

MARRIAGE, PROCREATION, AND SAME-SEX UNIONS

Should the political community declare that (some) same-sex unions are marriages? Margaret A. Somerville has ably argued that it should not, that doing so harms children and families. Adèle Mercier vehemently disagrees, describing Professor Somerville's argument as "contorted," "circular," based on "inert premises;" accusing her of multiple confusions, and of harboring "hidden (or at least unacknowledged) motives."

I argue, on the contrary, that Margaret Somerville's argument is sound, the confusions attributed to her by Professor Mercier are not actually in her argument, and so we need not speculate about Professor Somerville's motives. Her motives are likely just what they appear to be, and what I hope are Professor Mercier's too, namely, a lively concern for families and married life, and for the legitimate rights and well-being of everyone affected by what the political community affirms in its laws regulating marriage.

The argument advanced by Margaret Somerville is essentially this. In every society we find the following type of relationship: an inherently procreative relationship between men and women, that includes a commitment to share their lives with each other, and if children come to be, to rear those children together. That such a community does exist in every society is indisputable. Of course, other relationships are sometimes called by the word 'marriage', but these are different types of relationship. For example, men and women may cohabit and view children as merely an optional extra or as burdens to be avoided. Or two or more individuals may form a friendship for the sake of raising children—for example two sisters, or several celibate religious men or women. But neither of these relationships should be described as marriages. Finally, two people of the same sex may perform sexual acts on each other, may have a friendship, and also be dedicated to raising children together. But this also is not the same type of community as marriage; for in this arrangement, the sexual relationship is unrelated to the purpose of raising children. Marriage is

that type of community in which the personal community, and the bodily, sexual relationship, are *intrinsically* oriented to the twofold good of personal communion between the spouses, and bearing and raising of children. It also is important to note that marriage is not a mere means in relation to bearing and raising children. The union of the spouses is in itself good and remains good if procreation is not possible.

Marriage includes, of course, a romantic relationship. It is a relationship within which, in most cases, sexual acts regularly occur, and in which sexual acts enhance the relationship. But, how do sexual acts do this? One must understand this in order to understand more fully the distinctiveness of genuine marriage (and here I go further than Professor Somerville's book). In genuine marriage sexual intercourse is not merely an extrinsic symbol or only a pursuit of pleasure. In sexual intercourse between a man and a woman (whether married or not), a *real* bodily union is established. Human beings are organisms, albeit of a particular type. In most actions, such as digesting, sensing, walking, talking and so on, individual male or female organisms are complete units. However, with respect to reproduction, the male and the female are incomplete. In reproductive activity the bodily parts of the male and the bodily parts of the female participate in a single action, coitus, which is oriented to reproduction (though not every act of coitus actually reproduces), so that the subject of the action is the male and the female as a unit.¹ Coitus is a unitary action in which the male and the female become really biologically one.² In marital intercourse, this bodily unity is an aspect of, a constitutive part of, the couple's more comprehensive, marital communion.

When a couple make a commitment to each other to share their lives, in the type of community that would be fulfilled by bearing and raising children together, then the biological unity realized in sexual intercourse actualizes or concretizes that community. In sexual intercourse they unite (become one) precisely in that respect in which their community is defined and naturally fulfilled. That is, they have consented to a procreative-type of union; so their procreative-type *acts* embody their *community*. Hence the sexual intercourse of spouses is not an extrinsic symbol of their love, nor a mere means in relation to procreation, but *embodies*, or *actualizes*, their marital communion. In that way the loving sexual intercourse of husband and wife instantiates a basic human good: the good of marital union. This sharply contrasts with sex performed solely for pleasure, or

for an illusory experience of a union that is not actualized in the sexual act (in case they do not become biologically one in their reciprocal sexual acts or have not committed to a marital union). In each of these cases, the goal of the sexual act is *extrinsic* to it; the sexual acts (in these cases) are mere means in relation to extrinsic ends.

Political communities give legal recognition to the type of community that is fulfilled by bearing and rearing children, refer to it as 'marriage', and through their laws and regulations promote and protect it. It is right and proper for the political community to do so. The state has a necessary interest in the well-being of marriage as a community (a basic good) and as an institution (a set of norms, rights, and expectations in society that support a relationship or community)—and therefore it should not distort or confuse its nature. This is so principally for two reasons.

First, generally speaking, children will receive the best and most loving care, if they are raised by their biological parents, who have formed a community dedicated to providing the most suitable environment for any children they may procreate. As Professor Somerville expresses it: "Opposite-sex marriage establishes as the norm and institutionalizes the inherently procreative relationship between a man and a woman, and in doing so establishes children's rights with respect to links to their biological parents and families." This does not mean that adoptive parents cannot be good and loving parents. Obviously they can be, and adoption is often the best arrangement available for a particular child. It is simply to state that the ideal is one in which parents are willing and able to rear their own offspring.

Mothers and fathers are not interchangeable—mothers and fathers each bring something distinctive to the great task of bearing and raising children. The child needs both the model of a responsible and caring female figure and the model of a responsible and caring male figure. Moreover, a child has a natural need for the love and care of her own biological mother and her own biological father.³ Conversely, the biological mother and father naturally tend to develop a strong bond with the child, rooted in that biological connection. So, a home in which the child has the genuine love and care of both her own mother and her own father is, in general, the best situation in which a child is born and raised. Marriage is the community, and the institution, dedicated to attaining that ideal. The institution is particularly oriented to ensuring that fathers will fulfill their

responsibilities to the children their sexual intercourse may bring into being, and to the mothers of their children. Almost always, children can count on their mothers to care for them when they are young; the institution of marriage is dedicated to ensuring, as much as possible, that they (and their mothers) can also count on their fathers.⁴ And there is a need for this sort of community antecedent to any decrees by the political community. It is more than a mere social construct, in the sense that there is a natural need for it. The community and its structure arise from its necessity for the flourishing of children, and women and men in their domestic lives. The institution of marriage arises from society's recognition of that need.

A second reason why the political community should protect and promote genuine marriage is this: where this institution is strong, people's sexual passions and energies—which are frequently difficult to control, and can lead to self-centeredness and exploitation—are channeled toward an intelligible good. It is not that the sexual impulse must be repressed; rather, it needs to be directed to a genuine good. And the intelligible goods it realizes and promotes are marriage itself and families built on the foundation of marriage. In a good marriage one's sexual desires and actions are integrated into one's commitment to one's family and spouse. If the state declares same-sex unions equivalent to marriage, it obscures the nature of marriage—a community that transcends romantic affections. In effect, it will send the message that marriage is centrally about the romantic attachment and sexual relationship of adults to (or among) each other rather than about a relationship which by its nature is oriented to and suited for becoming family. Doing that will almost certainly further weaken the institution of marriage.

Moreover, sexual acts outside marriage are objectively immoral, not integrated into the realization of a genuine, intelligible good. (Here I can only sketch the case for this proposition.)⁵ In non-marital sexual acts, the body-as-sexual is instrumentalized for the sake of a mere experience—either the experience of pleasure or the experience of the bodily-personal union without the reality of it (for, if the sexual act is non-marital, either the participants do not become biologically one, or they have not committed to sharing their lives in a way that can be embodied by a sexual act).⁶ While it certainly does not follow from this that non-marital sexual acts should be criminalized, nevertheless, it does follow that it is reasonable to insist that the state not *endorse* or *encourage* such acts. By endorsing

and encouraging immoral sexual conduct, the state implicitly denies the unique nature of marriage as a two-in-one flesh union, and also implicitly denies the unique capacity of sexual acts to embody that union, affirming instead that sexual acts are merely instrumental to extrinsic goals.

Mercier raises several objections to this overall argument. Some of her comments suggest she thinks the argument rests on the naturalistic fallacy. She claims that Professor Somerville has failed to understand that the naturalistic fallacy is a fallacy. (p. 2) Later, when discussing Somerville's description of marriage as an "*inherently* and naturally procreative union," [emphasis added] Mercier says that a clear example of an inherent fact is that she (Mercier) is the product of her gametes, and that, "My gametes are an essential condition of my existence. As a matter of metaphysical necessity, my gametes are inherent to my being." (By the latter phrase, she must mean, "having-originated-from-the-gametes-whose-union-produced-me is inherent to my being.") But, noting that her sex, and eye, hair and skin color are products of her gametes, she then points out that nothing much follows from the fact that these traits are inherent—she may change any of them. "Inherent facts, metaphysically foundational though they are in defining me as me, are substantively rather trivial." (3–4)

But the overall argument proposed by Somerville does not rest on an inference from what is to what ought to be. Rather, the basic argument is that there are important basic goods of persons—the health and education of children, the integration, by young men and women, of sexual desire with genuine respect for persons and intelligible goods—that are best promoted by the political community's recognition of, promotion and protection of, the procreative type of relationship that is genuine marriage. Hence the requirements of real and personal goods, and not just a concern for biological or natural patterns, grounds the argument against same-sex marriage.

Although natural facts *just by themselves* do not logically imply an ethical conclusion, it is simply false to say unqualifiedly, as Mercier does, that such facts are "substantively rather trivial." (4) True, *some* are trivial (though not even all of the ones mentioned by Mercier) but others are indeed quite ethically important: for example, the fact that she and I are alive and can die, the fact that we are humans and so are intelligent, bodily, can form friendships, can believe or not believe in God, can lie, can promise, can assist other people, etc. All of these facts are inherent to our being (in one way or another they follow from the basic fact that we are

animals with reason and free choice), but they are indeed morally significant. Such facts do not by themselves establish ethical truths, but together with basic ethical norms or moral propositions, do indeed imply further, more specific ethical truths. Likewise with such facts about how human babies come to be, what human society is like, and what basic biological and psychological characteristics men, women, and children tend to have.

A second objection advanced by Mercier against Somerville's position is that marriage is not, contrary to Somerville's claim, "a naturally, inherently procreative relationship." (Mercier, 3ff.) We have seen above that Mercier takes issue with calling marriage *inherently* procreative. She also disagrees that it is inherently *procreative*. Her argument against this is a disjunctive one: Marriage is procreative either in the factive sense (that is, *procreating*), or in the potential sense. But it is not procreative in the *factive* sense, since no marriage is always procreating. Nor is it procreative in the *potential* sense, since octogenarians can marry, and we do not test for procreative capacity before allowing people to marry. Therefore, Mercier concludes, it is not inherently procreative. (4)

Yet this argument rests on an incomplete disjunction. She states her first premise as follows: "To say that a relationship is inherently procreative is a different matter. Depending on how one reads the suffix '-ive', it is to say either that procreation—a factive implying the existence of progeniture—constitutes the relation's identity conditions, or else that the mere potential for procreation does, whether that potential is ever actualized or not." (4) But, plainly, these do not exhaust the ways in which a relationship could be procreative. According to Somerville—and others who hold that marriage is a procreative union—marriage is procreative neither in the factive sense or (necessarily) in the potential sense. Rather, marriage is *oriented to* procreation, that is, procreation is a *purpose* of, a reason for, marriage. Marriage is a naturally procreative relationship in the sense that a central purpose of and reason for marriage is to provide the environment most suited to the bearing and raising of children. Although marriage is not a mere means toward procreation, its inherent *orientation to* procreation distinguishes it from other types of relationship or community. (It is almost certainly the case that marriage would not exist—in any culture, much less in every culture—were it not for the fact that human beings reproduce sexually and human infants are dependent on others for sustenance, nurture and education.)

Mercier writes that:

Anyone who thinks that the essence of their union is to produce children are mistaken unless they are ready to consider their marriage as having never existed as a marriage at all should it result in no children: a firefighter who has never chanced upon a fire is a firefighter in name only; a novelist who dies without writing a novel is at best a novelist-wanna-be; likewise, a relation whose metaphysical condition of identity is to procreate but which does not procreate is more than a failed relation, it is no relation at all. (p. 4)

But the very examples Mercier uses falsify her claim. A firefighter who has never fought a fire is certainly *not* a contradiction in terms. Clearly, firefighters who have not (or not yet) fought any fires still *are* firefighters. They are ready and willing, specially trained, and in the position most suited, to fight whatever fires might occur. And that would not change if, say, in some small town they never actually did fight a fire. A similar point is true of policemen and soldiers: each is dedicated to defending the community against internal or external threats even if they never actually have to repel such threats. In each case, persons occupy an office or role that is dedicated to being *ready to perform* a specific service for the community. Of course, we hope fires, and internal or external threats to a community's security, do not occur. The same of course is not true of babies—we are happy that babies do come to be. But the general point is this: there can be a good reason why an office or role—or a community, as in marriage—might have this complexity, namely, that it is dedicated not directly to a goal, but directly to readiness for performing a specific service, or (as in marriage) to creating a community specifically suited to a service.

With firefighters, policemen, and soldiers, the reason for this complexity is that there is a need for specific groups ready to perform a service before the imminent need for it arises (though in their cases it is hoped the imminent need does not arise). In the case of marriage, there is also a need for a community prepared to perform a service before the imminent need arises. However, with marriage, the community formed for that purpose is also in itself worthwhile and is not a mere means in relation to that end (bearing and raising children). Since their generating and nurture of a completely new person has no parallel in human actions and relationships, it should not be surprising that marriage's procreative goal or purpose (bearing and raising children) requires a community that is more than just

a means to it, and that the man and the woman in a marriage should be committed *to each other* for their own sakes, and view their community as not merely instrumental in relation to procreation. Thus, marriage is especially complex because of its orientation to a twofold good, the marital communion itself, as well as procreation.

Moreover, while firefighters can directly fight fires, spouses generally are able only to do those acts that *dispose them* to conceiving. That is, they are able only to perform the kind of act that, provided other conditions outside their conduct obtain (i.e., non-behavioral conditions of reproduction), will procreate (though of course once the child is conceived they can do many things that directly care for the child). In short, the nature of some offices, roles, or communities, and especially that of marriage, shows that they are in truth more complex than Mercier's argument allows them to be.

Mercier also objects to the claim that marriage is *naturally* procreative. She argues that a couple can form a friendship or union for the sake of bearing and raising children, but bear those children artificially, and that such a relationship is not significantly different from heterosexual married couples who adopt or have children by IVF. In fact, she argues, Somerville herself—and other proponents of the traditional definition of marriage—would grant that such a couple (if man and woman) is married, despite the fact that they cannot *naturally* procreate. Thus, marriage (Mercier argues) is not “a *naturally*, inherently procreative relationship.” [emphasis added] And if marriage need not be *naturally* procreative, then consistency demands (Mercier argues) that it be open to same-sex couples as well as opposite-sex ones.

This objection is related to Mercier's claim that Somerville “cherry-picks” from what is natural, since on Somerville's view a man and a woman unable to have children can marry and yet same-sex couples cannot. Mercier's objection could be expressed in this way: bearing and raising children cannot be an essential purpose of marriage (as contended in the preceding paragraphs), since octogenarians and other infertile people can marry (as is virtually universally admitted).

The answer to these objections is, one would think, obvious. Marriage is not just a *means* toward procreation, but a multi-leveled (bodily, emotional, spiritual) personal union that is fulfilled by expanding into family, but remains good in itself if in a particular case it cannot do so. The male and

female spouses who unite in fulfilling the behavioral conditions of procreation (unlike the same-sex couple) really do become one flesh, or biologically one, in consummating their marriage, even if the non-behavioral conditions of procreation happen not to obtain; and their union is still the type of union that would be prolonged or fulfilled by bearing and raising children together. In order to be genuinely married, a couple—*any* couple—must: A) commit themselves to the type of personal union that would be fulfilled by bearing and raising children together; B) perform the conduct by which they become biologically one, conduct that, with the addition of conditions extrinsic to that conduct (conditions over which they do not have direct control), might result in procreation. A and B together constitute the beginning (or renewal) of the distinctive community traditionally called “marriage,” a community that forms the basic building block of society, and in which therefore the state has a strong interest in promoting and protecting. So, if a couple fulfill conditions A and B, they are genuinely married. If subsequently they bear and raise children, this does not create a different type of union (as if they first formed one type of community, but later formed a distinct one, or as if they first formed a generic friendship but then later married). Rather, the bearing and raising of children is the prolongation or fulfillment of what they have pledged to each other on their wedding day.

By contrast, if a same-sex couple agrees to cohabit and they agree regularly to have sex together, that creates one type of relationship. If they subsequently decide to collaborate in raising an adopted child, or to cooperate in raising a child that one of them conceives by IVF, that creates a new and distinct relationship. There is no intrinsic link between their sexual acts, on the one hand, and their cooperative acts to raise a child, on the other.

Thus, if a man and a woman consent to share their lives in a personal communion that is open, and uniquely suited, to bearing and raising children together, and consummate their union by uniting biologically (becoming “one flesh,” to use the traditional language), then they *are* married, whether conditions extrinsic to their sexual acts allow the prolongation of their marriage into family or not. A man and a woman who are infertile, but who can fulfill those conditions, are capable of actually marrying, whether or not they know ahead of time of their infertility. The exclusion of same-sex couples from marriage is not unjustly discrimina-

tory. Any couple who is unable to fulfill those conditions is unable to marry. Not only same-sex couples, but couples who are too young, or opposite-sex couples who (because of impotence) cannot consummate their union are unable to marry.⁷ Thus, neither an alliance between people who have not committed to sharing their lives as spouses, nor a sexual relationship between people who coincidentally agree to collaborate in caring for a child (or children)—is a *marriage*.

It may be objected that in same-sex couples raising children, their sexual acts are linked to their cooperation in caring for a child, since such acts bring them closer together and thereby enable them to cooperate more effectively in care of the child. But two sisters, or several people, may agree to cooperate to raise children. They might then meet regularly to play tennis, and this regular practice may bring them closer together and thereby indirectly enable them to cooperate more effectively in raising children. But this fact would not make their tennis-playing specifically marital acts, nor would it make their alliances or arrangements marriages. The sexual acts of two people of the same sex (or more than two people, be they all of the same sex or a mix of the two sexes) are not directly related to any alliance or community they form for the purpose of caring for children. With genuinely married people, on the contrary, their sexual acts are procreative-type acts and their relationship is a procreative-type community—their sexual acts embody their community (even if not procreative in actual result).

Like Professor Somerville, I grant that in some instances the (unsatisfactory) best available situation for a child might be with a same-sex couple, and that where this is unfortunately so, the state has an interest in assisting such couples, as it has an interest in assisting any couple or group that is, as a matter of fact, bringing up a child.⁸ But children are, in general, best raised by their own biological mother and father. And this point is based, not on a presumption in favor of nature, but on the fact that generally mothers and fathers develop a strong bond with their biological children, and children experience a strong need to be known and loved by their biological parents. Also, children need both a mother *and* a father. Indeed, the central purpose of the institution of marriage is to encourage fathers to fulfill their responsibilities to the children and to their children's mother.

Ideally, then, the child should be raised by his or her own loving and responsible biological parents. In a society that respects, promotes, and

protects genuine marriage, this will happen much more frequently than in a society which in effect falsely tells fathers that their role is dispensable—a message that redefining marriage to include same-sex unions would inevitably send. For, since most same-sex couples have no intention of raising children, and since a same-sex union is not especially suited for that—in contrast to genuine marriage—to declare same-sex unions marriages would affirm that marriage is essentially concerned only with sexual or romantic relationships between adults, rather than a community structured by its orientation to becoming family. This would affirm, as Professor Somerville points out, that marriage is a mere social construct rather than a natural institution antedating the legal pronouncements of the state. Moreover, there would then be no principled reason why marriage should be long-lasting, or only between two people, these requirements being logical consequences of marriage's orientation to children.

At several places Professor Mercier confuses the argument Somerville has presented. For example, Mercier makes much of Somerville's statement that, "marriage is a compound right: the right to marry and found a family." (*Ethical Imagination*, 102). Mercier then argues that none of the things this "right" could refer to is incompatible with the state's declaring that some same-sex unions are marriages—such as the duty of the state not to interfere with natural biological reproduction, or "a duty on the part of the state to respect the innate bond and special interest between human parents and their natural offspring." (Mercier, 5) Neither of these, Mercier says, has much to do with marriage. Families (Mercier argues) can also be founded on adoption or artificial reproduction. In any case, the state can respect this right—"the *prima facie* right of parents to be the legal guardians of their natural offspring" (5)—but still (Mercier argues) declare some same-sex-unions marriages.

But here Mercier takes a phrase out of context. In that sentence Somerville is not attempting to define marriage—to do that she surely would also refer to mutual rights *and duties* exchanged by men and women, as well as to the duty of society to promote those mutual rights and duties. Further, it is clear that Somerville is not building her case around "a right to found a family" narrowly construed, for in the very next sentence she focuses on the rights *of children*, and the most important of these in this context is the (defeasible) right of children to be born in an environment suited to their being protected, nurtured, and educated.

Of course, everyone recognizes that this right to be born and raised by both of one's own biological parents is defeasible, and so Mercier's (exaggerated) assertion that complementarity in parenting has always been something of a luxury, is irrelevant. Moreover, her claim that no one has a duty, or that it is unclear who has the duty, corresponding to this right, is mistaken. The parents or potential parents have such a duty, and all of us in society do, indirectly, insofar as we can support whatever institution will ensure that most children are raised by their biological mothers and fathers (which turns out to be marriage).

Mercier accuses Somerville of "confusing the natural biological reality of reproduction on the one hand, with legal parenthood, that is, the legal recognition of responsibility for guardianship of children, on the other hand."⁹ However, Mercier falsely assumes that there are only two types of social realities: either natural biological relationships, or mere social constructs. Yet, while marriage is not solely a biological reality, it is a community and institution for which there is a *natural need*, in the sense that basic, natural facts about children, women, and men, generate that need. And so marriage is not a mere social construct. Society in many respects shapes this community, and yet it is morally required for the well-being of children and young women and men. So, given that we *morally ought* to ensure that children are nurtured and educated, and we *morally ought* to ensure that as often as possible fathers fulfill their responsibilities to their children and to their children's mother, marriage is an institution whose *existence* and *basic structure*, linking the natural realities of reproduction with legal recognition of natural duties, are not morally subject to change by the state.

Again, replying to Somerville's statement that "Opposite-sex marriage establishes as the norm and institutionalizes the inherently procreative relationship between a man and a woman," (EI, 102–03) Mercier replies as follows:

[I]t is difficult to see why granting same-sex couples the right to marry affects the norm about how children come into being. As long as heterosexual couples procreate by natural means, and as long as more heterosexual couples than homosexual couples reproduce, the norms will be that children come into existence the natural way. (p. 8)

But here Mercier is confused about what Somerville means by 'norm'. Somerville obviously does not mean merely a statistical norm—which is

what she would have to mean for Mercier's arguments to make sense. Rather, Somerville means a *directive to what ought to be*, an *ideal* that ought to be realized if possible.¹⁰ Somerville's argument is that, when the state gives legal recognition to genuine marriage, it affirms the importance of this relationship, and in particular the responsibility of the father to unite with and support his children and their mother. If the state does not distort the nature of marriage, children will have a much better chance of being raised by their mother and father, and young men and women in general will more likely see the intrinsic value of marital sex as integral to marriage rather than as a mere extrinsic tool by which to obtain pleasure or the feeling of closeness. Thus children, as well as young men and women, will be greatly benefited.

Because of these confusions, the summary Mercier presents (8–9) of Somerville's argument (numbering the asserted propositions 1 to 6) so distorts Somerville's case that her replies to it are beside the point. For example, she complains that (2) is false (namely, "This norm establishes the rights of children to biological parents.") because, "mere norms do not establish rights, mere changes in norms do not take them away." But, first, by "norm" Somerville means the affirmation of an ideal, not a feature of a statistical distribution. Second, Somerville does not hold that a norm (affirmation of an ideal) literally *creates* rights, or that changes in norms (ideals) literally take rights away: her point is that the affirmation of an ideal ("establishing the norm") *makes it more likely that those (defeasible) rights will be met*. This confusion of Mercier's also explains her complaints against (3) and (5) of her rendering of Somerville's argument.

Mercier also replies to Somerville's argument (as Mercier has rendered it) that:

The fact that some parents beat their children does not nullify the rights of all children not to be beaten. The existence of exceptions to families being founded by natural reproduction in no way affects the rights of biological children to their own parents. If it did, adoption would also nullify such rights. (9)

But the question is not directly about what many citizens do, nor about *exceptions* to what is viewed, by society and the law, as the environment most suited for raising a child, but about what the state and society affirm is in general the environment best suited to the bearing and rearing of children. If the state affirms that marriage and same-sex unions are equiv-

alent, then it blurs the distinction between affectionate relationships with no intrinsic relation to children, on the one hand, and the man-woman relationship that is naturally fulfilled by bearing and raising children, on the other. And to do that is harmful to children, and young women and men.

Instead of the inaccurate rendering of Somerville's argument proposed by Mercier, I would suggest a summary along the following lines:

- (1) If the state does not recognize marriage as the union of a man and a woman in a relationship that is naturally fulfilled by bearing and rearing children together, then it fails to affirm that this community is the situation most suitable in which to bear and rear children.
- (2) If the state fails to affirm that marriage is the context best suited to the bearing and rearing of children, then the (defeasible) rights of children to the protection, care, and nurturing of their own biological parents are less likely to be met (than would otherwise be the case).
- (3) If same-sex unions are declared to be equivalent to marriage, then the state does not recognize marriage as the union of a man and a woman in a relationship that is naturally fulfilled by bearing and raising children together.
- (4) Therefore, if same-sex unions are declared to be equivalent to marriage, then the (defeasible) rights of children to the protection, care, and nurturing of their own biological parents are less likely to be met (than would otherwise be the case).
- (5) The state *ought to* ensure that the (defeasible) rights of children to the protection, care, and nurturing of their own biological parents is more likely to be met (than would otherwise be the case).
- (6) So, the state ought *not* to declare that same-sex unions are equivalent to marriage.

I would also add the following argument:

- (1b) If the state affirms that same-sex unions are equivalent to marriage, then the state denies the unique nature of the multi-

leveled union between a man and a woman that is fulfilled by bearing and rearing children, and denies the intrinsic capacity of sexual acts to embody that multi-leveled union (insofar as it implies that sexual acts have only instrumental value).

- (2b) The state ought not to deny the unique nature of the multi-leveled union between a man and a woman that is fulfilled by bearing and rearing children, or the intrinsic capacity of sexual acts to embody that multi-leveled union.
- (3b) Therefore, the state ought not to affirm that same-sex unions are equivalent to marriage.

Mercier argues that the state should declare same-sex unions marriages, on the grounds that doing so would promote stability between those entering such unions, and that would be good both for the children that some of them rear, and for those couples. To do so, she argues, is just, love-affirming, and child-friendly. However, while it may be true that in some (unfortunate) circumstances the best available home for a child is one created by two people who happen to be same-sex partners, and so the work they do to rear those children should be assisted in some way by the state—this does nothing to show that such unions should be declared *marriages*.¹¹ Genuine marriage provides a service to society that is simply not met—not even less well—by other types of communities (including communities dedicated to rearing children, whether they incidentally involve sexual relationships or not). Genuine marriage encourages men and women to be responsible to the children their sexual intercourse may bring into being, and genuine marriage integrates sexual desires and acts with marital communion. A society that strives to ensure that as often as possible the child's own mother and father commit to each other and to the rearing of their children—and that will be a society that promotes genuine marriage, and does not distort its nature by falsely affirming the equivalence of other types of relationships with it—is a society in which children are most likely to receive love and stability.

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NOTES

1. The teleology of sexual acts primarily belongs to them as groups. That is, the design of the bodies is that *some sperm or other at some time or other* join with an ovum. The same is true with individual instances of sexual intercourse. That is, the functional orientation belongs to acts of sexual intercourse as a group, primarily, and only indirectly to the individual acts. The orientation to reproduction pertains to an individual act of intercourse as a member of a set, only some of which will result in reproduction.

2. Not every instance of two entities sharing in an action are instances of two entities becoming biologically one. In this case, however, the potentiality for a specific type of act, reproduction, can be actualized only in cooperation with the opposite sex of the species. The reproductive organs are internally oriented toward actuation together with the organs of the opposite sex. So, although the sexual organs of the male and the female are not interdependent for their continued life (as are the bodily parts of a male organism or a female organism) there is a real biological unity between them in the act of intercourse. Note also that, strictly speaking, men and women engaging in sexual acts do not choose to reproduce; the facts referred to in the preceding note are a main part of the reason why what people can choose and do is to perform reproductive-type acts.

3. Mercier is dismissive of this claim, but not justly so. Since we are bodily beings, not just souls or consciousnesses that inhabit bodies, our bodily connections to our biological parents are rightly felt to be part of who we are. This helps to explain the interest that many adopted children have in knowing and connecting with their biological parents. There is nothing irrational about this interest.

4. James Q. Wilson, *The Marriage Problem, How Our Culture Has Weakened Families* (New York: HarperCollins, 2002), ch. 2.

5. See also Patrick Lee and Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* (New York: Cambridge University Press, 2007), ch. 6; John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal Of Jurisprudence*, 42 (1997), 97–134.

6. This argument does *not* assume that every non-marital sexual act is done just for the sake of pleasure—as is alleged, for example, by Martha Nussbaum in her exchange with John Finnis: See John Finnis and Martha Nussbaum, "Is Homosexual Conduct Wrong?" in Alan Soble, ed., *The Philosophy of Sex* (New York: Rowman & Littlefield, 1997). See also John Corvino, "Homosexuality and the PIB Argument," *Ethics*, 115 (2005), 501–34, (at 521). Instead, the natural-law argument is that what is pursued in a non-marital sexual act is *either* pleasure alone *or* the experience of a union—though the act does not in fact actualize a union. The only type of community a sexual act can embody is marriage—as a procreative-type act, a sexual act can embody a procreative-type community, but not a community of another sort, such as a generic friendship. (Nor can pleasure alone be the common good, since pleasure is a genuine good only if it is attached to a condition or activity that is already genuinely fulfilling.) No other common good can be realized in the act, and so if it does not embody a marital union then it involves instrumentalizing the body-asexual. If the non-marital act is not done for the sake of pleasure alone, then it is done for the sake of the *experience* of a good that is not actually present, namely, a bodily union—and so the experience is illusory. Previous generations aptly called this "playing house."

7. The inability to consummate the marriage is often discovered only after the public consent to marriage. Although marriage is not a *mere* contract, it still is one. So, like other

contracts, marriage is null—the rights and duties are non-existent—if one of the parties is in principle unable to fulfill what is agreed to.

8. Although adoption or fostering by sexually active homosexuals is not intrinsically wrong, the occasions when it would be acceptable to place a child with such a couple are in practice vanishingly few. This is partly because such couples will almost inevitably inculcate in the child the false belief that same-sex sexual acts are morally permissible.

9. Mercier calls the latter, “matrimony” and says that the word is “from the Latin words ‘mother’ (mater) and ‘money (moneta, monium)” (Mercier, 6). This is fanciful: classical Latin, in which *matrimonium*, *testimonium*, etc. are good words, knows no word *monium*. As a word-part, *-monium* seems to be a longer form of *-ium*, perhaps derived from a lost adjective: see *Oxford Latin Dictionary*, ed. P. G. W. Glare (Oxford University Press, 1982).

10. In note 11 Mercier says that Somerville thinks there is a world of difference between orphans who will never know their biological parents and IVF-conceived children who were brought into existence by people knowing ahead of time that they will never know their biological parents. Mercier then replies: “Yet the Catholic doctrine of Killing vs. Letting Die, to which Somerville undoubtedly subscribes if she is consistent, prescribes that orphans who knowingly will never know their biological parents be brought into existence rather than aborted even when it is their very existence in the womb that will kill their mother.” But this is doubly confused. First, Mercier refers to the Catholic doctrine of *killing* (more precisely, *intentional* killing) vs. letting *die*: that doctrine, then, applies only to actual human persons—it could not then prescribe that certain orphans “be brought into existence rather than aborted.” A child who might be aborted already exists and so cannot be brought into existence. Second, Catholic doctrine holds that a child must not be intentionally killed (or even let die, if doing so is for a disproportionate or unjust reason); that doctrine *does* allow that a pathology that is an imminent threat to the mother’s life (e.g., a cancerous uterus, or a uterine tube that might haemorrhage due to an ectopic pregnancy) can be corrected even though doing so will involve the death of the baby as a side effect. Mercier’s gratuitous swipe against the Catholic Church misses its target.

11. See above, note 8.

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