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# NIGHT THOUGHTS: REFLECTIONS ON THE DEBATE CONCERNING SAME-SEX MARRIAGE\*

John V. Orth†

A few years ago, there was a brief vogue in legal scholarship for what was called story-telling. I am not sure I ever understood the method, but story-telling (at least as I understand it) came to mind as I followed the debate concerning the legal treatment of same-sex marriage. I would like to begin my reflections by telling a personal story. (Those uncomfortable with this approach may treat it simply as a hypothetical case.) Afterwards, I want to review some of the legal consequences of marriage, with particular reference to the property consequences. Same-sex couples, denied the legal status of marriage,<sup>1</sup> are obviously excluded from these consequences, and that forms a principal, but not the sole, ground on which their exclusion is criticized. Next, I will consider to what extent same-sex couples can approximate these consequences by the use of other legal arrangements. Finally, I want to ask not whether we should exclude same-sex couples from the legal consequences of marriage, but how we should decide which couples to include. First, the story.

## THE STORY OF MAUD AND MARY

*Maud and Mary were sisters and my aunts. They and my father were the only children of my grandparents to survive to adulthood. Maud was born in 1900 and Mary in 1905. They never married but lived with their parents, then together for their entire life. Mary worked outside the home as a laboratory technician; Maud carried on a modest business as a hairdresser out of their home, but mainly she ran the household, doing the cleaning and cooking. Despite Mary's employment, it was*

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<sup>1</sup> Marriage has many aspects other than the legal one. In its religious aspect, marriage may be regarded as a sacrament and regulated by canon law. See, e.g., CODEX IURIS CANONICI, cann. 1055-1165 (1983). Throughout this article, marriage is considered solely in its aspect as an institution of civil law. As Blackstone, speaking of English common law, said over two hundred years ago, "Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical law . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 421 (1765). The use of the same word "marriage" to describe both the sacramental and the legal relationship and the fact that state law generally authorizes religious functionaries to solemnize legal marriages, e.g., N.C. GEN. STAT. § 51-1 (2000), risks the confusion of the two aspects, particularly in the public mind.

*Maud who managed their finances. Economically they functioned much as a typical married couple with one wage-earner, although they filed separate income tax returns. When they died intestate in 1998, Mary in January and Maud in December, I was appointed administrator of their modest estates.*

*Maud and Mary functioned as a couple; but, of course, in contemplation of law, they were not a couple. Their only recognized legal relationship was as siblings. Their real property, when they had any, was held as joint tenants with right of survivorship. Otherwise, they maintained separate property: they had separate bank accounts and held their investments in separate names. Settling their estates was settling the estates of two unmarried individuals. Because the value of their estates was below the threshold for federal estate taxation, the unavailability of the federal marital deduction was irrelevant. For purposes of state inheritance tax, however, the fact that they were not spouses exposed the property passing to the survivor (in this case from Mary to Maud) to taxation; in addition, because the survivor was not one of the state's "class A" beneficiaries, defined as "children, grandchildren, stepchildren, and parents," the tax rate was higher. Mary's pension, which had formed a major source of their combined income during retirement, ended with her death, as did, of course, her Social Security benefits, which were far larger than those of the self-employed Maud; Maud was not entitled to survivor's benefits in either. The law simply ignored the fact that they had lived together as a couple for nearly a century.*

In its legal aspect, marriage is not about love; it is not even particularly about sex; it is mainly about property. With the possible exception of the abandonment of one by the other, the actual affective relationship of a legally married couple, whether they are living together or apart, is irrelevant in considering the property consequences of marriage.<sup>2</sup> Given the declining legal significance of illegitimate birth,<sup>3</sup> the nearly complete decriminalization of extra-marital sex,<sup>4</sup> and the end of immunity for spousal rape,<sup>5</sup> marriage law is

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<sup>2</sup> In a few states, statutes disqualify a surviving spouse from dower, inheritance, or an elective share if the spouse abandoned the decedent and committed adultery; sometimes, abandonment alone is sufficient. See, e.g., KY. REV. STAT. § 392.090 (1984); N.Y. EST., TRUSTS & POWERS LAW § 5-1.2 (1981 & Supp. 1993); N.C. GEN. STAT. § 31A-1 (1999); VA. CODE § 64.1-23 (1987). With respect to other marital incidents, it has been argued that "[e]ven in the absence of statute, the better view would seem to be to deny homestead and family allowances to the deserting spouse upon the ground that these provisions for the preservation of the family unit should not be allowed where the family relationship has been discontinued through the fault of the claimant spouse." THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 37, at 152 (2d ed. 1953).

<sup>3</sup> See *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding unconstitutional, as a denial of equal protection, an Illinois intestacy act denying an illegitimate child inheritance rights from the child's father); *In re Estate of Dulles*, 431 A.2d 208, 212-14 (Pa. 1981) (holding unconstitutional, as a denial of equal protection, a statutory presumption that the word "children" in a will did not include the father's illegitimate children); *In re Hoffman*, 53 A.D. 2d 55 (N.Y. App. Div. 1976) (construing the word "issue" in a will to refer to illegitimate as well as legitimate children, in the absence of an express statement to the contrary).

<sup>4</sup> It seemingly remains permissible under the United States Constitution for a state to criminalize homosexual sodomy. See *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986). During its current term, the United States Supreme Court will be invited to reconsider *Bowers*. See *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. 2001), cert. granted, 123 S.Ct. 661 (2002).

<sup>5</sup> See, e.g., *Warren v. State*, 336 S.E.2d 221, 226 (Ga. App. 1985) (finding no implicit marital exemption in rape and aggravated sodomy statutes). But see, e.g., *State v. Dominy*, 6 S.W.3d 472 (Tenn. 1999) (finding spousal rape not a lesser included offense in aggravated

decreasingly relevant to the legalities of sex. Everywhere, however, the legal status of marriage is of great significance with respect to property. In about half the states, legally married persons can hold real property as tenants by the entirety;<sup>6</sup> in some states personal property can be held by the same title.<sup>7</sup> Property held as tenants by the entirety cannot be partitioned or transferred by one of the owners acting alone.<sup>8</sup> On the death of one, the survivor automatically becomes the sole owner; the decedent's interest simply disappears; it cannot be passed by devise or inheritance.<sup>9</sup> In many states, creditors of one tenant by the entirety cannot levy on the entirety property.<sup>10</sup> Some states not recognizing tenancy by the entirety apply community property rules to married couples by which all income earned by either spouse during the marriage is attributed one-half to one and one-half to the other.<sup>11</sup> All states give preference in case of intestacy to a surviving spouse.<sup>12</sup> Most states not applying community property rules protect a surviving spouse from total disinheritance by providing an elective share, a minimum percentage of the estate of the predeceasing spouse regardless of the terms of the decedent's will.<sup>13</sup> Some states provide a more generous share to spouses inadvertently omitted (pretermitted) from a premarital will.<sup>14</sup>

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rape). See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1375 (2000).

<sup>6</sup> See John V. Orth, *Tenancies by the Entirety*, in THOMPSON ON REAL PROPERTY § 33.06(e) n.81 (David A. Thomas ed., 1994) (listing states).

<sup>7</sup> See Don W. Llewellyn et al., *Disclaimers by a Surviving Spouse: The Trend of Increased Opportunities for Post Mortem Tax Planning Continues*, 35 REAL PROP. PROB. & TRUST J. 1, 55 (2000) (listing twenty-eight states that do not recognize tenancy by the entirety in personalty).

<sup>8</sup> The theory of tenancy by the entirety is that the property is owned not by two persons but by one entity, the marital unit. See Orth, *supra* note 6, at § 33.08(b). Tenancy by the entirety is sometimes described as a specialized form of joint tenancy. *Morris v. McCarty*, 32 N.E. 938, 939 (Mass. 1893); UNIFORM PROBATE CODE § 1-201(26) (defining "joint tenants with the right of survivorship" to include "co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others," that is, to include tenants by the entirety). This is to misconceive the history of the estate, if not its present reality. See *infra* note 48.

<sup>9</sup> See Orth, *supra* note 6, at § 33.02, at 95-97.

<sup>10</sup> See *Sawada v. Endo*, 561 P.2d 1291, 1294-95 (Haw. 1977) (listing states). The federal tax collector has rights ordinary creditors do not possess. *United States v. Craft*, 535 U.S. 274 (2002). For conflicting views of the implications of this fact for the future of tenancy by the entirety, see Steve R. Johnson, *Why Craft Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 440 (2002), and Albert F. Rush, *United States v. Craft: Saying Goodbye to Tenancy by the Entirety?*, 17 PROB. & PROP. 59 (Jan./Feb. 2003).

<sup>11</sup> See generally WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* (2d ed. 1982).

<sup>12</sup> See ATKINSON, *supra* note 2, at § 15, p. 62 (describing "one point of agreement" among all states concerning the intestate share of the surviving spouse: "the spouse's case is so strong that all blood relatives take subject to the spouse's share - whatever that may be in the particular jurisdiction").

<sup>13</sup> See, e.g., N.C. GEN. STAT. § 30-3.1 to 30-3.6 (2000). See also UNIFORM PROBATE CODE § 2-202 to 2-207 (1993).

<sup>14</sup> See, e.g., FLA. STAT. § 732.301 (1993); CAL. PROB. CODE § 6560 (West 1998). See also UNIFORM PROBATE CODE § 2-301 (1993). Cf. CONN. GEN. STAT. § 45a-257(a) (voiding premarital will unless it provides for contingency of marriage).

None of these rules applies to the property of couples not legally married to one another, but mechanisms are available to approximate their consequences. Couples not legally married may take title to property, real and personal, as joint tenants with right of survivorship.<sup>15</sup> To reduce the risk that one joint tenant may sever the joint estate, either openly or without the knowledge of the other, the parties may execute an agreement against sale or partition.<sup>16</sup> If limited to a reasonable time, agreements against partition are presumptively valid,<sup>17</sup> although courts are often reluctant to enforce them against an unwilling party, particularly if circumstances have changed since the inception of the agreement.<sup>18</sup> Agreements against sale, on the contrary, are generally regarded as restraints on alienation and are therefore invalid, unless construed merely as agreements not to demand partition by sale.<sup>19</sup> Given the greater weight accorded intention in modern law, agreements against sale of an undivided interest may pass muster today, at least if limited to a reasonable time and so long as circumstances have not changed. Unless recorded, of course, such agreements would not prevent the actual sale of an undivided interest to a good faith purchaser but would form the basis for an action for breach of contract in case of such a sale. To lessen the risk of loss of the interest, or of other property, at the death of one party, the unmarried couple may also execute mutual wills leaving all or most of each testator's property to the other, and then may enter into an express contract not to revoke or alter the will. Contracts concerning wills certainly create legal obligations, but they are notorious producers of litigation and their actual enforceability in specific cases is uncertain.<sup>20</sup> Couples unmarried, in the legal sense of the word, may then, by adroit use of joint tenancies, anti-partition agreements, mutual wills, and contracts not to revoke the wills, gain some of the property consequences of legal marriage; but protection of the property from creditors, at least as to the debtor's one-half, seems to be beyond their reach.

Putting the couple's property together legally without marriage is, however, to address only the first part of the legal consequences of marriage. Legal marriage can, of course, be legally ended by divorce at the demand of either party, and with a final divorce decree many of the property consequences of marriage are automatically terminated. Property held in tenancy by the entirety, and perhaps also property held in joint tenancy by a married couple,<sup>21</sup>

<sup>15</sup> For a brief synopsis of the law of joint tenancy, see Orth, *supra* note 6, at § 31.02. For a reappraisal of the law joint tenancy, see John V. Orth, *Joint Tenancy Law: Plus Ça Change . . .*, 5 GREEN BAG 173 (2002).

<sup>16</sup> A somewhat more exotic possibility is the creation of estates for joint lives with alternative contingent remainders in the survivor. For an analysis of this estate, see Orth, *supra* note 6, at § 31.02. Although the life estate of each tenant (and, presumably, each tenant's contingent remainder) is alienable, alienation would not terminate the contingent remainder of the other.

<sup>17</sup> See LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 117, at 249 (2d ed. 1966).

<sup>18</sup> See, e.g., *Michalski v. Michalski*, 142 A.2d 645 (N.J. Super. Ct. 1958).

<sup>19</sup> See 6 AMERICAN LAW OF PROPERTY § 26.76, p. 522 (A. James Casner ed., 1952).

<sup>20</sup> See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 322 (6th ed. 2000).

<sup>21</sup> For the effect of divorce on tenancies by the entirety, see Orth, *supra* note 6, at § 33.08(d). In a few states, statutes provide for the automatic termination of joint tenancies

automatically converts on divorce into property held in tenancy in common, in which each party has a severable interest, one that is partitionable, alienable, devisable, and inheritable.<sup>22</sup> The inheritance rights of a surviving spouse, as well as the right to an elective or pretermitted share in the testamentary estate of the deceased spouse, end with the marriage, as do any provisions in favor of the ex-spouse in the decedent's will.<sup>23</sup> To attempt to incorporate the functional equivalent of divorce on demand into the anti-partition agreement and the contract concerning the wills is to risk the almost certain nullity of the entire undertaking. It is certainly beyond my drafting skills.<sup>24</sup>

The conclusion is inescapable that the law attaches valuable property consequences to the legal status of marriage that cannot be duplicated, although they can be approached, by private arrangements. This is to leave to one side the consequences, wholly unalterable by private agreement, of public laws concerning the rights of surviving spouses. Nearly all the states have homestead laws that secure the family home to the surviving spouse and minor children, free of the claims of creditors.<sup>25</sup> Related to homestead is the right of the surviving spouse and sometimes of minor children to have set aside from the probate estate certain tangible personal property of the deceased spouse up to a certain value.<sup>26</sup> Every state has a statute authorizing the probate court to award a family allowance during the administration of the estate for the support of the surviving spouse and often of dependent children.<sup>27</sup> The Federal Family and Medical Leave Act provides employees, in certain circumstances, with the legal right to unpaid leave to care for a seriously ill spouse.<sup>28</sup> Federal law protects (or creates) rights of surviving spouses in private pension plans,<sup>29</sup> individual retirement accounts, and in the social security system. The tax laws, both state and federal, afford significant opportunities for tax savings to married couples. "Married filing jointly" is often advantageous for purposes of income taxation, though as the recent debate concerning the so-called "marriage penalty"

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held by married couples on divorce. *See, e.g.*, ARK. CODE § 9-12-317; MICH. COMP. LAWS ANN. § 552.102; OHIO REV. CODE ANN. § 5302.20(C)(5).

<sup>22</sup> *See* Orth, *supra* note 6, at § 32.02.

<sup>23</sup> *E.g.*, MASS. G.L. c. 191, § 9; N.C. GEN. STAT. § 31-5.4 (2000). It is uncertain whether divorce automatically terminates provisions in favor of an ex-spouse in will substitutes, such as trusts. *See* Clymer v. Mayo, 473 N.E.2d 1084 (Mass. 1985) (terminating trust provision in favor of ex-spouse where trust was funded by pour-over will and was, therefore, part of an integrated testamentary disposition).

<sup>24</sup> Many of the same problems arise if a trust is created, despite the well-known flexibility of trusts and their greater responsiveness to intention. An irrevocable trust might defeat creditors and could tie-up property in favor of the survivor, but would, by definition, be immune from revocation in case of irreconcilable differences between the settlors. A revocable trust generally leaves each settlor's share exposed to creditors, and the very fact of revocability, necessary to permit the exit of either settlor, means the device is ineffective to guarantee the rights of the other settlor.

<sup>25</sup> *See* DUKEMINIER & JOHANSON, *supra* note 20, at 476.

<sup>26</sup> *Id.* at 477.

<sup>27</sup> *Id.*

<sup>28</sup> 29 U.S.C. § 2601 *et seq.*

<sup>29</sup> Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1998).

reminds us, it is not so in every case.<sup>30</sup> In addition, there is the unlimited marital deduction from estate and inheritance taxes<sup>31</sup> and the possibility for split-gifts by married persons to double the exemptions in federal gift and generation-skipping transfer taxes.<sup>32</sup>

Beyond the pecuniary benefits of legally recognized marriage lies the unquantifiable benefit of social recognition, as expressed by the law; couples who cannot be legally married may feel that their relationship is devalued by society. Religious groups, of course, are free to accept and solemnize same-sex marriages; the constitutional guarantee of the free exercise of religion certainly extends to a sect's definition of matrimony. In addition, certain communities and businesses may choose to accord a degree of recognition to couples not legally married.<sup>33</sup> But some, at least, of the demand by same-sex couples for legal marriage is a demand that the larger community represented by the state formally accept the validity of their relationship by adding legal recognition. From this perspective, the property consequences of marriage are actually secondary, important only as they reflect public acceptance of the marriage. To the extent that the demand for legal same-sex marriage is a demand for broad social acceptance, it will obviously not be satisfied by legal recognition of euphemistic substitutes – such as “domestic partnerships,” “civil unions,” or “reciprocal beneficiary relationships” – even if the legal consequences of these relationships are identical in all respects to the legal consequences attached to marriage.

Given the fact that the law accords special benefits, both tangible and intangible, to legally married persons, the demands of couples who are denied legal marriage deserve an answer. Fundamental fairness requires that like cases be treated alike, and the constitutions, both state and federal, specifically guarantee “equal protection of the laws.”<sup>34</sup> Yet courts have often ruled against the claims of same-sex couples.<sup>35</sup> The most common rationale is simply definitional, that marriage is the “union of man and woman, uniquely involving the procreation and rearing of children”<sup>36</sup> and that, therefore, same-sex couples are not the same as opposite-sex couples and may constitutionally be treated differ-

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<sup>30</sup> See generally CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX (1997); Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1772-79 (1998).

<sup>31</sup> 26 U.S.C. § 2056.

<sup>32</sup> 26 U.S.C. § 2513 (gift tax); 26 U.S.C. § 2631 (generation-skipping transfer tax).

<sup>33</sup> These provisions have not gone unchallenged. See Heidi Eischen, Survey, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. Tol. L. Rev. 527 (2000).

<sup>34</sup> U.S. CONST. amend. XIV, § 1; N.C. CONST. art. I, § 19.

<sup>35</sup> E.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (holding same-sex couple ineligible for marriage license); *Estate of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797, *appeal dismissed*, 624 N.E.2d 696, 604 N.Y.S.2d 558 (1993) (denying survivor of homosexual relationship rights of surviving spouse); *but see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that same-sex couples denied marriage licenses had stated a cause of action for sex discrimination prohibited by state constitution); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding denial of marriage license to same-sex couple a violation of state constitution). See also Robert F. Williams, *Old Constitutions and New Issues: National Lessons From Vermont's State Constitutional Case on Same-Sex Marriage*, 43 B.C. L. REV. 73 (2001).

<sup>36</sup> E.g., *Baker*, 191 N.W.2d at 186; *Cooper*, 592 N.Y.S.2d 797 (quoting *Baker*).

ently. Statutes, both state and federal, have been adopted to enact this definition into law,<sup>37</sup> and the Alliance for Marriage has proposed a federal constitutional amendment, limiting “marriage in the United States” to “the union of a man and a woman.”<sup>38</sup>

Perhaps because the latest challenge to legal marriage has been advanced by same-sex couples, the defense of the status quo has centered on the sexual relationship of such couples.<sup>39</sup> A different sex life, one with no reproductive potential, it is argued, justifies a different legal treatment. In addition, the claims of same-sex couples are also sometimes portrayed as a threat to conventional morality. Turning the criticism of the status quo on its head, defenders have argued that granting legal recognition to same-sex marriage would diminish respect for marriage in general, “by equating it with behavior that has been condemned by Western society for thousands of years.”<sup>40</sup> This, in turn, has led to a lively historical debate concerning Western attitudes toward homosexuality.<sup>41</sup> Even the attempt to equalize the effects of legal marriage and domestic partnerships of unmarried persons has been opposed on the ground that it “could undermine the institution of marriage and reflect an ideological bias against family relationships based on marriage.”<sup>42</sup>

In response, it could be observed that legal marriage is today predominantly an economic community for the material support of the couple during

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<sup>37</sup> See, e.g., Defense of Marriage Act, 28 U.S.C. § 1738C (West 2003) & 1 U.S.C. § 7 (West 2003) (“the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”). States have legislated preemptively to deny the validity of same-sex marriages recognized elsewhere. See, e.g., N.C. GEN. STAT. § 51-1.2 (2000) (“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”); NEV. CONST. ART. I, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”).

<sup>38</sup> See Robert Bork, *Stop Courts From Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A14. The proposed amendment would also eliminate any constitutional argument that the Equal Protection Clause requires that the “legal incidents” of marriage “be conferred upon unmarried couples or groups.” Bork admits that “reserving the name of marriage to its traditional meaning” is purely symbolic, but argues that “symbolism is crucial in cultural struggles.”

<sup>39</sup> At earlier times, the challenge to legal marriage was advanced by heterosexual advocates of free love.

<sup>40</sup> Letter to Editor by George W. Dent, Jr., N.Y. TIMES, Sept. 8, 1999 (identifying writer as professor of law at Case Western Reserve University). See also *Ex parte H.H.*, 830 So.2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (“Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God . . .”).

<sup>41</sup> See Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994) (rejecting historical claims made by witnesses for the State of Colorado in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), affirmed, 517 U.S. 620 (1996)); Randall Baldwin Clark, *Platonic Love in a Colorado Courtroom: Martha Nussbaum, John Finnis, and Plato’s Laws in Evans v. Romer*, 12 YALE J.L. & HUMANITIES 1 (2000). See generally K.J. DOVER, *GREEK HOMOSEXUALITY* (1978); JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE & HOMOSEXUALITY* (1980); Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371 (2002).

<sup>42</sup> N.Y. TIMES, Nov. 11, 2002 (quoting Brigham Young University Law Professor Lynn D. Wardle commenting on report of American Law Institute).



life, and a means of providing for the support of the survivor.<sup>43</sup> Subsidies for child-rearing, such as the homestead exemption from creditors and the possible set-aside and family allowance in probate,<sup>44</sup> constitute a very minor and distinctly adventitious part of the legal consequences of modern marriage. Almost every American state permits the complete disinheritance of children but not of spouses.<sup>45</sup> In addition, the benefits of legal marriage are not limited to opposite-sex couples who are capable of child bearing or who, if capable, are practicing sexual intercourse or sexual intercourse without contraceptive devices or practices. And, of course, modern reproductive techniques and modern adoption laws make legal parenthood available to single persons and to same-sex couples. Ever larger numbers of children are, in fact, being raised by unmarried persons.<sup>46</sup> Economic and moral support for parenting, if desired by society, may be provided by other, more specific means than restricting the legal benefits of marriage.

Theoretically, the simplest, but practically the most difficult, solution to the problem would be the elimination of the legal status of marriage. Stripped of its legal consequences, marriage would become a strictly private affair. There may actually have been an historical moment when such a solution was possible. The spread of Married Women's Property Acts in the last half of the nineteenth century, affording married women the same property rights as unmarried women, pointed toward a potential future for legal marriage without property consequences.<sup>47</sup> Indeed, in many states, the adoption of a Married

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<sup>43</sup> Unless elective share statutes take the assets of the survivor into account, election against the will of a deceased spouse can actually increase the net worth of the survivor. See Tracy Dawn Cobb, Comment, *North Carolina's New Elective Share Statute: Much Ado About Nothing?*, 36 WAKE FOREST L. REV. 795, 816-17 (2001).

<sup>44</sup> See *supra* notes 25-27 and accompanying text.

<sup>45</sup> At common law, spouses were protected by the law of dower and curtesy. Children were originally protected, to some extent, by the refusal of the common law to recognize the legal effect of wills, causing all land to pass by inheritance. When wills were first recognized at law, by virtue of the statutes 32 Hen. 8, c. 1 (1540) and 34 & 35 Hen. VIII, c. 5 (1542), the testator was allowed to devise only two-thirds of his lands held by knight service, the rest necessarily passing by inheritance. Not until the abolition of military tenures in 1660, 12 Car. 2, c. 14, did all land become freely devisable, at which time it became possible to disappoint the heirs altogether. See KENELM EDWARD DIGBY, INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 378-79 (1897). In Louisiana, where the civil law rather than the common law forms the basis of the law of succession, a testator for long could dispose of only one-third of his estate if he left three or more children, one-half if he left two, and two-thirds if he left one child. ATKINSON, *supra* note 2, at § 36, at 139. Due to changes introduced in 1996, the forced share now applies only to children under the age of twenty-three and to children of any age who are permanently and totally disabled by mental or physical handicap. LA. CONST. art. XII, § 5; LA. CIV. CODE art. 1493.

<sup>46</sup> In 1998, out of 37.7 million family groups with children in the U.S., 12 million were single-parent families; of these, 6.2 million were headed by a parent who had never married, 4.3 million by a divorced parent, and 1.3 million by a widowed parent. U.S. Census Bureau, 1998 March CPS Detailed Tables, available at <http://www.census.gov/population/www/socdemo/hh-fam.html> (last visited Apr. 20, 2003).

<sup>47</sup> The first Married Women's Property Act, described as "crude and somewhat tentative," was passed by Mississippi in 1839; "by 1850, about seventeen states had granted to married women some legal capacity to deal with their property." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 185-86 (1973). See also Richard H. Chused, *Married Women's Property Law, 1800-1850*, 71 GEO. L.J. 1359 (1983).

Women's Property Act spelled the end of the common-law estate of tenancy by the entirety,<sup>48</sup> forcing married couples to hold their property either separately in sole ownership or together as tenants in common or joint tenants with right of survivorship – the same choice now offered to unmarried couples. The contemporaneous decline of the marital estates of dower and curtesy pointed in the same direction, at least until statutory elective shares were created to prevent spousal disinheritance.<sup>49</sup> About the same time, general adoption statutes began the process of creating legal parenthood distinct from biological parenthood,<sup>50</sup> sometimes even terminating the legal consequences of the biological relationship,<sup>51</sup> and opening the possibility of tactical adoptions to prevent will contests.<sup>52</sup>

It may be that the focus on the reproductive potential of couples for whom legal marriage is an option is misplaced. Rather than worrying about what a couple does together at night, perhaps the law should focus on the daytime reality. Which brings me back to the story of my aunts, Maud and Mary, whose lifelong committed relationship was not based on sex.<sup>53</sup> It certainly never occurred to them to demand the right to marry one another; indeed, they

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<sup>48</sup> See, e.g., *Cooper v. Cooper*, 76 Ill. 57 (1875); *Appeal of Robinson*, 33 A. 652 (Me. 1895); *Clark v. Clark*, 56 N.H. 105 (1875). Sir William Blackstone did not originally include tenancy by the entirety in his chapter on concurrent estates because, under traditional analysis, the married couple was viewed as legally one person. See John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35. One reader of the last-cited article found in it a trumpet call for change. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 424 (2001) (describing the author's project as an attempt "to address the call for change trumpeted by Professor Orth"). Unfortunately, as the present reflections suggest, the trumpet sounded an uncertain note.

<sup>49</sup> Georgia is today the only non-community property state without an elective share statute. *DUKEMINIER & JOHANSON, WILLS*, *supra* note 20, at 480 n.1. Despite the statutory lacuna, most married testators in Georgia reportedly do make provision for their surviving spouses. Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 464-70 (1976).

<sup>50</sup> The first general adoption statute was passed by Massachusetts in 1851. See *ATKINSON*, *supra* note 2, at § 23, at 86. For the details regarding the development of the law of adoption, see generally Stephen Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971). For an analysis of how the changes in adoption and child custody law reflected changes in social, psychological, and political thought in the nineteenth century, see Jamil Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979).

<sup>51</sup> See, e.g., MD. EST. & TRUSTS CODE ANN. § 1-207(a) (2003) (providing that "on adoption, a child no longer shall be considered a child of either natural parent, except that upon adoption by the spouse of a natural parent, the child shall still be considered the child of that natural parent"); N.C. GEN. STAT. § 29-17 (2000) (same).

<sup>52</sup> Standing to contest a will is restricted to those who would benefit by its disallowance. Adoption offers a means, therefore, to prevent more remote heirs from having the necessary standing. See, e.g., *Collamore v. Learned*, 50 N.E. 518, 519 (Mass. 1898) (Holmes, J.) (describing as "perfectly proper" adoptions by a testator intended "to take away any inducement that some of those who otherwise would have been his heirs might have to oppose his will").

<sup>53</sup> The American Law Institute has recently defined "domestic partners" as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2003). Unless sharing "a life

would have been shocked (or perhaps amused) by the idea. Had a “domestic partnership” with the legal benefits of marriage been available, I doubt if they would have been willing to enter into one, although I would certainly have tried to talk them into it. The annual income tax savings alone would have been appreciable, while the prospective survivor’s benefits and inheritance tax savings would have provided them significant peace of mind in old age.

Maud and Mary did not recognize that the law materially disadvantaged, and perhaps devalued, their relationship. Whatever social stigma they might have experienced as unmarried women, they did not attribute to the law, even though conveyancers in their lifetime were still routinely describing unmarried women, like themselves, as “spinsters.”<sup>54</sup> Maud and Mary would, I believe, have readily agreed with the proposition that marriage is the “union of a man and a woman.” They did not understand that, as a legal institution, marriage had come to have little or nothing to do with sex but a great deal to do with property. Indeed, it took a social shift of seismic proportions before the claims of same-sex couples became publicly audible. A further shift will be required before the claims of partners not asserting a sexual relationship are taken seriously.<sup>55</sup>

The moral of the story of Maud and Mary is not a simple one, nor are the reflections it engenders likely to please all the participants in the debate concerning same-sex marriage; night thoughts seldom do. On the one hand, it suggests that merely opening the legal benefits of marriage to same-sex couples would not wring all the inequities out of the current system. There would still exist couples with a relationship functionally similar to marriage who would be excluded and therefore economically, and perhaps socially, disadvantaged. On the other hand, it reveals the ramifying difficulties of abandoning the traditional basis of legal marriage. Same-sex couples could be accommodated if their life style approximated that of traditional opposite-sex couples. Two siblings living together for a lifetime could be added without too much trouble. But what if there were three<sup>56</sup> – or more? And what if the basis of the relationship was not sex or kinship? Should such “marriage equivalents” be recognized as well?

Is the debate about same-sex marriage a debate about fairness to couples however constituted, or is it only about extending legal and social recognition to couples whose sexual relationship is not of the monogamous heterosexual variety (“one man and one woman”)? Is it, in other words, about fairness in

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together as a couple” implies a physical relationship, this definition excludes a sexual component.

<sup>54</sup> See, e.g., *Jackson v. O’Connell*, 177 N.E.2d 194, 194 (Ill. 1961). See also BLACK’S LAW DICTIONARY 1572 (4th ed. 1957) (defining “spinster” as the “addition given in legal proceedings, and in conveyancing, to a woman who never has been married”).

<sup>55</sup> It can be argued that this shift is already occurring, starting in Hawaii where non-sex couples are now accorded rights equivalent to marriage under state law. See notes 57-59, *infra*, and accompanying text.

<sup>56</sup> What if, for example, my father had not married but had spent his life living with his two sisters? In that case, the long-term relationship of the three would have been accorded none of the property consequences of legal marriage; the siblings would have been forced to rely on ordinary private law devices to provide for one another. In that case, too, I would not be writing this essay.

general or about fairness to a specific sexual minority? Before we can select a remedy, we must identify the wrong we are trying to correct.

Recent legislation implicitly recognizes the dilemma. The state of Hawaii now permits couples composed of "two individuals who are legally prohibited from marrying" to establish a "reciprocal beneficiary relationship" with the same legal consequences under state law as marriage.<sup>57</sup> Although expressly open to same-sex couples ("two individuals who are of the same gender"<sup>58</sup>), the new relationship is also available to "two individuals who are related to one another, such as a widowed mother and her unmarried son."<sup>59</sup> The effect, of course, is to dilute the social, if not the legal, recognition accorded same-sex couples. While possibly motivated by reasons of political palatability, the extension to couples whose relationship is not sexual generalizes the remedy to include couples constituted by kinship. In Hawaii, persons like Maud and Mary can today secure all the benefits accorded marriage by state law.

In Vermont, by contrast, recent legislation recognizes "civil unions," granting them the same legal consequences under state law as marriage, but limiting them to unrelated persons of the same sex.<sup>60</sup> Civil unions are expressly forbidden between persons related to one another, such as Maud and Mary: "A woman shall not enter a civil union with her . . . sister."<sup>61</sup> The new Vermont law does permit two related persons to establish a "reciprocal beneficiaries relationship," but the legal consequences include none of the property consequences incident to legal marriage or civil union.<sup>62</sup> The result is to create two classes of benefits: the first for couples united in legal marriage or civil unions, the second for all other couples.<sup>63</sup>

Since it is seemingly too late to go back to a system in which no legal consequences attach to marriage, and since the legal consequences of marriage today primarily function to provide economic security to couples and the survivor, perhaps the focus should be on their life together rather than on their sex life. "Partnership," with its dual connotations of relationship and property, is actually a better term to describe the legalities of modern marriage than "marriage" itself.<sup>64</sup> Just as modern adoption laws make parenthood a matter of

<sup>57</sup> HAW. REV. STAT. § 572C-1, 572C-3 et seq. (2000). See W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81 (1998); Symposium, *Same-Sex Marriage*, 22 U. HAW. L. REV. 1-235 (2000).

<sup>58</sup> HAW. REV. STAT. § 572C-2.

<sup>59</sup> *Id.* It is noteworthy that the example chosen to illustrate a couple not united by sex, "a widowed mother and her unmarried son," implicates a common stereotype of the male homosexual.

<sup>60</sup> 15 VT. STAT. ANN. tit. 23, §§ 1202, 1204 (2000). See Symposium, *Vermont Civil Unions*, 25 VT. L. REV. 1, 1-353 (2000).

<sup>61</sup> 15 VT. STAT. ANN. tit. 23, § 1203.

<sup>62</sup> 15 VT. STAT. ANN. tit. 25, § 1301 (limiting benefits of "reciprocal beneficiaries relationship" to matters related to health care, such as visitation rights and medical decision-making).

<sup>63</sup> There are actually three classes of benefits if one places independent value on the label "marriage." Although couples united in a civil union receive the same benefits under state law as married couples, the name "marriage" is withheld from same-sex couples.

<sup>64</sup> Although somewhat old-fashioned, "partner" remains a dictionary synonym for "husband" or "wife." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1648 (1993).

choice rather than biology, so modern marriage laws could recognize an economic rather than a reproductive relationship. Admittedly, the exclusion of a sexual component from legal marriage would not satisfy those who want to use the debate concerning same-sex marriage as an opportunity to validate (or condemn) the sexual behavior of same-sex couples. If sex could be disregarded, the debate concerning same-sex marriage could be transformed into a discussion concerning proper criteria for admission to a legal relationship involving social and economic support: less sexy, but perhaps thereby more productive.

Is that the happy dawn that will follow a dark night of reflections: a future Utopia where there are no legal marriages but only registered partnerships? Legal marriage today offers advantages to sexual couples. If same-sex couples are insignificantly different from opposite-sex couples, then they, too, must be admitted. By the same reasoning, non-sex couples must also be accommodated unless their relationship is qualitatively different. And unless kinship couples are unlike those otherwise united, then all couples, however constituted, must be included. But then, by what reasoning are the benefits to be limited to couples? Can sex, which unites and divides us, be so easily banished from our dreams?