Do wedding dresses come in lavender? The prospects and implications of same-sex marriage.

by Angela Bolte

Same-sex marriage will strengthen the institution rather than undermine it. While opponents argue that changes to the marriage law will diminish it, change cannot be logically equated with diminishment. Many alterations have already been enacted without any detriment to the law. Same-sex marriages will offer voluntary support to the institution by allowing freedom in selecting one’s partner.

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On 3 December 1996, a Hawaiian state court upheld the legalization of same-sex marriage, although the next day the presiding judge set the ruling aside pending the outcome of an appeal by the state. This ruling rekindled fears that exist regarding the potential legalization of same-sex marriage throughout the United States. To answer concerns regarding same-sex marriage, I will examine several issues. First, the concept of marriage must be defined. Opponents often argue that same-sex marriage violates the definition of marriage and, thus, same-sex marriage should not be legalized. Second, given the difficulty of defining the concept of marriage, I will undertake an examination of the features of marriage so as to illustrate the compatibility of same-sex marriage with those features. Third, I will examine traditional legal arguments against same-sex marriage for their validity. Fourth, I will evaluate Claudia Card’s arguments against same-sex marriage and offer a response to these arguments. Finally, I will explore domestic partnerships as a potential alternative to same-sex marriage. Once these steps are completed, it will be seen that same-sex marriage would be beneficial, rather than harmful, to the institution of marriage.

1.

One of the most important issues surrounding the same-sex marriage debate is whether or not same-sex marriages can even exist. All too often, same-sex marriages are discounted as impossible because marriage is viewed as existing only between a man and a woman. Gays and lesbians cannot meet the definition of marriage and, thus, "same-sex marriage" is an oxymoron.

One method of providing evidence for the possibility of same-sex marriages involves recognizing what is meant by the definition of marriage. Richard Mohr illustrates the difficulty of this task by pointing out the following:

Most commonly, dictionaries define marriage in terms of spouses, spouses in terms of husband and wife, and husband and wife in terms of marriage. In consequence, the various definitions do no work in explaining what marriage is and so simply end up assuming or stipulating that marriage must be between people of different sexes.(1)

It does seem that Mohr, for the most part, is correct. In most dictionaries marriage is defined in these terms, although at times any reference to "spouses" is dropped, but the point remains.(2) Dictionary definitions usually focus on the concepts of husband and wife and spend little time explaining anything about the actual nature of marriage.

The legal definition of marriage fares no better. Although the marriage laws in most states refer generically to spouses, Blacks Law Dictionary relies on the 1974 case Singer v. Hara to express the legal definition of marriage as "the legal union of one man and woman as man and wife."(3) Since the legal definition of marriage specifically excludes same-sex marriage, the courts have successfully argued that same-sex marriages cannot be allowed because these unions would destroy the very notion of marriage.

Some courts have tried to place an additional stipulation on the definition of marriage; namely, that marriage is a vehicle for the creation and raising of children. This traditional argument against same-sex marriage is also inadequate. With the elimination of the fertility clause in the marriage laws, the courts have removed the raising of children from the core of marriage law and the ability of spouses to create children together is no longer considered a requirement of marriage.(4) Thus, there is no legitimate legal basis from which to deny the right of marriage to gays and lesbians because they cannot create children together. Moreover, if this were legitimate, withholding marriage licenses from elderly or infertile couples would also be legitimate. In each of these cases, the couple cannot create children together and, to be consistent, denying the right of marriage to all of them would be necessary on these grounds. Due to the revised marriage laws, such a position would have little, if any, legal support.

It is also unclear how the stipulation that marriage is for the creation and, raising of children truly excludes gays and
lesbians. Gays and lesbians are increasingly becoming parents through new avenues such as adoption or artificial insemination. Many gays and lesbians also have children from previous marriages. This occurrence is presently so widespread that some mainstream and gay media have labeled this phenomenon a "gay baby boom."

It is estimated that there are three to four million gay and lesbian parents raising between six and fourteen million children.(5) This number is especially significant if it is argued that one of marriage’s goals is the protection and care of the children that exist within it. There is an expectation that children are to be protected and cared for by the spouses while a marriage exists and this is reflected in the legal process that occurs when a marriage ends. The divorce laws are devised to help protect children by ensuring that child support is paid if necessary for the welfare of a particular child. Moreover, when a spouse dies, custody of the children is designed to pass to the living spouse, thus ensuring that the children are not removed from a familiar environment.

While traditional arguments claim that same-sex marriages should be banned because the children within those families will be subject to harm both through ridicule and confusion over sexual roles, it is rather the case that children are directly harmed through the banning of same-sex marriages. Currently, when a same-sex relationship ends, no institutions are in place to ensure the protection of the children, as there are when traditional marriages dissolve. A partner who leaves a same-sex relationship is under no obligation to provide financial support for children that he or she may have cared for and supported for years. In a case where the biological parent dies, the children could be left without either parent, if the living partner had not adopted them in a second-parent adoption. Moreover, in most states the courts do not allow second-parent adoptions by gays and lesbians. Given the vast numbers of children with same-sex parents, by not allowing same-sex marriage, many children are adversely affected.

As for the traditional arguments against same-sex marriage, Fredrick Elliston states that "in the case of... homosexual marriage, the source of the harm to children is social prejudice" against gays and lesbians.(6) Elliston argues that if same-sex marriages were legalized, this social prejudice would be diminished. As for the second argument, that the children will suffer from confusion over sex roles, this is not necessarily a problem. According to feminist thinking, traditional sex roles are not desirable, and Elliston similarly argues that same-sex marriage "may help to combat this evil [of traditional sex roles]."(7)

Given the failure of legal definitions of marriage, perhaps sociology or anthropology would be a better source for a definition of marriage. Definitions from these areas are more informative, but do not provide a complete picture of marriage. For example, marriage is described in the following manner:

[M]arriage has been defined as a culturally approved relationship of one man and one woman (monogamy); or of one man and two or more women (polygyny/polygamy), in which sexual intercourse is usually endorsed between the opposite sex partners, and there is generally an expectation that children will be born of the union and enjoy the full birth status rights of their society. These conditions of sexual intercourse between spouses and reproduction of legitimate and socially recognized offspring are not, however, always fulfilled.(8)

The most important aspect of the above definition is the suggestion that a culture can define what is considered a marriage. In fact, a society could define and redefine marriage as often as it chooses.

Given that marriage is a perpetually evolving notion, same-sex marriages would not necessarily have a "negative" impact on the institution of marriage. The fear of such a negative impact is seen in a traditional argument that claims that the recognition of same-sex marriage would lead to the recognition of multiple forms of marriage, such as polygamy or group marriage, and traditional Western marriages would eventually be eradicated. If same-sex marriages lead to the eradication of traditional Western marriages, there is no reason to believe that this would somehow be negative. A move away from traditional Western marriages could be positive and stabilizing for the community because all citizens would be accepted, no matter what form their marriage takes.

Another traditional argument worries: "What if everybody did that [i.e., entered a same-sex marriage]?"(9) Although there eventually could be heterosexuals who choose to marry someone of the same sex, this would not necessarily be "negative." In fact, such marriages could be used to help provide basic needs and protections for those who are unable to support themselves. Unfortunately, in our society numerous citizens do not have equal access to basic rights and protections such as adequate housing or health insurance, because access to these rights and protections is limited by financial resources. If an individual lacks the financial means necessary to attain these rights and protections, he or she is usually forced to do without or to accept a substandard replacement.

Moreover, same-sex marriages would grant to gays and
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Lesbians the rights attached to marriage that are presently denied to them. Unlike married opposite-sex couples, gays and lesbians with children are unable to have custody automatically passed to their partner at their death. Similarly, without a will, gays and lesbians cannot ensure that their estates will pass to their partner. Without being married, gays and lesbians cannot even file joint tax returns. Finally, the right of gays and lesbians to live in the community of their choice is limited, if the community specifies by law that only married couples may purchase a house within it. The denial of such rights to these citizens, while presently legal, is heterosexist and unjust.

Same-sex marriage could be used to provide access to these basic rights and protections. For example, a same-sex couple could pool their resources and attain adequate health insurance, better housing, or simply provide themselves financial security. Presently, many gays and lesbians enter traditional marriages with a heterosexual or a friend who is gay or lesbian to obtain these basic rights and protections. Heterosexuals could join a same-sex marriage for the same reason and this would not "make" them homosexual; just as gays or lesbians who are presently in traditional marriages for similar reasons are not "made" heterosexual.(10)

Although some heterosexuals could choose to enter same-sex marriages, the percentage of heterosexuals and homosexuals would not change greatly as some opponents of same-sex marriage fear. Most estimates of the actual number of gays and lesbians in the United States range between one and ten percent. This number would most likely stay the same, although even if this number were to change, there is no reason to believe that this would be "negative."(11) If a person had not previously been attracted to someone of the same sex, the ability of gays and lesbians to marry would not alter the fundamental sexual behavior of this person. For example, with the advent of the gay and lesbian rights movement, gays and lesbians have become increasingly visible, but the percentage of gays and lesbians has not radically changed. What has happened is that gays and lesbians who had felt compelled to live a "straight" life have become more visible. If the legalization of same-sex marriage were to occur, the same phenomenon would be likely, with some gays and lesbians leaving, or not choosing, heterosexual marriages because of the more acceptable alternative.

Some might worry that by legalizing same-sex marriage, the number of children raised in such households would increase and those children would be more likely to be gay or lesbian. Given studies on the sexual orientation of the children of gays and lesbians, these children are no more likely to be gay or lesbian than other children. Moreover, it is unclear why an increase in the number of gays and lesbians would be a "negative." If those who construe the increase of gays and lesbians as negative are actually concerned about the extinction of the human race, it is unclear why this would necessarily happen. The increasing number of gays and lesbians with children illustrates that a reproductive drive exists within gays and lesbians and there is no reason to think that humans would disappear if everyone was gay or lesbian.

Although society can redefine what is meant by the concept of marriage, it is possible that same-sex marriage can be accepted while retaining the key features of marriage as it is presently known within Western society. Although describing marriage is difficult, the following list of features can be obtained:(12)

[Marriage] is usually a temporally extended relationship between or among two or more individuals; this usually involves (1) a sexual relationship; (2) the expectation of procreation; (3) certain expectations or even agreements to provide economic, physical, or psychological support for one another; and (4) a ceremonial event recognizing the condition of marriage.

Palmer points out, however, that "none of these is a necessary condition, and if they are logically sufficient conditions when taken jointly, it is probably because of the inclusion of feature number four."(13) Richard Mohr characterizes marriage similarly. He believes that marriage is "intimacy given substance in the medium of everyday life, the day-to-day. Marriage is the fused intersection of love's sanctity and necessity's demand."(14) This characterization appears adequate to explain an institution infused with vagueness. Taken together, Palmer's and Mohr's conditions for marriage cover what the partners in a contemporary Western marriage generally expect. Moreover, their conditions for marriage dovetail with the definition from sociology and anthropology, but the following reduction is possible: an adequate level of commitment between partners; the joint raising of children, if the partners want them; and love. Although this reduction can be made, it is uncertain what each of these conditions entails for same-sex marriages.

The issue of commitment in marriage is interesting, yet controversial, and upon its discussion, questions concerning both the required amount of commitment and how best to define commitment immediately arise. These questions can be reduced to the following: either a
committed marriage must be monogamous or it may be non-monogamous.(15) In the traditional Western view of marriage, monogamy in the form of sexual exclusivity is an essential ingredient in all marriages. Since gays and lesbians are often thought, under this traditional Western view, to be incapable of being sexually exclusive, it is claimed that they should not be allowed to marry, because they cannot meet a "necessary condition" of marriage.(16)

Although it is unclear that gays and lesbians are any less sexually exclusive or monogamous than heterosexuals, no marriage must be totally monogamous. If the partners in a marriage choose to have an "open" marriage, this does not mean that their marriage is somehow voided. The marriage is not voided, because monogamy is not a requirement of marriage; in fact, many types of marriage are non-monogamous by definition, such as polygamy or group marriage. Moreover, with the advent of no-fault divorce laws, the lack of monogamy within a marriage is no longer even legal ground for divorce. This shift in the law may be due to a recognition of the fact that the majority of society no longer considers monogamy a necessary condition of marriage. Therefore, if neither of the partners is coerced into giving assent to an open marriage, this decision should be respected.

Simultaneously, a decrease in monogamy need not amount to a decrease in commitment. While it is the case that a partner who is "cheating" on his or her partner most likely is guilty of a lack of commitment, if the relationship is open, a decrease in commitment is not necessary. While judging the degree of commitment in an open marriage is almost impossible, one indicator of commitment could simply be the continuation of the marriage.

In fact, Richard Mohr believes that if same-sex marriages were legalized, the marriages of gay men would help to improve mainstream views about monogamy. Mohr believes that monogamy is not essential for love and commitment in marriage, as evidenced by many long-term gay male relationships that incorporate non-monogamy.(17) Instead, Mohr believes that traditional couples should look at the relationships of gay men to rethink the traditional Western model of the family. Mohr's basic position on monogamy and commitment seems correct. A lack of monogamy should not undermine commitment if the partners have agreed not to be monogamous.

Turning to the question of children, as argued above, no legitimate reason exists for preventing gays and lesbians from marrying simply because they are seen as "incapable" of having children. Moreover, nothing prevents gays and lesbians from having children; as previously mentioned, many gays and lesbians do have children. Finally, there is the condition of love. Although love is closely tied to the issue of commitment, love and monogamy are separate issues. Viewed on its own, love is probably the one issue where some agreement can be reached, because gays and lesbians can easily meet this feature of marriage.

With these partial characterizations of marriage, it can be seen that gays and lesbians can meet its features. This means that the courts should not dismiss cases regarding same-sex marriage because these marriages are viewed as impossible by virtue of being between same-sex couples. Instead, a rigorous examination of the legal arguments against same-sex marriage must be undertaken to see if legitimate legal and moral reasons exist for not allowing same-sex marriage.

3.

During the 1970s, several court cases were aimed directly at allowing same-sex marriage, but none succeeded.(18) Because of these failures, and the United States Supreme Court's majority opinion in Bowers v. Hardwick, no other major cases regarding same-sex marriage were filed until the early 1990s.(19) In 1993, Baehr v. Lewin was brought before the Hawaiian Supreme Court and the court sent the issue back to the lower courts, ruling that the state must demonstrate a compelling state interest to ban same-sex marriage.(20) In December of 1996, a Hawaiian state court ruled that compelling state interest was not illustrated.

With the state court’s ruling, there has been enormous speculation as to its potential effect on the rest of the United States. In particular, it has been questioned whether the other forty-nine states will be forced to recognize same-sex marriages performed in Hawaii. A related concern is the impact this ruling will have on opening other states’ marriage laws to similar challenges. Many legal scholars believe that most, if not all, states’ marriage laws will be challenged and many of those states will eventually be forced to recognize same-sex marriages.

With the possibility of the legalization of same-sex marriage, many traditional legal arguments against same-sex marriages have resurfaced. For example, in discussions of sodomy laws, two traditional arguments are often raised against homosexuality. The first argument claims that homosexual sex is not "natural" because it does not consist of penile-vaginal intercourse. Connected to this argument is a second argument that claims that homosexuality is intrinsically tied to perversion because it involves a misuse of body parts.(21) These arguments can be linked to the idea of "legal moralism" as advocated by
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Lord Patrick Devlin. Legal moralism states that the law ought to be based on the morality of the majority of society. Moreover, if a society wishes to continue, it must defend its moral code or potentially be destroyed.

Legal moralism and its connected arguments underlie discussions of how states can avoid, through "choice-of-law theory," recognizing same-sex marriages performed in sister states. Under choice-of-law, "any time application of the foreign state's law would violate a substantial public policy of the forum, the foreign law need not be applied," although there are constitutional restrictions to this.(22) Given the wording of choice-of-law theory, the substantial public policy could simply be the morality of a given state as expressed in law. In fact, the sodomy laws, which legal theorists believe will be used in an attempt to illustrate a substantial public policy against same-sex marriage, can be construed as a legal expression of what is presumed to be the morality of the state's citizens.(23)

While sodomy laws perhaps could be viewed as a clear expression of public morality and opinion toward homosexuality, it is unclear why this method is available when applications of the actual sodomy laws are examined. Sodomy laws are not enforced with regard to either homosexuals or heterosexuals in consensual relationships and, consequently, might not be accurate expressions of public opinion and morality. Given that the sodomy laws are ignored (even in Bowers, where an individual was caught in the act of violating the law and yet never charged), the argument can be made that these laws are no longer a part of public policy. Perhaps these laws were once an expression of public morality, but, because these laws are not enforced, this connection no longer exists. Nevertheless, the alternative view must be examined, because the mere existence of these sodomy laws will no doubt be used to argue against the legalization of same-sex marriage.

While the sodomy laws might be viewed as an expression of public morality, the fact that these laws are applied differently to heterosexuals and homosexuals distorts their moral message. In fact, legal theorists argue that those states with sodomy laws that apply both to heterosexuals and homosexuals have a weaker ability to display a substantial public policy against same-sex marriage. This weaker ability is due to the fact that heterosexual couples in these states are subject to the sodomy laws and, presumably, some heterosexual couples also violate these laws; nevertheless, these couples are allowed to marry.

It may appear that Bowers allows such differential treatment with regard to sodomy laws, but this is not necessarily the case. In Bowers, the Supreme Court specifically held that there was no privacy right within the Constitution to homosexual sodomy, because the privacy rights of individuals are limited to the "liberties that are deeply rooted in this Nation’s history and tradition," a clear statement of legal moralism.(24) At the same time, there is no explicit statement within Bowers that sodomy laws that pertain to heterosexuals are in violation of the right to privacy and thus violate the United States Constitution. This means that the sodomy laws ought to be equally applied to heterosexuals and homosexuals in all areas. For these states to disallow same-sex marriage because of broadly written sodomy laws "would be indicative of differential treatment based on sexual orientation and arguably would be actionable under the Fourteenth Amendment if characterized as sex discrimination."(25) This strategy would be similar to the method presently being used in Baehr and would be available if Baehr is upheld.

Some might argue that homosexual sex is inherently in violation of the sodomy laws while heterosexual sex is not, and consequently it is not legitimate to apply broadly written sodomy laws to heterosexuals. This would mean that these states should have a good method for displaying a substantial public policy against same-sex marriage, but this argument is not necessarily correct. Depending on the wording of the statute, homosexual sex need not always violate sodomy statutes. For example, some sodomy laws are worded so that only anal sex is in violation of the law. Other sodomy laws are written so as either to make all intercourse illegal that is not penile-vaginal or to make oral sex illegal. Although some sodomy laws bar all of the above, not all sodomy laws are broadly worded. Given the variation of the laws, homosexual sex would not always be in violation of the sodomy statutes. Second, the question remains as to why heterosexuals should not be punished for violating sodomy laws. It seems that if states with broad sodomy laws are concerned with the violation of these laws, they should attempt to prevent all sodomy and not just apply the laws to gays and lesbians.

Another factor that would limit the demonstration of a substantial public policy against same-sex marriage by some states, but not all, is the presence of laws that protect gays and lesbians. Most relevant are the eight states that have laws forbidding discrimination against gays and lesbians, but there are several other important laws.(26) The courts in eleven states have rejected presumption against gays and lesbians in custody cases.(27) Eight states and the District of Columbia allow custody to gays and lesbians in second-parent adoptions.(28) Finally, cities in ten states and the District
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of Columbia have domestic partnerships for gays and lesbians. In each of these individual cases, the state would have a hard time proving a legitimate substantial public policy against gays and lesbians.

The presence of positive laws regarding homosexuality is particularly relevant when discussing legal moralism. Devlin's position relies on moral uniformity within society, but these laws illustrate that such uniformity does not exist. The law does not have a sound, uniform foundation that it can use to draw conclusions concerning homosexuality; thus, the law cannot be used for judging attitudes toward homosexuality. In addition, the law does not have a firm foundation concerning its position on sodomy for either homosexuals or heterosexuals. Most states have no laws concerning sodomy and only five have exclusively same-sex sodomy laws. If the law is to be based on the majority of society, the law ought to reflect the fact that most states do not hold any form of sodomy to be illegal. To base the law on the minority opinion that sodomy is immoral violates the basic tenets of legal moralism and, for that reason alone, ought to be rejected by advocates of legal moralism.

Moreover, as H.L.A. Hart pointed out regarding Devlin's argument, there is no way to judge if a society's morals have shifted or if the moral code has been destroyed. The positive laws listed above, when conjoined with the elimination of the majority of state sodomy statutes, could illustrate that society's values regarding homosexuality have shifted and homosexuality is no longer viewed by the majority as abhorrent. This would mean that if same-sex marriage were legalized, the law would be in step with society's moral code.

Nevertheless, this does not mean that legal moralism is correct. Even if the law is in accord with society's moral code, this does not mean that the moral code is just. The moral code of a society must be subject to scrutiny, and cannot simply be relied upon to generate the law without such scrutiny. It is not enough for tradition to support or deny any right; instead, a more neutral conception of justice must be used. If tradition were enough to support the law, numerous practices, such as slavery, would still be considered just. This fact alone illustrates the failure of legal moralism.

While some states may affirm same-sex marriages, this will not necessarily occur in all states. It could be that all states will be able both to eliminate laws that protect gays and lesbians and to put the necessary legislation in place to display a substantial public policy against same-sex marriage. Another scenario could be that the courts would allow any state to bar same-sex marriage due to the heterosexist tradition that exists regarding marriage within the United States. Only real challenges to the marriage laws of numerous states can demonstrate what will actually occur.

4.

Many within the gay and lesbian community also have articulated concerns regarding the acceptance of same-sex marriage. Claudia Card voices many of those concerns in her recent article "Against Marriage and Motherhood." Card believes that while it is wrong for the state to ban same-sex marriages, gays and lesbians should not be eager to enter marriage, because same-sex marriages will create multiple problems for the gay and lesbian community. Card rejects same-sex marriage because of the possible intrusiveness of the state into same-sex relationships, and she raises four specific problems that she believes should concern advocates of same-sex marriage.

First, gays and lesbians might be pressured into marriage to receive benefits such as health insurance. Second, once gays and lesbians enter these relationships, they could find the negative consequences of divorce too high because they could lose some of their economic resources. Third, marriage, due to its monogamous nature, will be too limiting and will distort the actual nature of many gay and lesbian relationships. Finally, Card claims that the legal access granted to spouses by marriage could open the door to all types of same-sex partner abuse. According to Card, instead of embracing flawed traditions, gays and lesbians should create their own traditions.

The problems that Card points out are significant but not overwhelming. As to her first two concerns, these problems are not specifically gay or lesbian in nature. Many of those working for same-sex marriage realize that basic benefits such as health care should be available to everyone. The expansion of such benefits to everyone, not just to those who are married, is a major goal of these activists. Although the lack of such benefits for everyone within society should be a concern, it need not be tied only to the movement for same-sex marriage.

The basic problem underlying Card's second objection is one that is not new to the gay and lesbian community. Presently, palimony lawsuits often take place when a same-sex partnership dissolves. Card briefly mentions this fact and states that palimony is problematic specifically because it both prevents a partner from easily leaving a same-sex relationship and applies "the idea of 'common law' marriage to same-sex couples." Card suggests that instead of palimony or marriage, couples who want a "contractual relationship" should engage in developing a
specific legal contract that defines their relationship.

Although Card may find the restrictions placed on relationships both by divorce and palimony too limiting, these legal structures serve to protect both partners in ways that individualized "relationship contracts" might not. First, for such a move to be equitable to both partners, each partner would require a lawyer to ensure that the contract was fair. While this might be a simple requirement for some, many would find the lawyers’ fees to be a burden and would reject a move toward a contract for that reason. Presumably, under Card’s position, if the partners do not have a relationship contract, there would be no system in place to ensure a fair division of assets following a separation.(34) Second, some might attempt to negotiate their own contracts, and such a move could easily lead to one partner unwittingly accepting an unfair contract. Third, even with a contract negotiated by a lawyer, there is no guarantee that one partner will not be taken advantage of by the other. Fraud and deception often arise in other contractual situations, and there is no reason to believe that relationship contracts would be immune to such problems. Finally, circumstances surrounding a relationship can easily change, and there is no guarantee that the legal contract that encompasses the relationship is flexible enough to span the changes or, if it is not, that it will be altered in response to the changes in the relationship. While a few relationships would not greatly change over time, it cannot be assumed that this would be true for all relationships. Relationship contracts require additional expense, have the potential for unfairness and fraud, and can be made irrelevant by changing circumstances. Most important, by making relationship contracts the sole option for same-sex couples, those who are unable or unwilling to have such a contract will lose their current protections. Thus, while divorce and palimony may have some negative consequences, eliminating these institutions would cause even greater harm.

Card’s third problem regarding the limiting nature of marriage is a common concern of some within the gay and lesbian rights movement.(35) Many of those in the gay and lesbian rights movement who stand opposed to same-sex marriage worry that marriage would become even more entrenched as the only acceptable type of relationship. They are concerned that those who are at the fringes of the gay and lesbian rights movement would be excluded because they choose not to live the more "acceptable" life of marriage.

I believe that this fear of accelerated exclusion due to the legalization of same-sex marriage is overstated. The fringe elements of the gay and lesbian rights movement are excluded currently by both the traditional and the gay and lesbian mainstreams with the ban on same-sex marriage. Since these elements are currently ostracized, legalizing same-sex marriage could not do a great deal more to harm those who are excluded.

It could be that those gays and lesbians who choose not to be married will be discriminated against, at times. Single and especially young heterosexuals are often thought not to be as stable as their married peers, and are, at times, at a disadvantage because they are not married.(36) The same would likely hold true for gays and lesbians. Nevertheless, it does seem that, overall, the legalization of same-sex marriage would have a liberalizing influence rather than cause a move toward increased conservatism.(37)

The legalization of same-sex marriage would bring what had once been determined to be "other," that is, what had been determined to be separate and inferior, into the mainstream. In other words, legalizing same-sex marriage would allow one form of difference to be included in what is deemed acceptable. By broadening the definition of what is considered acceptable, other forms of difference could become more accepted. For example, the gay and lesbian rights movement illustrates this occurrence. As gays and lesbians have become more visible and accepted, many issues surrounding their community have moved from unthinkable to potentially realizable. In fact, same-sex marriage has moved from unthinkable thirty years ago to potentially being legalized. In this manner, the legalization of same-sex marriage would lead to more rather than less acceptance of difference, and should therefore be supported by the gay and lesbian community.

Finally, Card’s fourth concern claims that same-sex marriage could allow an abusive partner to abuse his or her same-sex spouse easily. While same-sex marriages could potentially increase the control of an abusive partner, it is not clear that this would outweigh the potential benefit that marriage could bring to the issue of same-sex partner battering. Presently, gays and lesbians have difficulty finding help when they are in a battering relationship, for many reasons. Perhaps the main reason is the combination of homophobia and heterosexism. The gay and lesbian community does not wish to recognize the problem of same-sex partner battering, and for this reason "it is absolutely vital to work to eliminate homophobia and heterosexism in the shelter environment."(38) Although much of the theoretical groundwork on battering was done by lesbians, in conjunction with their work in developing many original shelters, these shelters are not always welcoming to those in the gay and lesbian community who need help.(39) Along with the fear and hatred of gays and lesbians that exists within the shelters, there is often
disbelief that a woman could batter another woman or that a man could not defend himself against another man.

If same-sex marriages became widespread, there could be a profound effect on opinions regarding gays and lesbians, which would be beneficial for those gays and lesbians who are in battering relationships. Same-sex marriages could help to eliminate heterosexism and homophobia by elevating homosexuality to the level of acceptability. Through the legalization of same-sex marriage, gay and lesbian relationships would be acknowledged as legitimate. Moreover, gays and lesbians could become more visible due to the protections accorded to married couples. This visibility would further increase acceptance of gays and lesbians throughout society. Attributing increased acceptance of gays and lesbians to their growing visibility does seem possible. The gay and lesbian rights movement itself provides similar evidence, because as gays and lesbians have left the "closet," there has been a corresponding increase in their acceptance by society. In addition, when at least some people are aware that someone they know is gay or lesbian, they can be more accepting of gays and lesbians in general.

Same-sex marriage could also revolutionize the institution of marriage with regard to gender roles that support heterosexism and homophobia. Nan Hunter theorizes that same-sex marriage will cause a "subversion of gender."(40) Hunter believes that statements made by opponents of same-sex marriage--such as "Who would be the husband?"--illustrate the fear that exists regarding the revolutionary power of same-sex marriages.(41) While such statements are meant to ridicule the very idea of same-sex marriages, they also illustrate the speaker’s fear that he or she will no longer be able to depend on the power granted by a social category such as "husband." Hunter believes that the subversion of gender would revolutionize marriage as it is known today and would begin the process of moving marriage away from its oppressive roots.

If gender roles were eroded, heterosexism and homophobia would be reduced, which would directly benefit those who are in abusive same-sex relationships by making shelter workers more willing to recognize and help them. Thus, it is likely that legalizing same-sex marriage would have a positive impact on abused gays and lesbians, regardless of their marital status.

5.

Although Card is concerned with any type of state regulation of same-sex relationships, she views domestic partnerships as less problematic, in some ways, than same-sex marriage.(42) In this respect Card agrees with many of those in the gay and lesbian community who have turned away from marriage and have embraced domestic partnerships.(43) While Card is not truly supportive of domestic partnerships, she is mistaken to consider them as a possible alternative to marriage.

Domestic partnerships may appear to be an attractive alternative to same-sex marriage, but the benefits of these partnerships are usually limited in scope. Municipalities offering the option of a domestic partnership usually offer the same benefits to both partners and spouses of employees. Non-employees, on the other hand, generally only have access to family memberships at city-owned attractions or the right to hospital or jail visitations. Private sector businesses offering domestic partnership policies usually restrict benefits to health insurance, although sometimes they are restricted further.

Although domestic partnerships are presently limited in their scope, advocates are working to expand their coverage. Their goal is to have the benefits attached to domestic partnerships equivalent to the benefits attached to traditional Western marriages. If domestic partnerships are implemented and expanded to become marriages by a different name, no fundamental difference between marriages and domestic partnerships would exist, because, presumably, domestic partnerships would be just as difficult to leave as marriages. If there were no difference between the two practices, there would be no real method by which to distinguish them. It appears that these advocates are engaged in self-deception, in that they want the rights and benefits of marriage, but not the label.

Supporters of domestic partnerships often claim that the problems surrounding domestic partnerships should be overlooked because these partnerships could be used to generate some significant benefits. One argument claims that domestic partnerships would be beneficial because they could be used to help educate the public in an effort to "pave the way" for same-sex marriages. A second argument is based on the idea that there is a much more realistic chance that domestic partnerships will become widespread than there is that same-sex marriage will be implemented soon. By having same-sex domestic partnerships in place, gays and lesbians can enjoy some actual benefits within their lifetimes, a guarantee that cannot be made regarding same-sex marriage.

While supporters of domestic partnerships try to illustrate their potential benefits, these relationships remain extremely problematic and could potentially contribute to the unjust treatment of gays and lesbians. If domestic
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partnerships are expanded, these partnerships could be viewed as "separate, but equal" to marriages between opposite-sex couples. As the civil rights movement illustrates, such situations are very rarely equal. Gays and lesbians must not be taken in by possible benefits, but must examine all the possibilities. There is a very real chance that domestic partnerships could be used to sidestep justice issues regarding the treatment of gays and lesbians. If domestic partnerships were granted, any request for the legalization of same-sex marriage could be seen as unnecessary and selfish. Moreover, while there might be an attempt to increase the legal rights of domestic partnerships, such as adding adoption or tax rights, access to these rights would have to occur at a state or national level through the legislative process. The prospects for state or nationwide same-sex domestic partnerships at the legislative level are no greater than the legalization of same-sex marriage. Thus, any promise of faster access to these rights is unlikely to be realized. These problems illustrate that domestic partnerships are not a legitimate alternative to same-sex marriage and it is only through marriage that gays and lesbians will achieve the rights they deserve as citizens.

6. While it has been shown that major changes will occur in marriage when same-sex marriage is legalized, I do not feel that this would lead to the destruction of the institution itself. While some practices that marriage supports will be affected, marriage itself will continue. The political right will argue that any change in marriage will serve to undermine the institution, but this argument is flawed. Change cannot simply be equated with undermining. If this were the case, then marriage has already been undermined. Marriage is significantly different from its original incarnation. Even in the past twenty years there have been many changes in marriage. From the elimination of fertility laws to the advent of no-fault divorce, marriage has changed, but it has not faded from existence. There is no legitimate reason to believe that by allowing gays and lesbians to marry, the institution of marriage will disappear. In fact, it could be that allowing everyone to marry the mate of his or her choice will strengthen marriage by furthering the natural evolution of this diverse and widespread institution.(44)

Notes


(2.) For an example of this usage, see The American Heritage Dictionary, 2nd ed., s.v. "marriage."

(3.) Black's Law Dictionary, 5th ed., s.v. "marriage." In Singer v. Hara [522 P.2d 1187 (Wash. 1974)], the court denied the following: The silence of the marriage statutes on this issue allowed same-sex marriage, denying that same-sex marriage violated Washington's Equal Rights Amendment, and a denial of the plaintiff's right to marry would violate the Eighth, Ninth, and Fourteenth Amendments to the Constitution.

(4.) In 1985, Hawaii became the last state to repeal this clause.


(7.) Ibid.

(8.) Social Science Encyclopedia, 1st ed., s.v. "marriage."

(9.) Elliston, p. 160.

(10.) Although it may appear by this statement that I am advocating the position that homosexuality is genetic in origin, I do not hold this position. The "nature vs. nurture" debate is a controversy that I wish to put aside. Nevertheless, I do believe that anyone can choose to self-define as gay or lesbian. Such self-definition is done occasionally by feminists as a means of moving away from the male community. This is similar to cases in which someone who is attracted to the same sex, for whatever reason, chooses to ignore this attraction.

(11.) Ten percent was the number arrived at by the Kinsey studies and is the percentage generally used by the gay and lesbian rights movement, but other studies have arrived at lower numbers. This variation in percentages can be traced to two basic problems. First, arriving at a representative sample is often difficult due to "passing" by gays and lesbians. Second, there are also conflicting opinions on how to define what it means to be gay or lesbian.

(12.) David Palmer, "The Consolation of the Wedded," in
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Baker and Elliston, Philosophy and Sex, pp. 119-29; p. 119.

(13.) Ibid.

(14.) Mohr, p. 227.

(15.) Here, I am using monogamy in its more popular usage. Strictly speaking, a monogamous marriage is one in which there are only two marriage partners. Popularly speaking, a monogamous marriage is one in which the two partners are sexually exclusive to each other.

(16.) This view is based on old stereotypes held by the heterosexual community that homosexuals are "sexual animals" who are incapable of controlling their sexual desires. This view contrasts directly with the stereotype within the gay and lesbian community that lesbian relationships tend eventually to suffer from "bed death," that is, lesbian relationships become less sexual with time. For a discussion of men, lesbians, and sex, see Sarah Lucia Hoagland, Lesbian Ethics: Toward New Values (Palo Alto: Institute of Lesbian Studies, 1988), pp. 164-78.


(18.) The first of these cases was Baker v. Nelson [191 N.W.2d 185 (Minn. 1971). Appeal dismissed 409 U.S. 810 (1972)]. The court denied the following: that the silence surrounding same-sex marriage was equal to permission, the Due Process Clause allowed same-sex marriage, and that by not allowing same-sex marriage the Equal Protection Clause was violated.

Two years later in Jones v. Hallahan [501 S.W.2d 588 (Ky. 1973)], it was argued that the state’s refusal of a marriage license to a same-sex couple denied the plaintiffs the following constitutional rights: the right to marry, the right of association, the free exercise of religion, and that a denial of a marriage license was cruel and unusual punishment. The court denied these claims and made the further claim that the state did not prevent the plaintiffs from marrying, instead, their sex did. The last major case in this era that attempted to allow same-sex marriage was Singer v. Hara (see n. 3). (19.) 478 U.S. 186 (1986). Here, the United States Supreme Court upheld the constitutionality of the Georgia sodomy laws. The Court refused to include consensual homosexual sodomy in the zone of privacy identified as residing in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments in the Court’s ruling in Griswold v. Connecticut [381 U.S. 479 (1965)].

(20.) 852 P.2d 44 (Haw. 1993). The plaintiffs in Baehr v. Lewin had applied for a marriage license and were denied under the Hawaiian marriage statutes, HRS 572-1, which restrict marriage to a man and a woman. As a result, a complaint was filed stating that it was unconstitutional for the plaintiffs to be refused a marriage license solely because they were of the same sex. The Hawaiian Supreme Court ruled that the plaintiffs in Baehr qualified for relief from the restrictions of HRS 572-1 under both Hawaii’s Equal Protection Clause and Equal Rights Amendment. The Hawaiian Supreme Court sent the issue back to a lower court in order to subject HRS 572-1 to a "strict scrutiny" standard. This means that statute would be found unconstitutional unless the state can display the following: *(a) the statute’s sex-based classification is justified by compelling state interest and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couple’s constitutional rights* (67). The lower court upheld the legalization of same-sex marriage on 3 December 1996, but this ruling is subject to appeal.


(22.) Henson, p. 553. There are limits to choice-of-law. The two main limits are the Full Faith and Credit and Due Process Clauses of the United States Constitution. The Full Faith and Credit Clause requires for purposes of regulating interstate commerce, in most cases, that sister states recognize each other’s laws. The Due Process Clause is relevant because, when a marriage is revoked, a host of other rights and benefits are revoked also and this potentially could violate a citizen’s due process under the law. Although these restrictions exist, a state would not have to recognize a marriage that violated the state’s substantial public policy. Choice of law in marriage is usually applied in the areas of incestuous and underage marriages.

(23.) Presently, only five states have exclusively homosexual sodomy laws, namely, Arkansas, Kansas, Missouri, Montana, and Oklahoma. Thirty states do not have sodomy laws and fifteen states have sodomy laws that pertain both to heterosexual and homosexual sodomy (Henson, p. 590).

(24.) Ibid., pp. 594-95.

(25.) Ibid., p. 590.

(26.) Ibid., p. 578. As of 1994, these states are Wisconsin,
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Massachusetts, Hawaii, Connecticut, New Jersey, Vermont, California, and Minnesota.

(27.) Jeffery J. Swart, "The Wedding Luau--Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities," Emory Law Journal 43 (1994): 1577-616; p. 1594. As of 1994, the states are Alaska, California, Indiana, Michigan, New Jersey, New York, South Carolina, Vermont, Washington, Massachusetts, and West Virginia. In New Mexico presumption was rejected in a custody case concerning a gay uncle. In Virginia, courts have both rejected and not rejected presumption against gay parents.

(28.) Ibid., p. 1597. As of 1994, the states are Alaska, Massachusetts, New York, California, Washington, Oregon, Vermont, and Minnesota.

(29.) Ibid., p. 1598. As of 1994, the states are Michigan, Georgia, Massachusetts, Connecticut, New York, California, Washington, Minnesota, Wisconsin, and Maryland.


(32.) At the same time, it should be noted that Card’s project is against marriage in general and not exclusively against same-sex marriage.

(33.) Card, p. 13.

(34.) In her proposal, Card would have legal contracts replace marriage and palimony for same-sex couples. Thus, the assumption that there would be no safety net of marriage and palimony laws for those rejecting relationship contracts is not far-fetched.


(36.) For example, promotions are often granted in the corporate and academic world only if the employee is married. Marriage is taken to mean that the employee has "settled down" and is now more serious and stable.

(37.) It should be noted that Card holds a contrasting position. Card believes that marriage could have a conservative effect by potentially making gays and lesbians less liberal and thus more "acceptable" to mainstream society.


(41.) Ibid., p. 225.

(42.) Card, p. 12. It should be noted that Card is less critical of domestic partnerships, not because of any benefits that can be attached to these partnerships, but because the State is less involved in their regulation and because they are more readily dissolved than marriages.

(43.) For a discussion of domestic partnerships, see Barbara Findlen, "Is Marriage the Answer?", Ms., May/June 1995, pp. 86-91.

(44.) I thank Irene Appelbaum, Claudia Card, Marilyn Friedman, Larry May, and Mark Rollins for extensive comments and suggestions on earlier versions of this paper. Earlier versions of this paper were read at the Thirteenth Annual International Social Philosophy Conference and at the 1996 Annual Meeting of the Society for Social and Political Philosophy. I thank those audiences for their criticisms and suggestions.

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