

### Lee's Rejoinder to Mercier's Reply

Professor Mercier's reply contends that my essay shows, "if anything," that Margaret Somerville's argument rests on a "hidden or unacknowledged" premise—namely, that sexual acts that are non-marital (including homosexual acts) are objectively immoral. She then says that since she (Mercier) does not share this premise Somerville (and I too, I suppose) can "kiss a shared ethics goodbye." This is doubly confused. First, I defend *two* overall arguments. The first was the one presented in Somerville's book; but this argument does not rest on the premise just mentioned. Indeed, on page 2 of my paper, where I advance the second argument, I explicitly say "and here I go further than Professor Somerville's book." So my article provides no support for Mercier's quest to show that Somerville is "disingenuous."

Second, I advance *arguments* (above and elsewhere) to support the premise Mercier rejects. I do not simply assert the premise as "the bottom line." Mercier offers no reply whatsoever to these arguments. Instead, in paragraph 2 she implies that I am trying to impose my religion on others—but provides no evidence for this assertion either. She writes: "He is not at liberty however to substitute his conception of "genuine" marriage when what is under discussion is marriage as this latter notion is embodied, not in Canon or Sharia Law, but in civil laws of secular states . . ." But the question is not what civil laws actually now say (and in fact the things she mentions that civil laws allow do not conflict with the nature of marriage); nor is the question whether the civil laws about marriage are applied fully consistently. Rather, the question is, what does sound moral reasoning disclose about how the civil laws *should* treat marriage. My arguments to show that marriage is inherently a union of sexually complementary spouses, and should not be treated by law as if it were something else, are derived not from any alleged revelation, but from the nature of the public goods to which the natural, civil institution of marriage has always been aimed. Civil law should promote, and not undermine, those public goods.

In paragraph 3 Mercier fancifully describes my position as that the marital unions of octogenarians are procreative in type because they could procreate through a miracle—but nowhere do I mention any type of miracle. Next, after falsely attributing to me this ridiculous position, she

accuses me of being *disingenuous* for *pretending* to hold it, and then says that I am *doubly* "disingenuous" for denying the same point of same-sex unions! Rather, my position is that an infertile opposite-sex couple can marry because they can perform all of the behavior (both physical and volitional) which disposes them to procreation and establishes a comprehensive (bodily as well as emotional/spiritual) union; the conditions that may prevent their procreating are *extrinsic* to their behavior and do not prevent them from becoming "one flesh," that is, uniting organically as bodily persons. (Also: *pace* Mercier, nowhere do I absurdly say that consummation of marriage requires a sexual act causing a sperm to meet an oocyte—which would invalidate almost all marriages where the woman is infertile. My view is that consummation requires the completion of an act of sexual intercourse, that is, penile-vaginal intercourse. A marital act is a certain type of coordinated behavior performed by spouses with a certain intent. It is an act that fulfills the behavioral conditions of procreation (whether or not the non-behavioral conditions happen to obtain) and its intent is not that of conceiving a child (though that may *also* be sought), but rather that of uniting organically where biological unity is the foundation of a comprehensive, multi-leveled sharing of life—a sharing at the bodily, emotional, rational, dispositional, and, for those who happen to be believers, even spiritual levels of our being as human persons.)

Mercier insists that if infertile opposite-sex couples can marry, then marriage cannot have any essential relation to procreation. She has offered no argument that entitles her to such a conclusion. She has simply ignored the argument made by me and many others that a community can be essentially related to procreation other than by actually realizing it or by having the potentiality for it. Mercier claims my position is contorted. But it is simple enough: marital communion is bodily as well as emotional and rational. True marital ("one flesh") communion is possible because human males and females can unite bodily, and our bodily unity is truly personal. Our bodies are not mere extrinsic instruments inhabited by "consciousnesses" or "souls"; they are, rather, intrinsic parts of our personal reality as human beings. At the same time, *qua* sexual, the consortium of spouses is the type of communion that is naturally fulfilled by bearing and raising children together; yet, as our law has long recognized, procreation is in no way the ultimate end to which marriage is a mere means. Rather, marriage, as a comprehensive sharing of life founded upon biological unity—unity

of the sort that is naturally fulfilled by the generation and rearing of children—is a good-in-itself. This explains three features of law that are longstanding, yet inexplicable apart from the understanding of marriage I have defended: (1) the capacity of infertile spouses to be married; (2) the requirement of consummation by sexual intercourse for a marriage to be complete and not subject to possible annulment; and the idea that marriage is the union of two and only two persons, not three or more, in a sexual partnership. It also explains how marriage differs profoundly from other forms of friendship and community.

Mercier's objection in paragraph 4 to the first numbered argument at the end of my article can be answered quite simply. She disagrees with my premise (1). The context and the whole debate make it clear that (1) means that the state should recognize marriage as *only* a specific type of opposite-sex union. For the debate concerns the right *definition* of marriage. Her view is that, "the state can treat same-sex unions as marriages without denying the unique nature of the union between a man and a woman just as surely as we can treat any number of plants as flowers without denying the unique nature of pansies." But this is a false analogy and misses the point. The debate concerns the type of community that will serve certain public goods—providing the most suitable environment for the flourishing of children, and integrating sexual acts with an intelligible good. If the state re-defines marriage, then it will at the same time be committed to treating same-sex unions as *equal* to traditional marriages. But, while pansies and daisies, say, are both equally flowers, it is false to say that marriage and same-sex unions are equally communities that serve these public goods. If flowers uniquely served a certain purpose, then the state's legislating that a non-flower is a flower would undermine that purpose. Similarly, the state's legislating that a non-marriage is a marriage would undermine the public goods for which marriage is uniquely suited.

Finally, Mercier denies that the state's declaring some same-sex unions marriages would tell fathers that they are dispensable. Here Mercier raises a legitimate question. Yet the answer is straightforward: the re-definition of marriage would legislate that the differences between the sexes are unimportant with respect to marriage, and so what is distinctive of a *father* (for example) would be, according to the official view of the state, dispensable. Also, if marriage were to be re-conceived so that bodily communion of the generative type were to be treated as irrelevant to what

marriage is, then the idea of marriage as an institution, one of the central purposes of which is to encourage fathers to fulfill their specific responsibilities, would be lost.

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