygamous marriages, which cannot form children from all of the partners, will have to be recognized. On this view, marriage must be two-person because only couples can create babies together. Moreover, that couple must be man-woman, because same-sex pairings cannot make babies together. There is thus a teleological defense of one man/one woman marriage. Once a part of that teleological defense is stripped away (the opposite-sex requirement), there is no logical, principled basis for retaining the other part of it (the two-person requirement). As Professor Hadley Arkes put it, “[i]f marriage is detached from that ‘natural teleology of the body,’ on what ground of principle could the law rule out the people who profess that their own love is not confined to a coupling of two, but woven together in a larger ensemble of three or four?”<sup>93</sup> This emphasis on the slippery-slope consequences of losing the marriage-procreation link is especially prominent among natural-law writers,<sup>94</sup> although it is also employed by others.<sup>95</sup>

The notion that gay marriage fundamentally severs the link between procreation and marriage, and thus leads to polygamy, founders on the same logical and experiential shoals as does the procreation argument discussed above. Procreation is not a requirement of marriage. Sterile

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<sup>93</sup> Hadley Arkes, *A Culture Corrupted*, 67 *FIRST THINGS* 30-33 (1996).

<sup>94</sup> See e.g., Bradley, *supra* note 18, at 194-95; Finnis, *supra* note 41, at 126-27, 129-32.

<sup>95</sup> See Duncan, *supra* note 41, at 125 (arguing that removing the gender element from marriage, which automatically removes the marriage-procreation link, would “open the door” to recognition of polygamous unions).

opposite-sex couples have already taken that step down the slope for us, yet society seems no closer to accepting polygamy as a result. Therefore, in terms of their non-procreativity, gay married couples will take society no further down the slope to polygamy than sterile opposite-sex couples already have.

The potential for procreation is a good reason to permit, indeed to encourage, fertile opposite-sex couples to marry. But it is not a good reason to refuse to permit, and even to encourage, sterile couples (gay or straight) to marry. The teleological defense of man-woman marriage is thus a fine account of why fertile heterosexuals marry; but it is not necessarily a critique of other marriages. The teleological account fails to acknowledge that recognizing infertile marriages has already “detached” marriage from the “natural teleology of the body,” with no apparent slide toward polygamy in sight.

## 2. *Sexual Autonomy as the Principle Logically Uniting Gay Marriage and Polygamous Marriage*

A second possible principle uniting gay marriage and polygamy is that accepting gay marriage means accepting a very broad and general right of sexual autonomy, under which many forms of unions must also be recognized, including polygamous unions, no matter how socially harmful they are.<sup>96</sup> But is the movement for gay marriage a movement for sexual liberation? Certainly many gay-marriage opponents see it as precisely that. As supporting evidence, they can point to statement by some gay-marriage advocates who speak in such terms, describing the gay marriage cause as an effort to free marriage from traditional expectations, like monogamy.

Yet as perceptive sexual liberationists have observed, marriage is antithetical to such liberation.<sup>97</sup> Marriage channels sex into forms and requirements regulated by the state, even as it implicitly disapproves of

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<sup>96</sup> Dent, *supra* note 91, at 440-43 (asserting that the reasons advanced by advocates in support of gay marriage apply equally to polygamy, incest, bestiality, and adultery).

<sup>97</sup> MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 90 (First Harvard Univ. Press 2000) (1999).

non-marital sexual intimacies.<sup>98</sup> While sexual autonomy may demand the end of sodomy laws and other sexual regulation, it hardly requires legal approval in the form of marriage. The cause of gay marriage is practically the opposite of the sexual liberation.

3. *The Absence of “Public Purpose” as the Principle Logically Uniting Gay Marriage and Polygamous Marriage*

A third possible uniting principle is that gay marriage necessarily makes marriage a private affair, catering to the wants and needs of private adult citizens, rather than an institution with a profound public purpose, like ensuring the rearing of the next generation. The argument goes, if marriage is a private matter, then the state has no business regulating entry to it, so polygamous groups cannot be denied marriage.<sup>99</sup> This supposed uniting principle also misconceives the argument for gay marriage, which, as discussed below, is not based solely on augmenting the happiness of two same-sex adults. Furthermore, using marriage to recognize adult love is a step down the slope already taken by straight couples. For more than a century in the West, marriage has been companionate, rooted in the romantic love and commitment of the spouses.<sup>100</sup> Among straight (and gay) couples, children are a common and important, but not a necessary part of the relationship. So even if gay marriage is justified solely by the love same-sex partners have for one another, recognizing such relationships is more analogous to taking a step to one side on a slope already partially descended, rather than an additional step down the slope.

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<sup>98</sup> *Id.*

<sup>99</sup> See Gallagher, *supra* note 45, at 775 (noting that under the “relationship view” of marriage law, where the marriage is said to be created by and for the couple, the state would have no right to impose one form of family and, therefore, consensual polygamy would be a viable option).

<sup>100</sup> See, e.g., Shannon Alexander & Heather Schafer, *Defense of Marriage Act: Amend the Constitution of the State of Georgia to Provide That Georgia Shall Recognize As Marriage Only the Union of a Man and a Woman; Provide for Submission of This Amendment for Ratification or Rejection; and for Other Purposes*, 21 GA. ST. U. L. REV. 14, 27 (2004) (defining marriage as “love, commitment and a contract between two people”).

#### 4. *The Principled Stopping Point Preventing a Logical Slide to Polygamy*

If, as some gay-marriage supporters claim,<sup>101</sup> gay couples must be allowed to marry simply because they love each other, there is indeed no principled reason to reject multi-partner marriages; multiple partners in a relationship are capable of loving each other.

But satisfying individual needs is not “the principle”—at least not the *only* principle, and not by itself a *sufficient* principle—supporting the recognition of gay marriage. Instead, any proposal for the expansion of marriage must be good both for the individuals involved (individualistic reasons) and for the society in which they live (communitarian reasons). Gay marriage is a good idea for both individualistic and communitarian reasons. The case for polygamous marriage is distinguishable (and weaker) on both counts, especially the second.

##### a. The Individualistic Distinction Between Gay Marriage and Polygamy

On the first issue—the effect of recognition on the individuals involved—the deprivation to gays by the gay marriage ban is even greater than the deprivation to polygamists by the polygamy ban. A polygamist may still marry someone if polygamy is banned, he simply may not marry many someones. The deprivation to the polygamist is admittedly large, especially if polygamy involves the exercise of his religious faith, but it is not a total deprivation. The gay person, however, has no realistic choice of a spouse under a gay-marriage ban. The deprivation is total.

Further, there is no evidence of a “polygamous orientation” causing an inborn and unalterable need for the close companionship of multiple partners (though some people may prefer it) to the exclusion of any such companionship with a single partner. There is, however, strong evidence of a homosexual orientation causing a person to need the close

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<sup>101</sup> Volokh, *supra* note 88, at 12-13 & nn.34-37 (quoting gay-marriage supporters who cite love between same-sex partners as a rationale for gay marriage).

companionship of a same-sex partner to the exclusion of an opposite-sex partner. The ban on polygamous marriage is the denial of state and social support for a preference, perhaps a strong one, for the companionship of many others. The ban on gay marriage, however, is the denial of state and social support for *any* companionship with even one other person.

b. The Communitarian Distinction Between Gay Marriage and Polygamy

On the communitarian issue—the effect of recognition on society—the differences between gay marriage and polygamous marriage are more pronounced. There is evidence that married people are healthier, happier, and wealthier than those who are single.<sup>102</sup> It is reasonable to think that marriage has contributed to that correlation through the legal and social support that comes with it. Gay marriage is a good idea because it will benefit not only the gay couple, but their families (including their children), friends, neighbors, and taxpayers, whose burdens to care for the gay partners singly would be greater.

While multi-partner marriages might benefit the partners involved, the much greater potential for jealousy and rivalry among the partners makes for a volatile arrangement, reducing the expected benefits to them and to everyone else. In a multi-partner marriage, it may also be unclear who has primary caretaking responsibility if a partner becomes sick or injured; there is no such uncertainty in a two-person marriage.<sup>103</sup> While we have some evidence that children do well when raised by same-sex couples,<sup>104</sup> we have no evidence they do well when raised in communal

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<sup>102</sup> See generally LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

<sup>103</sup> See RAUCH, *supra* note 63, at 77.

<sup>104</sup> William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 *FUTURE OF CHILDREN: MARRIAGE & CHILD WELLBEING* 97, 100, 102-04 (2005), available at [http://www.futureofchildren.org/usr\\_doc/06\\_FOC\\_15-2\\_fall05\\_Meezan-Rauch.pdf](http://www.futureofchildren.org/usr_doc/06_FOC_15-2_fall05_Meezan-Rauch.pdf) (reviewing more than fifty studies and other materials, and concluding that children of same-sex couples do as well as children of opposite-sex couples); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, *AM. SOC. REV.*, Apr. 2001, at 159, 176 (reviewing twenty-one studies of gay parents and their children and finding no differences of social concern between

living arrangements. Since multi-partner marriages have almost always taken the form of one man having many wives, recognizing such marriages presents special risks of exploitation and subordination of women, which is inconsistent with our society's commitment to sexual equality. There is no comparable concern raised by gay marriage.

In human history, polygamy has correlated strongly with societies that are illiberal and undemocratic, with no representative democracy, voting, or universal education. In contrast, gay marriage is arising in the most liberal societies, characterized by representative democracy, widespread franchise, and universal education. Why does this correlation exist? Several explanations are possible, but two are most relevant here. First, modern liberal societies have emphasized values like individualism and gender equality that seem inconsistent with polygamy as it has been practiced. Gay marriage, by contrast, is fully consistent with these values. Second, polygamy takes more women than men out of the marriage pool, since multi-partner marriages have overwhelmingly taken the form of one man married to multiple women. This leaves heterosexual men with fewer marriage opportunities. Unattached men with poor marital prospects destabilize societies,<sup>105</sup> and large numbers of such men in a society require strong mechanisms of state control to rein them in. Gay marriage helps ensure marriageable partners for everyone: polygamy does the opposite, with potentially anti-liberal, undemocratic, and socially destabilizing consequences.<sup>106</sup>

Whatever the strength of a Burkean case against gay marriage,<sup>107</sup> the Burkean case against polygamy is much stronger. Polygamy, unlike gay marriage, has been tried and rejected. Many human societies have practiced it at one time or another and almost all have abandoned it. Gay marriage, by contrast, has never been tried and rejected. Looking at

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children of gay parents and children of heterosexual parents), *available at* <http://www.e-noah.net/ASA/MO/articles/stacey.pdf>.

<sup>105</sup> RAUCH, *supra* note 63, at 129.

<sup>106</sup> I thank Jon Rauch for this insight.

<sup>107</sup> See Volokh, *supra* note 88, at 39 (characterizing the Burkean objection to gay marriage as relatively serious, since historically, gay marriage has been all but absent from civilization).

history, polygamy is something human society is evolving *from*, gay marriage is something that society is evolving *towards*.

Perhaps none of the considerations discussed above are decisive against the recognition of polygamous marriages. For each point that has been made, there are possible responses from polygamy advocates. Nor is it the object of this discussion to make a case against the recognition of polygamous marriage. Nevertheless, this discussion illustrates that gay marriage and polygamous marriage present very different issues of history, data, logic, and experience. Importantly, nothing in this complex discussion of history, data, logic, or experience turns on whether gay marriage has previously been recognized. Gay marriage and polygamous marriage should each be evaluated on their own merits, and not treated as if one is a necessary extension of the other.

### c. Gay Marriage, Polygamy, and Chicken Little

Finally, it should be said that slippery-slope arguments about marriage, especially polygamous marriage, have a certain Chicken Little quality about them. Throughout the extensive history of fundamental changes in the institution of marriage similar warnings have greeted every proposed reform. For example, in 1910, the United States Supreme Court rejected the right of women to sue their husbands for abuse, calling such an idea a “radical and far-reaching” change that would “revolutionize the law governing the relation of husband and wife as between themselves.”<sup>108</sup>

The ominous slide to polygamy has also been a favorite trope, with the same warnings once made in the context of allowing interracial marriage. In the Nineteenth Century, the Tennessee Supreme Court upheld the conviction of a white man for criminal fornication with a black woman.<sup>109</sup> When the defendant protested that he and the woman were married in a state that recognized interracial marriages, the court rejected the defense, stating that the recognition of such relationships would lead to

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<sup>108</sup> *Thompson v. Thompson*, 218 U.S. 611, 618-19 (1910).

<sup>109</sup> *State v. Bell*, 66 Tenn. 9 (1872).

“the father living with his daughter . . . in wedlock” and “[t]he Turk . . . establish[ing] his harem at the doors of the capitol . . . .”<sup>110</sup>

This is not to say that warnings about slippery slopes, even about slippery slopes in marriage reform, have never proven true.<sup>111</sup> But it is to say that nothing in the fundamental case for gay marriage brings society any closer to the harem than it was when the Tennessee Supreme Court warned about it more than a century ago.

#### IV. CONCLUSION

Why should we care? What does it accomplish to rebut the bad arguments? Maybe nothing: attitudes about gay marriage tend to follow from certain experiences one has or certain overarching principles one adopts, regardless of the specific arguments. Indeed, attitudes about gay marriage tend to correlate closely with general attitudes about homosexuality. People who believe that homosexuality is a benign variation of human sexuality tend to favor gay marriage. People who believe homosexuality is a harmful/sinful/pathological deviation from normal sexuality tend to oppose gay marriage.<sup>112</sup> So at the end of the day maybe arguments don't move people much on this issue.

But I operate on the faith that eliminating bad arguments at least may help focus the public debate on issues that really matter, the good

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<sup>110</sup> *Id.*

<sup>111</sup> See Volokh, *supra* note 88, at 4-7 (citing examples of warnings about slippery slopes in the marriage context that proved true, including the constitutional evolution of sexual autonomy; and “gay rights” legislation that contributed to the recognition of a right to same-sex marriage in Massachusetts).

<sup>112</sup> This correlation is not logically necessary. A person who accepts the benign-variation view of homosexuality might *oppose* gay marriage because he thinks there is something uniquely heterosexual about marriage. Or he might oppose it because he believes, in Burkean fashion, that a long-standing practice deserves a strong presumption and that gay-marriage supporters have not overcome the strong presumption in favor of the long-standing practice of recognizing only male-female marriages. By contrast, a person who accepts the harmful/sinful/pathological view of homosexuality might *support* gay marriage because she thinks that encouraging homosexuals to settle down and marry will help make the best of a bad situation for the homosexuals and society generally.



arguments on both sides, rather than on distractions. This clarifying effect may improve the quality of the debate and even help move the moveable middle in one or the other direction. Of course, my hope is that clarification will move them in the direction of supporting gay marriage.

This article demonstrates that three common arguments against gay marriage—the definitional, procreation, and polygamy slippery-slope arguments—are quite bad, indeed they are the worst of the lot. While each has some appeal, each is badly flawed as a matter of logic, experience, politics, or some combination of the three. While respect is due to the academics and commentators who have made these arguments, we should move on to other, stronger arguments against gay marriage that better test the affirmative case for gay marriage. This discussion has not, except by implication, made an affirmative case for gay marriage. That remains to be done.