

THE MAGISTERIUM'S ARGUMENTS AGAINST "SAME-SEX MARRIAGE": AN ETHICAL ANALYSIS AND CRITIQUE

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[The author examines the arguments used by the magisterium against same-sex marriage. Most of these arguments have features that make them problematic for public debate in pluralistic societies. The most plausible argument concerns the health of marriage as an institution within which adults take responsibility for child rearing. If the magisterium wishes to present a more persuasive argument for its position against same-sex marriage, it ought to develop this line of reasoning and jettison the practice of casting gay people in a negative light.]

THE MOST OUTSPOKEN and consistently negative response to proposals that the state recognize same-sex marriage has come from the Catholic Church.¹ "Marriage" in this context concerns the state-sanctioned exclusive, consensual union of spouses that is terminated only with a legal divorce; "civil marriage" needs to be distinguished from "sacramental marriage," "common law marriage," or other uses of the term. Rather than taking a constructive position on the question of civil marriage, this article

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¹ For the sake of economy this article will refer in a generic way to "same-sex marriage" as an umbrella term for partnerships between gay and lesbian people that are recognized by the civil law. Proposals for legal recognition of "civil union" will be considered under the one umbrella of "same-sex marriage," but there are significant differences between the two. This term "civil unions" is used in Vermont to describe the legal recognition of same-sex commitments. It should be taken here to include civil unions, though same-sex marriage grants more rights and benefits than do civil unions. "Civil union" is often the compromise option for those who want to maintain the traditional meaning of marriage, but it is rejected by some gay advocates as repeating the failed "separate but equal" logic long since rejected by the courts in the matter of racially segregated schools. Since the magisterium rejects both same-sex marriage and anything they it considers "tantamount" to it, including civil unions, they will be treated as one category here.

confines itself to examining the moral logic of the Church's opposition to same-sex marriage as expressed in documents issued by the papal and episcopal magisterium. It argues that the Church's strong suit is its recognition that marriage needs to be strengthened and has strong ties to particular cultural contexts, but that to do so it is not necessary to speak of gay people in a derogatory manner, to demean the value of committed gay partnerships, and to ignore the demands of social justice and the rights of gay people and their families.

This article proceeds in the following stages. The first part briefly describes some salient features of the contemporary social context surrounding the same-sex marriage debate. The second part reviews some key themes of recent statements of the magisterium. The third section subjects these statements and their arguments to ethical analysis and critique. It argues that the magisterium should continue to advance only its argument from marriage as a social institution and abandon the other arguments it has deployed against same-sex marriage.

THE SIGNS OF THE TIMES

Over the course of the last 40 years civil society has become more accepting of gay people.² The sexual behavior of gay people is probably as diverse as is it among heterosexuals. It seems to run along the same broad spectrum from strict monogamy to promiscuity. Some gay people, like some heterosexuals, regard recreational sexual activity between consenting adults as morally acceptable. Others embrace a very elevated moral interpretation of sexual ethics and find a minimalist sexual ethics of consenting adults to be morally unacceptable.

Some gay people believe that sex has a deep human meaning that is achieved only in lifelong and exclusive interpersonal commitment. They live in settled relationships that involve many practical interdependencies. About one-fourth of the 600,000 same-sex couples currently living together in the United States are raising children.³ Gay people live in the same

² Estimates vary, but one respected study reports 2.8% of men and 1.4% of women as describing themselves as exclusively gay or lesbian, respectively. See Edward O. Laumann, G. H. Gagnon, R. T. Michael, and S. Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* (Chicago: University of Chicago, 1994).

³ This estimate is based on the United States Census report as interpreted by Gary Gates and Jason Ott, *The Gay and Lesbian Atlas* (Washington: Urban Institute, 2004). It should be noted that there is wide disagreement regarding the estimates of children living in families headed by at least one gay parent. The American Academy of Pediatrics unhelpfully estimates a range of between 1 and 9 million children living with at least one parent who is gay; see Ellen C. Perrin, M.D., and the Committee on Psychosocial Aspects of Child and Family Health, "Technical

houses, often and increasingly raise children jointly, need health care insurance, and visit one another in hospitals. They rely on one another's paychecks, Social Security benefits, disability insurance, sick and bereavement leave, death benefits, and unemployment insurance. They contribute to their neighborhoods and other intermediary institutions and generally strive to be responsible members of their communities.⁴

Under current legal arrangements in most states, many people in these relationships are deprived of rights and benefits that are granted to married couples, including hospital visitation rights, joint income tax filing, rights to make income transfers and gifts, child and spousal support in the case of dissolution of the relationship, the right to make medical decisions for an incompetent partner, sponsorship for immigration, and so forth. (These concerns obviously also pertain to cohabiting heterosexual couples as well.)

Some activists argue that to meet these needs, cohabiting gay couples ought to be granted some form of legal recognition—special registration, civil unions, or marriage.⁵ Not all gay people, of course, want marriage for themselves or even think it desirable for marriage to be extended to gay people in general.⁶ Some gay people, going further, argue that the distinctive value of “queer” culture needs to be protected against the hegemonic design of the heterosexist majority to impose its own norm on sexual

Report: Coparent or Second-Parent Adoption by Same-Sex Parents,” *Pediatrics* 109 (February 2002) 341–44. A standard number often cited by the popular press is a range between 3 and 6 million; see Suzanne M. Johnson and Elizabeth O’Connor, *The Gay Baby Boom: The Psychology of Gay Parenthood* (New York: New York University, 2002). The more modest estimate used in this article has been taken from a study by Black, Gates, Sanders, and Taylor, who argue for a minimal number of 300,000; see *Demography* 37.2 (2000) 137–54. Their study estimates that there are about 2 million gay men and 1.2 million lesbians in the United States and that 14% of gay households and 28% of lesbian households are raising children.

⁴ See, for instance, Barbara Spector, “Gay and Lesbian Scientists Seek Workplace Equity,” *The Scientist*, March 2, 1992.

⁵ Gay and lesbian activists are divided over whether marriage ought to be an ideal for them. See Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con: A Reader* (New York: Vintage Books, 1997) and William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free, 1996).

⁶ Nancy D. Polikoff worries that gays who want to marry “mimic the worst of mainstream society, [and engage in] an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.” Nancy D. Polikoff, “We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage,” *Virginia Law Review* 79 (1993) 1535, 1536. Polikoff’s argument, focusing on social justice, holds that working for same-sex marriage will actually “detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all.” *Ibid.* 1549.

"others." Other people, however, both gay and straight, are convinced that, for a variety of reasons, marriage ought to be available to gay people. They argue, for example, that a gay person whose partner of 20 years becomes incapacitated for medical reasons ought to have the power to make important medical and financial decisions that is taken for granted by spouses. Children raised in gay households present a particularly compelling case, especially since, as the Church teaches, the "best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case."⁷ Children reared by same-sex adults need health care, inheritance rights, education, hospital visitation, etc. Sexual ethics and marriage law here are inextricably linked to social justice.

A number of European political communities have decided to grant various forms of legal recognition to gay couples. Iceland allows for registered cohabitation, France recognizes domestic partnerships, Sweden has civil unions, Denmark, the Netherlands, and Germany allow for same-sex marriage, and Belgium grants same-sex couples all the rights of marriage except the right to adopt. Courts in British Columbia and Ontario have granted the right to marry to gays.

The issue currently roils the American political scene with an intensity that is second only to the abortion debate. Recent polls indicate that most Americans are not in favor of same-sex marriage. As of July of 2003, 53 percent of Americans were either opposed or strongly opposed to same-sex marriage, against 38 percent who were either in favor or strongly in favor.⁸ These percentage points, though, reflect a statistically significant decrease in popular opposition to same-sex marriage since the mid-1990s. A gap exists along racial, denominational, and especially generational lines, where, for example, 47 percent of people polled between the ages of 18-29 approved of same-sex marriage in contrast to only 19 percent by people over 65.⁹

The 1996 Defense of Marriage Act restricted the definition of marriage to a relationship between one man and one woman. This act pertains to benefits guaranteed by federal law, but does not invalidate more extensive

⁷ Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons" (issued June 3, 2003) *Origins* 33 (August 14, 2003) 177-82. The magisterium is supported by Gerald Coleman, S.S., "Same Sex Unions and Marriage: The Issues," *Origins* 33 (February 12, 2004) 589-95. For a critique see Enda McDonagh, "Homosexuality: Sorrowful Mystery, Joyful Mystery—A Straight View and Its Origins," *The Furrow* 54 (September 2003) 455-64.

⁸ See The Pew Research Center, The Pew Forum on Religion and Public Life, Thursday, July 24, 2003.

⁹ See USA Today/CNN/Gallup Poll of March 5-7, in *USA Today*, 22 March 2004, 15A.

rights that might be granted by state governments. Thirty seven states have passed laws defining marriage as between one man and one woman. Some of these states, however, allow same-sex partnership registries that grant limited benefits and rights.

Since July 1, 2000, gay partners have been able to be joined legally in “civil unions” in the State of Vermont. The Vermont legislature was the first in the country to grant many marriage benefits to same-sex couples.

On November 18, 2003, the Supreme Judicial Court of the Commonwealth of Massachusetts ruled in *Goodridge v. Department of Public Health* that denying the right to obtain marriage licenses to gay couples is against the state constitution, and specifically a violation of its requirement that all citizens receive equal protection under the law.¹⁰ On Monday, March 29, 2004, the Massachusetts legislature adopted a state constitutional amendment that bans same-sex marriage but creates civil unions with the same rights and benefits that are currently afforded to married couples under state law. If the amendment is approved in two more legislative votes, it will be put to the popular vote in the fall of 2006. To make matters more confusing, as of May 17 the Commonwealth began issuing marriage licenses to gay couples.

RESPONSES OF THE MAGISTERIUM

The conjunction of church teaching and political controversy constitutes a challenge for both the magisterium and the consciences of Catholic citizens. The magisterium attempts to justify its position on the basis of reasonable arguments that can be clearly presented, critically explained, and widely agreed upon by fair-minded citizens. It gives special attention to Catholic politicians and citizens, but motivates them to adhere to values and norms derived from the natural law rather than known only by revelation or specific church teachings.

¹⁰ See Pam Belluck, “Marriage by Gays Gains Big Victory in Massachusetts,” *New York Times*, November 19, 2003; excerpts from the ruling available at <http://www.nytimes.com/2003/11/19/national/19GTEX.html> (accessed January 15, 2004); see also, on the impact of the Lawrence v. Texas, see Linda Greenhouse, “Supreme Court Paved Way for Marriage With Sodomy Law,” *New York Times*, November 19, 2003. Vatican moral theologian Gino Concetti descried this decision as a violation of the natural order and God’s plan for marriage. Philip Pullella, “Vatican Theologian Slams U.S. Court Gay Ruling,” Reuters, November 19, 2003. The first case addressing the issue of same-sex marriage in the United States was *Baehr v. Levin*, 852 P2d 44, 67, 74 (1993). In this decision the Hawaiian Supreme Court ruled that restricting marriage to opposite sex couples constituted sex discrimination as defined by the state constitution of Hawaii. In responding to this ruling, the state legislature held that the legislature “shall have the power to reserve marriage to opposite sex couples.” H.B. 117, sec. 2, 19th Leg., 1997 Haw. Sess. Laws (Haqw. 1997). Voters ratified this amendment in November, 1998. Haw Const. Art. I, sec. 23.

The proximate historical context for the magisterium's approach to same-sex marriage began with a 1986 document from the Congregation for the Doctrine of the Faith on the "Pastoral Care of Homosexual Persons."¹¹ This letter applied and extended principles from its earlier "Declaration on Certain Questions Concerning Sexual Ethics."¹² "Homosexual acts," it taught, are always wrong. The homosexual "condition" or "tendency," while not sinful, is an "objective disorder."¹³ This condition is often influenced by forces outside the control of the agent. Some of these come "from a false education, from a lack of normal sexual development, from habit, from bad example, or from other similar causes, and is transitory or at least not incurable."¹⁴ But there are "homosexuals who are definitively such because of some kind of innate instinct or a pathological condition judged to be incurable."¹⁵ The Congregation denounced attempts by "the homosexual movement" to change civil statutes and laws on the grounds that "homosexual activity" is harmless or even good.¹⁶ The most extreme interpretation of this condemnation would argue that civil legislation cannot condone behavior to which individuals have no right—an argument analogous to the axiom of Pope Pius XII that, "What does not correspond with truth and the moral law has no objective right to existence, propaganda or action."¹⁷ For a few Catholics, direct application of this principle is sufficient to preclude any further discussion. Most people, however, recognize that the issue is not so simple.

"Pastoral Care for Homosexual Persons" encouraged national bishops' conferences to take up the issue of civil law in light of the particular needs of their own cultures.¹⁸ In 1996, a brief "Statement on Same Sex Marriage" was made by Bishops Joseph Charron and William Skylstad on behalf of the Bishops' Committee on Marriage and the Family.¹⁹ The bishops affirmed three principles that recur throughout all Catholic discussions of the issue: (1) the unique status of marriage among all social institutions, (2) the dignity of all individuals, gay or straight, and (3) the absolute moral im-

¹¹ Congregation for the Doctrine of the Faith, "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons," *Origins* 12 (November 13, 1986) 377–82.

¹² *Origins* 5 (January 22, 1976) 485–94.

¹³ "Pastoral Care," no. 3. A helpful review of the related literature is provided by James F. Keenan, S.J., "The Open Debate: Moral Theology and the Lives of Gay and Lesbian Persons" (Notes on Moral Theology), *Theological Studies* 64 (March 2003) 127–51.

¹⁴ "Sexual Ethics," no. 8, 489.

¹⁵ *Ibid.*

¹⁶ *Ibid.* 490.

¹⁷ *Acta apostolicae sedis* 45 (1953) 798; see also the *Catechism of the Catholic Church* no. 2108. "Right" here means "moral entitlement" rather than "entitled to be free from government coercion."

¹⁸ "Pastoral Care," no. 17, 382.

¹⁹ *Origins* 26 (August 1, 1996) 32–33.

permissibility of “homosexual acts.” They held that these principles require Catholics to defend marriage as a social institution and to repudiate all attempts to extend the institution of marriage or the functional equivalent to gay partners,²⁰ and that supporting the legalization of same-sex marriage undermines the value of marriage as a social institution.

As local initiatives circulated and debates intensified, several national conferences of bishops issued official responses to political proposals to give legal recognition to “homosexual unions” in their countries. The New Zealand Bishops’ Conference’s 2001 statement entitled “People in Homosexual Relationships”²¹ affirmed the inherent dignity of each person, regardless of sexual orientation, while also reiterating the moral prohibition against “homosexual acts.” It rejected both legal recognition of same-sex marriage and any similar attempt to regard gay partnerships as in any way equal in value to marriage. In addition, the New Zealand bishops also repudiated the notion of “gay parenthood” by means of either adoption or reproductive technology.

Interestingly, though, the New Zealand bishops simultaneously supported a process of registration as a way for same-sex couples to gain access to “proprietary and civic rights” available to married couples. They recommended to the New Zealand Attorney General that gay people living in domestic partnerships be granted the same property rights as other similarly situated individuals, though not those of husband and wife. They insisted that these rights be accorded to gay people qua individual citizens, not qua couples. They made it clear that this registration should not be taken to suggest that same-sex unions are tantamount to marriage; indeed, they expressed their wish that some other form of protection could be employed that would more clearly avoid this appearance of equivalence.

The Swiss Bishops Conference statement of October 2002, echoed most of the teachings of the bishops of New Zealand.²² Though the debate concerned civil unions and not sacraments, the Swiss bishops felt compelled to remind their congregations that gay couples do not have access to the sacrament of matrimony. At the same time, they denounced prejudice against gays and even took the unusual step of issuing a sincere apology for their own past unjust treatment of them. Facing a situation in which several cantons had already voted to grant legal recognition to same sex partnerships, the Swiss bishops said that they were not opposed to same-sex couple

²⁰ See *Origins* 1996; the document is available on the United States Conference of Catholic Bishops website: <http://www.usccb.org/laity/marriage/samesexstmt.htm> (accessed May 1, 2004).

²¹ See <http://www.catholic.org.nz/documents/letters/hosex.html> (May 1, 2004).

²² See <http://www.kath.ch/sbk-ces-cvs/hirtenbriefe.php?sprache=i> (May 1, 2004).

registration for the sake of eliminating some forms of discrimination. Like the bishops of New Zealand, the Swiss attempted thereby to balance the demands of equity with traditional Christian marriage.

On January 16, 2003, the Vatican Congregation for the Doctrine of the Faith issued a “Doctrinal Note on Some Questions Regarding the Participation of Catholics in Public Life.”²³ This statement announced in no uncertain terms the magisterium’s complete rejection of any Catholic support for same-sex marriage. In language reminiscent of its teaching on direct abortion, the Congregation insisted that, “one must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application. In this area everyone can exercise the right of conscientious objection.”²⁴

Six months later, the Congregation published a strongly worded and controversial condemnation of all proposals for same-sex marriage in a document entitled “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons.”²⁵ The document intended to give a clear and unmistakable directive regarding the impermissibility of Catholic support for legislation recognizing same-sex marriages. It also gave a direct order to all Catholic politicians to work against such legislation, even to the point of engaging in civil disobedience. Since “homosexual acts” are “evil,” “depraved,” and “gravely unjust,” it argued, legislators have a duty to take every measure possible to oppose them. The Congregation insisted that proposals to the contrary constitute a grave attack on the common good.

On September 9, 2003, the United States Bishops’ Administrative Committee voted to endorse efforts to amend the United States Constitution to forbid same-sex marriage.²⁶ The bishops supported the Federal Marriage Amendment in order to “promote, preserve and protect marriage as it is willed by God, as generations have understood it, and as it has served the common good of society.”²⁷ The bishops’ statement concluded: “We strongly oppose any legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”²⁸ Yet though they opposed “equivalent status,” the bishops did not entirely preclude support for legal protections of individuals in same-sex partner-

²³ See *Origins* 32 (January 16, 2003) 537–43.

²⁴ *Ibid.* 541.

²⁵ See *Origins* 33 (August 14, 2003) 177–82.

²⁶ USCCB Administrative Committee, “Statement on Marriage and Homosexual Unions,” *Origins* 33 (September 25, 2003) 257–59, at 250.

²⁷ *Ibid.*

²⁸ *Ibid.*

ships. The bishops' spokeswomen, Sister Mary Ann Walsh, noted in an interview that while it opposes "government-sanctioned unions," the conference could lend its support to some limited "domestic partner" benefits that would be available to both gay and non-gay couples.²⁹

Finally, on November 12, 2003, the American bishops issued a statement at their semi-annual meeting entitled, "Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions."³⁰ After repeating the traditional doctrine of marriage and denouncing "homosexual activity," it argued that same-sex relations should not be given legal recognition because such a policy would amount to social approval for immoral sexual activity. Such approval would in turn devalue heterosexual marriage and thereby contribute to its growing deterioration. On the key issue of benefits and rights, the bishops held that: "It would be wrong to redefine marriage for the sake of providing benefits to those who cannot rightfully enter into marriage."³¹

Acknowledging the issue of justice, they maintained that: "Some benefits currently sought by persons in homosexual unions can already be obtained without regard to marital status. For example, individuals can agree to own property jointly with one another, and they can generally designate anyone they choose to be a beneficiary of their will or to make health care decisions in case they become incompetent."³² The claim, however, suffers from a major oversight. Certainly legitimate individual rights of gays can be obtained by legal means already at their disposal, but it is a fact of the American legal and social order that some rights accrue only to couples and families and do not pertain to individuals as such. Some benefits and rights—e.g., the right to make proxy medical decisions—can be obtained by private contracts. Yet other rights and benefits accrue only to family members as such—e.g., some workplace benefits, joint income tax status, and the right to make medical decisions in the absence of written instructions. Current legal arrangements, then, do not meet the demands of justice recognized by the American bishops.

The majority opinion of the recent Massachusetts Supreme Judicial Court decision lists some of these benefits, including shared rights to pensions for state and municipal employees, health care granted through the state's Medicaid program for low-income workers, and life and health insurance benefits for spouses of private-sector employees in the Commonwealth of Massachusetts. As the bishops themselves noted in their 1986 pastoral, *Economic Justice for All*, these kinds of rights are not trivial

²⁹ http://www.beliefnet.org/story/132/story_13234.html (accessed March 15, 2004).

³⁰ *Origins* 33 (November 27, 2003) 433–34.

³¹ *Ibid.* 434.

³² *Ibid.*

matters, but rather essential to economic justice.³³ At the very least, this situation implies that the bishops ought to be committed to working for the reform of the legal system so that it can recognize such rights. This agenda is particularly incumbent on the bishops in that they have made a concerted effort to obstruct legislation intended to meet precisely these demands.

THE MORAL ARGUMENTS

The magisterium offers a variety of arguments supporting its rejection of same-sex marriage. It joins four basic themes: (1) the immorality of “homosexual acts,” (2) the dignity of every person, including every gay person, (3) resistance to unjust discrimination, and specifically to unjust discrimination against gay people, and (4) the special good of marriage as a social institution. The second affirmation requires the third. The magisterium holds that all four themes, taken together, entail an obligation to reject proposals to grant legal recognition to same-sex marriage. The magisterium regards these positions as consistent with one another; their critics judge them to be mutually exclusive.

I now proceed to discuss each of the four major considerations involved in the magisterium’s argument prohibiting support for same-sex marriage: the impermissibility of “homosexual acts”; human dignity; discrimination; and the value of marriage, and then examine its conclusion that same-sex marriage should not be recognized.

The Prohibition of “Homosexual Activity”

The magisterium frequently argues that same-sex marriage is impermissible because “homosexual activity” is always wrong. This principle is the center of its general argument against same-sex marriage. All the components of its argument are anchored in it the way that spokes are anchored in the hub of a wheel. Sexual activity should be restricted to the context of two people of the opposite sex who have undertaken a permanent commitment to live in an indissoluble marriage. Every person is called to live chastely—to integrate his or her sexuality into a virtuous personal life. Sexual activity must embody both sexual (male-female) complementarity and procreative fruitfulness and sexual practices that fail to do so are morally wrong (the same reason that all forms of artificial birth control are deemed “intrinsically evil”). Every sexual act within marriage must be both loving and open to procreation, and every sexual act failing to fulfill both conditions is objectively immoral even in cases where subjective conditions mitigate culpability. “Homosexual acts,” like all sexual activity outside

³³ See *Economic Justice for All*, esp. nos. 177, 180, 206 (health insurance).

heterosexual, monogamous, and indissoluble marriage, are always wrong not only because they fail to fulfill the latter condition but also because, the magisterium teaches, they are intrinsically incapable of fulfilling the former condition. They are in all places and at all times, by definition, “intrinsically disordered.”³⁴

This moral teaching provides a ground for the magisterium’s rejection of same-sex marriage. Indeed, it might even be taken to justify the revival of anti-sodomy laws that have been recently been repealed in the United States. The Church, however, has long been able to tolerate a “lesser evil” in some circumstances, and seems to be willing to extend this category to de facto “homosexual unions.” This presumably pertains to countries where “anti-sodomy” legislation would be detrimental to the common good, for example, where it would be unenforceable. At the same time, the document’s extreme alarm about the social evils of all “homosexual unions,” interpreted in light of the responsibility of the state to protect public morality, might suggest to some observers that the magisterium would lobby for a legal ban on these unions if doing so were politically feasible. This implication seems akin to the old preconciliar “thesis-hypothesis” theory of religious freedom: the proper “thesis” is the Catholic confessional state, but one can, under less than ideal circumstances, tolerate the “hypothesis” of the religiously-neutral state as a “lesser evil” in cases where the ideal is not attainable.³⁵ Applied to “homosexual unions,” the Congregation would seem to be inclined to argue, the “thesis” is an entirely heterosexual society with “zero toleration” of gay partnerships, but the “hypothesis” can grant moral legitimacy to toleration as a “lesser evil” when the policy of repression entails prohibitively high costs.

The key question here concerns how to move from general moral principles to their practical application in concrete social settings. It was shown above that bishops from different parts of the world differ to some extent on the public policy implications of their common moral principles. There is no one entirely consistent magisterial teaching on the issue of whether gay and lesbian individuals in committed relationships ought to be given some kinds of legal protection. The bishops of Switzerland and New Zealand support forms of civil registration, and the American bishops admin-

³⁴ Ibid. #2396 and #2357, respectively. For an elaboration of the meaning of “intrinsically disordered,” see Livio Melina, “Homosexual Inclination as an ‘Objective Disorder,’ Reflections of Theological Anthropology,” *Communio* 25 (Spring 1998) 57–68. For a more extensive discussion of the Church’s moral doctrine, see James P. Hanigan, *Homosexuality: The Test Case for Christian Sexual Ethics* (New York: Paulist 1988) and Edward A. Malloy, *Homosexuality and the Christian Way of Life* (Washington: University Press of America, 1981).

³⁵ See Joseph Pohle, “Tolerance, Religious,” *Catholic Encyclopedia*, vol. 4 (New York: Encyclopedia, 1913).

istrative committee seems to be open to conferring some (yet unspecified) legal rights and benefits on cohabiting gay couples.

This diversity of views is due not to overt magisterial disagreement over the morality of homosexual sexual activity per se but rather to (1) varying perceptions about what is need in different cultures and political communities (e.g., what is appropriate for New Zealand might not be appropriate to Switzerland, and vice versa), (2) different interpretations of the social consequences of current practices (are current partnerships harming the common good? If so, how? If how, according to what evidence?), and (3) different predictions about the potential social consequences of various public policy options (will they contribute to the deterioration of marriage and the family as social institutions? Again, as indicated by what evidence?).

Catholic reflection on how to move from principles to policies and laws proceeds from a well-known set of moral categories. First, there are natural law obligations and virtues that pertain to all human beings everywhere whether they are Catholic or not, e.g., not to lie, steal, or kill. Second, there are obligations and virtues binding on Catholics in particular, e.g., to provide religious education for one's children, to attend Mass regularly, etc. Applied to public policy and civil law, this distinction issues in two critically important principles. First, the state is not allowed to enforce the *distinctive* requirements of any *particular* religious morality. In American civil law, this immunity is protected by the Constitutional separation of Church and state. The Church itself adopted this same protection in the Second Vatican Council's *Dignitatis humanae*: "The right to freedom in matters of religion is exercised in human society."³⁶ Civil society has a duty to protect itself against abuses committed in the name of religion, and civil authority must allow as much freedom as possible except when doing so is detrimental to public order. The notion of "public order," the Council Fathers taught, includes three components: the rights of citizens, public peace, and public morality.³⁷ Freedom should not be restrained except for the sake of public order.

Second, the state is required to enforce some aspects of the natural moral law. It is illegal, for example, unjustly to take another person's property, to lie under oath, or to take innocent life. The central concern of the natural moral law as it pertains to the civil law is, of course, justice and related notions of human rights, fairness, equity, and the common good. The state does in fact "legislate morality" in some sense, but, as St. Thomas Aquinas

³⁶ *Declaration on Religious Liberty, Vatican Council II: The Conciliar and Post Conciliar Documents*, ed. Austin Flannery (Northport, N.Y.: Costello., 1996, rev. ed.) no. 7.

³⁷ *Ibid.*

held, the civil law cannot and should not enforce the entire natural moral law.³⁸ The range of morality that the civil law enforces cannot embrace in its entirety even all the provisions of the natural moral law; it cannot, in other words, make all immoral acts also illegal acts.³⁹ This distinction is central to legislation regarding “homosexual activity.”

John Courtney Murray provided the most lucid criteria for addressing this issue. He argued cogently that natural law ethics implements in the civil law only those moral standards necessary for public order. Murray’s use of “public order” is a smaller subset of the more encompassing “common good,” the phrase most often used by the magisterium. The problems with the “maximalist” view of the state as responsible for the entire common good have been amply demonstrated in the cases of the former Soviet Union and, on a different scale, by the policies of some Islamic theocracies today. When the state is viewed as responsible for the entire common good, it takes on more duties that it can or ought to assume. It also thereby undermines the ability of other subsidiary bodies that have their own obligations for the common good. There is much more to the common good than public order, and the reach of the law is restricted to the latter. On this basis, Murray argued, “the moral aspirations of the law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order It enforces only what is minimally acceptable, and in this sense socially necessary.”⁴⁰ Murray’s public philosophy offers good reasons for not banning “homosexual activity.” His distinction between public order and religious ethics encourages us to recognize that ethics in pluralistic societies cannot always be a matter of directly applying moral norms to civil law, especially when these norms are widely contested.

The magisterium would presumably agree that a ban on “homosexual activity” does pertain to public morality, but there is certainly no broad public consensus on this matter. The magisterium is of course free to preach this norm both inside and outside the Church. It should, however, cease employing it as a major component of its case against same-sex marriage if it wants to build its public argument on the basis of widely shared premises.

There are a variety of ways of interpreting the natural law within Catholic theology, but the “new natural law” theory presents the most visible school of Catholic ethics engaged in the public debate over same-sex marriage. The “new natural law theory” works from a key premise: “In voluntary

³⁸ *Summa theologiae* 1–2, q. 96, a. 2, ad 3.

³⁹ *Ibid.*

⁴⁰ John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960) 166.

acting for human goods and avoiding what is opposed to them, one ought to choose and will those and only those possibilities whose willing is compatible with integral human fulfillment."⁴¹ Individuals may never legitimately attack a "basic good," including the "marital good."⁴² According to "new natural lawyers" Gerard Bradley and Robert George, "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."⁴³ "Homosexual acts" are thus not ethically permitted because they are incapable of attaining this "one flesh unity"; in fact, "homosexual acts" merely create the "appearance" of true sexual intimacy."⁴⁴ The "new natural lawyers" in effect maintain that the "good of union" cannot be pursued unless the couple is also "open to procreation."

The "new natural lawyers" recognize that the law should neither simply legislate the entirety of the moral law nor outlaw all sexual acts such as contraception or fornication that violate the "marital good." The purpose of civil law is to secure the conditions that "favor, facilitate and foster the realization by each individual of his or her personal development."⁴⁵ Finnis argues that the state has a "compelling interest in denying that homosexual conduct—a 'gay lifestyle'—is a valid, humanly acceptable choice and form of life," and that it ought to do "what it *properly* can . . . to discourage such conduct."⁴⁶ Since the government is a teacher and the law has a pedagogi-

⁴¹ Finnis, "Law, Morality, and 'Sexual Orientation,'" 1075, n.63.

⁴² See Germain Grisez, *The Way of the Lord Jesus*, vol. 2: *Living a Christian Life* (Quincy, Ill: Franciscan, 1993) 651; and John Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Law Review* 69 (1994) 1049.

⁴³ Gerard V. Bradley and Robert P. George, "Marriage and the Liberal Imagination," *Georgetown Law Journal* 84 (1995) 301–20, at 301–2.

⁴⁴ Grisez, *The Way of the Lord Jesus* 2.653. Finnis argues that sexual intimacy between two members of the same sex can by their very nature accomplish no more than what is expressed in casual sex, sex contracted with a prostitute, or solitary masturbation. (See Finnis, "Law, Morality, and 'Sexual Orientation,'" 1049, 1067.) Some critics of course object strenuously to this description of gay and lesbian sexual activity, but this debate need not be entered here. See Paul J. Weithman, "Natural Law, Morality, and Sexual Complementarity," in David M. Estlund and Martha C. Nussbaum, ed., *Sex, Preference, and Family: Essays on Law and Nature* (New York: Oxford University, 1997) especially 239–41.

⁴⁵ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980) 147.

⁴⁶ Finnis, "Law, Morality, and 'Sexual Orientation,'" 1070, emphasis in original text. See also Robert P. George, "'Same-Sex Marriage' and 'Moral Neutrality,'" in Christopher Wolfe, ed., *Homosexuality and American Public Life* (Dallas: Spence Publishing Company, 1999) 141–53.

cal function, neither government nor law can remain “morally neutral” with regard to social institutions as important as marriage and the family. Thus in some settings a government could be perfectly justified in imposing legal restrictions on “the advertising and marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist ‘lifestyles’ via public education and public media of communication,”⁴⁷ and so forth.

The state should refuse to grant legal recognition to same-sex marriages because, Finnis argues, they threaten the well-being, and specifically the stability and integrity, of the family.⁴⁸ Those who defend same-sex marriages are committed, he argues, to the view that (a) sexual activity for the sake of self-gratification is ethically legitimate, and (b) anyone who accepts this premise supports a view of sexuality that is “an active threat to the stability of existing and future marriages.”⁴⁹ Provision (a) provides a reason for disallowing any “homosexual activity,” not to mention that protecting same-sex marriage.

The “new natural law” theory is vulnerable to two objections. First, it fails to build a logical case for the claim that acceptance of the ethical legitimacy of any and all “homosexual acts” necessarily implies that one regards sexual activity as nothing more than the pursuit of individual self-gratification.⁵⁰ Its sweeping ethical condemnation of all intentionally non-procreative sex is excessively monolithic and undifferentiated. As legal scholar Stephen Macedo points out, it is “strikingly simplistic and implausible to portray the essential nature of *every form* of nonprocreative sexuality as no better than the *least valuable* form.”⁵¹ The same habit of gross overgeneralization is exhibited in its claims about gay people. It is a reductionistic exaggeration to epitomize the behavior of every gay person as driven by a “promiscuous, liberationist ‘gay lifestyle,’ which rejects all sexual restraints and value judgments.”⁵² If this were universally the case, there would in fact be few gay activists lobbying for same-sex marriage.

⁴⁷ Finnis, *ibid.*

⁴⁸ *Ibid.* 1076. Gay and lesbian adoptions are also at issue but this topic cannot be introduced here. This is not to say that the state ought to enact laws against all forms of immorality or even discourage every kind of immorality. Finnis does not want to revive “anti-sodomy” laws that would criminalize sexual acts between consenting adults (see *ibid.* 1076) presumably because the existence of such acts in private does not detract from the temporal common good. The state ought to discourage such conduct, Finnis thinks, but not to the point of making it illegal.

⁴⁹ *Ibid.* 1070.

⁵⁰ Weithman, “Natural Law, Morality, and Sexual Complementarity” 242–43.

⁵¹ Stephen Macedo, “Homosexuality and the Conservative Mind,” *Georgetown Law Journal* 84 (December 1995) 261–300, at 282; emphasis in the original text.

⁵² *Ibid.*

Gay people are more diverse, and in morally relevant ways, than is recognized by the “new natural law theory.”

Second, the “new natural law” argument does not take into account the concrete experience of gay people. Here it replicates the magisterium’s oversight. It attempts to justify its position on the basis of a deductive argument and abstract philosophical analysis, but it cannot avoid making claims of a predictive nature about the real world, how people will act in it, and the probable consequences of their actions on their communities. This empirical dimension is especially important when considering moral arguments against same-sex marriage. The claim that the state has a compelling interest in promoting heterosexual marriage only yields a negative judgment on same-sex marriages if there are good reasons for thinking that the latter would, in fact, undermine the former. The exercise of practical reason, in other words, requires evidence and it is not sufficient to reason from a priori ethical principles alone.

The Dignity of the Person

A second major component of the magisterium’s case against same-sex marriage concerns human dignity and the distinction between engaging in “homosexual acts” and having a “homosexual orientation.”

The fundamental principle of the moral law is that each person has inherent dignity simply in virtue of being created in the image of God. This dignity includes sexual identity. As the American bishops once put it, “God does not love someone any less simply because he or she is homosexual.”⁵³ The *Catechism of the Catholic Church* teaches that “Everyone, man and woman, should acknowledge his [or her] sexual identity”⁵⁴—it does not hold that heterosexuals, and only heterosexuals, must accept their sexual identity. People with a “homosexual orientation” must thus be treated with “respect, compassion, and sensitivity” and their rights should be defended.⁵⁵ The American bishops call on all Christians and citizens of good will to “confront their own fears about homosexuality and to curb the humor and discrimination that offend homosexual persons.”⁵⁶ They acknowledge, “that having a homosexual orientation brings with it enough

⁵³ Committee on Marriage and Family, United States Conference of Catholic Bishops, “Always Our Children,” revised in 1998, reprinted in John F. Harvey, OSFS, and Gerard V. Bradley, ed., *Same-Sex Attraction: A Parents’ Guide* (South Bend, Ind.: St. Augustine’s, 2003) 215.

⁵⁴ *Catechism of the Catholic Church* no. 2333.

⁵⁵ *Ibid.* 2358.

⁵⁶ National Conference of Catholic Bishops, *Human Sexuality: A Catholic Perspective for Education and Lifelong Learning* (Washington: United States Catholic Conference, 1990) 55.

anxiety, pain and issues related to self-acceptance without society bringing additional prejudicial treatment.”⁵⁷

The affirmation of the inherent dignity of gay people, however, is compromised by a fundamental ambiguity rooted in the somewhat recently drawn distinction between sexual *act* and sexual *orientation*. This distinction is employed so that the magisterium can prohibit a class of sexual acts without at the same time condemning their agents as such. The axiom, “love the sinner, hate the sin,”⁵⁸ recognized that concern for the agent can be joined with disapproval of his or her act. As a constituent feature of the person, orientation locates a condition for the sinful act more deeply in the person than did the old language of either temptation or “disordered concupiscence,” since the latter was assumed to be susceptible to the healing, correcting, and reordering power of grace. If one is to “hate the sin,” critics might wonder, how could one not also hate the inbuilt orientation that expresses it? And if the orientation is central to personal identity, then “hating the sin” that expresses this orientation seems to lead one to “hating the sinner” as well.

Clearly the magisterium believes that any act expressing a same-sex sexual orientation is inherently wrong. It teaches not only that same-sex sexual relations are “self-indulgent”—a description that could equally be applied to a considerable proportion of heterosexual sexual relations—but also that gays are inherently ordered to a kind of sexual love that will always be closed in on itself, psychologically sterile, and morally bankrupt. Any relationship expressing this form of love will be irredeemably dysfunctional.

⁵⁷ National Conference of Catholic Bishops, *Human Sexuality: A Catholic Perspective for Education and Lifelong Learning* (Washington: United States Catholic Conference, 1990) 55. Unfortunately, the magisterium omits discrimination on the basis of sexual orientation from its usual list of injustices. The American bishops’ conference, for example, wrote: “Our society must also combat discrimination based on *sex, race, ethnicity, or age*. Such discrimination constitutes a grave injustice and an affront to human dignity. It must be aggressively resisted. Where the effects of past discrimination persist, society has the obligation to take positive steps to overcome the legacy of injustice. We support judiciously administered affirmative action programs as tools to overcome discrimination and its continuing effects.” United States Catholic Conference Administrative Board, “Faithful Citizenship: Civic Responsibility for a New Millennium,” *Origins* 29 (October 28, 1999) 309–18, at 316. The USCC 2003 update of this document, called “Faithful Citizenship: A Catholic Call to Political Responsibility,” writes that: “Our society must also continue to combat discrimination based on *sex, race, ethnicity, disabling condition, or age*. Discrimination constitutes a grave injustice and an affront to human dignity. It must be aggressively resisted. Where the effects of past discrimination persist, society has the obligation to take positive steps to overcome the legacy of injustice” (emphasis added). *Origins* 33 (October 23, 2003) 328.

⁵⁸ This axiom is sometimes inaccurately attributed to St. Augustine.

The act-orientation distinction provides a few advantages. It attempts to keep up with the general modern acknowledgement that a variety of factors—genetic, hormonal, psychological, social, and cultural—interact with one another in complex ways to influence sexual orientation. Since orientation is regarded as prevoluntary, the language allows the Church to denounce acts of injustice perpetrated against gays on the ground that they cannot be assumed to carry responsibility or moral guilt for their orientation since it is prevoluntary. The distinction also helps to avoid the reductionism that identifies an entire person with his or her sexual identity. A person is much more than a “type” of sexual being.

Generalizations about act and orientation, however, need to acknowledge the complexity, diversity, and subtlety involved in the formation of sexual identity. The old moralistic language did not adequately capture this complexity. Moral theologians traditionally understood an internal orientation to a class of forbidden acts to be a “vice,” e.g., lust, avarice, or dishonesty. Yet the “orientation” to same-sex sexual relations is not exactly the same as these vices because it is not simply the product of bad choices shaping habituation. Nor is it the result of bad choices expressing the “fallen” nature of concupiscence and habituating the sinner to vice. Choices are always part of human behavior, but the language of orientation registers the fact that being gay is not like deciding to take up golf rather than tennis. Many gay people who experience a natural attraction to members of their own sex, in other words, are inclined to do so by bio-psychological conditions that they experience as having been “given” to them by nature, a “deep-seated and relatively stable” dimension of personality.⁵⁹

At the same time, the word “orientation” can be misleading if taken to suggest that all people have a definite and singular sexual identity that is genetically or biologically fixed throughout their lifetimes from the moment of birth. The language of orientation can also misleadingly suggest that every person has a sexual identity that is either entirely homosexual or entirely heterosexual. Some studies indicate that three or four percent of those who identify themselves as heterosexual find themselves from time to time somewhat attracted to members of their own sex.⁶⁰ Even many adults are neither completely straight nor completely gay in their orientation. This attentiveness to the fluidity of sexual identity usually comes from people who are not allies of the magisterium, but it actually lends some support to the policy of distinguishing the moral qualities of “homosexual acts” from the basic humanity of their agents.

The language sometimes suggests that all people are born with a fixed sexual orientation the way they are born with eye color or blood type. The

⁵⁹ “Always Our Children” 214.

⁶⁰ See Laumann et al., *The Social Organization of Sexuality*.

development of sexual identity is influenced in complex ways by post-natal physical, psychological and social factors. Moreover, if personal identity in general is not a matter over which individuals are entirely passive, then the same is true, at least to some extent, of sexual identity. Legal scholar Janet Halley argues that some gay people view their sexual orientation as the product of their own decisions.⁶¹ This is not to say that a mature adult's basic proclivity of sexual attraction can be reversed by a simple act of the will, only that this proclivity does not come into existence without some choices on the part of the person whose desire it is. Different individuals can exercise varying degrees of choice over the shape of their particular sexual identities and experience different degrees of "givenness" in their sexual identity.

Young people in particular can experience significant changes in sexual self-understanding over the course of their psychosexual development. Some young people who experience their sexual orientation as somewhat fluid make choices to act in ways that begin to give a direction to what becomes their sexual orientation. This is especially the case in Western societies, where sexual restraints have been loosened and popular culture encourages experimentation. Some teenagers and young adults go through a period in which they struggle with their sexual identity, seeing themselves, say, as straight for a while, then as gay, and then as bisexual, and then again as straight.

The bishops worry that same-sex marriage would lessen the social pressures that channel sexually immature young people into heterosexual identities. Some observers take the bishops to be afraid that some heterosexuals will "convert" to homosexuality if the traditional cultural discouragement of homosexuality continues to be relaxed. Yet as Judge Richard Posner points out: "Given the personal and social disadvantages to which homosexuality subjects a person in our society, the idea that millions of young men and women have chosen it in the same fashion that they might choose a career or place to live or a political party or even a religious faith seems preposterous."⁶² The bishops are probably not concerned with defection, since the issue concerns people who have not yet formed a stable sense of sexual identity, but they want law to help individuals form their sexual identities in a heterosexual pattern by encouraging certain kinds of behavior and social roles. Unfortunately, the bishops have failed to appreciate

⁶¹ Janet Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability," *Stanford Law Review* 46 (1994) 503-68, at 517-21.

⁶² Richard Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University, 1992) 296-97.

the extent to which this channeling strategy employs negative images of gay people.

The assessment of same-sex orientation as "intrinsically disordered" can be especially misleading. Technically, the disorder in question lies precisely in the wrongful object of the "homosexual act," but this wrongful object is the end of intentions motivated by a disordered orientation that is rooted in the agent. The language of "intrinsically disordered" sexuality, in other words, can easily slide into the message that all gays are "intrinsically disordered" people.⁶³ This mistaken inference is understandable given our increased appreciation for the role of sexuality as a fundamental component of personal identity. Because sexuality pervades one's identity, having an "intrinsically disordered sexual orientation" is more profound than having a detached retina or bad kidney. As moral theologian Kevin Kelly puts it, "our sexuality is an essential dimension of our being human persons and so affects our whole approach to life and all our relationships."⁶⁴ This appreciation for the significance of sexuality is also registered by the magisterium. The Pontifical Council for the Family, for example, teaches that sexuality "concerns the intimate nucleus of the person."⁶⁵ The *Catechism of the Catholic Church* similarly recognizes that: "Sexuality affects all aspects of the human person in the unity of his body and soul. It especially concerns affectivity, the capacity to love, and to procreate, and in a more general way the aptitude for forming bonds of communion with others."⁶⁶ If one suffers from a fundamental disorder in sexual orientation, and orientation is essential to identity, then it would hard to avoid the conclusion that a disordered sexual orientation involves a disordering of one's ability to engage in interpersonal relations and to form "bonds of communion" with others.

⁶³ Some of what follows was first argued in Stephen J. Pope, "The Vatican's Blunt Instrument," *The Tablet*, 9 August 2003:4–5. Suspicions that the magisterium regards gays and lesbians as disordered people were given some confirmation on December 9, 2002 by Cardinal Jorge Medina Estevez, the Prefect for the Congregation for Divine Worship and the Discipline of the Sacraments. In response to a query from a bishop whether it is licit to confer priestly ordination on men known to have "homosexual tendencies," the cardinal wrote that such ordination is "absolutely inadvisable and imprudent." He continued: "A homosexual person, or one with a homosexual tendency is not, therefore, fit to receive the sacrament of Holy Orders." *ZENIT News Agency*, December 9, 2002. This citation underscores the fact that the magisterium does not always speak in one voice. The bishops of Switzerland stated October 3, 2002, that "A homosexual predisposition lived in continence does not exclude one from ecclesial ministry." See Editorial, "Ordaining Gay Men," *America Magazine*, November 11, 2002.

⁶⁴ Kelly, *New Directions in Sexual Ethics* 137.

⁶⁵ Pontifical Council for the Family, "The Truth and Meaning of Human Sexuality: Guidelines for Education within the Family" no. 3.

⁶⁶ *Catechism of the Catholic Church* no. 2332.

As it has been presented lately, the magisterium's message about gay sexual orientation is powerfully stigmatizing and dehumanizing. It is also at least tacitly, if not explicitly, liable to be used to support exactly the kinds of unjust discrimination that the Church has repeatedly condemned. Describing someone's sexual identity as "gravely disordered" would seem to arouse suspicion, mistrust and alienation. This conclusion is reinforced by the painful direct psychological experience of many gay people.⁶⁷ One can understand why observers conclude that the magisterium's teaching about homosexuality stands in tension with its affirmation that each gay person is created in the *imago Dei*. To avoid this problem, magisterium ought to cease employing the act-orientation distinction.

Discrimination

The main secular argument supporting same-sex marriages is that any other policy entails unjust discrimination against gay people.⁶⁸ In American legal terms, this is expressed as a violation of equal protection under the law as established by the Fourteenth Amendment to the U. S. Constitution.

The magisterium responds to this position by making two claims. One concedes that all forms of unjust discrimination, including those against gay people, are wrong and unacceptable. The second argues more controversially that excluding gay people from civil marriage is not a form of unjust discrimination because gay people have no right to marry. The first claim is tautologous and hardly worth mentioning, except for the fact that many people and their communities routinely ignore its truth. The second claim is also tautologous, at least in a sense, but unless it is explicated in some detail its advocates will be accused of begging the question. Claiming that "act x is not unjust" on the grounds that a "person does not have a right to do act x" is not an argument, it is the conclusion of an argument.

⁶⁷ See, for example, the moving account provided in an Op-Ed essay by Andrew Sullivan, "Losing a Church, Keeping the Faith," *New York Times*, 17 November 2003, and Daria Donnelly, "A Gay Parent Looks At His Church: An Interview with Novelist Gregory Maguire," *Commonwealth* (October 24, 2003) 20–22.

⁶⁸ See Robert Wintemute, *Sexual Orientation and the Law* (New York: Oxford University, 1995); Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Gay Rights and the Law* (Washington: Cassell, 1997); Robert Wintemute and Mads Andenaes, ed., *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Portland, Ore.: Hart Publishing, 2001); Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (New York: Oxford University, 1997); William N. Eskridge, *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002); Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbor: University of Michigan, 2002); Kevin Nourassa and Joe Varnell, *Just Married: Same Sex Marriage and the Expansion of Human Rights* (Madison: University of Wisconsin, 2002).

First, the magisterium insists on drawing a somewhat awkward distinction between justified and unjustified discrimination. The *Catechism of the Catholic Church* insists that, "every sign of unjust discrimination in their regard should be avoided."⁶⁹ The phrase "justified discrimination" sounds oxymoronic, something like "justified murder" or "justified theft," but in fact, the magisterium rightly holds that one can draw a distinction between two forms of differential treatment: one that is just because required by the common good and another that is unjust because it detracts from the common good. In the past, of course, many acts of injustice to minority individuals or groups have been legitimated by spurious appeals to the common good. Laws forbidding interracial marriage were thought by their advocates to protect the good of the community, but they were repealed when it was recognized that they violate the right of individuals to marry whom they choose. At the present time, advocates of same-sex marriage regard marriage to members of the same sex as an individual right that should not be overridden in pursuit of the broader collective good. The magisterium, however, argues that this analogy is flawed. Race has nothing to do with the sexual composition of married couple, they argue, since as male and female they participate fully in the meaning of marriage as sexual, unitive, and procreative.

The fundamental ethical principle here is that "every sign of unjust discrimination should be avoided."⁷⁰ By "unjust" discrimination the magisterium means arbitrary differential treatment in virtue of membership in a particular group. The relevant governing moral principle is that one ought to treat similar cases similarly, and dissimilar cases dissimilarly. Simply being a gay person does not in and of itself warrant differential treatment, either pro or con.

The Congregation does allow differential treatment of gays for the sake of the common good. I have already mentioned the argument that if error has no rights, neither does immorality. For this reason one cannot decry as unjust discrimination restrictive policies necessary for the common good. The common good can only be pursued within the framework of the rights proper to the human person, but since there is no right to engage in "homosexual activity," the argument runs, there can be no right of gays to have access to civil marriage. In the eyes of the magisterium, sexual orientation is, at least in this regard, not analogous to race, religion, or ethnicity because these associations do not in and of themselves incline people to engage in "intrinsically evil acts." Thus the Congregation explicitly declared in 1992 that "Sexual tendency is not a quality comparable to race, ethnic origin, etc., with respect to non-discrimination. Unlike these, homo-

⁶⁹ *Catechism of the Catholic Church* no. 2358.

⁷⁰ *Ibid.* 2358.

sexuality is an objective disorder and calls for moral concern.”⁷¹ At this point, the argument regarding discrimination overlaps with the argument from the immorality of “homosexual activity” that was examined above.

The Congregation’s ability to offer a public moral argument breaks down precisely at this point, since there is no widely shared agreement about this norm or the evidence adduced to support it. In addition, the magisterium makes a significant rhetorical mistake when it engages the issue of discrimination. Given the pain and suffering heaped on gay people for millennia, it would seem most reasonable for the Congregation to begin with a criticism of these evils and a confession of guilt for its own failure to protect gay people. After having clearly established the Church’s repudiation of unjustified discrimination as well as the bigotry, ignorance, and hatred that has often generated it, the Congregation would have been in a better position to argue that refusing to support same-sex marriage does not amount to a case of unjustified discrimination. Instead of making a kind of “preferential option” with gays—as with all people who are vulnerable to abuse—the magisterium suggests that since the “homosexual tendency” is an “objective disorder,” it cannot—and, in principle, never can be—considered an object of immoral discrimination.⁷² This conclusion, of course contradicts the moral logic, both implicit and explicit, of other magisterial statements that defend the dignity of gay persons.

The magisterium’s treatment of the issue of discrimination replicates the confusions and ambiguities of its treatment of the dignity of gay people. The magisterium, and especially the Congregation for the Doctrine of the Faith, presents an important substantive principle that disallows unjust discrimination but then undercuts its own credibility by failing to register its understanding of the full extent to which discrimination against gays persists as a social evil. As such it prevents gays from participating in institutions within civil society that build up the common good, and it also fails to provide a moral vision that offers a sufficiently powerful challenge to those who would engage in violence against gays.

Marriage as a Social Institution

The fourth component of the magisterium’s argument concerns the value of marriage as a social institution. Marriage is socially and interpersonally beneficial in many ways. Married men live longer, generate higher incomes, and have lower rates of suicide, homicide, and mental illness than unmarried men, and they are less likely to have serious accidents or engage in

⁷¹ “Considerations,” no. 10, 181.

⁷² On something like this basis Michael Pakaluk argues for the revival of anti-sodomy laws in “Homosexuality and the Principle of Nondiscrimination,” in Christopher Wolfe, ed., *Same-Sex Matters: The Challenge of Homosexuality* (Dallas: Spence Publishing Co., 2000) 67–85.

violent crime.⁷³ Marriage orders, stabilizes, and elevates male sexual desire and encourages men to assume their share of financial responsibility for their children. Children are more likely to flourish when they have a chance to be nurtured in stable, two-parent homes. Recent studies have highlighted the negative effects of divorce on women and especially their children.⁷⁴ Children from divorced homes do not do as well on average as children from "in-tact" families; girls from broken homes, for example, are much more likely to become the victims of sexual abuse.⁷⁵ Personal and interpersonal benefits also redound to the benefit of extended families, neighborhoods, and communities. The state has a responsibility to favor marriage and family and to create conditions in which couples can obtain the resources needed to make them viable.

The magisterium is appropriately alarmed at the weakness of marriage in contemporary society. A number of indicators suggest that marriage and family are indeed in a process of deterioration.⁷⁶ Roughly 43 percent of marriages end in divorce,⁷⁷ more than 33 percent of children are born to

⁷³ See James Q. Wilson, *The Moral Sense* (New York: Free, 1993) and Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better-Off Financially* (New York: Doubleday, 2001).

⁷⁴ According to Judith Wallerstein, "Children in close post-divorce families do not, on the whole, look happier, healthier, or more well adjusted, even if one or both parents are happier. National studies show that children from divorced and remarried families are more aggressive toward their parents and teachers. They experience more depression, have more learning difficulties, and suffer from more problems with peers than children from intact families. Children from divorced and remarried families are two to three times more likely to be referred for psychological help at school than peers from intact families. More end up in mental health clinics and hospital settings. There is earlier sexual activity, more children born out of wedlock, less marriage, and more divorce [among children whose parents got divorced]. Numerous studies show that adult children of divorce have more psychological problems than those raised in intact marriages." Judith Wallerstein, Julia Lewis, and Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000) xxiii. See also Judith S. Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade after Divorce* (Boston: Houghton Mifflin, second ed. 1996).

⁷⁵ See Robin Fretwell Wilson, "Children At Risk: The Sexual Exploitation of Female Children After Divorce," *Cornell Law Review* 86 (2001) 251–327.

⁷⁶ More generally, see Don S. Browning, *Marriage and Modernization: How Globalization Threatens Marriage and What To Do About It* (Grand Rapids: Eerdmans, 2003); David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (New York: Basic Books, 1995); and David Popenoe, *Life without Father: Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (Cambridge, Mass.: Harvard University, 1999).

⁷⁷ Centers for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, Births, Marriages, Divorces and Deaths: Provisional Data for September 2001,

unmarried women,⁷⁸ and between 1990 and 2000 the rate of cohabitation increased 72 percent.⁷⁹ At the present time, nuclear families made up of married couples with children constitute only about 26 percent of all households in the United States. Households are marked by adoption, multiple generations, single-parenthood, cohabitation, and blended families constituted after divorces and remarriages. Roughly half of divorced couples have children, and many experience profoundly negative consequences from the breakup.⁸⁰ At the present time, around 25 million children in the United States live without their fathers.⁸¹

The Church has some way to go to overcome its patriarchal legacy and to develop a more egalitarian understanding of sex and gender.⁸² Never-

National Vital Statistics Reports, Vol. 50, No. 8, (May 24, 2002) available at http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_08.pdf (last visited Oct. 21, 2003). According to Lynn D. Wardle, in 1965 there were 479,000 divorces and the rate of divorce per 1,000 population was 2.5; in 1985 there were 1,190,000 divorces and the rate of divorce was 5.0. See her "No-Fault Divorce and the Divorce Conundrum," *Brigham Young University Law Review* 79 (1991) 141. On divorce statistics, see the National Center for Health Statistics' 2001 report at <http://www.cdc.gov/nchs/> (accessed March 15, 2004). See also A. J. Cherlin, *Marriage, Divorce and Remarriage* (Cambridge, Mass.: Harvard University, 1992) 67–68, and, more recently, Barbara Defoe Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and the Family* (New York: Vintage, reprint ed., 1998).

⁷⁸ See Joyce A. Martin, et al., "Birth: Final Data for 2000," *National Vital Statistics Reports* 50, no. 5 (Hyattsville, Md: National Center for Health Statistics, February 12, 2002). The rate of out-of-wedlock children rose dramatically between 1940 and 1990, some 1,300 percent between 1940 and 1994, and the birth rate for single women rose 600 percent. See Stephanie J. Ventura & Christine A. Bachrach, Centers for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, Nat'l Vital Statistics Report, Nonmarital Childbearing in the United States, 1940–1999, National Vital Statistics Report, Vol. 48, No. 16. (Oct. 2000) available at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf (last visited May 2, 2004). The number of births to unmarried women reached a record high of 1,365,966 in 2002, a growth that reflects the increased number of unwed women rather than an increase in the rate of unmarried pregnancy. It should also be noted that the teen birth rate has declined by 30 percent over the past decade. See Centers for Disease Control, National Center for Health Statistics, "Teen Birth Rate Continues to Decline," December 13, 2003, <http://www.cdc.gov/nchs/releases/03facts/teenbirth.htm> (accessed May 2, 2004).

⁷⁹ See Genaro C. Armas, "Cohabitation on the Rise: Unmarried-Partner Households Increase by 72%," Associated Press (May 21, 2001); Hilda Rodriguez, "Cohabitation: A Snapshot," Center for Law and Social Policy, at http://www.clasp.org/DMS/Documents/1011885243.62/cohabitation_snapshot.pdf (accessed May 2, 2004).

⁸⁰ See J. S. Wallerstein and S. Blakeslee, *Second Chances: Men, Women, and Children a Decade after Divorce* (New York: Ticknor and Fields, 1989).

⁸¹ See Gallagher and Waite, *The Case for Marriage*, 75.

⁸² See Lisa Sowle Cahill, *Sex, Gender and Christian Ethics*, and also her *Women and Sexuality* (New York: Paulist, 1992).

theless, the magisterium has a powerful and socially significant moral vision of marriage, sex, and family to offer contemporary society. The sexual ethic generated by this vision contrasts sharply with the popular individualistic reduction of sexual ethics to the private choices of consenting adults. It understands marriage as an essential part of the social order rather than as a mere private contract, offers a powerful alternative to the trivialization of sex that has become so much a part of popular culture, and supports the full interpersonal context for child-bearing and child-rearing. The Church recognizes that marriage involves a social as well as an interpersonal ethic. Its sacramental doctrine infuses marriage with a religious meaning that radically transcends its function in civil society.

The magisterium argues that support for marriage, and especially for children, requires opposition to the legal recognition of same-sex marriage. There is, however, no convincing evidence showing that currently functioning gay households are causally related to the deterioration of marriage in the wider society.⁸³ The biggest threat to marriage comes from the high incidence of divorce that has followed the development of "no fault" divorce laws of the 1970s.⁸⁴

The conservative gay position concurs with the Church's concern for the institution of marriage, but it argues that same-sex marriage would increase respect for the institution by enlisting more participants and extending its relevance to more sectors of society.⁸⁵ It maintains that gays themselves would benefit from ordering their lives to this institution, and that same-sex marriage would encourage fidelity, increase monogamy and reward loyalty, self-discipline, stability, and reciprocal emotional investment. It would ex-

⁸³ Accounts of the state of contemporary marriage rarely attribute a significant negative causal influence to the increased tolerance of gay and lesbian sexual activity. See, for example, the major historical study by John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville: Westminster/John Knox, 1998).

⁸⁴ Divorce prior to this time was granted in cases where one spouse could show that the other had been guilty of a grave offense such as adultery, cruelty, persistent neglect, desertion or the like. "No fault" divorce laws emerged in the 1970s to allow a spouse to sue for divorce without demonstrating the other's wrongdoing. Their enactment was followed by a dramatic rise in divorce rates. Included among the extensive literature on this topic is Leora Friedberg, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data," *American Economic Review* 88 (1998) 608–27, Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago, 1988); J. Herbie DiFonzo, *Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth Century America* (Charlottesville: University of Virginia, 1997); Allen M. Parkman, *Good Intentions Gone Awry: No-Fault Divorce and the American Family* (Lanham, Md: Rowman and Littlefield, 2000), and Allen M. Parkman, *No-Fault Divorce: What Went Wrong?* (Boulder, Colo.: Westview, 1992).

⁸⁵ See Sullivan, *Virtually Normal*.

tend rather than diminish respect for the institution. As Andrew Sullivan puts it:

Society has good reason to extend legal advantages to heterosexuals who choose the formal sanction of marriage over simply living together. They make a deeper commitment to one another and to society; in exchange, society extends certain benefits to them. Marriage provides an anchor, if an arbitrary and weak one, in the chaos of sex and relationships to which we are all prone. It provides a mechanism for emotional stability, economic security, and the healthy rearing of the next generation. We rig the law in its favor not because we disparage all forms of relationship other than the nuclear family, but because we recognize that not to promote marriage would be to ask too much of human virtue.⁸⁶

Same sex marriage also provides a context for familial responsibility those who adopt children or use reproductive technology. It would facilitate adults' taking mutual responsibility for children and reward the emotional attachment and personal self-sacrifice that is entailed in child-rearing. Put in the language of Catholic moral doctrine, gay-headed families can be said to fulfill the "procreative" function of marriage to the extent that they are engaged in the education of children. "Procreative" includes child-rearing as well as child-bearing (see *Gaudium et spes* no. 50; *Humanae vitae* no. 9; *Summa theologiae* Suppl. q. 41, a.1).

The magisterium, of course, does not accept these arguments. In its perspective, all of these purported benefits would be illusory because virtues cannot be generated from "intrinsically evil acts." Monogamy among gays is like honor among thieves, a virtue in other contexts but one that here is co-opted to facilitate wrongdoing. Here, too, the argument from marriage as a social institution is connected to the argument from the immorality of "homosexual acts."

In one of its least inspired judgments, the Congregation for the Doctrine of the Faith denies that families headed by gay adults are beneficial for either children or their communities. It insists that same-sex unions make no "significant or positive contribution to the development of the human person in society,"⁸⁷ and even asserts, without citing any evidence or providing any explanation, that gay parents actually do "violence" to the children that they raise.⁸⁸ The magisterium needs to address recent social scientific studies that maintain that gay partnerships are not, as a general rule, harmful either to children or to others.⁸⁹ A study conducted by the American Academy of Pediatrics, for example, found that, "there is no systematic

⁸⁶ Andrew Sullivan, "Here Comes the Groom," *New Republic*, Aug. 28, 1989, 20.

⁸⁷ "Considerations," no. 8, 181. ⁸⁸ *Ibid.* no. 7, 181.

⁸⁹ Some empirical studies argue to the contrary. See Bridget Fitzgerald, "Children of Lesbian and Gay Parents: A Review of the Literature," *Marriage and Family Review* 29 (1999) 57–75; Charlotte Peterson, "Children of Lesbian and Gay Parents," *Child Development* 62 (1992) 1025–42; David K. Flaks et al., "Lesbians

difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents."⁹⁰

Most magisterial statements have not been as aggressively negative toward gays as "Considerations." They have more consistently focused on the long-term effects of granting *legal* recognition to gay households on the institution of marriage. This argument need not reply on any negative stereotypes about gay people or their families. It maintains that the legal acceptance of same-sex marriage would involve a radical change in the definition of marriage, and in particular that it would detach marriage from procreation and its attending responsibilities. The Church's message is that marriage establishes stable bonds between men and women so that children will have mothers and fathers; if marriage is significantly diminished, so will the well-being of children. The Church also teaches that marriage is a relationship in which the local community, the wider civil society, and the state have a legitimate interest.

This argument over the meaning of marriage has also been at the center of attention in recent debates in family law in Canada and the United States. Catholicism, along with the Western tradition generally, has typically regarded marriage as a divinely and socially sanctioned institution that exists for the protection and rearing of children. In this view marriage is essentially conjugal and social, and derives its meaning from its function as the foundation of the family. It joins husband and wife in a lifelong bond that is ordered essentially, if not in every instance (e.g., as in the case of sterile couples), to their roles as father and mother and that assigns them responsibilities related to procreation and generational care-giving. Twentieth century moral teachings, and Catholic moral theology generally, brought a new level of appreciation for the companionate values of marriage, its "unitive" purpose, but not in such a way that the "procreative" dimension would be eliminated.⁹¹

Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children," *American Psychological Association* 31 (January 1995) 105–14.

⁹⁰ See n. 9: Ellen C. Perrin, MD, and the Committee on Psychosocial Aspects of Child and Family Health, "Technical Report," 344. See Charlotte J. Patterson, "Family Relationships of Lesbians and Gay Men," *Journal of Marriage and the Family* 62 (2000) 1052–64; *Lesbian, Gay, and Bisexual Identities in Families: Psychological Perspectives*, ed. Charlotte J. Patterson and Anthony R. D'Augelli (New York: Oxford University, 1998). These kinds of studies are of controversial. For a critical review of this literature and a summary of counter-arguments, see Timothy J. Daily, "Homosexual Parenting: Placing Children at Risk," Family Research Council, available at <http://www.frc.org> (accessed May 11, 2004).

⁹¹ See Lisa Sowle Cahill, "Marriage: Developments in Catholic Theology and Ethics," *Theological Studies* 64 (2003) 78–105.

A radical alternative has been proposed by some legal scholars in Canada and the United States who argue that marriage ought to be regarded as nothing more than a contract between people who love each other. Cornell University law professor Martha Fineman argues that marriage ought to be completely eliminated as a legal category. Adult interpersonal relationships would be arranged according to contracts, whether monogamous or involving some form of “plural sexual grouping.” Fineman regards the mother-child twosome as the key procreative relation. Fathers have no particular obligation to care for their children unless they voluntarily enter into a contract with their mates to do so. The state has no right to prevent gays from doing what heterosexual couples can do. No form of sexual relationship—permanent or temporary, gay or straight, monogamous or promiscuous, polygamous or polygynous—should be preferred to any other, subsidized, or prohibited by the state. For this school of thought, the extension of marriage to gays is but an intermediate step on the way to opening marriage to plural partners or the “full range” of family types. To pursue total equality in all choices and social relations, Fineman argues, requires that, “*we destroy the marital model altogether and collapse all sexual relationships into the same category—private—not sanctioned, privileged, or preferred by law.*”⁹²

This anti-marriage agenda is not the sole inspiration of a few law professors. It is promoted, among places, in the proposals for legal reform enunciated in the Law Commission of Canada’s 1997 report entitled “Beyond Conjuality.”⁹³ “Beyond Conjuality” made three recommendations: that judges presiding over dissolutions treat as identical the cases of similarly situated married couples and cohabitating couples, that laws be drafted to allow for officially registered partnerships, and that same-sex marriage be legalized. The radical “beyond marriage” legal theorists are cited in this study, and conservatives fear that the adoption of their convictions by this influential document signals not only the acceptance of same-sex marriage but also, and more ominously, the eventual destruction of marriage as an institution. A similar stream of thought has been seen in

⁹² Fineman, *Neutered Mother*, 5; emphasis added. See also Lenore Weitzman, *The Marriage Contract: Spouses, Lovers and the Law* (New York: Free, 1981) and Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Fantasies* (New York: Routledge, 1995) and Fineman, *The Illusion of Equality* (Chicago: University of Chicago, 1991)

⁹³ Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults*, available at <http://www.lcc.gc.ca/en/themes/pr/cpra/paper.asp> (last visited May 2, 2004). See also Coalition for Marriage, Family and Couples Education, Institute for American Values, “The Marriage Movement: A Statement of Principles,” available at <http://www.marriagemovement.org/html> (accessed May 1, 2004).

the United States, where the "Principles of the Law of Family Dissolution" issued by the influential American Law Institute recommends that judges effectively ignore the difference between domestic partners and married couples.⁹⁴

This scenario is exactly what worries the magisterium and makes it easy to understand why the American bishops support the Federal Marriage Amendment to the Constitution. In contrast to the contractualists, the Church offers a much more realistic acknowledgement of human needs and a deeper awareness of mutual interdependence. It offers a more profoundly social understanding of human relations than is allowed in the egoistic self-concern often assumed by contractualists. The Church has known for some time what has recently been stressed by social scientists, namely, that marriages only work if couples develop the ability to act for the good of one another, the children, the marriage itself, and the family as a whole rather than only for their own individual benefit.⁹⁵ This point is especially important as an expanding "expressive individualism" increasingly inclines people to view marriage as a private "lifestyle" choice regarding only "close relationships."⁹⁶

The magisterium fears that a purely non-procreative, contractualized notion of marriage might lead to the elimination of the family and to anarchy in child-rearing practices. They believe that even conservative gays who want to have their monogamous commitments receive the social support that comes from legal validation are, unwittingly or not, pursuing a Trojan horse policy in which entry into the institution will eventually lead to its demise. Instead of helping mothers, contractualism would leave them on their own and make it easier for fathers routinely to abandon their children.⁹⁷

This argument is not necessarily rebutted by the fact that some states allow a gay person or couple to adopt children or by the fact that children can be born to a gay person or couple by the use of reproductive technology. These ways in which gay people can form families should not be confused with the intrinsically procreative relationship constituted by hus-

⁹⁴ See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (New York: Matthew Bender, 2002). See Robert Pear, "Legal Group Urges States to Update Their Family Law," *New York Times*, 30 November 2002. Lynne Marie Kohm argues that ALI's domestic partnership proposal would diminish marriage, see "How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?" *Journal of Law and Family Studies* 4 (2002) 105 f.

⁹⁵ See, for example, Judith S. Wallerstein and Sandra Blakesless, *The Good Marriage: How and Why Love Lasts* (Boston and New York: Houghton Mifflin, 1995).

⁹⁶ On "expressive individualism," see Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (San Francisco: Harper and Row, 1985).

⁹⁷ See Wilson, "Children at Risk."

band and wife. The state allows individuals and couples to adopt, the magisterium might argue, but it ought to give special support and encouragement to heterosexual couples because they generally provide the optimal setting for child rearing.

Concern with the health of marriage offers a more credible context for thinking about same-sex marriage than do their other arguments. It presents the most publicly compelling consideration because its moral logic does not rest on a moral condemnation of all “homosexual activity.” One can hold that marriage between a man and woman is the best general context for the raising of children, and therefore receive legal recognition, without claiming that all gay partnerships are corrupt or all gay-headed families destructive. This presents the strongest aspect of the magisterium’s argument in its best possible light. It also involves a significant re-casting of its argument, since the “hub” of the spokes is now marriage as an institution rather than the wrongness of “homosexual activity.”

One aspect of this argument can be phrased in terms of the classical notion of the “pedagogical function” of the law. Legal scholar and ethicist M. Cathleen Kaveny contrasts the negative or restraining function of law in liberal legal philosophy with Thomas Aquinas’s understanding of law as teacher of virtue. “Law is always and inevitably a teacher,” she writes, and “sorely needed is critical self-reflection about what it teaches.”⁹⁸ Murray’s concern with minimal public morality pertains to the criminal law, and provides a helpful context for understanding why “anti-sodomy” statutes were properly overturned. Yet civil law, Kaveny emphasizes, has a much broader purpose in the way it gives positive social approbation to certain goods, functions, practices, and institutions. Though she writes about the ethics of life rather than sexual ethics, Kaveny’s point is relevant to this debate. It is one thing not to *punish* same-sex relations through the criminal law and another actively to *encourage* same-sex commitments through putting the full force of the civil law behind them.

Magisterial statements about same-sex marriage are concerned that civil laws would teach that marriage is morally neutral with regard to procreation. The magisterium holds that, according to the natural law, love, sexual intercourse, and reproduction constitute three essential components of marriage that cannot be detached from one another and treated as independent goods. It also runs against the social and procreative understand-

⁹⁸ M Cathleen Kaveny, “Toward a Thomistic Perspective on Abortion and the Law in Contemporary America,” *The Thomist* 55 (July 1991) 371. See also her “The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing *Evangelium Vitae*,” in *Choosing Life: A Dialogue on Evangelium Vitae*, ed. Kevin Wm. Wildes, S.J., and Alan C. Mitchell (Washington: Georgetown University, 1997) 132–49, and “Autonomy, Solidarity and Law’s Pedagogy,” *Louvain Studies* 27 (Winter 2002) 339–58.

ing of marriage that has been not only promoted by the Catholic Church but held by the Western tradition for millennia.⁹⁹

This line of argument was employed in a speech on October 2, 2003, by Archbishop Sean O'Malley of Boston,¹⁰⁰ who argued that the Massachusetts *Goodridge* decision attacked the common good. He claimed that redefining marriage in this way will undermine the well-being of marriage as a social institution and, in addition, will indirectly contribute to the incidence of poverty, child abuse, and drug addiction. Since divorce and cohabitation have contributed to these problems, the archbishop reasoned, giving further any impetus to the instability of marriage would exacerbate them even more.

This concern with marriage is not the sole preserve of Thomists and the magisterium. The recent development of the theory of "critical familialism" by Don Browning and his collaborators has united a wide variety of scholars who support an egalitarian marriage structure but who also want to recover a sense of marriage as the most appropriate context for child-rearing and care-giving.¹⁰¹ "Critical familialism" regards marriage as both the setting of companionate, romantic interpersonal bonds and a valuable social institution that channels male sexual desire and corrects the distinctively "male problematic" that militates against long-term commitments. Whatever their sexual orientation and marital status, men overall are more prone to engage in extra-partner sex than women who are similarly situated.¹⁰² The health of marriage requires that the "unitive" and "procreative" purposes of marriage not be completely severed from one another.

The magisterium's most plausible argument against same-sex marriage concerns the long-term consequences that it might have on marriage. There seems no reason to think that gay households today are having deleterious

⁹⁹ Witte, Jr., *From Sacrament to Contract*, and Don S. Browning et al., *From Culture Wars to Common Ground: Religion and the American Family Debate* (Louisville, Ky.: Westminster/John Knox, 2000).

¹⁰⁰ See <http://www.rcab.org/News/statement031002.html> (accessed December 1, 2003).

¹⁰¹ On "critical familialism" in relation to civil law, see Don Browning, "Critical Familialism, Civil Society, and the Law," *Hofstra Law Review* 32 (2003); on "critical familialism" generally, see Browning et al., *From Culture Wars to Common Ground*; Don S. Browning and Gloria Rodriguez, *Reweaving the Social Tapestry: Toward a Public Philosophy and Policy for Families* (New York: W. W. Norton, 2001) and Don S. Browning, *Marriage and Modernization: How Globalization Threatens Marriage and What Should Be Done About It* (Grand Rapids: Eerdmans, 2003).

¹⁰² See P. Blumstein and P. Schwartz, "Intimate Relationships and the Creation of Sexuality," in D. McWhirter, S. Sanders, and J. Reinisch, ed., *Homosexuality/heterosexuality: Concepts of Sexual Orientation* (New York: Oxford University, 1990) 96–109.

consequences on their members or communities; on the contrary, they seem, as least to common sense observation, to be as healthy, or unhealthy, as their straight counterparts. Yet the magisterium is not unreasonable to raise a question about the long-term social effects of a proposed social change that would give the support of the state to same-sex partnerships and regard them as equal in worth to marriage between a man and a woman. It is hard to have confidence in predictions—pro or con—about the long-term effects that would follow from enacting same-sex marriage. In the absence of knowledge regarding matters of this magnitude, and involving courses of events that would be irreversible, the magisterium is not unreasonable to call for caution and even to resist the new social experiment proposed by advocates of same-sex marriage. It is possible for people of good faith to differ on this issue. At the very least, further discussion, investigation, and deliberation are in order.

Those attentive to the pedagogical function of the law insist, at the very least, that proposed legal changes that might have a major impact on the moral substance of marriage ought to be subjected to extensive discussion, debated thoroughly, and resolved through the legislative process.¹⁰³ Thus the American bishops object not only to the contents of *Goodridge* but also to the way in which such a radical change in social policy was set by a thin 4-3 decision of the court. If the law should ordinarily be supported by broad consensus based on shared communal values, as Murray, Finnis, and Kaveny all hold, then the judiciary is not the best means for bringing about such significant legal change. If this position is correct, the burden of proof for serious changes in the law shifts squarely onto the shoulders of the innovators.

CONCLUSION

The magisterium's recent statements regarding same-sex marriage have been flawed and need to be reformulated. The major flaw involves a persistent tendency to communicate a mixed message about the worth of gay people and their place in the life of the civil community.

The Church stands as the most visibly identifiable moral voice in the Western world. It offers a profound core of moral wisdom regarding sex, marriage, and the family that is badly needed by societies in which people feel increasingly isolated, objectified and bereft of moral substance.¹⁰⁴ The

¹⁰³ This case is stated clearly in Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University, 1987).

¹⁰⁴ The ecumenical nature of this common core is discussed in John Witte, Jr., "The Goods and Goals of Marriage," *Notre Dame Law Review* 76 (April 2001) 1019–71, and Browning et al., *From Culture Wars to Common Ground*.

Church also offers a powerful basis for denouncing injustice against gay people. The Christian virtue of *agape* affirms not only that all classes and groups of human beings are worthwhile, but that they are *equally* worthwhile before God. As the bishops put it in "Always Our Children," "God does not love someone any less simply because he or she is homosexual."¹⁰⁵ If the magisterium wishes to be more persuasive regarding the topic of same-sex marriage, then church authorities must embody this love in what they say about, and how they act toward, gay people.

Unfortunately, the ineffective, self-contradictory, and counter-productive manner in which the magisterium has tried to promote its case against same-sex marriage has made it seem more irrelevant than ever to the public debate on this topic. To be fair, even without a mixed message, the Church's best insights need to be carefully formulated when expressed in a society that usually allows individual rights, tolerance, and the duties of non-discrimination to trump the common good, moral tradition, and institutional authority. But the content and tone of its own statements have exacerbated matters by reinforcing the view of some observers that its sexual ethics is simply out of touch with contemporary experience. The magisterium's credibility was not helped by the fact that this debate was joined in the wake of the crisis of clerical sexual abuse and the episcopal abuse of power. A special source of consternation, and another indication of anti-gay bias, was caused by church officials who blamed the crisis of sexual abuse on gay priests, despite the fact that most priests who are gay have not been guilty of these crimes.¹⁰⁶

The magisterium is ethically entitled to work against same-sex marriage on the grounds that it might contribute to the disassociation of marriage and procreation. Yet the magisterium is not ethically entitled to connect this case about the social institution to anti-gay bias. The magisterium claims to appreciate the talents of gay people but questions whether there is a place in ordained ministry for them; it asks every person to accept his or her sexuality as a gift from God but then makes an implicit exception of the gay person; it praises Christian generosity but then condemns gay

¹⁰⁵ Committee on Marriage and Family, United States Conference of Catholic Bishops, "Always Our Children," revised in 1998, reprinted in John F. Harvey, OSFS, and Gerard V. Bradley, ed., *Same-Sex Attraction: A Parents' Guide* (South Bend, Ind.: St. Augustine's, 2003) 215.

¹⁰⁶ On the crisis, see United States Conference of Catholic Bishops, "Report on the Implementation of the 'Charter for the Protection of Children and Young People,'" *Origins* 33 (January 15, 2004) 521–40; National Review Board, "Report: Causes and Contents of the Sexual Abuse Crisis," *Origins* 33 (March 11, 2004) 633–88; John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* (Washington: United States Conference of Catholic Bishops, 2004).

people who adopt orphans. It has no justification for continuing to issue documents that perpetuate stereotypes about gay people, stigmatize them, tacitly approve of unjust discrimination against them, discount their generosity, refuse to acknowledge their contribution to the common good, or suggest that they are in any way inferior human beings or less trustworthy members of the Body of Christ.

If the magisterium wants to work against same-sex marriage without confirming suspicions that it is homophobic, it needs, in addition to refraining from injustice, to take additional proactive steps on behalf of gay people. It ought to undertake a serious commitment to work against every form of prejudice against gays and to advocate for recognition of the rights of gay people wherever they are denied. It is incumbent on the Church to work for measures that would promote social justice for gay people as individuals and that would effectively enhance the well-being of the children and partners of gay households. If it fails to do this, the Church will rightly be judged negatively as an institution that labors to prevent gay parents from visiting their children in the hospital, attend teacher conferences, or receive the Social Security checks that would have been granted to a surviving spouse.

Finally, if it wants to communicate genuine love of neighbor, the magisterium must find a way to honor the experience of gay people, including gay Catholics who are sincerely trying to live in accord with the gospel and the best wisdom of Catholic morality. Murray believed that practical intelligence is rescued from ideology by maintaining a “close relation to concrete experience.”¹⁰⁷ The documents of the Congregation for the Doctrine of the Faith suffer from a major defect in this regard because they have not taken into account the experiences of gay people. The magisterium has yet to show any interest in engaging in dialogue with gay people or in listening to what they have to say about what it means to be gay and Catholic at the present time.¹⁰⁸

Many Catholic gay people do not always experience the magisterium as regarding them with respect, trust, and love. “Considerations” in fact communicates no sense of love for those involved in “homosexual unions,” and indeed none for gays generally. One can infer from its language that this document was not crafted after a process of serious consultation and conversation with gay people. Ironically, the magisterium has engaged in extensive official dialogues with Protestants, Jews, and Muslims, but it has yet

¹⁰⁷ *We Hold These Truths* 106 (see n. 40 above).

¹⁰⁸ For a clear analysis of this weakness in Catholic sexual ethics generally, see Patrick T. McCormick, “Catholicism and Sexuality: The Sounds of Silence,” *Horizons* 30 (Fall, 2003) 191–207.

to do so with gay Catholics. Its tone and contents exemplifies in a particularly graphic way the result of speaking *about* gays but not *with* them. One can only hope that, at some point, the magisterium will learn that affirmation of the value of marriage need not be connected to questioning the worth of gay people.¹⁰⁹

¹⁰⁹ Earlier drafts of this article received helpful criticism from James F. Kennan, S.J., John Paris, S.J., Lisa Sowle Cahill, Don S. Browning, and an anonymous referee for *TS*.