

JUDGING THE CASE AGAINST SAME-SEX MARRIAGE

*Andrew Koppelman**

The movement for same-sex marriage has been politically triumphant, but its case is incomplete because the arguments against it have not been understood. Major social change should not occur without addressing the claims made by same-sex marriage opponents. This piece presents and critiques consequentialist and non-consequentialist arguments against same-sex marriage. The consequentialist arguments rely on claims that legalizing same-sex marriage will lead to disastrous societal and familial effects. The nonconsequentialist arguments rest on claims that marriage is an inherently heterosexual institution. The Article concludes that none of these arguments have merit.

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* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Marcia Lehr and Michelle Shaw for research assistance, and to Douglas Allen, Ron Allen, Erik Anderson, Jeremy Bell, June Carbone, Mary Anne Case, Stephanie Coontz, Jon Corvino, Mary Geach, Wesley Harward, Josh Kleinfeld, Martha Nussbaum, Robert Peyser, Jonathan Rauch, Dorothy Roberts, Jonah Wacholder, and the Hofstra University Colloquium on Law and Sexuality for helpful comments.

I. INTRODUCTION

The case for same-sex marriage has been politically triumphant, and its victory looks inevitable. It nonetheless is curiously incomplete. It has succeeded, not because the most sophisticated opposing arguments have been considered and rejected, but because those arguments have not even been understood. Those arguments rest on complex claims, either about what sustains the stability of heterosexual marriages or about what those marriages essentially are. The most familiar claim, that recognition of same-sex marriage jeopardizes the heterosexual family, demands an account of the transformation of family norms in the past half century. Major social change should not be undertaken without a full awareness of what is at stake.

This Article remedies a major gap in the literature. It critically surveys and evaluates the arguments against same-sex marriage. You may not be persuaded by them. In fact, you should not be persuaded by them. But you need to know what they are.

Almost half of Americans oppose same-sex marriage.¹ Two-fifths think that homosexual sex is morally wrong.² The gay rights question continues to inflame perennial divisions in U.S. politics, and probably

1. According to Gallup, 43 percent oppose same-sex marriage, with 52 percent in favor. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>. There is a sharp generational divide: among those eighteen to twenty-nine years old, sixty-nine percent support same-sex marriages. *Id.* That number drops steadily with age, to thirty-eight percent of those fifty-five and older. *Id.* The percentage in support has doubled in only 15 years. Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx>. For an aggregation of available poll data, see Andrew R. Flores & Scott Barclay, WILLIAMS INST., *Public Support for Marriage for Same-Sex Couples by State* (Apr. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf>. A Washington Post-ABC News poll (which found fifty-eight percent of Americans supporting same-sex marriage) reported a majority of Republicans and GOP-leaning independents under fifty in support. Jon Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, WASH. POST (Mar. 18, 2013, 2:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/>. The effect is even noticeable among white evangelical Christians, otherwise a very conservative lot: fifty-eight percent of those 18-29 years old support some legal recognition of same-sex couples, with twenty-six percent supporting marriage rights. GREENBERG QUINLAN ROSNER RESEARCH, INC., *Young Evangelical Christians and the 2008 Election*, (Sept. 29 2008), http://gqrr.com/articles/2251/4697_ren08m1_VotePublicRelease.pdf. Only forty-six percent of those over thirty support any legal recognition, with nine percent supporting marriage. *Id.* Older evangelicals also care much more about the issue: according to a Pew Forum study, 61.8 percent of those over sixty said that “stopping gay marriage” was very important, while only thirty-four percent of those twenty-nine and under said so. Steven Waldman, *Abortion vs. Homosexuality: The Evangelical Age Gap*, BELIEFNET, <http://blog.beliefnet.com/stevenwaldman/2008/07/abortion-vs-homosexuality-the.html> (last visited Mar. 5, 2014) (citing similar data from Barna Research).

2. This number has been rapidly shrinking. In 2013, 59 percent thought that homosexual sex was morally acceptable, compared with 40 percent in 2001. Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx>. The Gallup poll found in 1982 that only 34 percent of respondents agreed that “homosexuality should be considered an acceptable alternative lifestyle.” The number increased to 50 percent in 1999 and 57 percent in 2007. Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP (June 18, 2008), <http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx>.

explains the most salient religious divisions as well.³ Yet one side of these divisions is almost entirely ignored in the academy.⁴ Opponents of gay rights are often dismissed as thoughtless, with views that cannot be expressed in secular terms. They are neither.

Opponents of gay rights have relied on two strategies. One focuses on consequences: the baleful effects on heterosexual families of societal tolerance for homosexuality or same-sex marriage. This argument is weak on evidence. A second is to claim that, irrespective of consequences, marriage is inherently heterosexual. This argument's weakness is that it moves so quickly from premise to conclusion: unless you perceive marriage, as defined in this peculiar way, to be intrinsically good, the argument cannot even get started.⁵

The most thoughtful statement of the consequentialist argument has been made by University of Pennsylvania Professor Amy Wax (who is not unambiguously opposed to same-sex marriage but who is worried by it). Addressing her claims requires engagement with an extensive literature on the evolution of family forms in the contemporary United States. Robert P. George and his colleagues have offered the fullest elaboration of the nonconsequentialist strategy. Mary Geach, in an article in *The Monist*, one of the oldest and most distinguished philosophy journals, has developed a novel hybrid of both consequentialist and nonconsequentialist arguments. I conclude that both arguments fail.

The consequentialist argument turns on the decay of the older American sexual ethic, which collapsed rapidly in the 1960s. The growing tolerance of homosexuality is part of a larger shift in sexual ethics that separates sex from reproduction. The effects have been good for some groups in American society and bad for others. The good effects are concentrated among those who have most deeply absorbed the new ethic. Within that population, children are thriving for the most part, and they are thriving because their parents used contraception in their early twenties, prolonged their educations, and delayed marriage and parenthood. Similar behavior by more vulnerable populations would make them better off.

The largest problem for the nonconsequentialist argument is one of coherence. It is doubtful that it can show, as it must, that the intrinsic goodness of sex is at once: (1) derived from its reproductive character and (2) present in the coitus of married heterosexual couples who know

3. One of the most striking recent changes in American religion has been the rapid increase in the number of people who identify themselves as having no religion. Those with more tolerant views of homosexuality are twice as likely as those with less tolerant views to thus identify themselves. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 129 (2010).

4. There is a small amount of literature that does respond to these arguments, but it has elicited responses from gay rights opponents that thus far have gone unanswered. *See infra* note 91.

5. I have previously examined both claims. Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004). That article is outdated. The present article addresses newer, more nuanced elaborations of those claims.

themselves to be infertile, but not present in any sex act other than heterosexual marital coitus.

II. THE CONSEQUENTIALIST CLAIM

The consequentialist claim is the more familiar and understandable one, so I begin by considering it.

A. *Miracle, Mystery, and Authority: Wax*

The family as an institution is in trouble in modern America, the argument claims, and same-sex marriage will make the situation worse. Thus, Maggie Gallagher argues that same-sex marriage “affirms that children do not need mothers and fathers, and that marriage has nothing to do with babies,”⁶ and claims that if the state endorses this message, there will be an increase in “poverty and trauma caused by widespread fatherlessness.”⁷

The consequentialist argument does not depend on any claim that the distinction between heterosexual and same-sex marriage is somehow written into the fabric of the universe. There need not be any real moral distinction between them (although the argument is not inconsistent with there being such a distinction). Thus, the consequentialist argument carefully insulates itself from the allegation that it is motivated by prejudice against gay people. Increasingly, it focuses on the moral failings and weaknesses of *heterosexuals*. As Gallagher states: “[t]he dramatic rise of out-of-wedlock births is testimony to the fact that the next generation—which has embraced gay marriage the most strongly—is losing touch with the idea that marriage has any strong relationship to having or raising children.”⁸ Many state appellate courts have been drawn to the claim that the function of marriage is to create safe conditions for accidental procreation—a function that is not served by extending marriage to same-sex couples.⁹ As presented by the courts, this argument is embarrassingly crude. Abrams and Brooks observe that few people marry today “because they have decided to have sex for the first time and want to insure themselves against ‘accidents’”¹⁰ But the argument has been developed in far more sophisticated form by Wax.

Wax does not claim that homosexual sex or marriage are per se immoral. Her concern is public mythos, not private conduct. She worries

6. See Maggie Gallagher, *A Reality Waiting to Happen: A Response to Evan Wolfson*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 12 (Lynn Wardle et al. eds., 2003).

7. *Id.*

8. Maggie Gallagher, *The Case Against Same-Sex Marriage*, in DEBATING SAME-SEX MARRIAGE 91, 162 (John Corvino & Maggie Gallagher eds., 2012).

9. See Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J. L. & HUMAN. 1, 2 (2009).

10. *Id.* at 32.

that recognition of same-sex marriage could weaken or transform the conventions surrounding heterosexual marriages.¹¹

For example, if homosexuals are less likely to have children, procreation might become less central to marriage. This might foster a model of marriage that views children as optional or even unimportant. Or, in keeping with past commitments and rhetoric, homosexual couples might place less emphasis on sexual fidelity or be more tolerant of sexual infidelity within their relationships. The existence of a significant number of “open marriage” homosexual couples might affect how heterosexuals view their own commitments, with potentially unsettling or disruptive consequences.¹²

At no point does Wax suggest that the sexual lives of gay people are per se inferior to those of heterosexuals, or in any way immoral. She is simply concerned about the effect of their acceptance on the broader social ecology. The old sexual scripts are a solution to *heterosexuals'* perennial problems, most prominently the difficulty of forging bonds between fathers and children.

Because most people are incapable of reasoning through every dilemma of social life on their own, they depend on off-the-shelf scripts that define basic duties and provide transparent guidelines for behavior in commonplace social situations. Simple, unyielding rules maximize the chance that persons of limited intellect and self-control will negotiate complex human interactions successfully. As such, these scripts should be as clear and unequivocal as possible. Formal institutions such as marriage, by embodying a simple and transparent set of expectations, help facilitate moral conduct by ordinary people.¹³

Wax's view of marriage here resembles Friedrich Hayek's view of religious belief. “Customs whose beneficial effects were unperceivable by those practising them were likely to be preserved long enough to increase their selective advantage only when supported by some other strong beliefs; and some powerful supernatural or magic faiths were readily available to perform this role.”¹⁴ Hayek himself was an agnostic who regarded the notion of God as unintelligible;¹⁵ he regarded religion as a functionally valuable fiction. Wax values the off-the-shelf scripts of

11. Amy L. Wax, *Traditionalism, Pluralism and Same-Sex Marriage*, 59 RUTGERS L. REV. 337, 400–01 (2007).

12. *Id.* (footnote omitted).

13. Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1090 (2005). She elaborates this argument in Amy L. Wax, *Diverging Family Structure and “Rational” Behavior: The Decline in Marriage as a Disorder of Choice*, in RESEARCH HANDBOOK ON THE ECONOMICS OF FAMILY LAW 59–66 (Lloyd R. Cohen & Joshua D. Wright eds., 2011) [hereinafter *Diverging Family Structure*].

14. F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 138 (W.W. Bartley III ed., 1988).

15. *See id.* at 139–40.

marriage for the same reason.¹⁶ It is an unhappy fact of social life that most people depend on miracle, mystery, and authority.

For the most part, Wax's focus is not on gay people, but on the feared effects of legitimized homosexuality on the wider heterosexual population. The argument seems to be that anything that keeps the older ethic going will be good for that population, and that same-sex marriage will damage that ethic, if only marginally. She does, however, raise concerns about gay people raising children (which will happen more often if gays marry). She cites studies showing that children thrive better when raised by their married biological parents than by other combinations, such as "[c]hildren in single parent families, children born to unmarried mothers, and children in step-families or cohabiting relationships."¹⁷ These concerns do not *necessarily* bar recognition of same-sex marriage: "enhanced risks for children, especially if modest, may not warrant abandoning reforms motivated by a firm commitment to rights and equality."¹⁸

Wax's conclusions do not follow from her evidence. Whatever the deficits of the kinds of households she lists, they do not show that children raised by *same-sex couples* do worse than children raised by heterosexual couples.¹⁹ The household types are too different to support any inference from one to the other. In heterosexual households with stepfathers, for example, the introduction of a new adult into the household is yet another disruption in children's lives; stepfathers are less likely to be committed to the child's welfare and less likely to be a check on the mother's behavior, they sometimes compete with the child for the mother's time, and the mother may be reluctant to share authority with the stepfather.²⁰ None of these problems are likely to be present in children of same-sex couples. Same-sex couples are already raising large numbers

16. Wax distinguishes her view from Hayek's at one point, but she is focusing on his libertarianism, not on his endorsement of religious mystification. Wax, *supra* note 13, at 1065 n.16. This conservative caution about changing family forms obviously has ramifications beyond marriage. Judge J. Harvie Wilkinson once suggested that the protection of traditional family patterns might justify the criminalization of homosexual sex. J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 596 (1977).

17. Wax, *supra* note 11, at 402 (quoting Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child Trends Research Brief 6 (Jun. 2002)). A similar argument is made by Maggie Gallagher, whose argument is critiqued in Koppelman, *supra* note 5, at 25.

18. Wax, *supra* note 11, at 412.

19. More generally, such studies as we have do not show that children are harmed by being raised by same-sex couples. See ABBIE E. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE* 179 (2010); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 162 (2001). This literature is criticized in Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 748 (2012). This critique simply reinforces my conclusion that *bad* outcomes have not been shown. Even if valid negative generalizations could be made, it is doubtful that they could have any practical significance, since as a general matter we do not make statistical differences between groups a basis for restricting either parental rights or (more pertinent here) the right to marry.

20. SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 29 (1994). This book is cited in Wax, *supra* note 13, at 1087 n.79. She acknowledges these specific issues in Wax, *supra* note 11, at 409.

of children and will continue to do so whether or not same-sex marriage is recognized.²¹ Withholding recognition just makes these children's lives less stable.²² Wax worries that they are likely to face other problems, such as "social relations . . . as tangled and complicated as those facing heterosexual blended or post-divorce families."²³ But if this were true, would there not be some evidence of it?

Her conclusion on the basis of this evidence—that the heterosexual nuclear family is the "gold standard" for family form²⁴ and that "[c]hildren do best if their entire childhood is spent with *both* their biological parents"²⁵—is like saying that because a poodle is bigger than a squirrel or a butterfly, a poodle is bigger than any other animal.²⁶

B. *The New Middle Class Ethic*

Wax is right to ask about the costs of relaxing the old rules. She has plenty of data that shows that children tend to do well when raised by their biological parents,²⁷ and that single motherhood is especially hard on children.²⁸ It would indeed be a mistake to discard the old ethic if what replaces it is an ethic of individual self-fulfillment, leaving men free to scatter their seed at will.

Society needs an ethic that binds fathers to children. But there is more than one candidate for that job. The story of the modern sexual revolution is not merely the story of the decay of the old ways. It has also seen the emergence of a new ethic, one that in many ways produces stronger, more functional families that serve children's needs *better* than the old model.

Naomi Cahn and June Carbone observe that two different family systems, presupposing different norms, now exist in the United States.²⁹ The older, more traditional model demands marriage before (or very soon after) sexual activity begins, identifies responsible parenthood with

21. The 2000 Census found that nearly 600,000 cohabitating same-sex couples reported themselves as "unmarried partners," compared with 145,130 such households tallied by the 1990 Census. The number is probably a substantial undercount, since many gay people are unwilling to share this information with the government. Same-sex households were reported in 99.3 percent of U.S. counties in 2000, and were about as racially diverse as the population as a whole. Of these reported numbers, children were present in 34 percent of lesbian couples and 22 percent of gay male couples. (By comparison, 46 percent of married heterosexual couples were raising children.) SEAN CAHILL, *SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS* 45–46 (Post–2004 Election ed. 2004).

22. For a few illustrative examples, see Andrew Koppelman, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 73–74, 109, 114–16 (2006).

23. See Wax, *supra* note 11, at 407.

24. *Id.*

25. *Id.* at 409.

26. Wax might also be saying that, whatever the effects of same-sex couples on the children they raise, their recognition will indirectly cause an increase in single-parent families by undermining the norms that govern traditional marriage. I have already addressed that argument. Thanks to Erik Anderson for raising this issue.

27. See *id.* at 399–411.

28. See *id.* at 381, 402.

29. See NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 1–2 (2010).

marriage rather than maturity or economic self-sufficiency, aims at socialization into traditional gender roles, and embraces authoritarian models of parenting. The appropriate response to unplanned pregnancy is the shotgun marriage. Same-sex marriage is perceived by this model's adherents to flout this entire complex of values, elevating the happiness of adults over the well-being of children.³⁰

This model remains prevalent in much of the United States. But it has costs. Where it prevails, divorce rates are the highest in the country, perhaps because early marriages are unusually likely to fail.³¹ Teen pregnancy, high rates of sexually transmitted diseases, and single motherhood are frequent.³² The problem is that, although this ethic has considerable continuing power, it is in decay. Its enforcement mechanisms have weakened. Unhappy couples can no longer be forced to stay together, and teenagers cannot be prevented from having sex. More generally, people's beliefs about marriage do not necessarily predict their marital behavior.

At the same time, a new sexual ethic has emerged. This model, which Cahn and Carbone call the "new middle class ethic," is tolerant of premarital sexuality so long as contraception is carefully used, with abortion as the responsible fallback.³³ It calls for postponing marriage and parenthood until the completion of higher education and aims at more egalitarian gender roles within marriage.³⁴ It produces lower rates of divorce and teenaged motherhood, but also falling fertility and more people living alone.³⁵

The new ethic has obvious advantages in the postindustrial economy. Delayed childbearing facilitates more education, which in turn leads to higher incomes later in life.³⁶ The newer model is no less functional than the old one. Indeed, from the standpoint of child welfare, it has obvious comparative advantages, since it produces less divorce and more mature parenting.

The new model is most prevalent among the most educated classes, who have the highest incomes.³⁷ The differences are starkly revealed in patterns of single childbearing. In 1960, about 14 percent of mothers in the bottom education quartile were single, compared with 4.5 percent of mothers in the top quartile.³⁸ By 2000, the respective percentages were

30. *Id.* at 1–4.

31. *Id.*

32. *Id.*

33. *Id.* at 39.

34. *See id.* at 38–39, 46, 209.

35. Wax treats this set of behaviors either a survival of the earlier ethic or individuals making decisions on their own in *Diverging Family Structure*, *supra* note 13. This overlooks the way in which this pattern functions as an *ethic*, a set of standardized scripts and norms.

36. *See* Steven P. Martin, *Women's Education and Family Timing: Outcomes and Trends Associated with Age at Marriage and First Birth*, in *SOCIAL INEQUALITY* 79, 83–85 (Kathryn M. Neckerman ed., 2004).

37. CAHN & CARBONE, *supra* note 28, at 193–94.

38. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 *DEMOGRAPHY* 607, 611 (2004).

43 percent and 7 percent.³⁹ College-educated women are more likely to marry than other women and less likely to divorce.⁴⁰ The disparity appears to have much to do with delayed childbearing by educated women, which in turn is the result of contraception and abortion.⁴¹

Integral to this model is greater tolerance of homosexuality. Since this model separates sex from reproduction and values recreational sex, it is not threatened by sex that manifestly has nothing to do with procreation. Tolerance for homosexuality correlates with high levels of education and income.⁴²

The greater stability of these high-income families may even be facilitated by their abandonment of the ethic that Wax hopes to preserve. Their children do better because the parents have separated sex from reproduction. Support for gay rights will not corrode these families. Many of them already support gay rights, and they are doing fine.⁴³

Wax thinks that “[f]amily disintegration is almost surely the product of a multipronged assault on conventional strictures and understandings from many quarters, with factors like the availability of birth control, changes in divorce laws, feminism, the sexual revolution, and the courts’ recognition of children’s and parental rights outside of marriage playing some role.”⁴⁴ The phenomena she describes are, however, equally present in the top-quartile and bottom-quartile families and cannot explain the differences between them.⁴⁵ In fact, the upper-income families have replicated the statistics of forty years ago, and in some respects their children are doing even better: their households are more prosperous, and they spend more time with their fathers.⁴⁶

The poorest Americans do have a tendency (only a tendency; more than half of bottom-quartile mothers are married) to exhibit an ethic focused on short-term satisfaction with disastrous long-term consequences. Men casually impregnate women.⁴⁷ The women raise the children with

39. *Id.*

40. CAHN & CARBONE, *supra* note 29, at 39.

41. McLanahan, *supra* note 38, at 617; *see also* David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for Answers?*, in SOCIAL INEQUALITY 3 (Kathryn M. Neckerman ed., 2004).

42. A 2003 study by the Pew Research Center found that 44 percent of college graduates, but only 23 percent of high school dropouts, supported same-sex marriage; 40 percent of those with incomes above \$75,000, but only 32 percent of those making less than \$20,000, had that view. *Religious Beliefs Underpin Opposition to Homosexuality*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS 21 (Nov. 18, 2003), <http://www.people-press.org/files/legacy-pdf/197.pdf>.

43. On the basis of a model much like Wax’s, some scholars have claimed that recognition of same-sex marriage in some jurisdictions has led to the decline of heterosexual marriage in those jurisdictions. Those claims have not withstood examination. *See* M. V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* (2009); WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006); Laura Langbein & Mark A. Yost Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292 (2009).

44. Wax, *supra* note 13, at 1086.

45. One can, of course, hypothesize that wealthier couples are able to find private substitutes for the now-gone legal protections. Thanks to Doug Allen for this suggestion.

46. McLanahan, *supra* note 38, at 608.

47. *Id.* at 617.

difficulty.⁴⁸ The men are disconnected from the next generation.⁴⁹ The children, especially the boys, are poorly socialized.⁵⁰ The pattern repeats from one generation to the next.

The causes of these patterns are not well understood. One survey concludes that the most widely cited papers are “those that disprove a popular explanation, not those that support one.”⁵¹

What does appear clear is that the greater prevalence of unmarried motherhood among the poor is caused, in part (no one knows how large a part) by the vestiges of the old ethic, which has decayed unevenly. Prohibitions that were functional in context have become pernicious in new circumstances. The stigma of using birth control has, for some populations, decayed more slowly than the stigma of premarital sex: sex is something unexpected that happens to you, while contraception identifies you as a bad girl who plans for sex.⁵² The stigma of unwed motherhood is sometimes felt less strongly than the stigma of divorce.⁵³ The unavailability of contraception to low-income women also increases the likelihood of pregnancy,⁵⁴ and abstinence-focused sex education increases the likelihood that a girl will not even know how to contracept when she has her first sexual experience.⁵⁵

Among the poorest Americans, there is a *third* sexual ethic which is more tolerant of childbearing outside of marriage than either of the other two. (This is less distinctively an ethic than the other two, since it is not so much a norm of childbearing as a pattern of response to births that are often unplanned and unwelcome.⁵⁶ What matters here is that it cannot be conflated with either of the other two.)⁵⁷ It is not, however, a world in which people feel contempt for marriage.

Poor Americans have the same high expectations for a marriage partner and an ideal marital relationship that rich Americans do. They do not, however, regard marriage as a prerequisite for childbearing, and they think that having a child together is not a sufficient reason to marry. Nor is cohabitation: one large study of children of urban unmarried parents found that eighty-three percent of out-of-wedlock births to adult

48. *Id.* at 621–22.

49. *Id.* at 612–14.

50. Ron Haskins, *Moynihan Was Right: Now What?*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 291 (2009). Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequality*, 34 ANN. REV. SOC. 257, 264–65 (2008).

51. Ellwood & Jencks, *supra* note 41, at 3.

52. See generally KRISTIN LUKER, *TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT* (1975).

53. Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage among the Disadvantaged*, 15 THE FUTURE OF CHILDREN 117, 125 (2005). One low-income mother declared, “I don’t believe in divorce. That’s why none of the women in my family are married!” *Id.*

54. J.J. Frost et al., GUTTMACHER INSTITUTE, *Improving Contraceptive Use in the United States* (2008), available at <http://www.guttmacher.org/pubs/2008/05/09/ImprovingContraceptiveUse.pdf>.

55. See CAHN & CARBONE, *supra* note 29, at 3,111; see generally John Santelli et al., *Abstinence and Abstinence-only Education: A Review of US Policies and Programs*, 38 J. ADOLESCENT HEALTH 72 (2006).

56. See CAHN & CARBONE, *supra* note 29, at 90, 173.

57. Thanks to June Carbone for a helpful conversation on this point.

women were to romantically involved couples, about half of whom were living together when the child was born.⁵⁸ Rather, they tend to think that marriage should be reserved for couples who can afford a mortgage on a home, a car, some savings, and money to pay for a wedding. Couples who eventually meet these economic goals do tend to marry once they have done so.

The low marriage rate is in part a product of circumstances.⁵⁹ The poor marry at a lower rate because most are unable to meet this higher standard. If they could meet it, the standard would do less damage. A substantial obstacle is many low-income men's unstable employment, low educational attainment, drug use, violence, and frequent encounters with the criminal justice system.⁶⁰ That, in turn, is the product of soft employment markets, bad schools, and drug laws that send huge numbers of young men to prison without significantly controlling drug markets.⁶¹ Poor women's sexual behavior is in many ways a rational response to these circumstances. College education is out of the question for many, and they perceive no reason to delay childbearing. Since life expectancy is short,⁶² there are also substantial costs to delay.

A different ethic about sex might help some of these people. Either of the two other American models would be an improvement. Under the old model, they would abstain from sex until they are married, and they would delay marriage until their early twenties. Under the new middle-class model, they would be sexually active during those years, but would carefully use contraception. (The old model's resistance to sex education bears some responsibility for America's very high rate of unplanned pregnancies.)

Wax is well aware of the class divergence in childbearing patterns that I have described here. She describes it herself, in an article that is not explicitly about same-sex marriage, but which concludes with the claim that these patterns are "reason to question our enthusiasm for innovative family forms and to support the revival of marriage and traditional family structures."⁶³ Her own data indicate, however, that it is precisely the more innovative family form—the "new middle class ethic," which needs no revival—that is most successfully looking after children's

58. CAHN & CARBONE, *supra* note 29, at 120.

59. And nothing I write here should be construed to support the preposterous but widespread canard that if only these people changed their sexual behavior, they would stop being poor. For description and critique, see MICHAEL BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 66–103 (2003); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 202–45 (1997).

60. Wax acknowledges this "crummy boyfriend" problem in *Diverging Family Structure*, *supra* note 13, at 57. To the extent that this is deemed the core problem, it is mysterious how same-sex marriage can make it worse, or how opposing same-sex marriage could make it better.

61. *See id.*

62. *See generally* Gary Burtless, *Life Expectancy and Rising Income Inequality: Why the Connection Matters for Fixing Entitlements*, BROOKINGS (Oct. 23, 2012), <http://www.brookings.edu/research/opinions/2012/10/23-inequality-life-expectancy-burtless>.

63. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L. Q.* 567, 599 (2007). Wax elaborates this argument in *Diverging Family Structure*, *supra* note 13.

needs in contemporary America.⁶⁴ Her caution that we should focus on “what actually works in practice to help shape human choice and nurture the most desirable human relationships”⁶⁵ is pertinent here.⁶⁶

The new middle-class ethic, to the extent that it is tolerant of same-sex unions, is a departure from the core, traditional purposes of marriage. Maggie Gallagher, who opposes same-sex marriage for reasons much like Wax’s, argues that marriage came into existence and primarily continues to function, “to manage the procreative consequences of sexual attraction between men and women.”⁶⁷ Same-sex marriage (absent children, although in fact children are often present) does not directly serve that function. But the real question is whether the goods that have traditionally been realized (when all went well) in that practice can also be realized in other social units that do not correspond to the traditional definition.⁶⁸

We would not have the institution of marriage if our species did not reproduce sexually.⁶⁹ But what is wrong with using something for an unintended purpose? The authors of the Constitution, many of whom owned slaves, did not intend the use of federal power to abolish slavery.

64. *Id.* at 596.

65. Wax, *The Conservative’s Dilemma*, *supra* note 13, at 1079.

66. Like other critics of same-sex marriage, she thinks that caution is warranted by the consequences, which in some respects have not been good, of another experiment with family forms, the rapid spread of no-fault divorce. That reform, however, directly altered the financial incentives of persons within marriage, and so would inevitably have some effect, good or ill, on their behavior. *See generally* Betsey Stevenson, *Divorce Law and Women’s Labor Supply*, 5 J. EMPIRICAL LEG. STUD. 853 (2008). Same-sex marriage, on the other hand, has no tangible effect at all on the behavioral incentives of heterosexual couples.

67. Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 ST. THOMAS L. REV. 33, 47 (2004). The same point is developed in great detail, and the same fallacious inference against same-sex marriage is drawn, in DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 11–125 (2007). Blankenhorn does not engage at all with the new middle-class ethic, only comparing aggregate data about attitudes toward marriage in different countries, and thus obscuring differences within countries. *See id.* at 213–46. He does focus on one group within the United States, but that is the group of scholars and activists who want to deinstitutionalize marriage altogether. *Id.* at 127–69. Most same-sex couples who marry, and most heterosexuals who support them, evidently have very different attitudes toward the institution. Blankenhorn has since recanted his opposition to same-sex marriage. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?adxnml=1&adxnmlx=1379632177-InV2PFdUXEd7YfLqBliOgg&r=0>.

68. Gallagher writes that “[s]ame-sex marriage will affect marriage by changing our core legal understanding of what marriage is. Marriage will be a unisex relationship, unconnected to sex, babies or family structure.” Maggie Gallagher, *Maggie’s Reply to Andrew Koppelman on Marriage and Same-Sex Marriage*, Oct. 4, 2005, available at http://www.marriagedebate.com/mdblog/2005_10_02_md_blog_archive.htm (last visited Feb. 14, 2012). Here’s a nice test of whether marriage, disconnected to reproduction, will have that consequence. Arizona and Wisconsin have statutes that allow first cousins to marry if and only if they can’t procreate. (ARIZ. REV. STAT. ANN. § 25-101(B) (2012) (West); WIS. STAT. ANN. § 765.03 (1) (West 2012)). How alarmed ought we to be about these laws? Do they install “a new definition of marriage, one disconnected from its historic meaning, purpose and function”? Gallagher, *supra*. Is this “going to make it much harder for parents and faith communities to promote the understanding that marriage is about generativity: connecting mothers and fathers to the children they make”? *Id.*

69. Marriage originally had other functions, such as “extend[ing] cooperative relations beyond the immediate family or small band by creating far-flung networks of in-laws.” STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* 6 (2005). But these functions presuppose that sex makes babies.

The builders of the Parthenon did not intend that it be maintained as an attraction for tourists and scholars. Saddam Hussein did not intend that his presidential palaces be used to house a democratically elected government. Screwdrivers are not intended to be used to pry open cans of paint. When a novel use of an inherited artifact is proposed, the question ought to be whether that use is a good one, not whether it is consistent with the artifact's original purpose.

Gallagher's claim is rather that marriage cannot perform its original function as well if its public meaning is changed by the inclusion of same-sex couples.⁷⁰ Such inclusion "will necessarily dilute and almost certainly repudiate responsible procreation as a key civil purpose of marriage."⁷¹ It would "serve the principle that adult desire trumps the needs of children every time."⁷² Is this what same-sex marriage signifies to the whole society, or only what it signifies to its opponents?

The real problem with Wax's model has to do with the importance of miracle, mystery, and authority. The old ethic did its job for a long time. But to say that children cannot thrive without the old sexual morality because they need to be connected with their fathers is like saying that animals cannot live on land because they need gills to breathe. I am not persuaded that people have to be fooled into being good parents. I repeat what I have said before: I have three kids, and I do not think I stick around because I am mystified or confused.⁷³

The basic Burkean point, that ancient rules probably have a rational basis or they would not have survived so long, is sound. But conditions change. Compare the prohibition of usury. In the primitive agrarian societies of Biblical times, a loan was likely to be a response to unexpected disaster, and the ban on charging interest was a way of preventing people from exploiting others' misfortunes.⁷⁴ As modern commercial conditions changed, and finance became an unavoidable prerequisite of business, casuists quickly figured out that conditions had changed and so the old rules had to be modified.⁷⁵

70. Gallagher, *supra* note 8, at 125.

71. *Id.*

72. *Id.* at 176.

73. Koppelman, *supra* note 5, at 30. To this Gallagher responds: "This is a soundbite, not a serious thought. It amounts to a rejection of the idea that the social meanings encoded in law matter. The law interacts only by directly punishing or directly benefiting free and disparate individuals. The law is an administrator alone. Its ideas do not have any consequences." Gallagher, *supra* note 67, at 58. Hardly. I once wrote a whole book arguing that the shaping of social meaning is a legitimate undertaking for the law. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996); see also Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001). What I doubt is that same-sex marriage will have the specific social meaning Gallagher claims it will: an invitation for men to desert their wives and children.

74. ALBERT R. JOHNSON & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 183 (1988); *Leviticus* 25:37.

75. JOHNSON & TOULMIN, *supra* note 74, at 181-94. The similarities between the usury and homosexuality taboos have been noted in John Corvino, *Why Shouldn't Tommy and Jim Have Sex? A Defense of Homosexuality*, in *SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY* 13-14 (Corvino ed., 1997); JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 330-32 (1980).

There is a moral anchor amid this historical contingency: the idea that people have value, that their needs should be looked after, and that it is wrong to regard another person as merely a source of economic gain. With sex as with lending, people should not stand toward one another in the relation of predator and prey.⁷⁶

The old rules of sex are sometimes valuable as a way of coping with the problem of unintended pregnancy, which has not gone away. But the old rules turn out to have costs. Most obviously, people want to be happy, and the ban on divorce is a problem for that.⁷⁷ The ban on contraception never made a lot of sense, absent condemnation of pleasure in sex. And, of course, the cost of the traditional sexual ethic to gay people was extremely high. So a more flexible set of rules has developed: premarital sex is fine as long as contraception is carefully used; there is a strong presumption against adultery, but some married couples have tolerated it, and some even testify that tolerating it has helped hold their marriages together. A central task of modern sexual ethics is to figure out what is living and what is dead in the old rules about sex, and where the lines are now to be drawn.⁷⁸ The eminently responsible parental behavior of the people who have most firmly embraced the new ethic suggests that that ethic is less dangerous than Wax fears.

III. THE NONCONSEQUENTIALIST CLAIM

Now consider the more philosophically sophisticated and difficult claim, that marriage is inherently heterosexual.

A. *The Intrinsic Good of One-Flesh Union*

Geach states the claim succinctly: “the marriage act has an intrinsic meaning which does not depend on human convention, but which is part of the fabric and constitution of our nature, so that by damaging our sense of the significance of our sexuality we undermine that fabric and undo that constitution.”⁷⁹ Part of the meaning of marriage as she under-

76. The old Biblical anti-usury ethic continues to be relevant. There is now a large subsector of the credit card industry whose function is predation, pure and simple—worse than usury in Biblical times, because the lender then did not deliberately engineer the economic desperation from which he then profited. See Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384–92.

77. Geach claims that the availability of divorce has made marriages unhappier. Mary Geach, *Marriage: Arguing to a First Principle in Sexual Ethics*, in MORAL TRUTH AND MORAL TRADITION 188–89 (Luke Gormally ed., 1994). In fact, it is uncertain whether marriages have become happier or unhappier, and whether any change that has occurred is the result of changing divorce laws or of other factors, such as the decline in many husbands’ wages. See PAUL R. AMATO ET AL., ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING 32 (2007).

78. There are a lot of people working on this, of course. One of my favorites is the advice columnist Dan Savage, who delicately tries to work out an appropriate etiquette for group sex, bondage, fetishism, and other unusual tastes. The need to treat other people decently and with due consideration for their feelings is a dominant concern of his work, and his popularity suggests that in this he is not idiosyncratic. See, e.g., DAN SAVAGE, SAVAGE LOVE: STRAIGHT ANSWERS FROM AMERICA’S MOST POPULAR SEX COLUMNIST (1998).

79. Mary Catherine Geach, *Lying With the Body*, 91 MONIST 523, 525 (2008).

stands it is that it is the only legitimate use of the sexual function. Among the acts which distort the meaning of the marriage act are sex outside of marriage, contraception, divorce, masturbation, sexual fantasy, and homosexual conduct. These are categorically immoral and never permissible under any circumstances.

The view that she puts forth has already been made prominent by the new natural law theorists (hereinafter NNL), the theologian Germain Grisez and the legal scholar and philosopher John Finnis, and further developed by Robert P. George, Gerard Bradley, Patrick Lee, Sherif Girgis, and Ryan T. Anderson.⁸⁰ Central to their argument is the view that sex is only morally licit within marriage, which is “a basic and irreducible good perfective of human persons.”⁸¹ I cannot review their argument for the impermissibility of nonmarital sex here,⁸² but will focus on their account of the distinctive good that they think is achieved by heterosexual marriage.

Grisez argues that marriage is an irreducible human good because it constitutes “a full communion of persons: a communion of will by mutual covenantal commitment, and of organism by the generative act they share in.”⁸³ Communion of will consists of a mutual commitment to an exclusive and indissoluble partnership, while organic communion consists in the fact that—here comes the boldest move of the NNL theorists, one that Geach does *not* make—when husband and wife engage in procreative marital intercourse, they *literally* become a single organism.⁸⁴

For NNL “each animal is incomplete, for a male or a female . . . is only a potential part of the mated pair, which is the complete organism . . . capable of reproducing sexually. This is true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit. In doing so, it is literally true that ‘they become one flesh’ (Gn 2.24).”⁸⁵ What looks like a metaphor in Genesis becomes a simple statement of fact in NNL.

80. She acknowledges her affinity with NNL. *Id.* at 527.

81. Robert P. George, *What's Sex Got to Do With It? Marriage, Morality, and Rationality*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET & MORALS* 142, 169 (Robert P. George & Jean Bethke Elshtain eds., 2006).

82. I have done so elsewhere. ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 80–93 (2002) [hereinafter *GAY RIGHTS QUESTION*]; see Koppelman, *supra* note 5, at 18–22; Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 *AM. J. JURIS.* 51 (1997) [hereinafter *Is Marriage Inherently Heterosexual*]. Since I wrote these pieces, Lee and George have elaborated considerably on their claims about the disintegrating effects of the pursuit of pleasure. PATRICK LEE & ROBERT P. GEORGE, *BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS* (2008). They specifically respond to my objections. *Id.* at 191–93. I cannot address their general argument here. I note, however, that their claims about the disordered character of nonmarital sex are parasitic upon their claims, which I do address below, that there is a distinct good achieved by the heterosexual couple, even if that couple is known to be infertile. If that distinct good cannot be shown, then, whatever the significance of pleasure might be, there is no radical difference between marital heterosexual sex and other kinds of sexual conduct.

83. 2 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE* 580 (1993).

84. LEE & GEORGE, *supra* note 82, at 199.

85. *Id.* at 570.

The married couple, when mating, “truly become biologically one, two-in-one flesh.”⁸⁶

Nonmarital sexual acts, whether homosexual or heterosexual, cannot achieve this bodily unity. At best, they achieve the *illusory experience* of unity. “For a truly common good, there must be more than experience; the experiences must be subordinated to a truly common act that is genuinely fulfilling.”⁸⁷ When gay couples (or even married heterosexual couples) achieve sexual satisfaction by means other than marital intercourse, the act “is really an instance of mutual masturbation, and is as self-alienating, or depersonalizing, as any other instance of masturbation.”⁸⁸ Thus Finnis writes of sex between unmarried people that

their reproductive organs cannot make them a biological (and therefore personal) unit. . . . Because their activation of . . . their reproductive organs cannot be an actualizing and experiencing of the *marital* good . . . it can do no more than provide each partner with an individual gratification. For want of a *common good* that could be actualized . . . *by and in this bodily union*, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.⁸⁹

The new natural law theorists’ claims have been subjected to withering criticism.⁹⁰ The most fundamental difficulty is the short distance from premise to conclusion. The uncontracepted union of the married heterosexual couple is uniquely good because, well, the uncontracepted union of the married heterosexual couple is uniquely good. The argument comes decorated with a complex theoretical apparatus, but that apparatus does no work. It is like one of those old trick math problems, which at first glance seems to require complex computations:

86. *Id.* at 199. The same claim is made in Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 253–54 (2011).

87. LEE & GEORGE, *supra* note 82, at 195.

88. *Id.* at 194.

89. John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1066–67 (1994).

90. See NICHOLAS BAMFORTH & DAVID A. J. RICHARDS, *PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW* (2008); Nigel Biggar, *Conclusion, in THE REVIVAL OF NATURAL LAW: PHILOSOPHICAL, THEOLOGICAL AND ETHICAL RESPONSES TO THE FINNIS-GRISEZ SCHOOL* 283, 284 (Nigel Biggar & Rufus Black eds., 2000); John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501 (2005); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Gareth Moore, *Natural Sex: Germain Grisez, Sex, and Natural Law, in THE REVIVAL OF NATURAL LAW: PHILOSOPHICAL, THEOLOGICAL AND ETHICAL RESPONSES TO THE FINNIS-GRISEZ SCHOOL* 223 (Nigel Biggar & Rufus Black eds., 2000); Martha C. Nussbaum & Kenneth J. Dover, *Dover and Nussbaum Reply to Finnis, in Martha C. Nussbaum, Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1641, 1649 (1994); Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 41 (1995); Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75 (1995); Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 239–40 (David M. Estlund & Martha C. Nussbaum eds., 1997); see also *supra* note 2.

$$7 + 865 \times (8,398,028.1414 \times \pi \div \sqrt{5555} \div 8,398,028.1414 \times \sqrt{5555} \div \pi) - 865 = ?$$

Look again, and it is clear that all of the complexity cancels itself out, and that you end up right back where you began.

To try to persuade the reader that their account of marriage is correct, the NNL theorists claim that it alone can account for widely held intuitions and longstanding practices, such as the state's interest in regulating certain relationships, the confinement of that interest to sexual relationships, and the demand for monogamy. They think that there is only one alternative view, which envisions marriage as, "in essence, a loving emotional bond, one distinguished by its intensity."⁹¹

There is, however, another alternative view, which holds that marriage has no essence at all. It is a socially constructed practice, like chess, with goods that are internal to it. That practice can be changed when this conduces to human well-being.⁹² The features they focus on are aspects of that practice. To the extent that the practice produces goods, there is reason to continue doing things as we have done them. That is all the explanation that is needed.

It is also doubtful that they are entitled to claim, as an attraction of their view, that it justifies the demand for monogamy. The physical union of male and female, in their view, is appropriately part of a more comprehensive union. "Being organically united – as 'one flesh' – spouses should have, by commitment, the exclusive and lifelong unity that the parts of a healthy organic body have by nature."⁹³ The "should" is a non sequitur. Monogamy has its advantages, but it does not follow from biological unity; one person can coordinate bodily with multiple others.⁹⁴

91. SHERIF GIRGIS, ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 1* (2012). The assumption that there is only one moral position on each side of this issue mischaracterizes both sides. Many conservative evangelicals think that same-sex marriage should not be recognized, but they do not share the NNL position on contraception or divorce. Their reasons, which are based on an interpretation of Biblical revelation, are not those of the NNL theorists. See Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, Gallup (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx> (Americans who oppose same-sex marriage are most likely to explain their position on the basis of religious beliefs or interpretation of biblical passages).

92. I elaborate this claim in *GAY RIGHTS QUESTION*, *supra* note 82, at 91–92. Girgis and his co-authors respond that, if one regards marriage as a social construction, "questions of justice should be secondary at best." GIRGIS, ET AL., *supra* note 91, at 50–51. Elsewhere they explain: "[I]f there are no principled boundaries demarcating some intimate associations as marriages, then no principle requires holding that same-sex sexual partnerships are marriages. In that case, all it takes to justify traditional marriage law is that the non-recognition of same-sex partnerships offer some (or a net) social benefit." Sherif Girgis et al., *Marriage: Merely a Social Construct?*, *PUBLIC DISCOURSE* (Dec. 29, 2010), <http://www.thepublicdiscourse.com/2010/12/2263/>. Something can be socially constructed but nonetheless be a concern of justice. Consider a law forbidding blacks and whites from playing chess with one another.

93. GIRGIS, ET AL., *supra* note 91, at 33.

94. In a response on the Mirror of Justice blog (a first rate blog of Catholic legal theory) to a draft of this paper, Prof. George challenges me to explain why my defense of same-sex marriage does not entail endorsement of polygamy: "[T]he redefinition of marriage to remove the element of sexual complementarity perforce eliminates any *ground of principle* for supposing that marriage is the union of two persons, as opposed to the union of three or more in a polyamorous sexual partnership." Robert George, *More on Koppelman's Paper*, *MIRROR OF JUSTICE* (Feb. 19, 2010), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2010/02/more-on-koppelmans-paper.html>; see also Girgis, et al., *supra* note 86, at 250–51, 272–74. How can my endorsement of same-sex marriage avoid this result?

The authors claim that, unless their understanding of marriage is widely shared, social pressures will diminish “for husbands to stay with their wives and children, or for men and women to marry before having children.”⁹⁵ This is because only that understanding can undergird marital stability: “[a]s more people absorb the new law’s lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion’s tyrannical inconstancy.”⁹⁶ But as we have already seen, among the Americans who are most likely to endorse same-sex marriage, rates of nonmarital birth and divorce have not significantly changed since the 1950s.⁹⁷ These people evidently perceive a reason, one which eludes the NNL theorists, to control emotion’s tyrannical inconstancy.

The NNL theorists claim that their view is not novel or strange, but rather is implicit in the old common-law rule that heterosexual intercourse alone can consummate a marriage.⁹⁸ I have responded to this:

Contra George, while infertility has been a well-known phenomenon, it has also been, for most of human history, an undetectable one. There was no way to be sure that a woman was infertile: you never could tell when childless, elderly Sara would hand Abraham a surprise. So bright line rules made sense here. Once a couple had had intercourse of the procreative kind, then she might be pregnant and the law took notice of that fact. If this explanation is correct, then the rules that George focuses on support, rather than undermining, the idea that marriage is a human construct.⁹⁹

As it happens, I do not have strong views on the polygamy question. I do not think my views on same-sex marriage entail anything about polygamy, either way. I take marriage for granted as a social institution that we have inherited, and I try to see whether there is any coherent reason for excluding same-sex couples from that institution. I do not need to think my way through the polygamy problem in order to address George’s challenge. I will note, however, that if there is a compelling anti-polygamy argument, George has not developed it. Here is another, fuller statement of his argument:

Such a union can be achieved by two and only two because no single act can organically unite three or more people at the bodily level or, therefore, seal a comprehensive union of three or more lives at other levels. Indeed, the very comprehensiveness of the union requires the marital commitment to be undivided—made to exactly one other person; but such comprehensiveness, and the exclusivity that its orientation to children demands, makes sense only on the conjugal view. Children, likewise, can have only two parents—a biological mother and father. There are two sexes, one of each type being necessary for reproduction. So marriage, a reproductive type of community, requires two—one of each sex.

Girgis et al., *supra* note 86, at 272–73; the same argument is made more summarily in the book version of this essay. GIRGIS ET AL., *supra* note 91, at 33, 36. This is a sequence of non sequiturs. All it does is stipulate that only a man and a woman can unite biologically. How does it follow that three people cannot form a family unit in which different pairs of them unite biologically through heterosexual sex? A second kind of unity is contemplated here, a “comprehensive union” that mirrors the biological union. The goodness of such a comprehensive union is evidently different from the goodness of biological union, since members of a polygamous household do achieve the latter. The relation of these propositions to one another would need to be specified before there could be an argument to react to.

95. GIRGIS ET AL., *supra* note 91, at 8.

96. *Id.* at 56.

97. *See supra* notes 32–36 and accompanying text.

98. GIRGIS ET AL., *supra* note 91.

99. Andrew Koppelman, *Something Special*, BALKINIZATION (Jan. 1, 2011), <http://balkin.blogspot.com/2011/01/something-special.html>. (They cite a different blog post. GIRGIS ET AL., *supra* note 91, at 118 n.35. Evidently, this is an error.) Consummation also would radically shift the equities of annulment in a society where a woman’s marriageability depended on her virginity.

They respond that “the wedding vow itself, a public act easier to verify without invasive questioning and harder to falsify, would have been a much ‘brighter’ line.”¹⁰⁰ Even if one can imagine alternative constructions, that does not mean that clarity was not the reason for the common law rule. And, again, they offer no evidence that the law was based on their specific account of marriage.

They also cite a few ancient philosophers who held ideas about marriage that were broadly consistent with some of theirs.¹⁰¹ Philosophy, however, is about arguments, not conclusions, and they offer no evidence that these ancient writers believed anything like the NNL conception of the nature of marriage.¹⁰²

In the discussion that follows, I will focus on just one difficulty, the peculiar claim that the married couple becomes a single organism, or coordinates bodily in an intrinsically valuable way. These are strange claims, but they become even stranger when NNL insists that they are also true of an *infertile* heterosexual couple.

Even when a heterosexual couple cannot reproduce, Finnis writes, the “union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality).”¹⁰³ Finnis explains that the infertile married couple

who unite their reproductive organs in an act of sexual intercourse which, so far as they can make it, is of a kind suitable for generation, do function as a biological (and thus personal) unit and thus can be actualizing . . . the two-in-one-flesh common good and reality of marriage, even when some biological condition happens to prevent that unity resulting in generation of a child. Their conduct thus differs radically from the acts of a husband and wife whose intercourse is . . . sodomitic or by fellatio or coitus interruptus.¹⁰⁴

The *radical* difference here is difficult to discern. That sterile heterosexual coitus could have been procreative in some other possible world does not distinguish it from homosexual sex.

The NNL distinction turns on the *form* of the act, about which Lee and George write:

People who are not temporarily or permanently infertile could procreate by performing *exactly* the act which the infertile married couple perform and by which they consummate or actualize their marital communion. The difference between sterile and fertile married couples is not a difference in *what they do*. Rather it is a differ-

100. GIRGIS ET AL., *supra* note 91, at 50.

101. *Id.* at 49.

102. Finnis’s specific claims about Socrates, Plato, and Aristotle are refuted in Nussbaum & Do-
ver, *supra* note 90, at 1581–93, 1641–61.

103. Finnis, *supra* note 89, at 1066.

104. *Id.* at 1068.

ence in a distinct condition which affects what may result from what they do.¹⁰⁵

I have stated my objection to this. The core difficulty is that the classification of marital acts, including the infertile heterosexual couple but excluding the homosexual couple, is arbitrary:

What sense does it make to postulate one type of sexual activity as normative in this way, so that heterosexual intercourse is held to be an act of reproductive *kind* even if reproduction is not intended and is known to be impossible? Why is it not equally plausible to say that all acts of seminal ejaculation are reproductive in kind, or to say that no acts of seminal ejaculation are reproductive in kind, and that reproduction is only an accidental consequence that may ensue under certain conditions? There is nothing in nature that dictates that the lines have to be drawn in any of these ways.¹⁰⁶

An infertile reproductive organ remains taxonomically a reproductive organ, but if it is infertile, it is not a reproductive organ “in the sense of power or potential.”¹⁰⁷ That is the only sense that could matter.¹⁰⁸ “A sterile person’s genitals are no more suitable for generation than an unloaded gun is suitable for shooting. If someone points a gun at me and pulls the trigger, he exhibits the behavior which, as behavior, is suitable for shooting, but it still matters a lot whether the gun is loaded and whether he knows it.”¹⁰⁹

The NNL theorists’ recent work largely repeats their view rather than defending it against objections,¹¹⁰ but Lee and George have re-

105. Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Unity*, 42 AM. J. JURIS. 135, 150 (1997); Girgis et al., *supra* note 86, at 266–68.

106. GAY RIGHTS QUESTION, *supra* note 82, at 86–87.

107. *Id.* at 88.

108. This point is elaborated in Erik A. Anderson, *A Defense of the “Sterility Objection” to the New Natural Lawyers’ Argument Against Same-Sex Marriage*, 16 ETHICAL THEORY MORAL PRAC. 759 (2013). Aristotle’s observation is pertinent here: “The eye is matter for sight, and if this fails it is no longer an eye, except homonymously, just like an eye in stone or a painted eye.” ARISTOTLE, *On the Soul*, in A NEW ARISTOTLE READER 166 (J.L. Ackrill ed., 1987). Thanks to Jeremy Bell for calling my attention to this passage.

109. GAY RIGHTS QUESTION, *supra* note 82, at 87–88. Sherif Girgis responds to this objection by arguing that natural organs, unlike artifacts, “have their function by nature” and “retain their function as long as they exist.” Artifacts such as guns, on the other hand, have their function “only as long as humans can and do intend to use them for a particular purpose.” Sherif Girgis, *Sherif Girgis on Guns and Knives, Sexual Organs, and Generative (or “reproductive-type”) Acts*, MIRROR OF JUSTICE (Mar. 29, 2010), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2010/03/sherif-girgis-on-guns-and-knives-sexual-organs-and-generative-or-reproductivetype-acts.html>. There is a sense, however, in which artifacts retain their function even if Girgis’s conditions are not satisfied. A sword in a museum remains a sword even if no one intends ever again to use it as a weapon. A broken gun remains a gun, because its parts are coordinated toward a purpose, even if the gun cannot accomplish that purpose.

110. See generally Gerard V. Bradley, *What’s in a Name? A Philosophical Critique of ‘Civil Unions’ Predicated Upon a Sexual Relationship*, 91 THE MONIST 606 (2008); Gerard V. Bradley, *Law and the Culture of Marriage*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189 (2004); Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 729 (2000); John Finnis, *Marriage: A Basic and Exigent Good*, 91 THE MONIST 388 (2008) [hereinafter *A Basic and Exigent Good*]; John Finnis, “An Intrinsicly Disordered Inclination,” in SAME-SEX ATTRACTION: A PARENTS’ GUIDE 89 (John F. Harvey & Gerard V. Bradley eds., 2003); Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U. L. REV. 21 (2004); Patrick Lee, *The Human Body and Sexuality in the Teaching of Pope John Paul II*, in JOHN PAUL II’S CONTRIBUTION TO CATHOLIC BIOETHICS 107 (Christopher Tollefsen ed., 2004). George

sponded to me in some detail.¹¹¹ In response to the problem of the infertile couple, they write:

But our claim is not that in a marital act, one must intend to procreate, hope to procreate, or even think that procreation is in these circumstances possible. Our claim is that a marital act is an act in which the man and the woman, as complementary, become bodily and organically one, in that they jointly perform a single act, single in that it is an act that is biologically oriented to procreation, though some other condition in the agents may prevent the completion of that orientation in this act.¹¹²

It is not clear what is doing the work here. Perhaps it is the proposition that the couple “become bodily and organically one” because they are engaged in a reproductive type of act. But they do not become a single organism even if they happen to conceive.

Lee and George concede that “not every instance of two entities sharing in an action are instances of two entities becoming biologically one.”¹¹³ The act of reproduction, however,

can be actualized only in cooperation with the opposite sex of the species. The reproductive bodily parts are internally oriented toward actuation together with the bodily parts of the opposite sex. So, although the bodily parts of the male and the female are not interdependent for their continued life (as the bodily parts are to each other in a male organism or the bodily parts to each other in a female organism) there is a real biological unity.¹¹⁴

The logic packed into the word “So” at the beginning of the final sentence is obscure. In reproduction, two entities share in a bodily action. That does not mean that they become one, even though the action they perform could not be performed by either of them individually. Two pianists playing a four hands piece do not become biologically one, even though they are using parts of their bodies in a complementary way. A chorus does not become biologically one even though its members are uniting their bodies to bring about a physical effect that no single human body could produce.¹¹⁵

and Bradley have also invoked these arguments to justify the criminalization of homosexual sex and a constitutional amendment against same-sex marriage. Gerard V. Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV., July 28, 2003; Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 30–31 (2000); Robert P. George, *One Man, One Woman: The Case for Preserving the Definition of Marriage*, CATHOLIC EDUCATION RESOURCE CENTER (Nov. 28, 2003), <http://catholiceducation.org/articles/marriage/mf0045.html>, at 26, 27; Robert P. George, *The 28th Amendment*, NATIONAL REV., July 23, 2001, at 32.

111. LEE & GEORGE, *supra* note 82, at 191–93, 197–204; George, *supra* note 81, at 161; *see also* Patrick Lee, *Marriage, Procreation, and Same-Sex Unions*, 91 THE MONIST 422 (2008); Patrick Lee & Robert P. George, *What Male-Female Complementarity Makes Possible: Marriage as a Two-in-One-Flesh Union*, 69 THEOLOGICAL STUDIES 641 (2008) [hereinafter *What Male-Female Complementarity Makes Possible*] (responding to similar objections).

112. LEE & GEORGE, *supra* note 82, at 204.

113. *Id.* at 183 n.15.

114. *Id.*

115. Martha Nussbaum suggested this example. The fundamental problem is that the NNL theorists do not clearly define their terms. They never explain what counts as an organism, nor are we told

To defend his claim of organic unity, George cites a thought experiment proposed to him in conversation by Grisez:

Imagine a type of bodily, rational being that reproduces, not by mating, but by some individual performance. Imagine that for these beings, however, locomotion or digestion is performed not by individuals, but only by biologically complementary pairs that unite for this purpose. Would anybody have difficulty understanding that in respect of reproduction the organism performing the function is the individual, while in respect of locomotion or digestion the organism performing the function is the united pair? Would anybody deny that the unity effectuated for purposes of locomotion or digestion is an organic unity?¹¹⁶

The thought experiment does not lead where Grisez intends. Let us suppose, to specify, that these beings have half the body of a human being, clumsily hopping about on a single leg, fulfilling the threat of Zeus in Aristophanes's speech from Plato's *Symposium*.¹¹⁷ In this fashion they can barely move at all by themselves (they keep falling on their one-eyed faces), while they can walk very efficiently if a left half and a right half grab each other's upper bodies tightly.

When they walk, thus connected, certainly it is the united pair that is walking. It does not follow that they are "an organic unity," much less a single organism. They are simply cooperating in a joint task. Two organisms engaged in symbiotic cooperation remain two organisms. In a lichen, the fungus and the algae do not become a single organism.

Even if the couple does not become a single organism, George can still say that their coitus "is an act that is oriented to procreation." That is the strategy that Girgis, Anderson, and George take in their book-length expansion of *What is Marriage?* There they silently abandon the single-organism claim in favor of a more modest one. Man and woman, in coitus, "*coordinate toward a common biological end of the whole that they form together.*"¹¹⁸ The consequence is a distinctive human good:

Just as one's organs form a unity by coordinating for the biological good of the whole (one's survival), so the bodies of a man and woman form a unity by coordination (coitus) for a biological good (reproduction) of their union as a whole. In choosing such biological coordination, spouses unite bodily, in a way that has generative significance . . .¹¹⁹

A same-sex couple cannot achieve the same good because "there is no bodily good or function toward which their bodies can coordinate."¹²⁰ In order for organic bodily union to occur, the two bodies' organs must be coordinated toward something, and in human bodies, there is only

what the criteria are for something being a bodily good toward which bodies can coordinate. Thanks to Erik Anderson for this point.

116. George, *supra* note 81, at 158–59.

117. PLATO, *PLATO'S SYMPOSIUM* 190d (Gilbert P. Rose ed., 1981).

118. See GIRGIS, ET AL., *supra* note 91, at 25.

119. *Id.* at 35.

120. *Id.* at 27.

one biological end that two persons' organs can coordinate toward.¹²¹ Because a same-sex couple cannot achieve this kind of bodily union, it is impossible for them to marry.

But it is obscure how an act can be oriented to procreation when procreation is known to be, not merely unlikely, but actually impossible. If the two Aristophanean halves grabbed hold of each other and waved their legs while suspended in midair on a bungee, would their action be oriented to locomotion? Could the locomotive character of their motion be a source of its goodness? Would that goodness be absent if two left-sided half-people (who could not walk together) waved their legs together while hanging from the same bungee?

George notes that coition is only one part of the reproductive process, and that as a part of the process, it can be completed by the infertile couple:

In performing this first part of the reproductive process together, the male and the female act as a single unit, even where in many cases the second part of the process cannot (for any of a variety of causes) be completed A condition, or even a defect, which prevents the second part of the process cannot change the fact that the male and the female did actually unite — became organically one — in the first part of that process. If conception *does* occur, it won't be until several hours later (at the earliest); and whether they *now* become one cannot depend on events that occur only later.¹²²

There is a deep confusion here. My action can make sense as part of a process, can take its meaning from its role in facilitating that process, only if the process is known or at least believed to be capable of completion. This is true even if the success of the project is unlikely. But it is not true if success is known to be impossible.

A surgeon trying to save the life of a gravely sick patient is engaged in the practice of medicine even if the patient's death is almost certain. No guarantee of success is necessary. (Little human endeavor comes with a guarantee of success.) So long as the patient is alive and the surgery even marginally increases the likelihood of the patient's survival, then the surgeon's behavior makes perfect sense. He is engaged in a medical-type act. Whether it is a medical-type act now cannot depend on events that occur only later, such as the patient's recovery.

But what would we think if the surgeon performed exactly the same actions, involving the same bodily motions, when the patient is already dead and the surgeon knows that? George writes that:

[T]he only behavior which the partners have direct control over is coition itself, performed in such a way as to fulfill the behavioral conditions of reproduction. This is the only act, the only behavior, which they directly perform, and it disposes them to procreation

121. This presumes that a chorus is not a biological end, but I will set that aside here.

122. George, *supra* note 81, at 162. The same argument appears in GIRGIS ET AL., *supra* note 91, at 75.

(rather than being the direct act of procreating). Thus, the other conditions (an adequate sperm count, time of ovulation, etc.) are not part of the couple's behavior, not part of *what they do*.¹²³

Try this logic on the surgeon as he operates on the corpse. All of George's verbal moves are available here, but the result will be pretty weird:

The only behavior which the surgeon has direct control over is surgery itself, performed in such a way as to fulfill the behavioral conditions of the patient's recovery. This is the only act, the only behavior, which he directly performs, and it disposes him to healing (rather than being the direct act of healing, which in every case of medicine may or may not happen). Thus, the other conditions (a patient who is alive at the time of the surgery, etc.) are not part of the surgeon's behavior, not part of *what he does*.

George adds that "a second reason" why infertile spouses' marital acts "are reproductive in kind is that they bespeak and bear witness to the intrinsic goodness of marriage, the kind of community that is naturally fulfilled by the bearing and rearing of children."¹²⁴ But this is not a second reason at all. It is the first reason restated. If the couple does not unite organically, if their actions are not intelligible because of their relationship to reproduction, then there is no "intrinsic goodness of marriage," in the sense in which he means these words, for their acts to bespeak and bear witness to.

It is one of the facts about the human capacity for signification that anything can bespeak anything. You can sprinkle the fairy dust anywhere you like: you could attribute goodness only to the sex acts of Chicago White Sox fans who copulate on Tuesdays. But the NNL theorists have not identified a distinctive, intelligible category of action to which intrinsic goodness can be shown uniquely to attach.

One might try to rehabilitate the argument in the following way. Begin with the assumption that bodily union is intrinsically good, whether or not conception results. In order for it to occur, the two bodies' organs must be coordinated toward something, and in human bodies, there is only one end toward which two persons' organs can coordinate.¹²⁵ A broken gun (even an irreparably broken gun) is still a *gun*, and its parts are still united with one another, even though they do not work properly. The same is not true of a pile of gun parts. The infertile heterosexual

123. George, *supra* note 81, at 163.

124. *Id.* at 164-65.

125. They curiously fail, however, to appreciate certain kinds of reproductive coordination. They think bodily union does not happen in artificial reproduction: "[G]ametes that have been extracted and manipulated for laboratory use are hardly parts of the parents' persons, so combining them could not possibly make for a bodily (hence personal) union of the parents . . ." Girgis et al., *supra* note 86, at 102. But many marine invertebrates, such as sponges, reproduce sexually through "broadcast spawning" in which they release gametes into the ocean, where they fertilize externally. In those cases, are not the male and female coordinating together toward a bodily good?

couple is united with one another in the same way in which the parts of a broken gun are united with one another.¹²⁶

But this move still leaves a puzzle about why the infertile heterosexual couple has achieved a *good* that the same-sex couple cannot achieve. They argue that the infertile couple's union is "a valuable part of a valuable whole."¹²⁷ But what value would there be in deliberately assembling an irreparably broken gun? The product would have a kind of unity, but the goodness of that unity, as a reason for action, is mysterious. Similarly with the asserted intrinsic goodness of the procreative-type acts of infertile heterosexuals.

B. Geach's New Strategy

Geach does not rely on the claim that the married heterosexual couple unites biologically.¹²⁸ She does, however, think that their coupling matters because of its relation to procreation.¹²⁹ Her central claims are that there is a distinctive sexual virtue for human beings,¹³⁰ that this virtue marks the boundaries of permissible sexual conduct in the ways earlier enumerated, and that this is so

for two related reasons: firstly, because the sense of marriage as an integral whole is part of the psychic makeup of the virtuous man, a part which is damaged when we use our bodies in a way which treats this whole as a collection of separable parts, and secondly, because it belongs to the good order of human society that marriage should be presumable as the sexual relation.¹³¹

She agrees with NNL that heterosexual marriage, defined as NNL defines it, is an ultimate, noninstrumental good.¹³² Her claims about sexual virtue are parasitic on this ultimate value claim. Her task, then, is to persuade the reader to see the distinctive human end that she sees.

This presents a rhetorical challenge, for her as much as for NNL. The basic problem, George observes, is that "intrinsic values, as *ultimate* reasons for action, cannot be deduced or inferred. We do not, for example, infer the intrinsic goodness of health from the fact, if it is a fact, that people everywhere seem to desire it . . . We see the point of acting for the sake of health, in ourselves or in others, just for its own sake, without

126. This argument was suggested in conversation by Jonah Wacholder. The NNL theorists may have shifted to this strategy in Girgis et al., *supra* note 86. See Andrew Koppelman, *More Intuition than Argument*, 140 *Commonweal* (May 3, 2013). This strategy also avoids the difficulties associated with the possible covert Aristotelian hylomorphism of earlier formulations. See *Is Marriage Inherently Heterosexual?*, *supra* note 82, at 75–77.

127. Girgis et al., *supra* note 86, at 75.

128. She offers formulations that approach this claim in *Lying*, but the claim is peripheral to her argument. Geach, *supra* note 79, at 524, 548–49. Unlike the NNL theorists, her argument would not be weakened if it were rejected.

129. *Id.* at 549.

130. *Id.* at 527.

131. *Id.* at 528.

132. *Id.* at 527.

the benefit of any such inference.”¹³³ If the value of health is defended as a means to some other end, then the question will arise why *that* is a good thing; the chain of reasoning has to conclude somewhere, with some good that is deemed good in itself and not as a means to something else. The intrinsic nature of intrinsic goods can only be defended dialectically:

While they may be defended by dialectical arguments designed either to rebut arguments against them, or to show up the defects or inadequacies of ethical theories that attempt to do without them, they cannot themselves be deduced or inferred or otherwise derived from more fundamental premises. One cannot argue one’s way to them (the way one can, on the basis of more fundamental premises, argue one’s way to a conclusion). The claim that they are self-evident does not imply that they are undeniable or, still less, that no one denies them. What it does imply is that the practical intellect may grasp them, and practical judgment can affirm them without the need for a derivation (which is not to say that they can be grasped without an understanding of the realities to which they refer).¹³⁴

Geach acknowledges the difficulty of demonstrating her core account of the virtue concerned with sex, a virtue that takes its character from both human nature and from the good that sexuality is directed toward. “One can’t *prove* the first principle, in the sense of demonstrating it as the logical consequence of some other principle.”¹³⁵ Instead, she proposes to follow a procedure she thinks is common in natural science: to “form an hypothesis which covers the facts, and then see whether things do happen in accordance with this hypothesis.”¹³⁶ The evidence that supports her hypothesis is “[t]he benefits of marriage” and, more importantly (since most supporters of gay rights do not deny that heterosexual marriage has benefits), “the ills resulting from disordered sexuality.”¹³⁷

To begin with, there is the importance, for any human civilization, of an ethic of chastity, especially among women. In all of the world’s great civilizations, “the chastity of women is highly valued, and . . . there is also some idea of a corresponding virtue of men.”¹³⁸ Female chastity is important so that men can know who their children are, and only men who know that will do the hard work of supporting women and children. Fathers also have “the strength and will to control [children] and teach them respect for authority and for law. . . . If the men laze around leaving

133. ROBERT P. GEORGE, *Recent Criticism of Natural Law Theory*, in *IN DEFENSE OF NATURAL LAW* 48 (1999) (emphasis added).

134. *Id.* at 45.

135. Geach, *supra* note 79, at 529. As she puts it elsewhere: “I don’t think we can deduce the need for marriage from first principles about life and friendship: we have to include among the first principles of morality not just the need to pursue these basic goods, but also the existence of marriage, the capacity for which is in itself a part of the fabric and constitution of our nature.” Geach, *supra* note 77, at 177, 181.

136. Geach, *supra* note 79, at 540.

137. *Id.*

138. *Id.* at 534.

everything to the women, and if the women were around so that no one knows who his father is, then everything will decay, and the people will no longer respect duly constituted authority and laws but will rather be ruled by servile fear or inarticulate adherence to custom.”¹³⁹ Civilization requires, then, that “the virtuous of both sexes have a profound state of mind inclining them to faithfulness in marriage.”¹⁴⁰ All of these facts point to the truth of the good of marriage as Geach conceives it. That good “stands to our sexual actions in a relation similar to that in which the truth conditions of a proposition stand to the assertion of it.”¹⁴¹ Orientation toward marriage as she understands it explains the state of mind necessary for marital chastity. It also explains and provides a justification for sexual jealousy,¹⁴² importance of consent to sex,¹⁴³ and why lovers yearn for a permanent union.¹⁴⁴

Pleasure, on the other hand, is “an aspect, but not an end”¹⁴⁵ of the marriage act. When it is disconnected from any good of which it could be a part, pleasure is not in itself good. “If someone has such sensations in connection with the pain suffered by others, should we say that, though the pain was bad, his erotic sensations were good? Or that his delight in these sensations was good? Surely not.”¹⁴⁶ Rather, these sensations are “about something, and what they are about should be appropriate, which we realize when we consider how stupid and mad our sexuality can make us . . .”¹⁴⁷

C. To Hell in a Handbasket, and Back

Geach, unlike Wax, thinks that homosexuality is immoral regardless of its social effects.¹⁴⁸ Even private homosexual conduct that no one else ever knows about is immoral.

Geach’s claim would be stronger if it could be shown, not merely that the ethic she describes is useful for some societies, but that human society cannot flourish without it. If a sexual ethic is merely a noble lie, then people can dispense with it if they are able to consciously and directly pursue the purpose that the noble lie serves. Hayek thought that religion inadvertently served the cause of economic growth, but his own philosophy aimed at growth without relying on what he regarded as

139. *Id.* at 535. I note in passing the strangeness of the implication that mothers cannot teach children respect for authority.

140. *Id.* at 536.

141. *Id.* at 544.

142. *Id.* at 537.

143. *Id.* at 537–38.

144. *Id.* at 539.

145. *Id.* at 546.

146. *Id.* at 547. The example does not prove that pleasure is not in itself good, but only that it is sometimes inextricably joined with something that is very bad. Any good thing that is abused by its possessor is a fit occasion for ambivalence. It would have been better if Hitler had been less clever and resourceful than he was, but intelligence is nonetheless in itself good.

147. *Id.*

148. *Id.* at 549.

childish mystifications, and he has many followers. If, on the other hand, it turns out that those who turn away from the ancient ways inevitably come to wreck, this would be evidence that those ways are, indeed, part of the fabric of human nature.

So Geach moves on, to enumerate the pathologies produced by our present civilization's relaxed sexual mores.¹⁴⁹ The relaxed attitude toward masturbation and sexual fantasy is destructive, because orgasmic fantasy "seriously undermines one's sense of reality, and damages one's ability to empathise [sic] with other people, because the use of one's sexuality signifies another party, and one has been using it when no other party was present."¹⁵⁰ This "explains the nastiness of some adolescents, and of some single people."¹⁵¹ The absence of clear conventions about the limits of what unmarried men may do generates the problem of date rape.¹⁵² The acceptance of homosexuality damages all relations between persons of the same sex, by making non-sexual friendship harder than it once was because it is now tainted by sexual fear and avoidance.¹⁵³ The acceptance of homosexuality tends to place society on a path of "decay to the point where there is no separate class of homosexuals, but one undifferentiated lustful multitude."¹⁵⁴ Most alarmingly, "where there is widespread abuse of human sexuality, life will come to seem meaningless and many will commit suicide."¹⁵⁵ And, in fact, "in our comfortable and apparently happy society . . . suicide happens a great deal."¹⁵⁶ Our society "is in a state of decadence, and with its aging population and weapons of mass destruction seems to be heading towards its end."¹⁵⁷ These are categorical claims about the destructive effects of sexual vice on human nature. No Hayekian elite could evade its malign power.

Geach despises cruelty and self-deception, and cares urgently about the future of civilization. Her humane impulses are admirable. But one must have a heart of stone to read her catalogue of horrors without laughing. Her theories about the catastrophic effects of masturbation are only the latest of a long series of delusions about the practice, all focusing (as she does) on the fear that young people would withdraw entirely

149. The NNL theorists often help themselves to this kind of claim, but it is peripheral to their argument, which does not depend on the existence of any such pathologies. See, e.g., GIRGIS ET AL., *supra* note 91, at 3, 38–46; *A Basic and Exigent Good*, *supra* note 110, at 402; George, *supra* note 81, at 147–49; Girgis et al., *supra* note 86, at 257–58, 262; Lee, *supra* note 110, at 432.

150. Geach, *supra* note 79, at 539.

151. *Id.* at 540.

152. *Id.* at 537–38.

153. *Id.* at 532. Her points about homosexuality are not, strictly speaking, part of her argument, as she states them before making the case for her first principle, and writes that in making that case she will "leave sodomy to one side." *Id.* at 531. Nonetheless, her allegations about homosexuality, if accepted, do strengthen her case that modern sexual mores are pathological, so they must be rebutted if her claims are to be answered.

154. *Id.* at 533.

155. *Id.* at 544.

156. *Id.*

157. *Id.* at 556 n.17.

from society, pursuing pleasures that were asocial and autarkic.¹⁵⁸ The causes of date rape are considerably more complex than the simple story she tells; well-understood conventions about sexual ethics would not prevent such rapes from occurring.¹⁵⁹ I cannot think of a single instance in which I have experienced the hesitation with my friends (including my gay friends) that Geach frets about. As the sexual revolution has unfolded in the United States and England, the suicide rate has been steadily *declining*.¹⁶⁰

If Geach's ethic is to be defended on the basis of its purported contribution to human flourishing, then we should pay some attention to the ways in which it crushes the human spirit. There is a very large population of people who are primarily sexually attracted to people of the same sex. They comprise between two and ten percent of the population.¹⁶¹ What are they supposed to do?¹⁶²

Of course, it's possible to say that, even though Geach's sexual ethic will not make people happy, even though it will doom them to a life of struggle and frustration, they should accept this, because that is the right thing to do.

But this sits uneasily beside her invocation of the happy lives of those who follow the path she prescribes. Both "This is the Path to Happiness" and "Tough Luck, Happiness Isn't for You" are coherent positions.¹⁶³ But they do not cohere with each other.

158. See, e.g., HELEN LEFKOWITZ HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH CENTURY AMERICA* 92–93, 97–107, 394–403 (2003); WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 138–43 (1988); THOMAS W. LAQUEUR, *SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION* (2003).

159. For a review of the literature, see Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in "Acquaintance Rape" Cases, 158 U. PA. L. REV. 729 (2010).

160. NATIONAL MENTAL HEALTH DEVELOPMENT UNIT, NATIONAL SUICIDE PREVENTION STRATEGY FOR ENGLAND, ANNUAL REPORT ON PROGRESS 3–14 (2008), available at <http://www.nmhd.org.uk/silo/files/national-suicide-prevention-strategy-for-england--annual-report-on-progress-2008.pdf> ("The suicide rate for the year 2007, the most recent available, was the lowest recorded."); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, HEALTH, UNITED STATES, 2008, 258–60, tbl.45 (2008), available at [http://www.cdc.gov/nchs/data/08.pdf](http://www.cdc.gov/nchs/data/hus/08.pdf).

161. The number varies depending on whether measurement focuses on self-identification (in which case the percentage is low) or on behavior (in which case it is higher). EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 292–301 (1994); RICHARD POSNER, *SEX AND REASON* 294–95 (1992).

162. This has been a problem for the American religious right, which faces growing tensions as its own "ex-gay" members bring them the unwelcome news that homosexual inclinations cannot simply be wished away. See Andrew Koppelman, *The Nonproblem of Fundamentalism*, 18 WM. & MARY BILL RTS. J. 915, 919–23 (2010).

163. Lee & George, who occupy the second position, have no trouble dismissing a priori the testimony of gay people about the value of their sexual acts. Since their philosophical position claims that such acts are worthless and harmful, any experience to the contrary, even voluminous experience, can be dismissed as illusory. *What Male-Female Complementarity Makes Possible*, *supra* note 111, at 653–55.

Happy gay people are more of a problem for Geach, who writes that "by sins against chastity and the marriage good we damage ourselves inside," and notes that the art of gay artist Francis Bacon "suggests that he at least had a vision of this damage." Geach, *supra* note 79, at 533. Bacon specialized in nightmarishly twisted portraits. "A man who knows that he is denying the value of humanity by what he does will be distorted like a Francis Bacon picture, which illustrates the effects of sodomy on the soul." *Id.* at 554.

D. Careful with that Gun

There remains a difficulty about the line that Geach draws to separate licit from illicit sex. The insistence on a link between sex and reproduction raises a by now familiar objection: why is it morally permissible for infertile heterosexual couples to copulate?¹⁶⁴

Like the>NNL theorists, Geach focuses on the capacity of the heterosexual couple to engage in acts of the reproductive *kind*. I have already reviewed the objections to this claim. Geach, unlike the new natural lawyers, does not claim that a copulating married couple becomes a single organism. Rather she responds to these difficulties in an original way. She is especially provoked by the following passage from my work, in which I elaborated on the gun example, discussed earlier.

Contingencies of deception and fright aside, all objects that are *not* loaded guns are morally equivalent in this context: it is not more wrong, and certainly not closer to homicide, to point a gun known to be unloaded at someone and pull the trigger than it is to point one's finger and say, "bang!" And if the two acts have the same moral character in this context, why is the same not equally true of, on the one hand, vaginal intercourse between a heterosexual couple who know they cannot reproduce, and on the other, anal or oral sex between any couple? Just as, in the case of the gun, neither act is more homicidal than the other, so in the sexual cases, neither act is more reproductive than the other.¹⁶⁵

Geach responds:

If gun-users in America make no such distinction, this must cause a lot of nasty accidents. Good gun practice treats the actions as utterly different: one has to make a strict rule against ever pointing guns at people unless one seriously means to shoot someone, and if one killed someone by shooting him accidentally in this way one would be to blame for his death.¹⁶⁶

If one does not make good gun practice a habit, one damages oneself by making oneself into the kind of gun-user who might kill someone. This, Geach concedes, is not an absolute moral rule; in narrowly defined circumstances, a departure from good gun practice might be warranted, because it would not necessarily damage the self in this way. "By contrast, a sexual act which fails to be of generative kind directly attacks the fabric and constitution of our nature, since our sexu-

164. The infertile couple is also a problem for Gallagher, who writes that elderly infertile couples "do not contradict in any intelligible, visible way, the basic purposes of marriage as a childrearing institution." Gallagher, *supra* note 68, at 45 n.34. When the 70 year old couple marries, does anyone think that they might have children? She explains that "we know for a fact that including these kinds of opposite-sex couples doesn't damage the meaning of marriage as a childrearing institution," because they have always been included in it. *Id.* But for reasons we have already considered, same-sex marriage—which, after all, merely produces another variety of infertile couple—does not damage the meaning of marriage as a childrearing institution for the new sexual ethic.

165. GAY RIGHTS QUESTION, *supra* note 82, at 88.

166. Geach, *supra* note 79, at 551.

ality and the significance of the marriage act are part of that fabric and constitution."¹⁶⁷

The point about good gun practice does not add much to the argument, since it rests on the contingency of human limitations. If we had X-ray vision and could see instantly whether a gun was loaded, good gun practice would be different than it is. If the point is that we need to habitually follow traditional sexual ethics because such rules provide a socially useful framework, even if there is no distinctive reason in any particular case to follow them, this comes dangerously close to Wax's position.

The deeper question is one of coherence: does it make sense to say that the significance of reproduction adheres to an act that is known to be incapable of reproduction? Geach's answer is the same as the NNL theorists: "Generation, when it takes place normally, involves a joint human act, which as a kind of human act is not defined as involving, for instance, the expedition of viable sperm, since the viability of sperm is a piece of recondite information."¹⁶⁸ But in given circumstances, that information may not be recondite at all. Sometimes we all have the functional equivalent of X-ray vision. A man may know perfectly well that he is infertile, or more commonly (in a case such as post-menopausal sex) that his wife is. Why is their coitus an act of the reproductive type, when they know for certain that it cannot possibly produce a pregnancy?

Geach observes that my objection presupposes that a given moral character "cannot belong to an act as being of a kind to produce a certain effect, unless it is in the circumstances liable to produce that effect."¹⁶⁹ But Geach denies this:

Thus, I suppose, [Koppelman] would say that it could make no difference to the moral character of one's action whether one had or had not provided information, if, as it happened, there was no way that one would be believed when one made some assertion of informative kind. But it could make a great difference to whether one had done one's job, or made one's protest, or warned one's enemies of the disaster about to overtake them. To provide information is to make an assertion of the kind called 'telling', which is distinguished from other kinds of assertion by its being an act of a kind to produce in the hearer belief of the one making the assertion. The fact that one will not be believed, however, does not mean that one is not performing the act of telling, and whether or not one has actually told someone something can make a great difference to the char-

167. *Id.*

168. *Id.* at 550.

169. *Id.* at 552. Similarly, Lee and George observe that "the key assumption in Koppelman's argument" is that "[n]o act in which the agents (or parts of the agents) lack the full internal resources (in a suitable environment, under certain circumstances) to produce X, can be internally oriented toward X." LEE & GEORGE, *supra* note 84, at 202. I am indeed making this assumption, which I defend *supra* text accompanying notes 124–25.

acter of one's action, even if one is not trying to make him believe one.¹⁷⁰

Much depends on what is meant by "the fact that one will not be believed." Suppose that I am trying to warn my enemy that the bridge he is determined to cross will collapse and plunge him to his death. I can be fairly sure, given his characteristic stubbornness and stupidity, that he is going to disregard my warning. I am obligated to warn him nonetheless.

But when I do that, I have to use means that I think have some chance of getting through to him, and I have to reasonably hope that this time I will get through to him. Stubborn, stupid people sometimes unexpectedly reform. (We are born stubborn and stupid.) If it is absolutely impossible for him to be informed, then my telling him is as pointless as if I told him the truth in a foreign language which he does not understand. One is not "performing an act of informative kind" if "one makes one's statement out of earshot."¹⁷¹

Geach thinks that the analogous case is that "one is not performing an act of reproductive kind unless there is reproductive complementarity."¹⁷² But why is my act of the reproductive kind if I am ejaculating into an infertile vagina (but not of the reproductive kind if I ejaculate anywhere else)? Why is this not just like a truthful statement made out of earshot? As our discussion of Lee and George, above, showed, a hopeless struggle is admirable only if there is some rational vestige of hope present. Otherwise it is just silly. The surgeon cannot perform a healing-type act upon a corpse. It does not make much sense to make a truthful statement to a corpse, either.

E. Sexual Ethics, Old and New

Geach observes that I have not attempted to offer "an account of sexual virtue in general."¹⁷³ The emergence of the new middle class ethic suggests that there is no such thing as a single sexual virtue for all human beings.¹⁷⁴ The ethic that demands premarital chastity, above all of women, evidently is not indispensable in all societies.

170. Geach, *supra* note 79, at 552.

171. *Id.*

172. *Id.*

173. *Id.*

174. Geach, of course, cannot seriously consider the new model as a solution, since she thinks that premarital sex, contraception, and abortion are categorically immoral. Many Americans agree with her about sex and abortion, but not about contraception. About 38 percent think that sex outside of marriage is morally wrong. See *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/Marriage.aspx> (last visited Oct. 8, 2013). Almost all of them, however, actually engage in premarital sex. See CAHN & CARBONE, *supra* note 29, at 38, 41–42, 80–81. Forty-seven percent of Americans describe themselves as "pro-life," though only twenty percent think that abortion should be illegal in all circumstances. Lydia Saad, *Plenty of Common Ground Found in Abortion Debate*, GALLUP (Aug. 8, 2011), <http://www.gallup.com/poll/148880/Plenty-Common-Ground-Found-Abortion-Debate.aspx>. On the other hand, birth control is supported by ninety-three percent of American adults, including ninety percent of Catholics. Humphrey Taylor, *New Harris Poll Finds Different Religious Groups Have Very Different Attitudes To Some Health Policies and Programs*, THE HARRIS POLL #78 (October 20, 2005), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-New-Finds-Different->

This is not the place to answer Geach's challenge, but I can say a few things about sexual virtue as I understand it. Begin with the noncontroversial, though perhaps trivial, premise that virtue is a disposition to choose well. Sexual virtue is a disposition to make good choices about sex. This has negative and positive implications. Begin with the negative.

Sex is, in characteristic ways, a frequent occasion for mistreatment of human beings: physical and emotional abuse, manipulation and deception, the reckless spread of disease, and the irresponsible begetting of children. Since one should not mistreat people, a fortiori one should not mistreat them in this sphere. The old and new sexual ethics converge here, though they disagree about the best strategy for avoiding such mistreatment.

There is also the question of the positive goal toward which choice should aspire. The fundamental disagreement between the old and new sexual ethics is here. I have already stated why I am not persuaded by the account of that *telos* offered by NNL and Geach. Can I offer anything better?

The goodness of sex at its best has to do with its character as a certain kind of interpersonal communion. "Conversation," Geach observes, "is delightful because it is good to share thoughts in this way, and a part of friendship (not just a means to friendship but a part of what is constitutive of it) and we take pleasure, we delight in, what we find good."¹⁷⁵ Sex at its best is something like conversation. It is not something you can do by yourself. It is essentially interaction with another person, an interaction in which you love and value me in my wholeness, as body and mind and infantile neediness, and I love and value you in the same way. When I am the object of lust, this sometimes means that I am appreciated in the full embodied particularity of myself, as I am not if you only love me for my mind.¹⁷⁶ Sexual virtue is a disposition to pursue sex at its best.

It is only in this sense that Geach is correct that the sex act is, "like the act of telling, a kind of human act which is, as it were, there already for us to do, whose generic nature is not formed by the agent's thought."¹⁷⁷ But she misapprehends the character of the goodness of the act in question, which is not essentially related to its procreative character. These goods are good without reference to reproduction. It radical-

Religious-Groups-H-2005-10.pdf. Even American Catholic priests increasingly reject the sexual ethic that Geach propounds with respect to premarital sex, homosexual sex, and contraception. See ANDREW GREELEY, *THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL 124* (2004).

175. Geach, *supra* note 79, at 54.

176. See ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 68–83 (1986), is the best development of this idea that I know, though I share the reservations stated by Martha Nussbaum in her review, *Sex in the Head*, in *PHILOSOPHICAL INTERVENTIONS: REVIEWS* 1986–2011, at 27 (2012).

177. Geach, *supra* note 79, at 553.

ly misunderstands the point of nonreproductive sex to say that its purpose is always merely pleasure.

The *telos* of sex that I have described has implications for the moral status of sex acts that fall short of this interpersonal ideal. Many people are unable to achieve the full goodness associated with sex at its best, often because of the simple bad luck of never meeting a suitable partner. When a given sexual act, one that involves no mistreatment of another person, is the best that is available for this person at this time, it is uncharitable to condemn it. Sex at its best demands generosity toward human neediness and imperfection. There is, then, something paradoxical and unvirtuous about condemning sex for being imperfect.¹⁷⁸ The stigmatization of masturbation, for example, is senseless and destructive precisely because of its brutal attitude toward sexual neediness.

Finally, a word about pleasure. For the reasons just stated, many of the couplings that Geach condemns are aiming at something more than pleasurable sensations, fundamentally private and meaningless. But it would be strange if pleasure were never a legitimate reason for action. Would Geach deny that, in the intercourse of married heterosexual couples that she valorizes, one sometimes legitimately performs intentional actions for no reason other than these give one's partner physical pleasure?

IV. CONCLUSION

A common refrain among opponents of same-sex marriage—all the writers I have critiqued here partake of it—is the importance of defending “the family.” They feel that the institution of the family, as they conceive it, will be undermined if same-sex marriages are recognized. This is a peculiar kind of argument, and it traps them in a paradox that has a remarkable historical precedent.

In the Civil War, the Southerners frequently declared that they were fighting for liberty and self-government. The title of James McPherson's history of the Civil War, *Battle Cry of Freedom*, capitalizes on the fact that, as McPherson writes, “[b]oth sides . . . professed to be fighting for freedom.”¹⁷⁹ Jefferson Davis declared in 1863 that the South was “forced to take up arms to vindicate the political rights, the freedom, equality, and State sovereignty which were the heritage purchased by the blood of our revolutionary sires.”¹⁸⁰ But the freedom that Davis was fighting for depended, of course, on the enslavement of others. The southern commissioners to Britain reported home that “the public mind here is entirely opposed to the Government of the Confederate States of America on the question of slavery. . . . The sincerity and universality of

178. See Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. REV. L. & SOC. CHANGE 855, 863 (2007).

179. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA*, at vii (1988).

180. *Id.*

this feeling embarrass the government in dealing with the question of our recognition.”¹⁸¹

Opponents of same-sex marriage today face a similar embarrassment. They are eager to protect their distinctive conception of family. But that conception depends on marginalizing the families of others and denying them legal recognition. In the long run, the invocation of “family” as a reason to beat up on gay people will seem as weird as the invocation of “freedom” did as a defense of the Confederacy.

These writers nonetheless have performed a public service. They advance our understanding of a perspective that many (though fewer and fewer) Americans share. Their work is a lucid window into a dying worldview.¹⁸² It is unlikely to persuade anyone who does not already agree with its claims, and will not have much impact on its intended, contemporary audience. It will, however, be of enormous value to historians.

181. *Id.* at 311.

182. They dispute that the worldview is dying, but that view is parasitic on the claim that their position concerning marriage must be durable because it is correct. Ryan T. Anderson & Andrew T. Walker, *Not Dead Yet*, NAT'L REV. ONLINE, (Dec. 11, 2012, 8:00 AM), <http://www.nationalreview.com/corner/335300/not-dead-yet-ryan-t-anderson>. If the position is not correct (and I have explained why I think it is not), then that source of durability is unavailable.

