Keep Friendship Unregulated

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One might think that liberals as well as conservatives would agree that state registries of friendships are a bad idea. When it comes to personal relationships, especially if they involve sex, even supporters of a regulated economy usually oppose state intervention. Yet many otherwise privacy-minded citizens favor opening an official registry of gay and lesbian friendships, called either "marriages" or "civil unions," backed by government incentives to sign up. Are they making a mistake?

Perhaps some supporters of legal recognition of same-sex unions adhere to what has been called, in jest, the German attitude to freedom: "Whatever is not officially permitted by the State is forbidden." They may think that homosexuals are not free to form marriage-like relationships until the government gives them a certificate of approval. But this is surely false.

Now that the United States Supreme Court, in Lawrence v. Texas, has decriminalized homosexual conduct throughout the nation, gays and lesbians are as free as anyone else to seal long-lasting sexual friendships with promises or vows (and supplement them with property-related contracts, if so desired) without government approval. Like other forms of friendship and like heterosexual marriage, permanent same-sex friendships can exist without state recognition of them. The argument for legal recognition of same-sex unions does not seek liberty. It seeks state involvement in what would otherwise be free personal relationships.

Justice Antonin Scalia seems recently to have made the same mistake, imagining that non-recognition of same-sex unions amounts somehow to a prohibition against them. Dissenting in the Lawrence case, Scalia writes:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . . called into question by today's deci-
sion . . . . See ante, at 2480 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added) [sic]).

He adds that it is impossible to distinguish homosexual sodomy from "other traditional 'morals' offenses."

However, same-sex marriage is not a criminal "offense." Indeed, it cannot be one as long as it has absolutely no existence in the eyes of the law. Where the state ignores what homosexuals do with their liberty—e.g. making and maintaining vows of fidelity—the state cannot restrict that liberty. Scalia is thus wrong to think that legal certification of same-sex unions is a logical consequence of Lawrence's invalidation of state intrusion into personal relationships.

2. Id. at 2490 (Scalia, J., dissenting).
3. Id.
4. Although the Human Rights Campaign Foundation states that thirty-seven states have "anti-gay marriage" statutes, in none of the listed statutes is there a penalty, such as imprisonment or a fine, for homosexuals living together in a marriage or marriage-like relationship (or attempting to do so). See Human Rights Campaign Foundation, http://www.hrc.org/familynet/chapter.asp?article=554 (updated July 23, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).
5. Lawrence might invalidate a law (if there were one) that prohibited homosexuals from making private marriage vows, because such a ban would take notice of and prohibit one use of their liberty "pertaining to sex." A few state laws might arguably fall into this category. For example, Arizona law states, "Marriage between persons of the same sex is void and prohibited." ARIZ. REV. STAT. ANN. § 25-101(C) (West 2000). (However, the lack of any attached penalty would seem to turn this "prohibition" into merely a redundant statement of non-recognition.) In the same way, as Justice Scalia avers, Lawrence could well lead to the abrogation of penalties for "bigamy," under the argument that the number of one's permanent sexual partners is a private matter. But Lawrence's goal of sexual liberty need not logically lead to official state recognition of bigamous unions. (Punishment for bigamy is an oddity in the criminal law. Ordinarily, there can be no punishment for doing, or "attempting" to do, that which one knows to be legally impossible—e.g., enter into a legally recognized same-sex marriage. Thus it is extremely unlikely that any state would enact laws penalizing invalid same-sex unions.)
6. The majority opinion in Lawrence supports the view of this essay that liberty may require non-punishment without requiring state recognition: "The statutes [banning homosexual sodomy] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." 123 S. Ct. at 2478. "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Id. at 2484. Any right to positive governmental intervention in the form of certification is obviously quite a different question.
But wait. Every modern state maintains a registry of certain different-sex unions, i.e., of marriages. Doesn't this mean that heterosexuals have a liberty that homosexuals lack, the liberty to enter into registered unions? Perhaps, but only in the curious sense that heterosexuals are free to become less free—and are encouraged by the state to do so. For the most part, marriage-related legislation limits, rather than increases, individual freedom: if heterosexuals try to marry two others at once, they (unlike similarly-situated homosexuals) may be sanctioned for bigamy—to take an obvious duty imposed by the state. Frankly, marriage law can more easily seem like some hangover from an earlier moral paternalism than like an instrument of individual freedom; it is so regarded by many contemporary homosexual as well as heterosexual thinkers.

It makes no sense, however, to think that liberal, secular states would go out of their way to restrict freedom for the sake of an antiquated morality. And if governments were somehow strongly interested in preserving ancient, quasi-religious customs, why would they always stop at marriage? Why not officially certify and reinforce the limitations that result from other spiritually-significant relationship events, such as the ordination of priests and ministers or the monastic vow of stability? But no modern state does these things.

Why, then, do governments continue to register and structure heterosexual marriages, if not for the sake of morals or relig-

7. Marriage may also obstruct a participant's ability to separate by imposing divorce proceedings, property division, and alimony; it may limit an individual's freedom to bequeath property upon death; it may make an individual liable for spousal debts; and it may restrict a member's sexual partners through social and even criminal norms. For instance, adultery—an offense only when a married person is involved—is punishable in various states. See, e.g., ALA. CODE § 13A-13-2 (1994); COLO. REV. STAT. ANN. § 18-6-501 (West 1999); FLA. ANN. STAT. § 798.01 (West 2000); MASS. ANN. LAWS ch. 272 § 14 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 750.30 (West 1991); N.Y. PENAL LAW § 255.17 (McKinney 2000).

8. See, e.g., Steven K. Homer, Note, Against Marriage, 29 HARV. C.R.-C.L. L. REV. 505, 505 (1994) (arguing that "marriage lacks legal as well as experiential coherence" and "is a place-holder for a series of idealized value judgments about our intimate lives"); Patricia A. Cain, Imagine There's No Marriage, 16 QUINNIPAC L. REV. 27 (1996) (arguing that marriage is more aptly defined by its benefits to government rather than the married couple).

9. The Rule of St. Benedict states that when a man is to be received into a monastery, "he comes before the whole community in the oratory and promises stability, fidelity to monastic life, and obedience." THE RULE OF ST. BENEDICT 269 (Timothy Fry ed., Liturgical Press 1981) (emphasis added). The Rule requires that someone be punished "who would presume to leave the enclosure of the monastery, or go anywhere, . . . without the abbot's order." Id. at 289.
ion? Is there some compelling reason that could account for state intervention in different-sex unions, and only in those unions? Everyone knows the answer: Sexual relationships between women and men may generate children, beings at once highly vulnerable and essential for the future of every human community. The good of those children as well as the common good thus require that that community do all it can to stabilize and secure such relationships. Vows of lasting monogamy receive public recognition and reinforcement because they help produce human beings able to practice ordered liberty.¹⁰

Does this singling out of potentially fertile relationships entail disapproval of infertile sorts of friendships? Not at all—no more than the singling out of binding contracts for legal enforcement entails disapproval of informal promise-making. The government need not be trying to suppress the kinds of friendships and promises it does not aid. It may simply prefer, rightly, to leave us alone except where protection of the weak or the common good requires intervention.

In fact, the infertile character of same-sex relations ought legally to entitle homosexuals to a greater sexual freedom than that of heterosexuals. Insofar as the sexual prohibitions listed above by Justice Scalia are aimed at confining intercourse to traditional marriage in order to protect any children conceived or born as a result, there is no similar state interest in limiting same-sex behavior. Bigamy has already been mentioned, but people in same-sex unions ought also to be immune to prosecution for crimes like adultery as well. Such immunities can be seen as special same-sex benefits flowing from the child-centered rationale for legal marriage.

Along with limits, the public weal also requires special benefits for relationships within which children may be born. Why would a couple be willing to accept public involvement (and, to a degree, control) in its most intimate concerns if it had no strong incentives to do so? Furthermore, being faithful and raising children obviously involve burdens still heavier than public intrusion in the form of marriage laws. Since bearing these burdens eventually benefits the whole community, it makes sense for the com-

¹⁰ Justice Scalia is thus incorrect when he mocks Justice Sandra Day O'Connor for describing "[the preservation of] the traditional institution of marriage" as a "legitimate state interest." Lawrence, 123 S. Ct. at 2496. He claims that her use of the phrase "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples." Id. at 2496. In fact, as the argument in this essay demonstrates, Justice O'Connor is right to say that "other reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group." Id. at 2488.
munity to provide concrete rewards in the form of special tax, social security, and other legal benefits. This is especially true where one spouse—usually the woman, but sometimes the man—gives up much or all of a career for the sake of raising children. Such a parent voluntarily shares the vulnerability of his or her children by becoming a dependent. Justice, the good of the children, and the common good all demand that the community at least lessen the financial cost of such self-sacrifice.

It is such benefits, not freedom to form permanent relationships, that gays and lesbians obtain through official recognition of their unions. They obtain a share of what really amount to state subsidies, as well as of the public approval that goes along with sacrificing for the good of others, in exchange for increased legal regulation of their property and liberty. They may be making a mistake as to their own best interests here, in terms of flexibility and freedom. (Some gun owners find even simple registration schemes ominous. How can gays and lesbians be sure registry lists won’t be harmful in the end?) In any event, they certainly cannot claim a like community interest in their unions, for gays and lesbians are not, nor do they generate, vulnerable citizens in need of special protection.

Unless: Aren’t gay and lesbian unions also potentially fertile, in that same-sex couples may jointly adopt children in some communities? Such an argument is at least on the right track in attempting to articulate a public interest in such unions. But it does not really work.

Different-sex unions, without any outside help or knowledge and without a conscious decision by either spouse, are able to engender children. There is thus a public interest in stabilizing

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11. Included among the benefits married persons enjoy are spousal privilege under the Federal Rules of Evidence, Social Security survivors’ benefits based upon the spouse’s work history, pension benefits, immigration preferences, immunity from Federal Estate and Gift Taxes on transfers between spouses, health insurance benefits, tort rights in each other, intestate succession preferences, and conjugal visits. See Homer, supra note 8, at 515.

12. Thus the Internal Revenue Code adds a special income tax benefit (joint return) for such households. See I.R.C. § 1(a) (West 2003).

13. See Laurie Essig, Same-Sex Marriage: I Don’t Care if it is Legal, I Still Think it’s Wrong—and I’m a Lesbian, Salon.com, July 10, 2000, at http://dir.salon.com/mwi/feature/2000/07/10/marriage/index.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Paula Ettlebrick, Since When Is Marriage a Path to Liberation?, OUT/LOOK, Fall 1989, at 9, reprinted in William B. Rubenstein, Sexual Orientation and the Law 721 (2d ed. 1997); Homer, supra note 8; Cain, supra note 8. For a thoughtful counter-argument (that same-sex marriage is a good thing), see William N. Eskridge, The Case For Same-Sex Marriage (1996).
them as soon as they exist. Same-sex unions in themselves are absolutely infertile, so there is no possible child-related reason why a community should care when they are formed or dissolved, though it would wish to know if they were to adopt children. If a community decides to permit same-sex partners to jointly adopt, then the point at which such adoptions take place is the moment when such unions need to be stabilized. In other words, adoption by same-sex couples is a good reason to grant legal recognition to their unions, but only at the time of each adoption—not before.

However, if the argument of this essay is right—that a liberal regime should not get into the relationship-certification business except to protect children—why would we permit marriage to last far beyond child-bearing age and even permit elderly persons and other infertile heterosexuals to marry? Letting marriage

14. For discussion of some of the policy issues here, see Charlotte J. Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective, 2 DUKE J. GENDER L. & POL'Y 191 (1995) (arguing, through the use of social science data, for homosexual adoption), and Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. ILL. L. REV. 833, 897 (1997) (arguing that “[t]he [social] impact on children of such radical changes in the form and structure of the family and in the institution of marriage that is the basis of the family, and of society, have not been carefully considered”).

15. Besides protection of potential children and potential parents, another reason to reinforce heterosexual unions ab initio is to make the ascription of paternity more plausible. This problem cannot arise in a homosexual union. If one partner has a child—e.g. by artificial insemination or other consciously chosen process—it is known with absolute certainty that the other partner is not the biological parent. Even if two gay men mix their semen before inseminating a female friend, one of them can be shown by DNA testing to be the only biological father. The parenthood of the second partner is called adoption and is within the joint control of the partners and the state. Therefore, the state need not be concerned about reinforcing the bond between a child’s potential same-sex parents until the adoption decision.

16. At the end of his dissenting opinion in Lawrence, Justice Scalia poses a similar question: “[W]hat justification could there be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution’ . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” 123 S. Ct. at 2498.

His formulation contains two errors. Those who ask for new public benefits for their liberty are those who need to come up with an adequate justification, not the state that has never provided such benefits. And there is a better formulation than “encouragement of procreation” to explain why the advocates of same-sex marriage do not meet their burden of proof, namely, that homosexual unions cannot in themselves produce children in need of state protection. This child-protective reason for recognizing only heterosexual marriages remains valid even if, perhaps because of some fear of overpopulation, the state does not wish to encourage procreation. (But for a defense of procreation as a state interest, see Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J. L. & PUB.
last a lifetime is easy to justify. Even adult children often need their parents' guidance and security in raising their own kids. It would be disruptive of ongoing family life, as well as often unfair to a dependent, non-working spouse, to terminate marriage automatically as soon as the wife becomes infertile, while allowing the still-fertile husband to get married again. Perhaps we could screen people for infertility before letting them marry. But such screening would probably be a burdensome and politically unacceptable invasion of our privacy. And there would quite often remain at least a slight chance of a child emerging from heterosexual relations, as against zero chance from homosexual relations.


19. If infertility were easy to determine with certainty and in a non-intrusive way, then the argument of this essay would indeed cut against legal marriage for infertile heterosexual couples.

Some readers may be concerned about this conclusion for the practical reason that under traditional Judeo-Christian morality, unmarried persons may not obtain the unitive benefits of sexual intercourse. However, the absence of legal marriage would not preclude religious marriage, or other forms of private mutual commitment, that could make sexual relations appropriate and profound even for elderly and other infertile persons. Anti-fornication statutes could nominally be applied to such unrecognized unions, but these laws are rarely enforced and would probably be held invalid under *Lawrence*, especially if they were used to penalize clearly infertile couples (where there would be no state interest in preventing procreation by unmarried persons). Because homosexual couples are in disagreement with a core part of traditional Judeo-Christian teaching on sexual relations, i.e., that which forbids homosexual acts, it seems less likely that they would feel a similar need to enter into marriage before having sex with one another. But if they did, an unofficial commitment ceremony would be possible for them as well. See also the discussion in supra note 5.

Other readers might raise a deeper, more theoretical (and perhaps more telling) objection to the implication of this essay that clearly infertile heterosexuals might properly be denied legal marriage. Even where they are infertile, males and females can be said to be in their nature (as shown, e.g., by their anatomy) to be designed for heterosexual reproduction and thus for marriage. Is a person's "nature" an impermissible category for legal treatment? Is current
All that has been said so far amounts to an argument that the reasons behind legal recognition of different-sex unions do not lead to official certification of same-sex unions. Those proposing legal recognition of the latter cannot show that fairness or protection of the vulnerable or nurture of future citizens requires state intervention. But there are also great harms generated by such recognition.

First of all, it is unjust to the community as a whole that the public purse be used to subsidize couples that do not, as couples, equally serve the common good. Those subsidies were set up to encourage and support unions that are in their nature able to generate children. It is not right to siphon these benefits off and pass them on to people to use largely for their private benefit.

Furthermore, to reward some private relationships would be unjust to many remaining unsubsidized relationships. If providing emotional security (or division of labor, or economies of scale, or some other such benefit) were considered a sufficient reason to recognize same-sex couples, why not groups of three, four, or fourteen? And why limit official unions to those based on sex? A monk’s ties to a monastery might be strengthened by legally-imposed duties. In fact, how could any sort of non-criminal friendship rightly remain unsubsidizable, under the Equal Protection Clause?

David Chambers of the University of Michigan Law School, in an article favoring same-sex marriage, has written:

[W]e should respect ... claims made against the hegemony of the two-person unit ...

....

.... If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two.

....

.... By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more ... and to units

function with capacity the only valid legal criterion? If so, how can we continue to consider any serious disabled persons to possess full human dignity under the law? For further reflections, see John Finnis, The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations, 42 AM. J. JURIS. 97 (1997).
composed of two people of the same sex but who are bound by friendship alone.\textsuperscript{20}

What would happen if we took Professor Chambers' advice and offered generous public benefits to every emotionally satisfying, long-term relationship? Would the direct and indirect costs rise so high that they could no longer be paid? Consider, if you will, not only economic costs, but also the quality of civil society. Do we really want a State Friendship Registry? Even if the government used mainly positive incentives, rather than penalties, to support its scheme, would there not be too great an intrusion into private life? Would we not have lost too much freedom and flexibility in our personal relationships? Would we not have created an excessive bureaucracy?

Surely the answer is "yes." Yet every omission from the official list would be rightly attacked as discriminatory as long as the purpose of registration were to provide primarily private benefits. If the way back to public support solely for heterosexual marriage were politically closed, I predict the government would decide just to get out of the registration business entirely. No relationships at all would be certified or subsidized. Children would not be abandoned—professional childcare would no doubt flourish—but the legal institution of marriage would disappear.
