

FAIRNESS, ACCURACY AND HONESTY IN DISCUSSING HOMOSEXUALITY AND MARRIAGE

*Lynne Marie Kohm & Mark A. Yarhouse**

I. INTRODUCTION

If a lie is repeated often enough, those who hear it will begin to believe that lie is the truth. Such has become the fate of fair and balanced legal academics. Some have heard for so long that homosexuality and marriage ought to be united, that many refuse to believe anything else, even when biology refutes it, the law negates it, and that statement is exposed as a lie.¹ Many academics and other communicators have indeed closed their minds² to both sides of this debate, determining there is no debate. That debate, however, is alive and well in the minds of open-minded legal academics. Although Stanford's Law and Policy Review solicited the other articles contained in this journal issue, its refusal to publish them has allowed Regent to inherit a fabulous law review edition.

This article will introduce these well-written pieces. They are not legal research articles, but their publication is equally important. If Stanford will not publish them, Regent will gladly do so. Due to the nature of these articles, it is quite possible that the readership of this issue will be much wider than legal academia. With that readership in mind, this article, in order to more adequately introduce these pieces, will first discuss some of the fundamental concerns in discussions about homosexuality, such as what sexual orientation actually *is* and what it means to integrate one's experiences of same-sex attraction into a "gay"

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Having been providentially coerced into researching, understanding, and publishing industriously on the topic of marriage, homosexuality, ethics and the law, it is really with great honor that we write now to introduce this edition of the Regent University Law Review with a fair overview of the key issues on the matter. We are very proud that our law review staff and board is striving to present this vital issue in a fair manner. This article is dedicated to their courage.

¹ Even Civil Unions in Vermont and Domestic Partnership laws in California have fallen far short of declaring the legality of homosexual marriage. Legally, socially, and scientifically, that term remains anathema.

² ALAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987), discusses this phenomenon. We are saddened that it has occurred at one of our nation's great academic institutions, Stanford University. We at Regent are grateful for the opportunity to reveal to the general public the thriving nature of this debate.

identity in contemporary culture, as well as what it means to dis-identify with experiences of same-sex attraction. We then turn to the two most significant legal issues surrounding the debate on what it means for two persons who have integrated their experiences of same-sex attraction into a gay identity to pursue same-sex "marriage."

The purposes of this article are to understand the context of the arguments about homosexuality with respect to what it means to have integrated experiences of same-sex attraction into a gay, lesbian, or bisexual identity, set out the two main arguments pertaining to same-sex marriage, and to follow that discussion with an introduction of each of the other articles appearing in this journal issue.

Section I will introduce the reader to a debate about what sexual orientation actually *is* as well as a model of sexual identity development that takes seriously one's personal creed or valuative framework and how that may impact subsequent identity synthesis. This will serve as a foundation for a proper understanding of what it means to then consider marriage between two persons who have integrated their experiences of same-sex attraction into a gay, lesbian, or bisexual identity. Section II will discuss the arguments surrounding the contention that marriage is a fundamental right and ought to be available to all citizens. Reviewing and clarifying the constitutional arguments and politically charged rhetoric is the goal of this section. Section III will discuss the sanctity of marriage argument. Postmodern legal academics purport to dismiss this argument as based purely on tradition. This section, however, will demonstrate the reasoning behind this argument, to help the general reader determine the place of the sanctity of marriage in our law today. Finally, Section IV will introduce each of the other articles contained in this issue, and state the relevance of each in this vital debate.

The objective is to clarify misconceptions and stimulate proper thinking on this crucial matter, and simply to be fair. As you read, may you approach these pieces with an open mind, and be educated in the contours of this debate as you strive for the truth.

II. ORIENTATION AND SAME-SEX IDENTITY DEVELOPMENT

We begin with a brief introduction to a debate this is occurring within the gay community itself. This is a debate about what sexual orientation actually *is*. You might think that such a fundamental issue would be settled given the number of court cases and legal challenges that surround the topic of homosexuality; however, at a most basic level, a debate continues as to whether sexual orientation is something universal and stable across time and place, or whether it is a social construct. This is not a debate between sexual progressives and social conservatives; rather, this is a debate you would hear about within the

gay community itself. Good scholars within the gay community disagree about metaphysical questions pertaining to the nature of sexual orientation.

On the one side of the debate are those who are referred to as *essentialists*. Generally speaking, essentialists view sexual orientation as a real thing, an essence that is universal in that we can see it throughout history and across cultures. Strong forms of essentialism also claim that this universal reality is at the core of who a person is and that it ought to find expression through same-sex behavior for that person to be personally fulfilled. There is then a kind of sexual self-actualization that characterizes strong forms of essentialism.³ Variations on this view are probably held implicitly by many people in our culture. Part of what has made this view appear compelling is the forceful advancement during the 1990s of the biological hypothesis for the etiology of homosexual orientation. Despite the fact that the research produced during that decade has yet to be replicated by independent research teams (or in some cases has failed replication), the media coverage during the 1990s suggested at a popular level that if biology "causes" homosexuality than only prejudice and bias can possibly fuel existing laws limiting homosexuals from rights given to heterosexuals.

On the other side of the debate are *social constructionists*. They hold that sexual orientation is not a real thing at all but rather a linguistic construct that is fashioned by society to capture differences we know to be sexual preferences. To understand this perspective on sexual orientation, consider the analogy of your membership in a political party. To say that you are a democrat or a republican only means something to people in our culture at this time in our society's history. The linguistic construct simply captures something about your voting preferences, your views on social issues, and so on. It is not a real thing. So too with sexual orientation.

The vast majority of both essentialists and social constructionists tend to be supportive of gay causes, but the differences between the two are often overlooked as social matters are discussed and legal precedent is challenged in our society's courts.

Related to metaphysical questions about sexual orientation are discussions as to how people who experience same-sex attraction come to identify as gay, lesbian, or bisexual. For over thirty years gay researchers and theorists have been trying to conceptualize how a person who experiences same-sex attraction comes to integrate their experiences into a gay, lesbian, or bisexual identity. It is widely

³ See Mark A. Yarhouse & Stanton L. Jones, *A Critique of Materialist Assumptions in Research on Homosexuality*, 4 CHRISTIAN SCHOLARS' REV. 26, 482 (1997). See also EDWARD STEIN, *THE MISMEASURE OF DESIRE* (2000).

recognized that ours is the only era and culture where people make the self-defining attribution, "I am gay." This consensus is held by gay theorists and conservatives alike.⁴ And so there has been great interest in understanding how it is that people come to identify as gay. In fact, there are numerous theoretical models, some of which address general gay identity development, while others focus in on the experiences of gay males, lesbians, bisexuals, ethnic minorities who experience same-sex attraction, and so on.⁵ What these models hold in common is a commitment to treating sexual identity synthesis and "coming out" as synonymous. In other words the only healthy, normative outcome for a person who experiences same-sex attraction is for that person to "come out" and identify as gay, lesbian, or bisexual. There is no model among those produced by gay theorists that takes into consideration the experiences of those who *dis*-identify with their experiences of same-sex attraction and pursue an alternative identity synthesis.

A recently proposed model of same-sex identity development takes seriously the personal creed, valuative framework, and attributions of those who experience same-sex attraction.⁶ It is proposed that people go through five stages: 1) identity confusion or crisis, 2) identity attribution, 3) identity foreclosure versus expansion, 4) identity reappraisal, and 5) identity synthesis. Although many of the stages are comparable to what is found in other models, this model notes that there is a point at which persons who experience same-sex attraction make attributions about what their attraction mean to them, and that then they go through a time where they either foreclose on alternatives or expand their alternatives to same-sex attraction insofar as it defines them as a person. Some people go on to integrate their experiences of same-sex attraction into a gay, lesbian, or bisexual identity, and they take on a self-defining attribution with respect to their proclivities, i.e., they say of themselves, "I am gay." Others dis-identify with their experiences of same-sex attraction. For a host of reasons they do not attribute their

⁴ See, e.g., G. Herdt, *Developmental Discontinuities and Sexual Orientation Across Cultures*, in *HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION* 208, 208 (David P. McWhirter et al. eds., (1990).

⁵ For an example of a general model of gay identity development, see V.C. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4 *J. OF HOMOSEXUALITY* 219 (1979); for an example of gay male identity development, see G.J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Counseling and Research*, 8 *J. OF HOMOSEXUALITY* 47; for an example of lesbian identity development, see J. Sophie, *A Critical Examination of Stage Theories of Lesbian Identity Development*, 12 *J. OF HOMOSEXUALITY* 39 (1986).

⁶ Mark A. Yarhouse, *Sexual Identity Synthesis: The Influence of Valuative Frameworks on Identity Synthesis*, 38 *PSYCHOTHERAPY* 331 (2001); see also, MARK A. YARHOUSE ET AL., *SEXUAL IDENTITY SYNTHESIS: A PILOT STUDY* (2002) (poster presented at the annual meeting of the Christian Association for Psychological Studies in Arlington Heights, Illinois).

experiences of same-sex attraction as at the core of who they are as a person. They do not deny that they have these attractions, and many will try a course of therapy or involve themselves in a ministry group to decrease the intensity, frequency, or duration of these attractions, but they do not integrate the attractions into a gay identity or foreclose on alternatives.⁷

This model actually reframes the debate about whether people can change their sexual orientation. Rather than ask whether a person can change his or her sexual orientation, this model asks about a person's sexual identity development and their current experiences with their identity vis a vis sexual identity synthesis. The issue of change, then, might best be understood as a question of life trajectory, of pursuing one or the other sexual identity synthesis. Either people integrate their experiences of same-sex attraction into a gay, lesbian, or bisexual identity, or they dis-identify with their experiences of same-sex attraction and pursue an alternative sexual identity synthesis.

This is the kind of thinking that is often out of the public's awareness. This is the kind of theorizing that may make sense to people upon reflection, but which is often overlooked because of assumptions about what the gay community is like as voiced by a small but vocal group from within that community.

We turn now to two of the key arguments in the debate about whether two people who integrate their experiences of same-sex attraction into a gay, lesbian, or bisexual identity have the right to have their relationship recognized by society as a marriage. Political manipulation and the lack of fairness have resulted in these arguments not being reasonably and practically understood by the general public. For this reason, they are the two most significant arguments that need clarification for the benefit of the general public. These two arguments are 1) the fundamental rights argument, and 2) the sanctity of marriage argument. The proponents of homosexual unions make the first argument, and the proponents of traditional marriage make the second. Each argument has merit and ought to be validly considered by the general public.

⁷ For examples of persons who report an alternative sexual identity synthesis, see K. W. Schaefer et al., *Religiously-Motivated Sexual Orientation Change: A Follow-Up Study*, 27 J. OF PSYCHOL. AND THEOLOGY 329; R. Spitzer, *Two Hundred Subjects Who Claim to Have Changed Their Sexual Orientation from Homosexual to Heterosexual*, in CLINICAL ISSUES AND ETHICAL CONCERNS REGARDING ATTEMPTS TO CHANGE SEXUAL ORIENTATION: AN UPDATE (P.A. Bialer ed., 2001) (paper presented at the annual meeting of the American Psychiatric Association in New Orleans and Los Angeles, in May 2001).

III. THE FUNDAMENTAL RIGHTS ARGUMENT

Proponents of same sex unions contend that same sex couples are discriminated against in that they are prohibited from enjoying the fundamental right to marry. Marriage has always been a fundamental constitutional right, stemming from pre-Bill of Rights values upon which our nation is based.⁸ Indeed, every American citizen does have the fundamental right to marry. However, many fundamental rights contain minimum requirements. For example, to vote one must be of the requisite age and also an American citizen. To enjoy the fundamental right to bear arms contained in the Bill of Rights, one is required to be an American citizen.⁹ In like fashion, the minimum requirements to marry include: the parties being of minimum age, one at a time, unrelated by blood or marriage, and of different sexes. American law has always contained these minimum requirements for the enjoyment of the fundamental right to marry. No court, legislature, or legal body can ever stop anyone from marrying, so long as they qualify for that right. For this reason, the argument that homosexuals are denied the fundamental right to marry is a fatally flawed argument from the outset. The most famous case that clarifies this argument is *Loving v. Virginia*.¹⁰ When a white man and a black woman were prohibited from marrying, the Supreme Court of the United States ruled that it is illegal for any state to prohibit such a union.¹¹ Each party to the marriage met all the minimum requirements for entry into marriage. Race, an immutable quality invoking the highest judicial scrutiny, is not among those requirements, and to prohibit such a marriage was illegal. When homosexual union proponents use this case, it evokes great sympathy for their argument in spite of the flawed analogy of race and homosexuality.¹² Such an argument for homosexuals, however, is fatally

⁸ See generally *Maynard v. Hill*, 125 U.S. 190 (1888).

⁹ See, e.g., *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

¹⁰ 388 U.S. 1 (1967).

¹¹ *Id.*

¹² Secretary of State General Colin Powell, when Chairman of the Joint Chiefs of Staff, responded to the analogy of homosexuality to race, particularly in regard to the military restriction on homosexuality. "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument." 139 CONG. REC. 2200 (1993) (statement of General Colin L. Powell). Professor Thomas Sowell also rejects an analogy between homosexuality and race.

The last refuge of the advocates of admitting gays into the military is to analogize the military's resistance to their past resistance to the racial desegregation of the armed forces. But such analogies are strained, and they certainly do not prove that military leaders are always wrong and politicians are always right.

Are we prepared to bet young people's lives, or the effectiveness of our armed forces, on the presumption that Pat Schroeder knows better than Colin Powell?

flawed when examined in light of the minimum requirements for entry into marriage. This fact, coupled with the constitutional standing of homosexuality,¹³ invalidates the argument.

This argument was proffered in a recent high profile Hawaii case. The issue presented there was whether there is a fundamental right to marry a person of the same sex.¹⁴ "The Due Process Clause guarantees more than fair process The clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."¹⁵ To constitute a fundamental constitutional right, two elements must be met: first, the right must be deeply rooted in our nation's history and tradition; second, that right must be clearly articulated in this nation's legal history.¹⁶ If these requirements are met, that asserted fundamental right is then afforded the highest judicial protection.

The Hawaiian plaintiffs claimed a fundamental right to same-sex marriage, asking the court to recognize a new fundamental right.¹⁷ However, that claimed right is not deeply rooted in this nation's legal history and tradition, and no new description of a fundamental right was articulated. Thus, the court held that the right to same-sex marriage does not exist.¹⁸

Therefore, the argument that homosexuals are denied the fundamental right to marry is resolved with a due process analysis that is considered in conjunction with the requirements for entry into marriage. Homosexuals are not denied the fundamental right to marry. Anyone can enjoy that right as long as he or she meets the minimum requirements for entry into marriage. Just as two ten-year-olds cannot marry one another, and two related people cannot marry one another, and two people who are already married cannot marry one another, nor can two people of the same sex marry one another. These individuals simply do not meet the minimum requirements for entry into marriage. Likewise, due process considerations reveal that no liberty interest is

Thomas Sowell, *Homosexuals in the Military*, FORBES, Dec. 21, 1992, at 146, reprinted in 139 CONG. REG. 2197 (1993).

¹³ In *Bowers v. Hardwick*, the United States Supreme Court stated that restrictions on the practice of homosexuality do not trigger heightened scrutiny, but rather need only bear a rational relationship to a reasonable state interest. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

¹⁴ See generally *Baehr v. Lewin*, 952 P.2d 44 (Haw. 1993); *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

¹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

¹⁶ *Id.* at 720-21.

¹⁷ *Lewin*, 852 P.2d at 57.

¹⁸ For an in-depth analysis of this concept, see Lynne Marie Kohm, *Liberty and Marriage: Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998).

abridged in that denial. Thus, these arguments made by proponents of same-sex unions fail.

IV. THE SANCTITY OF MARRIAGE

Proponents of heterosexual marriage argue that marriage is a sacred institution, and will be irreparably harmed by altering its essential nature. Others dismiss this argument as discriminatory. However, a clear explanation of this area of law invalidates such discrimination charges while exposing the general lack of understanding such objections are based upon.

This is most easily explained with a discussion of the essence of marriage. Certainly, marriage is "one of the most basic institutions of family law."¹⁹ David Hume called marriage "an engagement entered into by mutual consent, and has for its end the propagation of the species."²⁰ Yet family law is the regulation of that institution; it does not define the institution. The essence of something is that part of the substance that is indispensable. When a marriage is made, or when the marriage ceremony occurs, a new relationship is created – legally, morally, socially, and economically. And the essence of marriage is the act of sex between a man and a woman.²¹

The distinction between the sex acts that occur between a man and a woman contrasted to that of sex between two men or between two women shows this essence vividly. A marital act, or the act of marriage, is sexual intercourse that consummates and actualizes marriage by uniting the spouses in a reproductive-type act, thus making them, in no merely figurative sense, two-in-one-flesh.²² The marital act is intrinsically good, has uniting capacities, and is indeed the essence of marriage.²³ There are clear distinctions between this act, which is intrinsically good, and sodomitical acts. "[S]odomitical acts . . . lack this unitive capacity, and thus cannot actualize marriage. Such acts are, therefore, nonmarital *even when performed by persons who are married to each other*. It is precisely in this sense that sodomy is intrinsically

¹⁹ CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 152 (1st ed. 1996).

²⁰ David Hume, *Of Polygamy and Divorces*, in ESSAYS, MORAL, POLITICAL, AND LITERARY 181, 181 (Eugene F. Miller ed., rev. ed., Liberty Classics 1987) (1777), *quoted in* SCHNEIDER & BRINIG, *supra* note 19, at 29.

²¹ See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

²² *Id.* at 301.

²³ "Because the biological reality of human beings is 'part of, not merely an instrument of, their *personal* reality,' the biological union of spouses in marital acts constitutes a truly *interpersonal communion*." *Id.* at 301 n.1 (quoting John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1066 (1994)).

nonmarital."²⁴ The essence of something is that substance without which it cannot be itself. For marriage, that substance is the act of sex between a man and a woman in a sexually unitive capacity.

Marriage, considered not as a mere legal convention, but, rather, as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, is an intrinsic (or, in our parlance, "basic") human good; as such, marriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform such acts In choosing to perform nonmarital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies and those of their sexual partners (if any) as *means* or *instruments* in ways that damage their personal (and interpersonal) integrity; thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other nonmarital sex acts.²⁵

Reproductive acts freely chosen between spouses "are marital in that they actualize and enable the spouses to experience their interpersonal communion, of which such acts are the biological matrix."²⁶

"It is important to see that, though all marital acts are reproductive in type, not all reproductive-type acts are marital."²⁷ Two members of the same sex are simply incapable of entering into a marital act, making homosexual marriage anathema due to the essential nature of marriage itself. The essence of marriage requires a man and woman in the marital act.

As discussed earlier, couples are "not denied a marriage license because of their sex; rather, they [are] denied a marriage license because of the nature of marriage itself."²⁸ G. Stanley Buchanan offers an

²⁴ George & Bradley, *supra* note 21, at 301 n.1.

²⁵ *Id.* at 301-02 (citations omitted). See also Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321 (1995).

²⁶ George & Bradley, *supra* note 21, at 301 n.4.

²⁷ *Id.* at 301-02 n.4.

Acts of fornication and adultery can be reproductive in type, though they are intrinsically nonmarital. And even the reproductive-type acts of spouses lose their marital quality when they are wholly instrumentalized to ends extrinsic to marriage.

. . . The marital quality of spousal intercourse is not vitiated, however, by the fact that reproduction is impossible for all married couples most of the time—due to the periodic infertility of the female spouse, even during her fertile years, and eventually the permanent loss of fertility with age—and for some married couples all of the time—due to some defect in the functioning of reproductive organs.

Id. at 302 n.4.

²⁸ *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. 1974), *quoted in* MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 119 (1993), *quoted in* SCHNEIDER & BRINIG, *supra* note 19, at 50; Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM.

insightful defense of restricting marriage to a man and a woman based on "the standard of moral excellence in the core areas of sexual conduct and childrearing."²⁹ It is the model for intimate conduct.³⁰

In a recent case, the Vermont Supreme Court appeared to recognize the special distinction of the act of marriage. "The court could allow the legislature to cite symbolic reasons for restricting formal marriage to traditional couples."³¹ Chief Justice Jeffrey L. Amestoy indicated that even though a court may act in a certain way, reality and truth may limit opinion. Alluding to the phenomenon in Alaska and Hawaii, Amestoy understands the limits of the court's ruling in the scheme of all truth and reality. "Just as *Dred Scott* was nullified by the Civil War, the same-sex marriage cases were overturned by popular will. These cases show that 'judicial authority is not ultimate authority.'"³²

It is also helpful to review some basic philosophical principles for a clear understanding of the sanctity of marriage. Aristotle's argument from design provides the contemplation of an original design for a natural, physical, or social model that was a part of civilization before the existence of any formal government. This is often referred to as the Ontological Argument from design.³³ "The term 'ontology' derives from the Greek words that mean 'the study of being' or 'the study of that which is.' Ontology investigates the structure of reality as a whole."³⁴ The ontological argument reasons that there is a basic original design for everything. "The ontological argument employs a formalistic method of proof that proceeds by the tautological analysis of the meaning of the concept of God."³⁵ The derivative teleological argument, "the postulation

L.Q. 647 (1999); see also Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 430-34 (1985).

²⁹ G. Sidney Buchanan, *Same-Sex Marriage: The Lynchpin Issue*, 10 U. DAYTON L. REV. 541, 567 (1985), quoted in REGAN, *supra* note 28, quoted in SCHNEIDER & BRINIG, *supra* note 19, at 50.

³⁰ REGAN, *supra* note 28, quoted in SCHNEIDER & BRINIG, *supra* note 19, at 50.

³¹ Steve France, *A Marriage Proposal: Vermont Supreme Court Seeks Common Ground on Gay Unions*, A.B.A. J., Feb. 2000, at 28, 28 (quoting UCLA law professor Eugene Volokh).

³² *Id.* (quoting Vermont Supreme Court Chief Justice Jeffrey L. Amestoy).

³³ Plato's ontology is distinguished from that of his pupil, Aristotle and other predecessors and is not a basis of this article's argument. In his recognition that the ordering principle for the cosmos cannot be located within the cosmos itself, Plato was led to consequently develop a form of "other-worldly" philosophy in which his so-called theory of Ideas or Forms plays a major role. See JOHN H. KOK, PATTERNS OF THE WESTERN MIND: A REFORMED CHRISTIAN PERSPECTIVE 44 (2nd rev. ed. 1998) (1996). Aristotle rejected the Platonic doctrine of Ideas and other-worldliness, returning to a one-world philosophy. *Id.* at 52.

³⁴ *Id.* at 4.

³⁵ PAUL KURTZ, THE NEW SKEPTICISM: INQUIRY AND RELIABLE KNOWLEDGE 210 (1992). Kurtz's goal, however, sets out to disprove the ontological argument in "that it is

that what appears to be order in nature is evidence of a divine intelligence,"³⁶ "was replaced in the eighteenth century by the design argument."³⁷ The argument from design reasons that our discovery of "what appears to be a perfect symmetry and harmony in the parts points to a design or a plan."³⁸ Application of these principles to marriage and the family offers strong support for the sanctity of marriage and the design of marriage between one man and one woman raising children within a family unit, as nearly all of human history has known it. Only in recent human history has cultural change questioned this design. The family has survived every previous form of cultural change, and because it is authentic by design, it is likely that marriage and the family will survive any current cultural pressure for obsolescence, as well as any future pressure.

Ontology and design theory understand change, particularly that all things are in a process of change.

[E]very substance stays the same but is also changing as it moves from potentiality to actuality. Everything moves toward the fulfillment of a goal . . . or purpose. The stress on the role of purpose gives Aristotle's ontology a teleological character. . . . While he tries to explain change, coming-into-being and passing away, he maintains that such change is merely a part or an aspect of an eternal structure of things. The world as a whole has never come into being and will not ever go out of existence.³⁹

Marriage, by virtue of its origin and designed nature, is of original, unique, and authentic design. This is the heart of the sanctity of marriage.

dealing with purely analytic statements" and claims that "the ontological argument fails to convince those who do not have a prior belief in God." *Id.*

³⁶ *Id.* at 212. Kurtz, in his precise knowledge of philosophy and history, however, seeks to disprove this argument, as well as its successors, to prove his positive case for atheism. *See id.* at 216-20. His desire to prove religious unbelief uses deductive proofs to argue that belief is an illusion. The problem with such an argument is that atheism itself is a belief, and following Kurtz's line of reasoning, atheism, like any religion, is likewise an illusion, and thus self-defeating in the skeptic's application. This is evidenced by the fact that Kurtz has been instrumental in founding organizations such as the Committee for the Scientific Investigation of Claims of the Paranormal, and The Committee for the Scientific Examination of Religion. *See id.* at 347-54.

Regress in ontology is reminiscent of the now familiar regress in the semantics of truth and kindred notions—satisfaction, naming This similarity should perhaps not surprise us, since both ontology and satisfaction are matters of reference. In their elusiveness, at any rate—in their emptiness now and again except relative to a broader background—both truth and ontology may in a suddenly rather clear and even tolerant sense be said to belong to transcendental metaphysics.

W.V. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 67-68 (2d prtg. 1971).

³⁷ KURTZ, *supra* note 35, at 213.

³⁸ *Id.*

³⁹ KOK, *supra* note 33, at 54.

This thinking was not buried with time, but was carried into canonical laws and rules for marriage throughout church history. These laws were eventually ordained and regulated by Western Christendom. Marriage has been historically treated by the Church as "a natural association . . . [,] a contractual unit . . . [prescribing] for couples a lifelong relation of love, service, and devotion . . . to each other and proscribed unwarranted breach or relaxation of their connubial and parental duties."⁴⁰ Marriage, as "[t]he temporal union of body, soul, and mind within the marital estate, symbolized the eternal union between Christ and His Church, and brought sanctifying grace to the couple, the church, and the community."⁴¹ Theology is not out of place in a discussion of the sanctity of marriage. On the contrary, it is a useful guide due to its centuries of experience, and the original design of marriage is seen through both theology and the law.⁴²

⁴⁰ JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 3-4 (1997).

⁴¹ *Id.* at 4.

⁴² See Larry Witham, *Churches Debate Role in Gay Unions*, WASH. TIMES, June 18, 2000, at C1. "Despite the high-decibel debate, the number of church-sponsored same-sex unions remains small. The Census Bureau estimates that in 1998 there were 1,674,000 'same-sex partnerships' in the United States. Religious activists, meanwhile, speak only in terms of hundreds of 'holy unions' but cite a recent increase." *Id.* One would consider the most reliable statistical source to be the churches that promote and perform actual gay wedding ceremonies, rather than statistics based on government estimations.

New Testament scholar James B. De Young, author of the forthcoming book "Homosexuality," says the Bible gives no support to the homosexual movement's claim that gays and lesbians have a God-given homosexual "identity" that directs their behavior. JAMES B. DEYOUNG, *HOMOSEXUALITY* (forthcoming 2001). For an excellent analysis of the scriptural witness pertaining to same-sex behavior, see also ROBERT A. J. GAGNON, *THE BIBLE AND HOMOSEXUAL PRACTICE* (2001). The Bible's only concern on homosexuality, De Young says, is to proscribe sexual behavior. *Id.* "The Bible says the sin is the act, not the thought, in terms of church discipline," says Mr. De Young of Western Seminary, a Conservative Baptist school in Portland, Oregon. *Id.* The Hebrew Bible was the first ancient text to curb homosexuality, but other cultures eventually did likewise, he says. "Biblical morality is a common morality. It has proven to improve society over the ages." *Id.*

Meanwhile, the homosexual rights movement also has galvanized around the 1994 book, "Same-Sex Unions in Premodern Europe," which claims that early Latin and Byzantine ceremonies blessed homosexual bonds. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994). The author, Yale historian John Boswell, a convert to Catholicism who died of AIDS, cites the ceremonies as a basis for modern church policy, but concedes that he cannot prove they condone sexual activity. *Id.*

Mr. Hays of Duke University says the Boswell scholarship has been "fairly savagely criticized." What Mr. Boswell found were "Christian ceremonies blessing 'brotherhood' between individuals, sort of like making blood brothers," Mr. Hays says. *Id.*

Those who favor same-sex "holy unions" also argue that homosexuality is genetically endowed, not chosen. But church thinkers such as social psychologist Mary Stewart Van Leeuwen of Eastern College, an evangelical institution, argue that this is thin evidence on which to ignite an ecclesiastical revolution. Larry Witham, *Churches Debate Role in Gay Unions*, WASH. TIMES, June 18, 2000, at C1.

A plethora of individuals today still choose the sanctity and option of marriage, even when our culture accepts many types of people groupings and living arrangements. "Notwithstanding these developments, a majority of Americans still marry in the traditional way and continue to regard marriage as the most important relationship in their lives."⁴³ One of the most important factors for the staying power of marriage, particularly as the basis of the family, is the protection of children.⁴⁴ The key to reconciling design and culture is the sanctity of marriage.

Understanding these facts demonstrates why the sanctity of marriage is more than merely tradition, a bygone historical relic. Evidence shows that children do better in a two-parent family,⁴⁵ especially when the parents are married to each other.⁴⁶ The family based on the sanctity of marriage is not merely a tradition. Marriage is indeed of an original design followed throughout history as providing for the best interests of the child and of the family as a unit.

V. AN INTRODUCTION OF WHAT IS TO COME

Each of the articles that follow were solicited and accepted as agreed by the Stanford University Law and Policy Review editing board into a symposium that focused on whether homosexuality is associated with medical or psychological harm. As you will see, these articles suggest that this question may be answered in the affirmative. However, this result was not what the Stanford editors wanted to promote, so these authors were later refused publication, while those who answered the question presented in the negative were published.

The authors that follow in this law review issue chose to answer the question presented honestly without fear of ostracism. They will be remembered for their intellectual honesty, while the Stanford Law and

"Why would the church want to change centuries of teaching based on flimsy scientific grounds?" she asks. "Scientists vastly disagree." *Id.*

See also JAMES B. DE YOUNG, *HOMOSEXUALITY: CONTEMPORARY CLAIMS EXAMINED IN LIGHT OF THE BIBLE AND OTHER ANCIENT LITERATURE AND LAW* (2000); STANTON L. JONES AND MARK A. YARHOUSE, *HOMOSEXUALITY: THE USE OF SCIENTIFIC RESEARCH IN THE CHURCH'S MORAL DEBATE* (2000); cf., JOHN BOSWELL, *supra*.

⁴³ HOMER H. CLARK, *LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 75 (2d ed. 1987).

⁴⁴ LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 995-96 (2d ed. 2000).

⁴⁵ Patrick Fagan, *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*, at <http://www.heritage.org/library/categories/crimelaw/bg1026.html> (July 10, 2000); Robert L. Maginnis, *Challenges to Children's Well-Being: Fathers and Parental Time*, at <http://www.frc.org/get/pd99k1.html> (July 12, 2000).

⁴⁶ Leslie Carbone, *For Better or For Worse?*, at <http://www.frc.org/articles/ar99g2fs.html> (July 10, 2000).

Policy Review editors and staff will be remembered for their inability to be completely honest with the evidence. The six articles that follow do a superior job of examining the available evidence on whether homosexuality is associated with medical or psychological harm.

Three of the pieces in this issue deal with the effects of homosexuality on children. In *Child Molestation and the Homosexual Movement*, author and researcher The Honorable Steve Baldwin states very plainly that trends in lowering the age for sexual consent come clearly at the expense of our children, driven by some members of the homosexual community who appear to target youth for homosexual education, experimentation, and even movement expansion. Focusing on sexual abuse and molestation evidence found by California's Social Services in gay groups, Baldwin argues that homosexuality can sometimes be accompanied by disorders that have dire consequences for children. The author exposes some aspects of the gay lifestyle as a youth-oriented culture targeting children. Using homosexual media and multimedia sources, Baldwin exposes the bulk of pro-pedophile publications, boy prostitution rings and child molestation by gay men. According to Baldwin, some homosexual activism targets children, boys in particular, for deviant sexual exploits and the expansion of the homosexual movement.

Baldwin's article is significant because it discusses concerns for children that state legislators throughout the decade of the 1990s also recognized—adult sexual predators. At least seventeen state legislatures have seen it as critical in their governance to pass laws protecting women and children against sexually violent predators.⁴⁷ But when called upon to support these laws designed to protect children, some may

⁴⁷ Among these are Arizona: ARIZ. REV. STAT. ANN. § 13-4601 (West Supp. 1996-1997); California: CAL. WELF. & INST. CODE ANN. § 6600 (West Supp. 1997); Colorado: COLO. REV. STAT. § 16-11.7-101 (Supp. 1996); Connecticut: CONN. GEN. STAT. § 17a-566 (1992 and Supp.1996); Illinois: 725 ILL. COMP. STAT. § 205 (1994); Iowa: IOWA CODE ANN. § 709C (West Supp. 1996); Kansas: KAN. STAT. ANN. § 59-29a01 (1994); Massachusetts: MASS. GEN. LAWS, ch. 123A (Supp. 1997); Minnesota: MINN. STAT. ANN., § 253B (West 1994 & Supp. 1996-1997); Nebraska: NEB. REV. STAT. § 29-2923 (Supp. 1996); New Jersey: N.J. STAT. ANN. § 30:4-82.4 (West 1997); New Mexico: N.M. STAT. ANN. § 43-1-1 (Michie 1993); Oregon: ORE. REV. STAT. § 426.510 (1995); Tennessee: TENN. CODE ANN. § 33-6-301 (1984 & Supp.1996); Utah: UTAH CODE ANN. § 77-16-1 (1995); Washington: WASH. REV. CODE ANN. § 71.09.01 (West 1992 & Supp. 1996-1997); Wisconsin: WIS. STAT. § 980.01 (Supp. 1993-1994). This chart is listed as the Appendix to the opinion of Justice Breyer in *Kansas v. Hendricks*, 521 U.S. 346, 397 (1997), entitled "Selected Sexual Offense Commitment Statutes." Under these statutes, usually known as a Sexually Violent Predator Act (SVPA), a jury may find that a defendant is a sexually violent predator when he or she possesses some "mental abnormality" or "personality disorder" and are likely to engage in "predatory acts of sexual violence" in the future. Any such legislation is constitutional if it also adequately protects against the violation of a defendant's due process rights and double jeopardy rights, and does not impose *ex post facto* punishment, or punitive measures where treatment is deemed necessary.

be more concerned about protecting the rights of the adult perpetrator than the child victim.⁴⁸

When prominent people hold that pedophile behavior is not wrong or worthy of treatment, but is acceptable as a lifestyle, parents need to take note. Justice Ruth Bader Ginsburg's views on child sexuality were made known during her confirmation process. The record of that process

⁴⁸ *Kansas v. Hendricks*, 521 U.S. 346, (1997), is one example. This case is a concerning one because the United States Supreme Court upheld Kansas' SVPA only by a slim 5-4 decision, with full knowledge of some very disturbing facts. The defendant himself testified to a five-decade span of child sexual abuse and was a diagnosed pedophile. *Id.* at 354. That prior conduct was used for evidentiary purposes to determine whether the restraints allowed under the SVPA were appropriate. *Id.* at 356-58. The Court stated that consideration of Hendricks' prior conduct was not for culpability purposes, but for evidentiary purposes. The court listed this prior conduct.

Hendrick's own testimony revealed a chilling history of repeated child sexual molestation and abuse, beginning in 1955 when he exposed his genitals to two young girls. . . . Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year-old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered "safe to be at large," and was discharged from a state psychiatric hospital.

Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl - - he performed oral sex on the 8-year-old girl and fondled the 11-year-old boy. . . . He testified that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children. Indeed, soon after his 1972 parole, Hendricks began to abuse his own stepdaughter and stepson. He forced the children to engage in sexual activity with him over a period of approximately four years. Then . . . Hendricks was convicted of "taking indecent liberties" with two adolescent boys after he attempted to fondle them. . . . Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he "get[s] stressed out," he "can't control the urge" to molest children.

Id. at 354-55.

This case was a "classic example of nonpunitive detention," for the protection of children. *Id.* at 363 (citing the lower court's decision). Application of the SVPA was due to past sexually predatory acts.

This case is instructive not only in its decision, but also its dissent. Justices Breyer, Stevens and Souter agreed that it is not a violation of due process to restrain some mentally ill and dangerous people to protect the welfare of others, but that such due process requires the provision of treatment. *Id.* at 374 (Breyer, J., dissenting). Justice Ginsburg, however, did not join in this portion of the dissent, but only in Section II and III of the dissent that discussed the imposition of *ex post facto* penalties upon Hendricks in using his prior bad acts as evidence, and that use of this history "disadvantage[d] the offender," when such evidence must be limited to operate prospectively. *Id.* at 396 (Ginsburg, J., dissenting).

Clearly, the dissenters did not think it constitutional for a jury to consider a lengthy pedophile past. That is concerning to many parents. It is significant to note that Justice Ginsburg agrees with this discussion, but is absent in the requirement for treatment of sexual predators. This silence is difficult to understand as protecting children from sexual violence, or understanding pedophilia as a disorder or inappropriate behavior at all. This is not to imply that Justice Ginsburg uses Hendricks to promote pedophilia, but merely that her silence is worthy of thoughtful consideration.

shows "positions she has endorsed are . . . the lowering of the age of consent for sexual acts to 12 years . . ." ⁴⁹ Jocelyn Elders, Surgeon General under the Clinton Administration, has written a foreword for a publication that supports adult sex with children to be released by the University of Minnesota Press.⁵⁰ These are just two prominent people who appear to endorse adults having sex with children.

This type of promotion of child sexuality by adults often gets the cover of children's rights. These *rights* of children are more accurately described as opportunities for adults to seduce children to give their consent to sexual activities that interest that adult. Our children are at risk when well-known people no longer protect them from adults who want to get their consent to sexual activities.

Crafting "Gay" Children should capture every scholar's attention. Dr. Judith Reisman challenges the status quo by demonstrating the intentional screening of recent studies that suggest homosexuality is correlated with mental health concerns. Blaming the mainstream press and the media elite, Reisman exposes the dirty laundry of the gay lifestyle as reported by those within the gay community themselves, showing the propensity for violence and sexual abuse among gays with

⁴⁹ *Senate Record Vote Analysis for the Confirmation Hearings of Supreme Court Justice nominee, Ruth Bader Ginsburg*, 103 CONG., 1st Sess., Vote No. 232 (Aug. 3, 1993) (on file with author). This is underscored by the Hendricks dissent, *infra* note 48. These facts are supported by other sources as well. "The new Supreme Court Justice, Ruth Bader Ginsburg, wrote in 1977 that ... the age of consent for sexual acts should be lowered to 12 years..." TEXE MARRS, *BIG SISTER IS WATCHING YOU* 129 (1993), *citing* R.E. McMaster, *The Reaper*, May 19, 1993, at 14. Another source cites to judicial documents.

Particularly disturbing . . . is the reason she [Ginsburg] gave for opposing laws "controlling sexual behavior between adults and minors" – that statutory rape statutes are of "questionable constitutionality." As stated on page 30 of the (court's formal) minutes... In the second paragraph of the policy statement, Ruth Bader Ginsburg made a notion [sic] to eliminate the sentence reading: "The State has a legitimate interest in controlling sexual behavior between adults and minors." She argued that this implied approval of statutory rape statutes, which are of questionable constitutionality." *See id.* at 131-32, *citing* CHARLES A. PROVAN, *THE AMERICAN FREEDOM MOVEMENT* 3 (Aug. 1993).

Justice Ginsburg is not mainstream on this matter at all. States generally have some form of statutory rape laws, at least minimally, to protect children from adult overpowerment and manipulation in sexual abuse, yet a Supreme Court Justice has at least intimated that she believes such laws to be unconstitutional.

⁵⁰ Concerned Women for America, *Reject Academic Cover for Child Molesters*, CFI Say, March 28, 2002, available at http://cwfa.org/library/family/2002-03-28_pr_pedophilia.shtml (last visited Apr. 12, 2002). The new book, entitled JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002), projects positive insight into consensual child sex. Clearly this is a publication promoting adult sex with children who consent as a good thing. Critics argue that this sort of approval is effectively "giving cover for adults having sex with kids." *Id.* This type of child sexuality, however, is not legal and is commonly known as child rape, but this book, endorsed by Elders, is promoting exactly that activity. Jocelyn Elders also was previously known for advocating adults teaching children to masturbate. *Id.* It was shortly thereafter that she was discharged of her executive duties.

children. The article argues that the media owes the public a duty to warn of how some within the gay community attempt to guide children into homosexuality when they are vulnerable.

With sources like Paglia and the Gay Academic Union, Reisman makes quick work of the destructively persuasive powers of the press, suggesting that the press is strongly advancing the interest of the sex industry and gay activism. Reisman makes excellent points that cannot be ignored, and uses Aleksander Solzhenitsyn's powerful statement to summarize her concerns: "The press can both stimulate public opinion and miseducate The press has become the greatest power within the Western countries, more powerful than the legislature, the executive, and judiciary. One would then like to ask: By what law has it been elected and to whom is it responsible?"⁵¹ The national media has been less than honest, and less than fair, in informing the general public about the concerns of homosexuality. Reisman's article persuasively demonstrates this point.

Dr. George Rekers, in his article, *Studies of Lesbian and Homosexual Parenting: A Critical Review*, points out the problems and inherent flaws with nearly all the currently available studies and journal articles on gay parenting. The only current flawless study shows that there is still an open question as to whether gay and lesbian parenting is associated with the historically expected effects of significantly higher incidences of sexual abuse, childhood gender dissatisfaction, and adolescent as well as adult homosexual-orientation development and behavior. It is an enlightening challenge to those who conduct such studies.

Professor A. Dean Byrd and Mr. Stony Olsen discuss candidly whether homosexuality is innate and immutable. In their piece *Homosexuality: Innate and Immutable?*, these authors examine the biology and the scientific evidence of homosexuality, reviewing three main studies on the topic. Their discussion also focuses on the nature or nurture cause of homosexuality, leading from etiology to treatment and effectiveness of change. The authors, however, are most concerned with the normalization of homosexuality and efforts to ban conversion treatment. It is a balanced and thoughtful piece that suggests the evidence on this subject is being oppressed by the political pressure surrounding the homosexual phenomenon. Because of the balanced presentation and Professor Dean's stature as a highly reputed clinician as well as a formidable academic in psychiatry, this article is worthy of serious consideration.

Dr. Ben Kaufman discusses the significance of the National Association for Research and Therapy of Homosexuality (NARTH) in

⁵¹ Aleksander Solzhenitsyn, *A World Split Apart*, NAT'L REV., July 7, 1978, at 838.

Why NARTH? The American Psychiatric Association's Destructive and Blind Pursuit of Political Correctness. Because the mental health field has become a political battleground favoring homosexuality, treatment for same-sex attraction has been shunned. Sociopolitical concerns have prevented researchers from conscientious consideration of any reasonable hypothesis, even for a patient who wants to receive therapy for change. While some within the gay community lobby against reparative therapy, other therapists have defended the rights of patients who seek treatment for same-sex attractions based on personal dignity and autonomy.⁵² NARTH is a defender of the therapists' right to provide treatment of homosexuality, simultaneously providing a forum for the dissemination of research on homosexuality. Kaufman points out the lack of fairness in the mental health field when it comes to homosexuality, proffering that NARTH is a beginning to balancing the scales.

In his article *Selling Homosexuality to America*, marketing expert Mr. Paul Rondeau explores how gay rights activists use rhetoric, psychology, social psychology, and the media—all the elements of modern marketing—to *position* homosexuality and frame what is discussed in the public arena. Rondeau not only introduces the marketing strategies employed by homosexual activists such as Desensitizing, Jamming, and Converting, he also illustrates each with real examples exposing the systematic, orchestrated, and largely successful efforts of the homosexual activists to "normalize" homosexuality in the public eye.

Finally, the student note in this issue formulates a strategy for opposing same-sex marriage in the courts. This note identifies pitfalls with current litigation strategies and suggests improvements and solutions.

These articles are an important part of the entire body of evidence on whether homosexuality is associated with medical and psychological harm. The legal principles reviewed earlier have set the stage for thorough examination of the truth surrounding homosexuality. Our goal is to afford fairness to all sides of the debate.

All of us need to reconsider our thinking on these matters as a result of this publication. There is a desperate need for fairness, accuracy, and honesty in discussing homosexuality, marriage, and the law. It is our pleasure to challenge you to reflect clearly on these critical matters that will affect our civilization for decades to come.

⁵² See Mark A. Yarhouse, *When Clients Seek Treatment for Same-Sex Attraction: Ethical Issues in the "Right to Choose" Debate*, 35 PSYCHOTHERAPY 248; Mark A. Yarhouse & Warren Throckmorton, *Ethical Issues in Attempts to Ban Reorientation Therapies*, PSYCHOTHERAPY (forthcoming 2002).