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The Moral Reasoning of Family Law: The Case of Same-Sex Marriage

Helen M. Alvaré*

I. INTRODUCTION

Leading communities of faith in the United States are on record opposing the legal recognition of same-sex marriage. Perhaps the most well known opponents are the members of what have been called the “Abrahamic faiths”¹: Christianity, Judaism, and Islam. Many Americans likely believe that Abrahamic groups base their opposition to same-sex marriage solely upon their scriptures, which they believe to be the revealed word of God. Indeed, the written scriptures of each of the Abrahamic faiths do specifically prohibit homosexual behavior.² Yet there is more to these faiths’ opposition to legally recognized same-sex unions: there are fundamental differences between Abrahamic believers and supporters of same-sex marriage about *how* lawmaking regarding human sexual relations should be approached. Another way of articulating this is to say that there are differences in the elements of “moral reasoning”—how we come to know how we ought to behave, given

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1. They have been titled the “Abrahamic faiths” due to their mutual recognition of the pivotal role of the Patriarch, Abraham, in salvation history. See, e.g., BRUCE FEILER, ABRAHAM: A JOURNEY TO THE HEART OF THREE FAITHS 11 (William Morrow 2002) (discussing Abraham as a patriarch common to these three faiths).

2. For Judaism and Christianity, see *Leviticus* 18:22 (NAB) (“You shall not lie with a male as with a woman; such a thing is an abomination.”); *Leviticus* 20:13 (NAB) (“If a male lies with a male as with a woman, both of them shall be put to death for their abominable deed; they have forfeited their lives.”). For Islam, see *Quran* 26:165–66 (“Go you in unto the males . . . , [a]nd leave those whom Allah has created for you to be your wives? Nay, you are trespassing people!”); *Quran* 7:80–81 (“Do you commit the worst sin such as none preceding you has committed . . . ? Verily, you practise your lusts on men instead of women. Nay, but you are a people transgressing beyond bounds [by committing great sins]”). For Christianity, see 1 *Corinthians* 6:9–10 (“Do not be deceived . . . practicing homosexuals . . . [will not] inherit the kingdom of God.”); *Romans* 1:24–27 (“Therefore, God handed them over to degrading passions. Their females exchanged natural relations for unnatural, and the males likewise gave up natural relations with females and burned with lust for one another. Males did shameful things with males and thus received in their own persons the due penalty for their perversity.”).

convictions about who we are meant to be—about the rules that should govern adult sexual unions.

This essay will consider three aspects of moral reasoning about law-making concerning sexual unions. Each aspect features prominently in the same-sex marriage debate. Each is also approached in a different way by same-sex marriage proponents than by leading sources and voices within the Abrahamic faiths. The first aspect concerns the role of reason in a normative inquiry about same-sex unions.³ This includes questions about the role of reason versus emotion, and about the role of the created world in normative thinking about sexual unions. The second aspect concerns the relationship of children to adult sexual unions.⁴ The third concerns the notion of “freedom” operative in normative thinking about sexual unions.⁵

Holding fast to their position on each of these aspects is crucial for both sides of the argument over legal recognition of same-sex unions. For proponents of same-sex marriage, questioning traditional means of reasoning about the shape of marriage law, minimizing the social value of children, and defining freedom as broadly as possible are all essential to reaching the conclusion that society should recognize same-sex marriage.⁶ For Abrahamic believers, maintaining traditional means of reasoning about the shape of marriage law, welcoming children, and disciplining freedom, are integral to being a faithful, coherent member of those religions.⁷ A more widespread adoption of laws recognizing same-sex marriage or other same-sex unions could, therefore, potentially expose a vast and important divide between the state and Abrahamic believers. It might even be considered unprecedented.

Of course, when the United States Supreme Court announced a constitutional right to abortion in 1973,⁸ and when no-fault divorce swept the nation in the 1970s,⁹ the divide between Abrahamic beliefs and prevailing family law became quite visible. Yet, in those debates, even in the midst of breaking with past agreements concerning abortion and divorce, advocates for change attempted to enlist the language of traditional values—regularly shared by Abrahamic believers—in

3. See *infra* Part II.A (discussing reason versus emotion and reasoning from creation).

4. See *infra* Part II.B (discussing children as a blessing).

5. See *infra* Part II.C (discussing freedom in marriage and family life).

6. See *infra* Part II.A (discussing the moral reasoning of same-sex marriage proponents).

7. See *infra* Part III (discussing the implications of allowing same-sex marriages).

8. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

9. See Denese A. Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 320, tbl.1 (2002) (showing when various states enacted no-fault divorce legislation).

support of their causes. Thus, advocates for abortion linked abortion to an increase in “wanted” children and linked easier divorce to reducing harmful conflict in households with children.¹⁰ In the case of the argument for same-sex marriage, however, while a few proponents embrace the rhetoric of family stability¹¹—echoing a public preference for stable unions generally—most do not. Most insist, rather, that recognizing same-sex marriage is about a fundamental equality between same-sex and opposite-sex unions—an idea foreign both to centuries of family law worldwide¹² and to the Abrahamic faiths.

In order to explore the differing moral reasoning about adult sexual unions employed by same-sex marriage proponents and Abrahamic believers, this essay will proceed as follows: First, in the arguments favoring same-sex marriage, I will document examples of the three elements of moral reasoning identified above.¹³ These will be drawn from transcripts of legislative debates, oral arguments, and judicial opinions, all concerning same-sex marriage or related same-sex unions.

Second, I will contrast the reasoning favoring same-sex marriage used in these sources with the reasoning employed regularly by each of the Abrahamic traditions.¹⁴ In these portions of the paper, it is necessary in the case of Christianity and Judaism to focus upon certain denominations or branches and not others. Within Christianity, Roman Catholicism alone is discussed, not only for reasons of length, but also for the prominence of its opposition to same-sex marriage and for the

10. See, e.g., DOONE WILLIAMS & GREER WILLIAMS, EVERY CHILD A WANTED CHILD: CLARENCE JAMES GAMBLE, M.D., AND HIS WORK IN THE BIRTH CONTROL MOVEMENT xi (1978) (discussing Gamble’s work in showing men and women how to make conscious choices regarding the outcomes of their sexual acts); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 2 THE DIVORCE LAW DEBATES: TRANSCRIPTS FROM THE 1965–1973 ANNUAL MEETINGS OF THE UNIFORM LAW COMMISSION 139 (Aug. 3, 1970) (statement of Professor Levy arguing that studies show children do better with divorced parents than in conflicted households).

11. See, e.g., ANDREW SULLIVAN, VIRTUALLY NORMAL 202 (Alfred A. Knopf 1995) (discussing the value and importance of commitment, monogamy, marriage, and stability as modeled generally by heterosexual culture); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 18 (Times Books 2004) (arguing that settling the young and providing reliable caregivers are two purposes of marriage).

12. While several countries provide domestic partner recognition, only Belgium, Canada, the Netherlands, Spain, and South Africa recognize same-sex marriage. All of these countries’ laws are relatively recent. See Human Rights Campaign, <http://www.hrc.org> (follow “Marriage” hyperlink; then follow “International Marriage/Relationship Recognition” hyperlink) (last visited Aug. 23, 2006).

13. See *infra* Part II (discussing reason versus emotion and reasoning from creation, children as a blessing, and freedom in marriage and family life).

14. See *infra* Part II (distinguishing the reasoning of same-sex marriage proponents from the reasoning of followers of Christianity, Judaism, and Islam).

significant historical and theological record of its teachings on matters taken up by this paper. In Judaism, only Orthodox and Conservative Judaism are referenced.¹⁵ Reformed Judaism in the United States has endorsed same-sex marriage,¹⁶ and has done so largely by ignoring¹⁷ or disclaiming¹⁸ its own scriptures explicitly contradicting same-sex relations. Conservative and Orthodox Judaism, on the other hand, like Roman Catholicism, continue to rely upon longstanding and substantial historical and theological sources regarding the matters taken up by this paper. Islam is nearly univocal on the matter of same-sex unions.¹⁹

Third, and in conclusion, I will suggest two types of consequences that could flow from the more widespread adoption of same-sex marriage proponents' moral reasoning about adult sexual unions. These include consequences for family law itself, as well as consequences for the relationship between family law, society, and Abrahamic believers.²⁰

II. DIVERGENT MORAL REASONING

In each subsection below, I will begin by describing the approach of same-sex marriage proponents to the point of moral reasoning under discussion, then follow with its treatment by each of the Abrahamic faiths.

A. Reason (*Versus Emotion*) and Reasoning from Creation

A review of arguments made in favor of legally recognizing same-sex marriage yields at least two observations. The first concerns the relative

15. See *infra* Part II.A.3 (discussing reason as viewed by Orthodox and Conservative Judaism).

16. See Howard Goller, *Conservative rabbis weigh Jewish law on gays, unions*, WASH. TIMES, Mar. 22, 2006, at A12.

17. See, e.g., Affidavit of Rabbi Steven Greenberg, para. 4, 8, 9, available at http://www.gracecathedral.org/enrichment/reflections/ref_20040310a.shtml [hereinafter Greenberg] (including no citations or explanations of those Jewish scriptures explicitly rejecting same-sex relations; relying instead upon changing social mores and the civil nature of marriage to argue in favor of Jewish support for same-sex marriage).

18. A Kansas rabbi reported, for example, that his synagogue simply omits from the scriptures traditionally read on Yom Kippur (the holiest day of the Jewish calendar) that portion of Leviticus 18:22 that declares: "Do not lie with a male as one lies with a woman; it is an abomination." Goller, *supra* note 16, at A12.

19. It should be noted here that while books can and have been written about the approach of each of the Abrahamic faiths to each of the topics of reason, children, and freedom considered in this essay, I will offer only a relatively brief description of each topic, sufficient to indicate the contradiction between these religions' approaches and the approaches of same-sex marriage advocates.

20. See *infra* Part III (discussing the implications of state-sanctioned same-sex marriages).

importance of reason versus emotion, and the second concerns same-sex marriage proponents' refusal to acknowledge evidence from the created world.

As to the first, proponents of same-sex marriage regularly derogate the use of reason itself, as distinguished from emotion and anecdote, as a useful tool in arriving at a conclusion about the contents of marriage law. Several examples capture the way in which same-sex marriage proponents supplant reason with emotion and anecdote. At the Massachusetts Constitutional Convention, for example, a state representative opined:

It came down to how I felt about people with different lifestyles than me. . . . Who cares? I mean, who cares if gay people want to marry each other? . . . Think about how you felt when someone judged you. . . . You felt like crap didn't you? I know I did. . . . This is a personal decision for all of us.²¹

Likewise, a Connecticut state senator, following lengthy empirical testimony about the diminished well-being of children reared in households without two biological parents, responded by suggesting that the presentation was unkind and irrelevant:

I don't think we're looking for anything definitive, because you're dealing with two humans who are imperfect I mean we all live an imperfect life and that's the reality. I mean, that's about as definitive as we can get with that. . . . [B]ut I just think it's so hard in this day and age with the divorce rate and children growing up in this world that I think it seems very black and white for you to be taking that position.²²

There is also the Connecticut senator who concluded that it is useless to propose evidence about the benefits of opposite-sex parenting for children because “[m]y children have a mother and a father, but they still get in trouble.”²³ The director of the group Love Makes a Family testified before the Connecticut legislature (responding to the charge that the logic of same-sex marriage could lead to legal polygamy) stating that when interracial marriage was permitted, “we didn't see polygamy happen,” and “we didn't see incestuous brothers and sisters marrying.”²⁴ Finally, a Massachusetts senator assured his colleagues

21. *2004 Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Rep. Reinstein) (on file with author).

22. *Joint Comm. on the Judiciary Hearing Transcript*, Conn. Gen. Assemb. (Feb. 7, 2005) [hereinafter *Judiciary Comm.* Feb. 7, 2005] (statement of Rep. Klarides) available at <http://www.cga.ct.gov/2005/JUDdata/chr/2005JUD00207-R001300-CHR.HTM>.

23. *Regular Session Transcript*, Conn. Gen. Assemb. (Feb. 11, 2004) (statement of Sen. Newton) available at <http://www.cga.ct.gov/2005/trn/S/2005STR00406-R00-TRN.HTM>.

24. *Judiciary Comm.* Feb. 7, 2005, *supra* note 22 (statement of Ann Stanback, President, Love

that when he traveled to Vermont after the civil union law, “I saw cows and mountains and the sky. I didn’t see any chaos. I didn’t see any deviant people.”²⁵ Each of these examples illustrates the regular use of anecdotal and emotional arguments invoked to support same-sex marriage rights.

A second characteristic of leading arguments favoring same-sex marriage is their unwillingness to deduce normative conclusions from evidence provided by the natural or created (versus human-made) world. In the case of marriage, this would mean reasoning based upon the sexual complementarity of men and women and the link between complementarity and the procreation of children. Same-sex marriage proponents simply ignore these facts. If they arise during a debate, they are dodged, as best illustrated in the following exchange between Bishop Peter Rosazza of Connecticut and a Connecticut state senator. Bishop Rosazza delivered testimony about the “ends” of marriage, relying in part on evidence about complementarity and procreation.²⁶ The bishop concluded: “To sum up, those who want a change in the law believe that marriage and sexuality do not have natural ends. Rather it is only choices and purposes [private intentions] that matter, thus unlinking the state of marriage from reproduction.”²⁷ The entire and sole response of the Connecticut legislature was a statement by Senator McDonald implicitly declaring such reasoning theological, and as such, legally irrelevant: “I suspect many of us envy the ability to have such a unified view of such deeply held beliefs.”²⁸

A further refusal to consider evidence from the created world is evident in the response of same-sex marriage proponents to the fact that human societies have overwhelmingly practiced heterosexual marriage for all of recorded history. For example, a Connecticut state representative, responding to a legislative witness who relied explicitly upon “millennia of human history”²⁹ with marriage, said only: “I did actually look up [marriage] in Webster’s Dictionary and it talked about a union between two or more individuals. It didn’t talk about a man or a woman. . . . And usually, I use Webster as sort of my foundation of getting my definitions.”³⁰ Another quite common response to natural

Makes a Family).

25. 2004 *Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Rep. Costello) (on file with author).

26. Judiciary Comm. Feb. 7, 2005, *supra* note 22 (statement of Bishop Rosazza).

27. *Id.*

28. *Id.* (statement of Sen. McDonald).

29. *Id.* (statement of Brian Brown, The Family Institute of Connecticut).

30. *Id.* (statement of Rep. Walker).

and historic evidence about opposite-sex marital practices is to compare its presenter to the racists who relied on history for their support of antimiscegenation laws.³¹ A witness advocating same-sex marriages before the Connecticut legislature flatly declared: “Under current law, marriage is like a whites-only water fountain.”³²

A refusal even to consider such evidence flies in the face of a trend within family law to look to respected scientific findings in developing the law; this has been especially true in recent decades corresponding to an increased availability of reliable social science evidence about the family.³³ It also contradicts a method respected by all of the Abrahamic faiths for thinking about new problems and questions. Each of the Abrahamic faiths—albeit not in an identical fashion—not only value reason, but also embrace a willingness to reason from empirical facts, including facts concerning the physical structures of males and females and the intrinsic link between these structures and procreation. All proceed this way based generally upon the conviction that a loving and reasonable God made the world and human beings, gave us the supreme gift of reason, and did not and would not leave us here on earth with no visible indications whatsoever to guide us in the ways of goodness, happiness, and truth.³⁴ I now turn to each of the Abrahamic faiths’ relevant treatment of reason.

1. Catholicism

It is not overstating matters to say Catholicism celebrates human reason as a gift from God who has “bestowed the light of reason on the human mind.”³⁵ A currently popular book, *How the Catholic Church Built Western Civilization*, chronicles the role played by Catholics throughout history in promoting the use of reason in law, science, morality, and many other fields.³⁶

31. See, e.g., *id.* (statement of Ann Stanback, President, Love Makes a Family) (discussing changes to marriage laws allowing women to maintain legal rights and permitting racial marriages).

32. *Id.* (statement of Jennifer Brown, Professor, Quinnipiac University School of Law, and Ian Ayres, Professor, Yale Law School).

33. See *infra* Part III (discussing evidence concerning the effect of divorce on children, battered-spouse syndrome, and premarital counseling).

34. See *infra* Part II (discussing the notion of moral reasoning in Christianity, Judaism and Islam).

35. CATECHISM OF THE CATHOLIC CHURCH, para. 159 (Thomas More 1994) [hereinafter CATECHISM].

36. THOMAS E. WOODS, JR., *HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION* 1–7 (Regnery 2005).

Catholic statements on this subject usually begin by pointing out how all human beings—believers and nonbelievers alike—“alone among all animate beings” are endowed with intellect, reason, and free will.³⁷ With these gifts, they may come to understand what is true, to love what is good,³⁸ and to govern their conduct.³⁹ Law, in fact, according to perhaps the most famous Catholic author on this subject, St. Thomas Aquinas, is and should be the result of applying our reason to particular problems.⁴⁰ Thus, the Catechism of the Catholic Church defines law as “rule[s] of conduct enacted by competent authority for the sake of the common good,” and “established by reason.”⁴¹

What Catholics call “natural law” consists of human beings actively reasoning about “what-is-to-be-done” in concrete situations.⁴² Its first level is a “nondiscursive”⁴³ understanding and acceptance that one is to do good and avoid evil.⁴⁴ Included among basic “goods” at this level are life itself,⁴⁵ the sexual unions of male and female according to our physical nature, the procreation and education of children, knowing God, and living peacefully in society.⁴⁶ Its second level includes reasoning to “proximate conclusions” based upon the basic goods previously stated.⁴⁷ It is taught that such reasoning can lead, for example, to the Ten Commandments.⁴⁸

This very brief summation of the Catholic natural law tradition not only demonstrates the degree of Catholic reverence for reasoning, but begins to indicate a second aspect of Catholics’ approach to reasoning that is in tension with arguments promoting same-sex marriage: the affirmation that a rational God created a rational world, such that our at-

37. CATECHISM, *supra* note 35, at para. 1951 (citing TERTULLIAN, ADVERSUS MARCION).

38. SAINT AUGUSTINE, THE CITY OF GOD 851–52 (Marcus Dods trans., Modern Library 2000).

39. TERTULLIAN, ADVERSUS MARCION 97 (Ernest Evans, ed., trans., Oxford Univ. Press 1972).

40. See THOMAS AQUINAS, SUMMA THEOLOGIAE, TREATISE ON LAW, Question 90, *Of the Essence of Law*, First Article; see also, WILLIAM MAY, AN INTRODUCTION TO MORAL THEOLOGY (Our Sunday Visitor 1994) [hereinafter MAY] (discussing how humans are endowed with intelligence and free choice and are therefore capable of actively participating in God’s plan for human existence).

41. CATECHISM, *supra* note 35, at para. 1951.

42. MAY, *supra* note 40, at 46–47.

43. *Id.* at 47.

44. *Id.* at 49.

45. *Id.* at 48.

46. *Id.* at 48–49.

47. *Id.* at 50.

48. *Id.* at 50–51.

attention to its structure can help direct right living.⁴⁹ In the words of the first Catholic theologian, Saint Paul: “Since the creation of the world, invisible realities, God’s eternal power and divinity, have become visible, recognized through the things He has made.”⁵⁰ Or, according to St. Augustine: “Yet there is a great book, the very appearance of created things. Look above you; look below you! Note it; read it!”⁵¹ It is apparent that Catholic tradition affirms the importance not merely of the soul, but also of the body, in discerning how human beings ought to conduct themselves, such that male-female complementarity has normative implications. This is very clear, for example, in Catholic teachings regarding contraception⁵² and assisted reproductive technologies,⁵³ both of which are grounded in part upon the meanings of the physical structures of sexual intercourse and procreation.

Islam’s approach to the use of reason in lawmaking has enough in common with Catholicism’s approach for the two faiths recently to issue a joint statement memorializing their agreement.⁵⁴ The statement affirmed Catholic and Islamic agreement on the principle that “we can learn about God through attention to the entire universe, especially its structure and order and beauty.”⁵⁵ The following section expands upon the Islamic view of the role of reason in developing law.

2. Islam

Islam is commonly understood to consist solely in the commands of its holy book, the *Quran*,⁵⁶ and in the deeds (*Hadith*) and records of the deeds and sayings (*Sunna*) of the Prophet Muhammad.⁵⁷ This is not so. As noted in the section immediately above, the *Quran* plainly affirms

49. *Id.* at 45.

50. *Romans* 1:20 (NAB).

51. ST. AUGUSTINE, SERMON, Mai 126.6 (Vernon J. Bourke trans.) reprinted in VERNON J. BOURKE, *THE ESSENTIAL AUGUSTINE* 123 (Hackett 1978).

52. See, e.g., Pope Paul VI, *Humanae Vitae* art. 13 (Robert Bogan trans. 1968), reprinted in PETER HARRIS ET AL., *ON HUMAN LIFE: AN EXAMINATION OF HUMANAЕ VITAE* 126 (Burns & Oates 1968) (discussing contraception as repugnant to the nature of man and woman).

53. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY* 26–31 (United States Catholic Conference, Washington, D.C., 1987).

54. See MIDWEST DIALOGUE OF CATHOLICS AND MUSLIMS, *REVELATION: CATHOLIC AND MUSLIM PERSPECTIVES* 43 (United States Conference of Catholic Bishops 2006) [hereinafter REVELATION] (discussing the central teachings of the *Quran* as being important to Catholics as well).

55. *Id.*

56. The *Quran* has been held to be dictated, not merely inspired, by God. IRA G. ZEPP, JR., *A MUSLIM PRIMER: BEGINNER’S GUIDE TO ISLAM* 59 (Wakefield eds. 1992).

57. *Id.* at 80–81.

the place of human reason, admonishing that one “use one’s mind to think about creation”⁵⁸

Muslims, like Christians, hold that there is orderliness or rationality in nature, imbued by a rational God.⁵⁹ They further hold that nature, including all of its creatures, is subject to certain “inexorable laws” and purposes.⁶⁰ Reason is part of the “God-given equipment” with which human beings are endowed, in order to allow them to fulfill their particular purposes on earth.⁶¹ Human creatures are made by God to be “orderly and for purpose,” and have “within our own nature . . . a guiding mechanism which leads us to what is good and what is evil.”⁶² Nature’s properties include both human reason or intellect and human primordial nature (*al-’aql* and *fitrah*).⁶³ All human beings share this natural disposition.⁶⁴ God vests *fitrah*—which is not synonymous merely with instinct, and not opposed to intellect and reasoning—within the human person.⁶⁵ Human beings are “expected” to search nature in order to discover what is right and what is wrong.⁶⁶ One summary of Islam even concludes that “[t]he Islamic concept of Reason is similar to the Western notion of Natural Law which has been a reliable and authoritative guide for theology and ethics.”⁶⁷

Demonstrating a practical application of an Islamic understanding of natural law, as well as its reliance upon evidence from the created world, the president of the Ahm Muslim community in Canada referred to demands to give status to homosexual relationships as contrary to the “laws of nature.”⁶⁸ Likewise, a leading text in comparative religions explains that Islam judges sodomy to violate “one’s natural disposition (*’asl-al-fitra*)” because sodomy consists of acts unrelated to a natural

58. REVELATION, *supra* note 54, at 44 (citing *Quran* 3:191).

59. Muslim American Society, The Natural Sciences, <http://www.masnet.org/history.asp?id=1035> (last visited Oct. 11, 2006).

60. *Id.*

61. *Id.*

62. A. EZZATI, ISLAM AND NATURAL LAW 93 (ICAS 2002).

63. *Id.* at 93.

64. *Id.* at 95.

65. *Id.* at 94–95, 99.

66. Nehal El-Hadi, *Islam and the Nature of the Universe*, ISLAMONLINE.NET, June 2, 2005, <http://www.islamonline.net/english/introducingislam/Belief/Allah/article04.shtml>.

67. ZEPP, *supra* note 56, at 254.

68. See Harper Addresses Muslim Group on Same-Sex Marriage while Toronto Gays March, LIFESITE, June 27, 2005, <http://www.lifesite.net/ldn/2005/jun/05062703.html> (quoting President of the Ahmadiyya Muslim community in Canada, Naseem Mahdi).

purpose of sexual intercourse—procreation—and is performed with body parts for which sexual intercourse was not created.⁶⁹

In sum, Islam teaches that human reasoning, including reasoning based upon evidence provided by the created world, ought to be brought to bear on questions about correct behavior, including those concerning sexual unions.

3. Judaism

Jewish theology also embraces the notion of a God who acts in accord with reason. It too teaches that God creates human persons in his own image and likeness, such that human beings possess the gift of reason and are charged to “use and develop [their] rational faculty.”⁷⁰

As to the existence of norms which are knowable by all rational persons by means of the application of reasoning or intellect, some Jewish thinkers explicitly reject categorizing such norms as “natural law”⁷¹—even specifically in the context of the same-sex marriage question⁷²—while others embrace this concept. Conservative Jewish theologian Rabbi David Novak, the most important proponent of a Jewish natural law, asserts that such rationally available norms are captured in the “Noahide laws,”⁷³ which are variously called “timeless ideals”⁷⁴ or “God’s seven universal laws for all humankind.”⁷⁵ Relying on eminent ninth-century Jewish theologian Saadiah Gaon, David Novak calls such laws “rational commandments,” or “matters written in the Torah which even if they had not been written there, reason would have required that they be written.”⁷⁶ These include a prohibition upon homosexual practices.⁷⁷

Even among Jewish thinkers who see Jewish identity perhaps less as a system of revealed truths, and more in terms of a national or ethnic

69. Mashuq ibn Ally, *Islam, in* ETHICAL ISSUES IN SIX RELIGIOUS TRADITIONS 220, 250 (Peggy Morgan & Clive Lawton eds., 1996).

70. AHARON SHEAR-YASHU, *JEWISH PHILOSOPHERS ON REASON AND REVELATION* (1998), <http://www.bu.edu/wcp/Papers/Reli/ReliShea.htm>.

71. *See, e.g.*, MARVIN FOX, *INTERPRETING MAIMONIDES* 124 (Univ. of Chi. Press 1990) (reasoning that “[i]n the sources of Judaism there is very little evidence of support for [a] natural law doctrine . . .”).

72. Greenberg, *supra* note 17 (claiming that marriage “is not a natural institution,” but completely structured by societies).

73. DAVID NOVAK, *NATURAL LAW IN JUDAISM* 73 (Cambridge 1998).

74. Mendel Kaplan, *Matches Made in Heaven?*, *CANADIAN JEWISH NEWS*, Feb. 17, 2005, at 16, available at 2005 WLNR 4357736.

75. *Id.*

76. NOVAK, *supra* note 73 (quoting Sifra 86a).

77. *Id.*

identity involving similar land, language, and history, there often exists a notion that Judaism can offer ethics to non-Jews based upon common respect for nature or something akin to a natural law.⁷⁸

Creation has a place in Jewish thinking as a source of norms for ordering social life on earth.⁷⁹ In the words of one often-quoted Jewish writer: “God neither creates as a random act, nor abandons the world after creation. Instead, God continues to assert ownership over the world and expects us to recognize that claim.”⁸⁰ Creation can provide necessary knowledge not only for learning about God, but also for learning about what we ought to do on earth, according to the writing of a Jewish bioethicist who opined recently that one should not, according to Jewish theology, make judgments about right and wrong until one confronts modern physical realities and modern science to discover what things “really are.”⁸¹

Within Judaism, therefore, there is a reverence for the human rational faculty. There does not exist a broadly shared teaching concerning the existence of a “natural law” nor concerning the absolute necessity of reasoning based upon evidence from the created world. There are, however, Jewish scholars who embrace such teachings.

B. Children as a Blessing?

Another sharp difference between the arguments for same-sex marriage and the teachings of the Abrahamic religions is one of both tone and substance. It concerns the role of children in the family and society.

Both in judicial records and in legislative debates, advocates of same-sex marriage often give the subject of children scant attention. What underlies this is likely the need to “disappear” children as the centerpiece of family law concerning marriage, due to the biological impossibility of natural conception between homosexuals. Examples of child-free descriptions of marriage abound in these settings. The dissent in the New York case of *Hernandez v. Robles*, for example, opined that “both the law and the population generally now view marriage . . . as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual

78. Laurence J. Silberstein, *Judaism as a Secular System of Meaning: The Writings of Ahad Haam*, 52 J. OF THE AM. ACAD. OF RELIGION 547, 561–64 (1984).

79. See ELLIOT DORFF, KNOWING GOD: JEWISH JOURNEYS TO THE UNKNOWNABLE, 61–66, 78 (1996) (writing that the structure of the world God created is important in Judaism’s view of humanity).

80. *Id.* at 66.

81. Eric Cohen, *A Jewish-Catholic Bioethics?*, FIRST THINGS, June/July 2005, at 7.

financial and emotional support.”⁸² The Massachusetts Supreme Court in *Goodridge v. Department of Public Health* described marriage as “a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to society.”⁸³ The Vermont Supreme Court defined marriage as a “state-sanctioned human relation[,]” and an “intimate and lasting” relationship of adults.⁸⁴

When the subject of children does arise, it is generally in one of two ways. The first is entirely irrelevant to any discussion of children’s welfare or their place in marriage. It consists of lawmakers who favor same-sex marriage congratulating themselves or a like-minded colleague with the assurance that their children will be proud of their vote in favor of same-sex marriage.⁸⁵

The second concerns not children generally, but only those children presently being reared in homosexual couple households. Their situation is highlighted to argue that they would fare better if their parents had access to the social (and, usually, economic) benefits that come with marriage. A very typical remark of this kind was expressed during the Massachusetts Constitutional Convention: “Are we going to punish innocent children and deny them benefits because they are born into a family with two moms or dads and happen to live in Massachusetts?”⁸⁶ Another such example was the *Goodridge* court’s characterization of a refusal to recognize same-sex marriage as “penaliz[ing] children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”⁸⁷

Otherwise, little is said about children in arguments for same-sex marriage, save cursory references to claimed scientific conclusions that child-rearing in same-sex couple households has no proven problematic consequences for children—absolutely, or relative to married, opposite-sex households.⁸⁸ This is asserted despite the dearth of well-recognized studies on the matter.⁸⁹

82. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (App. Div. 2005) (Saxe, J., dissenting).

83. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

84. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

85. See, e.g., *2004 Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Rep. Costello) (on file with author) (“I hope [my children] will be as proud of their father as I was of my father for standing up and doing the right thing regardless of what my church tells me.”).

86. *2004 Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Sen. Chandler), http://www.anderkoo.com/ma_constitutional_convention (last visited Oct. 17, 2006).

87. *Goodridge*, 798 N.E.2d at 964.

88. See Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and its Predecessors*, 16 STAN. L. & POL’Y REV. 135, 177–81 (2005) (summarizing the treatment of extant evidence on children’s well-being in the Massachusetts, Hawaii, and

In sharp contrast to the way same-sex marriage proponents minimize children as an attribute of marriage is the way all three Abrahamic faiths welcome and celebrate children—even to the point, in some cases, of placing them right at the center of the meaning of marriage itself.⁹⁰ Again, the difference is both of tone and substance.

1. Christianity: Children as a Blessing

In Catholic teaching, procreation is one of the co-equal and inseparable primary ends of marriage,⁹¹ the other being the “good of the spouses themselves.”⁹² This teaching is based upon the natural tendency of sexual love to be “fruitful”⁹³ and upon the observation that the “Creator himself” made sexual relations a source of pleasure that strengthen the love between a husband and a wife.⁹⁴

For purposes of this essay, two things are especially noteworthy about Catholic teaching in addition to its basic affirmation of the good of children. The first is the degree of emotion or joy often expressed with this affirmation. Pope Benedict XVI, for example, calls children “the greatest wealth and most appreciated good of the family.”⁹⁵ In the Catechism, they are called the “supreme gift of marriage,”⁹⁶ and large families are a “sign of God’s blessing.”⁹⁷

A second feature of Catholicism’s treatment of children is the emphatic way in which it insists that procreation is increasingly being rejected, as evidenced by the historically low rates of childbearing today.⁹⁸ It ascribes to this rejection a transcendent meaning: the rejection

Vermont judicial opinions on same-sex unions).

89. See, e.g., Aff. of Steven Lowell Nock, para. 11, *Halpern v. Toronto*, [2002], 60 O.R.3d 321, *rev’d* 65 O.R.3d 161 (Ont. Div. Ct. 2003) (No. 684/00) (stating that a study of all extant studies on gay parenting by University of Virginia sociology professor Steven Nock concluded that “[a]ll of the articles I reviewed contained at least one fatal flaw of design or execution.” He continued, “The central question, that is, what effect does gay and lesbian marriage have on children in such unions, cannot be answered at the moment.”).

90. See *infra* Part II.B (discussing children as a blessing in the Abrahamic faiths; Catholicism, Judaism, and Islam, respectively).

91. CATECHISM, *supra* note 35, at para. 2366.

92. *Id.* at para. 2363.

93. *Id.* at para. 2366.

94. See *id.* at para. 2362 (citing Pius XII, Discourse, Oct. 29, 1951).

95. *Children Deserve Married Parents Says Pope: Presents Institution as “Patrimony of Humanity,”* ZENIT NEWS AGENCY, Dec. 4, 2005, <http://www.zenit.org/english/visualizza.phtml?sid=81086>.

96. CATECHISM, *supra* note 35, at para. 2378.

97. *Id.* at para. 2373.

98. See, e.g., *Document Deals with “Family and Procreation,” Echoes Teachings of “Humanae Vitae,”* ZENIT NEWS AGENCY, June 6, 2006, <http://www.zenit.org/english/visualizza.phtml?sid=90448> (describing a Vatican document, “Family and Human Procreation,”

of a future for society itself,⁹⁹ and the exposure of a “disturbing deficit of . . . hope and love.”¹⁰⁰

Whether it is speaking positively in favor of the link between marriage and procreation or negatively against demographic decline, the Catholic Church’s teaching about the relationship between marriage and the “gift” of children is robust.

2. Judaism

It is difficult to overestimate the welcome that Judaism sets before children, as evidenced by this excerpt from the Talmud: “Should the number of Israelites happen to be two thousand and two myriads less one, and any particular person has not engaged in the propagation of the race, does he not thereby cause the Divine Presence to depart from Israel?”¹⁰¹

In Jewish sources, fecundity is both a blessing¹⁰² and a weighty obligation, both to the Jewish community on earth, and to God. The obligation rests most explicitly upon the male¹⁰³ and consists of the necessity of having at least one son and one daughter.¹⁰⁴ Jewish scriptures, shared also by Roman Catholics, are clear on this.¹⁰⁵ Unlike Catholic teaching’s emphasis on how God has linked sex with procreation in the physical structures of human beings, or how children seal their parents’ one-flesh unity, Jewish teaching emphasizes the need for continuation of the Jewish community, which has been threatened

which states that people are going to great lengths to avoid having children, while same-sex couples are claiming the same rights as heterosexual adults).

99. *A Bill That Will Profoundly Divide Canada*, ZENIT NEWS AGENCY, July 13, 2005, <http://www.zenit.org/english/visualizza.phtml?sid=74185>.

100. *Pope: Lack of Love and Hope Explains Low Births*, ZENIT NEWS AGENCY, Apr. 28, 2006, <http://www.zenit.org/english/visualizza.phtml?sid=88223>.

101. BABYLONIAN TALMUD, Tractate Yebamoth, Folio 64a.

102. Abraham Cronbach, *Established Ideals*, in MARRIAGE AND THE JEWISH TRADITION: TOWARD A MODERN PHILOSOPHY OF FAMILY LIVING 26, 35 (Stanley R. Brav ed., 1951).

103. BABYLONIAN TALMUD, Tractate Yevamot, Folio 65b; *Deuteronomy* 25:5 instructs that if a man dies childless, his brother must marry his widow or release her. It is also said that it is obligatory upon a Jewish man to have two children, one male and one female. See Shulchan, Aruch EH 1:3. See also Richard L. Rubenstein, *Marriage and the Family in the Jewish Tradition*, 9 DIALOGUE & ALLIANCE 5, 11 (1995) (discussing Mishnah, stating: “A man may not desist from the duty of procreation unless he already has children.”).

104. See Elimelech Westreich, *Infertility as Ground for Polygamy in Jewish Law: Interactions among Legal Traditions at the Time of the Renaissance*, at 20, http://www.olir.it/areetematiche/70/documents/westreich_infertilityandpolygamy.pdf (stating that the commandment to be fruitful and multiply devolves on the man and is fulfilled by having at least one son and one daughter).

105. *Genesis* 1:28 instructs humans to be fruitful and multiply. *Deuteronomy* 24:1 indicates that this should happen by way of marriage.

repeatedly throughout history and across the globe.¹⁰⁶ *Gidul uboneth*—the obligation for effective childbearing and child-rearing—is considered one of the four Jewish values for family developed through the Talmud and “govern[ing] the Jewish family for . . . centuries.”¹⁰⁷ Procreation is “central” to Jewish life,¹⁰⁸ given how the child, from the Jewish perspective, is the “living vehicle for the transmission and fulfillment of the entire religio-social culture of the Jewish people,”¹⁰⁹ the “instrument” of their survival, and the determinant of whether the Jewish faith will be preserved¹¹⁰ unto the end of time. Thus, marriage in Judaism has “two fundamental purposes,” namely, the satisfaction of the spouses, and the procreation of children.¹¹¹

3. Islam

Islam, too, considers children a blessing from God.¹¹² One *hadith* instructs a man to “[m]arry those who are loving and fertile, for I will be proud of your great numbers before the other nations.”¹¹³ Procreation is a gift given to humans to allow them to share in God’s creative power.¹¹⁴ Unlike Judaism, Islam does not emphasize a procreation obligation. Islamic discussions of marriage, however, nearly axiomatically pair marriage with childbearing and child-rearing, showing the factual degree to which childbearing is an expected part of Islamic marriage.¹¹⁵ It has been said that Muslim families are “large by choice.”¹¹⁶

Furthermore, while Islamic sources regularly emphasize the importance of marriage for sexual morality and for creating piety and

106. Jocelyn Louise Hellig, *A Jewish Woman’s Reflections on the Pressure of Secularist and Hedonist Influences on the Traditional Jewish Ideals of Marriage and Family*, 9 *DIALOGUE & ALLIANCE* 85, 90 (1995).

107. Benjamin Schlesinger, *The Jewish Family in Retrospect*, in *THE JEWISH FAMILY: A SURVEY AND ANNOTATED BIBLIOGRAPHY* 3, 6 (Benjamin Schlesinger ed., 1971).

108. Hellig, *supra* note 106, at 90.

109. Leon S. Lang, *Four Foundation Stones*, in *MARRIAGE AND THE JEWISH TRADITION: TOWARD A MODERN PHILOSOPHY OF FAMILY LIVING* 8, 16 (Stanley R. Brav ed., 1951).

110. *Id.* at 15–16.

111. Rubenstein, *supra* note 103, at 10.

112. Shaykh Muhammad S. al-Munajjid, *Encouragement to have a lot of children*, *ISLAM QUESTION & ANSWER*, <http://www.islam-qa.com/index.php?ref=13492&ln=eng> (last visited Oct. 15, 2006).

113. *Id.* (citing a hadith reported by Abu Dawood, which indicates that “it is encouraged to have a lot of children”).

114. Mashuq ibn Ally, *Islam*, in *ETHICAL ISSUES IN SIX RELIGIOUS TRADITIONS* 220, 234 (Peggy Morgan & Clive Lawton eds., 1996).

115. *See, e.g.*, HUSAYN ANSARIAN, *THE ISLAMIC FAMILY STRUCTURE* 36 (1997) <http://www.rafed.net/english/books/family/index.html> (linking marriage with “attending to the children”).

116. ibn Ally, *supra* note 114, at 234.

tranquility between the spouses in the home and society,¹¹⁷ some also emphasize good child-rearing (as contrasted specifically with obtaining financial benefits or sex) as a co-equal goal of an Islamic marriage,¹¹⁸ and it is one of the four signs of God's "mercy and attention" to the human race.¹¹⁹

As with Christianity, Islam's tone respecting children is joyful. Children are God's "trust" to the couple.¹²⁰ They are the "greatest and most beneficial blessing that God has favored his servants with."¹²¹ One indication of the importance ascribed to the bond between parent and child is Islam's specific condemnation of artificial insemination using donor sperm; it is held that the resulting denial to the child of the "bonds" of "morality and lineage" are beneath what is owed to members of human society.¹²²

Regarding children, Catholicism, Judaism, and Islam speak nearly with one voice. Children are either the first blessing of marriage or a blessing co-equal with the unity and harmony of the spouses.

C. Freedom in Marriage and Family Life?

In arguments supporting recognition of same-sex marriage, one frequently sees the notion that expanding the quantity of acts identified as "rights" is the natural path of freedom in a legal context. Such expansion is also thought to enhance the actual experience of freedom by individual persons.

For example, during the Massachusetts Constitutional Convention, State Representative Harkins praised his colleagues for their history of "[i]n every instance . . . extend[ing] liberties to the people."¹²³ Another state representative praised extending rights to same-sex couples because it "extends the circle" of rights, indicating that this, by itself, is

117. See, e.g., MUHAMMAD IQBĀL SIDDIQI, *THE FAMILY LAWS OF ISLAM* 30, 31 (1984) ("The safeguarding of morality and chastity is of such an overriding importance that every other purpose may be sacrificed for its sake." The couple should aim to attain "peace, bliss and contentment in their matrimonial life which is an essential condition for their being healthy and well adjusted members of society.").

118. ANSARIAN, *supra* note 115, at 37.

119. *Id.* at 23 (the other signs being rain; making the marriage contract; and joining the couple in the marriage union).

120. *Id.* at 37.

121. *Id.* at 189.

122. Islam: The Modern Religion, The Rights of Parents and Children in Islam, http://www.themodernreligion.com/family/children_rights.htm (last visited Oct. 18, 2006).

123. 2004 *Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Rep. Harkins), http://www.anderkoo.com/ma_constitutional_convention.

a merit.¹²⁴ A Hawaii state legislator described Hawaii's reciprocal beneficiaries law as "an approach to life guided by a respect for the individual, out of which can be deduced a demand for the greatest possible freedom for the individual to live as he or she sees fit."¹²⁵ A Connecticut senator speaking in favor of legalizing same-sex unions congratulated his colleagues, saying: "We've always said yes when asked to expand rights. . . . [W]e have never taken rights away. We've only given them, an ever expanding and widening circle."¹²⁶ An attorney for Lambda Legal¹²⁷ urged the New Jersey Supreme Court to discover a right to same-sex marriages in that state's constitution by expanding the meaning of its article 1, paragraph 1 right to pursue happiness.¹²⁸

By contrast, all of the Abrahamic faiths propose in some manner that freedom is gained and experienced most surely by submitting to correct relationships with God, with fellow human beings, and with truth itself. A prominent author in the study of comparative religions, Dr. David Burrell, writes that all three Abrahamic traditions assume that human freedom does not include the notion that human beings are their own creators or the origin of meaning in the world.¹²⁹ In other words, they are never "self-starters."¹³⁰ Rather, they primarily respond to the "founding initiative" of the creator,¹³¹ by striving to act "responsibl[y]" and "properly."¹³² Burrell insists that this relationship does not "nullify" freedom,¹³³ but rather empowers the person to reach its goal of union with God.¹³⁴ Building upon this general characterization, I now turn to a brief consideration of each faith's treatment of freedom.

124. *2004 Constitutional Convention*, Mass. Senate (Feb. 11, 2004) (statement of Rep. Walsh), http://www.anderkoo.com/ma_constitutional_convention.

125. *Final Reading of H.B. 118 in Hawaii State Senate*, SENATE J. – 55TH DAY 661 (1997) (statement of Sen. Metcalf in favor of the bill).

126. *Regular Session Transcript*, Conn. Gen. Assemb. (Apr. 6, 2005) (statement of Sen. Finch), available at <http://www.cga.ct.gov/2005/trn/S/2005STR00406-R00-TRN.HTM>.

127. A leading organization advocating legal recognition of same-sex marriages. Lambda Legal, <http://lambdalegal.org> (last visited Oct. 18, 2006).

128. *Lewis v. Harris*, 875 A.2d 259, 261, 266 (N.J. Super. Ct. App. Div. 2005).

129. David B. Burrell, *Freedom and Creation in the Abrahamic Traditions*, (Occasional Papers Series: Delivered at a Seminar Sponsored by the Center for Muslim-Christian Understanding, Georgetown University, October 1994), 6–7.

130. *Id.*

131. *Id.*

132. *Id.* at 7–8.

133. *Id.* at 7.

134. *Id.* at 8.

1. Catholicism

In Catholic thought, freedom is the human's ability to understand and to either accept or reject what is right or what is wrong.¹³⁵ At the same time, because human beings are created for union with God, human freedom "finds its authentic and complete fulfillment" when it is responding to, and accepting, God's law.¹³⁶ As described at length in John Paul II's encyclical, *Evangelium Vitae* (The Gospel of Life), there are three essential aspects of authentic freedom: first, acting in solidarity, especially with the weaker; second, deferring to truth; and third, remembering that we are God's creatures.¹³⁷

As to the first aspect, solidarity, this includes maintaining an "openness to others and service of them."¹³⁸ A claimed "freedom" that fails to take others' welfare—particularly the weakest—into account, "ends up by becoming the freedom of 'the strong' against 'the weak' who have no choice but to submit."¹³⁹

A second essential aspect of freedom is its relationship to the truth. John Paul II writes that actions opposed to what are called "objective" and "universal" truths are prone to reliance upon "subjective and changeable opinion," or "selfish interest and whim."¹⁴⁰ When truth as a goal is ignored or denied, even the most fundamental human rights are subject to cancellation.¹⁴¹

Third, freedom is most completely understood and experienced when human beings maintain a sense of their creatureliness before God.¹⁴² If people fail to see themselves as lovingly created persons endowed with the gift of reason and moving toward union with God, and if they also fail to understand others in society in this same way, there arises the possibility of a ruthless "practical materialism."¹⁴³ In such an environment, there arises the risk that all lives will be judged strictly according to criteria such as beauty or wealth. The body, too, can become simply another material thing whose beauty and pleasure is to

135. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 59–60 (2004).

136. *Id.* at 60.

137. Pope John Paul II, *EVANGELIUM VITAE* para. 18–23 (2005).

138. *Id.* at para. 19.

139. *Id.*

140. *Id.*

141. *Id.* at para. 20.

142. *Id.* at para. 21–22.

143. *Id.* at para. 22–23.

be indulged. Self-sacrifice, dependency, and weakness become things to avoid at all costs.¹⁴⁴

Taking this general teaching about freedom into the realm of sex and marriage, Catholic teaching holds that authentic freedom would respect the natural link in creation between opposite-sex relationships and procreation. It would also closely attend to the well-being of the most vulnerable parties in the situation: children.¹⁴⁵ Pope Benedict XVI, in his first encyclical *Deus Caritas Est* (God Is Love), refers to Christian love as being “purif[ied]” or “heal[ed]” when it is understood in the context of the true nature of freedom.¹⁴⁶ Consequently, stable and exclusive marriage between a child’s married, biological parents is held up by Catholic teaching as the ideal situation of freedom both for the adults and for the children involved.¹⁴⁷

2. Judaism

In the often-quoted words of Rabbi Yehoshuah ben Levi, “a man is never more free than when he occupies himself with the study of the Torah.”¹⁴⁸ Considering the Torah’s 613 directions concerning mandatory and forbidden acts,¹⁴⁹ and its detailed provisos regarding “this God-given way of life,”¹⁵⁰ this observation is an apt summary of how deference to law functions as an integral aspect of freedom in Judaism.

An additional aspect of this freedom, similar to Christianity, lies in the ability of the human person to accept or reject the given laws.¹⁵¹ In fact, a significant portion of the Jewish scriptures tell the tumultuous story of Israel’s decisions sometimes to accept and sometimes to reject God’s offer of a covenant with them. According to these scriptures, God placed a choice before the people of Israel: “I call heaven and earth today . . . I have set before you life and death, the blessing and the curse. Choose life that you and your descendants may live.”¹⁵² As observed by comparative scholar Novak, “when Israel turns away from

144. *Id.*

145. U.S. CONFERENCE OF CATHOLIC BISHOPS, BETWEEN MAN AND WOMAN: QUESTIONS AND ANSWERS ABOUT MARRIAGE AND SAME-SEX UNIONS (2003), <http://www.nccbuscc.org/laity/manandwoman.shtml> [hereinafter BETWEEN MAN AND WOMAN].

146. POPE BENEDICT XVI, DEUS CARITAS EST 5–6 (2006).

147. BETWEEN MAN AND WOMAN, *supra* note 145.

148. CHAPTERS OF THE FATHERS, CHAPTER VI, at 99 (R. Sampson Raphael Hirsch trans. 1967).

149. Rabbi Yaakov Menken, The Meaning of Freedom, <http://www.torah.org/features/holydays/passover/menken.html?print=1> (last visited Oct. 15, 2006).

150. DAVID B. BURRELL, FREEDOM AND CREATION IN THREE TRADITIONS 84 (1993).

151. *Id.* at 85.

152. *Deuteronomy* 30:15–19.

God rather than towards him, she pays dearly.”¹⁵³ In other words, her true freedom is diminished.

Rabbi David Novak also concludes that Israel’s freedom is always in the nature of a “response”¹⁵⁴ to an offer made by God. It is not about maximizing individual license. Rather, the response necessarily promises service to God. As Novak carefully notes, Moses’ demand to Egyptian authorities (first uttered by God), “let my people go,” did not end there.¹⁵⁵ God had told Moses in full, rather, “Let my people go, that they may serve me”¹⁵⁶ At the same time, an integral effect of this service is to obtain freedom from worldly snares, from “the pursuit of lust, power, or jealousy.”¹⁵⁷

In the sphere of human sexuality, freedom is preserved when the laws grounding the very continued existence of the Jewish community are observed—laws on chastity, intermarriage, and the centrality of family and childbearing.¹⁵⁸ Without the discipline, the limitations prescribed by these Jewish laws, as well as the very continuity and identity of the Jewish community, are placed at risk.

3. Islam

Islam, as it is often said, is a religion founded on a book: The Holy Quran. It is a book held to contain all the laws needed to live a fully free, fully successful human life.¹⁵⁹ Its ethical guidelines are specific.¹⁶⁰ As the Quran states:

Those who follow the Messenger, . . . [who] allows them [what is] lawful . . . , and prohibits [what is] unlawful . . . , he releases them from their heavy burdens, and from the fetters that were upon them. So those who believe in him, honour him, help him, and follow the light which has been sent down with him, it is they who will be successful.¹⁶¹

The human person is free, in other words, to the extent he or she observes the laws. It has been called the very “meaning of human life,” to “realiz[e] the moral values” that God “wills,”¹⁶² to realize God’s

153. NOVAK, *supra* note 73, at 47.

154. *Id.* at 44.

155. *Id.* at 57–58.

156. *Exodus* 7:16 (ESV).

157. Menken, *supra* note 149.

158. Hellig, *supra* note 106, at 85, 87.

159. ZEPP, *supra* note 56, at 109.

160. *Id.* at 100.

161. *Quran* 7:157.

162. Muslim American Society, *The Natural Sciences*, (Mar. 10, 2004), <http://www.masnet.org/history.asp?id=1035>.

“original intention . . . in creation.”¹⁶³ Furthermore, God has given the human person the physical and intellectual “instruments” to accomplish moral works, even placing nature at his or her disposal, for purposes of human use.¹⁶⁴

Serving God in Islam—by following the teachings of the Quran—frees the human person from domination by otherwise enslaving personal and social forces at work in the world.¹⁶⁵ Thus, freedom flows from “commitment,” “responsibility,” and “self control.”¹⁶⁶ It is not achieved by gratifying all instincts or desires, nor by responding to pressures.¹⁶⁷

It is held that this relationship between discipline and freedom can be deduced by reflecting on the “consequences of our choices.”¹⁶⁸ With frequent reference to excesses in the Western world, one Islamic author points to the phenomena of drugs, crime, sexually transmitted diseases, family instability, child neglect, and the plight of the poor, as examples of what happens when the true demands of freedom are not observed.¹⁶⁹

A poetic yet accurate summary of the Islamic notion that freedom is best assured by submission to law states, “What may appear from outside it as a set of strictures, even a trap, a series of limitations, appears from inside to be . . . a crystalline structure of great beauty which not only insures safety and orders chaos, but allows the soul freedom to soar.”¹⁷⁰

This notion of freedom in Islam extends into the realm of human sexuality as well. Islam teaches that the preservation of tranquility in family and society, the preservation of sexual and social health,¹⁷¹ is best achieved when human sexuality is taken “seriously,” and controlled and directed in light of its purposes.¹⁷² This language very much

163. Eboo Patel, *On Nurturing a Modern Muslim Identity: The Institutions of the Aga Khan Development Network*, 98 RELIGIOUS EDUC. 213 (2003).

164. *Id.*

165. Al-Balagh Foundation, *The Concept of Freedom in Islam*, <http://home.swipnet.se/islam/articles/concept-freedom.htm> (last visited Oct. 30, 2006).

166. *Id.*

167. *Id.*

168. Muzaffar Iqbal, *What Makes Islamic Science Islamic?* http://www.ncseweb.org/resources/ncse_content/voll9/6221_what_makes_islamic_science_islamic.

169. *See id.*; *see also* Ali A. Mazrui, *Islamic and Western Values*, 76 FOREIGN AFF. 118, 132 (1997) (contrasting Western excesses with Islamic modesty).

170. Noura Durkee, *Marriage for a Muslimah: Surrender to him for Him*, 9 DIALOGUE & ALLIANCE 115, 115 (Spring/Summer 1995).

171. Mark N. Swanson, *A Study of Twentieth-Century Commentary on Surat al-Nur (24):27–33*, 74 MUSLIM WORLD 187, 192, 203 (Jul/Oct 1984).

172. *Id.* at 187.

echoes that quoted above from Pope Benedict's XVI's *Deus Caritas Est*.¹⁷³

All three Abrahamic faiths strongly affirm a necessary relationship between freedom and submission to external norms created by God, for God's creatures, and often signaled in creation. These norms derive not simply from scriptures but also from reasoned observations about the created world. Both sources are held to contain truth. More explicitly than the other Abrahamic faiths, Catholicism also stresses the relationship between freedom and solidarity—especially solidarity with the weakest persons affected by a decision. This relationship is also referenced, however, in the Jewish teachings about the relationship between freedom and the continuity of the Jewish tradition, and in the Islamic teachings about the relationship between obeying the law and preserving social order.

III. IMPLICATIONS

The legal implications of state-recognized same-sex marriage are numerous. Most have been raised again and again in public discourse. For example, what might be the fallout of such a definitive legal severance of the tie between sexual love and new life? Might same-sex marriage change public ideals about marital fidelity? Should obligations between parents and children be based first upon biological ties, or upon ties of choice? How would the well-being of parents and children respond to the subordinating of the legal importance of biological ties?

Less often discussed are the consequences for family law and for religious groups opposed to same-sex marriage, if the moral reasoning of same-sex marriage proponents succeeds. This is not a question simply about the future religious liberty of groups opposed to legalized same-sex marriage, which is an important question on its own. It has been documented, for example, that both abroad¹⁷⁴ and in the United

173. See *supra* Part II.C.1, note 146 (quoting language).

174. See, e.g., Islam and Homosexuals, Letter, TIMES (UK), Jan. 14, 2006, Features, at 22, available at 2006 WLNR 785164 (investigating comments on homosexuality made by Secretary General of Muslim Council of Britain; listing 22 signatory Muslim groups weighing in with fears); BBC News, *Gay policy row couple sue police*, http://news.bbc.co.uk/2/hi/uk_news/england/lancashire/4802274.stm (Christian couple wrote to local borough councilman in England challenging an administrative decision and were reported to the Borough Council and questioned by police for possible homophobic attitudes); Ron Csillag, *Rabbis Voice Opposing Views on Same-Sex Marriage*, THE CANADIAN JEWISH NEWS, Dec. 15, 2005, available at <http://www.cjnews.com/viewarticle.asp?id=421> (expressing fear that Jewish and other religious groups opposed to same-sex marriage could be looked at as “enemies of the state,” and that “religious liberty will be regarded as a form of socially unacceptable prejudice. . . . detrimental to the type of multicultural society we now have in Canada . . .”); Chris Traber, *Gay*

States,¹⁷⁵ state action against groups and individuals has occurred on the basis of their religiously based opposition to same-sex marriage. Both state actors and private parties accuse religious opponents of same-sex marriage of base motives. They have been likened not only to racists,¹⁷⁶ but also to Nazis on the hunt for Jews.¹⁷⁷ The Catholic Church was singled out for special contempt by the San Francisco Board of Supervisors, which called the Vatican a “foreign country . . . meddl[ing]” with the affairs of a state,¹⁷⁸ and adopted a resolution labeling it “hateful,” “discriminatory,” “insulting,” and “callous.”¹⁷⁹ These actions alone could tend to push religious actors further out of the public square.

It should also be asked, however, whether there are consequences for family law generally and for the relationship of Abrahamic believers to family law and society, if same-sex marriage gains more widespread legal acceptance. As to the consequences for family law generally, it is not strictly necessary to take these up in an essay primarily concerned with the Abrahamic faiths’ divergence from the moral reasoning of same-sex marriage proponents. Now that this essay has described the contents of such proponents’ moral reasoning, it seems worthwhile to note briefly how it diverges not simply from religious principles, but also from some important secular family law principles and aspirations. The remainder of the essay will therefore consider the possible consequences of a more general acceptance of the moral reasoning

Marriage Debate Over? Another Legal Battle Looming, Clergy Say, THE LIBERAL, June 30, 2005, at 1, available at 2005 WLNR 10884008 (reporting that homosexual rights groups in England acknowledge that suits to take away the status of religious groups as registered charities are “a logical next step”).

175. See Kevin Hasson & Anthony R. Picarello, Jr., Memorandum to All United States Senators: Will the Marriage Protection Amendment Cause Religious Liberty Problems?, June 7, 2006 (chronicling how same-sex marriage recognition would “create pervasive religious liberty conflicts.”); Maggie Gallagher, *Gay Marriage Creates New Conflicts for Neighbors*, (May 30, 2006), <http://www.townhall.com/Common/Print.aspx> (local fireman fired by local government for signing a citizen petition opposing gay marriage); Laura Christine Henderson, Comment, *Equal Benefits, Unequal Burdens: How the Movement for Gay Rights in the Workplace Is Affecting Religious Employers*, 55 CATH. U. L. REV. 227, 228–29 (2005).

176. See *supra* Part II.A (noting such a characterization that was made at a senate convention).

177. 2004 Constitutional Convention, Mass. Senate (Feb. 12, 2004) (statement of Sen. Creem) http://www.anderkoo.com/ma_constitutional_convention (“Whose rights are we going to try to strip away next? . . . What will happen when they come for me and no one is left able to speak?”).

178. Rachel Gordon, *Supervisors slam Vatican on adoptions: Resolution calls edict on gays “insulting, callous,”* S.F. CHRON., Mar. 22, 2006, at B3.

179. Pat Murphy, *Leading LGBT Voice Scorns Cardinal Levada LGBT Adoption Ban*, S.F. SENTINEL, Mar. 14, 2006, available at http://www.sanfranciscosentinel.com/news_in_brief/ammiano_levada_060314.shtml.

offered by same-sex marriage proponents, first for family law, and then for Abrahamic believers.

A. Implications for Family Law

Were the methods of reasoning adopted in the service of legalizing same-sex marriage to become institutionalized more generally throughout family law, what effects might this have upon family law? First, the refusal of same-sex marriage proponents to reason from observations about the natural world flies in the face of family law's increased ability since the later twentieth century to identify and utilize evidence from the social sciences in order to update and improve lawmaking. Here, for example, I have in mind the substantial available social science concerning matters such as the effect of divorce on children, the battered-spouse syndrome, and the effects of premarital counseling programs. This type of social science evidence has been used with great effect in recent decades to secure laws advancing the interests of children, of battered spouses, and of married couples.¹⁸⁰ This is contradicted when laws are founded upon emotional anecdotes and a generalized suspicion of reasoning from patterns found in natural human behavior and decision making.

Second, while those promoting same-sex marriage seem disinterested in the subject of children generally, a very significant part of family law's "story" in the last century has been its more decisive turn toward understanding children's relative vulnerability in the law and moving toward better protecting their best interests. By no means have children's interests been perfectly realized. Yet, it might still be said that the laws concerning adoption, child support, child custody, and more recently child abuse, have come to protect children's interests more robustly. Today, this concern regarding children has reached what might be called more fundamental proportions as the wealthier countries on earth, with the exception of the United States, are ceasing to have even enough children to maintain their populations. Articles and studies¹⁸¹ about the demographic decline of most European countries,

180. These might include laws requiring divorcing parents to attend classes regarding parenting children after divorce, see Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. OF AFCC 219, 220 (1999) (listing states); courts' willingness to accept evidence of the battered-spouse syndrome, see HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS*, 169, n.6 (5th ed. 2003) (summarizing laws); and laws requiring or inviting engaged couples to attend premarital counseling before their marriage, see Scott M. Stanley, *Making a Case for Premarital Education*, 50 FAM. RELATIONS 272, 273 (2001) (discussing one of the most prominent counseling programs).

181. See, e.g., Lola Velarde, Institute for Family Policies, Report on the Evolution of the

and the mostly fruitless efforts to reverse it, are becoming a news-media staple.¹⁸² Same-sex marriage proponents' lack of attention to children, and their willingness to legally sever the relationship between marriage and procreation, contradict not only the family law trajectory toward increasing solicitousness toward children's interests, but also the high social value placed on children's birth at all.

Finally, while there is no doubt that family law has increasingly adopted the notion that expanding individual rights for adults connotes "freedom"—evidenced by the legal developments concerning abortion, contraceptives for single persons, new reproductive technologies for anyone who can pay, and no-fault divorce—society has recently, perhaps, hit some sort of barrier to the continued pursuit of this notion. This barrier takes first, the form of children who have come of age following the widespread adoption of these laws. These include the children of divorce and children conceived by means of anonymous gamete donation, who are thus estranged from their natural parents. They are dissatisfied with the consequences of the legal rights and freedoms offered to their parents.

A second component of this barrier consists of adults whose experiences with legally granted freedoms have been negative. These individuals appear, for example, in studies indicating that a second marriage following divorce does not lead to happiness or stability.¹⁸³ They might also appear on the steps of the Supreme Court holding an "I regret my abortion" placard.¹⁸⁴ In either case, they represent a new development that family law should take into account. They stand in opposition to the theory of freedom proposed by same-sex marriage proponents, namely freedom as merely expanded individual rights.

Family in Europe, (2006).

182. See, e.g., Shannon Love, *Family Free-Riders*, CHICAGO BOYZ, Mar. 3, 2006, <http://www.chicagoboyz.net/archives/003976.html> (delineating in economic terms why "eventually, the society will either produce too few children or, probably more likely, will not produce enough children with the skills and habits needed to carry on the economy").

183. See, e.g., LINDA J. WAITE ET AL., INSTITUTE FOR AMERICAN VALUES, DOES DIVORCE MAKE PEOPLE HAPPY? FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES (2002) (summarizing the consequences of ending unhappy marriage with divorce); MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, DEP'T OF HEALTH & HUMAN SERVICES, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES ADVANCE DATA, No. 323 (2001) (discussing the frequency with which second marriages dissolve).

184. Sarah Blustein, *Choice Language*, AM. PROSPECT ONLINE, Dec. 6, 2004, <http://www.prospect.org/web/page/.ww?section=root&name=ViewPrint&articleId=8888>.

*B. Implications for the Relationship Between
Abrahamic Believers and Family Law*

There are several possible consequences, too, for the relations among the Abrahamic faiths, the law, and society, if same-sex marriage continues to make legal headway. The religious liberty issues have already been mentioned above.¹⁸⁵ A related, but less obvious, consequence is a type of withdrawal by Abrahamic believers and organizations from various community institutions.

In particular, given that every Abrahamic faith has robust beliefs about parents' duties to educate their children with a religious perspective,¹⁸⁶ same-sex marriage raises the possibility that those believers who can afford it will be more hesitant to send their children to public schools. Will they have more recourse to religiously based schools, assuming such schools remain free to teach their own religious viewpoints on marriage? Will some Abrahamic believers take marriage laws and practices into account when deciding what states, cities, and neighborhoods they inhabit? Some religious segregation is one possible consequence of the adoption of laws that challenge fundamental religious commitments about reason, freedom, and family life itself.

Another facet of this segregation might include religious organizations' withdrawal from providing social services. This has already made headlines in the case of Catholic Charities of Boston's complete withdrawal from providing adoption services in the face of Massachusetts laws mandating adoption agencies to allow homosexual adoptions.¹⁸⁷ The Catholic Church is the single largest private provider of charity in the United States. Catholic teaching holds that such charity is as indispensable to Catholic identity as the Word of God and the Sacraments.¹⁸⁸ The nation remains in constant need of large amounts of charitable social welfare assistance. What will be the effect of banning religious involvement in programs involving state funding in states legally recognizing same-sex marriage or other unions? Will churches

185. See *supra* Part II.C (outlining the Abrahamic faiths' rationale of religious freedom).

186. See, e.g., Schlesinger, *supra* note 107, at 6 (noting that care for the educational needs of the child is the family's imperative duty); CATECHISM, *supra* note 35, para. 2221 (stating that the role of parents in education "is so important that only with difficulty can it be supplied where it is lacking"); SIDDIQI, *supra* note 117, at 250 ("Imparting proper education to children has been the foremost responsibility of every parents (sic) in all ages.").

187. See Richard N. Ostling, *Gay Marriage Inevitable, Some Say With Them Will Come Church-State Challenges*, LEXINGTON HERALD-LEADER, June 3, 2006, at 1, available at 2006 WLNR 9510667 (considering further consequences of gay marriage).

188. BENEDICT, *supra* note 146, at 22.

provide less charity? Will they withdraw from all government programs and take care only of their own flocks?

Another possible consequence of the marginalization of religious beliefs about marriage might be the lessening of the leavening effects in both law and in culture of Abrahamic beliefs about marriage. It is well known that families adhering to traditional religious beliefs tend not only to have fewer divorces, but also to rear children who experience fewer social problems such as drug abuse or teen pregnancy.¹⁸⁹ This is likely related to the teachings, especially of Judaism and Christianity, that marital and family love ought to reveal the nature of God's love: permanent, faithful, and fruitful.¹⁹⁰ Couples who believe in these traditions, in other words, are exhorted to model their marriages as closely as possible upon the high standard established by the example of God's love for the human person. Their efforts and their presence are a leaven in society.

What will happen should there arise a more generalized distrust, or even disdain, for religiously grounded notions of marriage? Will these groups' contributions be deemed out of order not only when same-sex marriage is at stake, but also when divorce, parent-child obligations, and other family topics are before legislatures or courts?

Far more is at stake in the debate concerning same-sex marriage than first meets the eye. At this point, only the most uninformed observer could believe that nothing much about marriage, or family law, or culture will change if same-sex marriages are legally recognized. Attentive family scholars are aware that many of the technical rules governing the family could be affected by same-sex marriage recognition, whether regarding adoption, inheritance, custody, child support, or other staples of family law. What may not be understood is how adoption of the moral reasoning used to advance same-sex marriage could potentially alter not only some of family law's own

189. See, e.g., The National Campaign to Prevent Teen Pregnancy, General Facts and Stats about Teen Pregnancy, <http://www.teenpregnancy.org/resources/data/genlfact.asp> (last visited Sept. 30, 2006) (listing national teen pregnancy data); Andrew A. Weaver et al., *A Systematic Review of Research on Religion in Six Primary Marriage and Family Journals: 1995-1999*, 30 AM. J. FAM. THERAPY 293, 302 (2002) (detailing the research done in six different journals); Allen S. Maller, *Reducing the Risks of Divorce: A Responsibility of Religious Educators*, 87 RELIGIOUS EDUC. 471 (1992) (discussing large numbers of studies showing a tie between religion and marital stability).

190. Samuel Glasner, "A Source for Strengthening Marriage" in MARRIAGE AND THE JEWISH TRADITION: TOWARD A MODERN PHILOSOPHY OF FAMILY LIVING 4 (Stanley R. Brav, ed., 1951); Blu Greenberg, *Marriage in the Jewish Tradition*, 22 J. OF ECUMENICAL STUD. 3, 5 (1985); BENEDICT, *supra* note 146, at 11; POPE JOHN PAUL II, FAMILIARIS CONSORTIO: AN APOSTOLIC EXHORTATION ON THE FAMILY, at II, para.13, n.32.

secular aspirations, but also the relationships among Abrahamic faiths, law, and society.