

WHAT IS IN A NAME: WHY THE EUROPEAN SAME-SEX PARTNERSHIP ACTS CREATE A VALID MARITAL RELATIONSHIP

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I. INTRODUCTION

Throughout Europe there is a growing movement to allow same-sex couples to register their domestic partnerships. Since Denmark lead the way in 1989,¹ Norway,² Sweden,³ Iceland,⁴ and the Netherlands⁵ have followed with similar legislation. Additionally, domestic partnership legislation is being considered in Finland, Spain, Luxembourg, Switzerland, Belgium, Germany, Italy, and France.⁶ The cabinet of the Czech Republic recently approved a bill for presentation to the Chamber of Deputies that would extend to same-sex partners many social and property rights now reserved to heterosexual couples.⁷ Indeed, if only two more countries pass legislation authorizing same-sex partnerships, one-third of all European Community countries will

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¹ See Danish Registered Partnership Act, D/341 H-ML No. 372 (June 1, 1989) (English translation available in Jorge Martin, Note, *English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 CORNELL INT'L L.J. 419, 430 n.79 (1994)).

² See Norwegian Bill on Registered Partnership, Act No. 40 (Apr. 30, 1993) (English translation available at <<http://www.stud.ntnu.no/studorg/ilh/ilh/english/partnership.html>>).

³ See Law Regarding Registered Partnership (issued June 23, 1994).

⁴ See Law on Approved Cohabitation, arts. 1-9 (June 12, 1996) (English translation available at <<http://users.cybercity.dk/~dko12530/nordictx.htm>>).

⁵ See The International Lesbians and Gay Association (visited Oct. 24, 1999) <http://www.ilga.org/Information/legal_survey/europe/netherlands.htm *Partnership> (noting that since January 1, 1998, "same-sex couples have been able to legally register their partnership (under the Partner Registration Act)"). The Netherlands is considering a bill to allow for same-sex marriages, but such a bill will not eliminate the registered partnership bill already in place which governs both same-sex and different sex partnerships. Nederlands Vereniging Tot Intergatie Van Homasekualiteit (visited Oct. 24, 1999) <<http://www.coc.nl/index.html?file=marriage>>.

⁶ See Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 736-40 (1998) (reviewing international trends toward same-sex marriage); see also Paul L. Spackman, Note and Comment, *Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community*, 16 AM. U. J. INT'L L. & POL'Y 1063, 1094-99 (1997) (surveying comprehensively European movements toward same-sex marriage).

⁷ *Government Approves Gay Partnership Bill*, CZECH NEWS AGENCY, Mar. 10, 1999, available in 1999 WL 5472948.

recognize same-sex partnerships.⁸ These European partnerships provide most, though not all, of the practical benefits, obligations, and rights associated with marriage. However, the various legislative actions authorizing these relationships refrain from designating the resulting partnerships as marriage. An important question is therefore raised. Are these same-sex partnerships a form of marriage? An affirmative answer to that question could have a major impact on the debate over same-sex marriage in America. This is because most of the relatively few American court decisions rejecting the right of gays to marry⁹ have been predicated upon the assertion that a union between two people of the same sex is not contemplated by the term "marriage."¹⁰ Professor Mary Ann Glendon has pointed out that court cases had conceptual-

⁸ See Spackman, *supra* note 6, at 1099.

⁹ See Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-gender Matrimony*, 5 MICH. J. GENDER & L. 353, 383 (1999) (noting that "[t]he entire body of case law on direct challenges to the denial of marriage licenses to same-gender couples spans more than twenty-six years, but includes only six appellate cases").

¹⁰ See *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (holding that strict scrutiny is not required since "[t]he operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman"); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons . . . The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) ("In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary . . . appellants are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined."); *Dean v. District of Columbia*, 1992 WL 685364, at *8 (D.C. Super. Ct. June 2, 1992) (insisting that same-sex marriage is by definition impossible and that even the Constitution could not override the immutability of the same-sex marriage restriction found in the Ten Commandments). The legal issues are different in England where there is no constitution to trump a statutory act of Parliament. However, definitional issues remain important. In *Harrogate Borough Council v. Simpson*, 16 Fam. Law 359 (1986), the court did not allow a surviving lesbian partner to take over the tenancy of a council house upon her partner's death. The court looked to the 1985 Housing Act (s. 113, Housing Act 1985) for a definition of family, defined as a couple living together as husband and wife. It then concluded that Parliament would not have intended a lesbian couple to fall within that definition. The general acceptance of same-sex partnerships as a valid form of marriage would make such a connection more tenuous. *But see Baker v. Vermont*, No. 98-032, 1999 WL 1211709 (Vt. 1999). In this case, the Vermont Supreme Court held that the state was required to extend the same benefits to same-sex couples as those received by married couples. *Id.* at *1. The court left to the legislature the job of coming up with a system that would ensure these benefits. Perhaps by examining the Euro-partnerships described in this paper, the legislature would arrive at a system that would satisfy the requirements set forth by the court.

ized "same-sex marriage not as prohibited but rather as outside the scope of marriage altogether."¹¹ This note will focus on the assertion that currently no country has a valid form of same-sex marriage.¹² If, however, this is not true and there are western countries which already recognize the validity of same-sex marriage, then the force of the argument that marriage does not (and in the strongest argument, cannot) contemplate a union between two people of the same sex is seriously weakened.

Many commentators suggest that marriage is a basic human right.¹³ United States Supreme Court decisions have, either in dicta or holding, asserted such a proposition.¹⁴ The United Nations, through the International Covenant on Civil and Political Rights (ICCPR), treats marriage, though not specifically same-sex marriage, as a fundamental human right.¹⁵ If such a right is

¹¹ Mary Ann Glendon, *Marriage and the State: Withering Away of Marriage*, 62 VA. L. REV. 663, 677 (1976) (analyzing *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973) and *Baker v. Nelson*, 191 N.W.2d 185 (1971)).

¹² See Lynn D. Wardle, *International Marriage and Divorce Regulation: A Survey*, 29 FAM. L.Q. 497, 500 (1995) (asserting that "[a]t present, same-sex marriage is allowed in no country in the world" and classifying domestic partnerships as "a form of second-class marriage" comparable to concubinage).

¹³ See Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 999 (1991) ("The individual interest in marriage is very strong. Indeed, it is fundamental."); see also Wardle, *supra* note 6, at 748 (stating that "[i]t is undoubtedly true that the right to marriage is a basic human right"). But see Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 954 (1992) (arguing that "rather than a right to be free from state interference, the right to marry can only be conceptualized as the right to place the power of the state behind previously agreed-to, consensual arrangements, and to forge a linkage between a variety of different rights and obligations derived from those arrangements").

¹⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (noting that the right of privacy surrounding marriage is "older than the Bill of Rights"); *id.* at 599 (noting that the right of privacy in the marital relationship is fundamental) (Goldberg, J., concurring); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" and that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (reaffirming the "fundamental character" of the right to marry); *Turner v. Safley*, 482 U.S. 78 (1987) (striking down Missouri regulation prohibiting prison inmate's marriage without the permission of the prison superintendent and declaring that for inmates as well as the population at large marriage was a fundamental right).

¹⁵ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-2 (1977), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (recognizing marriage as a basic human right). For a more detailed discussion of the ICCPR see generally Anne M. Burton, *Gay Marriage—A Modern Proposal; Applying Baehr v. Lewin to the International Covenant on Civil and Political Rights*, 3 IND. J. GLOBAL LEGAL STUD. 177

recognized as constitutionally fundamental, then under the Due Process clause of the Fourteenth Amendment of the United States Constitution, the ability of a legislative body to define the sub-constitutional terms under which the right can be exercised is limited through the standard of strict scrutiny.¹⁶ For instance, *Zablocki v. Redhail*¹⁷ overturned a Wisconsin law that denied marriage licenses to residents who were not in compliance with court-ordered support payments to their minor children or whose minor children were receiving state welfare assistance. The Court held that since the right to enter into marriage was of fundamental importance, restrictions placed upon entry into marriage by the state should be subject to a "critical examination."¹⁸ Further, the Court has ruled that states are limited in their ability to limit the breadth of rights through statutory definitions.¹⁹ Otherwise rights could be manipulated by simply defining them out of existence. Professor Mark Strasser, a leading commentator on the issue of same-sex marriage, has pointed out that "a court cannot simply cite a definition to establish a statute's constitutionality, unless that definition has independent and significant weight."²⁰ Legislatures or courts cannot arbitrarily define marriage as the union of one man and one woman and simply be done with the matter. This is not to say that they have not tried this tactic in the past. For instance, a Virginia court upheld that state's anti-miscegenation laws limiting the right of a person of one race to marry another by stating, "The law concerning marriages is to be construed and understood in relation to those persons only to whom that law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy."²¹ The United States Supreme Court rejected such reasoning in

(1995).

¹⁶ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (2nd ed. 1988) (noting that while there is a case for deference to legislative choices in some areas, "the idea of strict scrutiny acknowledges that other political choices—those burdening fundamental rights, or suggesting prejudice against racial or other minorities—must be subjected to close analysis in order to preserve substantive values of equality and liberty").

¹⁷ 434 U.S. 374 (1978).

¹⁸ *Id.* at 383 (stating that "critical examination" is equivalent to "strict scrutiny").

¹⁹ See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty.")

²⁰ Strasser, *supra* note 13, at 984.

²¹ *Stones v. Keeling*, 9 Va. (5 Call) 143, 148 (1804).

Loving v. Virginia.²² In that case, the Court held that legislatures may not manipulate a definition so as to exclude a class of people from the protection afforded them by basic human rights.²³ Simply put, the basic human right trumps the artificial limiting definition; substance takes precedence over mere form.

A statutory definition, if used to define a basic right, must have independent and significant weight. Under this approach, we can see the significance of a determination that Western legal systems recognize same-sex marriage. What if there is no Western legal system that recognizes the right of people of the same sex to marry? Certainly, the absence of such recognition would independently give a certain weight to assertions that the definition of marriage, utilized in discussions of the "fundamental right of marriage," does not need to include people of the same sex. What if, on the other hand, there are Western legal systems that recognize the right of people of the same sex to marry? Then any attempt to define marriage as a union of two people of the opposite sex is more likely to be viewed as an arbitrary attempt to limit access to a fundamental right.²⁴

Whether the various European partnership acts create a valid marriage is not a simple question to answer. Some commentators, who have written extensively on the subject of marriage, have chosen to avoid any serious attempts to define it.²⁵ Yet, a definition of marriage is a critical factor in deciding whether the restriction of the right of same-sex couples to marry intrudes upon fundamental rights and, consequently, whether such intrusions should be subject to strict scrutiny. It is not within the scope of this note to

²² 388 U.S. 1, 9 (1967).

²³ *See id.*

²⁴ Which is not to say that this would end the matter. Fundamental rights can be limited, though such limitations should be subject to strict scrutiny by the courts. Whether same-sex marriages would pass such scrutiny is outside the scope of this paper.

²⁵ *See, e.g.,* JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPEAN xxii (1994) ("Even in modern cultures with vast and standardized legal establishments, the technical definition of 'marriage' is difficult to formulate. . . ."); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 219-21 (noting that standard dictionary definitions are "unhelpfully circular" and that legal definitions fare no better); ALAN MACFARLANE, MARRIAGE AND LOVE IN ENGLAND, MODES OF REPRODUCTION 1300-1840 299 (1986) (noting that "[b]y the sixteenth century [the betrothal] had come to mean different things in different contexts"). Other commentators in attempting to provide a definition of marriage provide us only with a picture of marriage as it is currently practiced in Western society. For instance, Linda Eckols defines marriage as "[a] committed relationship between two persons, formalized by society, and with traditional, religious, and legal roots." Eckols, *supra* note 9, at 359. Such a definition fails to account for polygamous marriages that remain common world wide.

arrive at a comprehensive definition of marriage. Even without a comprehensive definition of marriage, however, it is possible to construct a working rubric against which European same-sex relationships can be compared. In order to develop a useful rubric, this note will first examine the conflict between the traditional view of the personal and political as separate entities and a contrasting postmodernist/feminist view that the personal is political. If this feminist view is accepted in its most radical formulation, then the very concept of "fundamental rights" being a safeguard against state action would be called into question. However, a middle ground is possible that, while recognizing the power of the feminist analysis, still allows for a distinction between the personal and the legal. In order to use this distinction, an inquiry will be made into the history of marriage prior to its legal recognition. It will be argued that law has not been completely free to define marriage but instead has adapted its rules to the way that society recognizes marriage.²⁶

The purpose of this inquiry will be to develop a model of the relationship between law and marriage. As one commentator has suggested, marriage is not an all-purpose concept whose existence or nonexistence can be determined without regard to the question to which the validity of the marriage is incidental.²⁷ Nor can marriage be naively viewed as an exclusively legal creation whose validity is determined independently of the society in which the marriage is present. Rather, both marriage itself and the laws regulating marriage are affected by a complex series of interactions between legal, social, and ideological forces.²⁸

This note will then turn to a discussion of the Danish Partnership Act, since it is the oldest of such acts and serves as a model for most of the other European partnership acts. The "Euro-partnership"²⁹ will show that the act operates to create a valid marriage. Further, it will be shown that both

²⁶ *But see* ALAN WATSON, *THE EVOLUTION OF LAW* 73-76 (1985). Professor Watson argues for a greater recognition of the importance of the legal culture on the creation of law. He points out that systems are more apt to borrow "new" law from a system they recognize as akin to their own rather than creating new law based upon the societal needs of the people. Thus, the system from which the legal culture in a society imports its law is more important in determining, for example, whether that society would operate under a community property arrangement than would be the society's attitudes toward the equal partnership status of women.

²⁷ *See The Family in International Law: Some Emerging Problems*, THIRD SOKOL COLLOQUIUM 1, 17 (Richard B. Lillich ed., 1981) (suggesting that this is likely).

²⁸ MARY ANN GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 3 (1977).

²⁹ As far as I can determine, the term "Euro-partnership," a term used to refer to the domestic-partnership/same-sex marriage relationship model created by the Danish and similar European legislation, is a term of my own creation.

American and European contemporary cultures recognize the non-legal validity of same-sex marriages. Finally, it will be argued that the societal and ideological recognition of same-sex marriage, coupled with the domestic partnership's extension of marital rights to same-sex partnerships, supports the conclusion that the European domestic partnership acts constitute legal marriage.

II. THE RELATIONSHIP OF LAW TO MARRIAGE

As we approach the twenty-first century, it is very easy to take state regulation of marriage for granted.³⁰ Yet state regulation of marriage is a relatively recent occurrence.³¹ What enables us to so easily ignore the existence of marriage as an institution separate from law? It may, of course, be argued that there is no failure to notice a valid distinction. Marriage is simply not separate from law. This theory is summed up in the famous maxim: "The personal is political." The idea behind the maxim suggests that no disjunction may exist between our concepts of marriage, gender, or person and the legal culture that provides those concepts and regulates their behavior. A complete sphere of privacy surrounding either the individual or the family is a fiction having no legal significance. All legal choices impact the family. As one commentator defines the position, "Since the state constantly defines and redefines the family and adjusts and readjusts roles within the family, there can be no such thing as non-intervention. The legal system *must* intervene in the family."³² Indeed, according to this view, law and social policy determine who is a child and who is an adult, who is a parent and who is not, who belongs to a family and who does not. To say that a family "might exist independently of a legal system is as nonsensical as the claim that wills and codicils might exist independently of a legal system."³³

Opposing this idea is the traditional liberal notion of the individual as both pre-existing the state and maintaining a significant existence even after entry into the state. While some philosophers, such as John Locke, have felt that the civil society should imitate the moral obligations of the private compact, there

³⁰ See GLENDON, *supra* note 28, at 304.

³¹ See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 4 (1993).

³² Laurence D. Houlgate, *What is Legal Intervention in the Family? Family Law and Family Privacy*, 17 *LAW & PHIL.* 141, 143 (1998).

³³ Laurence D. Houlgate, *Must the Personal Be Political? Family Law and the Concept of Family*, 12 *INTL. J.L. POL'Y & FAM.* 107, 109 (1998).

is no necessary connection between the two.³⁴ Laurence Houlgate describes the traditionalist position as containing four components. First, the family exists naturally, predating the existence of law.³⁵ Second, while the obligations existing within the family are natural, the obligations arising from law are positive.³⁶ Therefore, positive law creates, defines, and enforces legal duties that are logically separate and independent of the "natural family."³⁷ Third, the interaction between positive man-made law and the "naturally" occurring family unit gives rise to the idea of public legal intervention in the private family.³⁸ Finally, these words, public and private, may be used to mark off areas where it is permissible for the state to intervene (public) and where it is not permissible (private).³⁹

While the two positions appear to be facially contradictory, reconciliation is possible.⁴⁰ For instance, the postmodern view that there are no possible "meanings" of marriage apart from the political is, on one level, refuted by the existence of relationships that we would define as marriage prior to the institution of the civil recognition of marriage.⁴¹ An analogy from linguistics might be illustrative. When a new language is being studied, there is a tendency to analyze combinations of sounds (phonemes)⁴² in the language as words and to assign those words roles such as verb or noun. Certainly those words and their relationships existed prior to their study and catalog. But it is dependent upon the attitude of the observer whether verbs or nouns existed in the language prior to the study. Nouns in one sense had an existence prior to the linguistic analysis of English. But nouns in another sense are both created

³⁴ See *id.* at 141. See generally JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 39-48 (J.W. Googh ed., Basil Blackwell 1956) (1690) (describing the connection between the personal and the civil).

³⁵ See Houlgate, *supra* note 33, at 107-08.

³⁶ See *id.* at 108.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.* at 117. While Houlgate concludes that they are complementary, my analysis follows a different track. For defenses of the viability of liberal feminism, see Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999) (advocating a three-part reconstructive task for a liberal feminist conception of privacy) and Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (criticizing the feminist model "atomistic man," which is said to be the root of liberalism and the legal system, as a caricature).

⁴¹ See *id.* at 110.

⁴² LEONARD BLOOMFIELD, LINGUISTIC ASPECTS OF SCIENCE 22 (U. of Chicago Press 1974) (1939) (noting that even the number of phonemes that exist in a language is dependent upon the method of distinguishing them).

and defined by linguistic analysis. It is this dichotomy that is operating in the tension between the personal and the political.

It is still possible to create a realm of privacy that may be defended against intrusion by the state. This is especially true if one is willing to confine the definition of intrusion to a proactive action by the state.⁴³ For instance, laws requiring all property to be treated as community property would be seen as a form of intrusion. On the other hand, laws allowing a couple to choose how they would title their property would be seen as permitting a sphere of privacy. Yet it is obvious that both scenarios result from political choices. Thus, law may not always intrude into the personal, at least in the sense of requiring a person to take actions against her will. Yet in constituting the choices and actions that may be taken, the political is constantly defining the personal. Viewed in this light marriage may be said to have a pre-legal existence (that is, there was a time when marriage was not recognized and granted rights by the state), but it has never had a pre-political existence. Therefore, it is possible to speak in a somewhat meaningful way about state intervention into the personal or family while at the same time realizing that all such conversation is made possible, on another level, by the political.

What then was marriage like before the state began intervening? The answer to this question provides a better idea of what we mean by marriage as a basic human right. Further, since the idea of basic human rights acts as a limit on the ability of the state to intervene in marriage, it is important to better understand marriage both before and during the period when the legal culture began recognizing and defining marriage.

III. THE DEVELOPMENT OF LAW AND MARRIAGE

It is not known when the shift between biological and cultural mating occurred.⁴⁴ Neither is it easy to determine what is innate and what is cultural in humanity.⁴⁵ Nonetheless, contrary to what some scholars assert,⁴⁶ marriage

⁴³ See, e.g., Agnes Heller, *Rights, Modernity, Democracy*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 346, 346-60 (Drucilla Cornell et al. eds., 1992) (arguing that rights themselves are fictions meant to be fictions but are useful nonetheless as pure practical political principles for regulating political actions and for constituting a socio-political arrangement).

⁴⁴ See GLENDON, *supra* note 28, at 305.

⁴⁵ See *id.*

⁴⁶ See BERTRAND RUSSELL, *MARRIAGE & MORALS* 130 (Liveright 1970) (1929) (arguing that legality is marriage's essential component but yet noting that the law merely embodies a practice already existing).

as a socially regulated institution arose before the law began to assert recognition and control.

In Roman times and among Germanic people, marriage was not regulated by legal norms but by social norms.⁴⁷ While marriage existed in the sense of being a social status, the marriage rite was important only in certain circumstances, such as when property was exchanged.⁴⁸ However, the lack of legal regulation did not mean that marriage was unregulated or that the law was indifferent. Rather, the existence of a marriage became important when considering such things as questions of succession on death, allocation of responsibility for civil wrongs, or membership in the "houses" of the body politic.⁴⁹

An example of the laxity with which Roman law regulated marriage can be seen by the institution of free marriage. The husband and wife married simply by starting life in common and by regarding each other as husband and wife (*affectio maritalis*).⁵⁰ If the intention was missing or if it ceased, then the marriage did not exist or was dissolved.⁵¹ While initially only the husband may have been able to unilaterally terminate the marriage, by the third century B.C. either husband or wife could terminate the marriage.⁵² Mary Ann Glendon describes Roman free marriage as a "formless transaction dissoluble at the will of either party. . . ."⁵³ The result of the minimal interest that the law paid in establishing a legal recognition of marriage was that even as late as the first half of the middle ages, marriage was regarded everywhere in Europe as either a personal or secular matter, almost entirely outside the law.⁵⁴

However, in England after the Norman Conquest, as well as in other areas of Europe, the clergy began to assert jurisdiction over marriage through ecclesiastical law. Because of tension with the common people who opposed a requirement that marriage be solemnized in church, legal fictions were developed which asserted that the parties intended that the marital arrangement would be formally solemnized.⁵⁵ Thus a person could be under contract to

⁴⁷ See GLENDON, *supra* note 28, at 306.

⁴⁸ See *id.* at 305.

⁴⁹ See *id.* at 306.

⁵⁰ See *id.* at 307.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See STEPHEN PARKER, *INFORMAL MARRIAGE, COHABITATION AND THE LAW* 12 (1990).

⁵⁵ See *id.* at 12-13.

marry someone to whom he or she was already married, at least in his or her own eyes and the eyes of society.⁵⁶

While church courts dealt with issues concerning the validity of the marital contract, English common law courts became interested in the issue of marriage as it related to property law. Common law courts held jurisdiction over questions concerning title to land.⁵⁷ The validity of a marriage, however, was material to the result in cases involving the widow's right to dower and the eldest son's right to his father's freehold land.⁵⁸ The common law developed a requirement that marriage must follow the exchange of consents *in facie ecclesiae* (at the door of the church) in order to be valid. This requirement, while more stringent than a mere private exchange of promises, was less stringent than the formal ecclesiastical requirements.⁵⁹ Significantly, this common law requirement only applied when questions of property were being considered. A marriage that did not meet this requirement could still void a latter marriage that did meet the requirement on the grounds that the first irregular marriage caused the second marriage to be bigamous.⁶⁰ Thus, the same social arrangement might be legally valid as marriage in regards to one question, but not legally valid as a marriage in regards to a different question. This distinction is important in our consideration of whether the Euro-partnerships create a valid form of marriage. One of the basic arguments used to say that the Euro-partnerships are not marriages is that the resulting arrangement lacks one or more of the legal benefits of marriage.⁶¹ However, as is apparent from the historical example of the relationship between marriage and titles to land, there may be valid marriages which do not grant the participants all of the legal benefits of marriage. Thus, the failure of the European same-sex partnerships to grant joint adoption rights or to authorize state church weddings should not be viewed as determinative of whether those partnerships are a valid form of marriage.

⁵⁶ *See id.* at 13.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.* at 13-14.

⁶⁰ *See id.*

⁶¹ *See* Cindy Tobisman, Recent Development, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians' Families?*, 12 BERKELEY WOMEN'S L.J. 112, 116-18 (1997) (listing the legal benefits lacking in Scandinavian domestic partnership laws that are present in European marriage and concluding that even the 'semantic reluctance' to the term same-sex unions as marriage is "dangerous to lesbian-headed families"); Wardle, *supra* note 6, at 736-37 (asserting flatly that "[n]o nation of the world permits same-sex marriage today" and then describing the Euro-partnership arrangements as tending toward the direction of marriage but noting they still lack some of the non-economic legal consequences of marriage).

Even with the increasing control of the church and the increasing regulation from common law, by 1700 only around fifty percent of women throughout Europe were married.⁶² Getting married was often an act of economic survival, and studies suggest that women of twenty who never married could expect to live nine years less than their married sisters.⁶³ As a form of economic protection, since a husband was obliged to support his wife and children, marriage was implied from pregnancy. Indeed, some researchers suggest that priests often registered couples as married even though no relevant statute (such as the Marriage Act of 1695) was satisfied.⁶⁴ In other words, what the community regarded as marriage became marriage. This flexible form of marriage performed an important function within the community by enabling social mores to create a marriage where neither civil nor ecclesiastical law provided for one.⁶⁵ We will see later that contemporary American and European social mores are likewise creating a form of marriage between partners of the same sex, though civil law has been slow to recognize this.

In looking at the interaction of law and marriage, we have been focusing on the evolution of marriage in Western Europe. Indeed, many commentators seem to suggest that the Western model of marriage is basic to all cultures. For instance, Professor Wardle says that “[t]he concept of marriage is founded on the factual reality that the union of two persons of different genders creates something unique”⁶⁶ He then goes on to suggest that “[t]he ubiquity of heterosexual marriage, the fact that marriage has exclusively referred to a heterosexual union in all cultures and across all time, suggests that this is not a matter of social construct.”⁶⁷ While these assertions are over-broad even in the context of Western culture, they are breathtakingly inaccurate from a global perspective. Polygamy is widespread culturally. For instance, Tunisia alone among the Arab world outlaws it. In West Africa, at least fifty percent of all women have at least one co-spouse who is a woman.⁶⁸ Professor William Eskridge of the Georgetown Law Center, a leading commentator on the issue of same-sex marriage, has written extensively on the *berdache*

⁶² See PARKER, *supra* note 54, at 15.

⁶³ *Id.*

⁶⁴ *Id.* at 20 (citing studies by Anthea Newman (1980) and E.A. Wrigley (1973)).

⁶⁵ See *id.* at 20.

⁶⁶ Wardle, *supra* note 6, at 748.

⁶⁷ *Id.* at 750.

⁶⁸ See Philippe Faragues, *The Arab World: The Family as Fortress*, A HISTORY OF THE FAMILY: VOLUME II: THE IMPACT OF MODERNITY 342, 343 (1996).

tradition found in Aztec, Mayan, Incan, and Native American cultures.⁶⁹ The “*berdache* is a person who deviates from his or her traditional gender role, taking on some of the characteristics of the opposite sex.”⁷⁰ *Berdaches* married persons of the same sex and Native American laws and cultures recognized those marriages as legitimate.⁷¹ Further, a 1950s study indicated that the phenomenon occurred worldwide. The survey found normal and socially acceptable same-sex activity in forty-nine of the seventy-six societies surveyed.⁷² The authors noted that “[i]n many cases this [same-sex] behavior occurs within the framework of courtship and marriage . . . In other words, a genuine mateship is involved.”⁷³

Of course, even in what might be considered traditional Western society, marriage cannot be so readily viewed as a romantic coupling of one man and one woman. K. Anthony Appiah, Professor of Afro-American Studies and Philosophy at Harvard University, points out that during some periods, Western marriage was not the creation of a relationship between individuals but between families.⁷⁴ This attitude is still reflected in our use of the term “in-law.”⁷⁵ Additionally, polygamous marriages were common among early Mormons. Fundamentalist Mormons still practice polygamy and have been given more and more rights in a series of Utah Supreme Court cases.⁷⁶ Interestingly, even after the death of the husband, the surviving wives may consider themselves as wives to each other.⁷⁷

Clearly, marriage had an active and vibrant existence before its codification into law. Contrary to some commentators’ assertions, there is no “ ‘deeply entrenched paradigm’ of the ‘two-person romantic unit of husband and wife’ ” which same-sex marriage will “cast onto the trash heap of history.”⁷⁸ Rather,

⁶⁹ See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 27-31 (1996).

⁷⁰ *Id.* at 28.

⁷¹ *See id.*

⁷² See Clellan S. Ford & Frank A. Beach, *PATTERNS OF SEXUAL BEHAVIOR* 130 (1951).

⁷³ *Id.* at 131.

⁷⁴ See K. Anthony Appiah, *The Marrying Kind*, N.Y. REV. OF BOOKS, June 20, 1996, at 48.

⁷⁵ *Id.*

⁷⁶ *See, e.g.*, In the Matter of the Adoption of W.A.T., 808 P.2d 1083 (Utah 1991) (holding that state prohibition of polygamy “does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists”); Sanderson v. Tryon, 739 P.2d 623 (Utah 1987) (holding wife’s continued polygamy does not disqualify her from retaining custody of her children).

⁷⁷ See Ken Driggs, *Utah Supreme Court Decides Polygamist Adoption Case*, 15:3 SUNSTONE 67-68 (1991).

⁷⁸ Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 163 (1997).

our contemporary version of marriage is quite different both in culture and law from the various versions preceding it. Further, even our contemporary versions of marriage do not so easily fit into the romantic paradigm of one man and one woman, as some seem to assume.

IV. THE EUROPEAN SAME-SEX PARTNERSHIP ACTS

Denmark was the first modern European nation to pass an exclusively same-sex partnership act.⁷⁹ Two years earlier Sweden had passed a more limited same-sex partnership but as part of a broader domestic relations reform package applying to both heterosexual and same-sex domestic partnerships. The act was more limited in nature, and Sweden has subsequently replaced it with a more expansive version of same-sex marriage that is analogous to the Danish act.⁸⁰ The Danish act was the result of a study begun by a commission in 1984, with a report issued in 1988.⁸¹ The final act was altered somewhat, the result of concerns expressed by various political factions,⁸² but passed the Folketing by a vote of seventy-one to forty-seven.⁸³

This Danish act has been the recipient of extensive commentary in the academic press. Characterizations of the act have varied,⁸⁴ so it may be valuable for us to look at the language (albeit a translation) of the act itself. The act specifically provides that "subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of a marriage."⁸⁵

⁷⁹ See Martin D. Dupuis, *The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-sex Relationships in the United States and Denmark*, 9 INT'L J.L. & FAM. 86, 86-87 (1995).

⁸⁰ See Homosexual Cohabitees Act (1987) (Swed.); Cohabitees (Joint Homes) Act (1987) (Swed.).

⁸¹ See Dupuis, *supra* note 79, at 104.

⁸² See *id.* at 109.

⁸³ See *id.* at 104.

⁸⁴ See, e.g., Wardle, *supra* note 6, at 737 n.7 (claiming that in Denmark and Sweden domestic partners "are not considered married for purposes of international treaties" whereas, under the Danish act, provisions of international treaties do apply if the other contracting party agrees). This is a significant difference from what Wardle claims.

⁸⁵ Danish Registered Partnership Act, *supra* note 1, § 3. The full text of the act is as follows:

THE DANISH REGISTERED PARTNERSHIP ACT

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, do make known that:

The Danish Folketing has passed the following Act which has received the Royal Assent:

The act basically incorporates Danish marriage law and extends most of the features of that law to same-sex partnerships. For instance, the act creates mutual obligations of maintenance and rights regarding compensation and insurance benefits, hereditary rights, rights of survivorship, and responsibility

1.-Two persons of the same sex may have their partnership registered.

Registration

2.-(1) Part I, sections 12 and 13(1) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnership[s], cf. subsection 2 of this section.

(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.

(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

Legal Effects

3.-(1) Subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of a marriage.

(2) The provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners.

4.-(1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.

(2) Clause 3 of section 13 and section 15(3) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.

(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.

(4) Provisions of international treaties shall not apply to registered partnership[s] unless the other contracting parties agree to such application.

Dissolution

5.-(1) Parts 3, 4, and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership, cf. subsections 2 and 3 of this section.

(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.

(3) Irrespective of section 448 c of the Danish Administration of Justice Act[,], a registered partnership may always be dissolved in this country.

Commencement etc.

6.-This Act shall come into force on October 1, 1989.

7.-This Act shall not apply to the Faroe Islands nor to Greenland but may be made applicable by Royal Order to these parts of the country with such modifications as are required by the special Faroese and Greenlandic conditions. *Id.*

for funeral arrangements.⁸⁶ Couples registered under the act are subject to the same community property rules as are opposite-sex couples united under the Danish Marriage Act.⁸⁷ Indeed, since the act incorporates all features of marriage except for those specifically excluded, it is easier to analyze what is missing.⁸⁸

The primary right missing from the Danish act is the right for couples to jointly adopt children. A similar prohibition is in place in Sweden, the Netherlands, Hungary, and Iceland.⁸⁹ However, the Dutch cabinet has recently approved a plan to allow same-sex couples to adopt children.⁹⁰ The Dutch Parliament is expected to act upon it this year.⁹¹ Also illustrative of changing attitudes is a recent public opinion survey that showed seven in ten Dutch people thought gays would make good parents.⁹²

It may be assumed that if the Danish legislature had not wished to extend marriage rights to same-sex partners it did not have to address same-sex partnership rights by the incorporation of marriage law. The recent Act Relating to Unmarried Couples passed in Hawaii is illustrative of an approach used by a legislature that specifically wished to avoid extending the right to marry to same-sex couples but still wished to allow them some partnership benefits.⁹³ That act created a "reciprocal beneficiary relationship" that was open to all couples legally prohibited from marrying under state law.⁹⁴ The law even specifies that it is as open to "a widowed mother and her unmarried son" as to two individuals of the same sex.⁹⁵ The Danish act, by contrast, incorporates the rules of marriage to regulate who may register under the act and merely extends those rules to include couples of the same gender. The benefits under the Hawaii act are far more limited. They are specifically enumerated and include an official registry, hospital visitation rights, public employee benefits, the right to elective shares in the decedents' estates of their partners, workers' compensation survivor benefits, and damages in wrongful

⁸⁶ See Dupuis, *supra* note 79, at 104.

⁸⁷ See Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189, 204 (1997).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *Dutch Cabinet Oks Adoptions by Gays*, ARIZ. REPUBLIC, Nov. 15, 1998, available in 1998 WL 7809777.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Act Relating to Unmarried Couples, No. 383, 1997 Haw. Sess. Laws (H.B. No. 118).

⁹⁴ *Id.*

⁹⁵ *Id.*

death actions.⁹⁶ While this list of benefits is broader than the typical domestic partnership registry,⁹⁷ it is not as comprehensive as the Danish act.⁹⁸ The notable difference is that the Hawaii act starts with a blank slate and creates specific rights, while the Danish act, as do other Euro-partnerships, starts with the full complement of marital rights and then excludes a select few.

Thus, the Euro-partnership, while not utilizing the name marriage, is a marital relationship as complete as many in history. On the other hand, the American model, as exemplified by the Hawaii approach, is a far more limited arrangement designed to grant specific enumerated rights to two individuals. These individuals may be people who not only are legally prohibited from marrying but, in some instances, who would not contemplate marriage even if it were a legal option.

V. HOW SOCIETY VIEWS SAME-SEX PARTNERSHIPS

As we have seen, marriage existed prior to the relatively recent entry of the state into its regulation.⁹⁹ Further, as the state began to regulate marriage, sometimes a marriage would be seen as valid in relation to one question and invalid in relation to another question.¹⁰⁰ Thus, neither state regulation nor the validity of a marriage in regard to every legal benefit that stems from marriage is necessary for the recognition that a relationship is a valid marriage. While the Danish partnership act appears to functionally create a marriage, an important question remains. That is, do the Euro-partnerships also create a relationship that is recognized by society as marriage? It is true that the act assigns to the same-sex relationship almost all of the benefits that any marriage would possess.¹⁰¹ However, if society at large looks upon the

⁹⁶ *Id.*

⁹⁷ *See, e.g.*, Atlanta, Ga., Ordinance 96-0-1018 (Sept. 3, 1996) (providing for the extension of health insurance benefits to the registered domestic partners of city employees, as well as "spousal" jail visitation rights to Atlanta citizens who register under the act).

⁹⁸ A new act is under consideration in the Hawaiian Legislature. It is being proposed so as to grant even more rights to same-sex couples. However, at this time, the bill is still in the process of being written and revised.

⁹⁹ *See supra* Part II.

¹⁰⁰ *See supra* text accompanying notes 55-57.

¹⁰¹ While the denial to same-sex couples of the right to adopt children jointly is a real, unfortunate, and serious limitation, it should be recognized that not all heterosexual couples have this right either. For example, a heterosexual individual with a history of child abuse would not be able to adopt a child, but states do not restrict the ability of that person to marry, even if he or she is in prison. It is, however, true that this determination of denial of a right to adopt would come into play only upon application for adoption rather than upon the application for marriage.

relationship as merely a tolerated and perhaps amusing oddity, then the act would fail to give any independent and significant weight to the proposition that same-sex relationships are included within the definition of marriage. We turn then to a brief discussion of how same-sex relationships are viewed in contemporary Western society.

A growing number of religions recognize same-sex relationships as a legitimate form of marriage, one that may be entered into ceremoniously. As early as 1972 the Reverend Troy Perry had performed two hundred and fifty services of holy union for same-sex couples.¹⁰² The Universal Fellowship of Metropolitan Community Churches reports performing over two thousand same-sex marriages a year.¹⁰³ Also regularly performing same-sex marriages are Reform Jewish synagogues,¹⁰⁴ the Unitarian Universalist Association,¹⁰⁵ and the Society of Friends.¹⁰⁶ Recently, in San Francisco more than ninety ministers of the United Methodist Church risked church sanction by blessing a same-sex union.¹⁰⁷ In Denmark the state church has not officially recognized same-sex marriages. However, this may be about to change. In 1997 a committee established by Danish bishops issued a report concluding that there was no principled basis to omit a ritual of blessing for a registered partnership. It authorized a ritual for a trial period of ten years, though it left the matter up to the discretion of individual priests.¹⁰⁸ While many religions oppose same-sex marriage, it is apparent that many others not only support it but recognize its day-to-day validity.

Just as various religions have moved to accept same-sex marriage, so too has society. The Minneapolis *Star Tribune* now includes announcements of same-sex marriages in its wedding section.¹⁰⁹ The mayor of San Francisco presided over a ceremony recognizing the marriage of fifty couples including

That distinction, while real, does not completely blunt the point that the right to adopt is not a necessary component of marriage.

¹⁰² See BECKY BUTLER, *CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS* 40 (1990).

¹⁰³ See Eskridge, *supra* note 69, at 194.

¹⁰⁴ See *id.* at 201.

¹⁰⁵ See *id.* at 196.

¹⁰⁶ See *id.* at 210.

¹⁰⁷ See *Group of Clergy Bless Same-sex Unions*, DALLAS MORNING NEWS, Jan. 17, 1999, available in 1999 WL 4095218.

¹⁰⁸ See Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121, 129 (1998).

¹⁰⁹ See *Paper Includes Gay Couples on What Was Wedding Page*, N.Y. TIMES, Mar. 22, 1991, at A20.

city controller Ed Harrington.¹¹⁰ In Denmark, Australian ambassador Stephen Brady officially presented his partner to Queen Margarethe at the same time he presented his credentials to the Queen.¹¹¹

In Denmark, where the ceremonies remain civil, families and friends join together to help couples make the commitment ceremonies more than a "mere" bureaucratic formality. For instance, the *Wall Street Journal* reported that Erik Ladefoged and Kim Norgaard were able to "formally tie the knot" after living together for twenty years.¹¹² The couple found the experience symbolic not only as a declaration of their love but also as an expression of Denmark's acceptance of them. More than thirty family and friends celebrated with them, drinking champagne and taking the typical wedding photographs. There was even the singing of the traditional Danish wedding song.¹¹³

The Danish official may say, "I pronounce you to be registered partners," but the public perception in Denmark seems to be that the couple is married. Mr. Ladefoged, who teaches at a private school, responds to his students' questions about whether his wife is a man by saying, "My husband is a man."¹¹⁴ Anette Lind, who married her partner Hanne Poulsen, laments that, "[m]y father's idea of marriage is a man and a woman. It was a little hard for him."¹¹⁵ Critics who oppose the Danish law have no problem whatsoever in calling it marriage. Henning Lysholm Christensen, a leader of the conservative Christian People's Party, which opposed the law in Parliament, criticizes the law as contrary to his belief that "[m]arriage is only between a man and a woman."¹¹⁶ These examples show that in everyday usage in Danish society, the domestic partnerships are thought of and referred to as marriage.

VI. THE ESSENCE OF MARRIAGE

Since the Danish Partnership Act grants the same-sex relationship the functions of marriage and since Danish society seems to be accepting of the

¹¹⁰ See Tyche Hendricks, *Same-sex Couples Tie the Knot En Mass in City Ceremony*, S.F. EXAMINER, Mar. 26, 1998, at A6.

¹¹¹ See Ian Mcphedran, *Three Queens in the Palace*, Australasian News Abstracts, Feb. 26, 1999, available in 1999 WL 2259811; *Briefly Noted-Politics*, NORDIC BUS. REP., Mar. 8, 1999, available in 1999 WL 10321751.

¹¹² Lawrence Ingrassia, *Danes Don't Debate Same-sex Marriages, They Celebrate Them*, WALL ST. J., June 8, 1994, at A1.

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

relationship as marriage, a metaphysical argument remains the major barrier to the acceptance of the partnerships as valid marriages. Professor Lynn Wardle, perhaps the most vociferous critic of same-sex marriage, notes that “[i]f marriage refers specifically to a heterosexual relationship between two consenting adults, then it is not a violation of the basic human right to marry for a state not to confer the legal status of marriage upon same-sex couples.”¹¹⁷ Of course, the implication of this statement is that *if* marriage refers to a relationship between both heterosexual and non-heterosexual couples, then it is a violation of basic human rights for a state to refuse to confer the legal status of marriage upon same-sex couples. Wardle attempts to preclude this possibility by arguing that “[t]he heterosexual dimensions of the relationship are at the very core of what makes ‘marriage’ what it is. . . .”¹¹⁸ Wardle fails to clearly elucidate what is meant by this. Wardle refers to the “unique potential strengths” and the “inimitable potential value” to society of heterosexual marriage without detailing any of the strengths or values that are unique to heterosexism.

Professor Wardle admits that the “functional equivalence” argument is “beguilingly appealing,”¹¹⁹ but he remains insistent that “it is false.”¹²⁰ Wardle first argues that functionalism is over-inclusive; “[p]ersons who are engaged in incestuous relations, for example, could just as credibly argue that their relationships are functionally equivalent to traditional marriages. . . .”¹²¹ A valid and proper response would be that they could, and in doing so, they would be correct. For instance, some states allow first cousins to marry and some do not. Those states denying first cousins the right to marry are certainly intruding upon the exercise of a fundamental right. However, the argument of these states is that there are either rational or compelling state interests making this intrusion allowable. Nevertheless, the same couple would be able to cross a state line and marry in a state with different compelling or rational state interests. Professor Wardle seems to be suggesting that this latter marriage, recognized by the state as valid, is somehow not valid as a metaphysical proposition. Obviously, however, cousins engaged in relations that seem incestuous to some, but whose relationship is not prohibited by the state, may marry. The state recognizes the marriage, the couple recognizes the marriage, and presumably the society in which they live recognizes the marriage.

¹¹⁷ Wardle, *supra* note 6, at 748.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 749.

¹²⁰ *Id.*

¹²¹ *Id.*

Wardle's criticism fails to distinguish between can (can an incestuous couple marry) and should (should an incestuous couple marry). The line that separates valid incestuous marriages from invalid incestuous marriages is a line drawn by law, one that can and does move from society to society. There is no essential element of marriage that prohibits incest. Indeed, societies prohibit incestuous marriages in response to their existence.

Professor Wardle then moves on to the more important argument, that "it is not a mere definitional restriction that limits marriage to heterosexual unions."¹²² Wardle is looking for a metaphysical essence of marriage that is not the creation of mere "social constructs."¹²³ Wardle seeks, in other words, to discover the true "nature" of marriage. Only those relationships that possess this true "nature," following Wardle's reasoning, should then be afforded the legal status of marriage. When marriage is spoken of as a fundamental right, it is the true "nature" of marriage preexisting both legal status and social construction that is the essence of the fundamental right. While legal status may be conferred on relationships that do not possess the true "nature," those relationships would have no constitutional claim to fundamental rights protection. Wardle contends, "The basic human right of marriage does not extend to same-sex unions because the protected relationship of marriage, by its very nature, is uniquely heterosexual."¹²⁴ Wardle posits, "It is not the label marriage that makes heterosexual unions are [sic] valuable, but because heterosexual covenant unions are valuable they are given the preferred legal status (and label) of marriage."¹²⁵

Wardle's position then seems to be that marriage exists prior to both legal and social constructs. It is recognized and labeled as marriage because it is "uniquely" (Wardle uses the word thirteen times in two pages) valuable. Against the view that marriage somehow predates human society, is the contrasting view that marriage post-dates the state as an institution.

Professor Maura Strassberg contends that "[m]arriage can be described as an affirmative right [as opposed to a negative right which exists as a limitation upon state action] in the sense that the right cannot exist in the absence of some state action, such as legislation."¹²⁶ While recognizing that "marriage as a common-law and religious institution pre-dated state legislation" she nonetheless believes that "our understanding of marriage as a fundamental

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-sex Marriage*, 75 N.C. L. REV. 1501, 1511 (1997).

right may be enhanced by analysis of marriage as something of an acquired right as well."¹²⁷ She analogizes marriage to the right to vote, a right which "may be traced to, but not fully explained by, natural liberty in primitive political conditions."¹²⁸

As we have seen, however, marriage as an institution existed without the benefit of state recognition in political conditions, such as the Roman Republic, that were anything but primitive. State recognition of marriage remains a relatively recent phenomenon. Further, while voting loses all meaning outside of the context of a legal-political culture, marriage maintains viability in all social conditions. Strassberg's analysis does, nonetheless, contain important insights into the value that marriage has as an institution which makes "social unity possible."¹²⁹ Importantly, it counters Wardle's vague assertion as to the uniqueness and value of non-same-sex marriage.

Same-sex couples are being married in both religious and non-religious ceremonies throughout the world. Strassberg points out that the "more it makes sense to them and to others to say that they are married, even if they are not legally married, the less the legal institution appears to accomplish."¹³⁰ Indeed, same-sex couples may begin to look to their marriages which, lacking legal recognition, produce no legal benefits and contrast those marriages with non same-sex marriages which do spin off legal benefits. This awareness of such inherent inequality might lead to a realization that civilly recognized marriage exists "to privilege some married people in some ways and penalize them in others."¹³¹ From this realization might arise a political drive to revert marriage to "a primarily private, or possibly religious, institution" over which the state would lose much control.¹³² The reality of this analysis is reflected in a recent move in the Hawaii legislature to strike the word marriage from all state statutes. Marriage would become the province of church and commitment ceremonies. All state recognized relationships would be called domestic partnerships.

This would be a tragedy because the marriage relationship is a vital state interest that contributes in many ways to a well-ordered society. The "critical role of the state" in this inherently private relationship "reconciles individuals to the apparent loss of personal liberty which social existence requires."¹³³ It

¹²⁷ *Id.* at 1515.

¹²⁸ *Id.* at 1564-65.

¹²⁹ *Id.* at 1623.

¹³⁰ *Id.* at 1621.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1612.

does this by creating an "enduring legal/social connection between individuals."¹³⁴ This allows individuals "a protected space" in which to "make commitments to each other that will be more stable than a connection based purely on variable emotions."¹³⁵ Marriage demonstrates that "the bonds of society" make possible a more fulfilled individual existence.¹³⁶ Correspondingly, there should arise a greater "willingness to sacrifice particular liberties for the sake of the state and society as a whole."¹³⁷

Additionally, legal marriage "allows all citizens to share a similar and equivalent experience of themselves and the state," which promotes greater social cohesion.¹³⁸ A "state-sponsored institution of exclusion and distinction" creates "rifts that undermine the possibility of social unity."¹³⁹ One commentator suggests that "once it is recognized that lesbian and gay family interests are essentially identical to heterosexual family interests, the state's denial of marriage licenses to same-sex couples becomes recognizably invidious and irrational."¹⁴⁰ As Professor Strassberg poignantly points out, "Marriage cannot have the same luster to anyone, even heterosexuals, when it is understood as the equivalent of eating at a segregated lunch counter or swimming in a public 'whites only' pool."¹⁴¹

Same-sex relationships, which are united by legal marriage, provide the same sort of benefits to the state as non-same-sex relationships united by marriage. Consequently, there is no basis for the claim that "heterosexual unions are different from same-sex unions in ways that are uniquely beneficial to individuals and to society."¹⁴² Unlike polygamous marriages, which serve to undermine the civil unity of the state,¹⁴³ same-sex marriages benefit society in the same manner as non-same-sex marriages benefit society. That is, same-sex marriages encourage individuals to engage in long-term stable relationships and to surrender some degree of individual autonomy to the state. In exchange, the state creates a stable environment for the family unit. Likewise,

¹³⁴ *Id.* at 1611.

¹³⁵ *Id.* at 1611-12.

¹³⁶ *Id.* at 1612.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1622.

¹³⁹ *Id.*

¹⁴⁰ See Alissa Friedman, *The Necessity for State Recognition of Same-sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 169 (1987).

¹⁴¹ Strassberg, *supra* note 126, at 1622.

¹⁴² See Wardle, *supra* note 6, at 750.

¹⁴³ See generally Strassburg, *supra* note 126, at 1576-94, 1615-18 (comparing the civil desirability of Mormon polygamy to same-sex marriage).

the European domestic partnership acts serve the same purpose for the state and for the individual as marriage. Wardle posits that it is because heterosexual covenant unions are valuable that they are given the term "marriage."¹⁴⁴ If this is the case, then same-sex covenant unions, being equivalently valuable to the state, should also be granted the term "marriage."

There is a story attributed to Abraham Lincoln: he is said to have once asked how many legs a dog would have if you counted a tail as a leg. Given the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg."¹⁴⁵ Likewise, calling a marriage between two people of the same sex something other than marriage, a domestic partnership for example, does not make that marriage anything other than marriage.¹⁴⁶

VII. CONCLUSION

The European same-sex partnership acts or Euro-partnerships, as exemplified by the Danish act, create a legitimate form of marriage for individuals of the same gender. Euro-partnerships provide most, though not all, of the functional benefits of marriage. It is very likely that the Netherlands, with the removal of the restriction upon adoption, will soon provide all of the benefits of marriage through its act. More importantly, however, the general public recognizes that the partnership acts create a valid marriage.

The domestic partnerships created by the European acts both functionally and socially reproduce marriage, thus weakening or dissolving the argument that same-sex relationships somehow conflict with the essence of marriage. Marriage is an important civil function that leads to the strengthening of society by providing couples a stable environment in which to promulgate legal relationships. By demonstrating that societal bonds make a more fulfilled individual existence possible, there arises a greater willingness to sacrifice individual concerns for the good of society as a whole. These concerns are advanced by same-sex marriage in exactly the same way as they are advanced by non-same-sex marriage. While there are many benefits to marriage, there is no benefit unique to non-same-sex marriages. Indeed, it is possible that a continued reluctance to grant individuals the right to marry will weaken the role of marriage in a civil society.

¹⁴⁴ See Wardle, *supra* note 6, at 750.

¹⁴⁵ See *id.*

¹⁴⁶ The story is taken from Wardle, *supra* note 6, at 750. Wardle uses the story to argue the opposite viewpoint.

Marriage itself is a fundamental human right that pre-exists the legal state. The exercise of this right in the United States can only be limited upon the showing of a compelling state interest. Traditionally, United States courts have not subjected regulations prohibiting same-sex marriage to strict scrutiny because the courts have contended that marriage is by definition a union of two people of opposite genders. The fallacy of this reasoning is illustrated by the growing number of European same-sex marriages. Both functionally and culturally, the Euro-partnerships are treated as marriages. Further, they advance the same state ends as non-same-sex marriage. It is time for the United States courts to recognize the existence of foreign same-sex marriages and to critically examine United States restrictions upon the entry into marriage by partners of the same gender.

