ABSTRACT

Christian Covenant and Liberal Freedom:
A New Approach to the Modern Marriage Crisis

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Today's society is burdened by an overwhelming abundance of government regulations in what is commonly regarded as the private realm, and sizeable numbers of people of all political ideologies are scrambling to end those regulations they find offensive. Interestingly, those same would-be reformers who balk most loudly at some regulations are wholeheartedly committed to maintaining or adding to existing regulations when it suits their political agendas, indicating that people will willingly abandon their political principles when they conflict with their efforts to attain political power. To my knowledge, no one has given serious consideration to the elimination altogether of government regulation, especially in marriage law, as a means of advancing toward a more Christian standard of living. Herein, I demonstrate that the modern Christian obsession with maintaining legal exclusivity for heterosexual marriage is misguided while the secular liberal appeal for legalization of same-sex (or gender-neutral) marriage is equally ill-conceived. Instead, a libertarian approach to the formation of families is ideal for both the Christian and the secular liberal, for it allows the Church to tighten its hold on the definition of marriage and frees the individual to pursue whatever life choices she or she wishes to make. Prevention of the legal disestablishment of marriage ultimately feeds religious complacency, weakens the marriage bond, and distracts from the pursuit of holiness; it also enslaves the free individual to the capricious whims of the secular state.

Christian Covenant and Liberal Freedom:
A New Approach to the Modern Marriage Crisis

by

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A Dissertation

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Dedicated in loving memory of my grandparents:

Jarrell O. Austin (1920-2002)

Jimmie Faye Austin (1929-2011)

and

Jeannine B. Holton (1929-2008)

CHAPTER ONE

Introduction: The Layout of the Terrain

Everyone has the right to marry. That is, everyone in a state of nature has a natural right to marry whomever they want to marry. It is, as Mark Strasser asserts, "a fundamental right," and as such, it is incumbent upon the state to show a compelling interest to restrict the exercise of that right to certain individuals. [1] Civil law and civil rights have, in fact, seen fit to restrict the "right to marry" to certain individuals only, based upon (at different times) their status, their race, and now more explicitly than in the past, their gender.[2] But if the right to marry is fundamentally a natural right and not first a civil right, then why did the liberal state begin to get involved in regulating it? The answer lies embedded in the state's transition from the classical liberal ideal of a mere guardian of individual security and private natural rights through attention only to the general public good, to the social engineering liberal welfare-state in which policy is crafted so as not only to guarantee basic individual rights in constitutional principles but also to nurture and develop the necessary conditions for the individual good to flourish in

[1] Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca, NY: Cornell University Press, 1997), 5.

[2] For example, divorce laws in several states prior to the Civil War explicitly banned a divorcee from remarrying. And even as late as the first few decades of the twentieth century, there were serious efforts to constitutionalize a ban on interracial marriage, a ban that was already statutory in several Southern states. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), 49, 163. On the question of same-sex marriage, see Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010), 127ff.

a highly pluralistic society.[3] Within this liberal system, orderly marriage arrangements that are contracted according to at least some minimal rules as to the rights and responsibilities of each spouse to the other and both to their offspring and their society may be understood as a better condition for individual happiness than were there no uniform legal standards and enforceable rules and each couple defined for itself the limits and boundaries of its relationship. Such non-legal, haphazard arrangements may, in fact, especially be exploitative of women and children, who are politically and physically weaker than the husband-father figure.[4]

For the Church's role in marriage, it is possible to see a similar transition from general freedom to marry within biblical norms to a stricter, social engineering sort of arrangement that aimed to accommodate interests of the wealthy and powerful whose fortunes and dominions depended upon legitimate children. Indeed, the law of the

[3] Theorist Ron Replogle notes that "liberal politics is animated by the belief that no one's claim to liberty is subject to a calculus of social interests. To put this liberal belief abstractly: there are some practices X such that my desire to X overrides everyone else's desire that I not X in ethical deliberation. When I am prevented from X-ing, I suffer a harm incomparably greater than the benefit afforded everyone else by my not X-ing." Ron Replogle, "Sex, God, and Liberalism," *The Journal of Politics*, vol. 50, no. 4 (November 1988): 941.

I must ask, if no one's liberty may be sacrificed for social interests, however, where is the line crossed, and for what reasons may we violate the liberty of another? For if the welfare state requires certain social conditions to prosper, someone's liberty will be sacrificed for the greater good. Take, for example, the racist storekeeper who does not want to open his doors to African-Americans. In a welfare-state, the racist is not permitted freedom to be who he chooses to be, because by refusing to sell to blacks, he disrupts the ideal conditions under which black citizens may flourish. In a more limited state, the racist would be free to discriminate, just as the African-American customer would be free to take his business elsewhere. If there are no businesses open to blacks in a certain community, the black community would be afforded the free and unhindered opportunity to open their own. Compassion for people—all people, not just those whose views align with the majority—demands this sort of freedom.

[4] Especially relevant to this line of thought is the justification for relaxation of divorce criteria in the nineteenth and twentieth century. Many of these relaxations were passed concomitantly with the legal recognition of married women's property rights. Only by state regulation could the voluntary and consensual nature of the institution of marriage be fully guaranteed. The emphasis on voluntarily accepted matrimony served to reaffirm the liberal state's commitment to government by consent of the governed. Cott, 55-5.

Church was a relatively late player in the marital decisions even of its own parishioners.[5] As it did become involved, the Church sought to steer individuals toward a life of holiness and orderliness in line with the law of God revealed through Scripture, but also in line with the contemporary political and economic climate.[6] Unlike the liberal state, however, the Church, as a voluntary institution comprised of members who willingly subscribe to its covenantal tenets, is a religiously homogeneous population, at least insofar as all members profess the centrality to their Faith of Jesus as Lord. Granted, there are disagreements even among Christians as to the appropriate interpretation of biblical doctrines and moral mandates, but in their general acceptance of Scripture as the Word of God, all Christians can at least agree that God's will takes priority over the law or policies of the state, whatever their stated aim. Thus, because of the homogeneity of the Church, it is better-suited for the purposes of social engineering than is the pluralistic liberal state in matters such as marriage.

This, of course, assumes that the society to be engineered, the membership of the Church, is always no more than a subset of the total pluralistic liberal society. This assumption comports with a thoughtful recognition that people are less likely to regard their religious beliefs as mere "preferences" as they would any average economic choice and more likely to regard them as something either revealed to them and/or discovered by them. Thus, "Your desire that I refrain from worshipping God as I deem appropriate counts as evidence of what you *want*. My desire to worship God as I think He requires

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[5] Over 1000 years passed before the Church successfully imposed upon Europe its particular conception of marriage through the device of canon law. Ibid., 5.

[6] Samuel Laeuchli, *Power and Sexuality: The Emergence of Canon Law at the Synod of Elvira* (Philadelphia: Temple University Press, 1972), 60-2; James E. Wood, Jr., E. Bruce Thompson, and Robert T. Miller, *Church and State in Scripture, History and Constitutional Law* (Waco, Tex.: Baylor University Press, 1983), 59.

counts as evidence of *whom I take myself to be*, a creature obliged to make God's purposes his own."[7] My point is that the members of the Church know who they are and what is best for themselves within that community of identity, whereas liberal society that tries to engineer ideal conditions for a pluralistic population cannot possibly do more than by law express its desires that we do X, Y, and Z, and threaten punishment or withholding of reward if we do not.

All social policy, therefore, whether it is civil or religious, is aimed at producing or engineering some desirable social result. But the nature of the intended results is not always agreed upon by everyone in society. Indeed, the conflict over the goals of society itself have contributed greatly to the ongoing culture wars between conservatives and liberals, Christians and non-Christians, secularists and traditionalists, etc. For the *contractual* liberal society, the overarching public goal and supreme public good is individual freedom attainable and maximized by consensual minimal government. Freedom to pursue one's own conception of the good, one's own moral vision of the good life, or one's own religious destiny are fundamental human rights that cannot be revoked by a government agent. Within such a liberal society, where freedom is the public goal, a variety of modes of life within intermediary communities can co-exist and thrive independently of each other. There may be disagreements and commotion between such communities, but provided each of those groups remains a minority of the whole without ample means to tyrannize the whole, and recognizes the right of the other

[7] Replogle, 942-3 (emphasis original).

to co-exist and pursue its own objectives, reasonable order in the political realm can be found.[8]

Among Christians, however, it is right and proper to believe that the ultimate goal of a human being and the Church as a whole is the fellowship and communion with God, who is the ultimate good. Within the *covenanted* Church where each individual has voluntarily assumed responsibility for the others, members must be held to a higher standard of accountability, for they are all together in pursuit of God. This is their duty as Christians, and it is their right as citizens of America, for they are free to pursue their religious objectives unmolested by governing officials. Where today's culture wars break out is not in concerns about freedom to worship or to believe or not to believe, but rather in those areas that had previously been undisputed: what are the ultimate goals of American society?

If American history is read as a specifically Christian history, then it is not a far leap of the imagination to view the goal of American society as the establishment of the Kingdom of God on earth. The basic freedoms we have secured and honored over time are the means that are necessary to attain this goal. Any attempt to change this goal, to reorient the ship of state and point it in a secular direction is tantamount to blasphemy.

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[8] Alexander Hamilton discusses the importance of union in the early days of the American nation in similar terms. The separate states are small and weak individually. Together, and only together, can they be strong enough to stand independently among the nations of the world. Left apart, each with its own sovereignty, they will destroy each other. I believe the same principle can apply within a liberal society such as that of twenty-first century America, where the intermediary social institutions such as the Church or other civic organizations may be substituted for the states of the eighteenth century in Hamilton's argument and the liberal government serve as the guarantor of public unity and peace between these naturally competitive but vital institutions. It is not that the states were to cede more power than necessary to the national government under the Constitution for the sake of national defense and economic/commercial stability. Nor is it necessary today that the intermediary social institutions cede more authority than necessary to any government, only enough to secure basic rights from infringement by hostile forces. *See* "Federalist #6," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 53-60.

This view of American history is associated with the common utopian idea of a "Christian America." [9] But if the history of the United States is read as secular history, as the unfolding of practical applications of classical liberalism for the first time in human affairs, then the goal of American society is individual freedom, an albeit lesser goal than the Kingdom of God, but one more easily attainable with the tools available to human governments that rule pluralistic societies. As Isaac Kramnick and R. Laurence Moore argue, "the nation's founders, both in writing the Constitution and in defending it in the ratification debates, sought to separate the operations of government from any claim that human beings can know and follow divine direction in reaching policy decisions."[10] That is, if human beings can know the will of God at all, it is for them to know privately and not attempt to impose it publicly. Major documents of government and political sermons alike testify to the classical liberal foundations of American society, with its attendant emphasis on individual freedom as the highest objective the nation could collectively pursue, even where that pursuit of freedom was deemed to be ordained of God.[11]

Contractually, all Americans are bound to press for maximization of freedom, to respect the rights of all others, where citizens recognize their debt to classical liberalism for America's constitutional order. As Jefferson proclaimed in the immortal Declaration of Independence,

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[9] This view dates back at least as far as the 1630s, when Massachusetts Bay Governor John Winthrop proclaimed that the New World would be a "city upon a hill" to which all the nations of the world would turn for guidance. It would continue to manifest itself in several forms, the most notable of which was in the religious right upsurge through the 1970s and early 1980s. *See* George M. Marsden, *Religion and American Culture* (Fort Worth: Harcourt Brace College Publishers, 1990), 16, 268.

[10] *See* Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: W. W. Norton, 1997), 12.

[11] *See* Mark A. Noll, Nathan O. Hatch and George M. Marsden, *The Search for Christian America* (Westchester, Ill.: Crossway Books, 1983), 81-2.

> We hold these truths to be self-evident, that all men are created equal and are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Leaving aside considerations of the nettlesome problem of institutional slavery that seemed to run counter to much of the spirit of 1776, this American social contract theoretically and specifically binds the government to guarantee the freedom of the individual, especially for the political minority. The foundations of the American government are not and cannot be covenantal, because they do not bear the marks of the covenant we will discuss in chapter two. Christians who want to argue for the goal-of-the-society-is-the-Kingdom-of-God approach will have to provide more than anecdotal evidence to convince the general American public that it has been wrong for two hundred years about its civil purposes. As citizens, American Christians are just as contractually bound to respect individuals' freedom as anyone else. As believers, they are *free to require more of their own membership*, but not of outsiders; instead, they are obligated all the more to require less of outsiders in recognition of the gospel of grace.

Even the covenant people of Israel did not expect outsiders to conform to all Israelite norms when living among the chosen people.[12] Such an expectation would

[12] John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988); *cf.* Ex. 12:48-9: "A foreigner residing among you who wants to celebrate the LORD's Passover must have all the males in his household circumcised; then he may take part like one born in the land. No uncircumcised male may eat it. The same law applies both to the native-born and to the foreigner residing among you." This passage suggests the voluntary nature of foreigners' participation in Jewish covenantal rituals. A foreigner could choose not to partake of the Passover and remain uncircumcised. Once circumcised, however, one was obligated to follow the whole Law, for through that ritual, he had become a Hebrew descendant of Abraham. *See also* Gal. 5:3.

subtract from the deliberate holiness of the people of God. God did not simply send out Israel to destroy other nations. Rather, He sent them to conquer, not so much because of the other nations' sins as because of Israel's holiness unto Himself. Pagan nations had persisted in the Promised Land for centuries, and in order to fulfill the covenant God had made with Abraham, they had to be driven out.[13] In effect, they were squatters who had no legitimate claim to the land which God had entitled to Israel. Furthermore, when Israel was compelled to dwell as a political minority in Diaspora among the gentiles, the Israelites never demanded more than to be left alone in their faith and practice by their gentile captors.[14]

American social policy, therefore, should aim at securing individual freedom in principle within reasonable and orderly limits, not at shaping a particular form of citizen who answers only to a certain higher power. Attempts at social engineering for a narrower purpose, secular or religious, than securing basic liberty violate the spirit of both the Revolution and the Constitution, whose First Amendment guarantees freedom of conscience and whose Fourteenth Amendment guarantees equal protection under the law for all persons living in the United States. If Christians accept the limited nature of social policy and renounce it as a tool useful to produce the Kingdom of God, then they also must ask to what extent anyone may be required to uphold public law for the sake of mere public order.

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[13] For example, 1 Sam. 17 narrates the tale of David and the Philistine champion Goliath, who is routinely described as "this uncircumcised Philistine" in the passage. The Philistines had antagonized the Hebrews for a period of 40 days before David stood up as the would-be hero of his people. Once David slew Goliath, the Philistines fled the land of Judah, and the Israelites pursued, destroying them and plundering their camp, and "the whole world will know that there is a God in Israel" (v. 46). Similarly, Is. 52:1 foreshadows the time of ultimate triumph for the Israelites when "The uncircumcised will not enter you again," the holy city of Jerusalem. In other words, God's covenant would be fulfilled and His enemies would be either eventually destroyed or voluntarily converted.

[14] Cf. the Book of Esther and the Book of Daniel.

In other words, when is civil disobedience justified in the face of public policy that runs counter to one's own moral convictions? If a law or policy against which one is fighting has not in fact commanded a certain action contrary to moral right nor prohibited a certain action required for the fulfillment of one's religious duties, then the mere legalization or legal recognition of an act is insufficient to warrant protests, especially in a pluralistic society. No one is contractually obligated in this instance to enter into a particular agreement or relationship contrary to one's personal moral standards. The public policy of concern here is the legalization of homosexual marriage, or as some phrase it, the establishment of "genderless marriage."[15] If, as noted above, the purpose of American public policy is to secure basic freedoms, then it would seem upon a superficial glance that legalization of genderless marriage is the only way to achieve it. But that may not be the best course of action. Before plowing into that argument, though, it is crucial to make another comparison.

Basic Rights or Civil Rights?

Is the American gay rights movement similar to the American civil rights movement of the mid-twentieth century, or, in a different light, is the conservative Christian movement of the late twentieth and early twenty-first century similar to the civil rights movement? The civil rights movement invoked civil disobedience against public laws that intentionally and deliberately prohibited the full participation of African-Americans and other racial minorities in some aspects of civil society, effectively making them second-class citizens of their own country. Disobedience to these laws not only brought public outrage but also legal consequences for the perpetrators, many of whom

[15] Monte Neil Stewart, "Marriage Facts," *Harvard Journal of Law and Public Policy,* vol. 31, no. 1 (2008), 312ff.

faced stiff fines and jail sentences for their freedom efforts. Through sustained disobedience, however, these protesters were able to shake the underlying prejudice of the American social system and win the right to full political participation. Eventually as consequence of the achievement of racial minorities' political rights, the habitual social barriers were slowly torn down between minorities and the white majority.

The homosexual community today cannot credibly claim political discrimination in the same way that African-Americans of the mid-twentieth century could. No law explicitly bans homosexuals from participating in some aspect of civil society as the Jim Crow laws and their remnants had done to African-Americans for well over half a century. Public laws against sodomy, only recently struck down—even those targeted specifically at homosexual sodomy— rarely were enforced, and in themselves did not constitute a political handicap of the sort experienced by racial minorities on account of the color of their skin.[16] Though they intruded into the most sacred precincts of individual privacy, and thereby cast a pall over the personal liberty of sexual expression, these anti-sodomy laws served as no barrier to homosexually-oriented persons holding public office or enjoying the other benefits of full social equality afforded to all other members of society. Even the Clinton-era "Don't Ask, Don't Tell" policy does not outright prohibit homosexuals from serving in the military, but merely requires them to keep their sexuality private both on duty and off, and to not engage in explicit homosexual acts.[17] In other words, it does not prohibit one from being homosexually oriented, only from acting on that inclination.

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[16] Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[17] Public Law 103-160 – Nov. 30, 1993 – § 546, 107 Stat. 1670 (1993) (codified at 10 U.S.C.A. § 654).

In the same vein, traditional conservative Christians cannot make a valid claim that the repeal of the anti-sodomy laws constitutes a state endorsement of homosexuality that deprives them of their political rights. Nor can they stretch that claim further to insist that the issuance of a marriage license to a homosexual couple represents the state's approbation of the relationship and thereby violates the rights of the Church.[18] Again, the state is not disadvantaging the Church's freedom to assign a higher moral value to the institution of marriage than general society would willingly accept in law. Because the state is not thereby mandating a marriage take place, nor is it proscribing a heterosexual marriage, the Church has no cause for civil disobedience. It remains entirely the prerogative of the Church itself to set the standards for marriages that will be performed by its clergy. If, at some point, it becomes mandatory for the Church to perform homosexual marriages, then and only then will the Church have just cause to engage in civil disobedience, for at that point the law of man has violated the law of God, just as the law of the state has interfered too much in the practices of the Church. Until that day, civil disobedience for both homosexuals and traditionalist heterosexuals seems to be a wrongheaded solution to the ongoing legal battle over homosexual marriage.

Another possible solution to the struggle over homosexual rights today could be to formally adopt a principle of legal toleration for practitioners of aberrant sexual practices in much the same way as the law formally tolerates adherents of religious sects

[18] Stanley Fish notes that challenges to certain beliefs may not be as seriously damaging to particular beliefs upon closer inspection of from whence the challenge arises. As he argues, "If the challenges come from within the structure of your belief…then the standard to which you are being held is one you have already acknowledged, and what is being asked of you is, simply, that you be consistent with yourself. If, however, the challenge comes in terms not recognized by the structure of your belief, why should you be the least bit concerned with it, since it rests on notions of evidence and argument to which you are in no way committed? Stanley Fish, "Moral Respect as a Device of Exclusion," in *Deliberative Politics: Essays on* Democracy and Disagreement, ed. Stephen Macedo (New York: Oxford University Press, 1999), 94.

that cut against the mainstream points of view, provided no one for whom the state has responsibility other than the practitioner is harmed by the practice itself. This alternative, however, places homosexuality in a category altogether different from the one in which its practitioners wish to place it, namely the category of a freely chosen lifestyle. If homosexuality is an altogether voluntary choice on the part of its practitioners, it becomes more easily subject to state regulation. Thus, if homosexuality is truly a bad choice of lifestyles, and more to the point, because it entails the practice of an act that necessarily involves another person, then the state has a right to regulate it, restrict it, or ban it entirely. Anti-sodomy laws on the books before the Supreme Court's 2003 *Lawrence v. Texas* decision understood homosexuality exactly in this way. Any question of licensing a homosexual marriage would automatically be impertinent to raise, because homosexual marriage would by definition, or at least by implication, entail the commission of an illegal act while the state turned a blind eye to the fact.

There is yet another way of approaching the social problem of homosexuality and, more specifically, the question of how to resolve the feud between proponents of genderless marriage and its detractors, a way that is at once fully Christian and fully respectful of the liberal freedoms of all Americans. Consider that from the biblical perspective, homosexual *acts* are crimes against the *covenant*. That is, they are sins against the ordered arrangement God has chosen for His people to accept and maintain. Outsiders among the Israelites are not under a strict obligation to follow the covenant law precisely because they are not chosen people. They are subject to God's control, but they are not part of the redeemed or elect, unless or until they join the covenant people and willingly renounce their pagan ways. As covenantal outsiders, they are not recipients of

God's gracious law, and are therefore left to their own devices, to perish in their willful ignorance. Christians are obligated by their scriptural teachings to accept this as divinely-revealed truth. Practitioners of homosexuality are free to enter the covenanted Church, but must agree to repent from their former sexual acts. Scripture says nothing about the condition of homosexuality itself, and therefore to argue that the orientation apart from the physical sexual act is morally unacceptable is a more tenuous argument that anyone is entitled to make but is wise to avoid in public debate for the reason that neither the Church nor the state can credibly attempt to "re-orient" anyone by force of law. A government can only legitimately regulate physical acts, not the thoughts or inherent inclinations that contribute to the act.[19]

Likewise, if homosexual acts are inappropriate for the covenant people of God, as are a whole host of other sexual sins, simply because of the people's election to holiness by God Himself and not due to any particular merit or pre-inclination on their part, we might expect to find instances of these acts being committed within the covenant community itself. And because of their anti-covenant character, such acts are all the more so not to be unexpected among a non-chosen community that has not received the law of God. Even this group of the non-elect, however, is subject to certain natural mandates of reason. If we accept that Locke and our Founding Fathers were correct in their belief that man's natural rights—life, liberty, and property—derive from the natural

[19] It may be that the homosexual orientation is akin to, but not the same as, a sincerely-held religious belief that cannot be sacrificed to the greater society, while the actions associated with homosexual orientation are akin to, but not the same as, religious practices that adversely affect the interests of the state. The Supreme Court made clear the distinction between belief and action in the early free exercise case, *Reynolds v. United States*, 98 U.S. 145 (1879), at 167.

law, and that natural law was a mode of human moral reasoning[20] rather than an eternal law of fixed dos and don'ts, then we might better understand what is at stake for the homosexual community today.

Within the pre-society state of nature, each individual possesses perfect equality of liberty, and each is under an obligation to himself to preserve himself and his natural freedom. In this state of nature, no one may claim a right to infringe on the equal rights of others, for the very reason that such infringement not only injures the other but also damages the possibility of self-preservation, which requires cooperation with others for survival. Make an enemy of someone or alienate somebody and the chances of one's survival in the state of nature decline. Therefore, one will exercise self-restraint, voluntarily limiting one's own natural liberty and the exercise of one's natural rights in order to afford greater protection for oneself within the community. One does not possess a natural right to violate the natural law that mandates self-preservation. Too extensive an exercise of natural liberty may threaten one's security more than help to preserve it for the reason that it may infringe on others' natural rights. Thus, prudence would dictate a moderate course of action of voluntary self-restraint in order to foster social goodwill with one's fellows.[21] Better to voluntarily surrender a little than to have all taken away by force.

How does this apply to the homosexual community seeking so-called marriage rights? To force the issue of *legalized* marriage is actually to violate the natural right of liberty—liberty to associate with a partner of one's own choosing in a mutually agreed-

[20] Locke, *Two Treatises*, 271; J. Budziszewski, *Written on the Heart: The Case for Natural Law* (Downers Grove, Ill.: Inter Varsity Press, 1997), 109.

[21] Phillip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," *Yale Law Journal* 102, no. 4 (Jan. 1993), 908, 13-4.

upon private arrangement—that one possesses in the state of nature. This applies equally to heterosexual as well as to homosexual state-issued marriage *licenses*. Attaching oneself to the guarantor-state through a legal marriage contract is not done for self-preservation but rather for self-destruction. It was recognized in the constitutional theories of the late eighteenth century upon which the American government is founded that the government could endanger individuals' natural liberty if it were allowed to limit that natural liberty beyond what was necessary for government's own preservation, which was necessary for the assurance of security.[22] Marriage licenses, as shall be made apparent further below, are not necessary tools of the government for the self-preservation of government, but rather are instruments of social engineering that simply serve as an obstacle to the full flowering and flourishing of family life, both as Christians understand it and as the non-Christian community sees it, as well.

Locke expresses an interesting view on the subject of marriage, as he ponders the common understanding of his time that marriage is monogamous and life-long and founded upon the mutual obligation of husband and wife to their offspring.

> But though these are Ties upon Mankind, which make the Conjugal Bonds more firm and lasting in Man, than the other Species of Animals; yet it would give one reason to enquire, why this Compact, where Procreation and Education are secured, and Inheritance taken care for, may not be made determinable, either by consent, or at a certain time, or upon certain Conditions, as well as any other voluntary Compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it should always be for Life; I mean, to such as are under no Restraint of any positive Law, which ordains all such Contracts to be perpetual.[23]

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[22] Ibid., 909-10. Hamburger does acknowledge that the Framers' understanding of the natural law did not preclude certain restrictive laws, such as those against obscenity or defamation or fraud, that seemingly went against the natural liberty of individuals. Instead, they understood that natural law itself required these types of restrictive laws, because that which they aim to proscribe goes against the natural liberty of others.

[23] Locke, *Two Treatises*, 321.

Locke follows much of the same train of thought that modern proponents of exclusive heterosexual marriage use to defend their positions, namely that the marriage institution was established for the purpose of procreation and childrearing and the orderly accession to and distribution of otherwise personal property. However, unlike the twentieth and twenty-first century marriage authorities, Locke regards the time of procreation and childrearing and securing of inheritance rights to be something temporary, not permanent. For him, marriage is more voluntary, based upon mutual consent between the spouses who are under no obligation to stay with each other once their social responsibilities toward their children have been exhausted. Additionally, he points out that there are certain societies where positive laws exist to establish the marriage bond with greater permanence, but he does not imply that this is the necessary or right policy for a government to take toward marriage. Presumably, then, in those societies without the legal mandate to stay together perpetually, the marital bond may still be formed temporarily or permanently and at the discretion of the partners, who because of their children and for no other reason, choose to stay together. No governing authority has the right to limit liberty more than necessary to preserve its own standing. Bastardy, familial dysfunction, and divorce may be grievous wrongs, but they do not rise to the level of a threat to state security.

Drawing from Locke's concept of marriage as a mutual pact between two willing partners who have mutually consented for an unspecified season to dwell together and support and assist one another until such time as they are no longer bound together by a natural obligation toward their offspring, it may be possible to conclude that in a liberal society premised upon a social contract, it is unnecessary for the state to regulate

marriages.[24] Within that overarching liberal society, it would still be possible to find institutions or communities, such as the Christian Church, that would attempt to enforce laws regarding marital permanence among their own members, but the non-community members would be under no such obligation to follow the more restrictive policy. The same may be true for the recognition of homosexual marriages. Disestablish marriage as a state-sanctioned institution and inject greater freedom into civil society at large. The accomplishment at once would be the fulfillment of the end of liberal contractual society and the means to fulfillment of nobler, more community-specific objectives, such as the Church's pursuit of the Kingdom of God.

Such a solution to the marriage question today may sound peculiar in a society that has regulated marriages and families for the past two centuries, under the pretense that it knew better than the average citizen what was good for them. However, today there are good reasons, to be explored below, found within the competing conceptions of marriage for both pro-traditional marriage (traditionalists) and pro-genderless marriage (progressivists) factions to accept marriage disestablishment as the solution to the ongoing marriage crisis that has left the United States deeply divided over constitutional issues such as full faith and credit, but also and more significantly, divided over fundamental religious obligations, duties and privileges and the right to privacy. Disestablishment of marriage may be the only way to avoid a long-term moral and political struggle that will satisfy no one in the end and result in further erosion of freedom on all sides.

[24] Martha Nussbaum acknowledges as much when she comments that "it would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business…." Nussbaum, *From Disgust to Humanity*, 132.

My purposes here are to show that the conservative Christian social agenda, associated with the popular notion of a "Christian America" contrives at a wrongheaded social policy of establishing a heterosexual-only legal marriage institution in order to legislatively engineer respect for the nuclear family and traditional gender roles as they are understood within conservative Christian circles. A similar charge of wrongheadedness applies to their secular counterparts who want to make state-sanctioned marriage inclusive of same-sex couples, establishing what will be referred to herein as "genderless marriage." Their objective is to legislatively engineer an end to prejudice through a means that ultimately subtracts from the freedom of choice rather than enhancing it. Each perspective represents an attempt to foist upon an unwilling segment of the population their own particular social objectives, and each is guilty of forgetting about the fundamental American social purpose to be achieved—the preservation of individual freedom, no more and no less.

Few American Christians of any stripe would self-consciously disavow the legitimacy of the American liberal tradition.[25] In their political pursuits, however, that is exactly subconsciously what they do. Differences among them stem from how to interpret that liberal tradition and what it entails for socio-political life and law. They may even dispute the label "liberal tradition" as the appropriate appellation for the national political philosophy, preferring instead to express their adherence to the tradition as a loyalty to "Judeo-Christian tradition." This tradition upon which many conservative

[25] A few, however, would . For example, proponents of Christian Reconstructionism, a movement within ultraconservative Reformed circles, openly assert that pluralistic democracy is heresy, because of its emphasis on tolerance and basic social interaction between Christians and non-Christians on the same, equal political plane. *See* Rousas J. Rushdoony, *The Institutes of Biblical Law* (Nutley, NJ: The Craig Press, 1973), 294.

Christians believe the American system is founded is remarkable in that the basic principles of it are much the same as those found in the liberal tradition—equality, individualism, freedom, and democracy—principles that are not easily associated with historical Judaism or Christianity.[26] As Christian historians Mark Noll, Nathan Hatch, and George Marsden put it, "To resist the evil of our day and to build a healthier society we almost instinctively turn to those who have gone before for wisdom and practical guidance. At stake is nothing less than what was once widely assumed to be America's Christian heritage."[27]

Seeking solace in a world gone amok, conservative Christians today often look not to the examples of Christian saints but rather to the lives of patriotic heroes. If the American Founders can be painted as conservative Christians, then their values must be Christian values, and the government they established must be premised upon Christian values and operate primarily to serve Christian ends, the Kingdom of God. Any interpretation of these values that does not jibe with the traditional interpretation must be morally as well as politically or judicially wrong. Others more mainstream embrace the liberal tradition for what it is, a philosophy of government that intends to maximize individual freedom and leaves social engineering to the voluntary societies, including the Church, under its umbrella. These differences have led to the question of whether or not

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[26] Cf. notions in many evangelical and fundamentalist churches of the equality of the soul before God, the individual and personal choice of following Jesus as Lord, the importance of free choice to conversion, and the autonomous rule of the local congregation. These notions in Christian society do not begin to make an earnest and organized appearance in Christian history until well into the Reformation period, justified as they were by the reaction against the corruption of the Catholic hierarchy and the secular rulers who attempted to manipulate the Church for their own gain. *See* William H. Brackney, ed., *Baptist Life and Thought: A Sourcebook* (Valley Forge, Penn.: Judson Press, 1998), 35-61; George M. Marsden, *Reforming Fundamentalism: Fuller Seminary and the New Evangelicalism* (Grand Rapids, Mich.: Eerdmans, 1987), 2-8.

[27] Noll, Hatch, and Marsden, 13.

America has departed from its original moorings and wandered into a new form of unjust society that, though still professing to be liberal and retaining all the external trappings of constitutionalism and representative democracy, has in fact become a form of oligarchical tyranny. For conservative Christians, the threat of tyranny come from a secular elite; for the others, the tyranny threat emerges from religious extremism. Both sides see their freedom jeopardized. Traditionalists believe the relativism and permissiveness pervasive especially in modern constitutional law endangers their freedom to meet their objective of establishing God's kingdom on earth.[28] Progressivists shudder at the thought of a reversal of certain constitutional decisions that may result in the deprivation of freedom of choice altogether.[29]

Laundry lists of contemporary social woes generally and historically reflect a clear but paradoxical conservative evangelical consensus that their beloved America is at once the "last best hope on earth" and at the same time going to hell in the proverbial hand-basket.[30] As Marsden puts it, there is a conflict between the popular dispensationalist theology to which many evangelicals subscribe that assumes American

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[28] Typical of this sort of view is the statement on citizen activism by the Liberty Alliance Action, the successor organization to the now-defunct Moral Majority that dominated religious conservative politics in the late 1970s-80s. The Obama administration is criticized for its support of hate crimes legislation and other pro-homosexual policies it has both already tackled or plans to tackle in the time it has left in the White House. The full statement is available at: http://www.libertyalliance.org/index.cfm?PID=18531 (accessed September 16, 2011); similar statements can be found on the Christian Coalition's website available at http://www.cc.org (accessed September 16, 2011).

[29] This position is summarized well in the slogan of the American Civil Liberties Union, "Because Freedom Can't Protect Itself." See http://www.aclu.org (accessed September 16, 2011).

[30] A quintessential pronouncement of this sort comes from Ronald Reagan, now the poster child of the conservative right. Ronald Reagan, "We Will be a City upon a Hill," January 25, 1974, speech delivered to the First Conservative Political Action Conference. http://reagan2020.us/speeches/City_Upon_A_Hill.asp (accessed September 14, 2011); a more recent expression of this consistent theme was Pat Robertson's call in 2003 for prayer that God would remove several justices from the US Supreme Court. Bob Allen, "Pat Robertson Prays for Change in Supreme Court," Ethicsdaily.com, http://www.ethicsdaily.com/print_popup?.cfm?AID=2836 (accessed January 30, 2004).

society, indeed all secular culture, is "Babylon" from which believers should withdraw, "be spiritual and wait for the coming kingdom," and the Puritan heritage of regarding America as a "new Israel" with which God had made a specific covenant for world redemption.[31] In the late nineteenth century and early twentieth century, fueled by the evangelistic revival meetings of D. L. Moody, Billy Sunday, and others, evangelicals accepted the bleak picture that "America is a moral cesspool. Something has happened to this nation…this country founded by Christians and blessed and protected by God."[32] Moral failure and divine favor seemed to uneasily coexist. The problems of that earlier generation were alcohol, cards and tobacco and the attendant (mostly male) moral licentiousness and neglect of the family, especially women and children.[33] The presumed remedy for these vices and the concurrent social decay was a return or conversion to evangelical Christianity, an acknowledgement of personal sin and a commitment to personal piety, especially among the men of America. God had not abandoned America, yet, so the time was ripe for repentance and national restoration.

The dichotomy between American moral failure and its chosen-nation status has continued, into the mid-to-late twentieth century and beyond into the twenty-first. Since the early 1960s, the list of evils to be stamped out has included *inter alia* the judicial exclusion of school prayer in state-supported educational establishments, increased prevalence of pornography, abortion and women's rights, and greater social toleration of

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[31] Marsden, 268.

[32] Douglas W. Frank, *Less Than Conquerors: How Evangelicals Entered the Twentieth Century* (Grand Rapids, Mich.: Eerdmans, 1986), 184, quoting Billy Sunday.

[33] Ibid., 185.

homosexuality.[34] Again, as with their early twentieth century counterparts, evangelicals deemed these social vices detrimental to the traditional nuclear family,[35] and again they point to the need for individual repentance and conversion as the key to their abolition and ultimate American triumph.[36] But unlike the evangelicals of Sunday's generation, the late-twentieth and early twenty-first century evangelicals have self-consciously moved into the political arena to fight the good fight to reclaim control over the mechanisms of power and influence.[37] By their standards, if Christians do not take back their government, they have not only failed to support justice, but they have failed in their God-ordained mission to the world.[38]

Another fundamental part of the American liberal system is the belief that the American government is founded upon a contract expressing the consent of the people as

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[34] Noll, Hatch, and Marsden, 13; William Martin, *With God on Our Side: The Rise of the Religious Right in America* (New York: Broadway Books, 1996), 201-5.

[35] James Davison Hunter, *Culture Wars: The Struggle to Define America, Making Sense of the Battles Over the Family, Art, Education, Law , and Politics* (New York: Basic Books, 1991), 176-96.

[36] Thoughts along these lines are popularly expressed through such organizations as James Dobson's Focus on the Family, http://www.focusonthefamily.com/socialissues/marriage-and-family/marriage.aspx (accessed October 14, 2011); the Family Research Council, http://www.frc.org/human-sexuality#homosexuality (accessed October 14, 2011); and the Southern Baptist Convention, http://erlc.com/article/homosexuality-your-questions-answered/ (accessed October 14, 2011).

[37] Cf. "Marriage, Family and Sexuality," Family Research Council, http://www.frc.org/get.cfm?c=ISSUES&issue=MF (accessed October 14, 2011).

[38] Statements along these lines may be found through Focus on the Family, http://www.focusonthefamily.com/socialissues/marriage-and-family/marriage/our-position.aspx (accessed October 14, 2011), and other similar conservative Christian political organizations; cf. Locke, *Two Treatises*, 415. Here Locke argues that "Great mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of humane frailty will be borne by the People, without mutiny or murmur. But if a long train of Abuses, Prevarications, and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel, what they lie under, and see, whither they are going; 'tis not to be wondered, that they should then rouse themselves, and endeavor to put the rule into such hands, which may secure to them the ends for which Government was first erected." If certain groups believe that the government was created for the sole purpose of advancing human civilization toward the righteousness of God, then, applying Locke's argument to the present situation of seemingly anti-Christian family legislation or court decisions, Christian political reaction to recent changes does not seem to be out of bounds, and indeed is much milder than the revolution Locke himself seems willing to endorse at such a juncture.

both the uplifting but not legally-binding Declaration of Independence and the less-stirring but unquestionably authoritative Constitution seem to make clear. If the people believe that the government is not responding to their needs and demands, then the people are under an obligation to take back the power they have ceded to the government and to give it to others who will respect whence it derives and exercise it with propriety.[39] Through their initial forays that took them into the very public trenches for a chance to achieve influence over high national office and through legislation, executive appointments and constitutional amendments, establish moral reform, evangelicals sought to do just that, with little tangible success on their main items. Today's evangelical political tactics are generally more sophisticated and subtle, aimed at achieving more modest and incremental goals, even while the ultimate aim of recapturing the hearts and minds of America remains the primary impetus for political engagement.[40] Still, with the American family in crisis, evangelical Christians can ill afford to sit passively and watch as their staunch enemy "secular humanism" rapaciously prowls the American landscape looking for any opportunity to destroy "Christian America."[41]

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[39] As Jefferson wrote in the Declaration of Independence, "But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." http://www.archives.gov/exhibits/charters/declaration_transcript.html (accessed October 14, 2011); *See also* The Constitution of the United States, Article V, which concerns constitutional amendments, http://www.usconstitution.net/const.html#Article5 (accessed October 14, 2011).

[40] For example, the 1995 *Contract with the American Family*, produced by the Christian Coalition, represents toned-down efforts on the part of politically active, conservative Christians, to accomplish their basic plans for society. Such key points as calls for tax breaks, balanced budgets, certain school reforms, etc., have been the staple of Republican Party platforms for the past few decades. *See* Stephen L. Carter, *God's Name in Vain: Wrongs and Rights of Religion in Politics* (New York: Basic Books, 2000), 54; Republican Party Issues, http://www.gop.com/index.php/issues/issues/ (accessed October 14, 2011).

[41] *See* Barry G. Hankins, *Uneasy in Babylon: Southern Baptist Conservatives and American Culture* (Tuscaloosa: University of Alabama Press, 2002), 46ff. Here, Hankins notes that many prominent Southern Baptists and Christian Rightists generally assume that a deviation from common conservative political themes and attachments is the result of a conspiracy of so-called secular humanists attempting to remove all vestiges of God from public life.

Which brings up a crucial point: do conservative Christians have the right idea of evangelizing to save people and families from moral decay but employ tactics that are the very reverse of what they should be in order to be effective? Classical liberalism, with its emphasis on the contractual consent of the governed, assumes that the powers of the government are limited to those to which the people have explicitly or tacitly given their consent. It is reasonable to speak of the classical liberal state as the creature of society over which society is to have sovereignty; so, when society loses control over the state, the creature becomes somewhat of a Frankenstein's monster. In the American federal system, sovereignty over the national government, through the Constitution, is held by all Americans, while sovereignty over each state government is held only by the residents of the individual state.[42] Furthermore, it may be possible in some jurisdictions to speak of local citizens' sovereignty over their city governments, county governments, school boards, or the like. The American population is over 300 million and includes representatives from myriad ethnic, linguistic, religious, and other groups. If this diverse society is to be thought of as the master over the national government, then it is impossible for the government to legitimately claim more than the basic powers necessary to preserving the political union and its security. Were it to assume powers not constitutionally delegated to it nor expressly denied to it, the federal government would breach the contract that established it, cease to serve the common good and instead serve only the interests of the few or the many, but not all.

But as indicated above, there are various degrees of sovereignty in the federal system that each citizen may participate in. The smaller the jurisdiction, theoretically the more homogeneous the sovereign society becomes, and the easier it is for it to grant

[42] *See McCullough v. Maryland*, 17 U.S. 316 at 410 (1819).

greater and further-reaching powers to the governing regime of its choice. However, the states today are far more heterogeneous in population than they were at the time of the American Founding, and many major, and several minor, metropolitan areas are quite pluralistic as well. This trend toward diversity at all levels of American society carries significant political implications for the goals of evangelical Christians. The day of a so-called "Christian America," if there ever were such a thing, is long past. That does not by itself negate the laudable goal of restoring public morality and piety, but it does mean that a re-evaluation of popular sovereignty and the meaning of contractual government is in order before the assumption of "Christian America" becomes a tool of oppression and does more to hinder the gospel than to assist its cause.

It is wise for evangelicals to first of all consider whence power derives in their own particular society, the Christian Church, and perhaps to recover an often lost but highly significant fact: Church organization is to be covenantal, not contractual. Regardless of the particular choice of ecclesiastical regime—episcopal, presbyterian, congregational— within specific denominations or local fellowships, the universal Church as the Body of Christ is a covenantal unit, from which departure by any single member represents a serious and irreparable wound. Early Church documents seem to imply this view. Jesus Himself instituted the New Covenant upon which the Church was founded on the occasion of the Last Supper and sealed it with His death and resurrection. Hebrews chapter six warns against apostasy and the impossibility of restoration once one has fallen away from the faith. Enlarging on that theme, early Church Fathers such as Ignatius of Antioch asserted that where the bishop is, there is the Church, while some

like Cyprian of Carthage readily avowed there was no salvation outside the Church.[43] Many American Christians, influenced as they have been by the liberal democratic tradition, fail to grasp this crucial point that distinguishes Church polity from state polity.

There seem to be two types of evangelical churches in the United States, both of which are built solidly upon the premises of contractarian liberalism. On the one hand, there is the church-as-local-and-voluntary-organization model in which the congregation is governed by those who have been given ministerial office only by the express contractual consent of the congregation's members.[44] When such ministers begin to do more or less than what their job description requires, they usually find themselves looking for another congregation. At the same time, individual members' piety is often judged by the degree of conformity with a specific set of written or unwritten rules of moral behavior, which it is the minster's duty to enforce either through church discipline or, more likely, through an aptly-timed and sharp-pointed sermon. Members can accept this because they have consented to the minister's rule, and they are free to move on to another church fellowship when their current congregation and its leaders no longer serve their needs.[45] The covenant in this arrangement, however, receives short shrift, because ecclesiastical power is premised upon congregational consent, not divine ordination. Church discipline is usually lax or ineffective, and movement out of the congregation is

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[43] Roger E. Olson, *The Story of Christian Theology* (Downers Grove, Ill.: Inter Varsity Press, 1999), 113-23.

[44] *See* "Baptist Faith and Message 2000, Article VI," Southern Baptist Convention. Available at: http://www.sbc.net/bfm/bfm2000.asp (accessed September 16, 2011).

[45] Nathan O. Hatch, *Democratization of American Christianity* (New Haven, Conn.: Yale University Press, 1989); *see also* an interesting discussion on levels of political tolerance among church members in Allan Cigler and Mark R. Joslyn, "The Extensiveness of Group Membership and Social Capital: The Impact on Political Tolerance Attitudes," *Political Research Quarterly*, vol. 55, no. 1 (March 2002): 20.

not strictly monitored or prohibited because what happens between an individual and God is no one's business but theirs.[46]

There is also another type of evangelical Christian organization in the United States, one that combines elements of the structure described above with a heavier emphasis placed upon church authority over the individual. In such cases, there tends to be both a great emphasis upon congregational autonomy and freedom and a firm belief in the inerrant and divinely-appointed Word and its minister. Churches that fall under this rubric may proudly describe themselves as "independent" or "separatist" or "fundamentalist" or some combination of those labels. There is a strong element of democratic choice, as members voluntarily agree to join and participate, but there is alongside it a powerful notion of authority and divine direction. Members who leave these congregations without valid reasons that are beyond their ability to control often come under criticism from remaining members for their lack of Christian virtue or for their fractious spirit. The recognition of the validity of church discipline is laudable here, but in their desire to retain their identity as God's elect, they often will take what is proper to the covenant Christian community and attempt to apply it in broad strokes and with missionary zeal to the whole of civil society. It is this type of church that has often taken the lead in the last 40 years or so in the most heated political battles of which evangelicals have been a part. They and their multi-faceted media and educational networks have contributed the greatest degree of energy to fighting America's culture wars. This is not to de-emphasize the involvement and work of the other type of church fellowship, but it is to serve as a starting point from which to mount a critical assessment

[46] John Locke, *Treatise of Civil Government and A Letter Concerning Toleration*, ed. Sterling P. Lamprecht (New York: Appleton-Century-Crofts, 1937), 167-70.

of the past, present, and future political activities of all Christians that have aimed at restoring or enhancing America's family life.

The Christian Family

The Christian family, like the Christian Church, is a covenantal unit, in which the constituent members—husband, wife, and their biological or adopted offspring—are covenantally united by the husband and wife's marriage vows and their subsequent sexual consummation that makes them literally one in heart, mind, soul, and body. Where the covenant is properly recognized, divorce and remarriage are frowned upon except in cases of spousal infidelity, and sexual activity outside marriage, whether premarital or extramarital, is damnable. In the same vein, homosexual conduct is unthinkable and unpardonable, whether there was a state-recognized "marriage" or not, because homosexual activity of any variety also violates the biblical covenant upon which human marriage is based.

One important point must be highlighted here, namely that the basis for Christian marriage and the basis for civil marriage—a legal institution that licenses a couple to receive certain civil benefits—are absolutely separate. Whereas civil marriage is premised upon the orderly interests of the state, Christian marriage is grounded in an unbreakable covenant between a man, a woman and God. In Christian marriage, the couple marries not to serve the state but to serve each other and God supremely, developing a Christ-likeness through mutual self-sacrifice. Civil law may recognize a valid covenantal Christian marriage, conferring civil benefits on a couple who have first received the blessings of the Church, but the church may not and necessarily must not

recognize all valid civil marriages for the very reason that the civil law, because of its objective of freedom, must of necessity treat all couples equally.[47]

Failure to fully recognize the covenantal character of the Christian family has contributed to Christians' inattention to their marriage vows and their obligations toward their children. And in some circles within the Church it has gone further and led to the formal recognition of homosexual "marriage." These moral missteps may be due to the near-universal view that a civil marriage license is a ticket to a certain social status. And with that approach to marriage, it is easy to prioritize the more lenient civil obligations over the more demanding Christian obligations. In other words, by issuing civil marriage licenses for all couples, not just non-church members, the state has usurped a legitimate function of the Church and has instilled even in most Christians the (false) idea that the state, the people's appointed legislative and executive agent, is well-equipped to govern all human relationships, even those as foundational as the family itself.[48] Liberty in family matters that follows from a liberal state ceasing to be liberal is no real liberty at all, for the state has substituted itself for God in the triangular marriage bond. The Church in this arrangement becomes a mere secondary voice of approbation that may or may not be sought out, and it loses its power to declare for itself the terms and conditions

[47] This position finds much support among liberal-leaning Christians. C. Welton Gaddy of the Interfaith Alliance argues that the debate over same-sex marriage is a debate about the freedom of religion. As such, it is not the place of the state to intervene in marital rites and ceremonies performed by churches that disapprove of same-sex marriages, but because marriage is a legal issue, not primarily a religious one, the law itself, to be equal, must apply to homosexual as well as heterosexual couples. "Same Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates," available at: http://www.interfaithalliance.org/images/stories/pdf/Green_paper.pdf (accessed February 8, 2010), 6-13.

[48] *See* C. S. Lewis, "Is Progress Possible? Willing Slaves of the Welfare State," in *God in the Dock*, ed. Walter Hooper (Grand Rapids, Mich.: William B. Eerdmans, 1970), 314. Here, the eminent Christian apologist argues that the modern welfare state does not merely attempt to support freedom and order, but instead to create a certain kind of citizen.

of marriage. That is, the Church surrenders its freedom of self-governance, which entails its freedom to be illiberal.

If liberal license has found its way within the Church as a result of the Church and the state swapping roles in guaranteeing marriages, how much less shocking should it be that the society at large has become more tolerant of marital deviance? Yet, some Christians who routinely turn a blind eye to divorce and infidelity within their ranks are ready to come out swinging against the efforts to tear down legal barriers to homosexual "marriage" in the society at large. In doing so, they raise the covenantal standard of the Christian family to a universal norm, and seek to apply that specific standard to the pluralistic national American society. But, it is worth pointing out that their goal is not to first of all to regain the *Church's* control over licensing marriage, but rather to concede that the *state* possesses the already-assumed authority to license and then to fight to maintain existing heterosexual-only marriage laws or to repeal recent laws and/or judicial decisions in some jurisdictions that legally establish genderless marriages. This effort, I will contend, is doomed to fail, because it does not recognize where the real battle is to be fought, that is, within the Church itself. Nor does it properly recognize that what is needed for a stronger Christian marriage institution is not more government power over marriage, but less.

Making Sense of the Marriage Battle

At least as far back as the early 1990s, the gay-lesbian-bisexual-transvestite movement has been regarded by many social conservatives, among whom are many evangelical or fundamentalist Christians, as "the most vicious attack on traditional

family values that our society has seen in the history of the republic."[49] Members of the National Gay and Lesbian Task Force publicly contend that "threats to the American family do not come from the desire of gay men and lesbians to create loving relationships,…[but] from the right wing's manipulation of ignorance, bigotry, and economic injustice. These threats to *our* families must be met with outrage…action…and resources."[50] As sociologist James Davison Hunter discussed in his acclaimed book, *Culture Wars*, there is in the marriage battle much more at stake than just the mere "emotional rewards of formalizing a shared commitment in a relationship."[51] Certain civil and economic benefits such as joint tax return filing, inheritance rights, community property rights, spousal participation in healthcare coverage and pension benefits, hospital visitation rights, child custody rights, etc. are bestowed with state-licensed civil marriage. The state, in other words, provides certain social and economic incentives for couples to marry. In monopolizing the definition of the specific terms of the civil marriage contract, the state nudges individuals to adopt the preferred state-approved living arrangements. It also sends a signal to those who would prefer alternative arrangements that they are not intrinsically worthy of receiving these civil benefits and that they are a separate class of citizens.

As Monte Neil Stewart of the Marriage Law Foundation correctly notes, there are only two kinds of marriage, and only one may at any time receive legal recognition. These are what Stewart terms traditional "man-woman marriage" and "genderless marriage," defined as "the union of any two persons" as it is in the laws of

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[49] The quote is from Congressman William Dannemeyer (R-CA). It was found in Hunter, 189.

[50] In ibid., 190, emphasis original.

[51] Ibid.

Massachusetts, Connecticut, Vermont, and Iowa.[52] Furthermore, Stewart highlights the divergence between man-woman marriage and genderless marriage in light of their respective social goods and ultimately in light of the different societies which they construct.[53] His point, with which I agree, is that neither mere emotional attachment of the spouses nor the conferral of civil rewards and benefits are, upon investigation, the true ingredients of socially beneficial marriage. But while Stewart, as many other proponents of man-woman marriage, wants to re-explore the inevitable linkage of marriage with children, my goal in this study is different.

I do not desire to continue the typical Christian handwringing over the decline of public morality and its attendant consequences on childrearing due to the increasing acceptance of genderless marriage, a higher-than-ever divorce rate, or any other commonly viewed "sign" of social decay. Nor do I hope to recreate yet another mechanical defense of man-woman marriage premised upon the centrality of procreation and child-rearing. Instead, my desire is to address a deeper issue from a uniquely Christian moral perspective—the heart and soul of the modern marriage crisis—to ask why this institution is indeed facing some serious challenges from all sides in our modern liberal society, and to suggest an alternative solution that many may at first find untenable. If we are to come to the point of crisis resolution, we may find that the solution is not at all what commentators and scholars on both the left and the right have been telling us for years. Indeed, it may be necessary to radically rethink how the American state and its citizens, both Christians and non-Christians, approach the question of marriage altogether. Central to this is a recognition that both politics *and* religion meet

[52] Stewart, 318-19.

[53] Ibid., 323-24.

in this debate, and that if we are to respect the First Amendment and political freedom of conscience as well as Christian liberation from coerced religious belief, we have to wrestle with the legitimate moral concerns and their public consequences that marriage as an institution raises.

Shortly after the United States Supreme Court announced the 2003 *Lawrence v. Texas* decision, columnist Michael Kinsley wrote an editorial piece for *Slate* in which he made the following proposal:

> The solution [to the gay-marriage controversy] is to end the institution of marriage. Or rather…the solution is to end the institution of government-sanctioned marriage…. Let the churches and other religious institutions continue to offer marriage ceremonies. Let department stores and casinos get into the act if they want. Let each organization decide for itself what kinds of couples it wants to offer marriage to. Let couples celebrate their union in any way they choose and consider themselves married whenever they want. Let others be free to consider them not married, under rules these others may prefer. And, yes, if three people want to get married, or one person wants to marry herself, and someone else wants to conduct a ceremony and declare them married, let 'em. If you and your government aren't implicated, what do you care?[54]

While I may not accept the flippancy with which this suggestion was made, I do find the libertarian argument implicit in this line of thought to be intriguing. Kinsley has made his suggestion, and with some assistance in fleshing out this line of thought, it may become a pragmatic bridge to span the ever-widening gulf between supporters and opponents of genderless marriage.

From Kinsley's standpoint, the issue is not the moral worth of marriage that is at stake in culture war over the *civil institution* that the state licenses. Rather, civil marriage is merely another (outdated) legal category that draws arbitrary lines between people on

[54] Michael Kinsley, "Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms," *Slate*, July 2, 2003, http://www.slate.com/toolbar.aspx?action=print&id=2085127 (accessed November 4, 2010).

the grounds of certain pre-existing commitments they have already made to each other. The contest, framed as it is between open and explicit public acceptance of all forms of relationships on the one hand and the adamant exclusivity of all but one form of relationship on the other, is to him fundamentally a dispute over the extent or denial of a civil right, understood in light of the Fourteenth Amendment's Equal Protection Clause. As Kinsley phrases it, "in the United States, we are about to find ourselves in a strange situation where the principal demand of a liberation movement is to be included in the red tape of government bureaucracy."[55] Both sides in the debate at heart want the same thing: the blessing of the state upon their chosen form of relationship, and neither side wishes to consider the public consequences of their potential victory, namely an enlarged and encroaching power of the state over what is the most fundamental of human intimacies.

Though I have already suggested above that the homosexual movement is not a civil rights movement, I wish to draw upon Kinsley's casual observations and suggestions and apply to them the investigatory tools of philosophical and theological inquiry. I see both political and theological value in Kinsley's suggestion that he himself has not probed. The potential transformation for both the liberal state and for the commitments of the Church that a re-arrangement of marriage law along more libertarian lines would entail is something too important to ignore and leave unexplored from a scholarly angle. If as a nation we are to get past the heated rhetoric that bitterly divides us, and if as Christians we are to adhere with strict devotion to the teachings of Jesus, then Kinsley's suggestion may offer a way to accomplish both public unity *and* stronger

[55] Ibid.

religious commitments while at the same time strengthening rather than weakening the institution of marriage at its core.

The Layout of the Study

In the following chapters, I will consider the marriage battle in light of the concerns I have outlined above: Christian fidelity to the covenant and political fidelity to the principle of freedom, particularly freedom of conscience and the right to privacy. In doing so, I will argue for marital disestablishment as the best possible solution to the social impasse existing between politically active Christian traditionalists who prioritize the principles of faith over political philosophy and secular or religious progressivists who publicly defer to political philosophy over personal religious principles.

Chapter two will be a consideration of the institution of marriage from a biblical perspective that has been lost or at least obscured over the years. Themes I will explore therein will include: What sanctifies Christian marriage and sets it apart from the civil marriages that are the norm today? Why are the two institutions fundamentally different? What key features of authentic Christian marriage are so incompatible with the liberal state's understanding of human relationships that it cannot be sacrificed to civil law's control?

Chapter three will thoroughly explore the common arguments of traditional Christianity against the legalization of genderless marriage. Herein I will address the legitimate concerns of many that the legalization of genderless marriage may undermine the traditional role of the family and lead to some devastating social consequences. But I will clarify that Christian marriage is not at all dependent upon state sanction for its legitimacy, nor are the secular social consequences of genderless marriage to be of

concern, for if the Church is consistently being holy, then there is nothing to fear from any arrangements, legal or otherwise, in the non-Christian world. At best, Christians should expect an uneasy peace in the world; they should not expect political dominion over or within secular society. They are free to pursue the Kingdom of God, but they must use the tools of the Church available to them, not those of secular liberal politics.[56] For this reason, disestablishment of marriage is a worthwhile aim, for it opens the door for the Church to be as illiberal as it desires when setting its marriage policies for its parishioners, pushing them toward holiness rather than selfishness.

The opposite side of the coin will be addressed in chapter four. This will entail an investigation into the modern progressivist claims that the institution of marriage as a mutually faithful, lifelong covenant between opposite-sex partners is a social construct of a bygone era, and that in order to be faithful to the spirit of Christ today, the Church should urge acceptance of all loving relationships. Such an argument centers on toleration as a key moral value and is representative of the spirit of liberalism that controls the public sector today. An open liberal tolerance, too, will be shown to produce an inadequate form of Christian marriage, for it capitulates to the world and ceases to be noticeably set apart. Effectively, it sublimates Christian marriage in secular marriage and equates the two, with secularity triumphing over the sacred. Furthermore, as I have already emphasized and will continue to do so, the pursuit of state licensing rights for a marriage is destructive of, not helpful toward, the desired goal of personal freedom, so disestablishment benefits this side of the battle, as well.

[56] I believe this was a point Jesus was trying to make when He sent out the 70 with nothing but the clothes on their backs (Lk. 10:1-16). The Kingdom of God would come about by divine favor and grace, not by human effort or preparedness.

The final chapter will summarize the foregoing and put forth a Christian vision of marriage and the role of the state once marriage is disestablished. It will also draw upon broader religio-political interactions to demonstrate that the Church need not, indeed must not, pursue its agenda through secular political channels if it is to be consistently holy and to live according to the expressed will of God. In a liberal state such as the United States, it is tempting to attempt to use the mechanisms of the state and the principle of majority rule to impose the specific worldview of a singular group onto the population as a whole. But this is beneficial neither for the Christian nor the secularist, for the end result of government imposition is hypocrisy at best or a slow-building resentment at worst that could explode into open conflict when the occasion rises. The Framers of the Constitution had a unique understanding of those potential consequences, and it is time that citizens on all sides recaptured and reapplied that insight today.

CHAPTER TWO

Till Death Do Us Part: Serious Religiosity and Covenant Marriage

Yale Law professor Stephen L. Carter, in his widely acclaimed book *The Culture of Disbelief*, relates the story of Maria Trapp, the young nun in interwar Austria whose life inspired the musical *The Sound of Music*. He draws particular attention to Maria's personal memory of why she married Captain von Trapp—her Mother Superior told her it was God's will for her to do so. Carter's purpose in sharing this anecdote is to illustrate that for those who take religion seriously, religion is all-embracing, even bearing on decisions our society regards as fundamentally private matters such as whether and whom to marry. Certainly non-Christians or the non-religious would not understand this intense religious devotion. Many Christians might even be taken aback by the suggestion that if they really want to take their religion seriously, such a demand placed upon them by religion should not be casually dismissed.[1] Instead, as I want to illustrate in this chapter, Christians, in fighting for the preservation of heterosexual-only civil marriage licensing, want to preserve the outward appearance of holiness without taking that divine command to be holy more seriously. As Carter understands the contemporary secular culture, the dominant mindset is to casually dismiss religion with the attitude that "there are some things that are too serious to be left to religion."[2]

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[1] Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Belief* (New York: Basic Books, 1993), 29-33.

[2] Ibid., 25.

In reply to the secular culture Carter introduces, I will say that there are certain things that are too important for us to leave to secularism or the state. A substantial resurgence of serious religion will not come about by more religious people's political activity. The sustained resurgence will occur as people of faith delve into their faith traditions for fresh guidelines and moral principles that often run counter to those espoused by the state. As Cater comments later, such religious fanaticism is by its nature "subversive."[3] More Christians, who have long dominated the cultural context of America and are now fighting to hold onto slipping, or to regain lost, cultural influence, would recognize their subversive potential and embrace it if they were not wedded to the misconceived notion of a "Christian America." More Christians, who took their religion seriously, might be more inclined to turn their back on state politics as the answer if they knew the full potential of their own doctrines to move mountains and topple empires. But the cost for embracing faith in its fullest is loss of social favor, loss of majority (or supposed majority) support, public humiliation when Christian truth is pitted against the trappings of a secular state that pays lip service to the notion of freedom but in actuality is more demanding of loyalty than Imperial Rome.

Lest I get too carried away, let me point out that the eminent Christian theologian Stanley Hauerwas suggests "that freedom of religion has been one ingredient in our ever-increasing tendency to be a society that is morally and spiritually empty at its core."[4] Freedom of religion, as Hauerwas understands it is a "subtle temptation" to Christians to accept the basic principles of democracy as neutral and therefore protective of the faith.

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[3] Ibid., 43.

[4] Stanley Hauerwas, *After Christendom? How the Church is to Behave if Freedom, Justice, and a Christian Nation are Bad Ideas*, (Nashville: Abingdon, 1991, 1999), 74.

And furthermore, freedom of religion subtly tempts Christians to believe it their duty "to support the ethos necessary to maintaining" the legal mechanisms of separation of church and state.[5] Such a constitutional arrangement "subverted" the faith "by making the gospel a civil religion in which the church, ironically, can only be politically irrelevant."[6] Hauerwas, in other words, is underscoring Carter's point, that religion in society is looked upon as a hobby[7] and not an all-embracing, cultural counterweight to the secular claims of the liberal state.

For my purposes herein, I want to suggest that in order for Christians to again take their religion seriously and to act as salt and light in a dark world, it is vitally important to consider the most basic of interpersonal relationships, marriage, from the perspective of what the Christian faith teaches. I want to show that Christian marriage, defined in terms of the covenant that implies the terms of "exclusive and permanent rights, mutually given and received, to marital acts,"[8] is not and never can be the mere equivalent of secular civil marriage. It is by definition much more. Once we consider that, it will be possible to see that the serious practitioner of faith need not pay any regard to what the state may expect citizens to acquiesce in with regard to another's relationships, except to shrug off state permissiveness as a symbol of its limitedness with respect to the private choices of free individuals. Instead of bemoaning the state's moral laxity, the serious Christian should simply ignore state policy and surrender to the Church authority over his/her

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[5] Ibid., 71.

[6] Ibid., 72.

[7] Carter, 22.

[8] Germain Grisez, "Moral Absolutes: A Critique of the View of Josef Fuchs, S.J.," quoted in John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: The Catholic University of America Press, 1991), 28.

moral thinking and acting. Of course, that entails also a recognition of the limitations of ecclesiastical moral authority in the public square over citizens not affiliated with the Christian tradition.

Marriage, as the most intimate union between people, is fundamentally theological and religious. When the state co-opted marriage and transformed it into a state-licensed institution, Christians should have protested the loss of their religious freedom. Their time for struggle with the details of the fact of state regulation that is accepted as a given is past. Today's marriage debates center around what definition of marriage the state will apply in its legal proceedings and the assignation of certain civil rights and privileges. Participants on both sides of these debates, secular and religious, assume *a priori* that the state has a right to define marriage. It is that assumption that is dangerous to serious faith, and it is that assumption that must be dealt with here. The case for serious Christianity, a commitment to the law and command of God, is best made through argument for the legal disestablishment of marriage.

If we are to argue for the legal disestablishment of marriage as a way to preserve Christian marriage and to take the faith seriously, we first have to know why this is the best course of action to take. The answer lies in the Christian conception of marriage as a covenant between two covenantal opposites—individuals who are at once alike, yet profoundly different.[9] Furthermore, this covenant will always involve God as a direct player in fashioning the covenant bond, and if God is a participant, it cannot be broken

[9] Russell Hittinger describes marriage as an institution that "exhibits the order and scope of natural thresholds: God-man, man-woman, and man-beast. Moreover, for Judaism and Christianity, the one-flesh unity of man and woman is the natural sign of a covenant whose purpose is the constitution of a sacral community." His point is that sexual differentiation of human beings and their coming together in matrimony completes the *imago Dei* in which they were naturally created. The full image of God is seen only in matrimonial unity, which "bears the imprint…of election, covenant, and sacrament." Russell Hittinger, "What Nature Hath Taught All Animals: Considerations on the Nature of Marriage." Calvin College, Grand Rapids, Mich. 15 May 2004.

except by death. Either God Himself will be one of the two primary participants, as in the case of the several biblical covenants addressed below, or as in the case of human marriage, God is the third party guarantor of the mutual pledge to fidelity and fulfillment of certain marital obligations and responsibilities. It may be proper to speak of the principal command of the covenant as "thou shalt (make) love." When two parties are united in the covenantal bond, they voluntarily accept the obligation to generate love—not just to be in love, but actually to *produce* love. Hence, in the truest expression of covenantal marriage, it should not matter who one's covenantal spouse is or what his/her habits are, etc. The only thing that matters is the deliberate, other-directed effort to make love, even to the otherwise unlovable. State-sanctioned marriage, with its emphasis on positive personal fulfillment destroys this moral imperative to make love, and consequently cannot comprehend the scope and depth of Christian marriage.[10]

Reason and the Choice to Marry

It may be said that the basic principle underlying the institution of marriage anywhere, but especially for Christians, is that which God spoke in Genesis 2:18: "It is not good for the man to be alone; I will make him a helper suitable for him." The diversity of interpretations to which this principle gives rise has led to the proliferation of any number of theories of human marriage; however, nearly all such theories before the late twentieth century assumed that reason was correct when it directed us unyieldingly

[10]John Finnis, *Moral Absolutes: Tradition, Revision and Truth* (Washington, DC: Catholic University of America Press, 1991), 28-9. Here Finnis elaborates on God-ordained marriage, saying that "By its utmost intimacy which yet preserves the individual identities and roles of those who share it, marriage (defined by negative moral absolutes in the way Grisez recalled) discloses the possibility of divine-human communion, initiated by a covenant-relationship to which we trust God will remain faithful unconditionally, exceptionlessly, by a commitment which has the moral necessity and stability of absolute moral norms."

toward heterosexual unions in which it was at least possible to conceive and bear children and thereby continue the species into the next generation.[11] As the eminent Christian apologist C. S. Lewis noted, there came a time, beginning in the nineteenth century and carrying into the twentieth century, that reason ceased to be the master of philosophical inquiry and itself became the object of such inquiry. With that transition from master to subject, reason lost its power to command and itself became subjective and malleable, to the point that it is now nearly impossible to grasp any degree of certainty as to the truth of something.[12]

Following Lewis's line of thought, it is not surprising that we have arrived in the twenty-first century at the point where, because reason has itself become obscured, the rational meaning of marriage has come under question. Consider historian Nancy Cott's observation that, "One could say that with the weight of the one supported faith lifted, plural acceptable sexual behaviors and marriage types have boomed." Furthermore, "unconventional" couples "expect to be left alone by others whom they are not harming, since marriage is understood as a private choice."[13] We no longer find a publicly reasonable universal agreement with a hitherto assumed moral premise that marriage is a good grounded upon a mutual pledge of lifelong fidelity between willing and consenting partners of the opposite sex. Instead, new movements abound to either destroy marriage altogether because it has become obsolete, or else to expand marriage and extend its civil

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[11] *See* Carl F. H. Henry, *Christian Personal Ethics* (Grand Rapids, Mich.: Wm. B. Eerdmans, 1957), 273.

[12] C. S. Lewis, "The Poison of Subjectivism," in *The Seeing Eye and Other Essays from Christian Reflections* (New York: Ballantine Books, 1967), 99-100.

[13] *See* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), 212-13.

institutional reach beyond the monogamous heterosexual relationship.[14] In this topsy-turvy world where reason is no longer regarded as universally rational, how might Christians committed to right reason fight the battle for marriage in the public arena and expect to succeed?

As Christians, we must assume the rationality of the Faith and its precepts built upon what Lewis calls "traditional morality." But, as Lewis also notes, the content of moral imperatives derived from traditional morality is fluid, because all "ultimate ethical injunctions have always been premises, never conclusions."[15] In other words, the traditional morality that is the foundation of every moral action is itself a basic conclusion upon which numerous ethical systems, of which the Christian Faith is only one, may be erected and which may be better or worse than each other in varying degrees. The goodness or badness of an ethical system cannot be properly judged unless the foundational conclusion, traditional morality, is a fixed point. Otherwise, if the principles of morality are themselves in flux, there is no definite standard by which to judge progress or regress, and therefore there is no rational way to conclude that one

[14] Certain groups have always existed on the fringes of society that held marriage was unnecessary or even wrongheaded for Christians. The heresy of Catharism in the 12th and 13th centuries produced libidinous individuals who, while professing the sinfulness of sexual relations of any sort, twisted their own doctrines to allow and even to celebrate nearly all forms of sexual liaisons. Emmanuel LeRoy Ladurie, *Montaillou: The Promised Land of Error* (New York: George Brazillier, Inc., 1978), 153-203. The Oneida Community in 19th century upstate New York managed to make the Christian injunction to love one's neighbor the antithesis of monogamous marriage, and therefore it became a seedbed for communally enforced heterosexual promiscuity. Cathy Gutierrez, "Sex in the City of God: Free Love and the American Millennium," *Religion and American Culture: A Journal of Interpretation* 15:2 (Summer 2005), 191. Today's world has reached the point where even the official public definition of marriage has come under scrutiny, and marriage is regarded as more purely a private matter between two people than a social matter that affects the entire community. John Witte, Jr. and Eliza Ellison, eds., *Covenant Marriage in Comparative Perspective* (Grand Rapids, Mich.: Wm. B. Eerdmans, 2005), 2-3.

[15] C. S. Lewis, "On Ethics," in *The Seeing Eye*, 75.

system is better or more advanced than the others.[16] Therefore, it is a correct statement that what all ethical systems have in common and cannot be rationally denied is "the doctrine of objective value, the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are."[17] Within our respective faith and/or moral communities, however, we may be inclined to see this or that moral position as more or less reasonable than another position. Different communities with different reasons will produce different ethical systems that will not always be able to dialogue with one another.[18]

I offer a brief mention of three competing conceptions of rationality and justice within the liberal community before discussing the Christian community below. Contractarian liberalism from Locke to Rawls assumes the priority of certain basic and inviolable rights, upon which society is constituted. These rights are derived from rational employment of a natural, pre-historical or fictional contract. The universe is a realm of reason, in which man as rational creature, unaided by special revelation, can and will understand his moral rights, duties, and obligations. If man rationally understands these rights and duties, he will seek their fulfillment because he will understand that to be in his best interest. The objective good in contractarian liberalism is thus reason itself, or rather the satisfaction of rational desire.[19] Following the light of unaided reason toward

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[16] Lewis, "Poison of Subjectivism," 103.

[17] C. S. Lewis, *The Abolition of Man* (San Francisco: Harper Collins, 2001), 18.

[18] Cf. Alasdair McIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988), 1-11. McIntyre relates state of academic and popular-level debate over questions of justice and rationality. These debates are anything but conclusive, as each party assumes its own procedures for determining the rationality of certain conclusions are the correct ones and that others who begin with different procedures are misguided.

[19] Richard L. Fern, "Religious Belief in a Rawlsian Society," *Journal of Religious Ethics* 15 (Spring 1987): 35.

the fulfillment of a particular rational desire, man will inevitably reach the objectively correct moral conclusions and strive to achieve social harmony through their implementation. That which is irrational is either not true or not good, or neither true nor good, and should be rejected.

With respect to the marital arrangement, what passes as rational in the contractarian world does not seem to measure up to Christian expectations of lifelong marital fidelity. Consider Locke's position mentioned in the previous chapter, that if there is no longer any necessity (because of children) or civil law requiring sustained commitment, there is no reason to assume that marriage must be monogamous and lifelong.[20] Rawls, in his lengthy development of a theory of justice, comments that,

> The principle of fair opportunity can only be imperfectly carried out, at least as long as some form of the family exists. The extent to which natural capacities develop and reach fruition is affected by all kinds of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances.[21]

In other words, Rawls is suggesting that the family is a barrier to realization of fair opportunities not contingent upon arbitrary factors such as accident of birth or certain social circumstances. Presumably, negative family experiences and social circumstances, however those are defined, unfairly hinder the potential for maximum personal achievement. If that is the case, Rawlsian liberalism would lead us to the inevitable conclusion that the institution of the family at some undefined point in the future would be shed altogether in favor of the just liberal state. Rawls implies as much himself

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[20] John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 321.

[21] John Rawls, *A Theory of Justice*, revised ed. (Cambridge, Mass.: Belknap Press of Harvard University, 1999), 64.

toward the end of his tome, noting, "It seems that even when fair opportunity (as it has been defined) is satisfied, the family will lead to unequal chances between individuals. Is the family to be abolished then? Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction."[22] Rawls is not prepared to abolish the family, yet, but does not seem particularly adverse to its end as society progresses. He says nothing specific about marriage, but we may extract from his thoughts on family that marriage itself is more a matter of personal preference and choice than anything, and one that constitutes an institution that cuts against the grain of liberalism's goals, at that.

While this form of liberalism may be premised upon false conceptions of right, insofar as human reason itself may be insufficient to lead us to genuine objective truth, or that standards of rationality differ from one person or community to the next, it at least avoids the avowed relativism of what may be termed the Whig model of liberalism. The Whig conception presumes that "limits are set by culture, by time- and place-bound conditions, and within these limits the task of government informed by the present state of values is to make a peaceable, good, and improving society."[23] In other words, change and progress are good and/or true in and of themselves, for social improvement is always a necessity; and improvement can only be measured in light of the current situation. Bickel further emphasizes that in this tradition, "the irreducible value, though not the exclusive one, is the idea of law," a statement of "the value of values."[24] From this, we might conclude that if the law is not working today, it must no longer reflect the values of

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[22] Ibid., 448.

[23] Alexander M. Bickel, *The Morality of Consent* (New Haven, Conn.: Yale University Press, 1975), 4.

[24] Ibid., 5.

the times and is therefore in need of revision; and if it is working, then it must be good policy and continue without correction. Without mentioning marriage per se in the discussion of Whiggish liberalism, its supporters suggest that as the institution of marriage is revalued, the law governing marriage must be revalued as well. Progress is measured by the degree to which the law reflects the values of the times.

Such a belief ultimately will cause society to spin out of control, to merely "chase after the wind" as the author of Ecclesiastes would say, for the very defenders of progress now pursue a course of endless and inevitable regression toward human enslavement or extinction because the *a priori* objective anchor that held society steadfast in the centuries past has been pulled up.[25]

The same may be true of the utilitarian conception of liberalism. In this line of thought, moral choices are judged to be good or bad upon their utility to the whole. Individuals are free to pursue their own ends without restraint until "there is a definite damage, or a definite risk of damage, either to an individual [other than oneself] or to the public," at which time "the case is taken out of the province of liberty, and placed in that of morality or law."[26] Granting individual liberty such as this is understood to be for the greater good or happiness of the community in the long run, a happiness that comes from freedom of expression and vigorous dissent from the status quo that, if given significant moral weight would stifle development and progress.[27] What is just, therefore, is what

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[25] *See* C. S. Lewis, *The Abolition of Man*, 67-8.

[26] John Stuart Mill, *On Liberty*, ed. Charles W. Elliot (New York: Barnes and Noble Books, 2004), 87.

[27] Ibid., 58-78; Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009), 50.

conduces to social happiness. And any pursuit of any alternative course would be irrational.

A utilitarian would likely view the institution of marriage, or at least the choice of marriage partners, as a private matter between two consenting adults. Provided that the two partners maintained their privacy, what forms of sexual relationships they engaged in are of no concern to the state, or anyone else for that matter. However, where children are concerned, that is, when a marital partnership turns into a family unit, the society's interest in the relationship rises. Mill suggests as much when he comments that, with respect to the weaker adult members of society, "society has had absolute power over them during all the early portion of their existence: it had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life."[28] In other words, children, because they are incapable of exercising reason on their own, must be steered by the society toward right reasoning. This level of interference in the personal family life of two individuals is not considered too intrusive, as it serves to improve the quality of society overall for the future. Children educated in an illiberal manner, brought up to respond to command and control, would not ever progress beyond that childish attitude. Indeed, "if there be among those whom it is attempted to coerce into prudence or temperance, any of the material of which vigorous and independent characters are made, they will infallibly rebel against the yoke."[29] Once they are old enough to reason for themselves, they are free to pursue their own goods and ends without social interference.

[28] Mill, 87-8.

[29] Ibid., 88.

The Christian perspective differs from all the conceptions of liberalism in the following way: a Christian understands his natural rights and duties to be the gracious gifts of a loving Creator in covenant with His chosen elect, not the product of the exercise of human reason, social circumstance, or some utilitarian calculus. These rights and duties are both true and good, are inseparable from each other, and they are worth pursuing. No doubt that some of these rights, though not all, may be identical with those that liberal natural philosophy may discover through reason alone. However, attendant duties of a Christian vis-à-vis his fellow man may be drastically different from those discernible by liberal reason. More than simply avoiding deliberate harm of another or following a set of laws to which one has at least tacitly given consent, such Christian duties entail an altruistic and self-less service of the other, the duty to love God and to love one's neighbor as oneself (Deut. 6:5; Lev. 19:18). Jesus himself, and also St. Paul, extend the principle of love to one's enemies, as well (Matt. 5:44; Rom. 12:9-20). This Christian duty is not one to which a man in his natural state, as liberal philosophy describes it, would ordinarily give consent unless it was in his own self-interest to do so. The very definition of love, however, is a self-less giving of oneself for another, even if that other is one's enemy. Such is the love that motivated the martyrs of the faith, and most importantly, the Savior Himself (Rom. 5:8). To summarize the Christian doctrine of rational society, "It is not good that man should be alone" (Gen. 2:18), for the man who is alone cannot properly make binding and eternal love. Liberalism in its various forms cannot comprehend the command to love anyone but oneself, but if Christian morality is premised upon the command to make love to the other, then it appears that liberalism and Christianity are incompatible with one another. Christian pursuit of

formal recognition from the liberal state is misdirected and would subtract from the vitality of the Faith itself.

What's Love Got to Do With It?

Ask anyone, Christian or non-Christian, why they want to marry. Most will offer some trite nod to self-fulfillment, easy access to sex, tax benefits, and the like; or the prospective couple may explain that the intended partner has certain qualities they admire, they enjoy each other's companionship, they make each other feel loved, and so on. Hardly ever will someone say that they marry in order to learn how to be more Christ-like, how to love someone the same as or more than they love themselves. Yet, if Christians are to take their religion seriously and follow its moral dictates, that should always be their answer; and they should endeavor to meet that objective with whomever is their spouse. No easy outs. No backing away when emotion flees.

Push further, and inquire why they seek a state marriage license. There may be little variation in the answers provided, all likely revolving around the theme of "it is the thing to do when people get married.," followed by a quizzical expression reflecting puzzlement that there may be any other substantive purpose for civil licensing. True thought about the social and moral significance of marriage seems to be lacking. Why have Christians, especially those who say they take their faith seriously, acquiesced in state involvement in the most profound and basic of human relationships, a relationship Christians believe was ordained by God and not by the state? To borrow from Hauerwas again, Christian marriage is a "subversive act" that deeply offends our liberal contractual society.[30] In its very commitment to lifelong fidelity and monogamy, Christian marriage

[30] Hauerwas, *After Christendom*, 118.

runs counter to liberalism's devotion to freedom and non-coercion. Christian marriage implies a moral ought that must be buttressed by the Christian community itself, a moral command to make love even when none previously existed, a divine command to imitate Christ Himself in every aspect of one's life. For the star-crossed couple starting out with nothing but a deceptive belief in an eternal feeling of love, the motivation to marry is selfish. State-approved contracts licensing marriage as a (temporal and/or temporary) institution can produce no other sort of marriage than one founded upon self-interest. The nature of contract itself is based upon mutual suspicion of the other rather than mutual trust. Suspicion that the other party may not fulfill their side of the agreement, suspicion that the other party might try to acquire more than that to which they are entitled.

For devout Christians, however, marriage is not supposed to be self-centered but other-directed. That is a concept that the contractarian society cannot properly fathom, and it is a concept that even today's Christians have trouble grasping. Enthusiastic couples eager to break out on their own rarely consider the bigger picture of what really are the implications of "till death do us part." Covenantal fidelity within the Christian community implies a complete and total surrender of oneself to another for the sake of the other, even to the point of willingly giving up one's own life for the other. A liberal state cannot sanction an act of this sort that it would regard as irrational or reckless. A man-made law or contract that required this sort of willed self-loss would be invalidated in the judicial process because it represents a violation of the fundamental liberal principle of self-preservation.

In order to make the case for Christian marriage as distinct from civil marriage, and to draw Christians back to their own tradition by emphasizing the value of legal disestablishment, it is necessary to consider the covenantal character of marriage more extensively. This will require the exploration of the biblical marks of covenant and how those marks are manifested in genuine Christian marriage. With the issue of the covenantal nature of Christian marriage settled, it will then be possible in chapter three to assess the validity of common Christian arguments for the preservation of the civil marriage status quo and show that they are either an unconstitutional attempt to impose a religious mandate on a secular general public, or to show that they are arguments designed to avoid the serious implications of covenant marriage for the devout Christian's life. Taking one's own religion seriously, being holy, requires the Christian to do more, not less, to combat the influences of an intrusive liberalism, even if it means reasserting ecclesiastical authority over members' lives in areas the liberal state has relatively recently usurped.[31]

The Covenant and Marriage

If man is left unfulfilled when alone, because he has no one with whom or for whom to make love, then it must be asked what sort of partner is best suited for man's love-making companionship. To that end, many, especially those in the Church, would assert that the partner best suited for man is a faithful woman who will stand and work by his side until death do they part. However, if we go no further than the general revelation that man is somehow incomplete when alone, and fail to account for what love-making really means, we may find that divergent modes of thought develop as to the

[31] See Carter, 41.

appropriateness and desirability of certain types of partnerships, their duration, the reasons for contracting them, and so forth. The Church may hold up faithful, exclusive, lifelong, monogamous marriage as the ideal human partnership, founded against the backdrop of "our baptismal covenant with one another,"[32] but even in Christian circles, there are significant variations and diversions from the ideal of self-less love-making relationships in practice. Reasons for these variations must be given full attention before anyone may possibly conclude that positive law must codify and enshrine the one ideal. Outside the Church among the non-Christian communities, there are even greater variations and diversions from the Christian ideal that are also beginning to find support in positive law, or if not support, then at least tacit acceptance.

It may preliminarily be concluded that the Christian marriage relationship, properly understood, is a type of the ideal society in which man lives "in a covenant with God's good creation," consents to "God's good order," and does not attempt to dominate it.[33] In such society, community members are covenanted with one another and are required to make love for the sake of the other. As St. Paul instructs the members of the Church at Ephesus, "Husbands, love your wives, just as Christ also loved the church and gave Himself up for her..." (Eph. 5:25). There is no command to fall in love, no mandate to feel giddy, no decree that one must walk on air for a time. C. S. Lewis wrote that the headship of the husband over the wife that comes as a result of the command to love "is most fully embodied not in the husband we should all wish to be but in him whose marriage is most like a crucifixion; whose wife receives most and gives least, is most

[32] Stanley Hauerwas, *In Good Company: The Church as Polis* (Notre Dame, Ind.: Notre Dame University Press, 1995), 161.

[33] Ibid., 113.

unworthy of him, is—in her own mere nature—least lovable."[34] The servanthood of the husband, not his lordship, characterizes the ideal Christian marriage; and this servanthood is one of willing, even excruciating endurance of travails for the sake of his (often unappreciative) wife. The command is simply to love, and where love is not present on its own accord, it must be made.[35] Love making is the essence of the covenant. It is not good for man to be alone, because man cannot make love for himself. He must have another (an Other) to/for whom love is made. Love is a commanded action, or an ideal to be constructed out of deliberate intentionality of selflessness on the part of human beings. It is a choice directed toward another, not a feeling nor a sentiment, and because it is a choice and not an involuntary reaction to another, it is stronger than death.

John K. Tarwater, in a study titled *Marriage as Covenant: Considering God's Design at Creation and the Contemporary Moral Consequences*, sets out to defend marriage as an institution of divine origin, having a basic intrinsic value of its own, independent of any cultural or community differences. Tarwater's argument, unlike mine, does not draw a distinction between civil and religious marriage, and therefore his assessment of the current state of marriage is bleak. The institution of marriage, he believes, is under attack by feminists and gays who want to redefine marriage

[34] C. S. Lewis, *The Four Loves* (San Diego: Harcourt Brace and Company, 1988), 105.

[35] C. S. Lewis, *Mere Christianity* (New York: Harper Collins, 2001), 109. "Love as distinct from 'being in love'—is not merely a feeling. It is a deep unity, maintained by the will and deliberately strengthened by habit; reinforced by (in Christian marriages) the grace which both partners ask, and receive, from God. They can have this love for each other even at those moments when they do not like each other; as you love yourself even when you do not like yourself. They can retain this love even when each would easily, if they allowed themselves, be 'in love' with someone else. 'Being in love' first moved them to promise fidelity: this quieter love enables them to keep the promise. It is on this love that the engine of marriage is run: being in love was the explosion that started it."

subjectively along the lines of sexual experience and "individual preferences."[36] Such a model of marriage, he contends, is inadequate to express divine intent at the creation of male and female.[37] Without delving into Tarwater's political position on genderless marriage—presumably he is opposed to it on principle and is willing to fight for the preservation not only of heterosexual exclusivity but also a specific religio-public justification for it—I want to borrow from his thesis some key points that are crucial to my argument against civil marriage of any sort. Both of us share the goal of strengthening Christian marriage, but instead of fishing for exclusive and elusive state support or recognition of the unique Christian position, I want to suggest that it is the very covenantal structure of marriage that is so vital to preserve that Christians must be willing to abandon the pursuit of state sanction.

Tarwater's approach draws from Calvin's covenant theology. This theology represents a Protestant departure from the Roman Catholic sacramental view of marriage that regards exclusive male-female relationships as vehicles for procreation and the grace of curbing of otherwise natural concupiscence. Calvin's brand of covenant theology also presumes that man is naturally social, not an isolated individual as man is presented in modern liberal philosophy. Because of this natural social condition, pairing off into marriages is a basic good, a holy union of a man and a woman into one body and soul.[38] Human society is thereby ordered, not chaotic—each man shall have his own wife—and

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[36] John K. Tarwater, *Marriage as Covenant: Considering God's Design at Creation and the Contemporary Moral Consequences* (Lanham, Md.: University Press of America, 2006), 1. Some of Tarwater's treatment of the contemporary marriage scene is more shrill than desirable, and I will try to steer clear of echoing his incendiary tone when citing his otherwise useful and convincing argument about the general Christian design and purposes of marriage.

[37] Ibid., 2.

[38] Ibid., 3.

through these orderly pairings, the human species is perpetuated. Within this natural social order, individuals are free to covenant with one another, forming voluntarily elected bonds of mutual obligation whose conditions are "established under divine sanction."[39] Furthermore, these covenantal bonds are not formed between blood relatives, they are not coerced, and they are established by an oath.[40] The emphasis here is on willful choice of the covenantal partners (or at least one of the parties), not something that occurs in nature out of pure instinct or necessity.[41] Presumably, any similarity between instinctual, fleeting male-female relationships and the covenantal relationships formed by the voluntarily chosen marriage bond is purely accidental. Thus, Christians who marry enter into a fundamentally higher order relationship that calls them out of the natural/instinctual human world.[42]

Tarwater identifies four general features of biblical covenants common to all them. One, there is in the covenant a unilateral dependence on the divine will and authority. Human beings do not enter covenants on their own accord. These relationships must be sealed with the promise of God, the enforcer of the covenant's terms. Second, the covenant is permanent, with blessings coming to those who honor it and curses befalling those who break it. Additionally, the covenant is validated and sealed by a sign that conveys the authority of the enacting party. Lastly, the covenant

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[39] Ibid., 32.

[40] Ibid., 34.

[41] Ibid., 36.

[42] *Cf.* Robert George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, Del.: ISI Books, 2001), 11; Ralph McInerny, *Aquinas on Human Action: A Theory of Practice* (Washington, DC: Catholic University of America Press, 1992), 143.

entails not only permanence but also life-long obligations that do not dissolve when the covenant is broken.[43]

I wish to modify and add to Tarwater's list, suggesting that biblical covenants are marked by a voluntary agreement between covenantal opposites that cannot be broken except on pain of covenantal death. By covenantal opposites, I mean two parties that are at once alike and different; that is, they are alike in their general capacity to give and to receive love, to think and to act rationally, and to cooperate in the making of a harmonious society, while they are different in their distinguishing characteristics, their physical or spiritual powers, and their natural roles assigned to them by virtue solely of who they are. God and man are covenantal opposites. God created man in His image, endowing man with the powers of reason and love, similar to but not the equal of those of God, and graciously empowering man to work alongside Him in building His kingdom on earth. God and man are obviously different in that God is spirit while man is flesh, God is Almighty while man is limited, and God is sovereign while man is subject. The other common pairing of covenantal opposites is male and female. Both male and female human beings are of the same species and have the capacity for reason and love. Both share the natural procreative purposes of God, the author of human sexuality, while each sex is uniquely equipped for both reproduction and for specific domestic roles required to raise and support a stable family. Human marriage, from the Christian perspective, then, involves the union of man and woman in a life-long bond sealed by their vows in the presence of God and dependent upon Him for accountability to their vows.

[43] Tarwater, 39-41.

Furthermore, a covenant is permanent and may be broken only by covenantal death. Covenantal death is the penalty for violating the sanctity of the covenant, and generally is applied in response to a crime that has robbed the covenant of its vitality, its very life for which the covenant exists. A biblical covenant must be open to new life, to sanctify its members by bringing them into a solid, permanent union in which the life of all and truly the life of the covenant community is established and preserved. Within the biblical law, one may find upwards of eighteen separate offenses punishable by death.[44] While capital punishment for some of these offenses today may seem draconian to modern ears, the moral point to be made by the law's prescribed penalties is not in the actual punishment carried out but in the reasons behind the sentence handed down. Clearly the biblical record itself testifies to instances in which violators of these laws were dealt with by kindness and mercy rather than allowing them to receive their due penalty. But the justifying reason for the extremity of the law's sentence has not been abrogated. Four examples, two from non-sexual relationships and two from sexual relationships, will serve to illustrate my point and to further illustrate what marriage is not.

The Choice of Death or Life in Non-Sexual Relationships

If the relationship between God and His people is like a marriage between them, then it is eternally binding. However, because human beings are temporal creatures, then their physical death signals the end of physical obligations of the still-living party to the

[44] See Leviticus 20.

covenant.[45] As God is the author of life, He cannot die; and as human beings are sinful, they have introduced death into the world by the corruption of their natures. God necessarily steadfastly upholds His end of the covenantal agreement. God in His mercy offers His people redemption and life through covenant with Him, but oftentimes, His people still choose death over life. That is to say, His people still choose to break their vows, the Law, and to shed their holiness, without which they cannot approach the throne of God and live. The Law is thus the key to life; to break the Law invites death, that is, a departure from the presence of God.[46]

When God gave to Moses the Torah, He charged Moses with serving as its mediator to the people. Moses then took the Law to the people, saying,

> See, I have set before you today life and prosperity, and death and adversity; in that I command you today to love the Lord your God, to walk in His ways and to keep His commandments and His statutes and His judgments, that you may live and multiply, and that the Lord your God may bless you in the land where you are entering to possess it…. I have set before you life and death, the blessing and the curse. So choose life in order that you may live, you and your descendants, by loving the Lord your God, by obeying His voice, and by holding fast to Him; for this is your life and the length of your days, that you may live in the land which the Lord swore to your fathers, to Abraham, Isaac, and Jacob, to give them (Deut. 30:15-16; 19-20).

The covenantal command to make love resounds throughout this charge to the people of Israel. How do they carry out that command? They adhere to the Law of the covenant, they choose life over death and live.

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[45] This is why Tarwater and other covenant theologians can assert that once the covenant is broken it is not correct to assume that it is also dissolved. The living party still bears responsibility to fulfill their ends of the covenant bargain perpetually. See Tarwater, 42.

[46] "Then Moses came and recounted to the people all the words of the Lord and all the ordinances; and all the people answered with one voice and said, 'All the words which the Lord has spoken we will do!'" (Ex. 24:3). The people, in accepting the Law as their governor, acknowledge that God places certain stipulations on those who desire to live. They cannot carouse with foreign deities, nor can they associate with non-covenanted people on their level, no matter how enticing it is to do so.

The idea that the Law of God is somehow morally repressive and stultifying is a modern invention, one that does not comport with the biblical testimony and the experience of the Jewish people. In fact, as Jewish scholar David Ariel informs us, "Whereas the Egyptians understood freedom as license, the Israelite idea of positive freedom was understood as the replacement of slavery by a moral law."[47] For this reason, the psalmist could exult with rapturous tones, "O how I love Your law! It is my meditation all the day…. Let my soul live that it may praise You, and let Your ordinances help me." (Ps. 119:97, 175). To the devout within the covenant community, the Law of God is the source and fountain of life, the reason to praise God and His goodness. If therefore the Law is life, to break it anywhere at any point is death.

The most obvious crime for which capital punishment is prescribed in the Law is murder. In Exodus 21:12-14, the Israelites are instructed: "He who strikes a man so that he dies shall surely be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint you a place to which he may flee. If, however, a man acts presumptuously toward his neighbor, so as to kill him craftily, you are to take him even from My altar, that he may die." The intention of the murderer in the commission of his crime is important here for determining the appropriate severity of the punishment. Mercy is shown to those who murder another but have not plotted with malice aforethought to kill. Those who have "acted craftily" in their wickedness are subject to the full penalty of the law. The point of the Law here is that the willful taking of another's life is a violation of the covenant of life. The murderer chooses death over life, and therefore brings the curses set down at the giving of the Law upon himself. The

[47] David S. Ariel, *What Do Jews Believe? The Spiritual Foundations of Judaism* (New York: Schocken Books, 1995), 59.

covenant community cannot be a place where life is at risk, so those who would deliberately put it at risk must be uprooted before they are allowed to do so again.

From that basic centrality of life, all other capital crimes may be better understood. One other crime to which I will draw attention will serve to illustrate my point. Exodus 21:15 and 17 inform the Israelites, "He who strikes his father or mother shall surely be put to death. He who curses his father or mother shall surely be put to death." If we remember the centrality of life to the covenant, this seemingly harsh sentence can be better understood. One's parents are the immediate source of one's own life. To strike them or to curse them is a direct affront to that fountain of life, a symbolic statement that one wishes one had never been born unto them. Therefore, if one turns his back on the source of life, so shall he be cut off from the living. The holy people of God cannot admit death into their camp without defiling themselves, for God is the God of life, and death, even figurative death, or more precisely in this case, figurative suicide, is His enemy. Those who violate the covenant ordinances do not do so in ignorance, and therefore it may be properly said of them that they have *chosen* death over life.

The Choice of Death or Life in Sexual Relationships

Several capital crimes found in the Law are sexual in nature, including among others, adultery, homosexual acts, and a few types of incest that are addressed in Leviticus 20. I will address the first two to continue to illustrate my point about the centrality of life to the covenant, and also specifically to highlight the essential nature of Christian marriage as a lifelong, heterosexual covenanted union. Adultery is the willful taking of another person's spouse for one's own sexual pleasure. The relevant analogy is that of robbing another of their life, or rather, their openness to new life. One who is

married may not lawfully reproduce outside that marital bond, but if one's spouse is unfaithful and produces a child with another partner, that spouses resources will be taken from the faithful spouse and their mutual children to provide for a child born outside the covenant bond. Apart from the safeguarded exclusivity of sexual relations within marriage, a man has no sure way of knowing if certain children are his own, and a woman has no sure way to permanently lay claim to the man's resources.[48] Both the adulterer and the adulteress are culpable for their act and will be punished, for they have turned their backs on the openness to life that legitimate sexual intercourse entails to pursue their own bodily pleasures and have thereby violated the exclusivity of the marriage covenant.[49]

Moral philosopher John Finnis discusses the difference between adultery and marital intercourse in this way:

> Aquinas puts the point starkly when he says that a conjugal act of intercourse and an act of adultery are *acts* of different types, even though the behavior, the physical and psychosomatic activity, may be identical. And he does not mean to make the merely logical, empty point that the two types are morally *right* and morally *wrong*. Rather, he is saying that the reason why there can be this profound moral difference is precisely that, despite their physical identity, they are different types of human act: the wills of the parties relate to the human goods at stake in intercourse quite differently.[50]

Psychiatrist Viktor Frankl informs us that "sex is justified, even sanctified, as soon as, but only as long as, it is a vehicle of love. Thus love is not understood as a mere side-effect

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[48] *See* David M. Buss, "Human Mating Strategies," *Samfundsokonomen* 4 (2002): 56. Evolutionary psychology suggests that human jealousy is an adaptation designed to safeguard a sexual relationship and to prevent the undesirable investment of resources into children which are not one's own (if the wife is unfaithful) and to prevent the loss of emotional and financial support (if the husband is unfaithful).

[49] *See* Roy Bowen Ward, "Why Unnatural? The Tradition Behind Romans 1:26-27," *The Harvard Theological Review*, 90 (July 1997): 263-284.

[50] Finnis, 38.

of sex; rather, sex is a way of expressing the experience of that ultimate togetherness which is called love."[51] One must love prior to sexual engagement if sexuality is to be more than acting on mere animal instinct. And whereas pregnancy for an intimate, loving married couple would under normal circumstances be welcomed with open arms, the same for an adulterous woman would be disastrous for her and her lover. Neither partner in an adulterous relationship has had the opportunity of truly loving the other; instead, the two furtively seek their own pleasures, instrumentalizing the other for the satisfaction of their own selfish lust. Therefore, the adulterers must take every precaution to prevent conception, and thereby intentionally turn sexuality upside down and misuse it primarily for pleasure rather than for its intended end of generation. Adultery looks upon life with disdain and heralds pleasure as paramount, while married intercourse does the reverse: pleasure is derived from the mutuality of spouses in their loving openness toward new life.

A similar analogy may be drawn for homosexuality. Notice it is not the homosexual individual, that is, the one who is oriented toward a preference for the same sex, who is condemned. Never mind that sexual orientation was not a separate psychological category until much later than the biblical period, for one's proclivities do not automatically make one evil.[52] The act of a man lying with another man is what is condemned. The connection to death is, as with adultery, apparent upon closer inspection. As Finnis says, "The same absoluteness of the properly (but still nonevaluatively) specified norm excluding adultery is found in the constant Christian

[51] Viktor E. Frankl, *Man's Search for Meaning* (New York: Washington Square Press, 1984), 134.

[52] *See* Dwane Moon, "Discourse, Interaction, and Testimony: The Making of Selves in the U. S. Protestant Dispute Over Homosexuality," *Theory and Society* 34 (December 2005), 555.

tradition, from the beginning, against abortion, suicide, fornication, homosexual sex, and blasphemy and disclaimer of the faith."[53] Homosexual relationships in which intercourse is a constituent part are inherently unproductive. The sole purpose of such acts of same-sex intercourse is to find pleasure. There may be some derivative consequences such as a closer intimacy and fuller appreciation of the partner, but the essential covenantal element of openness to life is not and cannot be found in homosexual sexually active relationships. The act of anal intercourse, the primary sexual act of homosexual males, but also a secondary act of many heterosexual couples, represents life being swallowed in death. The generative organ enters the organ of waste and decay and deposits the life-force where it cannot develop.[54] Thus, there is a deliberate choice of death, the only opposite of life, on the part of the homosexual partners, and since God is just, He gives to the homosexual offenders exactly what they have chosen, nothing more and nothing less.

Though the punishment of all these crimes may in the twenty-first century seem severe, the issue underlying them all is the sanctity of the God-human relationship, which then precipitates the sanctified inter-human relationships. And it must be pointed out that God, though He is just, is also merciful, and He provides an alternative to the strict demands of justice found in the Law. For example, in certain cases, when the husband finds something indecent about his wife, he is permitted to divorce her rather than to kill her. Deuteronomy 24:1-4 plainly allows the husband to show mercy to his errant wife rather than to exact upon her the full harshness of the law. However, the divorce decree

[53] Finnis, 8-9.

[54] J. Budziszewski, *What We Can't Not Know: A Guide* (Dallas: Spence Publishing, 2003), 86-7.

is equivalent to the covenantal death of the woman to the man.[55] So, divorce may not be permissible for light and transient causes, but only upon the discovery of the commission of some crime otherwise punishable by death. The errant woman is to live as though she were dead and to have no further relationship with her previous husband, nor with any other man. Nor is her husband to seek to reestablish relations with her if she remarries after her divorce.[56] First century B.C. rabbis were particularly concerned about the inability of divorcees to purge their memories of their former spouses—"when a divorced man marries a divorced woman, there are four yearnings in the bed"—and the social disruptions that may result.[57] But later Roman Catholic tradition reminds us that "Between the baptized, 'a ratified and consummated marriage cannot be dissolved by any human power or for any reason other than death."[58] Furthermore, "divorce does injury to the covenant of salvation, of which sacramental marriage is the sign. Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery."[59] Given the

[55] Ancient Jewish sources disagree over the necessary severity of the offense which triggers divorce proceedings. The prophet Malachi (2:14-16) explicitly proclaims God's hatred of divorce, equating it with a serious breach of the covenant. By the first century B.C., the rabbis interpreted divorce laws differently. The school of Shammai supported the idea I, too, embrace, namely that divorce should only result as a consequence of marital infidelity. The Hillel school, however, the one to exert more extensive influence, took the view that divorce was acceptable for a variety of reasons, some as trivial as the wife improperly preparing her husband's dinner. George Robinson, *Essential Judaism: A Complete Guide to Beliefs, Customs, and Rituals* (New York: Pocket Books, 2000), 170-71.

[56] Catholic moral theology also treats divorce as a form of death. Germain Grisez comments that "marriage is indissoluble except by death, and a 'remarriage' after divorce is an adulterous relationship." *The Way of the Lord Jesus, vol. 3: Difficult Moral Questions* (Quincy, Ill.: Franciscan Press, 1997), 140.

[57] Ariel, 70.

[58] *Catechism of the Catholic Church* (New York: Doubleday, 1994), 632.

[59] Ibid., 633.

gravity of divorce, there is an underlying current of mercy in justice beneath the covenant of Moses.

The present situation looks something like this: there are numerous views of marriage, how it is contracted, with whom, and for how long, that have currency in liberal American society. Even for participants in the Church, the practices associated with marriage often do not comport with the Christian ideal. This, I will show, is not a function of a more permissive positive law than the Christian standard, but rather because the Christian standard has been forgotten and replaced by positive law even in the Church itself.[60] The Church has, in other words, become too tolerant of the world's definitions of acceptable marriage practices, and has lost one of its key marks of holiness. Many in the Church have realized the failure of positive civil marriage law to produce desirable results, but rather than trying to reform the Church internally, they have bemoaned the fact that positive law no longer conforms to Christian standards, with an attitude that until the positive law changes, they have no real alternative but to accept it.[61] Such is the

[60] Referencing a 1977 report sponsored by the Catholic Theological Society of America titled *Human Sexuality: New Directions in American Catholic Thought*, Stanley Hauerwas points out that the "subversive" nature of Christian marriage has been maligned in modernity as "too negative, legalistic, and act-oriented" for a society that values sexual expression as a good in and of itself. The report cautiously suggests the need for more empirical evidence before a final judgment may be made as to the inappropriateness of premarital sex, adultery, or by implication, other sexual deviations. Hauerwas, *After Christendom?*, 113-16.

[61] It is instructive that in the US, even in states with the optional covenant marriage that would make divorce attainment more difficult, "state formulations of what marriage entails in the individual case will still trump countervailing religious formulations—even if the state is interpreting the meaning of a 'covenant marriage.'" Witte and Ellison, 24. Rather than provoke a confrontation with the state authorities, the Church simply rolls over and accepts the state's final word over an institution that is fundamentally religious in nature. Where Church and state conflict over the interpretation of marriage when two Christians seek a divorce, the state and the unrepentant sinner win over against the Church and the authority of the covenant. It would seem, then, that the liberal state will always grease the way for those desiring to evade Church restrictions to do so. Furthermore, the Church lacks authority because the membership is unwilling to yield it any. Instead of consenting to the authority of God, even Church members prefer to consent to the authority of the state where it serves their selfish purposes and to refuse the Church any authority over their private lives.

triumph of democratic liberalism in American society that even Christians go about seeking legal reform; yet liberalism rightly recognizes that "no citizen can fairly claim that what constitutes good citizenship is whatever happens to conform to his or her particular religion."[62] What, therefore, is really needed is reform in Christian spirituality and orthopraxy.

Our world is saturated with competing moral systems, each seeming to offer a different path to the good life. As Lewis shows, these competing claims are all grounded in what he calls traditional morality, an ethical code that must be assumed *a priori* in order to make sense of any criticism of any moral code. Only most competing moral claims are truncated systems that will ultimately "deprive us of our full humanity."[63] Traditional morality, says he, will not magically solve the world's problems, but it is the book from which all other moral systems are derived.[64] What the Church must do is to recover the fullness of traditional morality for itself, and then learn to defend the claims of traditional morality against those errant daughter moralities with which it comes in contact. I am not proposing the substitute of one moral system for another as the basis of our positive law, for that would do nothing other than to create a different set of problems for society at large to handle with which it is not structurally prepared to cope, lest it is willing to engage in suppression of opposition similar to that practiced by early-modern European states. In one way the liberal state represents the liberal value system associated with it that holds the highest good to be acknowledged is that there is no

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[62] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It* (Cambridge, Mass.: Harvard University Press, 1996), 67.

[63] Lewis, "On Ethics," 76.

[64] Ibid., 75.

highest good that can be exclusively legally supported in positive law.[65] From a different perspective, the liberal state in its ideal form is a values-free institution that benevolently allows ample opportunities for competing moralities to flourish and find support or opposition on their own merits, regardless of their agreement with liberalism in principle. Such might be a system centered upon rules of fairness that govern public moral deliberation.[66] The conflict between the Church and liberal political philosophy will be fully addressed in the following chapter, where I will examine the various arguments Christians use to justify a legal makeover in modern marriage law.

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[65] *See* John Langan, "Rawls, Nozick, and the Search for Social Justice," *Theological Studies* 38 (1977): 346-47.

[66] Gutmann and Thompson, 2.

CHAPTER THREE

That's Disgusting! Christian Attitudes Toward Homosexuality and Same-Sex Marriage

We have seen in the previous chapter that Christian marriage is a covenantal institution premised upon the command to make love. God directs His people to join together in covenantal marriage, a union of male and female and of both to God, all covenantal opposites of each other. These covenantal marriage vows may be broken only on pain of covenantal death, or more specifically, the breakage of vows entails the commission of a crime worthy of capital punishment as determined by the Law of God precisely because that crime represents the taking of life from the covenantal community. Therefore, covenantal faithfulness demands more than temporary commitment; it necessarily demands a lifetime of devotion to one, and only one other individual, before marriage, during marriage, and throughout the life of both partners, unless or until covenantal death is warranted or intervenes. As the Catechism of the Catholic Church presents it, "Fidelity expresses constancy in keeping one's given word. God is faithful. The Sacrament of Matrimony enables man and woman to enter into Christ's fidelity for his Church. Through conjugal chastity, they bear witness to this mystery before the world."[1]

As it is problematic enough in a secular state to police already existing marriages without the erection of an oppressive police-state apparatus, anti-adultery laws have been repealed, leaving couples without recourse to the state for solution to their marital troubles beyond the grant of a divorce decree. Such civil decree does nothing to *punish*

[1] *Catechism of the Catholic Church* (New York: Doubleday, 1994), 628.

the adulterer for his or her indiscretions but merely serves to absolve him/her of any continued responsibility to the faithful spouse. In the eyes of the state, even the one who was unfaithful may be permitted to marry again with impunity. If the state cannot punish marital infidelity, it is even more difficult for the state to police and to ensure fidelity in those marriages that have yet to be consummated. It would be quite an intrusion into people's personal lives were the state to be given authority over premarital relationships, and modern Supreme Court caselaw confirms this.[2] Both marriage and singlehood considered thusly seem to be outside the bounds of state regulation; they are private realms that the state may not lawfully impose upon.

That said, the notion of premarital fidelity must be articulated more thoroughly. My point is that marriage is an intimate, private union; it is a relationship that the state has acknowledged it has no legitimate control over when it repealed the anti-adultery laws. Yet, curiously, the state retains the right to license marriage. From the Christian perspective, that too is an illegitimate intrusion into personal privacy, the privacy of accountability to a group other than the state for the continuation of the marriage relationship. Correctly understood, Christian marriage is an eternal institution. If it is eternal, then it cannot be said to have a definite, temporal point of origin. The Christian couple is united to the covenantal bond even before they physically meet. For this reason, the Catholic Catechism can reasonably affirm that "fornication is carnal union between an unmarried man and an unmarried woman. It is gravely contrary to the dignity

[2] *See Eisenstadt v. Baird* 405 U.S. 438 (1972) recognizing a fundamental right to decide whether to bear or beget a child; *Roe v. Wade* 410 U.S. 113 (1973), extending the *Eisenstadt* ruling to cover a woman's choice to seek an abortion; *Carey v. Population Services International* 431 U.S. 678 (1977), affirming and extending the same right discovered in *Eisenstadt*.

of persons and of human sexuality which is naturally ordered to the good of the spouses and the generation and education of children."[3]

Fornication is also condemned by Scripture, though not with the same severity as the similar sin of adultery. Exodus 22:16 provides a clear instruction: "If a man seduces a virgin who is not engaged, and lies with her, he must pay a dowry for her to be his wife." In other words, as St. Paul would recognize centuries later, "the one who joins himself to a prostitute [or any unmarried woman] is one body with her[.] For He says, 'The two shall become one flesh'" (1 Cor. 6:16). A marriage between the two partners has been consummated, as they are physically bound into a one-flesh union. Refusal to accept the consequences of one's premarital sexual indiscretions is a violation of one's covenantal obligations. Covenantal death need not be the sentence for fornication, because the spouses prior to their tryst were not married to another, and thus the remedy is the recognition of their marriage sealed already by their shared sexual act. However, if one of the unmarried partners is engaged to another and the decision to participate in a sexual act was consensual, then both are guilty of the capital crime of adultery, for they have violated the marriage covenant transacted between the engaged parties. The absence of a state-approved ceremony or license is no defense for the offenders.[4] To disregard the seriousness of fornication as sin, to argue only for the necessity of a state-approved marriage license to make, at least for a time, sexual activity between spouses exclusive, is to cheapen the institution of marriage and to weaken its hold on the parties involved.

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[3] *Catechism of the Catholic Church*, 624.

[4] *See* Deut. 22:23-24.

To illustrate this, I will in this chapter demonstrate that the common arguments for the preservation of the marital legal status quo do not do justice to the cause of Christian marriage. Those who make these arguments are either shortsighted as to the real limitations placed on the regulatory power of the liberal state by the Constitution and believe that a simple change in law will solve all social ills, or else they have a more sinister agenda that aims to squelch only particular behavior that goes beyond the average person's typical temptations[5] while dodging the commands to be holy.

By showing that many of the arguments put forth against genderless marriage may also be applied to no-fault divorce laws and laws that permit unfaithful partners to marry, I intend to make the case for marital disestablishment rather than for legal marital limitations. Only disestablishment can put to rest the quarrels over marriage and family law, and open the door for *more* religious regulation of marriage rather than less. Disestablishment will summon religious practitioners to either take their faith seriously or to be content with their own personal choices. Civil licensing within a limited scope represents for religion the easy way out, giving religious practitioners an external something to fall back upon when the dictates of their faith do not permit the course of action desired.

The Family in Pluralistic America

An idea of a lifelong and mutually faithful commitment between partners still represents the ideal in modern American society, but in practice it has hardly become an

[5] William Martin, *With God on Our Side* (New York: Broadway Books, 1996), 100. Martin here points to the viable notion that heterosexuals can easily imagine themselves tempted by "fornication or adultery," and therefore allow some grace to those who fall into that sort of temptation. But heterosexuals likely are at greater pains to accept or to admit temptations to homosexual behavior and are thus unwilling to bend their insistence on legal proscription.

indisputable norm. This was recognized at least as early as the 1970s when the Carter administration convened the White House Conference on Families. While the use of the plural "families" was intended to publicly recognize the existence of "non-traditional" family units such as single-parent households, divorced parents with joint custody over their children, unwed couples cohabiting with their offspring, and even homosexual couples with or without children, the use was particularly upsetting to the politically emerging Christian Right. This rather nebulous and ill-defined group of conservative Christians conceived of "the family" as a married man and woman with their mutual blood-related or adopted offspring, the so-called "nuclear family."[6] Any other form of intimate social unit, to them, was not and could not constitute a true family.[7]

Pluralistic America, however, is not prepared to accept such a narrow definition of family as the only one legally acceptable. Consider for example the family comprised of "unwed" parents and their mutual offspring. Christian and non-Christian couples alike are increasingly likely to cohabitate prior to "marriage,"[8] meaning that they are perhaps less committed to their chosen partners and do not understand or at least do not accept the biblical teaching that sexual intimacy once experienced between two covenantal

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[6] It may be well to point out that the biblical record is far from consistently supporting the ideal of the nuclear family. Many of the great patriarchs of the faith were polygamists, several were involved in what would today be considered incestuous marriages, and still others had numerous concubines alongside their formally-recognized wives. *See also* Robert Parham, "Churches as a Safe-House in the Debate about Homosexual Marriage," *Ethic Daily.com,* 20 November 2003, available at: http://www.ethicsdaily.com/print_popup.cfm?AID=3398 (Accessed on 01-30-2004).

[7] Martin, 168-90.

[8] I use the quotation marks here and in the previous sentence to indicate that theologically these couples are married. It is only the state that regards them as yet unmarried. Where Christians fall into the trap of also referring to these couples as "unmarried" they are implicitly testifying to either their belief in the exalted position of the state, their ignorance of Christian teaching, or likely both. For statistics on cohabitation, *see* Larry Bumpass and Hsien-Hen Lu, "Trends in Cohabitation and Implications for Children's Family Contexts in the United States," *Population Studies* 54 (2000): 29-41.

opposites creates a lasting and permanent bond between them. Among non-Christians this should not be surprising, and furthermore that non-Christians practice cohabitation should not disturb the Christian population's moral compass. While Christians are free to believe and behave in accordance with their own judgment of what constitutes a marriage bond, they may not legitimately require the same of non-Christians. State licensing requirements in a liberal society cannot be tougher than the minimum standards required by the most lenient group in the society. Therefore, instead of lamenting the fact that the law or society generally does not do enough to discourage cohabitation,[9] the Church should do more to educate its members in the Law of holiness. For those unwilling to adhere to the Church's teachings, there is always the option of leaving the Church for another organization or forming one's own religious organization.[10] The Holy Church must not pursue vain efforts at social engineering through public law, lest non-believers' freedom be negatively impacted.

But the near impossibility or inadvisability of social engineering that affects non-Christians is only one side of the coin. What effect state licensing of marriage has upon even Christian members of society must also be considered. There is a dangerously false presumption created by civil licensure that until the license is issued and a marriage is formally contracted (not covenanted) between the two parties, the partnering individuals are free and clear of any and all responsibilities one to the other, except for those they mutually and voluntarily agree to assume upon themselves and may revoke at their

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[9] *See* Christopher Wildeman, "Conservative Protestantism and Paternal Engagement in Fragile Families," *Sociological Forum* 23 (September 2008): 558.

[10] Indeed, this has been the case for several of America's notorious religious discontents, such as Joseph Smith, Mary Baker Eddy, and Charles Taze Russell. For a meditation on the divisiveness and separationist tendencies of the religious, *see* Martin E. Marty, *Politics, Religion and the Common Good: Advancing a Distinctly American Conversation about Religion's Role in Our Shared Life* (San Francisco: Jossey-Bass, 2000), 25-6.

discretion at any time. This type of premarital or non-marital relationship adheres to a skewed view of fidelity, one that assume fidelity is serial, attaching to a particular partner for a particular time, rather than singular and lifelong from cradle to grave with the same individual, regardless of one's current relationship status. The prospect of attaining a formal state license in the future or not at all frees the individuals to explore the sexual field before finally committing to someone and settling down. If greater sexual license and the negative consequences of unwanted pregnancies and venereal diseases that come with it, rather than respect for the marital covenant, is the product of civil licensing, then perhaps Christians should re-evaluate their commitment to civil marriage rather than continuing to support it.

There is, in the continued endorsement by Christians of a civilly sanctioned marriage, a thinly veiled attitude present that "as long as I am not unfaithful for the duration of my (current or future) marriage, I am free to experiment as much as I want until I register my (final) relationship choice with the state." This is the equivalent attitude of those who say to themselves, "Let us eat, drink, and be merry, for tomorrow we die" (Is. 22:13). That is, it is parallel to ignoring the warnings of the prophets and continuing to plunge into ruin. Without the prospects of a state-issued license, the Church could more forcefully assert its own definition of marriage over its members, because there would be no *legal* alternative to select; or rather, the state would not stand up as the only necessary guarantor of a marriage and simply nod as some chose to add additional stipulations as they so chose. Where the state may license marriage, the Church's definition of marriage necessarily becomes subordinate, but where there is no state license, independent social institutions are free to be as strict or as lax as they want

to be. Members of these groups would have to either conform to group norms or else find another group before marriage. Broader society would simply do what it already does informally—simply regard all cohabiting couples as married, while each couple and the groups to which they belong would determine the truth or accuracy of that broader social judgment.

No-Fault Divorce and the Decline of Civil Marriage

Let us also consider the issue of no-fault divorce. All fifty states today allow a civilly married couple to divorce without having to show cause for doing so. Many Christians bemoaned the decision of the states to strip away the legal barriers to a quick and painless termination of marriage. Most public arguments made against no-fault divorce centered upon the decline of patriarchal authority and the consequent imperilment of the emotional and financial welfare of children and women whose fathers and husbands had been the primary breadwinners but are by divorce decree cut free familial obligations to pursue other interests. As early as the late eighteenth century, French conservative Louis de Bonald expressed the case against divorce this way:

> Today, the save the State, the domestic constitution must be defended against divorce; a cruel capacity, which takes all authority from the father, all dignity from the mother, all security from the child, and transforms domestic society into a struggle between strength and weakness, between power and duty; which constitutes the family as a temporary lease, where the inconstancy of the human heart stipulates its passions and interests, and which ends where other interests and new passions begin. [11]

In the United States, the case against divorce followed much the same line of thought. As one study phrases it, "By making divorce so easy to obtain, the no-fault regime has mined the lives of countless people, many of them children who are emotionally traumatized by

[11] Louis de Bonald, *On Divorce*, trans. and ed. Nicholas Davidson (New Brunswick, NJ: Transaction Publishers, 1992), 38.

divorce, and many others women whose financial well-being is mined when their marriages fall apart."[12]

With today's job market more open to women, the impending threat of financial disaster for a divorcee and her children is not as grave as in the days before gender equality was achieved. Indeed, one argument made against equal pay for equal work was the threat it posed to the stable two-parent household in which the father worked and put food on the table while the mother attended to the domestic chores and cared for her children.[13] If women were afforded the same opportunities for employment as men, they would have no need of marrying or, if already married, of staying married. Strict divorce laws, requiring the partner filing for divorce to show cause also represented social engineering targeting children's and women's welfare. A man who simply did not want to provide for his wife and children, but who otherwise had done nothing contrary to the marriage contract he and his wife had entered, had to fabricate reasons to convince the courts a divorce was necessary. Such acts could leave his spouse without many social options, as a divorce could leave a permanent smear on one's social reputation.[14]

By instituting no-fault divorce, the states effectively recognized the equality of women, but also recognized the responsibility of both partners to their mutual offspring.[15]

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[12] Steven L. Nock, James D. Wright, and Laura Sanchez, "America's Divorce Problem," *Society* 36 (May-June 1999): 44.

[13] Martin, 162-3.

[14] Nancy Cott comments that until comparatively late in the history of the United States, the most common means of ending a marriage was "self-divorce," which had the undesirable consequences of leaving "support obligations hanging" without resolution. Cott, 48. Stephanie Coontz more directly addresses the phenomenon of "routinized" fault-based divorces, that is, termination of marriages that were mutually unsatisfactory on fabricated grounds. Stephanie Coontz, *Marriage, A History: From Obedience to Intimacy or How Love Conquered Marriage* (New York: Viking, 2005), 252.

[15] Cott, 195.

Child support and alimony laws were passed to ensure that women and children would not be the victims of men's inconstancies. Prior to no-fault divorce, many couples stayed in otherwise miserable marriages, either because there was no legal cause to separate, or because of the detriment it posed to the weaker marriage partner.

Given that Christian tradition abhors divorce for any but the most serious of reasons, reasons that amount to crimes worthy of a sentence of covenantal death, it is no surprise that there would be public backlash against lenient divorce regulations. Much attention has been drawn to three states within the last 15 years—Louisiana, Arkansas, and Arizona—that have adopted "covenant marriage" laws that are designed to make marriages more durable.[16] These laws are curious examples of just how far many well-intentioned people will go to accomplish a public purpose without considering the long-term ramifications for those most directly affected.

The intent of these laws is simple—offer an alternative type of *civil* marriage for those who want to be held to a higher standard of accountability in their relationships. These so-called covenant marriages would, for those who opted for them, require the couple to receive premarital counseling, require couples experiencing marital turmoil to receive marriage counseling, and would reinstate the legal requirement of showing cause for divorce—an absolute last resort undertaken only after a mandatory cooling off period lapsed and no resolution was found to the marital problems—before the couple could permanently part ways.[17] There are at least three things wrong with this type of law from the outset: 1) it represents an attempt to use the secular law to uphold a religious ideal.

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[16] Nock, Wright, and Sanchez, 43ff.; Joe Loconte, "I'll Stand Bayou: Louisiana Couples Choose a More Muscular Marriage Contract," *Policy Review* (May-June 1998): 30ff.

[17] Loconte, 32.

Despite its facially neutral goal of limiting the number of divorces and strengthening marriages generally, the law's strongest supporters are those with solid religious commitments. The very language of "covenant" to describe this type of civil marriage belies the true intent of the legislators who sponsored it. 2) It assumes, as with more conventional marriage licenses, that the institution of marriage is temporal, not eternal. The mere assumption that a specific type of license is necessary to makes it more difficult to achieve a divorce seems to imply that the couple has no confidence in their own ability to stay together without a state mandate behind them. And 3) even if it did make sense for the state to offer this type of license as an alternative, couples who selected this option at the outset of their relationship and later earnestly desire a divorce despite absence of cause would always be free to pursue termination of their marriage in another state. Under the Full Faith and Credit Clause of the US Constitution, the states that issued the covenant licenses would be obligated to recognize the divorce decrees of the no-fault states, while the no-fault states would be under no obligation to recognize more to a couple's relationship other than their legal marital status as attested to by the covenant marriage state.[18] What would ultimately be accomplished by these "covenant marriages" other than a mockery of the true ideal of the Christian covenant marriage?

Divorce, from the state's perspective, would be simpler still if it were not in the power of the state to grant it. Disestablishment of marriage as a legal institution would absolve the state from the responsibilities of intruding upon people's private and intimate affairs in open court. State resources spent in divorce proceedings could be redirected to more necessary governmental matters, while the private individuals would shoulder the

[18] Peter Hay, "The American 'Covenant Marriage' in the Conflict of Laws," in John Witte and Eliza Ellision, eds. *Covenant Marriage in Comparative Perspective* (Grand Rapids, Mich.: Wm. B. Eerdmans, 2005), 297.

burden themselves, in conjunction with their social or religious groups, of deciding when divorce is appropriate and what each partner should take from the abandoned marriage. If the liberal state is about personal freedom and responsibility, this option seems best suited to attain those goals. If the Christian Church is about preserving the ideal of covenant marriage, it would be better able to do so without the state option of *any* kind of divorce, fault or no-fault. That is not to say that state-divorce should be made illegal, but rather to say that it should be made unnecessary. If marriage is disestablished, then by extension, state control over divorce is no longer required. That, too, would transfer to the couple and/or to their social groups or religious organizations from which they sought sanction originally.

State marriage contracts are by definition temporary, at least insofar as state divorce laws always allow for no-fault dissolution of the marriage. But no-fault divorce is an inevitable product of liberal thought, guaranteeing the individual the ultimate right to choose the course of his or her own life without regard to the social consequences of that decision. In effect, then, civil marriage is not marriage at all, but only a temporarily sanctioned union, the duration of which is left unspecified and the end of which can come at any moment when either or both partners elect to bring it about.

Christians and the Law of Civil Marriage

President of the Marriage Law Foundation, Monte Neil Stewart, argues that "marriage is constituted by a unique web of shared *public* meanings" which often become normative and "teach, form, and transform individuals, supplying identities, purposes,

practices, and projects."[19] He also discerns two possible types of civil marriage: "man-woman marriage" of the traditional variety, and "genderless marriage" in which the genders of the married individuals are legally "irrelevant to the meaning of marriage."[20] Stewart is right to point out that these are the only two possibilities legally recognizable and defensible within the scheme of liberal law. Either society will recognize the one or credit the other, but it cannot make sense of a dualistic approach to marriage law that puts each type of marriage parallel to the other, without violating certain elements of constitutive liberal freedom.[21]

According to Stewart, man-woman marriage produces certain social goods that genderless marriage cannot produce. These include 1) children's right to know and be raise by their biological parents, 2) maximization of children's "private welfare," 3) the "optimal child-rearing mode…that correlates…with the optimal outcomes deemed crucial for a child's, and therefore society's, well-being," 4) a bridge over the gender divide, 5) the social transformation of men into husband-fathers and women into wife-mothers, and 6) official endorsement of heterosexual intimacy.[22] Acknowledging that there are other social goods, Stewart stresses that these are the "relevant social goods" that genderless marriage cannot produce and that will be diminished and destroyed when man-woman marriage is deinstitutionalized.[23]

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[19] Monte Neil Stewart, "Marriage Facts," *Harvard Journal of Law and Public Policy,* vol. 31, no. 1 (January 2008), 320. Emphasis added.

[20] Ibid., 318.

[21] Ibid., 319.

[22] Ibid., 321-22.

[23] Ibid., 322.

But if the social goods that constitute marriage are only widely-shared and not universally shared, do we not fall into the trap of a sort of liberalism that adopts the preferences of the majority at the expense of the minority?[24] Furthermore, in a religiously diverse society such as the United States, are there any truly widely-shared social goods at all to be found? Each religion defines the constitutive elements of the marriage institution differently. Would it not be preferable for each religious organization or secular organization to define marriage for itself, to strengthen its own conception of marriage against the prevailing social conception, and shun the endorsement of the world? Have religious practitioners, specifically Christians, become too concerned with winning the approval of the world that, rather than endeavoring to stand over against the world, they would turn to the mechanisms of the world to validate their own unique doctrinal positions against those of everyone else?

Marriage is for Heterosexuals

American Christians aiming to establish and retain a foundational pride of place for heterosexual marriage firmly believe in the primacy of the Christian community and its norms for all of civil society, Christian and non-Christian alike. Any departure from the so-called Judeo-Christian tradition in secular law represents a fundamental shift away from the founding principles of American society and an embarkation on the path to social ruin.[25] Therefore, this segment of American Christianity is willing to enter the secular political fray in order to legally validate its own opinions. It does so, ironically,

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[24] James Madison, Federalist #10, in Clinton Rossiter, ed. *The Federalist Papers* (New York: Mentor Books, 1962), 77.

[25] *See* Mark A. Noll, Nathan O. Hatch, and George M. Marsden, *The Search for Christian America* (Westchester, Ill.: Crossway Books, 1983), 129-31.

with a firm belief that the social contract of American liberal democracy justifies its attempts.[26] These opinions will be shown below to be products of a deficient understanding of the foundations of American liberal society.

Many proponents of the Federal Marriage Amendment, a proposition first brought up for consideration in Congress in 2004 to guarantee that the federal government recognized only man-woman marriage, defend it on the grounds that, if it passes, it will represent the people's voice and individual rights better than the judicial activist courts have done since the Massachusetts *Goodridge v. Department of Health* decision in 2003.[27] In the proponents' political actions, there is a noticeable paradox between the espousal of the primacy of the Christian covenant community on the one hand and the *embrace* of the secular contractual community's tools of operation on the other. For acceptance of those tools implies also acceptance of individualism and liberty defined solely in personal terms, conceptions that, demonstrated in chapter two, are in direct contradiction with the ideal of Christian covenant community. I intend below to follow the arguments of Christians against legalizing genderless civil marriage and to show that these arguments, as do the arguments against social acceptance of unwed parenthood and no-fault divorce, do more to undercut the institution of Christian marriage than to help it

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[26] Mark A. Noll, *The Scandal of the Evangelical Mind* (Grand Rapids, Mich.: Eerdmans, 1994), 99. "Evangelical identity in America could no more be separated from its commitment to Enlightenment rationalism than from its belief in the divine character of the country and in God's ordination of democratic liberalism."

[27] *See Goodridge v. Department of Health,* 440 Mass. 309; Glen Stanton, "Why We Need the Federal Marriage Amendment," available online at http://family.org.cforum/fnif/commentary /a0021660.cfm (accessed on 2-18-2004); Pam Belluck, "Massachusetts Gives New Push to Gay Marriage in Strong Ruling," *New York Times On-Line*, 5 February 2004, available at http://www.nytimes.com (accessed on 2-5-2004); Richard W. Stevenson, "Bush Expected to Endorse Amendment Defining Marriage," *New York Times On-Line*, 5 February 2004, available at http://www.nytimes.com (accessed on 2-5-2004); Kevin Eckstrom, "Massachusetts Court Says Civil Unions Not Good Enough for Gay Couples," *Ethics Daily.com*, available at http://www.ethicsdaily.com/article_detail.cfm?AID=3736 (accessed on 2-5-2004).

accomplish the task of perfecting the partners in Christ. But before getting to the heart of the matter, some background relating to the social regulation of homosexual acts is required, for as it will be shown, the most vocal opponents of genderless marriage are not against homosexuals per se, but rather are against the explicit sexual acts involved in typical homosexual romantic relationships.

From Bowers v. Hardwick *to* Lawrence v. Texas

In 1986, the Supreme Court of the United States was faced with the question of upholding the constitutionality of state anti-sodomy laws or striking them down in light of a growing social tolerance, if not acceptance, of homosexuality. The case involved a Georgia man, Michael Hardwick, whom a police officer witnessed *in flagrante delicto* committing an act of consensual homosexual sodomy forbidden by Georgia statute in the privacy of his home. Though Hardwick was not indicted due to lack of evidence, he sued in federal court challenging the constitutionality of the statute. Similar anti-sodomy laws remained on the law books of many states at that time, so the case had the potential to transform legal tradition nationwide. After the district court dismissed the case, the circuit court declared the statute unconstitutional but ordered a trial, during which the state would have to show compelling interest to justify the law's retention. The state appealed to the Supreme Court, which eventually upheld the constitutionality of the law.

Hardwick had argued that as a practicing homosexual, he was put at imminent risk of arrest if the state insisted on enforcing the statute. He also asserted a stronger argument that the anti-sodomy law violated his fundamental privacy rights as those had been construed in the Court's earlier decisions invalidating anti-contraception and anti-abortion laws. Though the Eleventh Circuit Court of Appeals accepted Hardwick's

argument and ordered that Georgia demonstrate at trial a compelling interest to maintain the laws as they were, the Supreme Court took a narrower approach to Hardwick's claims and found the state to be within its constitutional powers. Justice Byron White writing for the majority argued that the case turned not on fundamental privacy rights; instead, "the issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[28]

Hardwick's personal and presumably unchangeable identity as a homosexually-oriented man was not a factor in the Court's decision. To draw a not-too-subtle comparison, the Court's decision in *Bowers* is similar to what may have happened had the Court decided *Loving v. Virginia* differently. In that case, the Court had to consider the constitutionality of a Virginia law prohibiting and criminalizing interracial marriage. The Court's majority noted that, "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."[29] It was therefore concluded that the Fourteenth Amendment guarantee of equal protection had been breached and that the Virginia anti-miscegenation statute was unconstitutional. But if the Court had simply decided that the question before it was whether the Constitution conferred a fundamental right for people of different races to engage in consensual sexual intercourse, the case may have been decided differently. In *Loving*, the Court recognized the significance of personal racial identity and that marriage between two people regardless of race is a constitutive part of a broader human identity.

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[28] *Bowers v. Hardwick,* 478 U.S. 186, at 190 (1986).

[29] *Loving v. Virginia*, 388 U.S. 1, at 11 (1967).

Neither Mr. Loving nor Mrs. Loving could alter their race, so to bar them from marrying on that basis alone constituted impermissible racial discrimination. It would have denied them a fundamental right as human beings to simply do what two people committed to each other naturally do. In Hardwick's case, however, his identity is not considered, only his actions. The Court failed to account for the fact that, for the homosexually-oriented, sodomy is the only possible form of intimate sexual expression and that as a human being, he had a natural right to relate to another so-oriented human being. The majority in *Bowers* argued that fundamental rights were those that were "implicit in the concept of ordered liberty," or that were "deeply rooted in this Nation's history and tradition."[30] Concludes Justice White, "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[31] The Court is clearly concerned to protect state regulatory power and also to avoid legislating a particular brand of morality from the bench that would come into conflict with the expressed will of the majority of a state's legislative body. Notwithstanding the legal barriers to openly expressing a homosexually-oriented individual's personal identity entailed by anti-sodomy laws, the Court concludes that these homosexual acts are inconsequential to that personal identity and may properly be regulated by the state as the majority desires.[32]

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[30] *Bowers*, at 191.

[31] Ibid., at 192.

[32] "Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis." *Bowers,* at 196.

Some seventeen years after *Bowers*, the Supreme Court revisited its position on anti-sodomy laws in *Lawrence v. Texas*. Like the *Bowers* decision, this case arose when sheriff's deputies, responding to a weapons disturbance call, discovered Lawrence and his partner engaged in homosexual sodomy in the privacy of their home. Both were charged with breaking Texas' anti-sodomy law, a misdemeanor offense. What distinguished the Texas law from the Georgia law under review in *Bowers* was the fact that the prohibition against sodomy applied only to homosexual acts, not identical acts committed between heterosexual partners. Furthermore, by 2003, the Court had altered its understanding of liberty, noting that, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[33]

Justice Kennedy boldly opens his *Lawrence* opinion for the majority with the following statement:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[34]

The Court here is emphasizing the private nature of intimate conduct driven by the individual's self-definition. In other words, the Court recognizes in 2003 that it made a grievous error in the 1986 *Bowers* decision in failing to appreciate Hardwick's self-identification as a homosexual human being who was free to practice homosexual activity

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[33] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[34] *Lawrence v. Texas*, 539 U.S. 558 (2003).

in the privacy of his own home without state intervention. While the *Bowers* decision rested on the rational basis of the state's interest in protecting public morality, the *Lawrence* decision would put such state interest outside the scope of constitutionally acceptable reasons. Justice Scalia in dissent castigates the *Lawrence* majority, decrying the inevitable conclusion that "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices,"[35] not on the expanded privacy rights of the autonomous individual the Court announced. Justice Thomas, also in dissent, interestingly commented that "Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources."[36] Thomas's own strict constructionist principles prevented him from voting with the majority to find a non-existent privacy right in the Constitution, but he would have the nation believe that state interests in other matters outside people's bedrooms are more significant and worthy of public attention. For Thomas, there is a desire to recognize personal liberty by simply legislatively repealing the anti-sodomy law rather than finding constitutional warrant for private sexual acts that does not exist.[37]

The Inevitably Slippery Slope

Justice Thomas's approach most nearly aligns with my argument here that the institution of marriage is a private matter. Granted, Thomas's comment applies only to

[35] Ibid., Scalia, J. dissenting.

[36] Ibid., Thomas, J. dissenting.

[37] Ibid.

state resources being used to *punish* certain consensual acts and says nothing about the state resources used to officially *sanction* them. Presumably, individuals should simply be free to make private sexual choices with or without formal state permission. But insofar as the principle detractors from and supporters of genderless marriage both seem to regard civil marriage licensing rather narrowly as official approval of intimate sexual relationships, we find in the public battle that "one extreme demonizes homosexuals at every turn, making homosexuality the unforgivable sin.… The other extreme sanctifies homosexuals, arguing that homosexuality is no different morally than heterosexuality."[38] In other words, the arguments raised during the genderless marriage debate generally are keyed in on the sexual nature of the relationship in question. It is to those arguments I turn in this section. In the following section, I will address the other principle avenue of criticism directed against genderless marriage, the affects it has on procreation and child-rearing.

Above, I noted Scalia's scathing dissent in the *Lawrence* decision that charged the Court with opening the door to numerous aberrant sexual practices. Scalia may be among the most formidable and level-headed individuals to adopt this position, but he is certainly not alone in holding it. Founder of the Christian Coalition, Pat Robertson, shortly after the *Lawrence* decision was announced mailed out a letter to his supporters predicting that the Supreme Court had paved the way for "homosexual marriages, bigamy, legalized prostitution and even incest."[39] Stanley Kurtz, writing for the conservative *Weekly Standard* in response to the same case railed, "Among the likeliest

[38] Parham, "Churches as a Safe House in the Debate about Homosexual Marriage."

[39] Bob Allen, "Pat Robertson Prays for Change in Supreme Court," *EthicsDaily.com* July 16, 2003 available at: http://www.ethicsdaily.com/print_popup.cfm?AID=2836 (accessed on 01-30-2004).

effects of gay marriage is to take us down a slippery slope to legalized polygamy and 'polyamory' (group marriage). Marriage will be transformed into a variety of relationship contracts, linking two, three, or more individuals (however weakly and temporarily) in every conceivable combination of male and female."[40]

After Vermont became the first state in the Union to license so-called civil unions for homosexual couples, more sophisticated cries of concern were heard from the legal world that echoed those expressed by the more homophobic popularizers. Two conservative Christian law professors carefully outlined what they believed the repercussions of civil unions would be for the rest of society. First, they were concerned that the public school system would "be forced to teach students that there is no difference between marriage and a same-sex relationship, because to think or say otherwise would be considered bigotry and thus forbidden by the non-discrimination provisions of the [Vermont] civil unions law."[41] In truth, this was a valid concern, in that though the label is different, the legal benefits conferred upon the civil union are identical with those conferred upon a traditional civil marriage. Since 2009, Vermont has formally licensed same-sex marriages, changing its statute to read: "Marriage is the legally recognized union of two people," becoming the fourth state in the U.S. to redefine marriage in genderless terms.[42] State law thus prohibits *legal* distinctions between male-

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[40] Stanley Kurtz, "Beyond Gay Marriage," *The Weekly Standard*, August 4/August 11, 2003, vol. 008, no. 45 available at: http://www.weeklystandard.com/Utilities/ printer_preview.asp?idArticle=2938&R=9D1A19 (accessed on 02-18-2004).

[41] David Orgon Coolidge and William C. Duncan, "Reaffirming Marriage: A Presidential Priority," *Harvard Theological Review* v. 24, no. 2 (Spring 2001), 623ff.

[42] *See* Vermont Legislature, S. 115, effective September 1, 2009, available at: http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf; David Abel, "Vermont Lawmakers Legalize Gay Marriage," *Boston Globe* April 7, 2009, available at: http://www.boston.com/news/local/breaking_news/2009/04/vermont_lawmake.html (Accessed on 08-11-2011).

female and same-sex marriages. For a school to strictly adhere to the law, it would merely have to nod to the legal identity of the two types of unions, not to the more nettlesome problem of their moral equality. Schools may have to teach the law, but families and religious institutions would be free to interpret the law any way they chose. I would also like to point out that the 2009 marriage law does not require religious officials to officiate at a same-sex wedding or formally approve of same-sex marriages.[43] Though civil society may extend its approbation to such unions, religious communities are still free to hold their members to higher standards of conduct.

Lest I too quickly dismiss the arguments of Coolidge and Duncan, however, I would point out that they also cite other valid concerns against civil unions and, presumably, against same-sex marriages as well. They worry that changes in the statutes governing interpersonal relationships would force religiously-motivated employers who would otherwise deny spousal benefits to a same-sex partner or who would fire or refuse to hire an employee based upon their relationship status to do the very things their consciences forbade them to do under pain of a civil lawsuit. Additional areas of concern for them include housing laws that would not exempt religious landlords from leasing to individuals who are, in their eyes, living in sin, and the loss of free exercise rights for religious organizations that offer charitable services with government subsidies.[44] Avowedly Christian law professor Stephen Carter, long before the issue of same-sex marriage became a hot political topic as a potential source of trouble for conscientious

[43] *See* Vermont Legislature, S. 115, effective September 1, 2009, available at: http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf

[44] Coolidge and Duncan, "Reaffirming Marriage."

religious organizations determined to hold on to government favors such as tax-exemption, rightly observed:

> Churches are not the only intermediate institutions that have become addicted to government aid, even through indirect form of tax exemptions and charitable deductions. But addictions carry costs, not the least of which is the sad fact that, in the end, the supplier always controls the addict—something to ponder, surely, as one contemplates how to avoid the trivialization of religious faith in America. One way might be to put the religions beyond the power of government not only to regulate, but to purchase; and the only way to stay beyond the reach of the government's power to purchase obedience is to remain beyond the long arm of government assistance. That would mean, of course, giving up the cherished deductibility of contributions to, and other tax exemptions for, religious organizations…."[45]

Carter's point, which nicely meshes with my argument here, is that the Church has to reawaken to what makes it unique as an external moral force that is able to criticize the state and hold it accountable.[46] The talk of loss of tax exemption or the threat of impending lawsuits directed against conscientious religious individuals or groups assumes that the tightly bound relationship between religion and politics today cannot or should not be broken, that somehow the religions and the religious need the state's support in order to survive.

To pose a question: what would the first Christians think about our obsession with civil law and its regulations of marriage? It may be instructionally beneficial to glance back at the ancient Roman marriage policies and draw a few inferences. Ancient Rome required no formal marriage ceremony or license for a couple to be legally considered married. In fact, the only thing that mattered was the intent of the couple to marry, what was called the "marital attitude," that distinguished formal marriage from the looser form

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[45] Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993), 152.

[46] Ibid., 115-20.

of relationship commonly called concubinage. Thus also, divorce turned exclusively on intent, and thus the law demanded no fault be shown before formal separation occurred.[47] This may explain why the biblical accounts of the relationship between Mary and Joseph, the parents of Jesus, are not crystal clear. The Lucan account of Jesus' birth refers to Mary as Joseph's fiancée (Luke 2:4-5), while the Matthean account has the holy couple already married and Joseph planning a quiet divorce after he learns that she is pregnant with a child not his own (Matt. 1:18-19). Though doubtless Mary and Joseph were under the authority of Jewish law regarding their relationship, the fact that the audience of the gospel narratives was largely gentile in the Greco-Roman world would put the gospel writers in the position of having to explain the relationship in terms the audience could understand. Whether they were married or engaged, the intent was there that legally bound them to each other, and Joseph's intent in Matthew's gospel was to withdraw from the marriage arrangement without attracting public attention.

Marriage historian Stephanie Coontz recounts changes in Roman marriage policy upon Augustus's accession to the imperial throne. Despite himself being divorced and a practitioner of promiscuity, Augustus proceeded to implement a pro-family campaign for the express purpose of boosting the birthrate throughout the empire. Before leaping to the conclusion that Augustus was the conservative Christian's dream politician, however, some additional information is needed. His pro-family agenda also included penalties for failure to marry by a certain age and for failure to marry after divorce or the death of a spouse. Political offices were the privileged domain of married men with children. Divorce was made compulsory if one's wife was discovered to be an adulteress, while

[47] Coontz, 79.

husbands who failed to divorce upon that discovery were subject to prosecution for pandering. Attempting to escape the charges of adultery, many socially respectable women chose to register as prostitutes, a profession that was legalized and regulated, not prohibited.[48]

Augustus, in other words, manipulated public marriage policy for explicitly political purposes. Such purposes were often very much at odds with the Christian Church's teachings on marriage and the family that emphasized monogamy and lifelong covenantal fidelity and exclusiveness, reflective of the relationship between Christ and His Church. Indeed, in the early stages of the Church's development, especially the apostolic period, the Church seemed to deemphasize marriage, placing the priority of the Kingdom of God well ahead of any personal relationship.[49] St. Paul expressed his wish that "all men were even as I myself am" (1 Cor. 7:7), that is, single and thus single-mindedly devoted to the Kingdom of God. But he did concede that it was not every man's gift to be sexually abstinent, so that it was thus better to marry than to burn with lust or to unite with a prostitute. If anything, then, the ancient Christian position seems to fly in the face of Augustus's imperial pro-family agenda that placed a high premium on marriage and gave it strong state support. Nancy Cott reminds us that it took over a millennium of struggle between the political order left behind in the wake of imperial Roman collapse and the emerging universal Church to bring marriage into line with Christian norms in Europe, and after a period, monarchs wrested control from the Church

[48] Ibid., 83-4.

[49] Ibid., 86.

yet again.[50] It would seem that the institution of Christian marriage has survived numerous social and legal assaults, and it may be right to infer that it will continue to survive long after the United States jurisdictions have adopted statutes that no longer take the gender of two willing partners into consideration before granting them a marriage license.

Argument from the Procreative and Child-Rearing Perspective

"The core of Scripture's negative assessment of homosexual practice is the positive biblical vision of sexuality, which applies equally to homosexual persons and to heterosexual, men and women, adults and children."[51] At the heart of Christian opposition to genderless marriage is this notion of what the Bible regards as the purposes of sex, the covenantal procreative and unitive function that is always open to life and the flourishing of the covenant community. Anything that falls outside this model's boundaries is sinful and worthy of condemnation. As Stanton L. Jones says, "Heterosexual and homosexual, the call of Christ is the same: if you find yourself unmarried, God wants you to live a chaste life."[52] Of course, this assumes that marriage is covenantal, that any other relationship outside that is really not valid. Therefore, since homosexuals are incapable of consummating a covenantal marriage, they are automatically put into the category of those who are called to be single. Such a calling to singleness and chastity does not make sense outside of the biblical covenant model; it may apply to Christian homosexuals who are called by their faith to abstain from acting

[50] Cott, 5.

[51] Stanton L. Jones, "The Loving Opposition," in *Homosexuality: Debating the Issues*, ed. Robert M. Baird and M. Katherine Baird (Amherst, NY: Prometheus Books, 1995), 245-46.

[52] Ibid., 247.

on their sexual orientation, but for non-Christian homosexuals, the Christian argument against genderless marriage seems merely bigoted.

Legal scholar Mark Strasser argues against the Christian exclusiveness entailed in the type of arguments Stanton and others want to make, commenting that "individuals do not have a fundamental right to have *others* precluded from marrying. It would be as if allowing same-sex couples to marry would so devalue the institution of marriage that the right of opposite-sex couples to marry would somehow have been abridged."[53] Thus, while it may be true that "no same-sex union can realize the unique and full potential which the marital relationship expresses" from a Christian point of view,[54] the secular law in a liberal society cannot legitimately deny someone a basic privilege afforded to everyone else simply because of their sexual orientation. This is especially true in light of the *Lawrence* Court's opinion "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[55]

Also, as the Texas law in question targeted only homosexual sodomy, not sodomy committed between heterosexual partners, it drew attention to homosexuals as a distinct class subject to special negative treatment and was struck down. A fair and consistent alternative would have been to call for a more rigorous enforcement of older anti-sodomy laws that drew no distinction between acts committed by heterosexual or homosexual couples. But laws such as these would involve much state intervention in private choices and private chambers that seems contrary to the spirit of the Constitution and to the

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[53] Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca, NY: Cornell, 1997), 11.

[54] Joseph Charron and William Skylstad, "The Roman Catholic Church Cannot Sanction Gay Marriage," in *Homosexuality: Debating the Issues*, ed. Robert M. Baird and M. Katherine Baird (Amherst, NY: Prometheus Books, 1995), 183.

[55] *Lawrence v. Texas*, at 559.

growing national recognition that privacy was more important than uniform sexual mores. The *Lawrence* Court quoted from the 1955 Model Penal Code of the American Law Institute regarding proscriptions of private consensual sex acts:

> (1)The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.[56]

The fact that since the 1970s states began to single out homosexual sodomy for criminalization[57] also indicates that the general public distaste for sodomy was more of a revulsion toward one particular kind of sodomy, not to the practice in general, and represented a wider social suspicion of homosexuals themselves, not just their particular activities. If, therefore, the state may not discriminate on the basis of long-standing moral tradition because of more recent understandings of the liberty of privacy, or on the grounds of sexual orientation because of equal protection concerns, then perhaps there is another way to avoid handing legal recognition to homosexuals.

Many Christian opponents of genderless marriage draw upon the arguments of both Christian and secular scholars who embrace the notion that marriage is fundamentally a child-centered institution, not a couple-centered one. I contend that while it may be important that Christian marriage be open to the *possibility* of child-bearing and child-rearing, the general covenantal openness to new life, child-bearing/rearing is not the *sine qua non* of the marital institution. Those who adopt the perspective that it is the essential element in marriage argue that the state is responsible

[56] Ibid., at 572; *see also* ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955).

[57] Ibid, at 570.

for creating the conditions necessary to social stability and well-being. Consider the following:

> Providing for the future means bearing, educating and socializing children; children are our social security, economically, physically, and emotionally…. If the children are not raised properly [i.e., within a family consisting of a married father and mother and their offspring], the well-being of those who depend on them later is threatened as much as, if not more than, if there are too few children.[58]

The appeal here is to the emotions. How could any society neglect its aging population by sanctioning marriages that by their very nature cannot be procreative and will ultimately result in a population decline as the birthrate declines? And furthermore, the argument implicitly assumes that the protection of exclusively heterosexual marriage laws will somehow drive homosexuals to renounce their sexual orientation and unite with a member of the opposite sex to save the species from extinction. The argument may carry some weight within a Christian covenant society, whose practices and standards will necessarily differ from those of the larger civil society, but it is a weak ground on which to stand in a secular contractual society as pluralistic as America's.

One perhaps may do better to wonder why the state got into the marriage business in the first place, especially since common law marriages were commonplace in nineteenth century America and were recognized by law as constituting marriage, without a formal state-issued marriage license. Only around the turn of the twentieth century did state licensing and regulation of marriage become the norm.[59] Nancy F. Cott supplies the answer to the question as to why government in the United States became involved: it

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[58] Burman Skrable, "Society Should Not Allow Same-Sex Marriage," in *Homosexuality: Debating the Issues*, ed. Robert M. Baird and M. Katherine Baird (Amherst, NY: Prometheus Books, 1995), 170-71.

[59] Howard Ball, *The Supreme Court in the Intimate Lives of Americans: Birth, Sex, Marriage, Childrearing, and Death* (New York: New York University Press, 2002), 60.

wanted to preserve the vital linkage of a male-dominated system of monogamy and property holding with formal citizenship. Public rights of men were tied to their property holdings, and the rights of women and children were tied to those of their husbands and fathers. State licensing and regulation of marriage, therefore, provided a way to control both property and admission to formal citizenship.[60] John Witte, Jr. and Eliza Ellison further note that as state power to contract marriage grew, the power of religious authorities to enforce religious laws respecting marriage and divorce subsequently weakened.[61] If Christians, and other religiously minded individuals for that matter, are serious about their religion, perhaps the key to solving the marriage crisis lies in disestablishment of marriage as a civil institution, not in futile attempts to limit it to one particular form of relationship.

Allan Carlson draws our attention to the fact that the bond between procreation and marriage is the "foundation for…the unwritten sexual constitution of our civilization" but this link is today in serious trouble of being destroyed.[62] Supreme Court decisions such as the 1965 *Griswold v. Connecticut* case that affirmed a "right not to procreate in marriage" or *Eisenstadt v. Baird* in 1972 that emptied marriage of any significant content as a corporate union of two people, have severed the millennia-old connection between procreation and marriage that has held Western society together since the fall of the Roman Empire and the rise of Christianity.[63] Instead, modern society

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[60] Cott, 27-8.

[61] John Witte, Jr. and Eliza Ellison, eds. *Covenant Marriage in Comparative Perspective* (Grand Rapids, Mich.: William B. Eerdmans, 2005), 23.

[62] Allan Carlson, *Conjugal America: On the Public Purposes of Marriage* (New Brunswick, NJ: Transaction Publishers, 2007), 7.

[63] Ibid., 14-15; 7.

has elevated itself to the position the family once held, and "companionate marriage" has replaced the more traditional covenantal bond between opposites open to life with an emphasis on individual spouses' pleasure.[64] Carlson continues, calling the "freedom to marry" sought by homosexuals "libertine" and socially destructive.[65] Rather than leaving the choice of marriage arrangements to the two people involved, Carlson asserts that there are "five concentric rings of others" having claims on a marriage: 1) the community of potential parents and unborn children, 2) kinfolks, 3) the neighborhood, 4) the faith community, and 5) the national community, which represents the unborn child at the wedding.[66]

Curiously, Carlson, while regarding marriage as a covenant transaction between both the couple and their families, says that marriage can help solve the social dependency on government common today by providing for children and the aged. As true covenant marriage declines, he contends, the size of government grows to fill the void left behind. However, he just a few pages later concedes that marriage cannot be "privatized" and returned to the realm of purely religious matters because the US does not have only one church, making it impossible to get the government to enforce all the disparate religions' rules on marriage and thus rendering the institution of marriage "moot" without "legal, economic and social status."[67] Carlson makes the mistake of assuming that the state must play some role in defining marriage in the first place. By assuming that marriage could only be privatized if there were one church in the US,

[64] Ibid., 27-31.

[65] Ibid., 41.

[66] Ibid., 42, 44.

[67] Ibid., 45, 50.

Carlson overlooks the constitutional fact of separation between church and state, that the US would remain a secular government, regardless of the number of religious communities under its protection. Additionally, he neglects to consider that "public secular law cannot, even in principle, enforce the personal commitment embodied in a marriage covenant. Nor should it be expected to," even if there were only one church.[68] Even small government involvement in private affairs should cause alarm, as it violates the freedom of the religious community to stand prophetically against the prevailing powers that be.

One final argument against homosexual marriage stems from more general arguments against the nature of homosexual sexuality itself. The late evangelical theologian Stanley Grenz discusses how the "modern emphasis on orientation has led some enthusiasts to conclude that the biblical authors lacked an awareness of homosexuality as a sexual inversion, as a stable, lifelong sexual preference."[69] Whatever the modern science tells us about the nature of sexual orientation, Grenz properly concludes within the bounds of the Christian community that "We may have only limited control over our orientation. We are nevertheless responsible for the choices we make concerning its expression."[70] Thus, like a person with a genetic propensity toward alcohol abuse, the homosexually oriented individual must choose to abstain from those desires that direct him to romantically pursue another of the same sex. Such is part of the (Christian) homosexual's cross to bear.

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[68] Margaret F. Brinig and Steven L. Nock, "What Does Covenant Mean for Relationships?" in Witte and Ellison, 279.

[69] Stanley Grenz, *Sexual Ethics: A Biblical Perspective* (Dallas: Word Publishing, 1990), 201.

[70] Ibid., 209.

The sexually active homosexual, according to Grenz, is by definition single, and therefore the sex act between two homosexual individuals is a violation of the sanctity of marriage, the consummation of which Grenz regards as the union of two same, yet different sexually supplementary individuals. Marital sex, in other words, involves two becoming one, and one cannot become one with another one.[71] Gender differences in marriage are essential to the God-ordained natural purpose of marriage. Thus Grenz can discuss the "deficiency" of homosexual marriage because it lacks four fundamental elements found in a heterosexual marriage. These elements are 1) a model of community of humanity reconciled to God, 2) procreative capacity, 3) permanence, and 4) they are sealed with the sex act. Homosexuals, he says, cannot fulfill any of these, since homosexual relationships are 1) unions of like and like, 2) inherently lacking a procreative ability, 3) are temporary in that they cannot carry a sense of "moral failure" because they cannot be said to symbolize the "destruction of the divinely intended metaphor of God to God's people" and 4) incapable of producing the united, one-flesh intimacy that is a natural result of heterosexual intercourse.[72] Again, Grenz's argument is reasonable and within the bounds of traditional Christian covenantal understandings of marriage. However, insofar as these proscriptive reasons are offered as justification for the continued legal exclusiveness of heterosexual unions, they fail to accomplish the appointed task.

The early conclusion, therefore, that can be reached at this point is that many sound arguments are valid, within the Christian community, for refusing to recognize genderless marriage. Once those arguments are put forward as justification for public

[71] Ibid., 212.

[72] Ibid., 216.

rejection of genderless marriage, on the other hand, they become flimsy and untenable. American society is so pluralistic today that it cannot erect a legal barrier to homosexual unions without treading on the privacy rights of individuals who do not share the covenantal Christian point of view. Thus, Christians would be wise to reconsider their fundamental opposition to genderless civil marriage, and instead of fighting *for* heterosexual exclusivity, should begin to fight *against* a state role in marriage at all. Our task in the next chapter will be to address the issue from the point of view of those who support genderless civil marriage and to show that it, too, is flawed, though for different reasons. And thus, it may be possible to find reconciliation between both supporters and detractors when all is said and done.

CHAPTER FOUR

The Law of Love: Liberalism, Homosexuality, and Same-Sex Marriage

Lest I be misunderstood to support legalization of genderless marriage, the same criticism directed against the heterosexual-only civil marriage defenders in the previous chapter holds true against their detractors as well, who, instead of using covenantal theological arguments to win their case, use arguments similar to those employed in the mid-twentieth century struggles for racial minorities' civil rights. My basic point has been, and will continue to be, that the use of legal machinery to establish certain beliefs or command outward conformity with any single moral worldview, religious or secular, is not a legitimate exercise of liberal government prerogative. Thus, efforts to establish genderless marriage as the new legal norm are no more legitimate attempts to co-opt the tools of the state for ideological social-engineering purposes than is the effort to foster certain religious values through the law.[1]

Christian ethicist David Gushee announced in an op-ed piece for the Associated Baptist Press early in 2011 that President Barack Obama's non-enforcement of the federal Defense of Marriage Act (DOMA) conforms to the Lockean liberal philosophy

[1] Scott L. Feld, Katherine Brown Rosier and Amy Manning make the point that the Christian Right, if it is to be politically successful, "must convince the majority of Americans that failing to stamp out their idea of 'immoral' behavior is not tolerance, but immorality itself." They also point out that many new Christian Right leaders have shifted political strategies to handle the ideological opposition, without softening their moral beliefs. That is, instead of focusing on prohibition of immoral activity, they couch their arguments in terms of choice and rights. This, I believe, is a necessary step to more fruitful political dialogue. However, their ultimate aim remains the same, namely, making the choice of non-Christian alternatives less appealing than the Christian option through the force of law. "Christian Right as Civil Right: Covenant Marriage and a Kinder, Gentler, Moral Conservatism," *Review of Religious Research* vol. 44, no. 2 (2002):174-76.

undergirding the Constitution and that it is that liberal philosophy that should best govern our public policy regarding same-sex marriage.[2] This prompted a response in the online forum, *The Public Discourse* in which Micah Watson challenged the Lockean conception Gushee put forward. Watson argues that Gushee's reading of Locke—that government is extremely limited in scope and authority—"taken to its logical conclusion, seems to lead not to an acceptance of same-sex marriage but to the abolition of a public recognition of marriage altogether."[3] My response is that even if Gushee is incorrect in his reading of Locke, as Watson suggests he is, Gushee has a point that should be taken seriously. A limited government, regardless of who originated the idea, without authority over private moral choices that affect no one but consenting individuals and the family around them, has no place deciding that the private good of marriage should be defined one way and one way only. Watson, on the other hand, is correct to point out that "if the state cannot uphold a controversial traditional view of marriage because it lacks the moral warrant to do so," as Gushee implies, "how can it then in turn uphold a controversial progressive view of marriage?"[4] Neither ethicist seems willing to let go of state control over marriage, but both must do so if the impasse in the marriage war is to come to an end and we are to move on to other issues.

In examination of the arguments offered in favor of genderless marriage today, I want to demonstrate that the attempt to make marriage and family law progressive results in the same type of moral domination that progressives themselves claim to want to

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[2] David Gushee, "Christianity, Locke, and Gay Marriage," February 28, 2011, http://www.abpnews.com/content/view/6166/9/ (accessed on 08-12-2011).

[3] Micah Watson, "Public Discourse: Ethics, Law and the Common Good," *The Public Discourse*, March 7, 2011, http://thepublicdiscourse.com/2011/03/2904 (Accessed on 03-07-2011).

[4] Ibid.

avoid. Any invocation of the government's licensing power to legitimize private interpersonal relationships, especially a relationship so basic to human life as marriage, is an attempt to insinuate the state into places it was never intended to go, extending the law to usurp the place of God and/or the local intermediary communities that stand in opposition to the all-encompassing power of the state.

Constitutional and Legal Semantics

Much of the controversy over traditional marriage versus genderless marriage arises from the semantics of the official legal labels for certain (presumably) sexual unions. When in May 2008, the California Supreme Court struck down California's traditional marriage law that, like those in most other states, limited marriage to heterosexual couples, it justified its decision in part on the grounds that "a 'separate but equal' comprehensive domestic partnership scheme" favorable in many states at that time, "denied same-sex couples the due process and equal protection rights guaranteed by California's Constitution."[5] Law professor Melissa Murray draws attention to the fact that the California Court, unlike the high courts of other states that have dealt with this thorny issue, included an opinion that the state could, instead of extending marriage rights to homosexual couples, simply abolish the label of marriage altogether for both homosexual and heterosexual couples. Instead, for the sake of "family equality," the state could confer another status than marriage on *both* types of couples and avoid the potential civil rights pitfalls of treating homosexuals as a distinct, separate class. Were the marriage label preserved for only heterosexual couples while civil unions or some such equivalent were conferred on homosexual couples, the courts would have to apply

[5] Melissa Murray, "Equal Rites and Equal Rights," *California Law Review* vol. 96, no. 5 (October 2008), 1395.

strict scrutiny to the law, forcing the state to show a compelling governmental interest in maintaining the traditional, exclusively heterosexual nature of civil marriage.[6]

What seems to be at stake in the California court decision, and in much of the national war over genderless marriage in general, is what label will apply to people's familial or romantic relationships and who will select it? Of course, the debate over legal semantics begs the question of whether the state has any business regulating personal private relationships in the first place. Regardless of what label is used, the couples and families upon which the status is conferred subject themselves to certain state regulations and duties that would not otherwise be incumbent upon them apart from that special status. Granted also, each of these couples would also receive certain benefits not available to single individuals under current law, which seems to be the real reason these couples seek the state license in the first place.[7] Why else would someone want to deliberately subject themselves to government regulation, if it were not for certain government carrots held out as incentives? As columnist Mark Kinsley humorously, but sincerely, points out, "in the United States we are about to find ourselves in a strange situation where the principal demand of a liberation movement is to be included in the red tape of a government bureaucracy. Having just gotten state governments out of their

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[6] Ibid., 1396.

[7] One group calling itself Beyondmarriage.org, formed in April 2006, forthrightly proclaims that "Marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others." Available at: http://www.beyondmarriage.org/full_statement.html (accessed on 04-48-2011). Their ultimate call is for the government to recognize and acknowledge the existence of families and households organized differently than the traditional nuclear family of the Christian ideal. Effectively, they are saying that the state attempts at social engineering toward nuclear, heterosexual families, has failed, and that legal and economic privileges that are the prerogative of the state to grant must be distributed more equitably among a diverse population. Until the law changes, however, these privileges remain the exclusive domain of married couples, and the law remains discriminatory.

bedrooms [after the *Lawrence* decision], gays now want these governments back in."[8] Watson confirms this redirection of aims among the homosexual community coming on the heels of the 2003 Supreme Court case, commenting that instead of merely asking "to be left alone" homosexuals are now petitioning for "same-sex relationships [to] be recognized and enforced as the moral and legal equivalent of heterosexual marriages."[9]

Legal scholar Martha Nussbaum has written, "To be told 'You cannot get married' is thus to be excluded from one of the defining rituals of the American life cycle."[10] She further explains that, despite what religious groups do to seal or validate a marriage, people "are not married in the sense that really counts for social and political purposes unless they have been granted a marriage license by the state."[11] The point that Nussbaum makes is a compelling one in light of the general public acceptance of state licensure, but it is disturbing in that this acceptance of the state's prerogative in matrimonial matters is so universal. By saying that civil marriage is what "really counts"

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[8] Michael Kinsley, "Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms," *Slate*, July 2, 2003, http://www.slate.com/id/2085127/ (accessed on 08-12-2011).

[9] Watson, "Public Discourse, Ethics, Law and the Common Good."

[10] Martha Nussbaum, "A Right to Marry? Same-Sex Marriage and Constitutional Law," *Dissent* vol. 56, no. 3 (Summer 2009), 43.

[11] Ibid. I have to wonder if there is a comparison that may be made here between state licensing of teachers or drivers and the licensing of marriage. Suppose an individual attends a reputable school, earns a degree, and emerges with a desire to teach the next generation. Suppose also that this individual, despite having earned a college degree, has testing anxiety that prevents her from scoring well enough on the state exam to receive her teacher certification. She decides that rather than pursues the state license again, she would much rather put her considerable talents to use in the classroom in a private school that does not require teachers to be certified by the state. Her students are successful throughout their academic careers, and many of them continue into stellar professional careers. Is this teacher any less of a teacher in the sense that really counts for social and political purposes because she has not been licensed by the state?

Or consider the young driver who has been behind the wheel of a vehicle from the time he was eight, working on his parents' farm. When his sixteenth birthday approaches and he goes to take the written state required licensing exam, he fails because he is dyslexic. He shows considerable skill during the practical portion of the exam, but still the state will not license him to drive. Is this young man any less of a driver in the sense that really counts because he does not have a state-issued card in his wallet? How can it be, then, that marriages are any different, that if they are performed only by a religious official or group they are somehow less than what really counts?

for social and political purposes, Nussbaum is cheapening the institution of *religious marriage* and denigrating the moral role that intermediary social and religious bodies play as centers of resistance to state encroachment. Effectively, she is saying no one really cares what a religious institution thinks or does not think about someone's status, even if we happen to belong to that institution ourselves. Religious rituals are nice ceremonial trappings that might have significance for the specific couple, but they cannot have significance for the public at large. In response to Nussbaum's argument, I cannot resist the temptation to paraphrase Thomas Jefferson: it does me no injury for someone to say there is a marriage between two people or no marriage between them. It neither costs me financially nor harms me physically for a couple married in a faith tradition other than my own to believe themselves married if that is what in fact they want to believe, state license or not.[12]

If Christians were honest about what marriage means to them, what we in fact believe it *is*, naturally by design, then we would not be so hasty to judge a state-issued license sufficient proof of a couple's monogamous lifelong commitment. Indeed, that is what we do, however, when we extend recognition to marriages officiated by a state magistrate rather than an ordained minister of the Gospel. It is this religious consent (or resignation) to recognize state-performed marriages that has detracted from the unique religious significance of the marriage institution, even among Christian marriage's chief supporters. Perhaps it is time for Christians to cease to extend recognition to state-performed marriage; that still would not change the fact that the non-Christian couple has

[12] The original, of course is: "But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg." -Thomas Jefferson, Notes on Virginia, 1782, http://etext.virginia.edu/etcbin/toccernew2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&division=div1, (accessed on 9-12-2011).

every right to consider themselves married in light of their own personal beliefs. Neither the Christian couple nor the non-Christian couple need possess a civil marriage license for either to consider themselves married.

Nussbaum presses her case further noting that there are three separate aspects of marriage—civil, expressive, and religious, in that order. The civil aspect entails the several social benefits given to married couples not available to singles.[13] The expressive aspect of marriage involves the publicly made "statement of love and commitment" to which the society as a whole responds by recognizing and dignifying that commitment as something unique among other relationships. Lastly, the religious aspect for many people (but not all) includes the formal religious solemnization according to the rites and customs of the particular religious tradition(s) of the couple.[14] It seems that Nussbaum has the order exactly backward. For many people, the religious ritual is the most significant aspect of marriage, and whether a state license follows from that or not is immaterial to their firm belief that they are in fact married. But does accession to a couple's marriage require the state to formally license it?

One scholar points out that same-sex marriages already exist, only the state does not officially recognize them as marriages.[15] Many dedicated homosexual couples have remained faithful to each other often for years, despite not possessing a state-issued

[13] Nussbaum, 44. These, Nussbaum says, include "favorable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; the spousal privilege exemption when giving testimony in court; and yet others."

[14] Ibid.

[15] Michael J. Perry, "Christians and Political Self-Restraint: The Controversy Over Same-Sex Marriage," in *A Nation Under God? Essays on the Future of Religion in American Public Life*, eds. R. Bruce Douglass and Joshua Mitchell (Lanham, Md.: Rowman and Littlefield, 2000), 178.

marriage license. So have many heterosexual couples, for that matter.[16] Superficially, therefore, it seems that a civil license of any sort is unnecessary to cement the bond between two people. If anything, the license makes it easier for couples to part ways with each other than it would be for them to do without a license, since the law provides in detail exactly how formal separation is to be handled. Were the couple without a license to choose to separate, they may find their lives are inextricably intertwined, and without a contract governing the terms of their relationship and separation, they may find it more suitable to domestic tranquility to remain together. As shown in the previous chapter, the absence of the license also may compel the couple to form a deeper appreciation for the other person that conduces to life-long attachment, whereas the couple that possesses a civil marriage license knows exactly what the terms are and what each spouse's duties are to the other. Suspicion falls upon the spouses who signs the contract, for the contract is self-centered, not other-centered. There is a certain escape hatch available to the contracted couple, whereas with the non-licensed couple, the details of escape must be worked out independently or with the help of their families or community of faith. At least one study suggests that "irrespective of the legal status of the relationship," couples who form a "single, longer lasting relationship" are more apt to stay together than those who experiment with multiple partners.[17] What I have called elsewhere lifelong fidelity, rather than legality, seems to be the essential ingredient in long-term commitment.

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[16] *See* Jay Teachman, "Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women," *Journal of Marriage and Family* vol. 65, no. 2 (May 2003), 444-55; *cf.* Hope Yen, "Four in Ten Say Marriage is Becoming Obsolete," Associated Press, November 18, 2010, http://news.yahoo.com/s/ap/us_declining_marriage/print (accessed on 11-18-2010).

[17] Ibid., 454.

Licenses appear to create only unnecessary red tape, an infringement on personal privacy and freedom.

Nussbaum argues that society has come to a fuller understanding of the civil aspects of marriage, with a greater willingness to at least consider the equal civil rights of homosexual couples alongside those of heterosexual couples. Michael Perry agrees with Nussbaum's contention that there is also an ongoing debate within Christianity, which is causing rifts within nearly all of the multifaceted denominations so that no single denomination can merely write off the others as "heretical."[18] Such internal strife, they say, is not a public matter of concern. Instead, as Nussbaum sees it, the public divisiveness today is in regard to the expressive aspect of marriage, as the state, in licensing marriage, essentially confers favor on one relationship and disfavor on others.[19] Her argument carries some force, especially in light of Supreme Court decisions that seem to abolish any special significance for marriage altogether.

Justice Brennan's opinion in the 1972 contraception case *Eisenstadt v. Baird* is telling:

> If, under *Griswold,* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that, in *Griswold,* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[20]

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[18] Perry, 180; *cf.* Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: Norton, 1997), 164.

[19] Nussbaum, 45.

[20] *Eisenstadt v. Baird*, 405 U.S. 438 (1972), at 453.

If the marital relationship is merely the agreement of two separate and distinct individuals to share their individual lives, then nothing special inheres in the corporate identity of the two becoming one. Christian views to the contrary, the Supreme Court has opined that civil marriage cannot be understood to create a new corporate identity, and the state thereby cannot legally enforce distinctions between a married couple *per se* and single individuals. Instead, Brennan implies that the corporate identity of the couple is a fiction, that rights do not pertain to that corporate identity, only to the two parties taken separately. If this is the case, then one must wonder why the state has persisted even after 1972 in licensing and regulating marriage at all. If no special rights inhere in the marital relationship *qua* corporate relationship, then the tax breaks and insurance benefits and other perks of civil marriage Nussbaum identifies need not be directly associated with marriage, either. Let individual citizens be just that in the eyes of the law, and let them decide for themselves with the help of the intermediary communities to which they belong how to treat their personal relationships.

Distinguishing *Eisenstadt* a bit further, we find that the Supreme Court already had abortion rights in mind when this case was decided.[21] Indeed, *Eisenstadt* gutted the earlier decision in *Griswold v. Connecticut* that had drawn an explicit connection between the marital relationship and the right to privacy.[22] Implicit in the *Griswold* case

[21] *See* Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, Del.: ISI Books, 2003), 143.

[22] *Griswold v. Connecticut*, 381 U.S. 479. Justice Douglas's opinion suggests that, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." At. 485-86.

was also the specific linkage of marriage with reproductive freedom, apart from the state's legitimate purpose of prohibiting "all forms of promiscuous or illicit sexual relationships" through its general ban on the use of contraceptives.[23] While the *Griswold* Court found that the marital relationship constituted a special "zone of privacy" outside the state's regulatory powers,[24] the *Eisenstadt* Court found that zone to be too restrictive of personal privacy. Single individuals, like married adults, were thus free to make decisions on their own without an overbearing nanny state telling them they had to abstain from certain private sexual conduct unless they were legally wed. Neither Massachusetts, nor any other state, could longer use the state power to ban the sale of contraceptives as a method of trying "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women."[25]

One can understand the Court's concern here that the government was attempting to engineer a society that conformed to certain moral standards not common to all citizens. Restricting access to and use of contraceptives to married couples was an effort of the state to force individuals to either refrain from premarital/non-marital/extramarital sexual activity or to suffer the consequences, not only of certain criminal punishments on the books in several states but also of the unintended pregnancies or disease that could result from such activity. In light of the growing spread of certain sexually transmitted diseases and the burden posed by unwanted pregnancies upon the state, the state might do

[23] Ibid., at. 505-6 (White, J., concurring).

[24] Ibid., 484 (Douglas, J.)

[25] *Eisenstadt*, at 448.

well to permit contraceptives to be sold and used rather than to persist in futile attempts to preserve a Victorian sexual ethic.

When *Roe v. Wade* was decided in 1973, the Court built upon the decisions rendered in those two earlier cases. Ultimately, in that complex case, the Court concluded that the decision to have an abortion was part of the constitutionally protected right to privacy, but with some caveats that serve to protect both the health of the mother and the "potential life" of her unborn child.[26] The important result, however, was that the state was told that it could not without good reason interfere in the personal sexual decisions of its citizens, even when those decisions involved aborting another life as yet unborn. Though the number of (legally performed) abortions shot up shortly after *Roe* was decided, [27] the opportunity also arose for individuals to publicly discuss the pros and cons of abortion in a public arena thitherto unopened to them.

Make no mistake, I do not approve of the widespread promiscuity and noncommittal sexual relationships common today. But I am not blind to the fact that these types of relationships existed long before relaxations in the law, and there were greater risks to individuals and to the general public before certain state sanctions were lifted. Moral communities need to do more to educate their children in the right choices;[28] having the state back off in its efforts to control those choices is a ripe opportunity for moral communities to fill the void left behind. A healthier system of intermediary moral communities will develop as the state concedes the limitations to its

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[26] *Roe v. Wade*, 410 U.S. 113, at 164-65.

[27] *Cf.* "Surveillance Summary Abortion Surveillance: Preliminary Analysis, 1979-1980—United States," Centers for Disease Control, http://www.cdc.gov/mmwr/preview/mmwrhtml/00001243.htm (accessed October 27, 2011).

[28] Carter, 200-06.

own power and ceases to regulate private decisions. As a way of understanding more of the rationale behind some of these state laws aimed at sexual or marital social engineering, I now want to consider the moral arguments presented in favor of genderless marriage.

The Equal Opportunity of Love—the Need for Intimacy and Commitment

What seems to drive many supporters of genderless marriage is a view of marriage itself as something that is of significance only to the two partners involved, not to the community or to the society at large. Much of the rhetoric from this side of the equation reflects a view that elevates personal happiness over and above the higher, social and moral implications of marriage implied in the traditional Christian view. Indeed, this partner-centered view, rather than the covenantal view that is open to not only the Other, but also to the creation of new life, may be more amenable to the liberal state's policy objectives of preserving and maximizing individual freedom, but it also has the effect of tearing down the consistent stabilizing institution of marriage that centers upon procreation and childrearing. As I hope to have demonstrated in the previous chapter, the procreation/childrearing approach to marriage carries much religious and moral baggage that does not accord well with the limits of the liberal state and that the choice of disestablishment of marriage would open the door for a more robust form of marriage to develop amongst people participating in various intermediary social and/or religious groups. In assessing the centrality of mutual happiness to favorable arguments for genderless marriage, I want to demonstrate that this, too, represents a moral component of marriage that is best left to individuals to accept or reject apart from the state's licensure or censure.

What matters more than anything to same-sex marriage proponents is that the married couple—two consenting adults—are happy in their marriage, regardless of their lifestyles, genders, religious demands, and some members of society's disapproval of certain sexual acts even within a marital relationship. As Patricia Beattie Jung and Ralph F. Smith see it, "If marriage describes an exclusive and permanent loving commitment of two people, we believe that there is no reason in principle for restricting it to heterosexual couples."[29] Lest we believe that this argument is only a later stage of development of the free love movement of the late nineteenth century, in which romantic relationships were to be premised upon "mutual love alone," it is important to remember that the free love movement had something going for it that the arguments against heterosexism do not have in their favor, namely the resistance to any and all religious or legal authority over private romantic relationships.[30] In other words, the proponents of genderless marriage are attempting to gain state recognition for relationships that simply involve a mutual commitment between two people. Of course, this begs the question of why the state must recognize a relationship of any sort that simply is understood as a mutual commitment. What prevents the partners in the relationship from deciding one day that they no longer want to be committed to each other? The state, in offering no-fault divorce, already allows legal severance of civil marriages with little hassle. Would it not save time, effort, and public money if the committed couple simply made their commitment in any way they chose, without asking for special state subsidies or additional rights unavailable to those not living in a committed relationship? Why should we limit state benefits for

[29] Patricia Beattie Jung and Ralph F. Smith, *Heterosexism: An Ethical Challenge* (Albany, NY: State University of New York Press, 1993), 145.

[30] Cathy Gutierrez, "Sex in the City of God: Free Love and the American Millennium," *Religion and American Culture: A Journal of Interpretation*, vol. 15, no. 2 (Summer 2005), 187.

committed relationships to just those between two human beings? Why not extend certain benefits to pet owners who have a deeply committed relationship with their dogs or cats? If mutual commitment is all there is to marriage, there seems to be no reason for state license at all, not just for the denial of state license to one particular group of people on the basis of sexual orientation.

Something else that Jung and Smith seem to misunderstand is the source of permanence and exclusivity. At one point in their book on the phenomenon of heterosexism, they suggest that "permanence and exclusivity are more significant than male-female complementarity or procreation in naming the uniqueness of the marriage relationship."[31] There is some truth to that statement that even conservative Christians can or should recognize, as I indicated in chapter two; that is, the covenant bond between marriage partners is one that is lifelong and unbreakable and procreation is merely derivative of the covenant's demand to make love and thus be open to new life. But Jung and Smith ignore the covenantal significance of oppositeness by placing too much weight on the legal condition of permanence and exclusivity and failing to understand that those two traits of human relationships are tied precisely together with the openness of the relationship to new life. A relationship that is closed to the potential of new life will eventually die from self-centered boredom. Leaving aside questions of the legitimacy of homosexual surrogacy and adoption, homosexual relationships are by definition closed to new life, as the partners cannot literally co-operate in its production. Permanence and

[31] Ibid., 150

exclusivity are byproducts of the deliberate choice the partners make of each other, and their openness to new life from their mutual union.[32]

Jung and Smith offer still further reasoning in their attempt to undermine traditional marriage law and to embrace a genderless definition. Here, they turn to the widely-varying scriptural accounts of marriage to illustrate their case. "Central or core to the [Christian] tradition's teaching about marriage is the mutual, lifelong gifting of our bodies to the other," regardless of their biological, anatomical and spiritual complementarity.[33] Marriage in this case is nothing more than an endowment of the one partner by the other with a specific *bodily* worth. Furthermore, there is no explanation as to the content of this bodily worth. If it is merely that one partner can make the other partner feel good, then why is the institution of marriage at all necessary? Now, if by bodily worth we understood the partners' role in assisting the other becoming a co-creator, being open to new life, then we have automatically excluded homosexual relationships from the definition of marriage.[34] Each partner individually has a certain bodily worth that can only be fully appreciated when acting in concert with the complementary opposite partner to (potentially) produce new life. But none of this is useful in justifying the maintenance of heterosexual exclusiveness in civil marriage law; indeed, it seems that the arguments direct attention to the importance of legal disestablishment of civil marriage, so as to allow couples who want to, to more fully appreciate their marriage vows by not being lulled into quiet complacency with easy-out

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[32] Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, Del.: ISI Books, 2001), 77-80.

[33] Jung and Smith, 150.

[34] George, 77-8.

civil marriage despite more rigorous personal religious demands, and couples who pursue other forms of relationships to do so without the social burden of not having access to a state-given label.

Continuing their case for genderless marriage, Beattie and Smith contend that "Scripture does not give us a single developed view of marriage, nor does it provide much evidence for rites that were used to formalize it."[35] Attempting to make their point, they cite several well-known scriptural references, beginning with Abraham and Sarah, whose marriage was barren. They use Sarah and Abraham's continued fidelity to one another as evidence that marriage is about more fundamentally than procreativity.[36] They are not alone in citing cases of lifelong fidelity between partners who are incapable of conceiving and bearing children to justify their views that the marriage relationship is grounded in spousal fidelity. Andrew Sullivan specifically criticizes the Catholic Church's position of compassion toward the infertile heterosexual couple as a double standard in light of its condemnation of homosexuality on the grounds that it is inherently non-procreative.[37] Homosexuals, says he, "may want, with all the will in the world, to have a unitive and procreative relationship; they can even intend to be straight. But they cannot and they are not. So why are not they allowed to express their love as humanely as they possibly can, along with the infertile and the elderly?"[38] Sullivan misses the

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[35] Beattie and Smith, 151.

[36] Ibid., 152.

[37] *See Catechism of the Catholic Church*, 630-31. The Church's position is quite clear on the essential linkage between sex and procreation, noting even at one spot that infertility treatments undertaken by an infertile couple such as "homologous artificial insemination and fertilization" are "morally unacceptable" because of the dissociation entailed between the sexual act and the procreative act. 631. For the Church's position on homosexuality, see ibid., 625-26.

[38] Andrew Sullivan, "The Roman Catholic Church Should Sanction Gay Marriage," in *Homosexuality: Opposing Viewpoints*, ed. Mary Williams (San Diego: Greenhaven Press, 1999), 178.

crucial point that I am trying to make, namely that there is nothing in the law that overtly prohibits the homosexual couple from expressing their love any way they choose. That is for them to decide, privately, just as it is for the heterosexual couple. The fact that the laws of most states erect barriers to homosexual "marriage" is not a cause for homosexuals to be concerned, but rather for heterosexuals to be alarmed that the state would have presumed to usurp so much authority over their marital relationships. The homosexual has freedom to pursue his own ends, apart from the state's interference; if he chooses to end a hitherto committed sexual relationship, there are no legal barriers standing in his way, while the heterosexual must go through a formal divorce proceeding. If the homosexual wants to "marry" within his own social community, let him. The heterosexual should not be the only one allowed to make that choice. But neither should be required to seek a state license before that relationship is recognized by the only community or communities that count.

Interestingly, Beattie and Smith contend that it is the contractual model of marriage that has barred homosexuals from marriage for so long. In their picture of the contractual model, the consummation of marriage with sexual intercourse represents an exchange of a "contractual good," while the covenantal model shifts the focus of marriage away from acts and toward the role of love in the fulfillment of commitment.[39] Though they do not say what the contractual good of marriage along a contractual model is, we can presume that it is the willingness to bear children that comes with heterosexual intercourse. While I appreciate the role of love in the covenantal model, as I have outlined in chapter two, Beattie and Smith's covenantal model is not by definition required to be open to new life. If anything, it is the very antithesis of the covenantal

[39] Jung and Smith, 158-59.

model I have outlined above, because it draws the attention of the spouses inward on themselves, not outward to the larger community. Ralph Wedgwood adds:

> Same-sex marriage would clearly not deprive anyone else of any important benefits of marriage, and would not fundamentally change its definition (intimacy, shared household, mutual commitment, and so on). Other elements that may be included in this definition, such as procreation, are far from being as categorical as the ones I have specified.[40]

The pro-genderless marriage arguments, it seems, all rest on the idea that the homosexual or heterosexual partners' happiness and shared lives are enough to sustain a faithful, lifelong commitment. They may be right that this is all the state can legally sustain by its law, but those that are Christian who take this position are fundamentally at odds with their own faith tradition.

Consider Abraham and Sarah's marriage more closely. They did not have children for years, and indeed, Sarai (her name before the covenant between God and her husband had been sealed) even reached the point of such frustration with her barrenness that she gave Abram (his pre-covenant name) her servant Hagar to have children in her stead (Gen. 16). Polygamy was not uncommon in that ancient period, and serves as no case against traditional Christian marriage, which has always been monogamous. Of greater concern is Abraham and Sarah's relationship as a marriage. It was clear that the couple desired children, for Abram reminded God in Genesis 15:2 that he was childless and would have no heir for the promises God was about to offer. Their relationship, therefore, was open to the possibility of new life.[41] Far from refusing to have children of their own, the couple sought to procreate, but were denied the fulfillment of their desire

[40] Ralph Wedgwood, "Society Should Allow Same-Sex Marriage," in *Homosexuality: Opposing Viewpoints*, ed. Mary E. Williams (San Diego: Greenhaven Press, 1999), 167.

[41] This is the condition that numerous Catholic moralists place on intercourse in order for it to be "marital." Germain Grisez, *The Way of the Lord Jesus, vol. 3: Difficult Moral Questions* (Quincy, Ill.: Franciscan Press, 1997), 132-38.

until God decided to give them Isaac (Gen. 18, 21). The same may be said for many infertile couples, who, though they want children, have been incapable of conceiving them or bearing them.[42] It is those heterosexual couples who are closed to the possibility of new life who do not fulfill the covenantal purposes of their marriage and thus violate the law of God. For that reason, the Catholic Church condemns the use of birth control as ardently as it condemns the homosexual relationship.[43]

By the definition of marriage offered thus far, namely an institution in which two people regardless of gender, find intimacy, commitment, and happiness, God's demands—procreation and (physical, but also spiritual, emotional, and mental) complementary unity—are removed from the couple's relationship, to a substantial degree, if not altogether.[44] Thereby the covenant is also removed from marriage, and it becomes a contract of mutually exchanging, bodily partners for an unspecified period of time, presumably till death do they part, but not necessarily so. One need not chastise only same-sex marriages for such a neglect of the covenantal obligations of marriage; heterosexual unions that perceive happiness of the partners as the chief goal of marriage are just as susceptible to quick and easy dissolution because they are grounded on a contract rather than a divine covenant.[45] But whereas heterosexual marriages have a

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[42] Ibid., 244-49.

[43] Ibid., 98-103; *Catechism of the Catholic Church*, 629-30.

[44] J. Budziszewski, *What We Can't Not Know: A Guide* (Dallas: Spence Publishing, 2003), 86-7, 100, 205; Stanley Grenz, *Sexual Ethics: A Biblical Perspective* (Dallas: Word Publishing, 1990), 214-17.

[45] Judge Robert H. Bork noted in a *Forbes* magazine article written shortly after the Massachusetts Supreme Court ruling in *Goodridge v. Department of Public Health*, that even heterosexual marriage "has already been lowered, via such innovations as no-fault divorce, to a temporary relationship based on little other than personal convenience and sex." I find it doubtful that Bork would disagree with my assessment that contractual marriage premised upon certain economic and legal benefits and (temporary) pleasure is a cheapened form of what true marriage actually is. "Judicial Tyranny, Gay Marriage," *Forbes*, December 22, 2003, 52.

potential to fulfill the covenantal obligations of marriage, same-sex marriages do not, because they cannot meet the strict standards of sexual complementarity and can only foster objectification and instrumentalization of one partner by the other.[46] In neither case, however, should the state be able to interject its own definition of marriage and use that as the only definition that matters socially. Marriage is of such an intimate nature that any state-imposed definition is an abridgement of the fundamental right of privacy of the partners. On that point, Christian traditionalists and progressives can agree, if they can see past the height to which we have elevated civil marriage over the past one hundred fifty years to the detriment of private marriage.

The Modern Biblical Approach

Other Christian proponents of same-sex marriage argue that some religious leaders and organizations merely read the Bible one way, the way that best fits their political agenda of establishing religious norms within secular law and best serves their desire to overcome various inherent uncertainties in their own beliefs. These ardently restrictive religious people are likely to be part of the Protestant establishment, or what L. William Countryman calls "Protestant culture religion," that is, the branch of Protestantism that is commonly assumed, within the context of any given age, to be the anointed representative of "traditional Christianity."[47] "Protestantism as culture religion does not read the Bible primarily for its own sake or in the hope of new spiritual or religious illumination; and it certainly does not read it for its revolutionary potential. It

[46] Grisez, 103-12.

[47] L. William Countryman, "The Bible, Heterosexism, and the American Public Discussion of Sexual Orientation," in *God Forbid: Religion and Sex in American Public Life*, ed. Kathleen M. Sands (Oxford: Oxford University Press, 2000), 168.

reads it for legal purposes and to confirm existing presuppositions."[48] Christian law professor Stephen L. Carter agrees with Countryman's assessment of American Protestantism's tendency to cherry-pick bible verses to justify certain political purposes or causes.[49] Such is the case for many on the Religious Right today who argue that the American nation has departed from its moorings in Christianity[50] and who are among the chief opponents of legalized same-sex marriage. Because these Christians are part of the culture religion of America in the early twenty-first century, they are able to challenge the "sacred values [of] freedom, opportunity, and equality" other Americans hold dear and to exclude from the broader culture's "range of permissible variation" any who do not measure up to the current interpretation of scriptural, moral, and religious standards.[51] Such deliberate exclusion is the epitome of heterosexism and exploitation of the Bible for political gain. The implicit assumption is that there is more than one correct way to read the Bible and remain within the orthodox fold of faith, an assumption bearing much validity, but that has some negative consequences for the idea of objective truth. Notice again, however, that the ideal of marriage on this side of the debate rests on the *rights* of individuals—freedom, opportunity, and equality—rather than on mutual obligations and covenantal norms.[52]

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[48] Ibid., 169.

[49] Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993), 74.

[50] Ibid., 83ff.

[51] Countryman, 171.

[52] Steven Carter, 18 years ago, noted Bernard Murchland's informal polling of his philosophy students that shows a trend toward a view of the good citizen centered on rights and solutions to individual problems, rather than upon "responsibilities to the larger polity." *Culture of Disbelief*, 203. The only social responsibility one seems to possess in a liberal society is the location and/or maintenance of a "basic

Theologian Roger Shinn has written of the burden that legalism places upon the individual seeking to experience love.

> If there is in Christian theology a clear emphasis on the normative place of heterosexual love, there is an equally clear awareness that no legalism is adequate to define authentic sexuality and sexual love. Although the Christian tradition endorses the monogamous, faithful, heterosexual marital union, such a marriage may still be joyless and exploitative…. Any legalistic definition of conditions that make sex "right" is a trap. Even so, it is still possible to maintain that there is a normative expression of sexual love, as Christian faith understands the meaning of such love.[53]

Shinn's analysis is correct up to a point. Granted, he wrote this before the war over civil licensure of homosexual marriage became a political issue. But, it seems to point toward a view that genderless marriage is acceptable or required from an authentic Christian standpoint of love. I accept his theory that legalism is a detriment to sexual love, and that, by implication, the civil law is not the proper tool to use to encourage right sex. However, if Shinn is implying that the biblical law is misguided or too oppressive, he stands outside the bounds of the covenanted community of which he claims to be a part. This seems to be the case, as he contends that "Christian judgments on human conduct are subject to change."[54] He is right to suggest that even some Christian marriages may be joyless and exploitative, but those negative conditions are not due to a deficiency in the law itself. Rather, they are the consequences of two individuals who have chosen to stake the joy of their marriage on ephemeral concepts such as passion, feeling, or personal gain rather than focusing solely on the good of the other, even at the expense of

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consensus" upon which "social life rests so that peaceful resolution of conflicts is possible." Raymond Geuss, "Liberalism and Its Discontents," *Political Theory* vol. 30, no. 3 (June 2002), 327.

[53] Roger L. Shinn, "Homosexuality: Christian Conviction and Inquiry," in *Homosexuality and Ethics*, ed. Edward Batchelor, Jr. (New York: The Pilgrim Press, 1980), 11.

[54] Ibid., 6.

oneself. Shinn's conception of Christian love seems, then, to be the repackaged and baptized version of self-love, the only love that liberalism can endorse.

Feminist theologian Mary E. Hunt argues that because the views of society on sexual orientation are rapidly changing, it would be best for the religions to cease looking for certainty on the matter at all. Instead, she notes, "It seems that so little is clear in this regard that scholarship is changing so quickly that religions might make a real contribution by offering what they know best: love, justice, tolerance, prudence, hospitality, welcome, ministry, and the like, all of which do not change sexual identities."[55] Curiously, these religious virtues Hunt offers remarkably resemble the virtues of liberalism, not the virtues of Christianity, or any religion for that matter, per se. Hunt implies that instead of ardently defending their moral foundations, religions should subsume themselves in larger liberal society and contribute no more than what might be expected from other, non-religious sources, in public dialogue. Yet, "when progressive religious voices are granted a hearing as *religious*, there is an opening to other values and mores that might shape a more tolerant, welcoming social order both within queer communities and well beyond."[56] It is hard to miss Hunt's jab at the religious right-wing, that they have co-opted the religious language and label for themselves, leaving religious liberals with no alternative than the secular rhetoric of the public square with which to present their cases.

Another common biblically-based approach to same-sex relationships begins with the assumption that the Old Testament Law is no longer relevant to Christians, and that

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[55] Mary E. Hunt, "Too Sexy for Words: The Changing Vocabulary of Religious Ethics," in *God Forbid: Religion and Sex in American Public Life*, ed. Kathleen M. Sands (Oxford: Oxford University Press, 2000), 158.

[56] Ibid., 161.

even the New Testament passages that seem to condemn homosexuality are not forthrightly condemnatory of specific sexual orientations, a concept that was foreign to the ancients. A representative of this view is Roman Catholic priest, Raymond F. Collins, who points out that the Pauline usage of "male prostitutes" and "sodomites" is rare and that the two vices are "only two of the 110 vices identified in the New Testament as forms of conduct to be avoided by the committed Christian."[57] Certainly Collins is correct in implying that homosexual *acts* are vices, but he differs from the more radical among the anti-homosexual religionists in suggesting that the orientation toward homosexuality is something that is beyond the individual's free choice. For instance, where the radical Christian right regards homosexuality itself as a perverse "movement" against the American family,[58] moderates like Collins accept that sexual orientation is a given, but that acting upon the inclinations toward which the orientation gives rise is no more grave a sin than any number of other vices condemned in Scripture, such as prostitution and adultery, deceitfulness, gossip, inhospitality, etc.[59]

From this moderate position, it is possible to argue for the civil institution of genderless marriage. Professor Janet Jakobsen notes that "in its right-wing usage, 'family' is attached to 'values' in order to reinstate the connections between 'values' and

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[57] Raymond F. Collins, *Sexual Ethics and the New Testament: Behavior and Belief* (New York: Herder and Herder, 2000), 87-8.

[58] James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991), 188-95.

[59] Collins, 92; *see also* Robert Parham, "Churches as a Safe-House in the Debate about Homosexual Marriage," November 20, 2003, *Ethicsdaily.com*, http://www.ethicsdailycom/print_popup.cfm?AID=3398 (accessed on 1-30-2004).

the norms of heterosexuality and gender dominance."[60] Her implication is that the government's willingness to go along with this linkage does injustice to the diversity of kinship groups found within American society. In many ways, her argument seems to entail what I have been proposing throughout—deregulation of marriage altogether—for she argues that "if kinship structures are part and parcel of gender, race, class, and national structures of domination, then efforts to regulate sexuality by keeping it within the confines of legitimate kinship are also efforts to regulate gender, race, class and nation," efforts that will set back the civil rights movement and the progress made in establishing social welfare.[61] Indeed, many gays and lesbians are themselves opposed to extension of civil marriage rights to same-sex couples, because the attempt to do so represents a concession that the traditional heterosexual model is the only legitimate one.[62] Others, however, argue that unless we "fine-tune" existing marriage laws rather than creating entirely new and independent ones and grant to homosexual couples the same social, economic, and legal support afforded to heterosexual married couples, homosexual unions will always be "relegated to an inferior, secondary, or subordinate status" that would result in homosexuals' isolation from the larger community.[63]

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[60] Janet R. Jakobsen, "Why Sexual Regulation? Family Values and Sexual Movements," in *God Forbid: Religion and Sex in American Public Life*, ed. Kathleen M. Sands (Oxford: Oxford University Press, 2000), 107.

[61] Ibid., 114.

[62] Hunter, 191.

[63] Jung and Smith, 163.

Legal Benefits of Marriage

Ralph Wedgwood comments that "many gay and lesbian couples want to make it clear to everyone that they have a relationship of the same general kind as society expects of married couples," that they are not out looking merely for casual sex and temporary commitments.[64] His implication is that until society permits same-sex couples to achieve the same status as heterosexual couples in committed, loving relationships, they will always be "second-class citizens."[65] He is careful to remind his audience, however, that the law does not and cannot require anyone to unwillingly approve of same-sex marriage.[66] Citizens merely have to acquiesce in the legal recognition of same-sex marriages without formally approving of them. This argument presents some problems, however, when confronted with the question of how disapproving citizens are to respond when same-sex couples seek to exercise their rights to non-discrimination in employment or housing or a variety of other public areas. Is compliance with the legal requirement of extension of benefits to homosexual couples not essentially tacitly approving that relationship? Non-discrimination law makes it judicially actionable to deny someone certain public benefits on the basis of race, gender, sexual orientation, marital status, and the like. Certainly one may respond by noting that the non-discrimination law applies only to those areas that people cannot themselves alter. But, obviously, marital status can be altered. Which begs the question of why marital status is covered by non-discrimination law in the first place? In a liberal society, all individuals are treated as individuals, and, as we have noted above, the Supreme Court has rejected the claim that

[64] Wedgwood, 167.

[65] Ibid., 168.

[66] Ibid.

marriage creates a unique corporate identity forged from the voluntary bond of two separate individuals. If individuals, who for moral reasons disapprove of same-sex relationships, are forced to acquiesce in their legal existence, then they lose their right to discriminate against practices they deem to be immoral based upon their interpretation of moral authority. If morality is about practice and not about identity, and if same-sex marriage is a practice based upon unalterable identity, it makes sense for the law to require non-discrimination against homosexual orientation but not against same-sex marriage. Indeed, it does not follow that the law must require non-discrimination against heterosexual marital status, either. As a protected category, marital status altogether should be jettisoned as legally irrelevant.

But what about the legal rights of marriage apart from the higher natural rights? "Same-sex marriages have significant implications for inheritance, insurance, hospital visitation policies for everyone, not simply consequences in terms of the emotional well-being of lesbian and gay people."[67] These rights are part and parcel of the state's civil blessing of marriage; they do not derive from something intrinsic to marriage, nor do proponents of same-sex marriage seem to believe they do. The popular efforts to secure state-sanctioned "civil unions" and to avoid state-approved same-sex marriages attest to this.[68] If the rights listed above inhered in marriage, "civil unions" would be meaningless, and only marriage would satisfy the demands of the gay and lesbian community. But "civil unions" do appear to be satisfactory to many homosexuals. For

[67] Hunt, 158.

[68] Cf. Jung and Smith, 144. "One should not assume that an analysis of marriage and the argument that as an institution it might be open to gays and lesbians arises from a univocal demand from the homosexual community…. In fact gays and lesbians may be more antagonistic than heterosexual men and women to the suggestion that they marry."

example, after July 1, 2000, when a Vermont law creating the first "civil unions" in the nation went into effect, giving gay and lesbian couples the same "benefits" of marriage, "1527 civil unions were registered" within six months, only 338 of which were contracted between Vermont residents.[69] Clearly, homosexual couples across the nation, especially those who initially made the effort to travel to Vermont and are now traveling to the several states that permit same-sex marriage, are interested in securing the same state-granted benefits heterosexual married couples now enjoy. But, it is also their way to step out of the closet and into the welcoming arms of the larger community. As Wedgwood comments, "It is the public recognition of the status of 'married' that constitutes the most important benefit of marriage, and what is most crucially abridged when the state discriminates against gay couples who want to marry."[70] Still, Wedgwood does not seem to answer the question as to why a legal status is necessary for either homosexual or heterosexual marriages. Why should we expect and cherish *public* recognition of a voluntary status we have assumed because of personal reasons? Such an expectation appears to be a matter of personal pride and vanity rather than anything of which human beings are legally- or morally-deserving.

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[69] David Orgon Coolidge and William C. Duncan, "Reaffirming Marriage: A Presidential Priority," *Harvard Journal of Law and Public Policy* 24 (Spring 2001), available online through http://infotrac.galegroup.com (accessed on 1-17-2004).

[70] Wedgwood, 166.

CHAPTER FIVE

Conclusion: The Right Rite for Left and Right

As I have tried to show in chapter three, the Christian arguments against same-sex marriage tend to be levied against liberalizing changes in existing civil marriage law, which already permits but does not require decidedly unchristian activities such as no-fault divorce, adultery, and fornication. If Christians were truly serious about preserving the sanctity of the institution of marriage through civil law, their priorities would be directed against these far more fundamental and universally condemned vices than that of homosexuality. The connection between divorce, adultery, and fornication and the threat to the basic rights—derivatives of life, liberty, and property—of others against whom those acts are directed, which it is the state's legitimate interest to protect, is more apparent than the connection between homosexuality and the threat to those same rights. Both adultery and fornication deprive the legitimate spouse of the right to life and property in the offending spouse, and divorce seals the covenantal death of the offending spouse to the innocent one.

If the state may not penalize fornication and adultery that does obvious harm to the innocent spouse, then how can it legitimately and consistently punish consensual homosexual activity, even though it too bears the penalty of covenantal death? Whereas heterosexual infidelity may destroy the innocent spouse who rightfully expected life and happiness, homosexual activity is embarked upon by not one but two consenting people who know from the outset that the result of the relationship is death or lifelessness. The

larger community is not injured, as liberalism understands injury, by the mutuality of this covenant of death. But as one commentator noted, the fact of universal temptation to common heterosexual vices is likely what prevents them from being soundly and legally condemned.[1] Another noted that the general heterosexual public tends to view the activities of homosexuals as "disgusting" in a way that it does not view similar heterosexual activities.[2] We may also point out that even in many heterosexual unions, the openness to life that is expected of the monogamous, lifelong Christian marriage is not present, and there is a certain subtle and mutual expectation of infidelity and transience, not permanence of the relationship. In that situation, most would be quick justly to claim for the state no right to interfere with the marital decisions of the couple. So, also with the decisions of homosexual couples, the state has no legitimate right of interference, for no partner has been legally harmed.

The covenant nature of Christian marriage, by civil licensure, has been sacrificed to the mere state recognition of a supposed, but not guaranteed, life-long and exclusive relationship between two people of the opposite sex. In chapter four, I argued that the pro-genderless marriage forces are equally guilty of attempting to curtail freedom, namely the freedom of same-sex couples by subjecting them to the same rigid regulation that heterosexual marriages have been subjected to for roughly the past 150-200 years.[3]

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[1] There is a far greater temptation to the average heterosexual Christian to be caught by lust and marital infidelity, and thus it is a far more common to extend forgiveness to these sins out of recognition of one's own tendencies to stray off the narrow path. *See* William Martin, *With God on Our Side: The Rise of the Religious Right in America* (New York: Broadway Books, 1996), 100-01.

[2] Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010), 2-26.

[3] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), 26-29.

And if heterosexual marriages are not more stable now than they were before state licensure began, which by all accounts, they are not, why should we expect homosexual relationships to be stabilized by state recognition?[4] Why, then, if individual freedom is the goal of civil society—freedom to pursue one's own chosen path limited only by the rights of others—should the state attempt to regulate any intimate relationship, heterosexual or homosexual, through licensing? That institution which may license has the power to define the thing licensed. Might it not make more sense for the state to simply guarantee an otherwise valid, independently-agreed-upon marital contract, the terms of which are dictated by an intermediary social institution such as a church or synagogue, or even merely by the parties themselves, and voluntarily accepted by the two parties involved? State law would then be constitutionally forbidden to impair the obligation of contract between the two parties where the contract was otherwise under law legitimate, involving mutually-consenting individuals of legal age whose goal was not to exploit the other as liberal philosophy understands exploitation. That the state has an interest in the enforcement of the contract is unquestioned.

As it stands today, there are the religious traditionalists who use the rhetoric of majority rule to justify social interventions in private personal decisions involving sex, family, and faith.[5] Often, these conservative champions of strict government intervention

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[4] One prominent national study indicates that the institution of marriage among the poor and moderately-educated middle class, marriage is becoming more and more fragile, even while marriage among the upper class remains relatively strong and/or appears to be strengthening. Divorce rates for the United States suggest that roughly one out of every two marriages will end in divorce at some point. *See* "When Marriage Disappears: The New Middle America," part of *The State of Our Unions Reports* of the National Marriage Project, University of Virginia. Available at: http://www.virginia.edu/marriageproject/annualreports.html, ix, 71.

[5] A recent example was published in a newsletter called "Marriage Under Fire" from the Family Talk organization headed by well-known conservative Christian activist Dr. James Dobson. In it, Dobson expresses indignation against "autocratic" American justices who "are determined to impose their will on the American people" a "majority" of whom still "believe in the traditional definition of marriage."

in what are frequently referred to as "moral" matters will promote the principles of free market capitalism and non-interventionist government in economic affairs, matters upon which a literal reading of Scripture produces very little of value. On the other hand, there are liberal progressives who use the rhetoric of minority civil rights to justify social interventions in private personal decisions involving financial and economic matters while allowing for unfettered personal freedom in what are regarded as "private" concerns.[6] From this angle, Scriptural prophetic injunctions to care for the poor and needy take priority over efforts to eradicate personal sin. From either side, the state is understood as the locus of social solutions to what may be regarded as social problems by those in power but are understood as matters of personal choice by those out of power.[7] The use of the state in such a manner, when it is convenient to do so, and the condemnation of the state when the personal private decisions with which it interferes are not the "right" ones to target for intervention produces a bipolar state, incapable of policy consistency and always likely to change course of action when a new majority takes power. The result is not good government, but an arbitrary one, craving raw power, a government that follows certain public whims and fancies rather than the consistent rule of a limited, fundamental law.

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http://media.salemwebnetwork.com/nameacquisition/campaigns/34/FTJuly2011Nwsltr.pdf, July 2011, (accessed 08-29-2011). One must wonder what Dobson would use to support his anti-same-sex marriage argument if a majority of Americans did not support traditional definitions. Would he then be willing to take a more thoughtful, theological view of marriage and turn toward the Church for support? Or, would he still insist on the state's positive role in licensing (heterosexual-only) marriage?

[6] John Langan, "Rawls, Nozick, and the Search for Social Justice," *Theological Studies* 38 (1977): 350-1.

[7] Jim Wallis, *The Soul of Politics: Beyond "Religious Right" and "Secular Left"* (San Diego: Harcourt Brace, 1995), 128.

Theologian A. J. Conyers theorizes that the uncertainties and fears of early modernity occasioned by the inevitable violent clashes between Catholic and Protestant orthodoxies following on the heels of the Reformation led not to "intellectual and cultural rigidity" as some have characterized the religious climate of the time, but rather they produced in all parties a "desire for power." The early seventeenth century and after, he explains, saw the development of both secular and ecclesiastical authoritarianism and a crackdown on philosophical speculation not as a necessary result of political or religious intolerance but as a means to power sufficient enough to end the "'poor, solitary, brutish,' life of the provincial peasant and city shop keeper," a means to security in an uncertain hostile environment.[8] Political absolutism for a time gained ascendancy, to secure stability in the turbulent territories of Europe. Absolutism had a good, noble vision of peace and security, even if it meant a modest degree of servitude. In order to correct the excesses of absolutism, toward the end of that same century we see the earliest buds of political liberalism coming to flower.

From that small flowering of late seventeenth century Europe to the present twenty-first century United States of America, the liberal idea of individual freedom has spread to support the democratization of peoples and societies on every continent of the earth. Though each society understands the implications of liberal theory slightly differently, the core of the liberal idea of individual freedom remains intact. With that core of independence, there comes a certain revulsion toward overbearing or unnecessary uses of government power. However, there also are residual traces of this drive for power that Conyers describes. It is found in the acceptance of these basic liberal ends of

[8] A. J. Conyers, *The Long Truce: How Toleration Made the World Safe for Power and Profit* (Dallas: Spence Publishing, 2001), 48-9.

the perseveration of rights, while the talk amongst the powers that be has become about the means to the ends.[9] The trick for the government and those who control it, given the bent toward power, is to justify the exercise of government power as a means to the realization of justice, the preservation of right. Christian theologian Stanley Hauerwas says as much about Christians who attempt to use the government to accomplish charitable purposes: "We say we want justice but I suspect even more that we want power—power to do good, to be sure, but power just the same."[10] The same may be said about Christians pursuing certain "moral" goals such as the elimination of abortion or the prohibition of homosexual activity. Their stated objectives may be well-intentioned, but the power to carry out those ends is what is necessary to the fulfillment of their political purposes. Thus the battle is over control of the lawmaking power itself, the definitional power over political right and wrong.

If power is the driving force behind all contemporary political activity today, another question has to be asked: is it rational for us to desire the population around us to conform to our ideas of absolute truth, justice, and good? John Locke, theorizing in the late seventeenth century, rejected the notion of innate epistemological and moral principles, and in doing so reduced virtue to something that was generally approved because it was "profitable" to one's well-being.[11] He also urged religious toleration as a means of avoiding public conflicts over matters that were best left to the individual and his conscience to sort out. Recognizing that religious beliefs are dictates of conscience,

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[9] Ibid., 218.

[10] Stanley Hauerwas, *After Christendom? How the Church is to Behave if Freedom, Justice, and a Christian Nation are Bad Ideas* (Nashville: Abingdon, 1991), 60.

[11] Gertrude Himmelfarb, *The Road to Modernity: The British, French, and American Enlightenments* (New York: Vintage Books, 2004), 26-7.

Locke understood that external law cannot compel them or punish them without compounding the sin of impiety with that of hypocrisy.[12] On the whole, Locke's thoughts on toleration were profitable for the stabilization of human society that had long been racked by the competing forces of religion and power.

John Rawls, in allowing for individual freedom of choice as to what sort of good to pursue with few limitations, follows a long train of earlier liberal thinkers. He also suggests that it is not rational for us to seek moral uniformity. Indeed, Rawls argues that

> In a well-ordered society…the plans of life of individuals are different in the sense that these plans give prominence to different aims, and persons are left free to determine their good, the view of others being counted as merely advisory. Now this variety in conceptions of the good is itself a good thing, that is, it is rational for members of a well-ordered society to want their plans to be different. The reasons for this are obvious. Human beings have various talents and abilities the totality of which is unrealizable by any one person or group of persons. Thus we not only benefit from the complementary nature of our developed inclinations but we take pleasure in one another's activities.[13]

Rawls's theory is premised upon the idea of placing the right prior to the good. That is, the basic principles of justice that he outlines earlier in his work are to be the measure of all conceptions of the good life from which an individual may choose without restraint, provided that ultimately, those conceptions of the good do not run afoul of the principles of justice.

Robert Nozick takes a slightly different tack. In his argument against utilitarianism, he explains the moral difficulty of justifying the utilitarian sacrifice of one for the good of many, which we find, if we boil them down, attempts to achieve social

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[12] John Locke, *A Letter Concerning Toleration*, ed. Charles L. Sherman (New York: Appleton, Century, Crofts, 1937), 173.

[13] John Rawls, *A Theory of Justice*, revised ed. (Cambridge: Belknap Press of Harvard University, 1971, 1999), 393.

conformity actually are. They are attempts to achieve power to destroy that which is understood as socially undesirable or dangerous. According to Nozick,

> …no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good. There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints, but it also, I believe, leads to a libertarian side constraint that prohibits aggression against another.[14]

By side constraint, Nozick means "the rights of others [that] would constrain your goal-directed behavior" toward a specific personal end.[15] The freedom to pursue one's chosen ends remains intact while others are safeguarded against both violations of specific rights and against general aggression from society as a whole. Thus, for example, if my goal is the state of holiness as defined by the Christian faith, I may pursue it with all the resources available to assist me, provided that I do not in that pursuit publicly denigrate the beliefs of another in a way that would cost him his reputation nor attempt to use my own physical force or the coercive power of the state compel him to convert to my religion.

American Christians, however, though they live in a liberal society, do not first of all take their orders from the liberal philosophers without harming the stature of their unique Faith. Hauerwas reminds us that "the problem is that we have been taught by the Enlightenment to believe that in fact there is a concept of 'justice qua justice' that corresponds to an account of 'rationality qua rationality' which blinds us to the tradition-dependent character of any account of justice."[16] Again, to ask the question of whether it

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[14] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 33.

[15] Ibid., 28.

[16] Hauerwas, 49; cf. Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopedia, Genealogy and Tradition* (Notre Dame: University of Notre Dame Press, 1990), 170-95.

is rational for us to seek conformity to a universal idea of truth, justice, and goodness, from our religious point of view, and even from our early liberal philosophical point of view, it certainly seems that it is. If we operate with the firm conviction that what we know is indisputably right and good, and that the entire world operates exactly as we know it does, anyone who believes differently is self-deceived and/or dangerously subversive of universal established order.[17] Such was the view of the Enlightenment, with its emphasis on the accessibility of universal truth to all who reasoned correctly. Departure from the Enlightenment worldview was understood as the equivalent to sinking back into the irrational darkness of superstition or delusion. Reason would bring everyone into the light of a universally-accessible knowledge, and justice would prevail as superstition and prejudice gave way to scientific empiricism.[18] Such is also the view of Christianity that assumes the universal and eternal validity of the revelation of God's law and gospel in Holy Scripture. Anything that departs from the word of God expressed in the bible is anathema to truth, and believers must fight against it in order for light to shine upon everyone everywhere, for the Kingdom of God to come to fruition.

On the one hand, there is the tradition of Christianity, handed down through the millennia to the successors of the apostles and the early crowds gathered around Jesus,

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[17] Philosopher Christopher Eberle explains that theistic moral visions very often lead to their adherents to seek and find secular rationales for supporting various coercive secular policies. For those committed to the particular moral vision, the discovery of a secular rational serves as evidence affirming the validity of the total moral vision. However, upon recognition that something that was long believed to be unacceptable practice under the particular moral vision has no concomitant secular rationale, the faithful adherent reaches a point of "crisis." Here, she must decide if the lack of a secular rationale serves as sufficient counterevidence to reject the entire moral vision, or if commitments to God override the available counterevidence. Either course of action is, according to Eberle, rational, but it may not always be "a good thing" to take the latter course, at least not insofar as she will actively attempt to promote coercive laws without a secular rationale. Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 324-9.

[18] Raymond Geuss, "Liberalism and Its Discontents," *Political Theory* vol. 30, no. 3 (June 2002), 326.

and on the other hand is the Enlightenment tradition passed down for roughly three hundred years always maintaining that it was not a tradition at all but simply true. For the Enlightenment, morality was more or less about following a certain set of rules that impose certain obligations upon us. Human virtue is that characteristic that predisposes us to obey the rules handed down. And while all may be free to pursue their own specific ends, we generally agree there are certain social duties incumbent upon us that, if not answered, will result in society's disintegration.[19] From the foregoing, it is clear that most liberal political thought shares much in common with general Enlightenment philosophy. But, have we considered the extent to which American Christianity also borrows from the Enlightenment?

For American Christians, much of the content of religious life centers upon fulfillment of certain personal ethical practices that conform to basic social expectations within a particular denomination. For example, there has from the Second Great Awakening been a strain of Christianity that holds personal moral renewal dear, with an emphasis upon such sins of the flesh as "Sabbath-breaking, profanity, and intemperance," as well as dancing, gambling, theatergoing, and sexual promiscuity.[20] The Enlightenment theme of virtue as the disposition to follow these basic prohibitions and of following the rules to be moral is clear enough to see in these Victorian-era lists of personal moral vices. But we also see the will to power behind these lists. Those who would control the personal attitudes of men and women through moral exhortation would thereby exercise wide-ranging political power that would give them numerous victories in nineteenth and

[19] MacIntyre, 175.

[20] Sydney Ahlstrom, *A Religious History of the American People* (New Haven, Conn.: Yale University Press, 1973), 387, 426-7.

early twentieth century American politics. Among these victories may be counted abolition, prohibition, and female suffrage, to name a few. Certainly, conformity to universal truth and justice and goodness here was a driving motivation, and one worthwhile.

Today's lists have changed somewhat and the political agenda behind them also, but the importance of abstention from personal vices remains a vital measure of the American Christian's commitment to Christ. Consider the 2010 Southern Baptist Convention's Baptist Faith and Message:

> In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.[21]

While the Southern Baptist Convention does not profess to speak for all Christians, it is the single-largest Protestant denomination in the nation, and holds considerable influence in a number of key U. S. states. So, it is worth pointing out that these moral vices are on the hearts and minds of many Americans. It is also worth calling attention to what seems to be an inordinate emphasis upon sexual immorality, especially since "vice" is not given any specific content while "sexual immorality" includes, but is presumably not limited to "adultery, homosexuality, and pornography." Thus, sexuality stands above any other area of human life where especially heinous sin may rear its head. Notice also the lengthy treatment that abortion receives in the excerpt from the Baptist Faith and Message. Coincidence? Probably not.

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[21] "Baptist Faith and Message, 2010," available at: http://www.sbc.net/bfm/pdf/The%20Baptist%20Faith%20and%20Message.pdf (accessed on 9-9-11).

While most Americans, even professing Christians, have given up on fighting most forms of personal vice through the instrument of the law, there are still two major moral-political issues of the day dear to the heart of conservative Christian America, abortion and gay rights. The goal of the Southern Baptist Convention and countless other conservative Christian churches and denominations around the nation is to attain and use political power for the purposes of eradicating these twin moral evils that involve very personal choices. Undoubtedly, there were past successes, as noted, when Christians won the political battle for influence. Moral evils such as slavery and female inequality were inherently social, as the law itself had erected arbitrary legal barriers between blacks and whites, between women and men, that could not be justified on any grounds other than sheer prejudice that certainly did not arise out of spirit of Christian love and generosity. In other words, the goals for which Christians in the late nineteenth and early twentieth century were positive goals, goals of emancipation and liberation that comported easily with the liberal spirit of the national law and Constitution.

Unlike their predecessors, conservative Christians today who seek to emulate their forebears' political success are fighting for the sake of essentially negative goals, to restrict a woman's right to exercise reproductive freedom and to summarily exclude homosexuals from participation in fuller human society on the mere basis of their sexual orientation. With the specific case of genderless marriage, the goal of conservative Christians is to maintain the existing status quo, with the state continuing to sanction only heterosexual monogamous unions, which would have the negative effect of maintain the strictly enforced social stratification of married and single individuals. Unlike their predecessors, therefore, contemporary conservative Christians have not managed to build

the desired and needed momentum for their cause to stop the inevitable slide toward state-licensed homosexual marriage. Indeed, their opponents' cause seems to be gathering steam, as several states have now granted legal recognition to same-sex marriage or are considering doing so and several others have extended benefits to unmarried same-sex partners, even though the majority of states have taken decisive action against same-sex marriage, at least for the short haul until court challenges slowly erase them.[22]

But a more fundamental question remains to be addressed: even if it is rational for people to desire conformity to a universal, absolute truth, justice, and good, is such conformity always possible or always desirable in a liberal society? In the case of the abolitionists and female suffragists, the desire for social conformity with their worldviews was well-placed. Both slavery and female inequality represented unconscionable instrumentalization of one class by another with the sanction of law. No liberal philosopher would embrace these political positions without undoing his entire system of thought. Consider Locke's position on slavery: "…Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joined with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together."[23] Modern Christians, too, have come to realize that slavery and female inequality are unacceptable social evils that must be combated. Note the injunction against racism found in the Baptist Faith and Message cited above, as well as the following statement on the family:

> The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to His

[22] National Conference of State Legislatures, "Same-Sex Marriage, Civil Unions, and Domestic Partnerships," July 14, 2011, http://www.ncsl.org/default.aspx?tabid=16430 (Accessed on 9-9-11).

[23] Locke, *Two Treatises*, 284.

> people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.[24]

Equality of male and female is expressed in such a way that it still retains some of the patriarchal character of earlier eras, but the general idea of moral and political equality is accepted, while the unique Christian interpretation of that equality is also preserved.

The unique Christian interpretation is the key. Male and female equality is considered essential to modern liberalism, and most secular liberals, indeed, many Christians also, would regard the Southern Baptist Convention's interpretation of equality as less than the desirable ideal. However, the Southern Baptist Convention does not seem to be overly eager to impose upon the totality of civil society its particular view of female equality within human marriage generally. The marriage relationship between husband and wife is a sacrosanct institution, privately covenanted between the two partners. Perhaps the Southern Baptists would prefer to see their view of heterosexual marriage adopted by the general public, but there does not seem to be evidence of that—except where the battle turns from defining the roles of marriage partners in heterosexual marriage to defining marriage itself.

As noted above, the power to define a thing comes as a package deal with the power to license. Until the early twenty-first century, all fifty states in the United States defined marriage as a union of one man and one woman. That the state, as licensing agent, had control over the public definition of marriage did not seem to trouble many people. Never mind that because of its authority to define marriage, the state could also

[24] "Baptist Faith and Message."

define legitimate divorce, which became no-fault in every state but New York by the 1980s; and New York adopted its own no-fault divorce law in the summer of 2010. And more than that, the state could go so far as to define the family itself. Institutions such as the Department of Family and Protective Services or the State Office of Children and Family Services[25] would have been unthinkable in pre-welfare-state America. As C. S. Lewis noted in a little-known essay, the welfare state does not so much seek to protect our basic rights as it "exists to do us good or make us good—anyway, to do something to us or to make us something."[26] This welfare state, if Lewis is correct in his assessment, is the antithesis of the classical liberal state, whose express purpose was not to make men good but to create the conditions under which men could pursue their own vision of the good unimpeded by a coercive, arbitrary moral authority.[27]

Such a view also correlates with Hauerwas's contention that charity suffers when Christians place an undue emphasis upon social justice and call for state intervention in what has traditionally been the work of charity, such as feeding the poor and lifting up the oppressed. If the state can make us good, then we have not need of moral compunction about not giving out of our fullness to those who are most in need. We simply work to "reshape and restructure society" because the poor "have claims against

[25] The names are of bureaucratic departments in Texas and New York, respectively. They represent the similarly-named departments in all fifty states.

[26] C. S. Lewis, "Is Progress Possible? Willing Slaves of the Welfare State," in *God in the Dock*, ed. Walter Hooper (Grand Rapids, Mich.: William B. Eerdmans, 1970), 314.

[27] *See* "Federalist #51," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor Books, 1961), 324-25. Here, Madison refers to the security of religious liberty, and justice generally, consisting in multiplying the number of sects and interests within society, so that no single group is able to form a dominant majority. Through such complex checks and balances he describes and defends earlier in this essay, minority rights are secured against the potential tyranny of the majority.

us—that is, rights."[28] In other words, the welfare state transforms the Christian command to love, to be charitable, into an illiberal mandate to give, not out of a selfless desire to give but out of a legal duty to do so. Such duty is to be performed, because we are told, it is in the individual's and the public's best interest. Where all are given the social opportunity to rise, even with public assistance, then other existing inequalities are acceptable.[29] This legal mandate to "love" through the contribution of public tax dollars comes with ample judicial penalties for noncompliance. Because it is compelled and not voluntarily assumed as a moral responsibility, public welfare falls far short of achieving the holiness and righteousness demanded of Christians by their Faith.

If this is the case, that the welfare state is a slave state or at least an overbearing institution that, in the guise of free society, attempts to engage in social engineering, then both traditionalists and progressives as we have described them above are supporters of the welfare state par excellence. Each has ceded moral authority to the welfare state in exchange for a certain degree of complacent comfort with state authority and for an excuse for shirking personal and intermediary institutional moral responsibility. To combat this loss of a moral sense of duty, I have proposed to rescind the state's power of definition over what are essentially private moral matters and to return it to those institutions and individuals to which it rightfully belongs.

Loss of, or Fear of, Holiness

The Church is called to be the Body of Christ, to be the covenant people of God set apart for the express purposes of God. As such, it is a voluntary institution. Though

[28] Hauerwas, 45.

[29] Harlan R. Beckley, "A Christian Affirmation of Rawls's Idea of Justice as Fairness—Part I," *Journal of Religious Ethics* 13 (Fall 1985): 236.

many have been born into the Church's bosom, the choice to stay with the Church or leave for another intermediary social institution or none at all rests with the individual. This is especially evident in a liberal society such as the United States that respects the religious freedom of its citizens. Compliance with any specific religious creed or practice may not be mandated by law.

Christians have grown complacent about the liberal state's role in maintaining social welfare. We have accepted rather easily that charity be mandated through confiscatory tax policy, and as a result give very little to support the genuine charitable work of the Church.[30] State welfare services will never be able to supply the necessary transformational power that will once and for all proclaim good news to the poor. But worse still than ceding charity to the control of the welfare state, we have surrendered to that same state our definitional power over the most fundamental institution in any society, the family. By accepting the state's power to license marriages, the Church at least implicitly and often explicitly accepts only a bare minimum definition of marriage rather than the full, rich definition as described in chapter two above.

Support for lifelong, monogamous marriage that may not be ended except upon show of cause worthy of covenantal death, seems weak in the United States even among Christians, whose heritage that definition of marriage is. The mere fact that the American Church generally accepts as valid proof of the establishment of a God-ordained relationship a couple's state marriage license, even if a couple was not wedded in a

[30] US Bureau of Labor Statistics data from recent years indicate that, on average, Americans donate roughly 2.2% of their pre-tax income to charitable causes. Those who are poorest are most generous, contributing around 4.3% of their income, while those who are in the upper-middle income brackets are the least generous, donating approximately 2% of their income. This is a far cry from the 10% tithe mandated by the Levitical law and supported as the ideal in many Christian churches today. *See* Frank Greve, "America's Poor are Its Most Generous," McClatchy Newspapers, http://www.mcclatchydc.com/2009/05/19/68456/americas-poor-are-its-most-generous.html (accessed 09-12-2011).

Church ceremony, and that it also without much hesitation recognizes a state divorce certificate when civil marriage comes to an end, speaks volumes about the liberal state's predominance in the private moral affairs of even most American Christians today. There are a great number of Christians who want the state's marriage law to reflect the natural heterosexuality of marriage, but who often fail to understand that the secular law, if it can do anything, can do no more than pay lip service to the hallowed institution of Christian covenantal marriage. In the end, marriage retains whatever meaning the couple and the intermediary social institutions to which they belong assign to it.

Those who have legal definitional power over marriage may use that definition to structure society a certain way, but in doing so, they are leaving countless others out, rejecting their claims to freedom that rightfully belong to them as members of a liberal political society. Rights-talk in a liberal society is unavoidable. But, as Hauerwas urges Christians to understand, the moral authority of the Church does not rest upon its ability or mandate to comply with or respect certain rights. Indeed, he reminds us that "the liberty and equality that we try to secure ironically legitimates the nation-state—which becomes, in Gidden's words, a 'power-container whose administrative purview corresponds exactly to its territorial delimitation.'"[31]

I agree with Hauerwas that the Church has a higher obligation than to concern itself with political liberty and equality. But I also believe that in our liberal society there is much to be admired for the way that it recognizes the freedom and equality of individuals to pursue their own particular chosen paths. My concern has been to show that both the Christian theological point of view and the liberal secular worldview are better served by a libertarian approach to private personal morality, especially in the

[31] Hauerwas, 48-9.

highly contentious area of marriage. Matters such as deciding with whom to relate intimately and sexually are not proper concerns of the liberal state, but most certainly are proper concerns for the Church. By ceding power of definition over the marital relationship to the liberal state, however, Christians have abdicated their moral duty to an institution that is ill-equipped to handle the burden. Because they have voluntarily ceded that power, the Church has had to come to terms with state policy that cuts against the grain of Christian covenantal ideals, first with the loosening of legal restrictions against adultery and fornication, then no-fault divorce, and now with genderless marriage.

If the state should retain definitional authority, then the best course of action from the liberal philosophical perspective would be to license same-sex marriages in a manner consistent with the licensing of heterosexual marriages. Homosexuals have come under judicial protection as a special class. The state must show at least a rational basis for laws that overtly discriminate on the basis of sexual orientation.[32] The common arguments made against homosexual marriage, as illustrated in chapter three, generally center upon the well-being of the family and moral disgust of traditional heterosexuals. While the argument from disgust may not carry much weight in the courts anymore, the argument from concern for the family carries more. Certainly, there are legitimate reasons for the state wanting the very best possible life for the children of the next generation. No child or adult should have to bear the abuse and indignity of a broken home. But, can the state do any more than provide a few economic incentives to keep parents of children together? Does the state really need a licensing authority to take those necessary precautions against violations of individual rights? Furthermore, arguments against genderless marriage are often deeply religious in content. In a liberal state where

[32] *Romer v. Evans* 517 U.S. 620 (1996).

religious freedom is prized, religious opposition to state policy is expected, but if religious reasons are the only reasons or the most forceful reasons supplied to counter the state's actions, then we should rightly expect the state to ignore the pleas of the religious constituency.

The Church, if it acts according to the Scriptures, will not approve of the state's move toward recognizing genderless marriages, but so long as in the revised marriage laws there are legal protections for any religious institution that does not wish to bless or perform homosexual marriages, there does not appear to be much attendant conflict with religious freedom. Let me re-emphasize that I do not at all approve of state licensing of homosexual marriages. However, I also do not approve of state sanctioned heterosexual marriages. State licensing of any intimate, private and consensual relationship represents an impermissible governmental intrusion into that most sacred precinct, the private chamber.

Add to it that marriage licenses are not free, but require a payment to the state before they may be obtained. Should we be forced to pay, however little, to publicly testify to the fact that we love someone and are committed to him/her? Just as a thought, without evidence to back it up, what if the poor are less inclined to civilly marry in part because of the licensing fee? To many people, $20-$100 is a sizable sum. Some states require a blood test, while others do not. Granted there is a state interest in the prevention of the spread of disease, but if the couple is truly intending to live together for the rest of their lives in a faithful monogamous relationship, should it matter that the couple is at special risk of infection? Perhaps willingness to take that risk of infection is a sign of serious affection. Several states are also nowadays encouraging or requiring

premarital training and counseling, even offering to waive the licensing fees if couples agree to take these state-approved courses. Does the state really know what is best for a marriage, especially since the state is also the legislator and executive of no-fault divorce laws? It is understandable that the state should want stable marriages because of the many intangible social benefits marriage has been proven to afford. A happy couple with a flourishing family is less of a burden on the state than an unhappy couple with a miserable family.

But again, the welfare state simply assumes that it has a responsibility for the family in crisis. Where did that idea originate? Taking responsibility for individuals qua individuals, the liberal state cannot comprehend the unique character of the family as a corporate institution. If it could, liberal society would recognize that intrusion into the private life of the family, no matter how miserable it is, constitutes a most egregious violation of freedom. Individuals should be free to arrange their affairs in any way they deem fit, provided that in the course of their interaction the rights of no unwilling third party are violated. If the state can interfere with the freedom of families to form and handle their own affairs, how much more may it presume to interfere with the activities of intermediary social institutions such as the Church that are more public in character? Let the state into the household, and we by default invite the state into these intermediary associations. Let the state into these intermediary associations, and they will lose their independent moral witness to oppose the state when necessary.

Does society want stable households? Take away the state pressures for live-in couples, many with children, to marry. But do not stop at relaxing welfare laws; abolish them altogether. Return power to the people to freely chart their own course, to freely

stand up for themselves rather than to depend on the benevolence of a faceless bureaucracy that sees them only as pawns in a power struggle and offers no genuine mercy. Such a policy will force the Church and other charities to take up the slack out of compassion for their fellow man, or else will at least serve to reduce the economically-dependent population by attrition where charity is not alone sufficient.

Does liberalism support the right of people to love whomever they choose for themselves? Let them do so without having to make a choice of license or no license, social recognition or social stigma. Let the intermediary associations once again take up the responsibilities for society that they ceded to the state. Let the Church, the brightest of intermediary institutions, resume its rightful role of moral witness to the world. Hiding behind a wall of state power, the Church has shied away for too long from its moral role and has let the state fill in the void. Consequently, society has accepted the subtle liberal redefinition of all that is right and good. Now that society has gone beyond what has traditionally been the limit of acceptability by even suggesting, and in some states endorsing, same-sex marriage, many in the Church are wanting back their power. But they are approaching it in the wrong way.

By attempting to retain or restore the state definition of marriage to heterosexual only, the traditionalists are fighting the wrong battle. They are endeavoring to squeeze everyone in this broad, pluralistic liberal society into the Christian mold, without recognizing that they, too, have years before conceded defeat in the definitional battle when they let the state begin licensing in the first place. A highly restrictive state definition that is universally applied would have the effect of producing not good Christian citizens, but hypocrites. And hypocrites are naturally dishonest and harbor

deep-seated resentment at forced complicity with the status quo. Those who are not inclined to accept the Christian definition of lifelong, monogamous fidelity will not accept it, no matter what the law of the land is. Those who are not inclined to accept the Christian definition of heterosexual exclusivity will not accept it, whatever the law happens to be. As Michael Perry has written, same-sex marriages already exist, but the state simply does not recognize the fact.[33] I do not, thereby, wish for homosexual marriages to be granted full state recognition. Instead, I wish for heterosexual marriages to be given liberation from the state's definitional power grip. Return the power of definition of marriage to the intermediary institutions such as the Church, and thereby strengthen the moral authority of those institutions and the freedom of each of their voluntary members. In that way, the Church may realize its call to holiness, to separateness from the world while living in the world. It may become the covenant community it was intended to be, drawing men and women unto itself not because of social approval or social complicity, but because it is unique, different, and offering substance in a substantially-starved civil society. So, too, may the liberal state reaffirm its commitment to personal freedom and abolish the welfare state that does not liberate as it professes but enslaves.

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[33] Michael J. Perry, "Christians and Political Self-Restraint: The Controversy Over Same-Sex Marriage," in *A Nation Under God? Essays on the Future of Religion in American Public Life*, ed. R. Bruce Douglass and Joshua Mitchell (Lanham, Md.: Rowman and Littlefield, 2000), 178.

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