Square Circles?!! Restoring Rationality to the Same-Sex 'Marriage' Debate

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Domestic partnership or civil union has passed in every country in the European Union, and in Japan and Canada. Why not in America? Because we are the only one that's really Christian. It seems to me that the single biggest enemy to homosexuality is Christianity … Any self-respecting gay should be an atheist. And so I think it's a battle worth fighting, not because I want to live behind a white picket fence and be faithful to a lover and both wear wedding rings – I think that's stupid.[1]

We find everywhere a clear recognition of the same truth … because of a general recognition of this truth the question has seldom been presented to the courts … These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterance that this is a Christian nation … We find everywhere a clear recognition of the same truth … Religion, morality and knowledge [are] necessary to good government, the preservation of liberty, and the happiness of mankind.[2]

> *We are a religious people whose institutions presuppose a Supreme Being.*[3]

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1 Merrell Noden, *Edmund White's Own Story,* PRINCETON ALUMNI WEEKLY (March 10, 2004), *available at* http://www.princeton.edu/~paw/archive_new/PAW03-04/10-0310/features2.html.

2 Church of the Holy Trinity v. United States, 143 U.S. 457, 458, 465-471 (1892).

3 Zorach v. Clauson, 343 U.S. 306, 313, 318 (1952).

We the People of the State of California, grateful to Almighty God for our freedom …[4]

The People of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government ...[5]

1. Preface

Whether one is for it or against it, "God talk" still occurs in the public square of this nation, one nation (under God), and other nations as well. But there is certainly a welter of opinion on how this plays out in the public square. Given these divergent and often conflicting perspectives, how does one rationally address the legal matters of the public square? "Rock, paper, scissors", though quite efficient, is certainly less than appropriate. And now same-sex "marriage" visits the public square. How does one construct a legally coherent marriage jurisprudence?

Perhaps one should begin with a different and more focused question: why is same-sex "marriage" a topic that more often than not, generates more heat, than light? To this question, the answer is straightforward. In American culture, same-sex "marriage" is a topic that "violates" the three taboos of polite public discourse: sex, politics, and religion. And yet, to properly address the same-sex "marriage" question requires squarely and realistically facing these supposed taboos – and how they integrate with law.

This article seeks to recapture reasoned discourse regarding these "hot button" topics with an eye toward vanquishing from the public debate specious reasoning and fallacious contentions. The goal is to promote a rational assessment of this issue – to generate more light, than heat. The conclusion, at least to the unbiased rational eye, will be that to 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.

Now, to be sure, marriage is in crisis in America,[6] and it is decidedly not the fault of those who practice homosexual behavior. Nevertheless, the

4 Conn. Const., pmbl (1965).

5 Conn. Const., pmbl (1965).

6 Key contributors to this crisis include the advent of so-called "no-fault" divorce schemes, corrupted notions of patriarchy (*see* www.patriarchy.org (identifying and critiquing distorted notions of male headship)), and ecclesiastical abdication in the face of eroding marital integrity.

marriage crisis cannot and will not be ameliorated by deconstructing the one institution which has been acknowledged to be "*the sure foundation of all that is stable and noble in our civilization*".[7] Same-sex "marriage" presents a radical departure, a structural deconstruction, from both American jurisprudence as well as from the Western legal tradition which spawned it. Tradition is not necessarily normative, but departing from it requires rational justification – something more than mere personal preference.

This article by design travels beyond mere technical "legal" argument and demonstrates that both the concept and practice of same-sex "marriage" lacks rational cogency, and that therefore, the State ought not to endorse it. The public square has no room for square circles, because like the Tooth Fairy, they do not really exist.

2. Introduction

Though this article focuses on rationality, the same-sex "marriage" debate is not a mere set of abstract contentions. This issue transcends propositional "black letter" law; it touches people – all people – both publicly and privately. And, it touches the future. This is why recovering rationality is both crucial and rudimental. Addressing and resolving an issue that concerns all without resorting to guns and bazookas underscores that being human matters. *How* issues are resolved matters. Animals "resolve differences" in an entirely different way. People should not. This is why restoring rationality must be a priority, especially with respect to marriage jurisprudence.

Marriage is a watershed issue that cannot be decided by political shibboleths, opinion polls, or by merely emoting civil rights jargon. Because marriage is so important to humanity, it behooves all advocates to approach the question rationally and to eschew fallacious assertions and inflammatory rhetoric. To erode rationality will ultimately erode being human.

All advocates must guard against the temptation to employ pragmatic methodologies, such as seeking at all costs for the ends to justify the means.[8] Rational discourse for the public square requires more.

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7 Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added).

8 See, Lockyer v. City and County of San Francisco**,** 33 Cal. 4th 1055 (2004). A classic instance of this defective "ends justifies the means" tactic occurred when the City and County of San Francisco purported to issue – in defiance of extant law – marriage licenses to same-sex couples. Thankfully, an informed (and unanimous) California Supreme Court invalidated this antinomian conduct. And this compromised methodology exists beyond the courtroom as evidenced by the barrage of "hate mail" directed to the Alliance Defense Fund and its attorneys, including used condoms, pornography, and personal threats. These actions indicate that rationality has departed – and starkly so – from the methods of some.

From a legal perspective, good advocates must contextualize the debate – and the debate must be balanced with principle, not parsed with preferences. Accordingly, as with any truly effective lawyering, good advocates (especially when dealing with foundational societal institutions) will not ignore history, precedent or the role of inference. Sadly, however, many proponents of same-sex "marriage" do just that: ignore or abandon the fundamental pillars of a full-orbed and balanced advocacy.

When rationality is recovered and when history, precedent and inference are consulted, the analytic barrenness of same-sex "marriage" becomes evident. And good lawyers will know the difference.

3. Discussion

A child, who notoriously despises vegetables, but loves French fries, was coaxed to try eating onion rings. Upon seeing the golden batter and smelling the familiar fried-foods odor, he eagerly consumed this new, but promising snack. When asked whether he liked what he had tasted, he exclaimed: "Yes, Dad, I like onion rings, but there's just one thing: they have onions in them!"

Indeed: onion rings do contain onions; without onions, they cease to be onion rings. They have an essential structure: they are geometrically "round", and qualitatively they contain onions. In the same way, marriage is structured both *quantitatively* and *qualitatively*. Quantitatively, marriage consists of *two* – and only two – persons; qualitatively, marriage consists of the union of a *male* and a *female*. Absent these essential components, the social construct ceases to be marriage.

The law understands this point. The Court, when challenged to deconstruct marriage via polygamy, affirmed marriage's fundamental essence by acknowledging marriage to be "*the union for life of **one man** and **one woman** in the holy estate of matrimony"*.[9] Words have meanings and those meanings cannot simply be ignored or conveniently (that is, arbitrarily) be reconfigured without justification.

Sadly, the current debate often attempts just that by jettisoning this and other foundational considerations. If the resolution to the marriage debate is to be rational – as opposed to simply the arbitrary preferences of one group or another – rationality must be restored. Marriage is a human institution. Animals mate; humans marry. Therefore, marriage as an human institution must reflect human experience and human anthropology.

9 *Murphy*, *supra* note 7, at 4 (emphasis added).

3.1 Courting the marriage debate: Preconditions for returning to rational legal discourse

Before any specific matter can be rationally addressed, certain preconditions must be presupposed – otherwise rational discourse itself cannot exist. For instance, if words lack fixed meaning, then debate itself becomes meaningless.

The next section will selectively set forth some key matters that, once recognized, will spark rational discussion of the same-sex "marriage" question.

3.1.1 Promoting argument rather than breeding quarrels

In popular culture, having an "argument" connotes something at best negative: conflict, anger, and decibels. This does not speak well of popular culture, which has lost its collective ability to analyze matters for their truth or falsity. This analysis, properly done, is done by argumentation.

Sadly, bad quarrels often obfuscate or negate good arguments and this should not be, especially when lawyers advocate. Too often a discussion degenerates into a quarrel and the rational development of argument withers into analytic anorexia.

Debates are won or lost however, as the truth is pursued by argumentation. Debates presuppose that truth exists (a "right" answer); otherwise, the very process of debating this issue (or any other issue) would be meaningless. Accordingly, and especially given this hot button issue, advocates must diligently seek to eradicate quarreling from their rhetorical arsenal.

The indicia of quarreling, though variable, are unmistakable: fallacious reasoning,[10] loaded slogans,[11] arbitrary assertions,[12] emotional appeals,[13] equivocation,[14] and anecdotal narratives.[15] None of these ploys can stand

10 *See infra* pp. 16-25.

11 These efforts can be classified as constituting "bumper sticker" jurisprudence, as if merely invoking shibboleths and sound bites of legal jargon – "equality", "due process", "civil rights", "discrimination" – can somehow transform an unsound argument into a cogent jurisprudential justification. True advocacy must press beyond "press release" language and pursue the analytic substance of the claim at issue.

12 The two great intellectual sins include contradiction and arbitrariness. One illustration: the same-sex "marriage" advocates often simply assume that marriage between close relatives should be proscribed, or that marriage consists of the union of two – and only two – persons. Upon the rationales typically advanced by same-sex "marriage" advocates, however, these positions are more a product of arbitrary assumption rather than principled analysis as will be shown. *See infra* pp. 8-9, or footnote 19.

13 All too common in this debate is the claim of supposed "unfairness" depicted with some sympathetic choreographed "couple" simply seeking to "marry the person they love".

alone and in many cases, they simply spawn tractionless quarrels rather than advancing the jurisprudential argument.

3.1.2 Acknowledging that both sides assert moral claims

Frequently, universities when sponsoring public debates regarding same-sex "marriage" will ask the participants to focus on the "legal", not the "moral" issues.[16] This request is often made as if some sophisticated analytic point has been drawn. Nothing could be further from the truth.

This same point recurs from the mouths of same-sex "marriage" advocates, who contend that he or she is not discussing the moral issue, only the legal issue.[17] Again, this distinction undercuts rationality. Why?

In the nature of the case, a debate focuses on (at least) two positions. The advocates are contending as to each position that their position *ought* to be the law. Stated differently, this debate is about what the law *ought* to be. The advocates therefore appropriately are asserting that the law *ought* to be a certain way, and *not* the other way.

Such evaluative claims are decidedly *moral* claims – determining the "oughtness" of a particular position. More importantly, resolving such claims requires and presupposes an appeal to a transcendent standard (such as the laws of logic) because that is the only way to truly answer a moral question.[18] Otherwise, the entire debate is nothing more than an exercise of sound and fury signifying nothing. So, to restore rationality to the same-sex "marriage" debate requires every advocate to candidly

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This may be good rhetoric, but it is deplorable law. There never has been a legal right to "marry the person you love". *See infra* pp. 52-55 or footnotes 142 through 146. Instead, this is just a calculated raw appeal to emotion devoid of legal justification or rationality.

14 *See infra* pp. 23-25, or footnotes 55 through 60.

15 Personal biographical narratives, while occasionally interesting, lack logical force. So, merely relating that "my life changed after being married to my lesbian partner in Canada because my sense of self-esteem and personal fulfillment were maximized" justify nothing in this legal debate – one way or another. *Compare e.g.,* comments made regarding Barbara Cox's remarks at a same-sex "marriage" debate, March 24, 2004, at the University of San Diego, *The Legal Debate Over Same Sex Marriage; An Interview with Jeffery J. Ventrella, J.D., by Dr. Roger Wagner*, The Word, PenPoint at http:// www.scccs.org/scccs/word/PenPointArticle.asp?id=

16 This has been the case in a number of the author's public debates, including those conducted for the law schools at the University of Pennsylvania (Apr. 16, 2004), the University of San Francisco (Apr. 24, 2004) and others.

17 This was the mantra this author heard from ACLU representative, Denise Lieberman, during a debate conducted at St. Louis University (Oct. 27, 2004).

18 This is also true because no argument can prove everything; every argument must have a fixed starting point, such as the laws of reasoning, fundamental notions of human

acknowledge that everyone is making a moral claim of some type. The issue is which moral claim can be justified.[19]

3.1.3 Remembering that words really do have meanings

On a related note, because debates pursue truth, it is axiomatic that words must have meanings. If words lack meanings, then debate itself is pointless.[20] This should be self-evident, but unfortunately, with the encroachment of post-modernity into jurisprudence,[21] a more intentional approach is necessary.[22]

This means at a minimum, that advocates must candidly acknowledge both the legal and cultural meaning of marriage.[23] Marriage law cannot be decontextualized merely to support someone's trendy preferences.

3.1.4 Recognizing that true knowledge must be justified

Two people were chatting. One opined that he knew how many ants lived in a designated ant hill in East Africa at 9:07 in the morning: 1 304 562. His friend was incredulous, since his friend had never visited Africa, let alone conducted a census of any ant hill. To his astonishment, a third party

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biology and the like. To ignore such considerations does not negate them any more than a spoiled child, who thrusts his fingers into his ears and screams "I can't hear you! I can't hear you!" negates his loving parent's corrective admonitions.

19 The proscriptions against bestiality and same-sex adult incest can only be justified upon moral grounds – the subjective "yuck factor" often invoked by same-sex "marriage" advocates to dismiss these admittedly unpleasant, but plainly logical implications to their positions, carries no philosophical water.

20 One is reminded of the now classic "*Does God Exist?*" debate convened in 1985 at the University of California at Irvine between Dr. Greg L. Bahnsen (a Christian) and Dr. Gordon Stein (an atheist). During one exchange Dr. Bahnsen noted that since debates presuppose the existence and reliability of the laws of logic, Dr. Stein, as a materialist, loses by showing up. How? As a materialist, Dr. Stein denied the existence of anything non-corporeal. However, the laws of logic are decidedly non-corporeal: they are abstract, absolute, and universal. Because Dr Stein "used logic" to advocate a position that, if true, would disprove the possibility of the logic he was employing, his position logically (!) imploded. Accordingly, Dr. Stein, by "showing up", lost. Both men are now deceased, and thus, someone has definitively "won" this debate. An audio version can be obtained from http://www.rctr.org/ap5.htm.

21 *See, e.g.,* Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. Rev. 371 (2002); Paul D. Carrington, *Incorrect Speech, Incorrect Hearing: A Problem of Postmodern Legal Education*, 53 J. Legal Educ. 404 (2003); Lars Noah, *A Postmodernist Take on the Human Embryo Research Debate*, 36 Conn. L. Rev. 1133 (2004); Matthew McNeil, *The First Amendment Out on Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clauses Jurisprudence*, 65 Ohio St. L.J. 1021 (2004).

22 This author notes that apologist Dr. Francis Schaeffer often remarked, that worldviews such as post-modernity are more often *caught*, than *taught*.

23 *See infra* pp. 25-38.

accurately calculated the number of ants living in that certain ant hill at that certain time in East Africa: 1 304 562. Amazing. But …

Now, given this scenario, the question is, can it truly be said that the friend *actually knew* the number of ants? Or, more plausibly, was his astonishingly accurate census simply what might be called "a lucky guess"? The answer is obvious: the friend guessed correctly, but he did not – philosophically speaking – *know* the quantity of ants. Why? If reasoning is to be returned to legal advocacy and especially the same-sex "marriage" debate, then advocates must restore the notion that knowledge – to be knowledge – must be justified, if it is to be anything more than opinion or a "lucky guess".[24]

Mere conclusory assertions – without more – are not justifications of the point, and hence, are unreliable. Legal positions ought not to be resting on unjustified and thus unreliable premises. Strenuous and sincere argument that cannot be justified produces arbitrary and therefore, useless jurisprudence.

3.1.5 Distinguishing marriage's definition from marriage regulation

Here is a test: review the following and then answer a simple question: With eyes closed, imagine a mermaid; fix the mermaid in the mind. Now, answer this question: what color is the mermaid's hair? In a group, the answers will vary, even though every person focused on a mermaid. Why?

The explanation centers on what constitutes the essence of "mermaidness". While the hair color of mermaids can vary considerably, in every case, the subject mermaid has a fish body with a female upper torso. Otherwise, the participants would not be imagining a mermaid. Instead, they would be imagining something else, but certainly not a mermaid. The same is true in the same-sex "marriage" debate.

Without question, marriage as an institution pre-existed the State. Marriage transcends law; the law did not create marriage. Rather, the law *recognizes* and *regulates* marriage. As the Court noted: states may "*regulate the mode of entering [marriage], but they do not confer the right*".[25]

This point is often missed in today's same-sex "marriage" debates. Analytically, the distinction that must be drawn is between the thing's *definition* – its essence – and its *regulation*. Marriage, as structured as the union of one man and one woman, is subject to regulation, but it ought not

24 *See generally,* ROBERT REYMOND, THE JUSTIFICATION OF KNOWLEDGE (Presbyterian & Reformed Publishing Company, Phillipsburg, New Jersey, 1976).

25 Meister v. Moore, 96 U.S. 76, 78 (1877) (emphasis added).

to be subject to structural obliteration – otherwise it ceases to be marriage. It becomes in effect an onion-less onion ring.

The law has historically recognized the essence of marriage as being the union of one man and one woman.[26] Now, the law regulates that pre-existing structure: establishing, for example, ages of consent, degrees of consanguinity, residency requirements, capacity, grounds for divorcement, *et al*. But in every case, these regulations serve the essence or definition of marriage; they do not deconstruct it. Proper regulation ought not to destroy the thing regulated, yet that is exactly what same-sex "marriage" and plural marriage would do.[27]

Accordingly, it is analytically confused as well as disingenuous for a same-sex "marriage" advocate to claim, as many do,[28] that because marriage *regulation* periodically changes, that "therefore" marriage's definition, its *essence*, also should change. This is a fallacious *non sequitur*. To restore rationality to the debate, all advocates must abandon immaterial assertions regarding regulation.

3.1.6 Admitting that animus is a red herring

A sad chapter in the same-sex "marriage" debate stems from perceptions and accusations of animus.[29] The assertion is typically made that those who oppose same-sex "marriage" are "homophobic" and "anti-gay", etc. This misses the analytic point completely. On a personal note, this author opposes same-sex "marriage" not because he is a member of the Flat Earth Society or some equivalent to the Ku Klux Klan, or is homophobic.[30] Rather, same-sex "marriage" ought to be opposed because it cannot be justified legally or philosophically.

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26 *See infra* pp. 27-28.

27 Same-sex "marriage" impugns marriage's *qualitative* essence; plural marriage impugns marriage's *quantitative* essence. In both cases, marriage's structure is transmogrified.

28 *See generally,* Freedom to Marry *at* http://www.freedomtomarry.org.

29 To be sure, groups – who will not even be dignified by identifying them – do exist that while purporting to be speaking for God, lace all communication with strident invective, animosity, and personal ridicule. Neither this author, nor the Alliance Defense Fund condones such sentiment or its methodology. Yet to be candid, on the other hand, there are also those within the sphere of homosexual advocacy groups that likewise color their rhetoric with uncharitable (and unsupportable) assertions, such as Evan Wolfson's repeated line that asserts in effect that those who oppose same-sex "marriage" "are opposed to any measure of protections for gay families. If we were arguing for oxygen, they would be against it". Such nonsense does not belong in rational discourse. *See, e.g.,* Thomas Peele, *Legal Minds Gear Up for Gay Marriage Fight*, CONTRA COSTA TIMES, Dec. 20, 2004, ("Same-sex marriage opponents 'are opposed to any measure of protections for gay families. If we were arguing for oxygen, they would be against it', said Evan Wolfson of New York-based Freedom to Marry.").

30 But, there certainly does appear to be something resembling homophobia-phobia manifested by some in the culture, not to mention, "theophobia".

Moreover, note that what is being asserted is not "stopping homosexuals from marrying". The opposition to same-sex "marriage", while it may impact those who engage in homosexual conduct, likewise impacts those who do not. The focus of the argument is directed to preserve the quantitative and qualitative structure of marriage: the union of one man and one woman. Sexual predilections are irrelevant, nor can animus be inferred. Rather, the animus assertion consists entirely of rhetorical flourishes designed to shift the debate from its focus: from the *structure* of marriage to some imagined civil rights context.[31]

Legally, an assertion of animus or invidious discrimination cannot be sustained under extant precedent. Neither explicit discrimination nor discrimination by "disparate impact" is unconstitutional unless motivated by a purpose to harm a protected group.[32] The federal courts will "*ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation*".[33] Under intermediate scrutiny, the alleged discriminatory statute must be purposely designed to harm an identifiable group. A court must find that the statute was enacted "*because of, not merely in spite of, its adverse effects upon an identifiable group*".[34]

Marriage in California, for example (and in all cultures and at all times for that matter), has always meant a union between a man and a woman. The text, structure, and operation of the California Marriage Statutes reveal a purpose to preserve and protect the societal advantages marriage has conferred from time immemorial upon society. The Marriage Statutes do not remotely reflect a purpose to spitefully harm homosexuals.

In *Tuan Anh Nguyen*, the Supreme Court considered the constitutionality of a statute for children born abroad to unwed parents seeking citizenship through one of their parents. The statute demanded more exacting proof of paternity than for maternity. The Court noted the natural biological difference between the mother and father in that the mother is necessarily present at the time of birth. This difference made it much easier to prove parenthood through the mother, than it did through the father. The Court ruled that the statute's more burdensome requirements to prove paternity

31 *See infra* pp. 53-54. The misleading notion that opposing same-sex "marriage" is analogous to racial discrimination will be addressed subsequently.

32 Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (Proof of discriminatory purpose is required to show a violation of the Equal Protection Clause).

33 Tuan Anh Nguyen v. INS, 533 U.S. 53, 67-68 (2001) (emphasis added).

34 Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added).

did not violate equal protection. The Court held that gender specific statutes are constitutional when it "*takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.*"[35]

The California Marriage Statutes are plainly gender-neutral. But the biological differences between opposite-sex and same-sex couples justify allowing only persons of the opposite-sex to marry. Procreation and parenting occur directly from the union of a man and a woman. That this serves the State's interest in replenishing society with posterity imminently nurtured by both sexes is undeniable. Despite this textual clarity, the Supreme Court of California held that its statutes were impermissibly discriminatory predicated not on sex, but rather on "sexual orientation", which as will be shown subsequently, is wholly illusory.

The court ruled: "These cases recognize that, in realistic terms, a statute or policy that treats same-sex couples differently from opposite sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently because of his or her gender but rather accords differential treatment because of the individual's sexual orientation." (87)[36]

"By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation." (94)

"Applying this standard to the statutory classification here at issue, we conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes – the interest in retaining the traditional and well-established definition of marriage – cannot properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest." (10-11)

The court took pains to rest its ruling on "sexual orientation" because the analysis predicated on sex is untenable: This plain because the marriage statutes do not mask unlawful stereotypes based on subjective prejudice. Rather, these statutes recognize an objective biological complement

35 Tuan Anh Nguyen v. INS, 533 U.S. 53, 64 (2001) (emphasis added).
36 *In re Marriage Cases*, 43 Cal. 4th 757, 834 (Cal. 2008)

between women and men not found in same-sex couples. Equal protection principles do not require that the legislature ignore this reality. Animus is manifestly a red herring legally and philosophically. The California court's attempt to avoid this analytic roadblock by invoking sexual orientation proves analytically unwieldy, as will be shown.

3.1.7 Avoiding fallacious reasoning

Good attorneys are quick to note factual discrepancies. Indeed, trials can often turn on such matters – "*the glove doesn't fit*". The slightest jot which should be a tittle can carry great persuasive weight. Sadly, the same is not true when discrepancies of reasoning appear. Often they are missed completely, or worse, embraced. Reasoning has left legal reasoning and this should not be.[37] To recapture rationality will require the humility to recognize that fallacious legal reasoning ought to be abandoned and this is true for several reasons.

A Lawyer's Ethical Duty to Speak Truthfully

Attorneys' communication as attorneys is constrained – ethically. Lawyers who trumpet free speech may cringe at such things, but it remains true. The Model Rules require attorneys to speak candidly and in fact, to speak truthfully. One state puts it this way:

> RULE 3.3: CANDOR TOWARD THE TRIBUNAL[38]
>
> (a) A lawyer shall not knowingly:
>
> [(1)] make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS[39]
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Trial work is also a truth finding exercise. What happens, however, is that attorneys fail to "connect the dots" between reasoning and promoting

37 Jeffery J. Ventrella, *Identifying and Refuting Fallacious Argument*, FOR THE DEFENSE, Dec. 1995, at 2.

38 IDAHO RULES OF PROF'L CONDUCT R. 3.3 (2005).

39 *See id*., R. 4.1.

truth. If one reasons fallaciously, truth is not promoted, but instead is obscured, if not negated.

Communicating ethically comprises more than conveying the *conclusion* or the object: the car was speeding; the light was green; the document is privileged. It also includes the *process* of communicating, including *how* the lawyer reasons. To reason in a fallacious way impedes, rather than promotes, speaking the truth.

For example: "There have always been people who engage in homosexual conduct; therefore, same-sex 'marriage' should be legal." Here a notorious fallacy is being used: the naturalistic fallacy, or in non-technical jargon, an attempt is being made to derive an "ought" from an "is". The fact that something exists, or even is natural, in no way implies that it *ought* to be celebrated let alone enshrined in the law. Consider these counter examples: "Cystic fibrosis is genetic and therefore natural; therefore we ought not to seek remediation for it." Or, "Slavery is universal; therefore the law ought to continue to protect this vital economic institution." Or, "Men lust after women naturally; therefore, rape laws comprise thinly-veiled gender-based discrimination that work to impede millennia of evolution-driven survival behaviors."[40] The "is" cannot derive the "ought".[41]

B Recurrent Fallacies in the Marriage Debate

3.2 Mixed modalities: Apples, oranges, and the occasional kumquat

A frequent, but fallacious rationale urged for altering marriage's fundamental structure invokes miscegenation laws. These deplorable laws proscribed aspects of interracial marriage.[42] The analytic problem

40 Don't gasp: Some evolutionary psychologists actually consider rape *"a natural, biological phenomenon that is a product of the human evolutionary heritage",* analogous to *"the leopard's spots and the giraffe's elongated neck"* . Randy Thornhill and Craig Palmer, *"Why Men Rape",* THE SCIENCES (January/February 2000) 20-28 *See also*, THE NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION (Cambridge, Mass.:MIT Press 2000), discussed in Nancy Pearcy, TOTAL TRUTH (Wheaton, Ill: Crossway Books 2004), p. 211. On this reasoning, there could be no *moral* outrage for rape or the September 11th terrorist attacks: their genes made them do it. Rather clearly, the "is" does not justify the "ought", despite what some same-sex "marriage" advocates may assert.

41 At this point, the same-sex "marriage" advocate may cry foul since reference is often made to the "is" of the historicity of "traditional marriage". This criticism misconstrues the point and thus lacks merit. Marriage as the union of one man and one woman is not right because it is traditional; it is traditional because it is right, which is why the historic cross-cultural evidence validates the case against same-sex "marriage" – the two situations are quite different.

with this comparison is that it is fallacious: it mixes modalities by comparing what amounts to apples with oranges.

The miscegenation cases addressed the misapplication of the fundamental structure of marriage; they did not obliterate it. Untouched by those now famous cases, notably Perez v. Sharp[43] and Loving v. Virginia,[44] was the notion that marriage consists of the union of one man and one woman. In fact, these cases underscore that fundamental essence. Indeed, *"[T]here is nothing in* Loving *or* Lorence *that indicates that the Fourteenth Amendment bars a state from prohibiting marriage between member of the same sex[.]"*[45] While the State, by departing from the common law, improperly regulated marriage by imposing a racial restriction, it did not in any way redefine marriage. Instead, the structure was affirmed. To continue to draw comparisons between these two situations is to mix modalities and thus reason fallaciously.[46] The true analogue to same-sex "marriage" is not interracial marriage, but rather polygamy because in each case the advocates are seeking to alter the essence of marriage's structure.[47] One court recently recognized the correction of this connection:

> The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to member of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiff view same-sex marriages, as "compelling and

42 These laws, actuated by racial bigotry and white supremacy, were thankfully never universally embraced. Moreover, these laws sharply deviated from the common law, the law that enshrined the Western legal tradition. As such, these laws represented a radical and unjustifiable departure from the law of marriage. Even so, none of these deeply flawed laws attacked the structural essence of marriage. Thus, from an analytic standpoint, proponents of same-sex "marriage" promote a vision for culture and the public square that is much more radical than the miscegnationists, albeit predicated upon different motivations. Damage to marriage, however, occurs with both.

43 *Perez*, 32 Cal. 2d 711 (1948).

44 *Loving*, 388 U.S. 1 (1967).

45 Lewis v. Harris, 875 A.2d 259, 272, (N. J. App. Div, June 14, 2005), Slip. Op. at page 30. The Supreme Court of New Jersey reversed. Lewis v. Harris, 908 A.2d 196 (NJ 2006).

46 *See infra* pp. 51-54. The legal assertions predicated upon *Loving* (equal protection) will be analyzed subsequently.

47 *See, e.g.,* AMERICAN CIVIL LIBERTIES UNION, ACLU POLICY GUIDE (1992). The frequent retort to this apt comparison is often (fallacious) name-calling: "extremist", etc. The reality is, however, that same-sex "marriage" advocates, notably the ACLU, understand and for years have quietly understood the logical consequences of same-sex "marriage": altering the structure of marriage necessitates validating plural marriage as well as same-sex "marriage".

> definitive expression[s] of love and commitment" among the parties to the union. … Nevertheless, courts have uniformly rejected constitutional challenges to statures prohibiting polygamy on the grounds that polygamous marriage is offensive to our Nation's religious principles and social mores.[48]

3.3 Hasty generalizations: "2 + 2 = 5; therefore mathematics is useless"

In today's climate of legal positivism, references to the venerable tradition of the natural law are often, when not summarily dismissed, greeted with snickers or worse. How one dismisses a legal assertion, however, is critical. Is this dismissal justified?

To take one example: in the context of same-sex "marriage", advocates who support forced marital restructure dismiss appeals to the divine or natural law by quoting the lower court's decision in *Loving*. There the court stated:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[49]

The advocate then fallaciously asserts that all appeals to the natural law or religion comprise a flawed contrivance of bigotry. Of course, another explanation exists and is much more plausible. To illustrate: Suppose that a man appears and asserts that he is a renown mathematician; he then emphatically intones repeatedly: "2 + 2 = 5". What should one conclude? That *mathematics* as an academic discipline is both flawed and meritless for any and all purposes? Or, instead, should one conclude that this man's *application* of mathematics is mistaken? The answer is obvious. To conclude the former, however, illustrates the fallacy of hasty generalization.

One may reject the natural law, but predicating that rejection on one judge's flawed invocation of something that sounds like natural law is specious. Or put in a different light. "To go to Harvard, one must be smart; the person supporting same-sex 'marriage' went to Harvard; therefore, his legal reasoning is sound."[50] Such assertions lack merit and manifestly so.

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48 Lewis, Id. at Slip Op. 23, 24 (citations omitted).

49 388 U.S. at 3.

50 *See infra* at nn.51-54. This also illustrates the positive circumstantial *ad hominem* fallacy as well.

3.4 Ad Hominem fallacies: "But you're religious!"

Ad Hominem fallacies argue "against the person" either positively or negatively. Though such references occur often in culture – famous athlete A uses Product X; therefore, Product X must be good – they should be eschewed in legal reasoning. They provide no logical force whatsoever.

Consider this example: Margaret Sanger, the founder of Planned Parenthood, advocated eugenics and spoke of "a race of degenerates", the "dead weight of human waste", "racial health",[51] and "genetically inferior races".[52] Ugly stuff. Would this fact alone provide a justification for opposing abortion? Hardly, and yet, this is the same form of argument often strewn before opponents of same-sex "marriage".[53]

The volume of such legal miscues can be deafening: "If you oppose same-sex marriage, you're a narrow-minded bigot!" Or, "You are employed by a right wing religious organization and as everybody knows, they can't be right!" Or, "We shouldn't leave rights up to a popular vote!"[54] The clutter of *ad hominem* rhetoric must be cleared if rationality is to return to the same-sex "marriage" debate.

3.5 Equivocation: Good steaks are rare

Another common logical flub involves the careless or imprecise usage of terminology – like "good steaks are rare".[55] In the realm of the same-sex "marriage" debate, equivocation arises in a number of ways.

First, it arises when advocates use the term "marriage" in very different, but unacknowledged ways. For example, advocates for same-sex "mar-

51 Donald De Marco & Benjamin Wiker, Architects of the Culture of Death 297-300 (2004).

52 Margaret Sanger, The Pivot of Civilization 264 (1922).

53 This is not to say that abortion should not be opposed; it certainly should be, but the rationale underlying that opposition must not be fallacious: Humans need food, water, and shelter; to deprive humans, by design of food, water, and shelter, simply because the human resides in a womb is unprincipled and cannot be justified.

54 Perhaps, but perhaps not. Note though, it was the *people* acting constitutionally – *not the courts* – who abolished slavery (white men – 13th Amendment) and granted women suffrage (white and black men – 19th Amendment). And, the people seeking to nullify a particularly egregious Court decision via the amendment process enjoys a long history. Indeed, the 11th amendment came to be in response to *Chisholm v Georgia,* 2 U.S. (2 Dall.) 419 (1798). This is how a constitutional republic functions and thus, to say that a proposed marriage amendment would somehow be undemocratic is both constitutionally unfounded and historically ignorant.

55 This particular miscue is known as amphibole. Another is, "Eat here, get gas." Or, "A man is not complete until he is married; when he marries, he's finished."

riage" often predicate their argument upon "marriage" being a "bundle or package of benefits".[56] This starting point, however, deviates from the law's well-established definition of marriage as being the legally recognized union of one man and one woman.[57] The State may and ought to confer benefits to marriage, but marriage does not consist of those legal incidents. Marriage is more than a welfare program for co-habiting couples. This equivocation confuses the analysis and transforms marriage into a mere economic arrangement, something utterly foreign to the operative law.

Second, in another well-worn example, the same-sex "marriage" advocate will emotionally intone that she simply wants marital equality for her relationship. However, when probed, the reality is very different. "Marriage" as classically understood connotes not only the union of one man and one woman, but also that marriage is the exclusive and best context for sexual expression, procreation, and child rearing. Accordingly, absent equivocation, this would be expressed by correlatively enforcing chastity before marriage, fidelity within marriage, and the recognition that marriage is the optimal environment for rearing children – in short, that marriage is the superior and therefore preferred mode of cohabitation without rival.

The same-sex "marriage" advocates, however, want something very different from those norms implicit in marriage. They want to maintain and expand a smorgasbord approach: one can choose marriage *vel non*, but it is only one of many equally viable options for cohabitation – not the preferred or endorsed institution. In fact, some advocates of homosexual behavior candidly acknowledge that they are seeking the radical reordering of societal norms, not access to an existing institution. As Professor Paula Ettlebrick notes:

> *Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations.* ***It is a way of dealing with the world*** *by diminishing the constraints of gender roles which have for so long kept women and gay people oppressed and invisible.* ***Being queer means*** *pushing the parameters of sex, sexuality, and family,* ***and in the process transforming the very***

56 *See, e.g.,* Karen Doering, remarks at Florida State University debate, "Re-Framing the Debate: Legal and Social Implications of 'Lawrence v. Texas' in the areas of Gay Marriage, Florida's Gay Adoption Ban and U.S. Military Policy." (Jan. 22, 2004).

57 *See infra* at pp. 27-29.

> ***fabric** of society … We must keep our eyes on the goals of providing true alternatives to marriage and of **radically reordering** society's view of family.*[58]

Until equivocation relating to the use of the term "marriage" is identified and eradicated, rational progress will be impeded.

Or consider another example: As mentioned, the invocation of the natural law is frequently pooh-poohed. But this itself reflects at best equivocation or at worse ignorance. First, it confuses the natural law itself with various theories of the natural law.[59] Second, it treats the various theories as analytic equivalents, which is far from the case.[60] Equivocation, rather than providing clarity by advancing an argument, muddles the analytic waters and then stirs them. This form of fallacious reasoning must likewise be rejected.

4. Consummating the marriage debate: A plea for an informed full-orbed legal discourse

No reasoning, especially legal reasoning can occur in a vacuum. In fact, legal reasoning is tri-perspectival – that is, it involves applying a *standard* (a norm or set of norms) by and to *persons* in particular *situations*.[61] For example, though the essence of contract law is "enforcing promises" [normative perspective] – the other perspectives make plain that not all promises are enforceable: the promisor must have capacity [personal existential perspective], and the promisee must not coerce or fraudulently procure assent [situational perspective].

Why delve into this arcane formulation? Because rationality demands it and because many same-sex "marriage" advocates express their positions extracted from the historical (situational), legal (normative), and/or personal (existential) contexts, the very contexts or perspectives that

58 Since When is Marriage a Path to Liberation? Out/Look, Fall 1989, reprinted in ***Lesbians, Gay Men, and the Law***, Ed. Wm. Rubenstein, pp. 402,403,405.

59 J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW 111, 133 (2003, Spence Publishing Company, Dallas, Texas).

60 *Compare generally*, RUSSELL HITTINGER, THE FIRST GRACE (ISI Books, Wilmington, Delaware, 2001) (Thomistic version) *with* J. BUDZISZEWSKI, WRITTEN ON THE HEART (Intervarsity Press, Downers Grove, Illinois, 1997) (classical synthesis) *and* ROBERT P. GEORGE, CLASH OF ORTHODOXIES (ISI Books, Wilmington, Delaware, 2003) ("new" natural law). STEPHEN J. GRABILL, REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS (Eerdmanns, Grand Rapids, MI, 2006) (Protestant Natural Law).

61 *See generally*, JOHN M. FRAME, THE DOCTRINE OF THE KNOWLEDGE OF GOD (Presbyterian and Reformed Publishing Company, Phillipsburg, New Jersey, 1987).

necessarily inform the debate. Rational advocates should consider the Situational, the Normative and the Personal perspectives. Ignoring any one of these produces a crabbed and ultimately ineffective or even tyrannical jurisprudence.

4.1 The extant historical [Situational] perspective: Good lawyers don't ignore history

Marriage laws apply to *situations*. One zealous advocate framed the unrestrained freedom to marry question this way:

> [E]very man and every woman shall have the *free liberty* to marry *whom they love*, if they can obtain *love* and liking of that party whom they should marry, and neither *birth* nor *portion* shall hinder the match, for we are all of one family of mankind[62]

These words stem not from the recent flurry of marriage litigation, nor from the traditional advocates of this cause: ACLU, Lambda Legal, the Human Rights Campaign, or Freedom to Marry. Rather, these words were advanced in the 17th century. The issue of "marital freedom" is not some cutting edge issue of civil rights, as is often portrayed. Instead, this is an issue that has been discussed and litigated implicitly and explicitly for centuries.

It was against this backdrop that the Supreme Court, recognizing the complementary and communitarian structure of marriage affirmed marriage's quantitative and qualitative components. In particular, the Court noted that marriage is "*the sure foundation of all that is stable and noble in our civilization*".[63] That being said, it behooves all involved to resolve the current debate question correctly. And, only arrogance will attempt to answer this question in a vacuum, extracted from the collective thinking of the nation's legal past – the Situational perspective. That history or context will now be rehearsed, albeit briefly.

The common law has always recognized marriage as a relationship between a man and a woman[64] without reference to race. Before any statutes regulated formation or solemnization there was a "*common-law*

62 Gerrard Winstanley, Leader of the Diggers in 17th-century England, quoted in JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT 178 (Don S. Browning and Ian S. Evison, eds., Westminster John Know Press, Louisville, Kentucky, 1997) (emphasis added).

63 Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

64 *See, e.g.,* Travers v. Reinhardt, 205 U.S. 423, 440-42 (1907) (finding that a common law marriage was established by man and woman who lived together and publicly acknowledged their marriage).

right to form the marriage relation by words of present assent".[65] When California, for example, enacted laws early in its history with "*certain provisions, different from the rules of the common law, . . there [was] no attempt made to change the essential nature of marriage ...*"[66]

The definition of marriage also pre-dates the state and the nation. As recognized by *Baker v. Nelson*,[67] "*marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.*" The English term "marriage" has meant the union of a husband and wife, a man and a woman, since at least the 14th century.[68]

The U.S. Supreme Court recognized what marriage meant at common law: the union of "one man and one woman", *Murphy v. Ramsey*.[69] Throughout the history of the United States, marriage, in a legal sense, has never meant anything other than the union of a man and a woman. California laws also reflect and embrace a pre-existing fact at common law: that marriage means the union of a man and a woman.[70]

And, these conclusions are confirmed by the regulatory reforms occurring throughout the Western Legal Tradition. This is true whether one is

65 Meister v. Moore, 96 U.S. 76, 79 (1877); *cf*. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) ("Marriage was a custom long before the state commenced to issue licenses for that purpose"). Common law marriage was recognized on evidence of a man and woman living together and publicly presenting each other as husband and wife. *Travers*, 205 U.S. at 440-42.

66 Sesler v. Montgomery, 78 Cal. 486, 486-87 (1889) (emphasis added).

67 191 N.W.2d 185, 186 (1971), *cert. denied*, 409 U.S. 810 (1972) (dismissing appeal for want of a substantial federal question) (emphasis added).

68 *See* Merriam Webster's Collegiate Dictionary – Tenth Edition 713 (1993) (definition of "marriage"). *See also,* Ancient English dictionaries are all consistent with this meaning. *See, e.g.,* Thomas Dyche & William Pardon, A New General English Dictionary (1740) (Marriage: "that honourable contract that persons of different sexes make with one another"); James Buchanan, Linguae Britannicae Vera Pronunciatio (1757) (Marriage: "A civil contract, by which a man and a woman are joined together"); Noah Webster, A Compendious Dictionary of the English Language 185 (1806) (Marriage: "the act of joining man and woman"); Noah Webster, An American Dictionary of the English Language 518 (1830) (Marriage: "The act of uniting a man and woman for life"); James Knowles, A Critical Pronouncing Dictionary of the English Language 425 (1851) (Marriage: "The act of uniting a man and woman for life"). The definition has continued unchanged. *See* Merriam Webster's Collegiate Dictionary – Tenth Edition 713 (1993) ("1 a: the state of being married b: the mutual relation of husband and wife: WEDLOCK").

69 114 U.S. 45; *See also In re* DeLaveaga's Estate, 142 Cal. 158, 171 (1904)

70 *See* Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 1128 (2004) (Kennard, J., concurring in part and dissenting in part) ("Since the earliest days of statehood, California has recognized only opposite-sex marriages.").

speaking of Roman Catholicism's sacramental reforms, Lutheranism's social estate theory of marriage, the Calvinists' covenantal reforms, Anglicanism's commonwealth view of marriage, or even the secular contractual reforms of the Enlightenment.[71]

In every instance of regulatory legal reform – whether ecclesiastically or secularly motivated – in every context and in every state – viable legal reformation always affirmed the structure, that is, the essence of marriage. To depart from the considered practice and analysis on a whim and without significant justification, defies rationality by ignoring the context, that is, the Situational perspective. Good lawyers don't ignore history.

4.2 The extant legal [Normative] perspective: Good lawyers don't ignore precedent

Marriage laws apply *standards*. What are these standards? Is marriage law a *tabula rasa*? If not, how have these standards been articulated and implemented? Only by first answering these questions can the same-sex "marriage" question be addressed from the normative perspective.

The reality is that each and every federally-based argument being advanced in favor of same-sex "marriage" today has been tried, tested, and has failed. And, good lawyers don't ignore precedent.

In *Baker v. Nelson*,[72] the U.S. Supreme Court considered on direct appeal the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth Amendment or the Due Process Clause of the 14th Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the 14th Amendment.[73] The Minnesota Supreme Court had ruled that the state's definition of marriage "*does not offend the First, Eighth, Ninth, or 14th Amendments to the United States Constitution*".[74]

California Supreme Court Justice Kennard recently explained that *Baker*,

> is a decision ... binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does not violate the federal Constitution's guarantees of equal protection and due process of law.[75]

71 *See generally*, WITTE, JR., *supra* note 62.

72 191 N.W.2d 185, 186 (1971), *cert. denied*, 409 U.S. 810 (1972) (dismissing appeal for want of a substantial federal question).

73 *See Id.* at 186-87.

74 *Id*. at 187 (emphasis added).

75 Lockyer v. City and County of San Francisco, 33 Cal. 4th at 1126 (Kennard, J., concurring in part and dissenting in part) (emphasis original).

Justice Kennard also remarked that,

> [u]ntil the United States Supreme Court says otherwise, which it has not yet done; Baker v. Nelson defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry.[76]

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to State Supreme Court review "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution ... of the United States, and the decision is in favor of its validity".[77] On direct appeal, the Minnesota Supreme Court "*dismissed for want of a substantial federal question*".[78] This dismissal comprised a decision on the *merits* thereby binding all other courts considering the same issues:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. "*They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions*."[79]

The precedential value extends to "*the precise issues presented and necessarily decided ...*"[80]

The Jurisdictional Statement in the *Baker* appeal specifically raised the issues currently being bantered about: whether excluding same-sex couples from marriage: "*deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] ... constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.*"[81] The appellants also directly raised a claim of a fundamental right to marry "*fully protected by the due process and equal protection clauses of the Fourteenth Amendment*".[82]

Moreover, they claimed that "*[t]he discrimination in this case is one of gender*".[83] They further argued that "*[b]y not allowing appellants the*

76 *Id*. at 1127.
77 28 U.S.C. § 1257(2) (amended 1988).
78 Baker v. Nelson, 409 U.S. 810 (1972) (emphasis added).
79 Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).
80 *Id.*
81 Appellants' Jurisdictional Statement, *Baker v. Nelson* (409 U.S. 810; 93 S. Ct. 37; 34 L. Ed. 2d 65; 1972 U.S. LEXIS 1164).
82 *Id*. at 11 (citing Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska**,** 262 U.S. 535 (1923)).
83 *Id*. at 16 (citing Reed v. Reed, 404 U.S. 71 (1971).

legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy".[84]

The Supreme Court's dismissal of this appeal necessarily rejected the merits of each of these claims. There is no right to same-sex "marriage" in the Ninth or 14th Amendments to the U.S. Constitution.[85] As shown below, *Baker*'s precedent comports fully with the Supreme Court's equal protection, and due process jurisprudence. Good lawyers don't ignore precedent – the Normative perspective.

4.3 The extant personal [Existential] perspective: Good lawyers don't ignore the role of inference

Marriage laws apply to *people*. This is self-evident but its implications are unfortunately largely overlooked, dismissed, or ignored.[86] Instead, many advocates favoring same-sex "marriage" treat males and females as being fungible and interchangeable for a variety of purposes: intimacy, procreation, child rearing, *et al*. This Mr Potato Head exchangeable-parts-view of man cheapens humanity by ignoring the obvious and beautiful distinctions between mankind as male and mankind as female. And, these distinctions are crucial to the marriage question. Design, and the legitimate inferences to be drawn there from, matter.[87] And, it is precisely these inferences that generate the State's important interest in regulating and protecting marriage as between one man and one woman, as opposed to some other social construct: brothers and sisters, friends, uncles and nieces, aunts and nephews, and polyamorous communes.[88]

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84 *Id*. at 18 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Boddie v. Connecticut, 401 U.S. 371 (1971); Mindel v. United States Civil Service Commission 312 F. Supp. 485 (N.D. Cal. 1970)).

85 Every published decision has recognized that *Baker* comprised a binding decision on the merits. *See* McConnell v. Nooner, 547 F.2d 54, 56 (8th Cir. 1976); Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *In re* Cooper**,** 187 A.D.2d 128, 134 (N.Y. App. Div. 1993). Most recently, *see*, Wilson v. Ake**,** No. 8:04-cv-1680-T-30TBM (M.D. Fla., Jan. 19, 2005).

86 To be sure, same-sex "marriage" advocates do invoke personal testimonies in an attempt to "humanize" their legal position, *see, e.g.,* www.freedomtomarry.org, but this is different from addressing the foundational anthropological matters impacting humanity qua humanity.

87 *See* discussion *infra* pp. 59-63.

88 This is precisely why the State does not license these other relational constructs, even though friends can and should love and can be committed and mutually supportive. The fact is that not every relationship that manifests love, commitment, privacy, and dependency can rightly be called "marriage" — nor should they be so denominated.

Courts have always recognized that the relationship between procreation and marriage is the reason for State protection of the institution.[89] The D.C. Court of Appeals noted that the U.S. Supreme Court "*has called this right [to marriage] 'fundamental' because of its link to procreation*".[90]

This relationship between procreation and marriage was recently recognized by the Arizona Court of Appeals:

> *Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.*[91]

The Washington Court of Appeals likewise held that:

> *[T]the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.*[92]

A Pennsylvania appellate court incisively described the state's interest in marriage:

> *Many variations of style can be accommodated within the concept of marriage and the family but style should and cannot be confused with substance. The essence of marriage is the coming together of a man and woman for the purpose of procreation and*

89 This is true, for example, of the California Supreme Court. *Baker v. Baker*, 13 Cal. 87, 103 (1859) (of the two ends of marriage, the Court identified, they noted, "the first purpose of matrimony, by laws of nature and society, is procreation."); Sharon v. Sharon, 75 Cal. 1, 33 (1888) ("principal ends of marriage . . . [is] the procreation of children under the shield and sanction of the law.") (quoting Stewart on Marriage and Divorce, sec. 103).

90 Dean v. District of Columbia, 653 A.2d 307, 332 (App. D.C. 1995) (emphasis added).

91 Standhardt v. Superior Ct., 77 P.3d 451, 462-63 (2003), *review denied,* 2004 Ariz. Lexis 62 (Ariz. May 25, 2004).

92 *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

> *the rearing of children, thus creating what we know to be the traditional family. A goal of society, government and law is to protect and foster this basic unit of society. It therefore is entitled to a presumption in its favor over any other form of lifestyle, whether it be polygamy, communal living, homosexual relationships, celebrate utopian communities or a myriad of other forms tried throughout the ages, none of which succeeded in supplanting the traditional family. The test of equality between the traditional family and the homosexual relationship cannot be met by the homosexual relationship. Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society. It is clearly evident that the concept of family is essential to society, homosexual relationships are not. A primary function of government and law is to preserve and perpetuate society, in this instance, the family. It, therefore, is required to protect and support the family, which means it must be given every reasonable presumption in its favor.*[93]

New Jersey similarly recently articulated this rationale:

> When plaintiffs, in defense of genderless marriage, aruge that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences – the so-called "private welfare" purpose. To maintain otherwise is to ignore procreation's centrality to marriage.[94]

Given the history of the State's interest in marriage, states enjoy a valid, indeed compelling interest in recognizing and extending benefits to married couples in order to steer procreation into marriage.[95] It cannot be credibly said that regulating marriage in order to steer procreation into an environment so that children receive optimal nurture[96] is anything but sound, both legally and philosophically.

The vast majority of opposite-sex couples of child-bearing age will procreate absent deliberate efforts to avoid doing so. It is of paramount

93 *Constant A. v. Paul C.A.*, 496 A.2d 1, 6 n.6 (Pa. Super. Ct. 1985).
94 *Lewis*, *Id*. at Slip Op, p. 5, (J. Parrillo, concurring).
95 Indeed, the Supreme Court has long linked procreation to the fundamental right to marry. *Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race.")
96 *See infra* notes 156-162 and accompanying text.

interest to the State whether procreation occurs within or without the marital bounds because, as a general matter, children born out of wedlock incur multifarious disadvantages economically, socially, emotionally and physically.[97] Accordingly, the State has a compelling interest in attempting to steer procreation into marriage. The issue is not whether any individual parent is or can be a good parent – parenting skills can be learned. Nor is the issue whether some children reared in alternative structures do well, or even excel – some surely do. But as one court importantly noted in a matter involving an exceptional plaintiff, "*law and policy are based on the general rather than the idiosyncratic*".[98] It is not irrational to conclude that the right to marry is and should be linked to the State's interest in procreation and the nurture of children within marriages.

In contrast to opposite-sex couples, no same-sex couple will ever procreate – they may adopt;[99] they may acquire children through one of them having an opposite-sex relationship; two women may use some form of artificial reproductive technology; or two men may use a surrogate mother. In all these cases, the same-sex couple will rely on a third person of the opposite-sex. Same-sex "marriage" advocate William Eskridge concedes this point: *"Because same-sex couples cannot have children through their own efforts, a third party must be involved:* a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption."[100]

But no same-sex couple, regardless of how much they love a child or how well they parent, can provide a child the benefits of his or her own biological parents. Every child reared in a same-sex home has been deliberately made to be motherless or fatherless. Through marriage, the State may act to encourage children to be reared by a father and a mother bound by biological and legal ties.

There is no generally applicable social science evidence that children reared by a same-sex couple do as well as children reared by their own biological parents. In fact, the most significant research to date comparing children reared by their own parents with children reared by a same-sex couple is from Australia. Professor Sotirios Sarantakos[101] studied 174 children

97 *See infra* note 165.

98 *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 608 (7th Cir. 2001).

99 Although states are free to regulate the parameters of adoption. *Lofton v. Sec'y of the Dept. of Children & Family Servs.*, 358 F.3d 804 (11thCir. 2004), *reh'g en banc denied* 377 F.3d 1275 (11th Cir. 2004), *cert. denied* 125 S.Ct. 869 (2005).

100 William Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE 81 (1996) (emphasis added).

101 Sotirios Sarantakos, "Children in Three Contexts: Family, Education and Social Development," CHILDREN AUSTRALIA, 1996, Volume 21, Number 3, pages 23-61.

of similar age, gender, and socio-economic characteristics. There were 58 children living with their own married parents, 58 children living with an opposite-sex cohabiting couple and 58 children living with a same-sex cohabiting couple. In almost every measure used in the study, children reared by their own biological parents performed best, followed by children in an opposite-sex cohabiting home. Children reared in a same-sex home performed significantly worse. Long before Sarantakos, every major civilization has known and practiced the conclusion that marriage between a man and a woman provides, in general, the best environment for rearing children.

The fact that the State permits same-sex couples to rear children does not mean the State must ignore that the best, and most naturally convenient for that matter, environment for rearing children is in the context of their own married parents. The unavoidable truth is that opposite-sex couples will procreate and establish an immediate and powerful bond with their children. That society relies upon married parents of opposite sexes to provide the optimal environment for rearing children is far from irrational. In fact, the State has a compelling interest in continuing to recognize marriage as the union of a man and a woman. Good lawyers don't ignore the personal perspective.[102]

5. Conceiving the marriage debate for the better, not the worst: Evaluating the rationality of trendy demands to deconstruct marriage

Viewing the marriage question from the three aforementioned perspectives confirms the invalidity of same-sex "marriage". Nevertheless, either undaunted by or ignorant of these matters, same-sex "marriage" advocates press other theories in search of legal justification for altering marriage's long-recognized and protected fundamental structure. These efforts, though retaining a surface plausibility, wither under informed scrutiny.

5.1 Same-sex "marriage" and Lawrence's purported liberty interest: From sodomy to sacrament?

The debate concerning the structure of marriage has recently been reintroduced in *Lawrence v. Texas*.[103] While *Lawrence* can be significantly criticized,[104] if taken at face value, that ruling militates against same-sex "marriage".

102. This is true collectively, as the foregoing explains, but is also true individually when the focus is concentrated upon the design of the marital union, as is discussed *infra* at p. 57-63.
103 539 U.S. 558 (2003).
104 Certainly Justice Scalia's dissent contains a barrage of valid criticisms. Moreover, the thrust of *Lawrence* can also be questioned given its (1) ruling from and relying upon an

First, *Lawrence* explicitly disavows its application to marriage.[5] Second, *Lawrence* may not even have involved a fundamental liberty interest. Indeed, subsequent decisions have read *Lawrence* to simply apply a rational basis test to a criminal law.[106]

Third, even if *Lawrence* does involve a fundamental liberty interest or substantive due process right – again a debatable point – the Court's due process jurisprudence makes plain that same-sex "marriage" fails to qualify as a claimed right entitled to constitutional protection. This is because under existing law, a claimed right exists, if and only if, it is "*objectively, deeply rooted in this Nation's history and tradition*".[107]

Rather plainly, same-sex "marriage" is decidedly not "objectively, deeply rooted in this Nation's history and tradition". And, referring to trendy European or Canadian rulings violates this nation's fundamental due process law. Such references by definition are immaterial under *Glucksberg*.

Even more striking is the fact that *Glucksberg* involved the ultimate private, intimate, consensual decision: assisted suicide. Nevertheless, the Court firmly rejected elevating this private, intimate, consensual decision to constitutional proportions, ruling:

> Here … we are confronted with a consistent and *almost universal* tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, *we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.*[108]

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ambiguous paper thin record; (2) reaching a decision unnecessarily, that is, one not demanded by the statute in question; (3) confusing a policy choice with a constitutional question; (4) arbitrarily jettisoning precedent and the Rule of Law; (5) invoking an arbitrary referent for historical consideration, thereby committing the fallacy of prejudicial chronological bias; (6) wrongly utilizing foreign precedent; and (7) arbitrarily utilizing foreign precedent by ignoring the predominate weight of international authority concerning such questions. For a survey broader than *Lawrence* of international jurisprudential practices concerning same-sex relationships, *see*, FOCUS ON THE FAMILY United Nations Department Briefing (compiled and updated February 18, 2004 by Thomas W. Jacobson) cataloging the laws of 135 nations.

105 *Lawrence* 539 U.S. at 558, 578, 585 (2003) (Kennedy J., writing for the majority and O'Connor J., concurring).

106 *See Standhardt v. Super. Ct.,* 77 P.3d 451 (Ariz. CDt. App. 2003); see also *Lewis v. Harris* No. MER-L-15-03, 2003 WL 23191114, *23 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (unpublished decision).

107 *See Washington v. Gluckberg*, 521 U.S. 702, 720-21 (1997).

108 *Id*. at 723 (emphasis added).

Plainly, some conduct is unacceptable despite its being private, intimate, and consensual. This rationale applies with even more vigor to the same-sex "marriage" question because marriage is decidedly not a private matter; rather, marriage is a public institution. As Lauren Winner reasons: *[S]ex can be rightly understood as a matter of communal concern.* ***Sex is communal because it is real …*** *What we do with our bodies,* ***what we do sexually shapes who we are.*** *If we believe that sex* ***forms us****, then it goes without saying that it is a* ***public business****, because* ***how we build the persons we are*** *– persons who are social and communal and political and economic being –* ***is itself a matter of social concern****.*[109]

Similarly, merely because something is deemed "not illegal" does not compel the conclusion that the State must positively endorse the conduct. Such reasoning is again fallacious.[110]

Fourth, *Lawrence* reached its holding in part by referencing the perceived trend of the law as related to the decriminalization of consensual adult sodomy.[111] Indisputably, the predominant trend in American jurisprudence is to define and protect marriage as being the union of one man and one woman.[112] Upon this basis alone, *Lawrence* undercuts any claim for same-sex "marriage". Accordingly, though *Lawrence* served as the spur for the current discussion of this issue, accurately read, that decision in no way justifies same-sex "marriage".

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109 Lauren Winner, **Real Sex** (2005), p. 50.

110 Confusing public and private matters mixes modalities, and arguing from "non-criminal" to endorsement commits the naturalistic or "is/ought" fallacy.

111 This methodology is flawed because it commits the naturalistic fallacy by attempting to derive an "ought" from an "is". And, it is problematic for the independent reason that under *stare decisis* it allows no methodological room for a reversal of the trend – its analysis only travels one way. Nevertheless, taken at its face, this methodology still militates against same-sex "marriage".

112 At least 40 states have passed DOMA legislation as has the United States. Moreover, as of October 25th, 2008, 23 states have taken the additional step of amending their constitutions to reconfirm that marriage is the union of one man and one woman: Alabama, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota Tennessee, Texas, Utah, Virginia, and Wisconsin; these states joined Hawaii, Alaska, Nebraska, and Nevada, who had previously amended their constitutions, and similar efforts are progressing in Arizona, California, Florida, Indiana, and Pennsylvania. Some of these state amendments continue in litigation. *See* Citizens for Equal Protection, Inc. v. Attorney General, Memorandum Decision and Order, May 12, 2005 addressing the Nebraska amendment, available at http://www.alliancealert.org/2005/2005051203.pdf.

5.2 Same-sex "marriage": Can privacy or equal protection justify?

A privacy justification?

To be sure, a marital union includes privacy interests under extant precedent.[113] However, it is the union – not the individual – who enjoys that right. The right to privacy inheres in the essence of marriage; This right does not create that essence, nor can it do so. Axiomatically then, not every relationship that enjoys some component of privacy is deemed to be "marriage" – an obvious, but often forgotten, point.

In addition from a philosophical perspective, privacy seeks to *exclude* governmental intrusion. In direct contrast however, with marriage, the parties are *demanding* governmental intrusion. Relying on privacy in this context is incoherent, and thus, "privacy" is to same-sex "marriage" as is a glass slipper is to a clubfoot.

An equal protection justification?

A frequent refrain during the same-sex "marriage" debate is "equality" and "equal protection". Advocates for same-sex "marriage" attempt to bridge the gap between the essences of marriage and either sexual orientation or gender considerations. The seeming plausibility of such comparisons lacks merit.

5.3 Equal protection: Operative principles

Equal Protection "*guarantees equal laws, not equal results*".[114] Classifications are drawn each time a Legislature makes law. The Equal Protection Clause will subject suspect classifications[115] to laws that impinge fundamental rights.

No constitutional, statutory, or common law authority exists to support the proposition that same-sex "marriage" is a fundamental right. The fundamental right to marry has always meant the right to enter a legal union between a man and a woman. When the United States criminalized polygamy in U.S. territories, the Supreme Court upheld these laws based

113 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

114 *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (emphasis added).

115 The Supreme Court has identified only three suspect classes: *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (race), *Strauder v. West Virginia,* 100 U.S. 303, 307-08 (1879) (race); *Korematsu v. United States,* 323 U.S. 214, 216 (1944) (national and ethnic origin); *Graham v. Richardson,* 403 U.S. 365, 372 (1971) (alienage).

upon the historical meaning of marriage in England and the colonies.[116] *Murphy* articulated the essence of marriage:

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[117]

*Maynard v. Hill***,** described marriage "*as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution*" and as "*the foundation of the family and of society, without which there would be neither civilization nor progress*".[118] *Maynard's* description of marriage's import was invoked in and underpins the fundamental right to marry cases.[119]

Same-sex "marriage" advocates are not seeking to correct a misapplication of regulatory power to marriage; rather, these advocates are walking the same analytic aisle with the polygamists because in each situation, the altar they seek demands the structural obliteration of marriage. Lohengrin may be playing, but the Valkyries are circling.

5.4 As to sexual orientation

No federal court has ever held that sexual orientation is a suspect class. In *Dean v. District of Columbia,*[120] Judge Ferran wrote*,* "[H]omosexuals

116 *See Reynolds v. United States*, 98 U.S 145, 166 (1878) (upholding polygamy conviction); *Murphy*, 114 U.S. 15 (1885) (upholding law prohibiting polygamists from voting).

117 *Id*. at 45.

118 125 U.S. 190, 205, 211 (1888).

119 *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating law prohibiting Caucasians from marrying African-Americans); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (invalidating law prohibiting remarriage for individuals who failed to pay child support); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down ban on marital contraception). *Griswold's* context, contraception, has no application for anyone but opposite-sex couples. *See id*. at 485. All of the fundamental right to marry cases involved a man and a woman. *Loving*, 388 U.S. at 12 (involving the marriage between a black man and a white woman); *Zablocki*, 434 U.S. at 384 (involving a man delinquent on his child support payments who wanted to marry a woman); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing marriage and procreation); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding that prison inmates had the right to enter a legal union).

120 653 A.2d 307 D.C. 1995).

comprise neither a 'suspect' class mandating 'strict scrutiny' of the statutory bar against same-sex marriage, nor a 'quasi-suspect' class requiring 'intermediate scrutiny' of the marriage barrier."[121]

Federal courts of appeal have unanimously found that sexual orientation is not a suspect class.[122] *Lawrence*, as mentioned, is not to the contrary. Confirming this point, a post *Lawrence* case declined to recognize homosexuality as a suspect class.[123] Thus, *Lawrence* is no marital aid to same-sex couples in their effort to obtain suspect class status.

Similarly, until quite recently, every state but one that has considered whether sexual orientation is "suspect" has concluded that it is not.[124] This changed when three states –two in 2008, California and Connecticut – ruled that marriage statutes discriminate based on "sexual orientation". The surface plausibility of this assertion withers under informed scrutiny.

The first state to so rule was Massachusetts. There, the court invoked foreign precedent and with refreshing, though invidious candor,

121 *Id*. at 333 (Ferran, J., dissenting).

122 *See, e.g*., Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (rejecting heightened scrutiny of "don't ask, don't tell" policy); Baker v. Wade**,** 769 F.2d 289, 292 (5th Cir. 1985) (applying rational basis review to Texas sodomy statute), overruled on other grounds, Lawrence v. Texas, 539 U.S. 558 (2003); Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati**,** 128 F.3d 289, 292-93 (6th Cir. 1997) (holding that the city's charter amendment concerning sexual orientation was subject to review "under the most common and least rigorous equal protection norm" (the 'rational relationship' test)); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (holding that a "deferential standard of review" was applicable to military regulation regarding homosexuals); Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied sub nom*. Richenberg v. Cohen, 522 U.S. 807 (1997) (rejecting that homosexuals are a "suspect classification" requiring strict scrutiny); Holmes v. California Army Nat'l Guard**,** 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1998) (stating that "homosexuals do not constitute a suspect or quasi-suspect class" and military "don't ask don't tell" policy is only subject to "rational basis review"); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (holding that a group defined by homosexual conduct "cannot constitute a suspect class"); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert*. *denied*, 494 U.S. 1003 (1990) (holding that homosexuals are not in a "class to which heightened scrutiny must be afforded").

123 Lofton v. Sec'y of Dept. of Children and Family Servs**.,** 358 P.3d 804 (11th Cir. 2004).

124 *See* Baker v. Vermont, 744 A.2d 864, 878 n.10 (Vt. 1999) (listing cases). The single exception, Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. App. 1998) employs a truncated analysis and relies on a unique Oregon constitutional provision. *Id*. at 446-47. The Oregon Supreme Court, notwithstanding *Tanner*, recently invalidated numerous same-sex "marriages" in light of the recent Oregon constitutional provision affirming marriage as between one man and one woman. Li v. Oregon, 110 P.3d 91 (2005)

acknowledged that it was departing from established jurisprudence.

California and Connecticut took a similar course and in doing so codified irrationality. Both courts utterly confused philosophical categories: in particular, they confused an *ethical* category – sexual behavior – with a *metaphysical* category – "sexual orientation". Moreover, the very notion of "sexual orientation" being a discernible metaphysical, let alone legally cognizable, category cannot be rationally sustained, as will be shown subsequently.

5.4 As to Sex

Sex-based discrimination is also called gender _____? subject to intermediate scrutiny:

For a sex-based classification to withstand equal protection scrutiny it must be established that the challenged classification serves important governmental objectives and that the *discriminatory means employed* are substantially related to the achievement of those objectives.[125]

As a threshold matter, it must be shown that a statute discriminates in favor of one sex over the other. Stated another way, a statute must employ a discriminatory means of *preferring* one sex to another. Then, and only then, may the statute's objects be scrutinized.

Marriage statutes permit either sex to marry a person of the opposite sex. Because both sexes are treated equally, there is no discrimination against one sex to the benefit of another. Males are not preferred, and females are not disfavored. Females are not preferred, and males are not disfavored. Each sex is permitted to marry *on the same basis* as the other.

In addition marriage statutes are not invalid on the plea that any distinction involving sex violates equal protection. The Supreme Court rejects this theory noting that "[j]ust as neutral terms can mask discrimination that is unlawful, *gender specific terms can mark a permissible distinction*. The equal protection question is whether the distinction is lawful."

Invalidating marriage statutes simply because they mark sex distinctions would prove too much and lead to absurd results. As the District Court incisively noted when rejecting a claim of discrimination under Title VII by a transgendered employee:

125 *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60-61 (2001) (emphasis added) (internal punctuation omitted).

> *In fact, if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stenotype, and nothing more, then there is no social custom of practice associated with a particular sex that is not a stereotype. And, if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII.*[127]

Only an illogical sophistry could find that the State's implicit preclusion of same-sex "marriages" is tantamount to a preference of one sex to another.[128]

5.6 Dispelling common misconceptions and other legal prestidigitation

5.6.1 A bifurcated public square: The artificial "civil marriage" distinction

Another seemingly plausible, but analytically defective notion asserts that the same-sex "marriage" question is limited to "civil marriage" and thus, will in no way impact "religious" marriage. This assertion is often conjoined with the (wrong) idea that marriage is simply a pre-determined conglomerate of benefits. This assertion is as factually naïve as it is philosophically irrational.

First, this assertion is self-refuting because it contradicts a main point underlying same-sex "marriage" advocacy – namely that marriage is a fundamental human right. If indeed marriage is a fundamental human right, then it follows that there could be no moral – let alone legal – justification for any group – including a religious group – to deny someone a fundamental human right by refusing to solemnize their same-sex "marriage". Put differently, no logical brakes exist for limiting same-sex "marriage" exclusively to a "civil" sphere.[129]

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126 *Id*. at 64 (emphasis added).

127 Etsitty v. Utah Transit Authority, 2005 WL 1505610 (C.D. Utah, June 24, 2005), Slip Op.,pp. 8, 9; *aff'd* Etsitty v. Utah Transit Authority 502 F.3d 1215 (10th Cir. Sept. 20, 2007).

128 The absurdity of these rationales is also illustrated by the fact that they would also mandate the elimination of all cultural distinctions of gender: segregated public restrooms, athletic competitions segregated by nothing more than gender. Hmmm …

129 And, the same-sex "marriage" advocates are being less than candid with this assertion since they seek "full equality" – as they define it. Plainly, the "fullness" sought is not limited to benefits access, but also includes the "status" conferred and recognized within the culture in its entirety. Same-sex "marriage" is the starting point only; the

Second, this notion is mistaken because it wrongly assumes that people live their lives in tidy categories and never move among the various realms of the public square.[130] In other words, this assumes that people of faith never own and operate businesses in which they seek to express their First Amendment associative rights, including practices informed by their faith.[131] Illustrating this point, one can reference the Lambda Legal website. There, guides have been produced for assisting "married" same-sex couples to integrate their "family" into key social sectors, including: work, the public community, and even the religious community.

These assimilation efforts implicitly recognize that citizens living in the public square do not wear only one associational hat. And, the public square does include religion. However, as Professor White asserted, a strong antithesis exists between homosexuality and Christianity. As a result, religion does not remain "neutral" or unimpacted. Quite the contrary: when same-sex unions become part of a prevailing "politically correct" orthodoxy by receiving the State's imprimatur, religious persecution results:

> *While proponents of same-sex unions disavow any intention of demanding that religious bodies recognize or participate in solemnizing these unions, the experience in other Western European*

goal is obtaining the State's and the culture's blessing. Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, presented at the National Lesbian and Gay Law Association "Lavender Law" Conference (Sept. 30, 2004), *available at* http://www.freedomtomarry.org/document.asp?doc_id=1937 (last visited Jan. 18, 2005);
See also, *Civil Rights. Community. Movement,* (Jan. 13, 2005), jointly adopted by the American Civil Liberties Union Lesbian & Gay Rights Project; Equality Federation; Freedom to Marry; Gay & Lesbian Advocates & Defenders; Gay & Lesbian Alliance Against Defamation; Gay & Lesbian Victory Fund and Leadership Institute; Gay, Lesbian and Straight Education Network; Human Rights Campaign; Lambda Legal; Log Cabin Republicans; Mautner Project; National Association of LGBT Community Centers; National Black Justice Coalition; National Center for Lesbian Rights; National Center for Transgender Equality; National Coalition of Anti-Violence Programs; National Gay and Lesbian Task Force; National Youth Advocacy Coalition; Parents, Families and Friends of Lesbians and Gays; Servicemembers Legal Defense Network; Sigamos Adelante: National Latino/Hispanic LGBT Leadership; and Stonewall Democrats, *available at* http://www.hrc.org/Template.cfm?Section=Press_Room&CONTENTID=24793&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Jan. 18, 2005).

130 This is yet another fruit of failing to employ a balanced, tri-perspectival analysis. By emphasizing only the *norm* of civil marriage, and not allowing that concept to be informed by the *situational* and *personal* realities impacting marriage, only a truncated and skewed similitude of marriage can result.

131 Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995); Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

> *countries should give us pause. For example, two Canadian provinces recognize same-sex unions as marriages by judicial fiat. In that same country, there have been criminal convictions under hate speech laws for publication of an advertisement opposing same-sex marriage that merely cited Bible verses without quoting the verses. In Ireland the Irish Council on Civil Liberties has publicly threatened "[c]lergy and bishops who distribute the Vatican's latest publication describing homosexual activity as "evil" could face prosecution under incitement to hatred legislation". In Spain, Madrid's Cardinal Varela gave a sermon condemning gay marriage. He has been sued by the Spanish Gay Advocates for "slander and an incitement to discrimination on the basis of sexual orientation". In England, self defense was denied to a pastor who defended himself when assaulted by several attackers while carrying a sign citing Bible verses regarding homosexual conduct. In Sweden, a pastor who has been charged with hate speech for a sermon condemning homosexual acts.*[134]

Third, the California Court bottomed its ruling on "human dignity" but in doing so ignored that fact that under extant state law, same-sex couples were entitled to the very same state benefits as to married couples. How this manifest equal treatment becomes the basis for finding inequality is troubling and legally less than cogent.

Fourth, this assertion proves too much. If "marriage" consists only of civil benefits and nothing else, then the solution to perceived "inequality" is to develop civil tools to ensure predicable legal relationships – not deconstruct marriage.[135]

5.6.2 False conception: The infertile couple red herring

When responding to the rather obvious State interest in channeling procreation into opposite-sex marriage, same-sex "marriage" advocates quickly note that not all couples are fertile, and moreover, that some

132 *See, generally.* http://www.lambdalegal.org.

133 *See supra* note 1.

134 *Id. Hearing Before the Minn. H.R. Comm. on Rules and Leg. Admin.*; 78th Reg. Sess., (Mar. 17, 2004) (prepared testimony of Professor Teresa Stanton Collett).

135 Interestingly, given the premise that marriage only consists of benefits, why would one arbitrarily limit the conferral of those benefits to those who are married? Why not devise a more inclusive economic litmus that evaluates which relationships – of whatever variety or convenience – deserve or demand benefits. At this point, the rationale advanced for same-sex "marriage" is grossly under-inclusive and thereby displays selective and arbitrary narrow-mindedness.

couples decline to procreate for other reasons. Both points are true, but irrelevant to the issue at hand.

That the State possesses a strong justification for *supporting* and *regulating* marriage between one man and one woman does not mean that the purpose of marriage is procreation. To so conclude commits an analytic error of confusing the distinction between intrinsic goods and instrumental goods.[137] It is only in the latter case that marriage is deemed to be for the purpose of procreation. The reality, however, is that marriage itself, as a complementary union, comprises an intrinsic good.

Finally, even absent fertility, the intimate acts of opposite sex couples remain reproductive in type, thereby reinforcing the pedagogical function of law.[138] So the infertile octogenarian retort is an impotent straw man, devoid of legal vitality.

5.6.3 Wearing logical and legal blinders: Ignoring that polygamists are people too

The rationales typically advanced in support of same-sex "marriage" also carry the water for other innovations that similarly seek to deconstruct marriage, including polygamy. As recognized by the Supreme Court, marriage properly defined consists of both a quantitative as well as a qualitative component: Marriage is for *two* people, one of which is necessarily a *man*, and the other of which is necessarily a *woman*.[139] Same-sex "marriage" advocates are currently attacking the qualitative element – disputing the necessity of man and woman.

However, the rationales being advanced in this endeavor – legal and emotional – logically entitle the bi-sexual to "be fulfilled" by "marrying both a man and a woman". Put popularly: "*Why deprive this poor bi-guy his self-fulfillment and punish his family – he's a sexual minority too!"* "*Who are we to judge?!*" And indeed, one same-sex "marriage" advocate owns, and has owned for over a decade, the logical implications of their assertions:

136 *See* notes 81-96.

137 An instrumental good serves as a means to another end, but is not inherently good. In contrast, an intrinsic good, may produce other goods, but its goodness stands alone irrespective of those consequent goods, which may or may not follow. *See* GEORGE, *supra* note 60, at 25.

138 *See infra* note 155 and accompanying text.

139 *See Murphy*, 114 U.S. at 45.

The ACLU believes that criminal and civil laws prohibiting or penalizing the practice of plural marriage violate constitutional protections of freedom of expression and association, freedom of religion, and privacy for personal relationships between consenting adults.[140]

This candor is at least refreshing, if also shocking. Note carefully: the stated legal basis for embracing polygamy in all its permutations stems from the same rationales employed to support the relatively more tame marital deconstruction known as same-sex "marriage". This is not a slippery slope, but a present and logically demanded reality.[141]

5.6.4 Who shall overcome: The infelicity of the loving analogue

Oame-sex "marriage" advocates assert that they are only seeking "the right to marry the person they love". This may be good rhetoric, but it is poor law. The reality is that the law has never granted anyone a right to "marry the person they love". In fact, the law, as it properly regulates marriage imposes a number of gateway criteria for marriage: capacity; consent; the age of consent; consanguinity; unmarried; and gender.[142] Consequently, both sides of the debate must concede the goodness of some restrictions on marital eligibility.[143]

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140 AMERICAN CIVIL LIBERTIES UNION, POLICY MANUAL (1992). Notably, during a formal debate conducted January 19, 2005, at Rutgers Law School (Camden) against Professor Sally Goldfarb, both she and a lesbian colleague expressed great incredulity and disdain for the comparison this author proffered between same-sex "marriage" and polygamy, contending that such was a non-existent "slippery slope". Providently, that very date, the *Yale Daily News* carried a story quoting ACLU President Nadine Stroseen as candidly acknowledging that the ACLU has "*defended the right for individuals to engage in polygamy*". Following the debate, this story was provided that evening to Professor Goldfarb, a Yale College and Law School graduate; she did not respond. Ponder this: will today's vocal advocates of same-sex "marriage" now oppose the ACLU's efforts regarding polygamy? Not likely. *See*, Crystal Paul-Laughinghouse, *Leader of ACLU Talks On Agenda*, Yale Daily News Publishing Company Inc., *at* http://yaledailynews.com/articlefunctions/Printerfriendly.asp?AID=27865 (last visited April 14, 2005).

141 Confirming this reality is litigation advanced by self-identified polygamists Tom Green and Rodney Holm seeking to establish a constitutional right to group "marriage". *See, e.g.,* Jonathan, *Polygamy Laws Exposes Our Own Hypocrisy*, USA TODAY, Oct. 4, 2004, at 13A; *see also* Joseph A. Reaves and Mark Schaeffer, *Polygamist Sect Target of Arizona-Utah Inquiry,* ARIZ. REP., Sept. 28, 2003.

142 Notably, the law does not require love between spouses, and rightly so since the State lacks jurisdiction over the human heart. Compare that with "hate crime" legislation, which predicates criminal liability upon the State's purported jurisdiction over the accused's motive.

143 Thus, everyone presupposes some definition of marriage; marriage simply does not, nor can it, exist in an undefined constant fluidity.

At common law, no racial restriction existed. Rather, prompted by segregationist sent, some, but not all, states imposed miscegenation laws. The pertinent question here is whether such laws are analogous to the qualitative requirement that marriage be between a man and a woman. They are not.

In the first place, zealous advocates frequently make this claim as if no one had ever aed it previously, that is, as if the Supreme Court had not considered *Loving* in relation to a claim seeking constitutional recognition of same-sex "marriage". In fact, this very claim shortly after *Loving* was tried, tested, and rejected.[144]

Second, the asserted analogy crumbles since race is immutable whereas sexual conduct is mutable.[145] The very rationale underpinning *Loving* derives from the identifiable class incurring disparate treatment: African Americans. No such class exists rseeking to enter same-sex "marriages". The actual miscegenation cases confirm this analysis.

Third, and not to belabor a previous point, the proper analogue to same-sex "marriage" is polygamy. This is true because in both instances the essence of marriage, its structure, would be altered.

And, lastly, as several leading advocates of same-sex "marriage" now sheepishly concede, the notion of "equality" actually undercuts the "gay ethos":

144 *See* Baker v. Nelson, *see also supra* text at 19-21.

145 This is obvious anecdotally: approximately 40% of those who had entered a Vermont civil union had previously entered an opposite-sex marriage. REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION, Finding 3 and Appendix B, Table I-5 (Jan. 2002) (according to this report 77% had not been previously married or in a civil union), http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm

And then consider the well-publicized "conversions" to opposite sex marriage and motherhood of noted self-defined lesbians: Sinead O'Connor, Julie Cypher, and Anne Heche. How is this possible if "sexual orientation" is immutable? More problematic is the utter impossibility of legally defining the operative class. Who would actually qualify and how would the law be able to make that determination without being overly invasive and/or analytically arbitrary? Would the putative class include (1) those with homosexual ideations; (2) those engaging in homosexual behavior, and if so, in what context and in what frequency; (3) those formerly engaged in homosexual conduct; (4) those formerly engaged in heterosexual conduct; (5) those engaged in bisexual conduct; (6) those formerly engaged in bisexual conduct; (7) those, though privately "heterosexual", who for motives of (say) profit, engage in homosexual conduct; or (8) those, though privately "homosexual", who for motives of (say) profit, engage in heterosexual conduct? Conduct does not create class: A convincingly effeminate man is still a man; a convincingly masculine woman is still a woman; and a convincingly white hip-hop artist like Marshall Mathers is still white. Role playing is not reality.

"[T]he concept of equality in our legal system does not support differences, it only supports sameness. The very standard for equal protection is that people who are similarly situated must be treated differently. ***To make an argument for equal protection, we will be required to claim that gay and lesbian relationships are the same as straight relationships."***[146]

Accordingly, even the honest advocates of homosexual behavior acknowledge in a candid moment that the "equal protection" analogy predicated on race and miscegenation laws is inapplicable to same-sex "marriage".

5.6.5 What's the harm: Chicken Little meets Tobacco Litigator

A final motif that permeates much same-sex "marriage" discussion usually takes the form of a gauntlet: "What harm does Bill marrying Ted do to your opposite sex marriage?"[147] While technically not a legal question, it remains a fair – and quite answerable – question to public discourse.

At the outset, note that this question leap frogs over a key point: some conduct – even among private consenting adults – is wrong *per se*, such that a society will bar its practice: incest, polygamy, dueling, assisted suicide,[148] gladiator contests, and cannibalism.[149] The assumption, therefore, that same-sex "marriage" should be classified as being intrinsically proper must be proven, not side-stepped.[150] Indeed, the notion of "moral harm" and the related concept of "common good" is simply sidestepped. Surely, rationality requires a more honest assessment of the issues.

Second, note the presupposition to the question: harm must be immediate and discernable or else the target conduct must remain legally unrestricted. No other area of public policy relies on such a narrow view

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146 RUBENSTEIN, W.B., ed. 1993. *Lesbians, Gay Men, and the Law*. New York, NY: The New Press at page 403, citing professor Paula Ettelbrick (emphasis added).

147 *Compare, e.g.*, comments of Dale Carpenter, remarks at debate on same sex "marriage" to opponent, at the University of Virginia Law School, (Jan. 19, 2004).

148 *Glucksberg*, 521 U.S. 702 (1997).

149 Consider the German trial of Armin Meiwes, who by mutual consent, ate and then murdered – in that order – his willing same-sex partner. *See, e.g.,* Malcolm Thornberry, *Germany Rattled by New Gay Cannibal*, www.365Gay.com, Oct. 8, 2004, (visited Jan. 18, 2005) http://www.365gay.com/newscon04/10/100804cannibal.htm.

150 For centuries, even pagan philosophers described sodomy, for example, as something contrary to nature [*paraphysin*]. *See, e.g.,* Plato, LAWS, section 636a-c. *See also*, Peter Lubin and Dwight Duncan, *Follow the Footnote, or The Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1324 (1998).

of harm. Initially, the question should not be Bill and Ted's marriage *per se*, but rather, what cumulative impact that legalizing same-sex "marriage" in general would precipitate. These are very different questions. And, the law has never confined "harm" to immediate and objectively manifested matters. Tort law alone recognizes the reality of latent injuries by utilizing tolling provisions for minors, discovery provisions for assessing slow incubating or delayed harm (radiation and medical malpractice) to name a few. To contend that the law demands some overly narrow and artificial notion of harm betrays the rationality of the demand for same-sex "marriage".

In addition, the premise sounds more like a self-serving rationale asserted by an unscrupulous tobacco harvester, who points to little Johnny after he inhales his first few puffs and upon seeing "no harm", declares that smoking comports with public health. But not so fast. If the question is what harm results from Johnny smoking one cigarette, the answer is obvious: none. However, if the question becomes what harm would one expect if Johnny continues to smoke four packs of cigarettes daily for four decades, the answer is also obvious and quite different.[151]

In the same way, no reputable sociologist expected the sky to crumble on May 17, 2004.[152] However, the data do indicate that serious harm does result when a culture abandons "absolute monogamy".[153] So the harm question turns on the window of inquiry – the timing of the expected harm. Same-sex "marriage" advocates ignore this key point.[154]

152 To cite one example: many cities and even some states ban all smoking from any public venue, whether privately owned or not. Why? Because the State deems the potential for cumulative harm over time considerable. *See, e.g.,* Conrad DeFiebre, *The Plan: Statewide Smoking Ban*, Minneapolis Star Tribune, Jan. 15, 2005 ("California, New York and five other states prohibit smoking in all workplaces, including bars and restaurants. Seven Minnesota cities and four counties also have smoking bans, some with exceptions for bars.") (visited Jan. 18, 2005). http://www.startribune .com/stories/587/5187085.html.

152 This date coincides with the granting of same-sex "marriage" to Massachusetts residents under *Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003).

153 *See e.g*, Joseph Daniel Unwin, Ph.D., Sexual Regulations and Cultural Behavior (Library of Congress HQ12.U52; Frank M. Darrow ed., Trona, California; 1969), (1935) (finding that when a culture abandons absolute monogamy, harm inexorably results after 40 years).

154 The data indicate also that those cultures who have embraced same-sex unions and their "relatives" have not seen the marital institution strengthened, but to the contrary, have seen marriage crumble. *See, e.g.,* Stanley Kurtz, *Death Blow to Marriage,* http://www.nationalreview.com/kurtz/kurtz200402050842.asp. This stands to reason: if anything is marriage, then nothing is marriage. *Cf., "The legal nature of marriage cannot be totally malleable lest the durability and viability of this fundamental social institution be seriously compromised, if not entirely destabilized."* Lewis, Slip Op. (J. Parrillo concurring) at p. 8.

Third, the "no harm" shibboleth likewise ignores that the State can properly proscribe conduct that cumulatively creates a risk of harm. In other words, some conduct, if singular, insular, and non-recurring, does not "harm" society. Examples would be driving at night without headlamps; driving without seat belts; speeding; driving while intoxicated; building stairs without hand rails; using a toilet with "too much" flushing capacity. The point of all these regulations is an informed acknowledgement that it is the cumulative impact of these behaviors that require them to be proscribed. Same-sex "marriage" advocates ignore this point.

Fourth, the long established pedagogical nature of law has been forgotten.[155] Law proclaims policy. And what same-sex "marriage" would proclaim is that the State should endorse by design motherless and fatherless environments – something the law has for centuries known to be less than optimal for the future generations.

Fifth, and related to the prior point are the data that establish that the optimal environment for rearing children consists of a mother and a father.[156] Claims to the contrary are simply that – claims to the contrary predicated upon invalid or otherwise unreliable methodology, data, or both.[157]

In particular, the research indicates that same-sex relationships are environments that disproportionately impact children. Those reared in such contexts experience poorer physical health;[158] poorer mental health;[159]

155 Nearly two millennia ago, Paul expressed this truth this way: *What then shall we say? That the law is sin? By no means! Yet if it had not been for the law, I would not have known sin. I would not have known what it is to covet if the law had not said, "You shall not covet." Romans* 7:7 (English Standard Version) (emphasis added).

156 FAMILY RESEARCH COUNCIL: WASHINGTON D.C. 2004, Peter Sprigg and Timothy Dailey, co-editors, GETTING IT STRAIGHT: WHAT THE RESEARCH SHOWS ABOUT HOMOSEXUALITY, Chapters 5 and 6, (Family Research Council: Peter Sprigg & Timothy Dailey eds., Washington D.C., 2004).

157 ROBERT LERNER AND ALTHEA NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (Marriage Law Project: Washington D.C., 2001). In a nutshell, the studies proffered in favor of same-sex parenting are flawed because they employ (1) sweeping generalizations; (2) defective statistical samples; (3) defective qualitative samples; and (4) result-oriented, "targeted" research.

158 Ronald J. Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 J. OF HEALTH and & SOC. BEHAV 38, 48-49 (1988).

159 Ollie Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 SOC. SCIENCE & MEDICINE 1047, 1050 &, Table 3 (1993); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems of Children of Divorce*, 61 J. MARRIAGE & THE FAM 1020, 1028 (1999); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & THE FAM 197, 205 (2001).

a greater likelihood of substance abuse;[160] a higher risk of suicide;[161] and a higher likelihood of committing a crime that leads to incarceration.[162]

In addition, same-sex environments fail to optimize the health of those adults living in them. The data[163] indicate that same-sex co-habitants enjoy less fidelity,[164] experience greater intimate partner abuse,[165] and present greater incidents of psychological disorders.[166] Harm does inure to Bill and Ted.

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160 Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 J. MARRIAGE & FAM 171, 175 & Table 2 (1990).

161 DAVID M. CUTLER, EDWARD L. GLAESER & KAREN NORBERG, EXPLAINING THE RISE IN YOUTH SUICIDE, Working Paper 7713 at 32, (National Bureau of Economic Research, Working Paper No. 7713, (May 2000) (citing impact of divorce).

162. LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 134 (2000).

163 The studies cited in the notes supporting this section target single mother homes. This is because same-sex "marriage" advocates have urged that such environments are the most analogous to same-sex environments. *See*, Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM 1052 (2000). *"It has been widely believed that children living in families headed by divorced but heterosexual mothers provide the best comparison group." Id.* at 1059.

164 JOSEPH HARRY, GAY COUPLES**,** 115 (1984) (65% of male couples had sex outside the relationship within the first year and approximately 90% had sex outside the relationship after five years). *See also*, DAVID P. MC WHIRTER & ANDREW H. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984); *compare*, lesbian Camille Paglia's similar assessment:

> After a period of optimism about the long-range potential of gay men's one-on-one relationships, gay magazines are starting to acknowledge the more relaxed standards operating here, with recent articles celebrating the bigger bang of sex with strangers or proposing 'monogamy without fidelity' – the latest Orwellian formulation to excuse having your cake and eating it too.

Camille Paglia**,** *I'll Take Religion Over Gay Culture*, Salon.com online magazine at 4 (June 1998), http://archive.salon.com/col/pagl/1998/06/23pagl2.html.

165 *See*, PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 30 (U.S. Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention, 30, NCJ 181867, July 20002). (finding that among women, 39.2% of same-sex co-habitants and 21.7% of opposite sex co-habitants experience physical assault or stalking; and among men the comparable features are 23.1 % and 7.4%).
See also, ENDING ABUSE IN LESBIAN, BISEXUAL WOMEN'S AND TRANSGENDER COMMUNITIES, THE NETWORK/LA RED, (Dec. 13, 2002) ("1 in 4 GLBT people are battered by a partner"); *see also* Press Release, Anti-violence Project Press Release, National Coalition of Anti-violence Programs Releases Annual Report on Domestic Violence (Sept. 24, 2002) (on file with author) (5,046 cases of homosexual domestic violence in 2001); and DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE 1 (1991) (estimating 500,000 male homosexual victims).

166 See, e.g., Theo G. M. Sandfort, et al, Same-sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS), 58 ARCHIVES OF GEN. PSYCHIATRY 85, 86 (January 2001): Homosexuals

Certainly lawyers can and will quibble about the evidentiary weight to be attributed to the battle of experts, but the point is that many facets of "harm" do exist and to dismiss out of hand the notion of harm associated with same-sex co-habitation is both naïve and irresponsible.[167]

5.7 Avoiding design defects: The role of inference in rationally analyzing the marriage debate

When driving along Interstate 90, there comes a point when a large edifice comes to view. On the edifice are amazing carvings, carvings depicting men from America's history. Consider the almost imperceptible, yet strongly present role inference plays in viewing the treasure of Mt. Rushmore. As one sees those carvings, does one conclude that the winds must have been really special to have eroded the face of the cliff so that it appeared to resemble faces? Of course not. Rather, one infers that something or someone designed those carvings.

Similarly, when one enters the beautiful city of Vancouver, B.C. a wondrous bed of flowers presents a message: "Welcome to Vancouver." Again, what inferences ought to be drawn? That the winds randomly blew just the right color flowering seeds in the right proportions at just the right time so that the words – in modern English no less – would appear? Again, of course not. One knows better and one knows better because of

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had significantly higher levels of psychological disorders in nearly every category measured. Id. at 88, Table 2. Moreover, "[m]ore homosexual men than heterosexual men had 2 or more [DSM-III-R] disorders, both lifetime and in the preceding year … Homosexual women were more likely than heterosexual women to have had 2 or more [DSM-III-R] disorders during their lifetime but not in the preceding year." *Id*. at 87-88. (emphasis added). The authors suggested that "the study might underestimate the differences between homosexual and heterosexual people …" *Id.* at 89. They concluded that the "study offers evidence that homosexuality is associated with a higher prevalence of psychiatric disorders. The outcomes are in line with findings from earlier studies in which less rigorous designs have been employed." *Id.* at 90. (emphasis added).

167 These considerations stand in addition to those health considerations associated with same-sex intimate conduct. The incidence of STDs among those practicing homosexual behavior likewise presents questions for governmental consideration. *See, e.g.,* Mark Worrall, Syphilis Transmission Rampant Through Internet Hookups, www.365gay.com, Dec. 18, 2003, http://www.365gay.com/newscontent/121803netSyph.htm (article citing Center for Disease control Dec. 19 *Morbidity and Mortality Weekly Report* noting that of the 2003 reported cases of syphilis in San Francisco, 90% (450/500) were attributable to homosexual males). Similarly, the rates of bacterial vaginnosis reported among lesbian women exceed that experienced by women in other intimate relationships: Barbara J. Berger, et al., *Bacterial Vaginosis in Lesbians: A Sexually Transmitted Disease*, 21 CLINICAL INFECTIOUS DISEASES**,** 1402 (1995). *29%* (lesbians); *19%* university health services; *17%* STD clinics (emphasis added).

the operation of rational inference.

This same principle operates when observing natural phenomena: meteorologists infer from the design of fallen crops whether the violent storm consisted of a microburst or a tornado. The evidence drives the inference. And, this is true even if the design is "natural".

And, this is true of human interaction as well. When a fire occurs, a determination is made as to whether it was "of suspicious origin". Arson inspectors do what? They look at the evidence. For what? They look for indicia of design. When that evidence exists, they infer that arson occurred. Inference informs.

In the same vein, the popular TV show, CSI and its progeny are predicated upon inference: a human body is found and the question is whether the evidence supports a mere natural death, a death of unfortunate providence, or is there a more sinister conclusion: a murder. It is the evidence and whether it bears the design of murder that drives the analysis.

Inference surrounds what it means to live as humans. Sadly, the evident design of being human, especially as configured as male and female is neglected in the same-sex "marriage" arena – to the detriment of all concerned. Rather obviously, men and women are designed and moreover, that evidence of design depicts at the very least a biological complementarity. But there's more.

Design implies function. To ignore design is to risk malfunction. If a car's wheels are not aligned, that is, they are in disorder, operating the car – while not producing immediate harm – will certainly impede – and then over time incrementally destroy – the car's functionality. And tragic personal injury could result as well.

This is why car manufacturers and just about every other widget maker supply owner's manuals. Indeed, the law of torts incorporates the notion of design and misuse into the law of product liability. And, a failure to warn – failing to direct usage according to the product's design and potentiality – can engender liability. Yet, there's even more.

The design of being human is not some mystery. Rather, it is something so foundational that "we can't not know it".[168] We can suppress it, but only to personal and societal detriment. Design matters, whether the topic is

168 J. Budziszewski, What We Can't Not Know (Spence Publishing Company: Dallas, Texas, 2003).

weed killers, posthole diggers, open heart surgery, or marriage and its attendant intimacies. When in doubt, maybe the directions should be followed; maybe design does matter. This is nothing radical, but is prudent. Maybe what is radical is unfettered self-directed autonomy.[169]

One need not be a Christian or even "religious" to understand this reality. In fact, the late professor Arthur Leff made this point profoundly when he noted that:

Napalming babies is bad; starving the poor is wicked; buying and selling each other is depraved; … there is in the world such a thing as evil – SEZ WHO??!![170]

In the same way, we can't not know that mankind is created in two complementary genders of equal dignity, so wonderfully designed such that:

> *the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; [is] the sure foundation of all that is stable and noble in our civilization; [as well as] the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.*[171]

Maybe, just maybe, the Supreme Court spoke some truth prior to 1947.[172] Maybe the Court indeed understood certain foundational matters, matters

169 Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 U.S. 2791, 2807 (1992) (regarding the sweet mystery of life passage). *Compare*, Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003). *Cf*., the Washington State NARAL "Screw Abstinence Party." *See*, http://www.wanaral.org/s01takeaction/200506101.shtml (visited July 13, 2005). So much for tolerating someone else's "private intimate decisions".

170 Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L. J. 1229, 1249 (1979).

171 *Murphy,* 114 U.S. at 45 (emphasis added).

172 In 1947 with Everson v. Board of Education, 330 U.S. 1 (1947), the Court began injecting non-historical irrationality into Establishment Clause jurisprudence. The Court did so by predicating legal doctrine upon a privately voiced, figurative metaphor: the "*wall of separation between church and State*" which "*must be kept high and impregnable*". *Id*. at 16, 18. The Court wrongly attributed Jefferson's metaphor to the Establishment Clause, rather than the Free Exercise Clause as he intended. Indeed, after penning this private letter on a Friday, Jefferson proceeded to worship – in the Congressional Chambers – the very next Sunday – hardly expected (or appropriate) conduct if Everson's analysis were correct. The subsequent mythical and non-historical application of this private Jeffersonian metaphor to the public square has been well-documented, albeit largely ignored by jurists and liberal separationists alike. *See*, DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE**,** (NYU Press: NY, 2002); and PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE, (Harvard University Press: Cambridge, MA; 2002). The resultant crabbed jurisprudence is yet another example of what occurs when the Situational perspective is ignored in law.

that, though often suppressed, remain "what we can't not know". Matters that ring true. Matters that matter. Only by recognizing this reality can rationality be restored to the same-sex "marriage" debate.

6. Conclusion

To be authentically human is to be rational. Destroying rationality also destroys humanity. Same-sex "marriage" rests on irrationality. Its thesis can only exist by ignoring precedent, ignoring history, and ignoring the operation of design and inference. Therefore, the reasoning that promotes same-sex "marriage" is reasoning that ultimately mars what it means to be human.

Embracing same-sex "marriage" would therefore not create a world of expanded rights, but one of expanded irrationality and thus, a world of decreasing humanity. This would be the world of onion-less onion rings, married bachelors, and square circles. Whether liberal or conservative, faithful or faithless, prudish or promiscuous, the fact is: No one reading this article actually believes – in their heart of hearts – in square circles. It is time to stop pretending that the law can draw them.

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