

FAMILY LAW IN THE SECULAR STATE AND RESTRICTIONS ON SAME-SEX MARRIAGE: TWO ARE BETTER THAN ONE[†]

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For thousands of years, western society has defined marriage as the union of a man and a woman, and courts in the United States have relied on this definition in decisions denying same-sex couples the right to legally marry. In the following article, originally presented as part of the University of Illinois College of Law David C. Baum Memorial Lecture Series on Civil Liberties and Civil Rights, Professor Mary Becker questions the notion that marriage is necessarily limited to heterosexual relationships.

Professor Becker examines the origins of our marriage tradition, from the pre-Christian cultures of Israel, Greece, and Rome through the medieval Canon law of the Roman Catholic Church to the modern-day United States, in order to show that, despite some differences, marriage in western cultures has been a patriarchal institution centered around the needs or obsessions of men, with the underlying purpose of reproduction. Using empirical data, she then explores the real good in marriage — what we now know about the connection between marriage and human well-being — to assert that the primary good of marriage is the “pair-bond,” an intimate human connection that transcends gender and procreation. Professor Becker details how, for many individuals, their best chance of a successful pair-bond is with a same-sex partner. She recommends that government, in its regulation of marriage, should promote a model that has as its ultimate purpose the furthering of human happiness and well-being, recognizing that two are better than one. Such a model, Professor

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Becker concludes, would provide for the legal recognition of same-sex marriage.

Two are better than one because they have a good return for their work: If one falls down, his friend can help him up. . . . Also, if two lie down together, they will keep warm. But how can one keep warm alone? Though one may be overpowered, two can defend themselves.

*1 Ecclesiastics 4: 9–12*¹

I. INTRODUCTION

For many people, marriage *is* the intimate union of a man and a woman. Only that combination can generate children genetically linked to both partners. In fact, for millennia Western societies have defined marriage as a particular relationship between a man and a woman.²

American courts have relied upon this understanding of marriage to hold that same-sex couples cannot marry. For example, in the earliest of these cases, *Baker v. Nelson*,³ decided in 1971, the Supreme Court of Minnesota explained that the Minnesota statute used “marriage” in its “common usage, meaning the state of union between persons of the opposite sex.”⁴ Although the statute did not expressly limit marriage licenses to heterosexual couples, it was, as the court noted, “replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom.’”⁵ Twenty-four years later in *Dean v. District of Columbia*,⁶ the District of Columbia Court of Appeals cited with approval the *Baker* court’s explanation and reached the same result.⁷

The second case upholding the refusal of a state official to issue a marriage license to a same-sex couple involved a Kentucky statute authorizing the grant of marriage licenses to (any two) competent unrelated adults; the statute did *not* contain words of “heterosexual import.” In *Jones v. Hallahan*,⁸ the Kentucky Court of Appeals nevertheless upheld the refusal to grant a marriage license to a lesbian couple because “marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.”⁹ The court

1. (New International Version).
2. See discussion *infra* Part II.
3. 191 N.W.2d 185 (Minn. 1971).
4. *Baker*, 191 N.W.2d at 185–86, *appeal dismissed*, 409 U.S. 810 (1972). There is one earlier case involving the marriage of two men, but at the time of the marriage ceremony, one man thought the other was a woman. See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (holding fraud irrelevant because marriage by definition is the union of a man and a woman).
5. *Baker*, 191 N.W.2d at 185–86.
6. 653 A.2d 307 (D.C. 1995).
7. See *Dean*, 653 A.2d at 315–16.
8. 501 S.W.2d 588 (Ky. 1973).
9. *Jones*, 501 S.W.2d at 589.

saw the meaning of marriage as the core difficulty: Marjorie Jones and her partner were “prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”¹⁰ A license would not make any difference, because “[a] license to enter into a status or a relationship which the parties are incapable of achieving is a nullity.”¹¹

In some of these cases, including *Baker v. Nelson*,¹² the challengers argued that the state’s refusal to grant them a marriage license unconstitutionally discriminated on the basis of sex in violation of state or federal constitutions, citing *Loving v. Virginia*.¹³ In 1967, the Supreme Court held that Virginia’s refusal to allow interracial couples to marry discriminated unconstitutionally on the basis of race.¹⁴ Gay and lesbian challengers argued that if race-based restrictions on who can marry whom discriminate on the basis of race, then sex-based restrictions on who can marry whom discriminate on the basis of sex.¹⁵ Most courts have, however, rejected this argument. In *Baker v. Nelson*, the Minnesota Supreme Court dismissed the argument in a single conclusory sentence: “But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”¹⁶

*Dean v. District of Columbia*¹⁷ involved a similar equal protection challenge.¹⁸ One of the two judges in the majority dismissed the equal protection claim because “the word ‘marriage,’ when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex ‘marriages’ are legally and factually — i.e., as a matter of definition — impossible.”¹⁹ The

10. *Id.*

11. *Id.*

12. 191 N.W.2d 185, 187 (Minn. 1971).

13. 388 U.S. 1 (1967).

14. *See id.* at 2.

15. *See infra* notes 16–37 and accompanying text. For articles making this constitutional argument see, for example, Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 212–16 (1998); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1998); Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 200–01 (1994).

16. *Baker*, 191 N.W.2d at 187.

17. 653 A.2d 307 (D.C. 1995).

18. *See id.* at 307.

19. *Id.* This explanation was also used in *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), where the plaintiffs made equal protection claims, citing *Loving*, as well as statutory arguments. *See id.* at 1191. The Court of Appeals of Washington identified the “operative distinction” between the same-sex marriage case before it and *Loving* as the meaning of marriage: “marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship.” *Id.*; *see also* Anonymous v. Anonymous, 325 N.Y.S.2d 499, 501 (Sup. Ct. 1971) (finding no need to reach the fraud issue where one man thought that the other man was a woman at the time of the ceremony; the “marriage ceremony itself was a nullity” because marriage is defined “as the status or relation of a man and a woman who have been legally united as husband and wife”); DeSanto v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (holding a common-law marriage impossible be-

other judge in the majority explained that even if homosexuals are a quasi-suspect class, there could be no constitutional violation because “at bottom the institution reflects considerations ‘fundamental to the very existence and survival of the [human] race,’ and bound up with sexual relations, procreation, childbirth, and childrearing.”²⁰

In only three states, Hawaii, Alaska, and most recently, Vermont, have judges been able to imagine same-sex marriage. In Alaska, a lower court held that the denial of a marriage license to a gay couple was the denial of the fundamental right to marry under the Alaskan Constitution and therefore constitutional only if the state could show a “compelling interest” supporting the denial.²¹ In *Baehr v. Lewin*,²² the Supreme Court of Hawaii held that the denial of a marriage license to lesbian and gay couples violated the Equal Rights Amendment to the Hawaiian Constitution.²³ The court reasoned that if a statute banning interracial marriage discriminated on the basis of race, as the United States Supreme Court had held in *Loving v. Virginia*, then a statute banning same-sex marriage discriminated on the basis of sex in violation of the provision against sex discrimination in the Hawaiian Constitution.²⁴

The dissenting justice in the Hawaiian case made the same argument earlier decisions marshaled to deny marriage licenses to same-sex couples in the face of equal protection challenges. According to Justice Heen, the *Loving* analogy was inapt: “The operative distinction lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.”²⁵ The difficulty for same-sex marriage-license applicants was not the state’s discrimination on the basis of sex, but the meaning of marriage:

[A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.²⁶

Heen then linked marriage and procreation:

[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossi-

tween two men because, although “Pennsylvania’s Marriage Law does not define marriage,” common law marriage, like statutory marriage, requires the “relationship of husband and wife”).

20. *Dean*, 653 A.2d at 363 (citation omitted).

21. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

22. 852 P.2d 44 (Haw. 1993).

23. *See id.* at 59–60.

24. *See id.* at 61–63.

25. *Id.* at 71.

26. *Id.*

bility of reproduction, rather than from an invidious discrimination “on account of sex.”²⁷

As of the date of this writing, no state in the United States allows same-sex marriage.²⁸ A constitutional referendum mooted the Alaska Superior Court’s decision before the hearing on Alaska’s compelling governmental interest.²⁹ The Hawaiian Supreme Court remanded to give the state an opportunity to justify the sex-based classification as serving compelling governmental purposes.³⁰ At trial, Hawaii failed to bear this burden, and the ban on same-sex marriage in Hawaii was held unconstitutional.³¹ But while this decision was on appeal, a constitutional referendum made the issue moot.³²

In December of 1999, just months after the Hawaii and Alaska decisions had been overruled by constitutional referenda, the Supreme Court of Vermont decided *Baker v. Vermont*³³ in favor of same-sex couples who made statutory and constitutional arguments for their right to marry. The plaintiffs argued that under the Vermont marriage statutes they were entitled to marriage licenses because the statutes contained no provision limiting marriage to unions between a man and a woman. The court rejected this argument for the reasons it has been rejected by the other decisions described earlier. The court referred to the ordinary meaning of “marriage,” dictionary definitions, and various statutory provisions suggesting that the Vermont legislature intended to refer to heterosexual unions in using the word “marriage.”³⁴ For example, the stat-

27. *Id.* at 594.

28. In September 2000, the Netherlands became the first country in the world to allow gay and lesbian couples to marry. See PlanetOut News Staff, *Dutch OK Full Marriage Rights*, PLANETOUT.COM, Sept. 12, 2000, at <http://www.planetout.com/news/article.html?2000/09/12/1>. A number of other countries recognize domestic partnerships, which give marriage-like rights and obligations in areas other than adoption of children and artificial insemination. See Leslie Goransson, *International Trends in Same-Sex Marriage*, in ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL, AND LEGAL ISSUES 165, 165–78 (Robert J. Cabaj & David W. Purcell eds., 1998) (noting for example, that Denmark, Greenland, Norway, Sweden, and Iceland, have such laws and that Hungary recognizes “common-law” gay marriage). In 1999, the Canadian Supreme Court held unconstitutional a provision of family law allowing only married (heterosexual) partners to receive spousal support at dissolution. See D’Arcy Jenish, *The Family Redefined*, MACLEAN’S, May 31, 1999, at 26. In 1999, the French Parliament passed a law giving legal status to any two adults sharing a household. This status carries all the benefits of marriage in “such areas of income tax, inheritance, housing, and social welfare.” Suzanne Daley, *Unmarried Couples Gain Legal Status Under French Law: Homosexual Unions Included in ‘Pacts’*, NEW ORLEANS TIMES-PICAYUNE, Oct. 14, 1999, at A21.

29. *Voters Ratify Traditional Marriage*, OMAHA WORLD-HERALD, Nov. 7, 1998, at 10 (noting that voters in Alaska and Hawaii had amended their constitutions, Alaska by defining marriage as the union between one man and one woman and Hawaii by authorizing the legislature to limit marriage to heterosexuals).

30. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

31. See *Baehr v. Miike*, 910 P.2d 112, 116 (Haw. 1996).

32. See Elaine Herscher, *Same-Sex Marriage Suffer Setback: Alaska, Hawaii Voters Say ‘No’*, S.F. CHRON., Nov. 5, 1998, at A2.

33. 744 A.2d 864 (Vt. 1999).

34. *Id.* at 868–69.

ute provides that “the license shall be issued by the clerk of the town where either the bride or groom resides.”³⁵

Plaintiffs’ constitutional argument was based on the Common Benefits Clause of the Vermont Constitution. All five Justices on the Vermont Supreme Court agreed that the state could not constitutionally limit the benefits of marriage to heterosexual couples.³⁶ The court did not, however, extend marriage to same-sex couples. Rather, it held that because the plaintiffs’ arguments had been focused on the benefits that accompany marriage, the legislature could respond *either* by extending marriage to same-sex couples *or* by creating domestic partnerships or some other “parallel licensing or registration scheme, [which would] extend all or most of the same rights and obligations provided by the law to married partners” to registered same-sex partners.³⁷

In April of 2000, the Vermont Legislature responded by enacting “An Act Relating to Civil Unions.”³⁸ Under this statute, same-sex couples (and only same-sex couples) can enter into a “civil union”³⁹ with requirements, rights, and obligations that precisely parallel those of married couples.⁴⁰ Like a marriage, a civil union begins with a license and a ceremony presided over by a judge, justice of the peace, or member of the clergy.⁴¹ Partners to a civil union have all the “benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil

35. *Id.* (quoting 18 VT. STAT. ANN. tit. 18, § 5131(a) (2000)).

36. *Id.* at 886 of majority decision, at 893 of Justice Dooley’s concurring opinion, at 898 of Justice Johnson’s concurring and dissenting opinion. The justices disagreed vehemently with each other on the appropriate form of constitutional analysis. The majority used a balancing test to determine constitutionality of the challenged governmental action under the common benefits clause. Concurring Justice Dooley and concurring and dissenting Justice Johnson preferred tiered scrutiny, arguing that a balance standard gave judges too much discretion and created too much uncertainty about the constitutionality of economic regulation and too little protection for members of vulnerable groups. *Id.* at 892–97 of Justice Dooley’s opinion; *id.* at 907–08 n.13 of Justice Johnson’s opinion. Justices Dooley and Johnson disagreed, however, on the application of tiered scrutiny analysis. Justice Dooley would have found sexual orientation a suspect classification, *see id.* at 893–97, though he conceded that “[t]he marriage statutes do not facially discriminate on the basis of sexual orientation.” *Id.* at 890. But he viewed the denial of marriage licenses to same-sex couples as having “the effect of discriminating against lesbian and gay couples.” *Id.* Justice Johnson rejected analysis in terms of a classification based on sexual orientation, because, as she pointed out, gay men and lesbians were free to marry persons of the opposite sex. *Id.* at 909–12. She characterized the challenged laws as facial sex discrimination, because a man, but not a woman, could marry a woman. *Id.* The majority regarded this approach as inappropriate because “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex.” *Id.* at 880 n.13.

37. *Id.* at 886. Justice Johnson, in her concurring and dissenting opinion, characterized this remedy as “novel and truncated” and an “abdication” of the Court’s duty to redress violations of constitutional rights. *Id.* at 888, 898. Justice Johnson would have granted “the requested relief and enjoined] defendants from denying plaintiffs a marriage license based solely on the sex of the applicants.” *Id.*

38. Act of Apr. 26, 2000, Pub. Act 91, H. 847, 2000 Vt. Acts & Resolves, at 68–91 (LEXIS).

39. VT. STAT. ANN. tit. 14, § 1202(2)–(3) (2000).

40. *Id.* tit. 15, § 1204(a).

41. *See id.* tit. 18, §§ 5160(a) (civil union license), 5161(a) (those authorized to certify civil unions), 5131(a) (civil marriage license), 5137 (same), 5144 (those authorized to solemnize civil marriages).

law, as granted to spouses in a marriage.”⁴² For example, partners to a civil union enjoy rights to children⁴³ and to employment-related insurance benefits⁴⁴ which parallel those of married couples. Like a marriage, a civil union terminates only on death or divorce, and all the laws of divorce apply to the dissolution of civil unions.⁴⁵ A married person cannot enter into a civil union and a person in a civil union cannot marry.⁴⁶

The Act does not, however, entitle those united in a civil union to federal benefits. Under the Defense of Marriage Act (DOMA) enacted by Congress in 1996, “marriage” for purposes of federal law “means only a legal union between one man and one woman as husband and wife and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.”⁴⁷ Because of this provision, Vermont couples united in a civil union are nevertheless excluded from Social Security coverage, marital status for federal tax purposes, and a host of other federal benefits that DOMA limits explicitly to heterosexual marriage.⁴⁸

As of today, Vermont has gone far farther than any other state in extending marriage-like rights to same-sex couples, though ironically the Vermont Civil Union Act also amends the Vermont marriage statute so that “civil marriage” is now explicitly defined as “a union between a man and a woman.”⁴⁹ And the Act explicitly denies the status of marriage to same-sex couples: the legislative findings include that a civil union “does not bestow the status of civil marriage.”⁵⁰ Thus, even in Vermont, marriage continues to be limited to the intimate union of a man and a woman.

In an odd twist, the notion that heterosexual intercourse is the fundamental basis of marriage was used by a New Jersey appellate court in 1976 in *M.T. v. J.T.*⁵¹ to uphold the validity of a marriage between two people who were both men at birth.⁵² One had undergone successful sex reassignment surgery *prior* to the marriage ceremony.⁵³ The court held that the transsexual individual was now a woman because “for purposes

42. *Id.* tit. 15, § 1204(a).

43. *See id.* tit. 15, §§ 1204(d) (custody at divorce), 1204(e)(4) (adoption), 1204(f) (“The rights for parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple.”).

44. *See id.* tit. 8, §§ 4063(a), 4724(e).

45. *See id.* tit. 15, § 1204(d) (“The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.”).

46. *See id.* tit. 15, §§ 4, 1202(1).

47. 1 U.S.C. § 7 (Supp. II 1996).

48. *See* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 3–4 (1997).

49. VT. STAT. ANN. tit. 18, § 5131; *see also id.* tit. 15, § 1201(4) (“‘marriage’ means the legally recognized union of one man and one woman”).

50. Pub. Act 91, H. 847, 2000 Vt. Acts & Resolves § 1(10), at 68 (LEXIS)).

51. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

52. *See id.* at 210–11. Had the ceremony taken place prior to the sex reassignment surgery, it would presumably have been invalid.

53. *See id.*

of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized.”⁵⁴ The key factor was her “[s]exual capacity or sexuality”—marriage was possible because one partner had the “physical ability and the psychological and emotional orientation to engage in sexual intercourse” as a female while the other was a man.⁵⁵

In this essay, I argue that in regulating marriage, the secular state should facilitate the ability of couples to enter into committed pair-bonds likely to promote health, wealth, happiness, and longevity.⁵⁶ These benefits should be available to same-sex couples as well as to heterosexual couples. Part II begins with the past: non-Christian and medieval Christian traditions regulating sex and marriage. I consider the purpose of marriage in these societies, how marital relationships differed from other sexual relationships, and how the medieval law of the Church of Rome became the law of the United States of America. In part III, I consider what we know today about marriage and human well-being. How and why is marriage good for human beings? In part IV, I suggest that we use a model of marriage focused on human needs and well-being, rather than the models of medieval Roman Catholic Canon law or of the non-Christian traditions that have most influenced Western notions of marriage. In part V, I apply a model based on human needs to same-sex relationships and conclude that couples should be permitted to marry regardless of sexual orientation. I do not make a constitutional argument, but an argument for sound policy in the regulation of sexuality and family by a secular state.

II. ANCIENT AND MEDIEVAL REGULATION OF FAMILIES AND SEX IN THE WEST

A. *Non-Christian Traditions: Greek, Roman, Jewish, and Germanic Peoples*

Although we inherited our law of sexuality and family from medieval Roman Catholic Canon law, neither marriage nor the regulation of marriage and sex began with Christianity. Ancient Israel, Greece, Rome, and the pre-Christian Germanic tribes all regulated marriage and sex and contribute to our notion that marriage is necessarily the union of a man and a woman.

54. *Id.* at 209.

55. *Id.*

56. This is not the only legitimate purpose of the secular state regulating marriage. It should also protect the vulnerable, particularly children and their caretakers.

1. *Ancient Israel*

The Hebrew Scriptures do not regard sex as evil, but they do see it as somewhat dangerous: “a milestone on the road to the worship of false gods.”⁵⁷ These authorities see “[m]arriage . . . not [as] a game played for pleasure, but an institution that served both the social purpose of continuing the family line and the religious destiny of perpetuating God’s chosen people.”⁵⁸ The rabbis “prescribed that men and women should remain separate from one another, both in public and private, in order to minimize opportunities for [dalliance] outside of marriage.”⁵⁹

Every man had a religious obligation to marry and beget children.⁶⁰ A man could marry more than one woman in ancient times, though a woman could only marry one man.⁶¹ A man was permitted concubines as well as wives,⁶² and most concubines were slaves or foreign women.⁶³ The main difference between a wife and a concubine was one of status; for many purposes, concubines were married women, though they did not enjoy the higher status of wives.⁶⁴ The essence of marriage was a man and woman living together with the intention of being married,⁶⁵ rather than any formal ceremony. Many marriages began, however, with a ceremony that served as “a public acknowledgement of the bargain that had been struck and the family alliance that the union sealed.”⁶⁶ A man could divorce his wife, although authorities differed on whether he needed a good reason to justify his action.⁶⁷ A woman had no corresponding right to divorce her husband, though the marriage contract sometimes afforded her property protections, such as the return of the dowry to her family, in the event of divorce.⁶⁸ Although concubinage

57. JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 51 (1987).

58. *Id.*

59. *Id.* at 51–52.

60. See LOUIS M. EPSTEIN, *SEX LAWS AND CUSTOMS IN JUDAISM* 144–45 (1948); MOSES MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES, AND ITS RELATION TO THE LAW OF THE STATE* 16 (1884).

61. See MIELZINER, *supra* note 60, at 28–31.

62. See LOUIS M. EPSTEIN, *MARRIAGE LAWS IN THE BIBLE AND THE TALMUD* 49–73 (1942).

63. See *id.* at 49–50.

64. See BRUNDAGE, *supra* note 57, at 54; EPSTEIN, *supra* note 62, at 51–54.

65. In biblical law, “no fixed form for concluding marriage” is known. MIELZINER, *supra* note 60, at 75. According to Professor John J. Collins, four steps formalized marriage in Second Temple Judaism (approximately 520 B.C.E. to 70 C.E.). First, the groom asked the person with authority over the woman if he could marry her. Second, the groom stated that the woman was his wife and that he was her husband. Third, the groom paid a bride-price to the person with authority over the woman. Fourth, the groom and witnesses signed a contract that included information about the dowry and provided for the economic consequences of divorce. See John J. Collins, *Marriage, Divorce, and Family in Second Temple Judaism*, in *FAMILIES IN ANCIENT ISRAEL* 108 (Leo G. Perdue et al. eds., 1977). According to Collins, there is a dispute over whether marriage contracts existed in pre-exilic Israel and Judah. See *id.* at 109.

66. BRUNDAGE, *supra* note 57, at 52.

67. See MIELZINER, *supra* note 60, at 116–18; BRUNDAGE, *supra* note 57, at 53.

68. See MIELZINER, *supra* note 60, at 116–18; BRUNDAGE, *supra* note 57, at 53.

usually began informally, some concubines, like the legitimate wives, might have brought dowries and had marriage contracts affording them property rights on dismissal.

There was no general ban on sex outside marriage in either the Scriptures or the rabbinical literature.⁶⁹ A man was expected to have sex with a woman other than his own wife or concubine only if she was a servant or a slave, because access to respectable women was severely limited.⁷⁰ Rape, which probably included seduction and abduction of virgins,⁷¹ was a civil wrong remedied by an action for monetary damages.⁷² Both seduction and abduction were serious offenses against the family of the woman.⁷³ Prostitution was legal, but Jewish women were forbidden to work as prostitutes, though, of course, some did.⁷⁴ In marriage, some authorities allowed intercourse only for procreation.⁷⁵ And all intercourse caused impurity, requiring ceremonial ablutions.⁷⁶

Both the concubine and the wife were forbidden to have sex with any man other than the man to whom she was linked in the relationship of marriage⁷⁷ or concubinage.⁷⁸ Both the woman and her lover could be put to death by stoning.⁷⁹ Children of an illicit union could not inherit and were denied most “civil and juridical privileges.”⁸⁰ The Scriptures and the rabbis also disapproved of homosexuality.⁸¹ The Scriptures make no mention of lesbianism, but it, too, was forbidden.⁸²

2. *Ancient Greece*

The Greeks varied greatly in their attitudes toward sex but tended to regard it somewhat more negatively than other ancient peoples. The Greeks regarded sex as causing impurity, requiring ritual purification.⁸³ And because sex was defiling, some “cultic observances” were performed “by virgins or by priests who were required to observe chastity” when ministering at the temples.⁸⁴ Many Greeks thought pleasure of any kind,

69. See BRUNDAGE, *supra* note 57, at 54.

70. See *id.* at 53.

71. See EPSTEIN, *supra* note 60, at 181–82.

72. See BRUNDAGE, *supra* note 57, at 55.

73. See *id.* at 56; EPSTEIN, *supra* note 60, at 180–82.

74. See BRUNDAGE, *supra* note 57, at 55–56; *Deuteronomy* 32:18 (Jerusalem).

75. See BRUNDAGE, *supra* note 57, at 52; EPSTEIN, *supra* note 60, at 145–46.

76. See BRUNDAGE, *supra* note 57, at 52.

77. See EPSTEIN, *supra* note 62, at 51–52.

78. See *id.* at 55; see also VERN L. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* 81 (1976); EPSTEIN, *supra* note 60, at 194–95.

79. See BRUNDAGE, *supra* note 57, at 55; EPSTEIN, *supra* note 60, at 195–96; *Leviticus* 20:10, 13 (Jerusalem); *Deuteronomy* 22:22 (Jerusalem).

80. BRUNDAGE, *supra* note 57, at 55.

81. See *id.* at 57; EPSTEIN, *supra* note 60, at 3, 134–38.

82. See BRUNDAGE, *supra* note 57, at 57; EPSTEIN, *supra* note 60, at 138.

83. See BRUNDAGE, *supra* note 57, at 15.

84. *Id.*

sexual or otherwise, was not “a worthy goal,”⁸⁵ and many “esteemed chastity as a virtue and linked it to the capacity for other kinds of praiseworthy self-denial, such as foreswearing excessive eating and drinking.”⁸⁶

Plato was at best ambivalent, sometimes seeing “sex as a positive element in human nature”⁸⁷ and other times as dangerous, “a snare that distracted men from the love of wisdom” with the power “to trap men in a bog of sensuality.”⁸⁸ Aristotle’s attitude was more uniformly negative: sex was “an especially corrupting pleasure” because it not only “produces exquisite gratification and hence seems particularly alluring, but also because it affects the entire body, not just parts of it.”⁸⁹ For Aristotle, sex was an irrational desire like other physical pleasures “precisely because reason played little or no part in” its pursuit or enjoyment.⁹⁰ The Pythagoreans “disapproved of sexual enjoyment even within marriage”⁹¹ and believed that all persons should refrain from having sex for pleasure; sex was only for reproduction within marriage.⁹² To ensure that sex was so limited, men were not to have sex until they were at least twenty years old.⁹³

Epicurus held a more positive attitude toward pleasure, though not toward sex. He judged the good in terms of pleasure and regarded pleasure as “basic to ethical judgments.”⁹⁴ By pleasure he meant not sensual enjoyment, but “ease of mind and freedom from bodily pain.”⁹⁵ Epicurus regarded “[t]ransient fleshly joys” as “treacherous.”⁹⁶ Such feelings could play “no significant role in the ordering of a contented life.”⁹⁷ Sex was particularly dangerous: “Sexual intercourse has never done a man good, and he is lucky if it has not harmed him.”⁹⁸

85. *Id.*

86. *Id.* Masturbation, however, “was regarded as a natural substitute for men lacking in opportunity for sexual intercourse,” and the Greeks made masturbatory aids for women. BULLOUGH, *supra* note 78, at 99.

87. BRUNDAGE, *supra* note 57, at 16.

88. *Id.* Plato believed that “copulation lowered a man to the frenzied passions characteristic of beasts, and he relegated sexual desire to the lowest element of the psyche.” BULLOUGH, *supra* note 78, at 165. Plato also stated that an Athenian man should not have sex with men or with any woman with whom he did not want to have children. See SUSAN TREGGIARI, *ROMAN MARRIAGE: IUSTI CONVIGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN* 200 (1991).

89. BRUNDAGE, *supra* note 57, at 17.

90. *Id.*

91. *Id.*

92. *See id.*

93. *See id.*; see also BULLOUGH, *supra* note 78, at 163 (“Sexual consummation was considered [by the Pythagoreans] to be the prime pandering to the indwelling Furies [evil passions], and every passion, every symbol relating to this had to be repudiated.”); see also TREGGIARI, *supra* note 88, at 106.

94. BRUNDAGE, *supra* note 57, at 17.

95. *Id.* at 18.

96. *Id.* Epicurus believed that “the pleasant life could not result from ‘sexual intercourse with women.’” An ancient Greek commentator on Epicurus believed that “sexual desire was a sickness and that neither homosexual nor heterosexual intercourse could cure it.” BULLOUGH, *supra* note 78, at 166.

97. BRUNDAGE, *supra* note 57, at 18.

98. *Id.* (quoting Epicurus, *Fragments*, in EPICURUS: THE EXTANT REMAINS 107, 123 (Cyrill Bailey ed., 1926)).

The Cynics seem to have been the only Greek group with a positive attitude toward sex and advocated what would be today termed “free love.”⁹⁹ They rejected conventional Greek norms and saw nothing wrong with sexual pleasure, believing that people should satisfy their sexual desires in the simplest way.¹⁰⁰ As long as two individuals consented to have sex together, moral questions did not arise.¹⁰¹ Marriage, as well as sexual relations in general, required consent, but marriage was not necessarily monogamous for either men or women.¹⁰² Each individual, even when married, was free to have consensual sex with people of either gender, because free choice of the parties was the basis of every relationship.¹⁰³ Diogenes believed that the only true marriage was created by mutual assent to sexual intercourse.¹⁰⁴ The Cynics regarded the “sole criteria of sexual morality” as whether sex was “simple, natural, voluntary and uncomplicated”¹⁰⁵ but were not a very large or powerful group.¹⁰⁶

Far more influential on subsequent Western attitudes toward sex were the Stoics, with their “stern and restrictive view of sexual pleasure, which they thought was of trifling value.”¹⁰⁷ In contrast, chastity was an important virtue.¹⁰⁸ Because any departure from chastity, even in marriage, was a departure from virtue, even married sex should be “minimal.”¹⁰⁹ The Stoics saw “sex as a potentially destructive temptation that virtuous persons should resist, save for procreative marital sex.”¹¹⁰ Sex was problematic because “human reason vanished during the sex act.”¹¹¹ But sexual immorality was no more serious than other immorality; the Stoics believed that all immoral acts were equal, as were all moral acts.¹¹² Stoic beliefs influenced attitudes of the intellectual elite in the Greek and Roman worlds and came to influence many who were not themselves Stoics, including Paul.¹¹³

Although Greek attitudes toward sex were more negative than those of other ancient civilizations that have strongly influenced the

99. See J.M. RIST, *STOIC PHILOSOPHY* 60 (1969).

100. See *id.* at 57–63.

101. See *id.* at 62.

102. See BRUNDAGE, *supra* note 57, at 18; see also RIST, *supra* note 99, at 60.

103. See BRUNDAGE, *supra* note 57, at 18.

104. See RIST, *supra* note 99, at 60.

105. BRUNDAGE, *supra* note 57, at 18.

106. See *id.*

107. *Id.*

108. See *id.*

109. *Id.* at 20. Some early Stoics advocated more positive sexual attitudes, including free love. See *id.* Later Stoics repudiated this approach, however. See E. VERNON ARNOLD, *ROMAN STOICISM* 348 (1958).

110. BRUNDAGE, *supra* note 57, at 21; see also BULLOUGH, *supra* note 78, at 167, 354.

111. BRUNDAGE, *supra* note 57, at 21. A Stoic teacher, Musonius Rufus, stated in one of his lectures that “only those sexual practices are justified which are consummated within marriage and for the creation of children.” CRAIG A. WILLIAMS, *ROMAN HOMOSEXUALITY: IDEOLOGIES OF MASCULINITY IN CLASSICAL ANTIQUITY* 54–55 (1999).

112. See BRUNDAGE, *supra* note 57, at 21; RIST, *supra* note 99, at 81–96.

113. See BRUNDAGE, *supra* note 57, at 21; see also *infra* Part II.B.1.

West, the Greek pattern of regulation was much like that in ancient Israel (and, as will be seen below, that in Rome and among the pre-Christian Germanic tribes). A double standard governed sex.¹¹⁴ A wife's adultery was a serious crime, while husbands were not expected to be faithful.¹¹⁵ Foucault notes that although a married man could not marry again,

no sexual relationship was forbidden him as a consequence of the marriage obligation he had entered into; he could have an intimate affair, he could frequent prostitutes, he could be the lover of a boy—to say nothing of the men or women slaves he had in his household at his disposal.¹¹⁶

Marriage was, however, more monogamous than in ancient Israel, and most men with concubines had childless marriages.¹¹⁷ In the sixth century B.C.E., Greek marriage laws required two elements: the *engyesis*, a betrothal contract between the groom and the bride's father; and the *ekdosis*, the "handing over" of the bride by her father to the groom's house.¹¹⁸

Prostitution was common and was not penalized, although male prostitutes lost their citizenship.¹¹⁹ Divorce was available to either party, with the wife's dowry returning (with her) to her family at divorce.¹²⁰ Both seduction and rape were illegal because of the harm they did to the woman's father, guardian, or husband.¹²¹ Seduction was a more serious offense than rape because it was seen as more intentional and injured not just the woman's bodily integrity but, more seriously, turned her affection and obedience away from the appropriate man.¹²²

3. *Ancient Rome*

Roman writers tended to view sex dispassionately, seeing it as less morally questionable than many of the Greeks, but not romanticizing or idealizing it.¹²³ Like Greeks and other Mediterranean peoples of the time, a married woman was required to be faithful,¹²⁴ and her adultery

114. See David Cohen, *Consent and Sexual Relations in Classical Athens*, in *CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES* 5, 7 (Angeliki Laiou ed., 1993).

115. See *id.*; see also MICHAEL FOUCAULT, *THE USE OF PLEASURE* 145 (Robert Hurley trans., 1985) (stating that "[a] man's marriage did not restrict him sexually," and that adultery constituted a breach of the marriage contract only when committed by the woman).

116. FOUCAULT, *supra* note 115, at 146–47.

117. See JACK GOODY, *THE ORIENTAL, THE ANCIENT, AND THE PRIMITIVE* 393 (1990).

118. See NIKOS A. VRISSIMTZIS, *LOVE, SEX AND MARRIAGE IN ANCIENT GREECE* 30 (1995).

119. See BRUNDAGE, *supra* note 57, at 14–15.

120. See GOODY, *supra* note 117, at 393; VRISSIMTZIS, *supra* note 118, at 41–42.

121. See BRUNDAGE, *supra* note 57, at 14.

122. See *id.* at 14; FOUCAULT, *supra* note 115, at 146.

123. See BRUNDAGE, *supra* note 57, at 22.

124. See J.P.V.D. BALS DON, *ROMAN WOMEN: THEIR HISTORY AND HABITS* 45 (1962).

could be punished by her death.¹²⁵ Although married men were also to be faithful during the Republican period, there was no penalty for an offense, and the prohibition was generally ignored.¹²⁶ Concubinage was widespread and quite acceptable.¹²⁷ Prostitution was legal, regulated, and taxed.¹²⁸

Roman law prohibited *stuprum*, which was “habitual sexual intercourse with an unmarried, free woman” who was not a prostitute, a loose woman, one’s concubine, or in another “available” category.¹²⁹ An upper-class woman could not have intercourse with anyone outside marriage.¹³⁰ Adultery was an offense committed by a married woman and her lover; a married man did not commit adultery by having sex with an *appropriate* woman other than his wife.¹³¹

A married man who had a concubine or who frequented prostitutes was not engaging in illegal or immoral behavior.¹³² Masturbation was not a moral issue¹³³ nor was male homosexual behavior, provided that an upper-class man was the active, not the passive, partner.¹³⁴ A man could perform cunnilingus on a woman without stigma.¹³⁵ More disapproval seems to have been directed at lesbian relationships than at homosexual relationships.¹³⁶

In classical Rome, marriage was a consensual contract between the parties with the “purpose of” procreation of children.¹³⁷ Given this pur-

125. See BRUNDAGE, *supra* note 57, at 23; BALSDON, *supra* note 124, at 217.

126. See BRUNDAGE, *supra* note 57, at 23.

127. See BALSDON, *supra* note 124, at 226–33.

128. See *id.* at 224.

129. BRUNDAGE, *supra* note 57, at 29 (stating that *stuprum* covered sex with a woman not a prostitute or loose woman or one’s own concubine); see also ANTTI ARJAVA, WOMEN AND LAW IN LATE ANTIQUITY 217–18 (1996) (stating that *stuprum* included sex with a virgin, widow, or divorced woman; it was not always clear whether sex with a particular unmarried woman was *stuprum* or permissible because it would depend on her status, reputation, and whether anyone “wanted to lay a charge against her”); BALSDON, *supra* note 124, at 217 (stating that *stuprum* included sex with widows); BULLOUGH, *supra* note 78, at 332 (stating that *stuprum* “can mean ‘debauchery,’ ‘seduction,’ ‘violation,’ ‘wantonness,’ ‘lewdness,’ ‘rape,’ ‘dishonor,’ or ‘disgrace,’ thus covering a whole range of heterosexual, homosexual, and even asexual activities, and it is not always clear just what meaning was intended”). For an analysis of *stuprum*, see WILLIAMS, *supra* note 111, at 96–124.

130. See BRUNDAGE, *supra* note 57, at 30.

131. See *id.* at 30–32; see also BALSDON, *supra* note 124, at 218; PERCY ELLWOOD CORBETT, THE ROMAN LAW OF MARRIAGE 141–42 (1969).

132. See BRUNDAGE, *supra* note 57, at 27.

133. See *id.* (“Masturbation by men or women was regarded as a blameless but unsatisfactory substitute for intercourse and carried no moral stigma, although the adult masturbator was sometimes ridiculed as immature or childish.”).

134. See *id.*; WILLIAMS, *supra* note 111, at 163 (“[A] *real man* must always and only play the insertive role . . . [a man] who played the insertive role was not simply a biological male but a fully gendered ‘real man,’ that is, one who penetrates.” (emphasis in original)). For a more complete analysis of Roman sexual roles, see *id.* at 160–229.

135. See BRUNDAGE, *supra* note 57, at 27.

136. See *id.* (suggesting that the reason for disapproval of lesbian relationships might have been that “upper class men found lesbianism threatening to their own sexual self-esteem”); WILLIAMS, *supra* note 111, at 262 n.28.

137. BRUNDAGE, *supra* note 57, at 33; see also BALSDON, *supra* note 124, at 190; TREGGIARI, *supra* note 88, at 13.

pose, marriage was limited to people of equivalent classes. A free man could not marry a prostitute or former prostitute, an actress or former actress, a woman caught in adultery, a procurer, or a woman given freedom by a procurer.¹³⁸ Slaves could not marry.¹³⁹ Women who were too old to have children (over the age of fifty) could not “marry at all, although they could become concubines.”¹⁴⁰ As noted earlier, concubinage was an accepted institution, often as an alternative to marriage for free people who could not marry.¹⁴¹ There were no formal requirements for marriage—no required ceremony, no requirement of consummation or even cohabitation.¹⁴² As long as the parties intended to be married (and could marry each other), they were married.¹⁴³

Divorce was freely available and almost routine, at least among the propertied households after the early Republic, and the woman had the right to the return of at least part of her dowry at divorce.¹⁴⁴ Divorce, like marriage, was a question of intent; “marriage was deemed to cease when marital affection ended.”¹⁴⁵ Either spouse could divorce the other.¹⁴⁶

Although concubinage was initially unregulated by law, in time the law defined it so as to distinguish it from *stuprum* (illegal intercourse with a free woman not one’s wife).¹⁴⁷ Concubinage was in many ways a form of marriage with lower status for the woman and her children.¹⁴⁸

Modern rape is a descendant of the Roman crime *raptus*, which “consisted in the abduction and sequestration of a woman against the will of the person under whose authority she lived” (intercourse was not necessary; her consent irrelevant).¹⁴⁹ There is no evidence that *raptus* was severely punished in early Roman law, although it was a serious matter by the early imperial period.¹⁵⁰ Capital punishment was imposed on those who committed *raptus* and those who successfully seduced mi-

138. See BALSODN, *supra* note 124, at 229; BRUNDAGE, *supra* note 57, at 36.

139. See BRUNDAGE, *supra* note 57, at 36.

140. *Id.* at 36.

141. See *supra* note 127 and accompanying text.

142. See BRUNDAGE, *supra* note 57, at 35–36.

143. See *id.* at 35.

144. See BALSODN, *supra* note 124, at 188–89 (stating that the claim to recovery of the dowry was used in the republic initially when the husband died or was the guilty party in a divorce; later, the wife could make a claim in the event the husband divorced her, although the amount the husband had to return could be limited by several factors, including adultery and the existence of children).

145. BRUNDAGE, *supra* note 57, at 39.

146. See Susan Treggiari, *Divorce Roman Style: How Easy and How Frequent Was It?*, in MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME 31, 33–38 (Beryl Rawson ed., 1991).

147. See BRUNDAGE, *supra* note 57, at 40; see also *supra* note 129 and accompanying text.

148. See BALSODN, *supra* note 124, at 231; BRUNDAGE, *supra* note 57, at 41–44.

149. James A. Brundage, *Rape and Marriage in the Medieval Canon Law*, in JAMES A. BRUNDAGE, SEX, LAW AND MARRIAGE IN THE MIDDLE AGES 62, 63 (1993).

150. See BRUNDAGE, *supra* note 57, at 47.

nors.¹⁵¹ As in Greek society, the harm of *raptus* or seduction was that done to the household, not the woman herself.¹⁵²

For the most part, special penalties did not apply to homosexuality in Rome, but the laws governing heterosexual sex applied as well to homosexual sex. Thus, for example, *stuprum*—sex with an inappropriate person—could occur between males just as it could occur between a man and a woman.¹⁵³ As in Greek society, there was disapproval of a man who played a passive role in anal intercourse.¹⁵⁴ A passive male could not practice law or serve in the army.¹⁵⁵

4. *Germanic Tribes*

Little is known about the sexual attitudes of pre-Christian Germanic tribes, apart from their double standard for men and women and some information about their rules.¹⁵⁶ Prior to their conversion to Christianity, the Germanic tribes followed rules similar to those of ancient Israel, Greece, and Rome.¹⁵⁷ Marriage was not created by formality but by cohabitation¹⁵⁸ and was a social, not legal, status.¹⁵⁹ Polygamy was practiced but may not have been an option for most men for economic reasons.¹⁶⁰ As usual, women were required to be monogamous in marriage, and adultery (by a woman) was severely punished.¹⁶¹ Concubinage was common in the sense of “a long-term more or less permanent relationship between a man and woman of unequal social status.”¹⁶² Divorce was readily available to men, yet difficult for a woman to obtain.¹⁶³ The laws

151. *See id.*

152. *See id.* at 48.

153. *See id.* at 48–49; *see also* BALS DON, *supra* note 124, at 77–78. Bullough states that during the time of Emperor Augustus, homosexual intercourse was subsumed into *stuprum* with the purpose “to ensure that men between 25 and 60 marry and father children.” BULLOUGH, *supra* note 78, at 138.

154. *See* BRUNDAGE, *supra* note 57, at 49.

155. *See id.*

156. *See id.* at 127 (noting that Tacitus is the source of most of our information about the pre-Christian Germanic tribes and that they “strongly disapproved of extramarital sexual adventures by their womenfolk”).

157. After the Germanic tribes migrated to what had been the Roman Empire, they gradually became Christians. Between 600 and 900 C.E., Christian sexual ethics were gradually extended to the Germanic areas. *See id.* at 135–53.

158. *See id.* at 128.

159. *See id.*; *see also* RUDOLF HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 588 (1918) (stating that marriage did not mean monogamy; what distinguished marriage from other sexual unions was “the fact that wife and children, notwithstanding their subjection to the unlimited mundium of husband and father, enjoyed in relation to him a position legally more secure than that of other women with whom he cohabited, and his offspring by such”).

160. *See* BRUNDAGE, *supra* note 57, at 128; *see also* HUEBNER, *supra* note 159, at 588 (stating that, although most primitive Germans had only one wife, they were legally permitted to have many wives).

161. *See* BULLOUGH, *supra* note 78, at 350.

162. BRUNDAGE, *supra* note 57, at 131; *see also* HUEBNER, *supra* note 159, at 589.

163. *See* BRUNDAGE, *supra* note 57, at 131–32; HUEBNER, *supra* note 159, at 612–14 (noting that over time, it became more difficult for the husband to unilaterally divorce his wife).

of several Germanic tribes imposed fines for fornication¹⁶⁴ and rape was a serious crime.¹⁶⁵ Most Germanic codes said nothing about prostitution, although the Visigothic code made it illegal.¹⁶⁶ Unlike the other non-Christian traditions discussed above, the Germanic tribes treated bastard children much like legitimate children.¹⁶⁷

For Greek, Roman, Jewish, and Germanic peoples, marriage was the union of man and woman structured to form alliances between families, to assure the man and his family that the wife's children were his, and to assure the woman's family that her children would be the legitimate heirs of their father's property and that she would have the status and rights of wife.¹⁶⁸ Full divorce with rights of remarriage was generally available; typically, however, the right to divorce belonged solely to the man.¹⁶⁹

Marriage was an overtly patriarchal institution in these pre-Christian cultures, designed to ensure a man that his wife's children were his own and hence the appropriate heirs of his property.¹⁷⁰ For women, marriage was preferable to other heterosexual relationships, such as concubinage and prostitution, because a married woman had higher social status, her children were entitled to inherit property, and she could not be summarily dismissed.¹⁷¹ In the event of divorce, the law might extend some protections to the wife, such as granting her family rights to certain property.¹⁷²

B. Christian Regulation of Marriage and Sex Through the Middle Ages

1. Early Christianity

According to the Gospels, Jesus said relatively little about sex. He was far more concerned about wealth and demonic possession.¹⁷³ Although Jesus mentioned adultery and fornication as sins, even specifically indicating that a married man could be an adulterer,¹⁷⁴ he also advocated empathy rather than the death penalty for the woman caught in adultery.¹⁷⁵ While not approving of prostitution,¹⁷⁶ Jesus indicated that

164. See HUEBNER, *supra* note 159, at 601.

165. See BRUNDAGE, *supra* note 57, at 133.

166. See *id.*

167. See *id.* at 131.

168. See *id.* at 130–33.

169. See *id.* at 131.

170. See *id.* at 128–29.

171. See *id.* at 130–31.

172. See *id.* at 131.

173. See *id.* at 57.

174. See *Matthew* 5:27–32 & 15:19 (Jerusalem); *Mark* 7:21 (Jerusalem).

175. See *John* 8:3–11 (Jerusalem).

176. See BRUNDAGE, *supra* note 57, at 59.

individual prostitutes would enter the Kingdom ahead of the Chief Priests at the Temple in Jerusalem.¹⁷⁷

On the other hand, there are passages that suggest Jesus regarded sex, or perhaps any close human relationship, as a barrier to salvation.¹⁷⁸ For example, in the parable of the wedding feast, being newly married is an unacceptable excuse for not attending.¹⁷⁹ Jesus said that followers must leave all, including wives and children, to follow him;¹⁸⁰ those who did so would receive much in this life and eternal life hereafter.¹⁸¹

Jesus also stressed, however, the love between wives and husbands and equity between them (husbands could be guilty of adultery and should not divorce their wives except for adultery).¹⁸² His emphasis on the power of sex to make of the two “one flesh” also seems affirming of marriage and sexuality within marriage.¹⁸³

In the decades after Jesus’ death, Paul was very influential.¹⁸⁴ His letters “were in fact written before any of the Gospels.”¹⁸⁵ And sex was a much bigger item on Paul’s agenda than on Jesus’.¹⁸⁶ Paul’s views on sex are remarkably similar to the Stoics,¹⁸⁷ perhaps because he was from a city with strong Stoic teachers and schools.¹⁸⁸ Paul thought that the end of the world was fast approaching and saw sex as, at best, a distraction from important matters.¹⁸⁹ Paul listed sexual offenses among the most heinous of crimes,¹⁹⁰ with specific denunciation of male homosexuality.¹⁹¹

177. See *Matthew* 21:23–32 (Jerusalem).

178. See BRUNDAGE, *supra* note 57, at 59.

179. See *Luke* 14:20–27 (Jerusalem).

180. See *id.* at 14:25–27.

181. See *id.* at 18:29 & 20:34–37 (reporting that it is only in this world that people take husbands and wives; in the perfection of the Kingdom “the dead do not marry because they can no longer die”).

182. See *Matthew* 5:27–32 (Jerusalem) (stating that a man can commit adultery by even looking at a woman with lust); *id.* at 19:3–6 (answering the question whether a man can divorce his wife for any reason: “Have you not read that the creator from the beginning made them male and female and that he said: This is why a man must leave father and mother, and cling to his wife, and the two become one body? They are no longer two, therefore, but one body. So then, what God has united, man must not divide.”); *Mark* 10:2–12 (Jerusalem) (similar).

183. See *Mark* 10:2–12 (Jerusalem).

184. See BRUNDAGE, *supra* note 57, at 59.

185. *Id.*

186. See *id.* at 60.

187. See *supra* notes 107–13 and accompanying text.

188. See FRANK BOTTOMLEY, ATTITUDES TO THE BODY IN WESTERN CHRISTENDOM 31–32 (1979); BRUNDAGE, *supra* note 57, at 60 n.51; ARTHUR DARBY NOCK, *Early Gentile Christianity and Its Hellenistic Background*, in *ESSAYS ON RELIGION AND THE ANCIENT WORLD* 49, 125 (Zeph Stewart ed., 1972).

189. See ANTHONY KOSNICK ET AL., HUMAN SEXUALITY: NEW DIRECTIONS IN AMERICAN CATHOLIC THOUGHT 23, 27 (1977); see also ERIC FUCHS, SEXUAL DESIRE AND LOVE: ORIGINS AND HISTORY OF THE CHRISTIAN ETHIC OF SEXUALITY AND MARRIAGE 75 (Marsha Daigle trans., 1983).

190. See *1 Corinthians* 6:9–10 (Jerusalem) (“You know perfectly well that people who do wrong will not inherit the kingdom, of God: people of immoral lives, idolaters, adulterers, catamites, sodomites, thieves, usurers, drunkards, slanderers and swindlers will never inherit the kingdom of God.”).

191. See *Romans* 1:26–27 (Jerusalem) (“That is why God has abandoned them to degrading passions: why their women have turned from natural intercourse to unnatural practices and why their menfolk have given up natural intercourse to be consumed with passion for each other, men doing shameless things with men and getting an appropriate reward for their perversion.”); *id.* at 1:32 (“They

He saw celibacy as superior to marriage¹⁹² and regarded all sex outside marriage as sinful.¹⁹³ Sex in marriage, though not the ideal, was preferable to eternal damnation: “it is better to marry than to burn.”¹⁹⁴ Sex in marriage united husband and wife spiritually as well as physically, so that they became one flesh.¹⁹⁵ Paul forbade divorce¹⁹⁶ and frowned on remarriage even for widows and widowers.¹⁹⁷

Although Paul did not see sex in a positive light even within marriage, both wife and husband owed a sexual obligation to the other.¹⁹⁸ Neither could say no because each had all rights over the others’ body:

The husband must give his wife what she has the right to expect, and so too the wife to the husband. The wife has no rights over her own body; it is the husband who has them. In the same way, the husband has no rights over his body; the wife has them. Do not refuse each other except by mutual consent, and then only for an agreed time, to leave yourselves free for prayer; then come together again in case Satan should take advantage of your weakness to tempt you.¹⁹⁹

Later generations of Christian theologians would refer to this mutual obligation as the “marital debt”; it is the basis of the marital rape exemption²⁰⁰ that survives in some form to this day in about half of American states.²⁰¹

2. *Christianity During the Second and Third Centuries*

Little is known about sexual norms between the time of Paul and the second or third century of the Common Era. By that time, however, sex emerged as an increasingly important aspect of Christian ethics, far more important than it had been for either Jesus, according to the Gos-

know what God’s verdict is: that those who behave like this deserve to die—and yet they do it; and what is worse, encourage others to do the same.”).

192. See 1 *Corinthians* 7:1–2, 7–9 (Jerusalem).

Now for the questions about which you wrote. Yes, it is a good thing for a man not to touch a woman; but since sex is always a danger, let each man have his own wife and each woman her own husband. . . . I should like everyone to be like me, but everybody has his own particular gifts from God, one with a gift for one thing and another with a gift for the opposite.

There is something I want to add for the sake of widows and those who are not married: it is a good thing for them to stay as they are, like me, but if they cannot control the sexual urges, they should get married, since it is better to be married than to be tortured.

193. See *id.* at 6:18 (“Keep away from fornication. All the other sins are committed outside the body; but to fornicate is to sin against your own body.”).

194. 1 *Corinthians* 7:9 (King James).

195. See *id.* at 7:1–10.

196. See *id.* at 7:10–11.

197. See *id.* at 7:8–9.

198. See *id.* at 7:3.

199. *Id.* at 7:3–6.

200. See, e.g., DIANA E.H. RUSSELL, RAPE IN MARRIAGE 2–3 (1982); James A. Brundage, *Implied Consent to Intercourse*, in CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES 245, 245–56 (Angeliki Laiou ed., 1993).

201. See *infra* note 318 and accompanying text.

pel accounts, or Paul, according to his letters. Many were influenced by Gnostic beliefs, according to which sex and death were linked to each other and to the Fall.²⁰² Both were unknown prior to the temptation of Adam and Eve in the Garden of Eden.²⁰³ The first sin—the evil of lust—brought sex and death into the world.²⁰⁴ Gnostics believed that “[o]nly a cessation of sexual activity in the world would bring about life without death. Thus, so long as people marry and have sex, they will also die.”²⁰⁵

Mainstream Christian scholars and theologians never accepted Gnosticism and regarded sex as a “natural” human function, bringing natural law notions from pagan philosophy into Christian ethics with far-reaching consequences.²⁰⁶ But even they regarded sex as “inherently so filthy and degrading that the reason for condemnation of it was self-evident.”²⁰⁷ Many early Fathers praised celibacy and virginity as much as they denounced sex and sexuality.²⁰⁸ Although writers in other, earlier traditions had sometimes seen virtue in virginity,²⁰⁹ “the early Fathers elevated virginity from the position of a rare, charismatic choice made by a few to a general virtue required of many.”²¹⁰

Although marriage ceremonies were not required at this early date, Christians were expected to marry publicly.²¹¹ And the early Fathers believed that sex should be limited in marriage to procreation: “marital sex was legitimate when employed for procreation but not when indulged in for pleasure.”²¹² They also taught that married couples should avoid sex “on holy days and Church festivals.”²¹³ Concubinage continued to be an accepted social practice, especially for couples who could not marry under ancient law,²¹⁴ and was condoned by the Church as another kind of legitimate union.²¹⁵

Sex outside marriage or concubinage was prohibited.²¹⁶ Even at this early date, “[u]nchastity ranked with homicide and idolatry as the most

202. See BRUNDAGE, *supra* note 57, at 62; Vern L. Bullough, *Introduction: The Christian Inheritance*, in *SEXUAL PRACTICES & THE MEDIEVAL CHURCH* 1, 5 (Vern L. Bullough & James Brundage eds., 1982).

203. See BRUNDAGE, *supra* note 57, at 62.

204. See *id.*

205. *Id.*

206. See *id.* at 63.

207. *Id.*; see also DERRICK SHERWIN BAILEY, *SEXUAL RELATION IN CHRISTIAN THOUGHT* 48 (1959).

208. See BRUNDAGE, *supra* note 57, at 65.

209. See *id.*

210. *Id.* The early Christians attempted to attain perfection through renunciation of the world and subjugation of the body, especially through “the cult of virginity.” BAILEY, *supra* note 207, at 19–20.

211. See BRUNDAGE, *supra* note 57, at 66.

212. *Id.* at 67.

213. *Id.*

214. See *id.*

215. See BAILEY, *supra* note 207, at 69 n.2; BRUNDAGE, *supra* note 57, at 70–71; FUCHS, *supra* note 189, at 95–96.

216. See BRUNDAGE, *supra* note 57, at 71.

serious offenses in the early Church's penal law.²¹⁷ By the fourth century, the Church also provided penalties for rape.²¹⁸ Prostitutes could not join the Church.²¹⁹ Little was said during these early centuries about homosexuality, but Paul's prohibition on all types of male homosexuality seems to have been the accepted norm.²²⁰

3. *The Fourth Through the Sixth Centuries*

St. Augustine's (354–430 C.E.) attitude toward marriage and sex was somewhat more positive than that of the patristic writers.²²¹ Augustine was originally a member of the Manichean religion and was also influenced by Gnostic beliefs (the Fall caused sex and death, which are inextricably linked together as punishment)²²² and by Stoic philosophy (celibacy is the ideal; sex should be resisted except for procreative marital sex).²²³ More specifically, the Manicheans rejected marriage and procreation as part of the dark side in a universal struggle between light and dark.²²⁴ Augustine regarded himself as “a slave to lust” during the time he had been living with a concubine and thinking about marrying.²²⁵ He regarded his own sexual urges as disgusting, and this attitude permeated his attitude toward marital sex.²²⁶ Eventually, after many struggles with his own sexual nature, including two concubines and a son, Augustine became a Christian and celibate.²²⁷

Augustine regarded marriage as having positive aspects because it restrained the “intrinsically evil” nature of sex.²²⁸ Marriage also “produced children, it promoted mutual fidelity between the spouses, and it brought them together in a bond of love.”²²⁹ But celibacy was far better. Augustine was the first Christian theologian to insist that marriage was indissoluble and divorce with remarriage unavailable.²³⁰ This conclusion

217. *Id.*

218. *See id.* at 73; *see also* BAILEY, *supra* note 207, at 72–73.

219. *See* BRUNDAGE, *supra* note 57, at 73.

220. *See id.* at 73–74.

221. *See id.* at 89.

222. *See supra* notes 202–05 and accompanying text; *see also* JOHN T. NOONAN JR., CONTRACEPTION 107–39 (1966).

223. *See supra* notes 107–13 and accompanying text; *see also* NOONAN, *supra* note 222, at 57–106.

224. *See* NOONAN, *supra* note 222, at 107–09.

225. BRUNDAGE, *supra* note 57, at 90; *see also* SAINT AUGUSTINE, ST. AUGUSTINE ON MARRIAGE AND SEXUALITY 19 (Elizabeth A. Clark ed., 1996).

226. *See* BRUNDAGE, *supra* note 57, at 90; *see also* SAINT AUGUSTINE, *supra* note 225, at 13–19 (describing himself as being overtaken by “the mists of slimy lust of the flesh,” “the dark mist of lust,” and as following “the violence of my flooding passions”).

227. *See* BRUNDAGE, *supra* note 57, at 99–100; *see also* SAINT AUGUSTINE, *supra* note 225, at 17–19.

228. VERN L. BULLOUGH, THE SUBORDINATE SEX: A HISTORY OF ATTITUDES TOWARD WOMEN 118 (2d ed. 1973).

229. BRUNDAGE, *supra* note 57, at 89.

230. *See id.* at 95; SAINT AUGUSTINE, *supra* note 225, at 49–50, 55–56; Elizabeth A. Clark, *Introduction to SAINT AUGUSTINE, ST. AUGUSTINE ON MARRIAGE AND SEXUALITY* 6 (Elizabeth A. Clark ed., 1996).

was based on his objections to sex and “his belief that people marry largely because of sex.”²³¹ In 407, the Council of Carthage ruled “that a divorced Christian might not remarry.”²³² Over the next centuries, concubinage was also outlawed for Christians.²³³

Similar to Roman law, Christian writers in this era assumed that the essence of marriage was consent and rejected the notion that consummation might be a requirement.²³⁴ For Augustine, whether marital sex was moral depended on the parties’ intentions.²³⁵ There was no sin if they engaged in sex solely to have children.²³⁶ If they did not try to avoid procreation but had sex for pleasure, they sinned slightly.²³⁷ If they had sex for pleasure and deliberately avoided the possibility of procreation, they committed a serious sin.²³⁸ In fact, the sooner a married couple stopped having sex, the better for their moral health.²³⁹

Jerome (c. 347–419/20 C.E.)²⁴⁰ was even more negative than Augustine. He saw marital sex as “a concession to human weakness, a remedy, and a poor one at that, for fornication.”²⁴¹ Jerome “regard[ed] matrimony as a concession to the inordinate desires of fallen humanity and as a refuge for those weaker souls who could not bear the discipline of celibacy.”²⁴² He believed that intercourse was evil and unclean²⁴³ and taught that married couples should keep sex to “an absolute minimum.”²⁴⁴ He regarded as a deformity the feelings of “married men who loved their wives too excessively.”²⁴⁵ In his view, “[n]othing . . . [was]

231. BRUNDAGE, *supra* note 57, at 95. St. John Chrysostom (344–407 C.E.) also strongly opposed second marriages “not because they were wrong in themselves, but rather because they represented a concession to fleshly lust and a taste for sexual pleasure.” *Id.* at 97. Moreover, he opposed remarriage after death of a spouse and advocated lives of penance and religious devotion for widows and widowers. *See id.* at 98; *see also* SAINT AUGUSTINE, *supra* note 225, at 49–50, 55–56; Clark, *supra* note 230, at 6.

232. BRUNDAGE, *supra* note 57, at 95.

233. *See id.* at 98–103; James Brundage, *Prostitution in the Medieval Canon Law, in* SEXUAL PRACTICES & THE MEDIEVAL CHURCH, *supra* note 202, at 151–52.

234. *See* BRUNDAGE, *supra* note 57, at 92.

235. *See id.* at 89.

236. *See id.*; *see also* SAINT AUGUSTINE, *supra* note 225, at 43.

237. *See* BRUNDAGE, *supra* note 57, at 89; Clark, *supra* note 230, at 6.

238. *See* BRUNDAGE, *supra* note 57, at 89.

239. *See id.* at 90; *see also* SAINT AUGUSTINE, *supra* note 225, at 52.

240. *See* BRUNDAGE, *supra* note 57, at 82.

241. *See id.* at 90. Jerome also said that “I do not condemn wedlock . . . I should like everyone to take a wife who cannot manage to sleep alone because he gets frightened at night.” BAILEY, *supra* note 207, at 28; BULLOUGH, *supra* note 78, at 189 (stating that contemporaries of St. Jerome held similar views supporting sexual asceticism, including Gregory of Nyssa, who “dismissed marriage as a sad tragedy . . . [and] St. Ambrose [who] called marriage a ‘galling burden’ urging all those contemplating matrimony to think about the bondage and servitude into which wedded love degenerated”).

242. BAILEY, *supra* note 207, at 23 (noting that the Patristic Fathers generally held this view).

243. *See id.* at 45–46, 171–72.

244. BRUNDAGE, *supra* note 57, at 90.

245. *Id.* “If we abstain from coitus we honour our wives; if we do not abstain—well, what is the opposite of honour but insult?” BAILEY, *supra* note 207, at 46.

filthier than to have sex with your wife as you might do with another woman.”²⁴⁶

Both Augustine and Jerome believed that married couples “ought to avoid arousing one another sexually.”²⁴⁷ Although Augustine and other writers of his time forbade sex for pleasure, they also taught that each spouse owed the other the “marital debt”: sex on demand.²⁴⁸ No matter how wrong the demand, the other spouse was obligated to agree and did not sin in doing so.²⁴⁹

All sex outside marriage was fornication or adultery and therefore sinful.²⁵⁰ And because the only moral sex was for procreation,²⁵¹ much sexual contact in marriage was impermissible. In 342 C.E. the Christian emperors Constantius and Constans promulgated “a tortuously worded decree” that “prohibited sexual relations between man and wife in any fashion that did not involve penetration of the vagina by the penis.”²⁵² Masturbation and even unwanted sexual fantasies emerged as issues during the fourth and fifth centuries.²⁵³ Both were regarded as serious sins.²⁵⁴

4. *The Sixth Through the Eleventh Centuries*

Between the end of the sixth century and the beginning of the eleventh century (when the classical period of Canon law began), “a new genre of Christian moral literature . . . grew increasingly influential in shaping Catholic sexual doctrine.”²⁵⁵ This new literature consisted of the penitentials, handbooks for confessors to use to determine penances for various sins and covering sexual sins in amazing detail.²⁵⁶ The penitentials adopted the negative attitudes toward marital sex evident in the earlier patristic writings. Marital sex was sinful if engaged in for pleasure rather than for procreation, and was a dangerous incitement to lust.²⁵⁷

246. BRUNDAGE, *supra* note 57, at 90–91.

247. BRUNDAGE, *supra* note 57, at 91.

248. *See id.* at 93.

249. *See id.*

250. *See id.* at 103–04.

251. *See supra* notes 235–40 and accompanying text.

252. BRUNDAGE, *supra* note 57, at 108. To read the decree, see Vern L. Bullough, *Formation of Medieval Ideals: Christian Theory and Christian Practice*, in *SEXUAL PRACTICES & THE MEDIEVAL CHURCH*, *supra* note 202, at 14, 18.

253. *See* BRUNDAGE, *supra* note 57, at 109.

254. *See id.* at 109–10.

255. *Id.* at 152.

256. Sexual sins were the “largest single category of behavior that the penitentials treated.” *Id.* at 153. Twenty-six percent (of forty-six canons) of the penitentials dealt with sex. *See* Pierre J. Payer, *Confession and the Study of Sex in the Middle Ages*, in *HANDBOOK OF MEDIEVAL SEXUALITY* 3, 4–8 (Vern L. Bullough & James A. Brundage eds., 1996) [hereinafter PAYER, *HANDBOOK OF MEDIEVAL SEXUALITY*]; *see also* BULLOUGH, *supra* note 78, at 355–63 (containing several examples of punishments for sexual sins in penitentials); Warren Johansson & William A. Percy, *Homosexuality*, in *HANDBOOK OF MEDIEVAL SEXUALITY*, *supra*, at 155, 165–66. *See generally* PIERRE J. PAYER, *SEX AND THE PENITENTIALS: THE DEVELOPMENT OF A SEXUAL CODE 550–1150* (1984) (describing penitentials provisions dealing with sexual sin in great detail) [hereinafter *SEX AND THE PENITENTIALS*].

257. *See* BRUNDAGE, *supra* note 57, at 155.

When a married couple did engage in sex, they were to do it at night, in the dark and partially clothed.²⁵⁸ The only permitted sex was vaginal intercourse in the missionary position.²⁵⁹ Even permissible sex in marriage was seen as “a source of spiritual pollution,” and bathing was required before entering a church.²⁶⁰ Sex outside marriage was forbidden, along with masturbation, which received a great deal of attention.²⁶¹ Homosexuality was forbidden,²⁶² although oral sex (even in marriage) “merited greater severity than anal intercourse” in some penitentials.²⁶³ Femoral intercourse (penis and partner’s thighs) was forbidden within, as well as outside of, marriage.²⁶⁴

Although the penitentials began as practical guides for priests hearing confessions, they were the first formal formulations of the relative severity of sins.²⁶⁵ Over time, they were used as legal manuals and eventually “infiltrated collections of canon law and penitential writers came to rank as canonical authorities.”²⁶⁶

5. *The Twelfth Through the Thirteenth Centuries*

This was the classical era of the Canon law, the period during which Canon law was systematized, and modern Canon law emerged.²⁶⁷ The canonists had a more positive attitude toward sex than the penitential or patristic writers. The standard view was that sex within marriage for procreation or to fulfill the marital debt upon the other spouse’s demand was never sinful.²⁶⁸ Church leaders continued, however, to warn against the dangers of too much sex in marriage and to forbid “unnatural” sex, which could include everything but vaginal intercourse in the missionary

258. *See id.* at 161.

259. *See* PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 29–30.

260. BRUNDAGE, *supra* note 57, at 163; *see also* PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 35–36.

261. *See* BRUNDAGE, *supra* note 57, at 164–65; PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 46–47.

262. *See* BRUNDAGE, *supra* note 57, at 167 (noting that the penitentials occasionally mentioned lesbianism and female masturbation but seemed to consider lesbianism “slightly less serious than male homosexual relationships”); PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 40–44. *See generally* Jacqueline Murray, *Twice Marginal and Twice Invisible: Lesbians in the Middle Ages*, in HANDBOOK OF MEDIEVAL SEXUALITY, *supra* note 256, at 197 (discussing the lives of lesbians in the Middle Ages).

263. BRUNDAGE, *supra* note 57, at 167; *see also* PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 29–30 (discussing the ambiguity surrounding whether heterosexual oral sex was forbidden in the penitentials). *But see* Johansson & Percy, *supra* note 256, at 166 (stating that the penitentials “prescrib[ed] greater severity for anal than for oral sex—whether with a partner of the opposite or of the same gender”).

264. *See* BRUNDAGE, *supra* note 57, at 167; PAYER, SEX AND THE PENITENTIALS, *supra* note 256, at 41.

265. *See* BRUNDAGE, *supra* note 57, at 174.

266. *Id.* at 169.

267. *See id.* at 346–47.

268. *See id.* at 364–65.

position.²⁶⁹ Fornication and adultery were, of course, forbidden to men as well as women.²⁷⁰

Sodomy, or the crime against nature, was formally proscribed. The Third Lateran Council of 1179 adopted a canon specifically prohibiting “that incontinence which is against nature,”²⁷¹ though its meaning varied with the speaker. For example, Peter Lombard (c. 1100–60 C.E.) defined the sin against nature as all nonprocreative sex and “worse than fornication, adultery, or incest, presumably because these others could possibly lead to offspring.”²⁷² Peter Damian ranked sins against nature in order of sinfulness (from least to most sinful) as masturbation, mutual masturbation, femoral intercourse, and anal intercourse.²⁷³ Few defined sodomy as specifically as Damian (who was obsessed with masturbation, homosexual practices, and other “unnatural” sex),²⁷⁴ and the term referred confusingly to “all kinds of deviant sex practices” and also, more specifically, to anal sex.²⁷⁵

Thomas Aquinas—the most influential medieval theologian in the Roman Catholic Church and perhaps the most influential Catholic theologian of all time—ranked the sinfulness of various sexual acts in his *Summa Theologica* from least to most sinful: “simple fornication committed without inflicting injustice upon another[;]” seduction (aggravated if violence is used); adultery (aggravated if violence is used); incest; and finally, the sins against nature.²⁷⁶ Aquinas also ranked the sins against nature from least to most sinful: masturbation; the refusal of a married person to fulfill her or his marital obligation; sodomy (including all ho-

269. See *id.* at 366–67, 398.

270. See *id.* at 380–89.

271. *Id.* at 399; Vern A. Bullough, *The Sin Against Nature and Homosexuality*, in *SEXUAL PRACTICES & THE MEDIEVAL CHURCH*, *supra* note 202, at 55, 63. Although, as the paragraph in text explores, the meaning of sodomy varied, it clearly included homosexual acts, which were vigorously proscribed by the Roman Catholic Church from an early date. In this essay, I do not rely on John Boswell’s most recent book, JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994). The book’s accuracy in identifying certain Catholic rituals in premodern Europe as same-sex commitment ceremonies is doubtful. James Brundage, the leading scholar on sex in the ancient Western cultures and in medieval Christianity, on whom I rely extensively, rejects Boswell’s conclusions: “It’s pretty clear to me from the legal texts that the chaps who wrote [the ceremonies] did not accept same-sex relationships.” Kenneth L. Woodard, *Do You, Paul, Take Ralph . . .*, *NEWSWEEK*, June 20, 1994, at 76, 77. Federal Judge John Noonan, another highly respected scholar, regards Boswell’s book as a “curious attempt to create for himself a past in a church whose Scriptures and teachings never accepted the relationships he defends.” *Id.*; see also Brent D. Shaw, *Same-Sex Unions in Premodern Europe*, *NEW REPUBLIC*, July 18, 1994, at 33 (book review) (concluding that Boswell has mistranslated texts and misconstrued evidence throughout his book); David Wright, *Do You Take This Man . . .*, *NAT’L REV.*, Aug. 29, 1994, at 59–60 (book review) (concluding that “Mr. Boswell’s extraordinary skills and industry are deployed with such tendentiousness, exaggeration, special pleading, and occasional banality that the work deserves, at very best, the distinctive verdict of the Scottish courts: not proven”).

272. BULLOUGH, *supra* note 78, at 379.

273. See BRUNDAGE, *supra* note 57, at 212; Bullough, *supra* note 271, at 60–61.

274. See BRUNDAGE, *supra* note 57, at 212; Johansson & Percy, *supra* note 256, at 167.

275. BRUNDAGE, *supra* note 57, at 212–13.

276. BAILEY, *supra* note 207, at 159–61.

mosexual sex); and bestiality.²⁷⁷ According to one scholar, “intercourse in an unnatural position” (meaning sex in any position other than the missionary position) appeared between masturbation and homosexuality in Aquinas’s rankings.²⁷⁸

Aquinas believed that sins against nature (including both sodomy and a spouse refusing to honor her marital obligation) were worse than other sins of lust (including violent rape and other “sexual activities that injured others and were contrary to the virtue of charity”);²⁷⁹ other sins of lust were only sins against people, whereas sins against nature were against Divine Law.²⁸⁰ Aquinas’s views “tended to dominate all thinking on sexual subjects to the end of the Middle Ages, with the result that any kind of sexual activity not leading to procreation could be classed as deviant whether it took place inside or outside marriage.”²⁸¹

The Church permitted a married couple to separate in two ways. The marriage could be declared invalid, a nullity, in which case each partner was free to marry in the future (an annulment in modern Canon and secular law).²⁸² Or, the Church might allow a divorce without right of remarriage: *divortium a mensa et thoro*, i.e., separation from bed and board.²⁸³ Experts disagreed on the grounds for *divortium a mensa et thoro*, some limiting it to adultery and others allowing it more broadly.²⁸⁴ Consummation was now required for a valid marriage.²⁸⁵ Gratian, the first canonist to compile a systematic code, regarded consummation as holding “a primary role in marriage formation.”²⁸⁶

Rape outside of marriage was a sin in Canon law, as well as a crime in secular law, and required resistance; silence was consent.²⁸⁷ Rape as defined by the Canon law contains the recognizable elements of contemporary rape law, requiring intercourse, force, and lack of consent.²⁸⁸

277. See *id.*

278. BULLOUGH, *supra* note 78, at 380.

279. *Id.*

280. See *id.* at 161.

281. *Id.*

282. See 1 HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 406 (2d ed. 1988).

283. See BAILEY, *supra* note 207, at 82–83.

284. See *id.*

285. See BRUNDAGE, *supra* note 57, at 236.

286. See *id.* at 237–38, 376; Penny S. Gold, *The Marriage of Mary and Joseph in the Twelfth-Century Ideology of Marriage*, in *SEXUAL PRACTICES & THE MEDIEVAL CHURCH*, *supra* note 202, at 102, 104–07; Jo Ann McNamara, *Chaste Marriage and Clerical Celibacy*, in *SEXUAL PRACTICES & THE MEDIEVAL CHURCH*, *supra* note 202, at 22, 30–31. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), Chief Justice Burger stressed the “ancient roots” of proscriptions against sodomy, specifically noting that “Blackstone described ‘the infamous *crime against nature*’ as an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’” *Id.* at 196–97 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* 215).

287. See BRUNDAGE, *supra* note 57, at 396.

288. In addition, the canonists required abduction, derived from the requirements for *raptus* in Roman law. See *id.* Abduction is no longer required.

Canonists, following Paul, continued to hold that each spouse owed the other an absolute obligation to sex on demand (the conjugal or marital debt).²⁸⁹ Because of the marital debt—the obligation of both husband and wife never to say no—rape within marriage was an impossibility; “consent to intercourse had already been given.”²⁹⁰ (Hence the common law’s traditional “marital rape exemption.”)²⁹¹ Indeed, as illustrated by Aquinas’s ranking of sexual sins, it was the raped wife who had sinned by refusing to fulfill her marital obligation.²⁹² Her sin was a crime against nature; more heinous than fornication, violent rape (for the unmarried), adultery, or incest, because it did not simply harm other human beings but also violated Divine Law.²⁹³

In sum, medieval Roman Catholic Canon law classified sexual acts into two categories: licit (marital and procreative, including marital rape) and illicit (all nonprocreative sex and all sex outside of marriage). Marriage enabled men and women to avoid sin by having a place where (procreative) sex was licit. All sex outside marriage was either adultery or fornication and a sin for everyone.

In the West, the Church of Rome, unified under the Pope with a Canon law applicable throughout Europe, preceded the nation-states.²⁹⁴ Canon Law was the *first* modern legal system in the West.²⁹⁵ During the late eleventh and twelfth centuries, following papal assertion of universal power and authority, the laws of the Church were systematized, incorporating elements of “old law” (canons or rules from various sources regarded as authoritative, including the penitential manuals) with the “new law,” laws enacted in papal decrees (decretals).²⁹⁶ As Berman notes, the “basic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries.”²⁹⁷ When the common law of England developed, it was heavily influenced by the existing systematized body of law that existed in England, i.e., Canon law.²⁹⁸ Many of those who developed the early common law would have trained in Canon law, the only law taught

289. See *id.* at 358–60; Margaret McGlynn & Richard J. Moll, *Chaste Marriage in the Middle Ages: “It Were to Hire a Greet Merite”*, in HANDBOOK OF MEDIEVAL SEXUALITY, *supra* note 256, at 108–09. For an analysis of the conjugal debt as viewed by people in the Middle Ages, see Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1195–99 (1990).

290. JAMES A. BRUNDAGE, *Rape and Marriage in the Medieval Canon Law*, in SEX, LAW AND MARRIAGE IN THE MIDDLE AGES 62, 70–71 (1993).

291. See BRUNDAGE, *supra* note 57, at 611.

292. See *supra* notes 226–39 and accompanying text.

293. See *id.* Special thanks to my wonderful research assistant, Raizel Liebler, for discovering this perverse ordering.

294. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 553 (1983).

295. See *id.*

296. See *id.* at 202.

297. *Id.* at 165.

298. See *id.* at 553.

in the universities of Europe during this period.²⁹⁹ Inevitably, early English law was based on Canon law:

Secular law was supposed to emulate the canon law. All the various secular legal systems—feudal, manorial, mercantile, urban, royal—adapted to their own uses many basic ideas and techniques of the canon law, if only because the canon law was more highly developed and was available for imitation. This was inevitable, since in the twelfth and thirteenth centuries most lawyers, judges, and other professional advisers and officers of secular legal institutions were clerics and either had been trained in canon law or were generally familiar with its basic features.³⁰⁰

Differences between common law and Canon law did emerge, but even a description of the differences reveals their fundamental similarity. For example, by the sixteenth century there was a sharp conflict in England over whether a person whose parents married after his birth was a bastard.³⁰¹ The Church insisted that such a person was legitimate, but the English law barons held that such a person was illegitimate.³⁰² This was doubtless an important issue at the time, but it does not touch the basic ways in which marriage, family, and sex were regulated.

Although we no longer share the religious sensibilities that informed Canon law during the classical period when it was systematized and became the model for English common law, “the legal institutions, concepts, and values that have derived from them still survive, often unchanged.”³⁰³ Berman concludes, in his study of the foundations of Western legal systems, that “Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.”³⁰⁴ He illustrates his point with the following example from criminal law:

If a sane man is convicted of murder and sentenced to death, and thereafter, before the sentence is carried out, he becomes insane, his execution will be postponed until he recovers his sanity. Generally speaking, this is the law in Western countries and in many non-Western countries as well. Why? The historical answer, in the West, is that if a man is executed while he is insane he will not have

299. See *id.* at 162. Berman notes that graduates of these institutions could return to their home country or work elsewhere:

[They could work] as ecclesiastical or lay judges, practicing lawyers, legal advisers to ecclesiastical, royal, and city authorities and to lords of manors, and as administrative officials of various kinds. To the extent that they were involved with canon law, they could use their university training directly; to the extent that they were concerned with secular law, they applied to it the terminology and the method of the Roman and canon law that they had studied.

Id.

300. *Id.* at 274. Berman also notes that “[a]t the same time, the secular authorities resisted the encroachments of the ecclesiastical authorities upon the secular jurisdiction; and for that reason, too, they sought to achieve for secular law the cohesion and sophistication of canon law.” *Id.*

301. See RICHARD H. HELMHOLTZ, *CANON LAW AND THE LAW OF ENGLAND 187–210* (1987).

302. See *id.* at 187.

303. BERMAN, *supra* note 294, at 165.

304. *Id.*

had the opportunity freely to confess his sins and to take the sacrament of holy communion. He must be allowed to recover his sanity before he dies so that his soul will not be condemned to eternal hellfire but will instead have the opportunity to expiate his sins in purgatory and ultimately, at the Last Judgment, to enter the kingdom of heaven. But where none of this is believed, why keep the insane man alive until he recovers, and then kill him?³⁰⁵

Many of the basic patterns of American law regulating sex and family can be traced to Canon law.³⁰⁶ Canon law defined marriage as the union of a man and a woman, as did all ancient cultures and traditions (though for varying reasons). But many other important notions in American law regulating sex and family have roots in Canon law, and these notions, listed below, were not shared by the ancient Greek, Hebrew, Roman, or Germanic peoples.

- Marriage should begin with some sort of recognition of the union by an official.³⁰⁷ Informal (or common law) marriages were also recognized in the early America colonies,³⁰⁸ but statutes have eliminated this option in all but eleven states and the District of Columbia.³⁰⁹
- A marriage is indissoluble except by a court, through either annulment or divorce.³¹⁰ This remains the law in the United States.³¹¹
- In early American law — indeed, until the divorce revolution that began in the late sixties — divorce was available only if one party was at fault in certain proscribed ways (such as adultery) and the other innocent, the basic requirements for a *divortium a mensa et thoro* under Canon law.³¹² The canonical defenses — so called because of their origins in medieval Canon law — recrimination, condonation, connivance, provocation, and collusion³¹³ — were also applicable in American courts prior to the no-fault revolution.³¹⁴

305. *Id.* at 166. A Texas appellate court recently required a hearing to determine whether a man condemned to death and sane at the time of his trial is still sane. If he is now insane, he cannot be executed. *See Ex parte Robison*, No. 12, 952-03, 1999 Tex. Crim. App. LEXIS 90 (Aug. 17, 1999).

306. *See* MARY ANNE GLENDON, *STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 310–15 (1977).

307. Prior to the Council of Trent in 1563, the Catholic church required that couples go to church for a blessing when marrying. *See id.* at 310, 313–14. By the time the Roman church required a formal marriage ceremony in the decree *Tametsi*, adopted at the Council of Trent (but valid only where promulgated), the reformation had already occurred in England. *See id.* at 313–15. In England, the Anglican church did not require formal marriages until 1753. *See id.* at 314.

308. *See* Cynthia G. Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 717–22 (1996).

309. *See id.* at 715; *see also* 1 CLARK, *supra* note 282, at 101–03.

310. *See* HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 335–36 (3d ed. 1995).

311. *See id.*

312. *See* 1 CLARK, *supra* note 282, at 693–703.

313. *See* 2 HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 54–71 (2d ed. 1988) (defining the following terms: connivance — the petitioner for divorce consented to adultery; collusion — the petitioner and other spouse both want a divorce and have colluded to create evidence to support the petition; condonation — the petitioner forgave the other spouse for the wrong by having sex with her or him after the wrong; recrimination — both parties are guilty; provocation — the petitioner provoked the other spouse to do the action that is the subject of the complaint). With the

- Until recent rape reforms, American law required that the victim resist to demonstrate her nonconsent (required even if the man used force or the threat of force to obtain her compliance) and excluded marital rape from criminal sanctions.³¹⁵ Recently, some reforms have been enacted,³¹⁶ but they have not dramatically changed the way we think about rape or prosecutions and convictions for rape.³¹⁷ Marital rape continues to be excluded from the definition of rape in five American states.³¹⁸ Most of the other states proscribe marital rape, but do so only with additional requirements not applicable to other rapes.³¹⁹
- Early American law prohibited fornication,³²⁰ adultery,³²¹ and sodomy.³²² Although modern reforms have eliminated these crimes in some states, they remain on the books in many others.³²³
- During the nineteenth century, the states adopted legislation criminalizing prostitution.³²⁴ Many states continue to criminalize adultery, fornication, and sodomy; most continue to criminalize prostitution.³²⁵
- During the nineteenth century, laws banning obscenity and lewd acts were enacted.³²⁶ These laws were interpreted as prohibiting birth control³²⁷ until well into this century.³²⁸

change from legal separation only (*divorce a mensa et thoro*) under Canon law to full divorce (with right of remarriage) at the reformation, the continuing requirement that one party be so guilty as to justify divorce became bizarre. It nevertheless survived until modern divorce reform. The worse the failure of the guilty party, the more likely it was that a divorce would be granted and remarriage therefore possible. See KRAUSE, *supra* note 310, at 336–37. As Krause notes, “[t]he analogy to a law that allows renewal of a driver’s license only on proof of a crash—the worse the better—is not altogether far-fetched.” *Id.* at 336–37.

314. See 2 CLARK, *supra* note 313, at 54–71.

315. See SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 27–56, 72–79 (1987).

316. See *id.* at 80–91.

317. See *id.* at 84–91.

318. See, e.g., RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS 35–43 (1996) (describing the law of each state on marital rape).

319. See *id.*

320. See WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1 (1997) (“[V]irtually all American state or colonial jurisdictions had laws criminalizing fornication.”).

321. See *id.* (same with respect to adultery).

322. See *id.* (same with respect to sodomy).

323. See, e.g., POSNER & SILBAUGH, *supra* note 318, at 65–71, 98–110 (describing the law of each state on fornication, adultery, and sodomy).

324. See ESKRIDGE & HUNTER, *supra* note 320, at 1.

325. See, e.g., POSNER & SILBAUGH, *supra* note 318, at 155–87 (describing the law of each state on prostitution).

326. See *id.* at 83–97, 188–206 (describing the law of each state on public nudity, indecency, and possession of obscene material).

327. See ESKRIDGE & HUNTER, *supra* note 320, at 2.

328. See, e.g., ESKRIDGE & HUNTER, *supra* note 320, at 3 (noting that Margaret Sanger was subject to a federal obscenity indictment in 1914 for sending information on sex through the mail); HANDBOOK OF AMERICAN WOMEN’S HISTORY 529 (Angela Howard Zopy & Frances M. Kavenik eds., 1990) (noting that in 1916 Margaret Sanger was arrested for opening the first birth control clinic and that in 1936 the United States Supreme Court “permitted the mailing of contraceptive materials intended for physicians”); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (giving even unmarried people a constitutional right to buy contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965)

This section has described the Christian and non-Christian origins of our notion that marriage is by definition a relationship between a man and a woman. Before turning to the question of what should be the purpose of the secular state in regulating families, discussed in part IV, I first consider what we know today about the benefits of marriage.

III. WHAT IS THE GOOD IN MARRIAGE?

It is not good that man should be alone³²⁹—or woman. Companionship is the core good of marriage, not procreation or sex.³³⁰ Recently, Garrison Keillor reported that “[g]etting married for the sex is like flying to London for the free peanuts and pretzels. It’s not the point.”³³¹ John Gottman, a psychologist at the University of Washington who has studied married couples extensively, has also concluded that sex is not the key to a good marriage.³³² He begins a passage titled “The Purpose of Marriage”:

In the strongest marriages, husband and wife share a deep sense of meaning. They don’t just “get along”—they also support each other’s hopes and aspirations and build a sense of purpose into their lives together.³³³

Elsewhere, Gottman explains that “[t]here are few gifts a couple can give each other greater than the joy that comes from feeling known and understood.”³³⁴

Even on a biological level, marriage serves a need deeper and more fundamental than the need to procreate. According to sociobiologist Edward O. Wilson, sex is not primarily about procreation.³³⁵ Among human beings, sex is primarily a bonding device and only secondarily a means of procreation.³³⁶

Human beings are connoisseurs of sexual pleasure. They indulge themselves by casual inspection of potential partners, by fantasy, poetry, and song, and in every delightful nuance of flirtation leading

(striking as unconstitutional a state statute banning the sale of contraceptives when applied to married couples).

329. See *Genesis* 2:18 (Jerusalem).

330. For an article making a similar argument about the core good of coupling, see Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIAC L. REV. 27 (1996).

331. *Prairie Home Companion* (NPR radio broadcast & Garrison Keillor, Feb. 20, 1999).

332. See JOHN M. GOTTMAN, *WHY MARRIAGES SUCCEED OR FAIL* 22 (1994) (arguing as not true that the more frequent the sex the happier the marriage; what “matters is that you agree on what is acceptable”) [hereinafter GOTTMAN, *WHY MARRIAGES*].

333. JOHN M. GOTTMAN, *THE SEVEN PRINCIPLES FOR MAKING MARRIAGE WORK* 23 (1999) [hereinafter GOTTMAN, *SEVEN PRINCIPLES*].

334. *Id.* at 51.

335. See EDWARD O. WILSON, *ON HUMAN NATURE* 142 (1978) (“All that we can surmise of humankind’s genetic history argues for a more liberal sexual morality, in which sexual practices are to be regarded first as bonding devices and only second as means for procreation.”); see also PIERRE L. VAN DEN BERGHE, *HUMAN FAMILY SYSTEMS: AN EVOLUTIONARY VIEW* 44–46 (1979) (commenting on pair-bonding as the primary purpose of human sexuality).

336. See WILSON, *supra* note 335, at 141.

to foreplay and coition. This has little if anything to do with reproduction. It has everything to do with bonding. If insemination were the sole biological function of sex, it could be achieved far more economically in a few seconds of mounting and insertion. Indeed, the least social of mammals mate with scarcely more ceremony. The species that have evolved long-term bonds are also, by and large, the ones that rely on elaborate courtship rituals. It is consistent with this trend that most of the pleasures of human sex constitute primary reinforcers to facilitate bonding. Love and sex do indeed go together.³³⁷

If sex is, on a biological level, primarily about bonding and not procreation, there is no reason to expect it to be limited to heterosexual intercourse or, indeed, to heterosexual sex. “Natural” sex is sex that facilitates bonding, not sex that results in procreation. Wilson notes that “[t]he biological significance of sex has been misinterpreted by the theoreticians of Judaism and Christianity.”³³⁸ Contrary to the traditional and contemporary teaching of the Catholic Church, “natural” sex is *not* solely “the insemination of wives by husbands.”³³⁹ If certain forms of sexual activity were truly unnatural, i.e., “were written by natural selection,” these truly natural limits would “require little if any enforcement by religious or secular authorities.”³⁴⁰ He concludes that the Church’s “natural law” theory of sexuality—the notion “that immutable mandates are placed by God in human nature”—is therefore erroneous.³⁴¹

Wilson also observes that “[h]omosexuality is above all a form of bonding. It is consistent with the greater part of heterosexual behavior as a device that cements relationships.”³⁴² It is a phenomenon observed in nature: “Homosexual behavior is common in other animals, from insects to mammals, but finds its fullest expression as an alternative to heterosexuality in the most intelligent primates, including rhesus macaques, baboons, and chimpanzees.”³⁴³

In a recently published book on homosexuality among animals, biologist Bruce Bagemihl describes the widespread and quite varied patterns of homosexual “courtship, affection, sex, pair-bonding, and parenting” in the animal world.³⁴⁴

If sex is, on a biological level, primarily about bonding and not procreation, then marriage, a socially sanctioned and supported pair-bond, is about more than procreation. Family law should take into account the deep human need not to be alone, a need that exists regardless of

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 142.

341. *Id.* at 141.

342. *Id.* at 144.

343. *Id.* at 143.

344. BRUCE BAGEMIHLE, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY 12 (1999).

whether a couple procreates.³⁴⁵ In *Turner v. Safely*,³⁴⁶ the Supreme Court recognized (and constitutionally protected) the nonprocreative purposes of marriage, holding that the fundamental right to marry extends to prisoners even though inmates have no constitutional right to conjugal visits.³⁴⁷ After noting that the right to marry “is subject to substantial restrictions as a result of incarceration,”³⁴⁸ the Court noted that “[m]any important attributes of marriage remain.”³⁴⁹ In addition to consummation upon release of the inmate, the court listed three such attributes: (1) marriage is an “expression[] of emotional support and public commitment;”³⁵⁰ (2) marriage has spiritual significance to many people, and “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication;”³⁵¹ and (3) marriage is often “a precondition to government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).”³⁵² The Court concluded that “[t]hese incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.”³⁵³

Empirical studies have confirmed the importance of marriage as a source of emotional support in America today. These studies compare married and cohabiting couples using a number of measures important to well-being.³⁵⁴ The National Marriage Project at Rutgers, the State University of New Jersey, has recently published a review of the literature on the benefits of marriage relative to cohabitation.³⁵⁵ This report demonstrates that households in which the partners are married are happier and healthier (for children as well as adults)—in a number of ways—than those in households where partners cohabit.³⁵⁶ In addition, couples who

345. See E.J. GRAFF, WHAT IS MARRIAGE FOR: THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION 48 (1999) (“The unpaid economy of coupled life—which shores up our interdependence, so full of sacrifices and joys, so tremendously valuable in an isolating society like our own—*should* gain all marriage’s recognitions, in sickness and in health, even when those couples are the same sex.”) (emphasis in original).

346. 482 U.S. 78 (1987).

347. *See id.* at 99–100.

348. *Id.* at 95.

349. *Id.*

350. *Id.* at 95.

351. *Id.* at 96.

352. *Id.*

353. *Id.*

354. *See infra* notes 355–449 and accompanying text.

355. DAVID POPENO & BARBARA DAFOE WHITEHEAD, THE NATIONAL MARRIAGE PROJECT, SHOULD WE LIVE TOGETHER?: WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH (1999) [hereinafter NATIONAL MARRIAGE PROJECT REPORT].

356. *See id.* at 10; *see also* Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 486–96 (1995) (detailing the advantages of marriage over cohabitation in terms of healthy behavior, mortality, sexual satisfaction, wealth, labor force participation, career success, and the well-being of children).

cohabit are more likely, if they do marry, to divorce than couples who marry without cohabitation,³⁵⁷ although this correlation does not hold for engaged couples who cohabit while planning their wedding or for elderly couples who cannot marry for economic reasons.³⁵⁸ Indeed, if a person cohabits for an extended period of time or with a number of partners over time, that person, if ever married, is significantly more likely to divorce.³⁵⁹ Although some of the differences are doubtless linked to selection—those who select cohabitation over marriage are likely to differ in important ways from those who marry without cohabitation—scholars have included all sorts of variables to capture these differences and conclude that long-term cohabitation decreases the likelihood that a person will ever be in a marriage that does not end in divorce.³⁶⁰ The selection effect—and the evidence against it—will be discussed in greater detail below.³⁶¹

In describing this research, I begin with the ways in which married couples are better off than cohabiting couples. I then describe the higher break-up rates for cohabiting couples and those who marry after cohabiting. As noted, selection is a factor in these differences, but there is more occurring than selection differences, and I discuss this point next. Children, as well as adults, are disadvantaged by living in cohabiting rather than married households, and I discuss these problems before ending with a brief discussion of why cohabitation seems to be such a risky business.

With the exception of short-term cohabitation prior to marriage and perhaps also seniors who do not marry for economic reasons, “[c]ohabiting couples report lower levels of happiness, lower levels of sexual exclusivity and sexual satisfaction, and poorer relationships with their parents.”³⁶² Compared to the general population of unmarried

357. See NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 7–8.

358. See *id.* at 10.

359. See *id.*

360. See *id.*

361. See *infra* notes 377–80 and accompanying text.

362. NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 10; see also Robert H. Coombs, *Marital Status and Personal Well-Being: A Literature Review*, 40 FAM. REL. 97, 97 (1991) (concluding that “married people live longer and generally are more emotionally and physically healthy than the unmarried”); Allan V. Horwitz et al., *How the Negative and Positive Aspects of Partner Relationships Affect the Mental Health of Young Married People*, 39 J. HEALTH & SOC. BEHAV. 124, 124 (1997) (“The relationship between marriage and positive mental health is one of the most established findings in the stress literature.”); Arne Mastekaasa, *Marital Status and Subjective Well-Being: A Changing Relationship?*, 29 SOC. INDICATORS RES. 249, 249 (1993) (concluding that the relationship “between marital status and . . . well-being indicators” has not declined in the last ten to twenty years and noting some evidence that the “relative position of never married men” may have worsened). *But see* Allan V. Horwitz & Lelene Raskin White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 J. MARRIAGE & FAM. 505, 505 (1998) (finding, in a study of young adults sampled once at age eighteen to twenty-four and seven years later at age twenty-five to thirty-one, no significant difference between cohabitators and others, whether single or married, in terms of mental health once premarital levels of mental health and conventionality are factored into the analysis, although “cohabiting men report significantly more alcohol problems than both married and single men, and cohabiting women report more alcohol problems than married women”).

people, married couples are more productive and have higher levels of “physical and mental health, general happiness, and longevity,” but these advantages are “diluted for couples who are not married but merely cohabiting.”³⁶³ Indeed, cohabiting couples are three times as likely to be depressed as married couples.³⁶⁴ Even more disturbing, levels of physical and sexual abuse are higher among cohabiting couples;³⁶⁵ some studies suggest aggression levels may be twice as high for those who cohabit.³⁶⁶ Married couples also have more money.³⁶⁷ As with other differences, there is some selection effect³⁶⁸ here (i.e., poorer couples are less likely to marry), but the evidence also indicates that “men[,] when they marry, especially those who then go on to have children, tend to become more responsible and productive.”³⁶⁹ And families of origin are more likely to transfer assets to married couples than to cohabiting couples.³⁷⁰

Cohabitation relationships are unlikely to endure as such. Although “only about 45% of first marriages today are expected to break up over the course of a lifetime,” about half of cohabiting couples either marry or break up within two years; “after five years only about 10% of couples are still cohabiting.”³⁷¹ Approximately sixty percent of cohabiting couples eventually marry,³⁷² but their marriages tend to be more fragile than the marriages of those who have not cohabited.³⁷³ For example, “[a] 1992 study of 3,300 cases . . . based on the 1987 National Survey of Families and Households, found that in their marriages prior cohabitators ‘are estimated to have a hazard of dissolution that is about 46% higher than for noncohabitators.’”³⁷⁴ Serial cohabitation (cohabiting with more than one person over time) appears to be particularly dangerous.³⁷⁵

As noted, selection is a factor in these differences. Those who cohabit are different from those who marry—cohabitators are likely to be more unconventional, less religious, and more willing than others to split up when unhappy.³⁷⁶ But researchers have tried to control for differences between cohabitators and those who marry without prolonged cohabitation, and “a negative effect of cohabitation on later marriage stability still remains.”³⁷⁷ Differences between married and cohabiting couples have

363. NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 10.

364. *See id.*

365. *See id.*

366. *See id.* at 11.

367. *See id.* at 13.

368. *See id.*

369. *Id.*

370. *See id.*

371. *Id.* at 10.

372. *See id.*

373. *See id.* at 7–8.

374. *Id.* at 8 (quoting Alfred DeMaris & K. Vaninadha Rao, *Premarital Cohabitation and Subsequent Marital Stability in the United States: A Reassessment*, 54 J. MARRIAGE & FAM. 178 (1992)).

375. *Id.* at 9.

376. *See id.* at 8.

377. *Id.*

been considered in trying to explain differences in abuse levels and depression, but “the most careful statistical probing suggests that selection is not the only factor at work; the intrinsic nature of the cohabiting relationship also plays a role.”³⁷⁸ A 1996 study found that the link between psychological well-being and marriage is not explained by the selection hypothesis but by the value of having “a kin confidant” and higher income.³⁷⁹

Similarly, a 1991 review of the literature on the viability of the selection hypothesis also concludes that there exists “little support for the selection hypothesis.”³⁸⁰ Instead, this review finds that “the evidence is consistent with the protection/support hypothesis that a marital partner who provides companionship and psychic aid buffers individuals against physical and emotional pathology.”³⁸¹

Perhaps the most likely self-selection explanation is religion; the religious are likely to marry rather than cohabit and are also less likely to engage in serial monogamy (i.e., divorce and remarriage).³⁸² A study of the interaction of religion with decisions to cohabit or marry concludes that, indeed, the religious are less likely to cohabit.³⁸³ But this study also finds that “cohabitation leads toward lower levels of religious involvement while marriage tends to increase religious participation.”³⁸⁴

Similarly, a longitudinal study of male medical students in 1982 indicates that self-selection is not the only explanation for the marriage bonus; instead, the bonus is linked to having a supportive partner.³⁸⁵ At the beginning of medical school, there were no differences between the married and unmarried in terms of stress.³⁸⁶ But as the year continued and pressure increased, the unmarried were under greater stress than the married and more likely to drop out or consider doing so.³⁸⁷ When the unmarried married, however, their levels of stress fell, and their sense of well-being increased.³⁸⁸

378. *Id.* at 11.

379. Nadine F. Marks, *Flying Solo at Midlife: Gender, Marital Status, and Psychological Well Being*, 58 J. MARRIAGE & FAM. 917, 917, 926–27, 930 (1996) (concluding that “selection does not account for marital status differences in well-being”).

380. Coombs, *supra* note 362, at 97.

381. *Id.*

382. See Arland Thornton et al., *Reciprocal Effects of Religiosity, Cohabitation, and Marriage*, 98 AM. J. SOC. 628, 647–48 (1992).

383. *See id.*

384. *Id.* at 649.

385. See Robert H. Coombs & Fawzy I. Fawzy, *The Effect of Marital Status on Stress in Medical School*, 139 AM. J. PSYCHIATRY 1490, 1492 (1982).

386. *See id.*

387. *See id.*

388. *See id.*

A broader (not limited to male medical students) and more recent 1998 longitudinal study³⁸⁹ also undermines the self-selection explanation. This study used “recent longitudinal national survey data . . . to examine the effects of marital status continuity and marital status transitions (change) on psychological well-being” of a stable population.³⁹⁰ This study also supports “the continuing importance of marital status for well-being.”³⁹¹ The authors found that remaining single for five years was more likely to be associated with a “significant negative change in psychological well-being” than remaining married for five years.³⁹²

The relationship between marital well-being and gender is complex. Marriage clearly benefits women as well as men in terms of physical health and longevity.³⁹³ In the past, some researchers have concluded that marriage makes men happier and women more depressed.³⁹⁴ A recent study, however, concludes that both women and men benefit from marriage,³⁹⁵ although men benefit more than women on the depression-happiness dimension.³⁹⁶ For example, the authors of this 1996 study note that in general, women are more likely to be depressed than men,³⁹⁷ and their data indicates that this is true for unmarried as well as married women³⁹⁸ (although other studies indicate that single men are more depressed than single women).³⁹⁹ The authors report that “married men have greater well-being than married women, but married women seem to be better off than women who are not married”⁴⁰⁰ and conclude that “American marriage, in spite of its many limitations, is beneficial to mental health for both men and women.”⁴⁰¹

389. See Nadine F. Marks & James David Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults: Longitudinal Effects on Psychological Well-Being*, 19 J. FAM. ISSUES 652 (1998).

390. *Id.* at 654.

391. *Id.* at 675.

392. *Id.* at 676.

393. E.g., Coombs, *supra* note 362, at 98 (citing numerous studies).

394. E.g., JESSE BERNARD, *THE FUTURE OF MARRIAGE* 26–27 (1982).

395. E.g., Xiaoqin Wu & Alfred DeMaris, *Gender and Marital Status Differences in Depression: The Effects of Chronic Strains*, 34 SEX ROLES 299 (1996).

396. *See id.* at 300.

397. *See id.* at 299.

398. *See id.* at 316.

399. *See id.* at 300.

400. *Id.* at 316–17; *see also* David H. Demo & Alan C. Acock, *Singlehood, Marriage, and Remarriage: The Effects of Family Structure and Family Relationships on Mothers' Well-Being*, 17 J. FAM. ISSUES 388, 389 (1996) (“Studies examining marital status yield consistent evidence that, compared with married women, single women generally are not as happy and experience greater stress, anxiety, depression, and physical health problems.”). The Demo and Acock study compares single and married mothers and finds that “single mothers have lower well-being and tend to be more depressed than married mothers.” *Id.* at 403. Another study indicates that whether mothers are happy depends on whether they are suited to their current role as either stay-at-home mothers or working mothers. *See* Helen Pattison & Karen Moyse, *The Effects of Suitability for Current Role on the Psychological Well-Being of Employed and Non-Employed Mothers*, 13 J. REPROD. & INFANT PSYCHOL. 229, 233 (1995).

401. Wu & DeMaris, *supra* note 395, at 317. Some commentators argue for the abolition of marriage. E.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–36 (1995) (stating that the core family unit would be the

Some researchers have argued that marriage does not do more for men than women, despite the evidence,⁴⁰² because men are more likely to react to stress with substance abuse and behavior disorders, while women are more likely to become depressed.⁴⁰³ But married women are under greater stress than married men because of their multiple and often inconsistent roles, and when stress is factored in, differences in the level of chronic strains between married women and men explain half of the happiness (or depression) gap.⁴⁰⁴

Another factor contributing to the gender gap in the marriage bonus may be that men are more likely to have a supportive spouse. “[M]arriage is more advantageous for men than for women because wives are more likely than husbands to provide emotional support.”⁴⁰⁵ Men are “less nurturing and more demanding” spouses than women.⁴⁰⁶

Importantly, women in good marital relationships are less likely to be depressed than women in poor relationships (there is less of a connection between relationship quality and depression for married men).⁴⁰⁷ The connection between relationship quality and depression for women may be explained partly by women’s greater tendency, relative to men,

mother-child dyad; the state, rather than the private family, should be responsible for dependency); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* 149–51 (1998) (arguing that the abolition of marriage for all women should serve the needs of lesbians better than the legalization of same-sex marriage); Diane Post, *Why Marriage Should Be Abolished*, 18 *WOMEN’S RTS. L. REP.* 283 (1997) (arguing that marriage is inherently patriarchal). Some pro-gay commentators have argued that lesbian and gay activists should not seek the extension of marriage to lesbian and gay couples. *E.g.*, Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *L. & SEXUALITY* 31, 59–61 (1991) (discussing many problems with current rules regulating marriage and resolving marital disputes and suggesting that lesbians and gay men are better off outside this system because they would not be able to pick and choose within it); Steven K. Homer, *Against Marriage*, 29 *HARV. C.R.-C.L. L. REV.* 505, 530 (1994) (arguing that legal recognition of same-sex marriages would not create social approval); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage.”* 79 *VA. L. REV.* 1535, 1549 (1993) (similar); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L. REV.* 511, 540 (1990) (recognizing that same-sex marriage would create acceptable (married) and unacceptable (unmarried) lesbians and limit the “multiplicity of relationships and the complexities of coupling in the lesbian experience”); Paula L. Ettlbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK*, Fall 1989, at 9. Ettlbrick argues that gay men and lesbians should not seek marriage rights because marriage has traditionally been an oppressive institution for women and would not be radically changed by extension to lesbians and gay men. *See id.* Further, such an extension would help most those who are already best off. *See id.* None of these commentators consider the social science literature indicating that married people, women as well as men, are happier, healthier, and better off than cohabiting or single people. For articles supporting the extension of marriage to gay couples, see *infra* note 474.

402. *E.g.*, Carol S. Aneshensel et al., *Social Structure, Stress, and Mental Health: Competing Conceptual and Analytic Models*, 56 *AM. SOC. REV.* 166 (1991).

403. *See id.* at 168.

404. *See* Wu & DeMaris, *supra* note 395, at 315–16.

405. Coombs, *supra* note 362, at 98; *see also* Catherine E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 *J. MARRIAGE & FAM.* 129, 130 (1995) (finding that differences in depression levels among the married, the cohabiting, the single, and the divorced can be explained in terms of social attachment measured by whether one has a kin confidant).

406. Coombs, *supra* note 362, at 98.

407. *See* Angela C. Edwards et al., *Gender Differences in Marital Support Following a Shared Life Event*, 46 *SOC. SCI. MED.* 1077, 1080–81 (1998).

to link self-esteem to the quality of their relationships.⁴⁰⁸ It also may be connected to women's performing the majority of the domestic labor in most American families and their perceptions that domestic work is inequitably distributed between themselves and their husbands.⁴⁰⁹ In general, marital inequality is associated with unhappiness for married women; working tends to increase women's power in marriage, although having children (even if also working) tends to decrease women's power.⁴¹⁰

A seventeen-nation comparative study of marital status and happiness was published in 1998.⁴¹¹ The study analyzed data from national surveys of seventeen industrialized nations⁴¹²—the only countries for which data was available—and compared married people and cohabitants with controls for socioeconomic variables, church attendance, and national character.⁴¹³ The study concluded “that the relationship between marital status and happiness holds in sixteen of the seventeen industrialized nations” (all but Northern Ireland).⁴¹⁴ Moreover, “the strength of the association does not vary significantly in thirteen of these sixteen nations.”⁴¹⁵ And the marriage bonus was equally strong for women and men.⁴¹⁶ The authors found that after controlling for “socio-demographic variables and national binary variables, married persons report[ed] significantly more happiness than single persons.”⁴¹⁷ Happiness varied most with wealth, then with health, and, next with marital status.⁴¹⁸ Cohabitants were happier than single people, yet married people were significantly happier than cohabitants.⁴¹⁹ Indeed, the authors

408. Laurie N. Culp & Steven R.H. Beach, *Marriage and Depressive Symptoms: The Role and Bases of Self-Esteem Differ by Gender*, 22 *PSYCHOL. WOMEN Q.* 647, 647 (1998).

409. See Jennifer Glass & Tesushi Fujimoto, *Housework, Paid Work, and Depression Among Husbands and Wives*, 35 *J. HEALTH & SOC. BEHAV.* 179, 179 (1994) (finding that “time spent in housework is universally [for women as well as men] associated with increased depression, no matter what other role constellations exist[.]” that perceptions of inequity are also related to depression; and that “husbands are strongly affected by perceived equity in the performance of paid work, while wives are strongly affected by perceived equity in the performance of housework”).

410. See JANICE M. STEIL, *MARITAL EQUALITY: ITS RELATIONSHIP TO THE WELL-BEING OF HUSBANDS AND WIVES* 27–42 (1997).

411. See Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. MARRIAGE & FAM.* 527 (1998).

412. The countries surveyed were Australia, Belgium, Britain, Canada, Denmark, France, Germany, Iceland, Ireland, Italy, Japan, Netherlands, Northern Ireland, Norway, Spain, Sweden, and the United States. See *id.* at 534.

413. See *id.*

414. *Id.* at 527 (noting the exception of Northern Ireland).

415. *Id.* at 535. The three countries with a significant difference in the correlation of marital status to happiness relative to that of the United States were Denmark, Iceland, and Spain. See *id.* at 533–34.

416. See *id.* at 535.

417. *Id.* at 531.

418. See *id.*

419. See *id.*

found that “[m]arriage was 3.4 times more closely associated with the variance in happiness than was cohabitation.”⁴²⁰

Possessing an exit option from marriage is also conducive to human well-being, the study found.⁴²¹ After controlling for other variables, the authors concluded that “living in a nation with a low rate of divorce was associated with lower levels of reported happiness among the married” for both women and men.⁴²² Consistent with this finding, a 1995 study from the United States concluded that being in a bad relationship was worse than being single.⁴²³

Households in which the adults are married are better for children as well as adults. Three-quarters of children born to cohabiting parents will see their parents break up prior to their sixteenth birthdays, whereas only about one-third of children born to married parents face such odds.⁴²⁴ Children living with a cohabiting mother had, according to one study, “significantly more behavior problems and lower academic performance than children from intact families.”⁴²⁵ We now know, despite initial optimism about the benefits of divorce for all members of unhappy families, that divorce places many children at risk along a number of dimensions.⁴²⁶

Part of the problem for children living with a cohabiting mother is that the man they live with is a stepfather, and we know that children are at greater risk in stepparent families, whether married or not.⁴²⁷ Although we do not have data from the United States to compare child abuse in stepfamily households where the adults are married with households in which the adults cohabit, what we have suggests that problems are more likely when adults cohabit.⁴²⁸ We know, for example, that child abuse is higher in households in which mothers live with boyfriends (cohabiting and dating) and stepfathers (married to the mother and cohabiting) than in households in which parents live with their own children.⁴²⁹ One study from Great Britain does compare child abuse in households of married and unmarried parents and finds that “children living with cohabiting but unmarried biological parents are 20 times more likely to be

420. *Id.* at 534.

421. *See id.* at 532.

422. *Id.* at 532.

423. *See* Ross, *supra* note 405, at 137.

424. *See* NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 11–12.

425. *Id.* at 12.

426. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 10–15* (1989) (describing, *inter alia*, the negative effects of some divorces on children).

427. *E.g.*, Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 156–57 n.119 (1991).

428. *E.g.*, Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 541 (1992) (showing that “although mothers' boyfriends perform relatively little child care, they are responsible for substantially more child abuse than other nonparental caregivers”).

429. *See* NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 12.

subject to child abuse” than those living with married biological parents.⁴³⁰ Moreover, children living with their mother and “a cohabiting boyfriend who is not the father face an increased risk of 33 times.”⁴³¹ In comparison, the rate of abuse is fourteen times higher for a child living with only a biological mother than a child living with married biological parents.⁴³² Income levels explain some of these differences, because households in which adults cohabit are poorer than households in which adults are married.⁴³³ But, as noted earlier, marriage appears to be a “wealth enhancing institution” independent of selection factors.⁴³⁴

Cohabitation is widely accepted today. A survey of high school seniors reveals that sixty percent believe cohabitation is a good idea prior to marriage to ensure compatibility.⁴³⁵ Yet in the empirical studies, “no positive contribution of cohabitation to marriage has ever been found.”⁴³⁶ Instead, researchers have found the many negative correlations detailed above.⁴³⁷ Why? Researchers suggest that “while marriages are held together largely by a strong ethic of commitment, cohabiting relationships by their very nature tend to undercut this ethic.”⁴³⁸ Studies indicate that cohabitants “tend not to be as committed as married couples in their dedication to the continuation of the relationship and reluctance to terminate it, and they are more oriented toward their own personal autonomy.”⁴³⁹ These researchers suggest “that once this low-commitment, high-autonomy pattern of relating is learned, it becomes hard to unlearn.”⁴⁴⁰ They note that women see cohabitation “as a step toward eventual marriage, while men regard it more as a sexual opportunity without the ties of long-term commitment.”⁴⁴¹ It seems likely that this lack of commitment, particularly on the part of men, is related to the disadvantages cohabitation poses for all members of households and particularly women and children.

Linda Waite, a demographer at the University of Chicago, suggests that the benefits of marriage are linked to three factors: (1) the long-term commitment implicit in marriage encourages emotional investment in the relationship and specialization of tasks; (2) couples form an insurance pool of two in the risky business of life; and (3) married couples have stronger ties to the larger community around them, including their

430. *Id.*

431. *Id.*

432. *See id.* at 12–13.

433. *See id.*

434. *Id.* at 13; *see also supra* note 367 and accompanying text.

435. *See* NATIONAL MARRIAGE PROJECT REPORT, *supra* note 355, at 6.

436. *Id.* at 8.

437. *See id.*

438. *Id.*

439. *Id.* at 8.

440. *Id.*

441. *Id.* at 20–21.

families of origin, and these ties provide social, emotional, and economic support.⁴⁴²

Some might object that happiness data is a slim reed for social policy. And it is certainly true that happiness is not always the only consideration. One might become happy with a lot in life that is unjust, unfair or harmful, particularly if one is doing what one is supposed to be doing in one's society. But the marriage-and-happiness studies do not, in fact, support the proposition that people report themselves as happier when they are doing what they are expected to do.⁴⁴³ Consider the evidence from studies in the United States that, although fatherhood has no negative effects on husbands' well-being (and in some studies has a positive effect for married, employed fathers), "parenthood is often related to poorer well-being for mothers."⁴⁴⁴ Yet women fulfill more of society's expectations by having children than men do.⁴⁴⁵ Similarly, although society expects mothers to find their greatest happiness and fulfillment in caring for their children, studies have shown that the more husbands are involved in childcare, the better off their wives are.⁴⁴⁶ Moreover, the literature in the United States "consistently shows that wives are less satisfied with their marriages than their husbands" and are "twice as likely as husbands to be depressed."⁴⁴⁷ Yet marriage, like children, is a much greater part of what society expects of a woman than of what it expects of a man.

Recall the comparative study of seventeen industrialized Western nations, which reported that "living in a nation with a low rate of divorce was associated with lower levels of reported happiness" for the married—both women and men.⁴⁴⁸ This result is clearly inconsistent with the claim that the marriage bonus is simply the result of doing what is expected in one's society. Something more is happening. People actually are happier or less happy depending on whether they have intimate supportive relationships, and such relationships are more likely to be found among the married (particularly in societies where divorce is available) than the cohabiting.

The good inherent in marriage in Western culture seems associated with several aspects of marriage: its tendency to increase health, wealth, and social connections to family and other groups; and its ability to provide emotional support and intimacy. Two can weather the risky business of life easier than one. Despite high rates of divorce and a great

442. See Linda J. Waite, *Social Science Finds: "Marriage Matters"*, THE RESPONSIVE COMMUNITY, Summer 1996, at 26, 33.

443. See generally STEIL, *supra* note 410.

444. *Id.* at 16.

445. See *id.*

446. See *id.* at xviii.

447. *Id.* at 87.

448. Stack & Eshleman, *supra* note 411, at 352.

deal of cynicism about marriage, marriage (with the option of divorce) is conducive to human happiness.

For human beings, happiness is socially constructed in many senses, but it is also reality—the quality of one’s life as lived and felt. We would be foolish to ignore the evidence that in our society, as in similar nations (other than Northern Ireland)—the only nations for which we have data—marriage (with the option of divorce) appears to be more conducive to happiness for women and men than the alternatives of living alone, living with roommates, or cohabiting.⁴⁴⁹ I turn now to consider the relative merits of marriage models based on pre-Christian cultures, the Canon law tradition, and human well-being in intimate relationships.

IV. MODELS OF REGULATION OF SEX AND MARRIAGE

A. *Ancient Pre-Christian Model*

In the ancient, non-Christian cultures that most influenced the West, marriage was an alliance between families in which the wife’s family was assured that she would have the status of wife (rather than concubine), protections from dismissal (such as the obligation to return the dowry), and that her children would be the husband’s heirs. The man and his family, in return, were assured that her children would be his.⁴⁵⁰ Marriage identified genetic progeny entitled to inherit from their father.⁴⁵¹ The need to identify genetic progeny is felt, of course, only by men in relationships with women. Recall that in ancient Rome, women over fifty could not marry, though they could be concubines.⁴⁵² This is the logically consistent result of viewing marriage as a way to identify men’s heirs.

This model is inadequate today. Marriage is much more than a way for a man to ensure he leaves his property to his children or a way for a woman’s family to ensure that she has the status of wife rather than concubine and that her children are their father’s legitimate heirs. Indeed, the legitimacy/illegitimacy distinction is regarded as suspect. It no longer makes sense that only the legitimate child should be able to inherit when the father dies without a will; today children are permitted to inherit from fathers when paternity has been established as required under the relevant state law.⁴⁵³ In fact, many distinctions between legitimate and

449. This is not to say that in some other culture, there might not be another form of intimate relationship equally or more conducive to human happiness. But in our culture, at this time, marriage (with the option of divorce) seems better for people than cohabitation and the other alternatives just listed.

450. See *supra* note 168 and accompanying text.

451. See *id.*

452. See *supra* note 140 and accompanying text.

453. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 115–16 (6th ed. 2000).

illegitimate children have disappeared from law in recent decades.⁴⁵⁴ Further, marriage is not regarded as futile when procreation is impossible. Women over fifty are—and should be—permitted to marry.

B. Canon Law Model

Canon law also saw procreation as the essence of marriage; marriage was the only place for licit sexuality, which, in turn, was justified by procreation.⁴⁵⁵ Hence, legitimate sex was limited to uncontracepted heterosexual intercourse in marriage. This, too, is an inadequate model today. It would be inaccurate and inappropriate to claim that marriage is the only place for licit sex in our culture or that only uncontracepted intercourse is licit. Moreover, focusing so much ethical concern on sexual sin—by limiting licit sex to procreative sex in marriage—has another problem. It distracts human beings from serious evils. I discuss each of these three points briefly.

First, the medieval Canon law view—that the only legitimate sex is procreative marital sex—is no longer accurate because we believe reasonable people should be free to engage in sex for nonreproductive purposes. Indeed, both the married and the unmarried have constitutional rights to engage in contracepted sex.⁴⁵⁶

Second, the medieval view is inappropriate given our contemporary commitment to equality for women. Canonical regulation of sexuality and marriage was based on androcentric, misogynistic, and repressive beliefs. It was androcentric because it viewed the only licit sex as uncontracepted vaginal intercourse, which requires only a male orgasm. Orgasm for a woman is unusual if that is all that happens.⁴⁵⁷ It is misogynistic and repressive because Canon law saw married women as reproductive vessels obligated to produce children. Women could not refuse sex on demand; they were bound by the marital debt. Sex could not be contracepted, so a woman had no control over her reproductive life, which often meant she had little control over any aspect of her life. Although this may not sound like an American vision of marriage, it is the vision we inherited.

Finally, an obsessive fixation on sex distracts human beings from serious ethical issues. For example, after his conversion to Christianity and celibacy, Augustine obsessed in his writings about his prior (sinful) sexual life.⁴⁵⁸ Yet he never saw the summary dismissal of two concubines as

454. *See id.*

455. *See supra* notes 268–94 and accompanying text.

456. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that unmarried couples also have such a right); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that married couples have a constitutional right to access to contraceptives).

457. *See MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 178–81 (1994) (describing female orgasm).

458. *See BRUNDAGE, supra* note 57, at 89–90.

in any way problematic, even though he dismissed the first after they had been together fifteen years and had a son together.⁴⁵⁹ When her presence became inconvenient because he was trying to negotiate a marriage, Augustine sent her home to Africa—and kept their son.⁴⁶⁰ And recall that Aquinas carefully ranked numerous sexual sins in order of severity but did not regard rape as possible in marriage.⁴⁶¹

I suggest that similar problems arise today from an obsession with sexual sin. More specifically, the obsession with homosexual sex blinds us to other ethical issues, such as the structure of heterosexual marriage in many households today, given the unfair division of caretaking and household labor, the relative unhappiness of women in marriage,⁴⁶² and the economic vulnerability of women associated with divorce.⁴⁶³

Perhaps a heterosexual requirement for marriage is appropriate because of the importance of marriage in forming a healthy and stable environment in which to raise children. But such an environment can be created using a model of marriage based on the need to foster human well-being and happiness, and I discuss this point in greater detail below.

C. *Human Well-Being and Happiness*

I suggest, with Wilson, that we regard “natural” sex as that which facilitates bonding, not that which results in procreation. Today, I believe we should be able to see that the primary good of marriage is the pair-bond: two are better than one. If, on a biological level, sex is primarily about bonding and not procreation, then marriage, a socially sanctioned and supported pair-bond, is about more than procreation. Family law should take into account this deep human need *not to be alone*, a need that exists regardless of whether a couple desires to or can procreate. This approach is consistent with that of the Supreme Court in

459. *See id.* at 99–100.

460. *See id.*

461. *See supra* note 276 and accompanying text.

462. *See supra* note 447 and accompanying text.

463. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 649–53 (1998). The state should continue to regulate marriage, rather than leaving the arena to contract as courts are increasingly doing today, because of the many problems with contract as a solution in this setting. It is most unlikely that contract will provide adequately for dependents and their caretakers. Recall, for example, that a woman’s power in marriage decreases when children are born even if she continues working. *See supra* note 410 and accompanying text. And given current levels of child support, it is no answer to this problem to assert that children’s needs are met by the child support system without any need for contract. Despite the ability to contract for better rights for caretakers at divorce than those available at common law, such contracts are never seen. Even between adults without children, it is far from clear that a negotiated contractual relationship will afford people the advantages of marriage, which has been understood as a certain kind of deep commitment. On some of the problems with a contract solution, see Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 *DENV. U. L. REV.* 1169 (1996). On the importance of adequate support of dependents’ caretakers for women’s equality, see EVA FEDER KITTAI, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999).

Turner v. Safley, discussed above,⁴⁶⁴ the case in which the Court recognized (and constitutionally protected) the nonprocreative purposes of marriage, holding that the fundamental right to marry extends to prisoners even though inmates have no constitutional right to conjugal visits.⁴⁶⁵ The Court listed three important attributes of marriage other than procreative sex: “emotional support and public commitment;”⁴⁶⁶ spiritual significance—“an exercise of religious faith;”⁴⁶⁷ and “a precondition to government benefits.”⁴⁶⁸

Two need not, of course, marry. They can cohabit or live as roommates. But it is when two are married that the pair-bond is strongest and potentially most beneficial, to adults as well as to children. Compared to single individuals (whether or not they live with other adults)⁴⁶⁹ and cohabiting couples, married couples in the United States are happier, healthier, have more assets, and enjoy closer connections to their communities and families of origin.⁴⁷⁰ Moreover, married relationships are more enduring than cohabiting relationships, particularly if the married individuals did not previously cohabit with several people or for a prolonged period.⁴⁷¹ Marriage is also good for children. Children face higher rates of abuse and family instability in households in which the partners are not married and are likely to be poorer.⁴⁷²

Marriage does more, however, for men than for women.⁴⁷³ In light of this data, we cannot regard the current institution as acceptable in its entirety. We must change marriage to make it more responsive to women’s needs.

V. APPLYING A MODEL OF MARRIAGE BASED ON HUMAN WELL-BEING TO SAME-SEX RELATIONSHIPS

The need served today by marriage—the forming of committed pair-bonds for the good of adults and children—also arises in gay and lesbian households.⁴⁷⁴ Gay and lesbian people, like heterosexual people,

464. See *supra* notes 346–53 and accompanying text.

465. See *Turner v. Safley*, 482 U.S. 78, 99–100 (1987).

466. *Id.* at 95.

467. *Id.* at 96.

468. *Id.*

469. See Catherine E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129, 130 (1995) (noting that “unmarried people who live alone are no more distressed than those who live with other adults”).

470. See *supra* notes 356–77 and accompanying text.

471. See *id.*

472. See *supra* notes 424–34 and accompanying text.

473. See *supra* notes 394–410 and accompanying text; see also STEIL, *supra* note 410, at 43–70 (describing evidence of the ways in which marriage is more beneficial to men than to women and the links between inequality and unhappiness, particularly for women).

474. For a similar argument that lesbian and gay couples should be able to marry because of the value of intimate relationships, see Cain, *supra* note 330. For other lesbian and gay arguments in favor of seeking the right to marry (in contrast to the lesbian and gay arguments against the extension of marriage, some of which are described *supra* note 401), see WILLIAM N. ESKRIDGE, JR., THE CASE

need marriage for all the nonsexual reasons the *Turner v. Safley* Court listed: emotional commitment, religious faith, and material benefits.⁴⁷⁵ In addition, children living in gay and lesbian households would be better off were their parents able to marry.⁴⁷⁶

Marriage would, I believe, be more stable in a society that supported same-sex marriages. In such a society, people would be more likely to form pair-bonds that work; they would be under less pressure to enter heterosexual marriage regardless of their preferences. I have five siblings, including a gay brother. Between my brother and me, there are three marital break-ups, one (his) with two small children. Part of the instability of heterosexual marriages (although likely a small part) is attributable to divorce associated with unhappiness with heterosexuality. This instability is not good for adults or children.

The option to form a committed pair-bond with a partner of the same sex is important for a number of reasons. For people with a strong preference for sexual partners of the same sex, this relationship might present the only possibility for a stable pair-bond. For those flexible in their choices of sexual partners, the option of a same-sex marriage may be important for other reasons. For example, same-sex pair-bonds are far more fulfilling emotionally for some people, and, therefore, likely to be more stable. In addition, evidence suggests that women tend to have a more fluid sexual orientation than men;⁴⁷⁷ thus nonheterosexual options for women are particularly important. Women often have difficulty finding a man emotionally responsive enough to form a strong pair-bond; a relationship with another woman can be emotionally more rewarding. Furthermore, as women age, the odds of heterosexual marriage diminish.⁴⁷⁸ Forming a relationship with another woman may, therefore, become an increasingly important option.

Finally, and most importantly, heterosexual marriage does not offer women what it offers men—a relationship in which they are as emotion-

FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 51–85 (1996); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage”*, 66 FORDHAM L. REV. 1699 (1998); Samuel A. Marcossan, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their “Second Line of Defense”*, 35 U. LOUISVILLE J. FAM. L. 721 (1997); Samuel A. Marcossan, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217 (1998); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the In-tracomunity Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994); Jennifer Wriggins, *Maine’s “Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages”: Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345 (1998); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9. For constitutional arguments that gay and lesbian couples should be able to marry, see *supra* note 15.

475. See *supra* notes 350–52 and accompanying text.

476. See *supra* notes 424–41 and accompanying text.

477. See Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 207–12 (1998).

478. See *id.*

ally healthy and happy and as economically secure as married men. Obviously, we need to work at lessening the gender gap in the marriage bonus and to strengthen the postdivorce economic well-being of children's caretakers (mostly mothers). But the option of a lesbian relationship, if available and socially respected, might also improve marriage for women who have a fluid sexuality. There are, I believe, two major reasons for women's unhappiness in heterosexual marriage: the emotional remoteness of many husbands,⁴⁷⁹ and the persistent inequities in the distribution of power and responsibility for caretaking and domestic labor.⁴⁸⁰ Lesbian relationships offer benefits along both of these dimensions. Because both partners are women, both are more likely to give as well as receive emotional support than heterosexual partners. Further, childcare and domestic work are more equitably shared in lesbian relationships.⁴⁸¹

Living with married partners is good for children as well as adults. The data we have cannot, of course, compare children of married and unmarried same-sex partners because same-sex partners cannot marry. But everything we do know suggests that, in general, children would be better off were lesbians and gay men able to marry.⁴⁸²

In thinking about whether gay and lesbian marriage would be good for children, it is important to remember that many children already live in lesbian and gay households. According to one recent review of the data on lesbian and gay households, thirty-two percent of lesbians (compared to thirty-six percent of heterosexual women) have children under eighteen at home.⁴⁸³ And fifteen percent of gay men (compared to twenty-eight percent of heterosexual men) have children at home.⁴⁸⁴ Thus, lesbians are nearly as likely as other women to be in households with children, and gay men are more than half as likely as heterosexual men to live in such households. For children living in these single-parent or cohabiting households, the data suggests that they would be better off if the adults with whom they are living could marry.

Common sense also indicates that children living in gay and lesbian households would be better off were their parent(s) able to marry. Mar-

479. See *supra* notes 405–06 and accompanying text.

480. See GOTTMAN, SEVEN PRINCIPLES, *supra* note 333, at 99–109 (stating that in happy marriages, husbands share power with wives); GOTTMAN, WHY MARRIAGES, *supra* note 332, at 149–57 (stating that in good marriages, men do not withdraw emotionally, and housework is equitably divided); ROBERTA S. SIGIL, AMBITION & ACCOMMODATION: HOW WOMEN VIEW GENDER RELATIONS 143, 167 (1996) (describing working wives' unhappiness with the current division of caretaking and domestic work and husbands' indifference to the problem); Glass & Fujimoto, *supra* note 409, at 179.

481. See Becker, *supra* note 477, at 205–06.

482. For a contrary view, see Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833. For a critique of Wardle's article, see Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253.

483. See M.V. LEE BADGETT, INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS 18 (1998).

484. See *id.*

riages are more stable than cohabitation relationships, and stability is good for children. Marriages are also likely to be happier relationships, and living with adults who are happy is good for children. A child living with a married parent (or parents) can easily be adopted, creating a legal link to both parents and ensuring that the child will continue to be able to live with the survivor should the other die. A child living with a married parent (or parents) is likely to be in a household with stronger ties to the community and the parents' families of origin, and these support networks are good for children as well as adults. A child living with a parent (or parents) who are lesbian or gay is less likely to be teased or suffer bias because of the parents' status if the parent(s) can marry and are well integrated into their communities and families of origin. A child may have better health insurance, health care, and healthier parents if the adults the child lives with are married, and the child is legally recognized as the child of each.

What evidence we have, however, suggests that no conflict exists. One common concern is that homosexual people are likely to prey on children as sexual partners.⁴⁸⁵ Although this fear is primarily directed at gay men, it is occasionally directed at lesbians. Reliable data on child abuse is notoriously difficult to obtain because of problems with memory and under reporting. What data we do have, however, suggests that heterosexual men are overwhelmingly responsible for child abuse.⁴⁸⁶ Most child abuse involves adult male abuse of a young female.⁴⁸⁷ Gay men appear to be no more likely than heterosexual men to abuse children.⁴⁸⁸

485. See GEORGE GRANT & MARK A. HORNE, *LEGISLATING IMMORALITY: THE HOMOSEXUAL MOVEMENT COMES OUT OF THE CLOSET* 38–43 (1993); Colloquium, *The Homosexual Movement*, 41 *FIRST THINGS* 15, 19 (Mar. 1994) (advocating discrimination against lesbians and gay men in education programs when “the intent is to prevent predatory behavior”).

486. See Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 *DUKE J. GENDER L. & POL'Y* 207, 216–17 nn.55–56 (1995) (citing Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *L. & SEXUALITY* 133, 156 (1991) (researching adult sexual orientation and child molestation and finding that gay men are not more likely than heterosexual men to molest children) and CRIMINAL JUSTICE CTR., SAM HOUSTON STATE UNIV., *RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67TH SESSION OF THE TEXAS LEGISLATURE* 22 (1980) (showing that most sex crimes against children are committed by heterosexual, not homosexual, adults)); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 *CHILD DEV.* 1025, 1034 (1992).

487. See CHILDREN'S DIV., AM. HUMANE ASS'N, *PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS* 216–17 (Vincent De Francis ed., 1969) (stating that ten out of eleven victims are female); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *PEDIATRICS* 41, 42 (1994) (stating that 81.5% of victims were female).

488. See A. Nicholas Groth & H.J. Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 *ARCHIVES OF SEXUAL BEHAV.* 175–81 (1978); A. Nicholas Groth & Ann W. Burgess, *Male Rape: Offenders and Victims*, 137 *AM. J. PSYCHIATRY* 806, 806–07 (1980) (finding that most of the male offenders in the study had had consensual sexual relationships with women); Jenny et al., *supra* note 487, at 42 (stating that, of 269 incidents of child abuse, 18.5% of victims were male but only one abuser was gay (2%); 81.5% of victims were female and 96.4% of their abusers were heterosexual males, none were gay); Edward P. Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 *CHILD WELFARE* 127, 131 (1979) (finding that 92% of reported sexual offenses are committed by a heterosexual); Mary J. Spencer & Patricia Dunklee, *Sexual Abuse of Boys*, 78

For example, a study of 269 cases of suspected child sexual abuse at Denver's Children's Hospital found that most of the victims (81.5%) were female, and 96.4% of their abusers were heterosexual males (none were gay men).⁴⁸⁹ In fact, the most dangerous group was heterosexual relatives of the abused child⁴⁹⁰ and heterosexual partners of close relatives of the child.⁴⁹¹ The same study found that 18.5% of victims were male but only one abuser (2%) was gay.⁴⁹² There is similarly no evidence suggesting that lesbians pose any special danger to children.⁴⁹³ Of the 219 incidents of female child abuse, one was committed by a lesbian (0.4%), and six were committed by heterosexual women (2.7%).⁴⁹⁴ On the basis of this currently available evidence, we should be most committed to keeping heterosexual men away from children, particularly girls.

There are a number of empirical studies of children raised by lesbians. As is typical of work in this area, much of the research suffers methodological problems.⁴⁹⁵ But the studies report that the children of lesbian mothers have not differed in statistically significant ways from the

PEDIATRICS 133, 135 (1986) (finding that, of the 140 cases of male child abuse, four (2.9%) of the perpetrators were known homosexuals).

489. See Jenny et al., *supra* note 487, at 42.

490. See Glen Kercher & Marilyn McShane, *Characterizing Child Sexual Abuse on the Basis of a Multi-Agency Sample*, 9 VICTIMOLOGY 364, 370 (1984) (finding that 40.6% of male perpetrators were fathers or stepfathers of the victim).

491. See Jenny et al., *supra* note 487, at 44 (finding that over 80% of abusers were heterosexual partners of a close relative of the victim).

492. See *id.* at 42.

493. See NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERV., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 87-90 (Barbara M. Jones et al. eds., 1980); Elena Marie DiLapi, *Lesbian Mothers and the Motherhood Hierarchy*, in HOMOSEXUALITY AND THE FAMILY 101-09 (Frederick W. Bozett ed., 1989); David Finkelhor & Diana Russell, *Women as Perpetrators: Review of the Evidence*, in CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 171-87 (David Finkelhor ed., 1984) (finding sexual abuse of children by adult women extremely rare); Patterson, *supra* note 486, at 1026; Sarafino, *supra* note 488, at 131. One study reports that children of gay or lesbian parents are less likely to be victims of parental sexual or physical abuse. See A.H. Fishel, *Gay Parents*, 4 ISSUES HEALTH CARE WOMEN 139-64 (1983).

494. See Jenny et al., *supra* note 487, at 42.

495. For a discussion of methodological problems, see Wardle, *supra* note 482. But Wardle himself makes a number of questionable assumptions. He views a girl growing up to be lesbian rather than heterosexual as problematic. See *id.* at 853. And he reports that:

Three of the thirteen lesbian mothers [in one study] preferred for their daughters to become homosexual, compared to none of the fifteen heterosexual single mothers, and all of the heterosexual mothers (100%) hoped their children would marry and have children, but only nine of thirteen lesbian mothers (69%) wanted their children to have children.

Id. Although the lesbian mothers are more open than the heterosexual mothers to their children growing up with a sexuality different from their own, Wardle sees as the only possible problem the fact that some lesbian mothers would like their daughters to be lesbians. There are, however, good reasons for that preference. Heterosexual marriage (particularly when there are children) is problematic for women today. See *supra* note 410 and accompanying text; Becker, *supra* note 477, at 212-16 (discussing the immorality in heterosexual relationships today, including—along with the unjust division of power and domestic labor—sexual immorality present when married women have sex they do not desire). Wardle assumes that having a mother who sees the problems for women in contemporary heterosexuality is a disadvantage for a daughter—whereas having a mother who pressures her daughter to marry a man and have children with him is not problematic.

children of heterosexuals on measures of sexual orientation,⁴⁹⁶ gender identity,⁴⁹⁷ gender role,⁴⁹⁸ self-esteem,⁴⁹⁹ psychological health,⁵⁰⁰ and so-

496. See TASK FORCE ON HOMOSEXUALITY, NAT'L INST. OF MENTAL HEALTH, FINAL REPORT AND BACKGROUND PAPER 15 (1972); Frederick W. Bozett, *Children of Gay Fathers*, in GAY AND LESBIAN PARENTS 39, 39-57 (Frederick W. Bozett ed., 1987); Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, in HOMOSEXUALITY AND THE FAMILY 137, 137-62 (Frederick W. Bozett ed., 1989); Julie Schwartz Gottman, *Children of Gay and Lesbian Parents*, in HOMOSEXUALITY AND FAMILY RELATIONS 177, 188-89 (Frederick W. Bozett & Marvin B. Sussman eds., 1990); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in HOMOSEXUALITY AND THE FAMILY 123, 123-24 (Frederick W. Bozett ed., 1989); J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEV. PSYCHOL. 124, 126-28 (1995); Frederick W. Bozett, *Gay Fathers: How and Why They Disclose Their Homosexuality to Their Children*, 29 FAM. REL. 173, 173-79 (1980); Frederick W. Bozett, *Heterogeneous Couples in Heterosexual Marriages: Gay Men and Straight Women*, 8 J. MARITAL & FAM. THERAPY 81, 81-89 (1982); M. Neil Browne & Andrea Giampetro, *The Contribution of Social Science Data to the Adjudication of Child Custody Disputes?*, 15 CAP. U. L. REV. 43, 48-49 (1985); Nanette Gartrell et al., *The National Lesbian Family Study*, 66 AM. J. ORTHOPSYCHIATRY 272, 272-73 (1996); Susan Golombok et al., *Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHIATRY 551, 564 (1983); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual and Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 692-97 (1978) [hereinafter Green, *Sexual Identity*]; Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 103 (1985-86); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 544-52 (1979); Ann O'Connell, *Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH C. STUD. SOC. WORK 281, 295 (1993) (finding no correlation between the parent's sexual orientation and the sexual orientation of the child); Patterson, *supra* note 486, at 1031 (citing Jay P. Paul, *Growing Up with a Gay, Lesbian, or Bisexual Parent: An Exploratory Study of Experiences and Perceptions* (1986) (unpublished Ph.D. dissertation, University of California (Berkeley), on file with author)); Ruth B. Weeks et al., *Two Cases of Children of Homosexuals*, 6 CHILD PSYCHIATRY & HUM. DEV. 26, 26-32 (1975); Richard Rees, *A Comparison of Children of Lesbian and Single Heterosexual Mothers on Three Measures of Socialization* (1979) (unpublished Ph.D. dissertation, California School of Professional Psychology (Berkeley), on file with author).

497. See A. ELFIN MOSES & ROBERT O. HAWKINS JR., COUNSELING LESBIAN WOMEN AND GAY MEN: A LIFE-ISSUES APPROACH 207-09 (1982); Golombok, *supra* note 496, at 568; Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Soloparent Heterosexual Mothers and Their Children*, 15 ARCHIVES OF SEXUAL BEHAV. 167, 175-81 (1986) [hereinafter Green, *Lesbian Mothers*]; Green, *Sexual Identity*, *supra* note 496, at 696 (finding no significant difference in gender role identity); Gottman, *supra* note 496, at 189; Beverly Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536, 542-43 (1981); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (finding no significant difference in gender role identity).

498. See Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concept, and Sex-Role Identity*, in 1 LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH AND CLINICAL APPLICATIONS 156, 168-69 (Beverly Greene & Gregory M. Herek eds., 1994); Gartrell, *supra* note 496, at 272-73; Golombok, *supra* note 496, at 568; Gottman, *supra* note 496, at 189; Green, *Lesbian Mothers*, *supra* note 497, at 179 (finding that the sex role behavior of children of lesbian mothers fell within the normal limits; the only difference was that offspring of lesbian mothers had less sex-typed preferences for activities at school and in their neighborhoods than did children of heterosexual mothers); Green, *Sexual Identity*, *supra* note 496, at 696; Hoeffler, *supra* note 497, at 542-43; Kirkpatrick, *supra* note 497, at 551.

499. See Laura Lott-Whitehead & Carol T. Tully, *The Family Lives of Lesbian Mothers*, 63 SMITH C. STUD. SOC. WORK 265, 265 (1993) (demonstrating that there is no negative effect on self-esteem and social adjustment); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 199 (1995) (stating that none of twelve studies found differences in measures of self-esteem).

500. Many studies found no differences in measures of self-esteem, problems of adjustment, or psychiatric disorders. See Browne & Giampetro, *supra* note 496, at 47-49 (finding no psychological harm); David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUNS. DEV. 504, 506 (1986); Golombok et al., *supra* note 496, at 565, 570; Gottman, *supra*

cial adjustment.⁵⁰¹ Researchers have also found no deficits in children of lesbian mothers in other areas of “personal development, including separation-individuation, locus of control, self-concept, intelligence, or moral judgment,”⁵⁰² and many studies show that “children of lesbian mothers have normal, healthy relationships with other children as well as with adults.”⁵⁰³ Several studies suggest that children of lesbian mothers may experience more teasing than other children, although the problem does not appear to be particularly serious.⁵⁰⁴ Children in general seem to be more tolerant of differences than adults.⁵⁰⁵ Although children are doubtless better off living in households with two parents, the empirical evidence does not suggest that one parent must be a man and the other a woman for children to flourish.

One study suggests that children raised by lesbian mothers may be more likely to become lesbian or gay for a number of reasons, including being raised in an environment more permissive of same-sex relationships.⁵⁰⁶ But surely the question here should be whether these girls and boys will be happier as lesbians and gay men than they would have been as heterosexual women and men. If these children can foresee a future in which they are happily married adults in relationships respected by

note 496, at 186 (“In general, none of the . . . studies on children of lesbian mothers and gay fathers reported negative effects on children relative to their parent’s sexual orientation.”); Harris & Turner, *supra* note 496, at 101–13 (finding that heterosexual parents made a greater effort to provide an opposite-sex role model for their children but finding no other differences in parenting behaviors); Huggins, *supra* note 496, at 123–35; David J. Kleber et al., *The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature*, 14 BULL. AM. ACAD. PSYCHIATRY L. 81 (1986); Patterson, *supra* note 499, at 199; Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203, 211 (1995) (finding such children equally likely to have sought help for anxiety and depression); Daniel Goleman, *Studies Find No Disadvantage in Growing Up in a Gay Home*, N.Y. TIMES, Dec. 2, 1992, at C14.

501. Lott-Whitehead & Tully, *supra* note 499, at 265 (demonstrating that there is no negative effect on social adjustment); see also Nanette Gartrell et al., *supra* note 496, at 272–73. On peer relationships, see Susan Golombok et al., *supra* note 496, at 564–67 (showing that most school-aged children reported same-sex best friends and predominately same-sex peer groups); Gottman, *supra* note 496, at 179–83; Green, *Lesbian Mothers*, *supra* note 497, at 178 (finding that the quality of peer relations was good); Green, *Sexual Identity*, *supra* note 496, at 692–97. Dr. Patterson also noted that the research on the social relationships of children of lesbians and gays found no differences in children reared by heterosexual parents. See Patterson, *supra* note 499, at 200. She also found that the majority of child sexual abuse is committed by heterosexual men, not lesbians and gays. See *id.* at 199 (citing Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD. DEV. 1025, 1034 (1992)).

502. Gartrell, *supra* note 496, at 272–73; Ailsa Steckel, *Psychosocial Development of Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS 75, 75–85 (Frederick W. Bozett ed., 1987) (finding that the separation-individuation process for children in heterosexual families is more aggressive and that children in heterosexual families are bossier and more domineering). In reviewing the research concerning children in lesbian and gay families, Dr. Charlotte J. Patterson found no evidence that the children in such households develop negatively relative to children reared in heterosexual households. See Patterson, *supra* note 496, at 1034.

503. Gartrell, *supra* note 496, at 272–73; see also Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY & HUM. DEV. 235, 236 (1993).

504. See Green, *Lesbian Mothers*, *supra* note 497, at 695–96 (finding teasing relatively minor and transitory); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 99–100 (1996).

505. See Patterson, *supra* note 499, at 200–01.

506. See Steckel, *supra* note 502, at 81.

their families and communities, they are more likely to grow into healthy adults whatever their sexuality.

If the empirical studies of children raised in lesbian households were more negative, we would nevertheless need to pause before banning same-sex marriage. The negative effects might be associated not with any problems in gay and lesbian families but rather with a culture that has not yet come to fully accept such families. The fact that children in lesbian households are doing so well shows how far we have come in terms of bias and prejudice.⁵⁰⁷

It is true that lesbians and gay men can and (myself included) do “marry” today in commitment ceremonies, which are often religious.⁵⁰⁸ Other couples regard themselves as committed to each other, albeit not through a formal ceremony. Because an important factor contributing to the well-being of the married couple is mutual commitment, perhaps there is no need for *legal* marriage.

No data exists on the relative well-being of committed lesbian and gay couples versus other lesbian and gay couples. Even for committed couples who have participated in formal ceremonies, however, their “marriages” lack legal effect and full social recognition. Legally effective marriages would, for at least some couples, increase well-being in a number of ways. Many lesbian and gay couples find commitment ceremonies healing,⁵⁰⁹ i.e., find that the public recognition of and support for the couples’ commitment helps the individuals involved “let go of some lingering internalized homophobia.”⁵¹⁰ Legal recognition would, I believe, be even more healing, eliminating the nagging caveat many of us feel today: “but we’re not *really* married.” Legal recognition would also contribute to wider social acceptance of same-sex marriages, so that more relatives and other friends or acquaintances would attend ceremonies, providing stronger community support for the relationship. Legal recognition would encourage broader social support and therefore closer ties between lesbian and gay couples and others in the communities in which they live. Recall the earlier discussion indicating that to some extent, the higher levels of well-being among the married are associated with their being more integrated into their communities and less isolated than cohabitants.

Legal recognition would materially benefit and buttress the relationship by, for example, providing spousal protections associated with many jobs, such as health insurance. Also, some families would be more willing to share family wealth with a lesbian or gay child who is legally

507. Special thanks to Ruth Colker for stressing the need to include these points.

508. See generally ELLEN LEWIN, *RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT* (1998) (describing and analyzing, from an anthropologist’s perspective, how gay and lesbian marriage ceremonies function as rituals).

509. See Kathleen E. Hull, *The Legal Consciousness of the Legally Disadvantaged: The Case of Gays and Lesbians* 10–11 (May 1999) (unpublished manuscript) (on file with author).

510. *Id.* at 11.

married, as is true with heterosexual children.⁵¹¹ Two can weather the storm better than one, but it also helps to have adequate resources.

Legally recognized marriages would be emotionally beneficial for some couples, strengthening the partners' commitments. One respondent in a study of lesbian and gay attitudes toward marriage stated that "I'm really convinced, one thing that keeps straight couples together is how difficult it would be to disentangle legally, and that kind of gives you time to get over some difficult things. . . . That's what marriage does for people, it kind of gets you over those times."⁵¹² Gay and lesbian couples need marriage for its corresponding protections of divorce, both as a bulwark against splitting up for trivial reasons and for the buffer divorce law provides with respect to economic security and security in relationships with children. Marriage will also be good for children in terms of easing prejudice, increasing social acceptance, and lessening teasing.

Civil unions in Vermont will, of course, afford same-sex couples much of the marriage bonus enjoyed by married couples. But, as noted earlier, this legislation explicitly denies same-sex couples the "status" of marriage.⁵¹³ On its face, the statute recognizes two forms of intimate unions which are equivalent in terms of legal rights and benefits—"civil marriages" for opposite-sex couples and "civil unions" for same sex couples—but that are intended to be associated with different levels of status.⁵¹⁴

It is both easy to understand why the Vermont legislature adopted this intermediate "solution" of civil union—neither denial of the benefits of marriage nor the extension of marriage itself to same-sex couples—and inexplicable. On a pragmatic level, affording civil unions to same-sex couples is easy to understand because this "solution" will be acceptable to more of the citizens of Vermont than extending marriage would be.⁵¹⁵ On any other level, however, the two-tiered system is inexplicable. What is the difference between these two forms of partnership, and can *any* arguments be made for the intermediate solution other than acceptability to the majority (heterosexuals) who prefer to keep marriage for themselves? Obviously, the status difference between the two forms of intimate union creates a hierarchy, with the (higher) status associated with the traditional word "marriage" reserved for opposite-sex couples.⁵¹⁶ But any argument one can make against extending marriage to same-sex

511. For a discussion of the data showing that married couples tend to be wealthier than cohabiting couples because, *inter alia*, the couples' families of origin are more likely to give assets to a married than a cohabiting couple, see *supra* notes 367–70 and accompanying text.

512. See Hull, *supra* note 509, at 11.

513. See *supra* text and notes at notes 38–50.

514. See *supra* text and notes at 38–50. The legislative findings in the Vermont Act Relating to Civil Unions include that a civil union "does not bestow the status of civil marriage." Act of Apr. 26, 2000, Pub. Act 91, H. 847, 2000 Vt. Acts & Resolves § 1(10) (LEXIS).

515. See Andrew Sullivan, *Why "Civil Union" Isn't Marriage*, NEW REPUBLIC 18, 18 (May 8, 2000).

516. *Id.* at 22–23.

couples can be made against allowing civil unions.⁵¹⁷ As Andrew Sullivan puts this point in a recent essay, “[t]o endorse one but not the other, to concede the substance of the matter while withholding the name and form of the relationship, is to engage in an act of pure stigmatization.”⁵¹⁸ The act of creating two forms of intimate union has no other purpose than to reserve some benefit for the majority of (heterosexual) citizens.

It is too soon to know the extent to which Vermont civil unions will afford families headed by gay and lesbian couples the advantages enjoyed by families headed by heterosexual couples. If, as is likely if not inevitable, it turns out that there *is* (in the real world, not just the statute books) any status or other difference between marriage and civil unions, civil unions will offer families headed by same-sex couples a significant portion of the marriage bonus enjoyed by families headed by heterosexual couples, but not as much of it as they would enjoy were marriage actually available. (Though, of course, even if marriage itself were available immediately to same-sex couples, it would likely be some time before they enjoyed the full marriage bonus because of lingering hostilities, biases, and discomfort.)

If we adopt a model of marriage based on what is good for human beings, we will simply recognize same-sex marriages. Such recognition is good for children who are or will be living in lesbian and gay households whether or not their parent(s) can marry. Such recognition will also be good for lesbian and gay adults, giving them the same opportunity heterosexuals enjoy of living a life that is happier, healthier, wealthier, and longer because they are able to form a committed pair-bond cemented by legally recognized marriage.

VI. CONCLUSION

I have argued that two sources support our notion that reproduction and marriage are inextricably linked. One is the model of marriage common among the ancient pre-Christian cultures of the Greek, Roman, Jewish, and Germanic peoples; the other is the model of marriage in medieval Canon law. Both saw reproduction as the heart of marriage, although for different reasons. The non-Christian model viewed marriage as a bond between families ensuring the man and his family that his property would descend to his children and ensuring the woman’s family that she would have the status of wife and her children would be the man’s legitimate heirs. The Christian model, in contrast, viewed sex as less virtuous than celibacy, justified only by procreation and permitted only in marriage. Both paradigms were deeply patriarchal, seeing women as beings without autonomy, independence, or the legitimate need to control their own reproduction.

517. *Id.* at 18–19.

518. *Id.* at 19.

Neither model is appropriate for the twenty-first century. Instead, we should ask: How can government regulation of marriage further human happiness? Under such a model, sex and marriage should both be seen as primarily about pair-bonding, which is important for the happiness and well-being of adults as well as the children in their care. Strong pair-bonds are more likely to exist when the partners make the commitment to each other and to their relationship that marriage entails. To marry is to forge a particularly strong kind of pair-bond by becoming kin with legal as well as social recognition of kinship. If the business of the state in regulating marriage is to facilitate and strengthen pair-bonding for the well-being and happiness of adults and children, then marriage should be an option for lesbian and gay couples.