

MORRISON V. SADLER
(in Indiana Court of Appeals)
Docket #49A02-0305-CV-447 (Ind. Ct. App.)
Amicus Curiae Brief of the Society of Catholic Social Scientists

INTEREST OF THE AMICUS CURIAE

The Society of Catholic Social Scientists is an interdisciplinary association of Catholic scholars working in the social sciences, including law and jurisprudence. The Society's purposes are to pursue and produce knowledge about the social order; to evaluate contemporary social-science work in light of Catholic social teachings; to apply these teaching to the challenges posed by modern society; to encourage distinctively Catholic scholarship in the social sciences; and, where appropriate, to put the tools of social science at the service of the Church's evangelizing mission.

The SCSS publishes the only interdisciplinary Catholic social-science journal in North America – *The Catholic Social Science Review* – as well as other research-oriented publications. The Society also sponsors periodic conferences and symposia, issues statements and papers on important social and political questions, and recognizes outstanding contributions to a distinctively Catholic approach to the social sciences. The SCSS aims, too, to assist students who are interested in integrating social-science careers with the faith and tradition of the Catholic Church.

All the amici are September 22, 2003 interested in protecting the dignity and rights of the family in political society. This commitment reflects the Catholic Church's position that the family is "the first and vital cell of society" and that "[i]t is from the family that citizens come to birth and . . . find the first school of the social virtues that are the animating principle of the existence and development of society itself."¹

SUMMARY OF ARGUMENT

Marriage is the union of a man and a woman. Marriage between two men, or between two women, is not possible and has never been legally recognized in the United States. No human authority may make any other relationship the legal equivalent of marriage.

These convictions of the amici are not matters of sectarian doctrine or private morality. They are great public truths, recognized around the world from time immemorial. The universal fact of the matter was well described by the great anthropologist Margaret Mead:

¹ Vatican Council II, *Decree on the Apostolate of Lay People*, 11 (1965).

When we survey all known human societies, we find everywhere some form of the family, some set of permanent arrangements by which males assist females in caring for children while they are young. . . [I]n most societies there is the assumption of permanent mating, the idea that the marriage should last as long as both live.¹

The United States Supreme Court has frequently cited the indispensable contribution of marriage to our political institutions and our way of life. Marriage, according to the Court, “creates the most important relation in life” and “is the foundation of the family and society, without which there would be neither civilization or progress”.² Marriage has always been the keystone in the arch of our public morality of sexual activity. As Justice John Marshall Harlan said: “the laws regarding marriage [] provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up”. Justice Harlan said that laws against fornication, adultery, and homosexual conduct *all* are justified by their protection of marriage. These laws, he concluded, form a “pattern” “deeply pressed” upon our common life.³ No wonder that Indiana law, too, has always limited marriage to the union of man and woman.

These legally authoritative *encomia* to marriage could be endlessly multiplied. But there is no need for repetition. For all the statements say or imply that marriage is a moral reality which precedes --“is the foundation of” -- law. The *Catholic Catechism* puts it plainly: The family is “prior to any recognition by public authority”.⁴ Law does not make marriage; it regulates and protects that sacred relationship for the happiness of people and for the well-being

¹ M. Mead, *Male and Female: A Study of the Sexes in a Changing World*, 188, 195 (1949).

² *Maynard v. Hill*, 125 U.S. 190, 211 (1888)

³ *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

⁴ *Catechism of the Catholic Church*, sec 2202.

of society.

The questions squarely raised by Plaintiffs' challenge to Indiana's marriage laws are these: Is gender complementarity essential to marriage? Is constitutional for Indiana to decline to recognize the partnership of two men, or of two women, as marriages?

The answer centers upon exactly what man and woman can do but which same-sex couples can never do. No two men – and no two women – can form a mated pair. They cannot engage in sexual acts suited to procreation. They can never be a single reproductive principle. They cannot by their sexual acts become, literally, two-in-one-flesh.

Children can never be the “issue” of any same-sex act. But children of the married couple literally *embody* their parents' marriage, perfecting their parents' two-in-one-flesh communion. This procreative orientation of marriage makes possible the awesome web of valuable relationships we call the family. The law protects and preserves this procreative orientation precisely by holding that marriage is the union of man and woman. As the Trial Court stated in its opinion (quoting a Minnesota case): marriage – the union of man and woman – “*uniquely* involv[es] the procreation and rearing of children within a family”. [Emphasis added.]

Plaintiffs would uproot and cast aside the law of marriage. They would revolutionize our legal understanding of the family. They invite this court to squander destruction the great and “unique” goods which marriage offers our civil society.

ARGUMENT

I. The Supreme Court Decision in *Lawrence v. Texas* Does Not Warrant Reversal of the Trial Court Decision in this Case.

The United States Supreme Court in *Lawrence v. Texas*⁵ addressed the constitutionality of a statute which made it a crime for two persons of the same gender to perform certain sexual acts. The Court's holding was limited to the validity of the challenged statute, and rested upon the view that, as the majority reasoned, the statute "demean[ed]"⁶ homosexuals by making their private, consensual intimacies a crime. In the course of its opinion, however, the majority observed that persons in a homosexual relationship "may seek autonomy" for various "personal decisions" -- including marriage -- "just as heterosexual persons do"⁷.

Commentators on both sides of the same-sex marriage question -- as well as the dissenting justices -- think *Lawrence* is a preview of the majority's views on so-called "gay" marriage. Whatever else one might say about such speculation -- and the *amici* are surely concerned about the high court's direction -- nothing in *Lawrence* provides grounds for this court to overturn the judgment below.

First, the expansive language in the *Lawrence* majority opinion is *dictum*. The decision's *ratio* does not imply or entail that same-sex marriage is constitutionally required. The majority concluded that the Texas statute furthered no legitimate state interest, that it was a meddlesome "intrusion into the personal and private life of the individual".⁸ But no one doubts that the legal definition of marriage is a great *public* matter. Declining to endorse certain relationships as *marriages* is not a meddlesome interference in anyone's bedroom activities.

⁵ _ U.S.-, 123 S. Ct. 2474 (2003).

⁶Id at 2484.

⁷ Id at 2481-2

⁸ Id. at 2484.

Second, the *Lawrence* majority repeatedly said that it took no position on the marriage question. “The present case does not involve”, said the Court, “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁹ Elsewhere the majority said that the law ought to steer clear of consensual sexual intimacies, absent “abuse of an institution the law protects”¹⁰. The *Lawrence* court clearly did not want its ruling, however portentous some claim it to be, to be authoritative in a case such as this.

Third, the *reasoning* behind the most expansive comments of the *Lawrence* Court must be treated with great caution. The majority relied chiefly upon the Mystery Passage of *Casey v. Planned Parenthood*, an abortion liberty case in which three justices joined to claim that:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.¹¹

This passage supports the individual’s liberty to come to his deepest beliefs without coercion and without being punished for the conclusions he reaches. But Indiana has taken no steps to deny anyone’s beliefs in the value or desirability of certain relationships. No same-sex couple is precluded from believing that they are married, or from seeking and obtaining private or religious recognition of their partnership as a marriage. In fact, none of the Plaintiffs complains of coercion, or of molestation, or of any discrimination whatsoever, save that in the marriage law itself: man and woman, only.

⁹ Id at 2484.

¹⁰ Id at 2478.

¹¹ Id at 2481, quoting 505 U. S. at 851.

The Supreme Court's post-*Casey* but (pre-*Lawrence*) decisions make it clear, moreover, that philosophical abstractions such as the Mystery Passage are not founts of fundamental rights. Abstractions such as personal autonomy are, at most, useful descriptions of some of the Court's holdings.

That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are protected,...and *Casey* did not suggest otherwise...By choosing th[e] language [of Mystery Passage] the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.¹²

Glucksberg was, until *Lawrence*, the Court's standing order on Due Process methodology. *Glucksberg* established beyond doubt that fundamental rights do not arise from the urgency or intensity with which proponents advance their claims on behalf of them, from the asserted importance of the matter to them, or from any *subjective* basis at all. Rather, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'.¹³ A glance at that history and tradition conclusively shows that there is no fundamental right to same-sex marriage. This history and tradition are decisive here, notwithstanding the fervent hopes and beliefs of the Plaintiffs.

Fourth, the *Lawrence* Court's reliance upon *Casey* is, at most, suggestive, if it is not merely incautious rhetoric. The majority asserted that homosexual couples have the *same*

¹² *Washington v. Glucksberg*, 521 U.S. 727, 728 (1997)(citations omitted).

¹³ 521 U.S. at 720-21 (citations omitted.)

interests as heterosexuals do with regard to “contraception” and “procreation.”¹⁴ The assertion is absurd. Same-sex couples have no interest in contraception, much less one comparable to opposite-sex couples. That is because same-sex couples can engage in no act which might result in pregnancy. Contraception, by definition, has to do with preventing a new life from coming to be by acts of sexual intercourse.

Same-sex couples have no interest comparable to heterosexuals in “procreation”. “Procreation” refers in both legal and common usage to the natural generation of new life through acts of sexual intercourse. It may be that same-sex couples can cooperate with other people in the production of a new human life which bears a genetic relationship to one of them. But no issue of the *couple* is possible; neither two men nor two women can conceive a child of their own.

In no case does a same-sex couple stand on the same footing as a heterosexual couple reproducing by assisted artificial means. Married couples sometimes produce *their* genetic child with artificial assistance at say, an IVF clinic. But in IVF the gametes of husband and wife spontaneously fuse in a dish. The resulting embryo is then implanted and nurtured in the wife/mother’s uterus. In this resort to IVF, a baby comes to be just as it would in the wife’s fallopian tubes; is genetically a unique and unrespectable combination of the couple; and is nurtured in the womb as is any other child. Same-sex couples necessarily have to rely upon third (and maybe fourth and fifth) parties for production of a baby, thus implicating the rights of persons outside the couple.

Lastly, *Lawrence* is an opinion torn at its center. The majority separated legal protection

¹⁴ 123 S. Ct. At 248-82.

and preservation of opposite-sex marriage from the question – there decided – of complete sexual liberty for consenting adults. The majority strived to preserve state authority to protect marriage against “abuse” by non-marital sexual conduct. But these justices seem to have forgotten what Justice Harlan said on behalf of the whole legal tradition: public morals laws regarding sex are not meddlesome interferences in persons’ bedrooms. They are not oppressive denials of autonomy. They are justified, wholly and entirely, by their tendency to protect marriage against abuse.

This forgetfulness at the center of *Lawrence* requires, in our view, that this court and all other courts *not* extend its reasoning, especially not to effect the revolutionary end of abolishing marriage as we have always known it. If such cataclysmic social change is *ever* to be introduced by courts – and we think it should never be – the U. S. Supreme Court must be the one to pronounce it.

II. Excluding Plaintiffs From Marriage Is Just Because Plaintiffs’ Relationships Are Not, In Reality, Marriages

Marriage is the state’s business, but it is not the state’s creation. The *encomia* rehearsed earlier testify that marriage is a natural human relationship whose basic features — monogamy and gender complementarity among them — precede political society and its law. Even where legal authorities refer (as they often do) to marriage as a “civil contract”, they point to the fact that marriage occurs only by the consent of man and woman. They do not mean that marriage is whatever contracting parties wish it to be.

This relationship between law and marriage is not anomalous. The law often enters into creative partnerships with institutions and practices it does not make, where those institutions

contribute to the common good *and* where they need law's help to prosper. Public authority helps in various ways – it recognizes, ratifies, regulates, promotes, supports, and protects. Law “supervenes” upon these institutions, and by so doing creates, within limits, a legal version or dimension of a particular social practice or institution. The state's partnership with marriage and family is the most important such partnership.

The partnership is quite one-sided: law exists *for* these institutions because law is *for* the persons whose well-being and flourishing is dependent upon them. Marriage does not exist for law, or for the polity, or for the success of the nation-state as a world historical actor, or for the GNP. Things are the other way round. Law supports certain institutions of civil society for the sake of the common good.

A. “Hard” Marriage

The civil law takes the basic shape and definition of marriage from the truth about marriage. Marriage is thus “hard”; it possesses foundational features beyond human choosing. Public authority in America has traditionally protected, often through criminal penalties, all the constitutive features of marriage: monogamous, heterosexual, sexually exclusive, the legitimate context for having children.

William cannot legally marry his male neighbor, or the two sisters next door, for neither same-sex marriage nor polygamy is possible. No one in the United States is *able*, legally speaking, to marry another so long as one's spouse is alive. “Bigamists” and “polygamists” are *not* persons with more than one spouse, for no one can have more than one spouse. Marriage is, in reality, monogamous; it is for couples only. A “bigamist” is someone who, with a spouse still living, *attempts* to marry another.

The law has never recognized any same-sex couples as married because, notwithstanding their subjective hopes, dreams, and beliefs, marriage between a man and another man, or between two women, is *objectively* impossible. Marriage, being a two-in-one-flesh communion oriented toward procreation, is available only to couples comprised of man and woman.

To illustrate the point further: All states ban marriage within certain degrees of family relation, at least in the lineal line of consanguinity. But no one doubts that such marriages are *possible*. They are, simply, *unlawful*. Even staunch opponents of interracial marriage never doubted that persons of different races were *able* to marry each other. These racists held that interracial marriages contravened some imagined social good, and ought therefore to be declared unlawful. Prohibited marriages based upon consanguinity are a good example of the basis for legally declaring some *possible* marriages unlawful. The Indiana Supreme Court succinctly explained the law in the 1910 case of *State v. Tucker*.¹⁵ Incest, the *Tucker* court said, is defined as sexual intercourse between persons “so nearly related that marriage between them would be unlawful.”¹⁶

It is generally agreed that marriages between persons in the direct lineal line of consanguinity, and also between brother and sister, are unlawful as against the law of nature, independent of any church canon or statutory prohibition. This inflexible rule arises from the institution of the family, the basis of civilized society; and, the rights, duties, habits, and affections, flowing from that relation. Family intermarriages and domestic licentiousness would inevitably confuse parental and filial duties and affections, and corrupt the moral sentiments of mankind.¹⁷

¹⁵ 93 NW 3 (1910).

¹⁶ *Id.*

¹⁷ *Id.*

B. “Soft” Marriage

The question might arise: if marriage is always and everywhere a two-in-one flesh union of man and woman – and if this is a hard, undeniable moral reality – what difference does the civil law make? The answer is that marriage is “soft” as well as “hard”. Individuals in any particular society depend upon the culture and law of that place and time for the meaning of marriage. Someone entering into marriage can only choose what he or she understands marriage to be. This is an example of a wider truth about human choosing and acting: no one can choose an option which is never presented to the mind and will for decision and adoption.

The marriage available in any society is powerfully formed by law, and by cultural practices and popular beliefs which are themselves shaped by law. This is not to suggest that marriage is extirpated where local law is unfavorable to its flourishing. But all too often, corrupt culture and law conspire to deprive people of the opportunity to choose (real) marriage – where, for example, polygamy is the social norm, or where wives are treated as chattel, and not as equal spouses. In the latter situation, where true equality and mutuality between spouses is unimaginable due to false beliefs about the inferior nature of women, marriage as a two-in-one-flesh communion is simply not available for choice.

People are not free to choose the culture in which they live, interact, court, marry, make love, have children. One set of laws shapes, structures, and ultimately holds in place by legal sanction the public architecture and, in great measure, the cultural forms of these practices and relationships. Legal philosopher Joseph Raz (who does not share the *amici*'s negative moral evaluation of same-sex sexual relationships) says, “monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which

recognizes it, and which supports it through the public's attitude and through its formal institutions."¹⁸

Raz does not suppose that, in a culture whose law and public morality do not support monogamy, someone who happens to believe in it will be unable to restrict himself to having one wife or will be required to take additional wives. The point, as expressed by Princeton's Robert George, is rather that

even if monogamy is a key element of a sound understanding of marriage, large numbers of people will fail to understand that or why that is the case — and will therefore fail to grasp the value of monogamy and the intelligible point of practicing it — unless they are assisted by a culture which supports monogamous marriage. Marriage is the type of good which can be participated in, or fully participated in, only by people who properly understand it and choose it with a proper understanding in mind; yet people's ability properly to understand it, and thus to choose it, depends upon institutions and cultural understandings that transcend individual choice.¹⁹

Someone who chooses to marry for life, to the exclusion of sex with all others, enters into a *different* relationship than someone who does not really choose fidelity unto death. Someone who enters into a marriage understanding it as procreative enters into a different relationship from one who does not. All these persons may, as far as our law is concerned, be married. But the relationships which these married couples participate in is different because of what the law about marriage is.

C. Legally Recognizing Same-sex "Marriage" Would Greatly Change the "Marriage"

¹⁸J. Raz, *The Morality of Freedom*, 162 (1986)

¹⁹ "‘Same-sex Marriage’ and ‘Moral Neutrality’", K. Whitehead, ed., *Marriage and the Common Good*, 93 (2001).

Available For Choice In Our Society

Legal recognition of same-sex marriage would *not* signal to our country's young people that their government had reconsidered some matter of policy, had recalculated costs and benefits, had acted upon new information or the latest techniques – and changed its mind about some regulation. Recognizing same-sex marriage would instead be a state broadcast of a new (putative) truth about marriage (correcting an ancient prejudice or lie): marriage is not really ordered to procreation. What was off the menu of available options, is now on it. What could not be chosen, now can be. Culture, popular practice and individual choices – the whole reality of marriage on offer in the state – would thus be transformed.

The U.S. Supreme Court knows this profound capacity of law to shape an entire culture. Affirming the central holding of *Roe v. Wade* the Court wrote in *Planned Parenthood v. Casey* that “[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of woman to act in society, and to make reproductive decisions”.²⁰ With what effect? “[F]or two decades... people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”.²¹

Note well: *Casey* was not talking about just, or even mainly, the millions of women who had abortions. The Court was talking about how *Roe* altered the psychology and self-

²⁰ 505 U.S. 833, 860 (1992)

²¹ 505 U.S. at 856.

understanding, the dreams and achievements, of *every* woman. *All* women, according to the Court, enjoy the benefits of ultimate control over their reproductive lives. It is like unemployment insurance or Medicaid, or any other strand in social safety net. No matter what chances one takes with one's money or job, no matter how bad one's luck turns, one knows that one is not going to starve, or be left to die with no doctor to lend a hand. According to the land's highest court, then, *Roe* would have transformed our world even if no one actually had an abortion.

Meeting Plaintiff's demand would reconstitute our world of marriage and family. No one can say with confidence how rapidly the legal revolution will trickle down to ordinary persons' understanding of marriage, and alter what marriage is to them and for them. But the abortion example, the lessons of history, and the warnings of keen observers such as Joseph Raz and Robert George all give us reason to fear that the descent could be both fast and steep.

III. Marriage And the Common Good

How does marriage contribute to the political common good? How does the procreative orientation of marriage benefit the polity?

Marriage is the uniquely appropriate context for having kids. This unique appropriateness is *not* a raw societal interest in population replacement. It is not a matter of a pro-natalist legislative policy, or of worries about having enough soldiers and workers. This unique appropriateness does *not* depend upon statistical verification of claims about children's grades, emotional adjustment, or some other measure of social well being when they live in traditional mother and father homes. It is not about providing adequate shelter, food, and nursing care for children (though taking care of children in these ways is part of being a good mother or father).

Likewise, the imprudence of public policies encouraging the formation of families headed by same-sex couples does *not* depend upon claims about the comparative disadvantages – by the same statistical measures – of such households as environments for raising children. Much less is it about median incomes or quality of medical care available.

This unique appropriateness is not about social scientific findings at all. It has rather to do with the valuable human relationships which the reproductive union of man and woman makes possible: the married couple as husband and wife; mother and father; father and daughter; father and son; mother and daughter, mother and son.

The necessary gender complementarity of marriage goes well beyond the biological unity possible for man and woman. It is, however, partly that. By their marital acts the couple actualize, or express, in a profound and special way their whole married life together. When their marital acts bear the fruit of children, these children are (literally) the *issue* of their marriage: embodiments and thereby extensions into space and time of their parents' marriage. Mother and father are equally, and exclusively, parents of all their children. All the children are, one compared to the others, equally and wholly the offspring of the same parents. This family-wide equality, mutuality and natural bond of identity is the wellspring and ground of love, duty, loyalty, care-giving – the whole matrix of family life. Nothing can replace it.

This complementarity is also partly psychological. It results in a unique combination of male and female psyches, temperaments and culturally shaped roles for the husband/father, wife/mother, daughter/sister, son/brother. One need not and we do not endorse all features of our culture's — or any culture's — gender role definition. But some such rough definition and differentiation according to gender is found in every culture, for some such differentiation is

endemic to our experience of life as embodied males or females.

No society's conception of how a husband, or an eldest daughter, for example, is to behave is beyond criticism. But *being* a wife and mother is scarcely a matter of assuming a socially constructed type. It is a natural moral reality upon which culture -- and law -- rightly supervene, and in so doing structure, specify, reinforce, protect. And in doing *that* culture -- and law -- promote these great (natural, morally valuable) opportunities for human flourishing, keeping them alive, intact, and available for choice of persons within the culture.

These marital and familial relationships drive the law's protection of marriage as the morally appropriate context of parenting. This factor is no more subtle or beyond the state's concern than is the correct judgment that the factor of *equality* of marital friendship lies at, or very near, the heart of the state's legitimate judgment that polygamy is not supportable, even to the point of making criminal a person's attempts at plural marriage.

Once marriage is no longer a bodily communion oriented towards procreation then three or more persons could as readily constitute a marriage as could two. As the trial court said, "[t]here is no inherent reason why [Plaintiffs's] theories, including the encouragement of long-term stable relationships, the sharing of economic lives, the enhancement of emotional well-being...could not be applied to groups of three or more."²² In this scenario, the underlying, unavoidable equality and mutuality of the traditional family is out the window.

IV. Objections

Someone might object: the civil law already has denied the procreative orientation of marriage. The law does not require married couples to have children. Infertile couples have

²² *Morrison, supra* note 10, at 13.

always been able to marry. Many couples marry without a firm intention to have children and some marrying couples are known to be sterile. As the trial court said, “not all opposite-sex couples may be able to reproduce on their own, or may wish to have children at all”²³ The objection concludes: to deny same-sex couples a license to marriage at this point in history is arbitrary.

It is surely true that couples unable or presently unwilling to have children are permitted to marry in Indiana. But it is wrong to assert that this fact makes the decision below arbitrary. Not every couple marrying must have children in order for marriage to be procreative. Man and woman, even if infertile, are perfectly able to engage in the kind of act which is procreative – sexual intercourse. It is instructive to note that infertility has never been a bar to marriage but that impotence has been. That is, the inability of one or the other spouse to engage in the marital act, even where children are not in view or sterile vitiates the marriage. Barrenness does not. The law has always sought to treat marriage as a two-in-one flesh communion actualized by the reproductive – type acts of the couple, not as a baby factory.

Much in our culture has tended in recent years to undermine the institution of marriage and the moral understandings upon which it rests. But longstanding features of our legal and religious traditions still testify to the intrinsic value of marriage as a two-in-one-flesh communion. Consummation has traditionally (though, perhaps, not universally) been recognized by civil as well as religious authorities as an essential element of marriage. “Physical defects and incapacities which render a party unable to consummate the marriage, existing at the time of

²³ *Morrison v. Sadler, Marion County Court (slip opinion), May 7, 2003*

the marriage, and which are incurable are, under most statutes, grounds for annulment.²⁴ This requirement for the validity of a marriage, where in force has never been treated as satisfied by an act of sodomy, no matter how pleasurable. Nothing less (or more) than an act of genital union consummates a marriage;²⁵ such an act consummates even if it is not particularly pleasurable. Unless otherwise impeded, couples who know they are sterile can lawfully marry so long as they are capable of consummating their marriage by performing such an act.²⁶

Someone might object, too, that the legal permission to adopt children granted to same-sex couples undermines any claim here about the unique appropriateness of the marital family for *having* children. But *amici* do not deny the capacity or the willingness of homosexual and lesbian adoptive parents to provide adequate food, shelter, peace, and comfort to children. *Amici* instead assert a claim about the moral environment in which children are born and reared.

The Trial Court put our position well:

The ability of same-sex couple to adopt children, or to conceive children using donor-assisted reproductive technology, does not undermine the state's interest in recognizing marriage for opposite-sex couples only. The General Assembly may believe that the traditional family context is the best environment for procreating and for raising children, yet still rationally understand that such arrangements do not always work and therefore permit other family arrangements. The objective of marriage law is to encourage potentially procreative couples to marry, and thereby to prefer that context for procreation and child rearing, not to create a rigid family construct that permits only one type of domestic living unit.²⁷

²⁴ 4 Am. Jur. 2d *Annulment of Marriage* §30 (1962)(footnote omitted).

²⁵ *Id.* at §32.

²⁶ *Id.* at §30.

²⁷ Slip opinion p. 10.

CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed.

Dated: September xx, 2003

Respectfully submitted,

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