





# IN HIS OWN



MONTE STEWART CHRONICLES HIS RECENT DAYS AS A  
STUDENT AT OXFORD UNIVERSITY AND SUMMARIZES HIS THESIS

# WORDS



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ince graduating first in the Law School's first graduating class of 1976, Monte Stewart has defined and redefined his work from clerking for Justice Warren Burger to private practice to mission president to professor to public interest attorney to scholar. Stewart spent September 2003 through June 2004 at Oxford University studying and writing on the judicial redefinition of marriage. He put together the chronology printed here as the basis for an article, but after reviewing it, the editors decided the chronology *was* the article. For more information about Stewart's work, visit [manwomanmarriage.com](http://manwomanmarriage.com).

ILLUSTRATION BY MARK SUMMERS

# PART I

## DAYS AT OXFORD

2003

**JANUARY** Knowing that my work for the State of Utah on high-level nuclear waste dumping would be coming to an end in six or eight months, Anne and I consider what and where next. We are thinking a fair amount about returning to Las Vegas, where our family had been greatly blessed from 1981 to 1994. We make trips investigating this possibility. We come to understand that we are to do something different, something that we had never considered before and that had never even remotely entered into any kind of idea of the course of our lives—I was to go back to school (the best school I could get into) to get further education to make myself more useful. Very soon thereafter, it seems clear that the presently most consequential area of the law pertained to the challenge to man/woman marriage and that is the subject I should study. I soon learn that the Harvard and Yale deadline for LLM applicants was December, and nothing else of the right sort is available in America. I am befuddled momentarily, because this does not square with our recent understanding. I sit and think, and Oxford comes to mind. Its deadline is March.

**FEBRUARY AND MARCH** We tell our family and a few others close to us, and word of our decision spreads. Reactions vary. Many are skeptical and seem to view this as manifes-

tation of a midlife crisis. Richard Wilkins and Cole Durham help me prepare my application materials and essays for Oxford. The tentative plan is for Anne and the children to join me in Oxford in January, after Rob's football season is over. (At home, Rob, 16; Emily [fervid Anglophile], 13; Amy, 11; Elizabeth, 9.)

**APRIL** Oxford tells me that, given what I propose doing there, I have applied for the wrong course (a "taught" course); the right one is a "research" course, Masters of Studies in Legal Research (MSt, or, as it is called there orally, MStud). Oxford and its educational system is all such a mystery to me, I am not surprised at my mistake. I tell Oxford folks to deem me an applicant for the MSt course and they kindly agree. The law faculty accepts me quickly, but my going also depends on one of the 35 colleges there accepting me. Ignorant of the colleges, I state no preference and leave the choice of where my dossier goes to the university. The dossier begins circulating.

**MAY** Because of the children's schooling, the family plan moves to the family joining me for June and July 2004 only. I continue wondering how to support the family and pay for the education. Our almost-missionary son volunteers his trust account; moved, we decline. The British Columbia Court

of Appeal holds that Canada's Charter of Rights and Freedoms mandates the redefinition of marriage as the union of any two persons but stays its judgment for over a year to give Parliament an opportunity to speak.

**JUNE** I call Oxford to see what is happening with a college acceptance and learn that several have passed on me. I ask where the dossier is and hear "St. Anne's." Worried (it is getting late), I force myself to take this as a good omen. Two weeks go by with no word. I call again, and the lady is reluctant to answer, leading me to think the news is bad. I press, and she says that St. Anne's had accepted me. I ask when. She says "June 4." That is Anne's birthday. The Ontario Court of Appeal holds that the Charter mandates genderless marriage and refuses to stay its judgment. The British Columbia Court of Appeal then gives its judgment immediate effect also.

**JULY** I figure out a way to finance the plan; I will borrow \$120,000 from my life insurance policy. (Oxford is expensive, and even a frugal family's needs are not small.)

**AUGUST** With the realization that the family probably will not be with me during the school year, I ask St. Anne's for "in college accommodation." Although the application deadline is long past, an opening has just arisen in the college's graduate residence hall. This is a big financial boon, but the hall is coed, and the college says it does not arrange for single-sex accommodation in any of the flats comprising the hall. I call and explain to the hall warden that I'm married and live by certain standards, which I explain. He says, "High standards are good. I've got a vacancy in a miniflat of three rooms, with a good, clean English lad and a good, clean Chinese lad. I'll put you in there."

**SEPTEMBER** I work with Tom Lee in the state's appeals to the Tenth Circuit and the District of Columbia Circuit in the fight against the high-level nuclear waste dump. We go to Albuquerque for the Tenth Circuit oral argument. Just a few days before I leave for England, we finish the D.C. Circuit brief, which I deem the best I have ever been involved with. The Sunday evening before I leave, my home teachers give me a priesthood blessing. Nearly all the night before I

leave, I sit in the living room, immobilized by the thought of leaving my family like this. Very early, Anne drives me to the airport. I shed a lot of tears at the curb. She is a brick. I realize once again that she is one in a million to support me in this, an extraordinary but hard experience in a long series of such. I fly on frequent-flier miles given me by Richard Wilkins. I arrive on a Saturday afternoon, call the bishop, and get directions to Church and the elders' phone number. I call the elders and start a close relationship that lasts with them and their successors all through the year. I show up at Church a stranger and end up teaching the priesthood lesson.

**OCTOBER** In full *sub fusc* (cap, gown, white bow tie, white shirt, dark suit), I matriculate in Christopher Wren's Sheldonian Theatre and begin to develop a sense of Oxford's mysterious but awesome educational traditions and practices. I meet my supervisor, John Eekelaar, and he immediately sends me to a conference of the International Society of Family Law, in Spain. It is my first time on the Continent. At the conference Lynn Wardle is virtually the lone voice for using the law to protect, promote, and prosper man/woman marriage; nearly all the other academics are "progressive," but only one (and he an American) is strident in the discourse. I become a home teacher to two Brazilian sisters with little English (and begin to resurrect my Portuguese) and some new convert families in a working-class area; the Gospel Principles teacher (with the class nearly each week proceeding in English with Portuguese and French translations, with me sometimes also doing the Portuguese translation); and the high priests group leader.

**NOVEMBER** I struggle with my ignorance of non-American legal systems and of much of the literature and discourse surrounding the move to genderless marriage. I read primarily gay and lesbian literature and South African court cases. I labor at times with discouragement, even depression, over the prospects. I narrow my focus to the equality jurisprudence of South Africa, Canada, and the United States in the context of man/woman marriage versus genderless marriage. On the 18th the Massachusetts Supreme Judicial Court issues its 4–3 *Goodridge* decision, holding that the state constitution man-

dates genderless marriage because limiting marriage to a man and a woman is not rational. The next day Richard Wilkins arranges for me to be invited to participate in a Toronto conference on the marriage issue slated for December. I begin working with Terry Warner on a paper for the conference. On the issues of philosophy and anthropology that crop up, I am completely out of my league. The long paper (20,000 words) is much more polemic than scholarly and detached, but I learn the pitfalls of the paper's approach by falling in the pits and come to understand the weaknesses and difficulties of certain arguments by trying to make them.

**DECEMBER** I continue to work on the Toronto paper, thinking that what it contains may be transferable to my thesis. We take a fairly large group of newer members to the London Temple to do baptisms for the dead as a key to retention. After 12 weeks in England, I leave for home by way of Toronto. The conference is small but consists of scholars largely committed to preserving and protecting man/woman marriage, scholars (from the UK, Canada, and America) with extraordinary credentials, professional achievements, and candlepower. I hear ideas that come to play a key role in my thesis. With Richard Wilkins, I meet with a group of Canadian Latter-day Saints, feel

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I WALK FOR SEVERAL MILES ALONG THE OXFORD CANAL AND

THE THAMES. . . . THESE ARE DAYS NEVER TO BE FORGOTTEN.

their sorrowing over their nation's apparent imminent adoption of genderless marriage, and tell them not to despair. There is genuine hope for preserving marriage in Canada as the union of a man and a woman. I return home to Anne and the children.

2004

**JANUARY** I return to Oxford. I suffer bouts of homesickness that at times cause physical pain and remember the Missionary Department's adage that no one ever died of homesickness. I continue to benefit attending and participating in Professors Sandra Fredman's and Christopher McCrudden's comparative human rights seminar. (My thesis is a comparative law piece, an approach that before September I had never touched and was only dimly aware of.) The students are mostly young and breathtakingly bright ("clever," as they say in England) lawyers from countries all around the world. I become the go-to guy on United States Supreme Court cases and lore. I complete my study of the relevant South African, Canadian, and American cases.

**FEBRUARY** By what seems to me a miracle, I encounter some key concepts in the writings of Ronald Dworkin and John Finnis that I see to be of great importance to the marriage issue. These men do jurisprudence. All school year I had felt that the roots of my thesis go into jurisprudence but had never touched the area before and floundered ahead by reading elementary works in the area. Oxford is awash in jurisprudence. I begin attending a seminar led by Joseph Raz and John Finnis. I talk to Professor Finnis about my discovery. He agrees but seems sadly resigned about the prospects for preserving man/woman marriage in Canada. He has a light about him that the other law professors, wonderful as they are, do not. We again take the newer members to the temple for baptisms. With three weeks left in the month and before my departure for home, the District of Columbia Circuit rules against Tom Lee and me (actually against the State of Utah), essentially ignoring in the process our best arguments. I begin writing my thesis, sitting at my computer in my little room, with cases and other materials spread

on a card table and the bed. Key ideas flood in from the first hour. The structure becomes so clear in my mind and the pace of my writing so certain that I am able to predict when I will complete each of the seven chapters. I start writing every day at 8:00 a.m. Late in the afternoon I walk for several miles along the Oxford Canal and the Thames (called the Isis in Oxford). This continues for three weeks. I finish the day before I am to leave. These are days never to be forgotten.

**MARCH AND APRIL** I return home for a long holiday between terms. During the night after my return, another chapter comes clearly into my mind, one based on a distinction in the modes of judging made by Dworkin. I write the chapter in the coming days, applying the distinction to the 4-3

*Goodridge* split. Because of length limitations, the chapter does not become part of the thesis but does become part of the longer article I seek to publish. With hardly even a foggy notion about our future, Anne and I decide that we are to build out our unfinished basement. Most of my time is devoted to this project, especially laying tile. Anne appreciates this work far, far more than any legal work I ever did. On April 22, I leave for England by way of Boston. I visit with an articles editor at the Harvard Law Review about publication of my thesis/article there. It has already gone through two stages of the review process with very good reviews.

**MAY** John Eekelaar thinks highly of my thesis (he thought the Toronto paper was not very good). I finalize the thesis and prepare for my

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*viva* (oral defense of the thesis). John arranges for Jon Herring, a young Oxford family law professor whose lectures I had attended, to be the internal examiner and for Helen Reece, a barrister and professor in London, to be the external examiner. I read Helen's recent book on divorce reform and find language supporting two key concepts in the thesis (so the book is now in two footnotes). Harvard Law Review rejects my article. With Bill Duncan's help, I send it to about three dozen journals in Canada and the United States. At the stake president's direction, I work hard to arrange for all temple-worthy people in the ward to go to the temple on the 18th. My *viva* gets scheduled for late morning on the 18th and cannot be moved. In full *sub fusc*, I go to my *viva*. It is longer than usual and quite intense in a not unfriendly way. The examiners challenge me particularly regarding the social science data that married mother/father child rearing is the optimal mode. After, I catch a ride to the temple with a dear recently returned missionary friend of Nigerian descent. The ward members consider the temple excursion a great success. In the coming days on my own initiative I rewrite the child-rearing chapter, chapter 4, to make it stronger, this in light of the *viva* experience. On the 27th Anne arrives. Before entering my flat, she meets Michael Korsah from the next flat, the PhD (material sciences) student from Ghana we have been fellowshiping for some months, who is now taking the missionary discussions. She is moved when she sees my little room and has an epiphany of my experience this past year.

**JUNE** Anne's and my week together in England is glorious. It is hard saying goodbye to the ward members. The night before we leave, I get an e-mail that the examiners' report is in the Graduate Studies Office. We catch a bus early for Heathrow on the 4th, Anne's birthday, before the GSO opens. I call from the bus. The lady tells me that I am being awarded my degree "with distinction." I had thought that coming down in favor of man/woman marriage would preclude that relatively rare award. The *Canadian Journal of Family Law*, a peer-edited journal, agrees to publish the article in September, before the October 6th oral argument before the Supreme Court of Canada on whether the Charter mandates genderless marriage.

## SUMMARIZING THE ARTICLE: A JUDICIAL REDEFINITION OF MARRIAGE

# PART II



In both the political and the legal spheres, the genderless marriage war is fought almost entirely on the equality battleground. Accordingly, the key question becomes whether there are any meaningful differences between marriage defined as the union of a man and a woman and marriage defined as the union of any two persons.



# THE LEGAL STAGE IS SET

In the *Goodridge* case in November 2003, the Massachusetts Supreme Judicial Court announced that there were no meaningful differences, and, therefore, the limitation of civil marriage to the union of a man and a woman was “irrational.” (In 1999 the Vermont Supreme Court went almost that far but exercised a touch of self-restraint, allowing the state legislature to provide for civil unions, essentially marriage without the name “marriage.”) Five months before *Goodridge*, the Ontario Court of Appeal had said essentially the same things stated by the Massachusetts court, as had the British Columbia Court of Appeal in May, just a few weeks before the Ontario court spoke. The question of one or more meaningful differences is now before the Supreme Court of Canada, with oral argument set for October 6, and before the courts of South Africa, New Jersey, and California. The question will come before the courts of most American states in the coming months and years, because nearly every state constitution has an equality guarantee.

## *Man/Woman Marriage v. Any Two Persons*

The most obvious difference pertains to procreation. Civil marriage limited to the union of a man and a woman suggests that society is up to something having to do, in some way, with procreation. The four courts (Massachusetts, Ontario, British Columbia, and Vermont) got around this difference with three interrelated tactics. First, they ignored the description (put forward by the defenders of man/woman marriage) of what society was up to with its limitation of marriage to the union of a man and a woman and instead substituted a phony, even silly, argument in its place. The courts cast the argument as one resting on a supposed societal purpose of mandating procreation. Second, the courts shot down this phony argument by saying that this was not a true societal purpose as evidenced by society’s refusal to make procreative intentions, capacities, and performance a requirement of civil marriage. Third, the courts

said in essence that the “true” purpose of civil marriage is a companionate relationship, with respect to which the abilities and needs of a same-sex couple are the same as those of a man and a woman.

Taking the third tactic first (to use Rex Lee’s approach), what the courts did in effect was treat the Constitution (or Charter in Canada) as “enacting” a particular social theory known as the “close [or pure] personal relationship” model of dyadic (two-person) relationships. Under this model as described by Ceres, a relationship is “stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved. In this new world of ‘relationships,’ marriage is placed on a level playing field with all other long-term sexually intimate relationships.” There are three problems with this. One, in the United States and Canada, although many couples (including married couples) have adopted this model as their own, the majority have not; they adhere to the much broader and richer conception of traditional, conjugal marriage. Two, the model, or theory, although popular in some quarters of the academy, is contested even there, as well as in society generally. Three, at least since Holmes, it has been clear that the “enacting” of a contested social theory under the guise of constitutional interpretation is a bogus judicial endeavor.

Regarding the second tactic (the absence of procreative requirements for man/woman marriage shows a societal lack of interest in marital procreation), the far more persuasive explanation of society’s reticence to inquire into marital procreative intentions and capacities is society’s long-standing aversion to governmental intrusions into the sphere of marital privacy, as witnessed most famously by the 1965 *Griswold v. Connecticut* case on marital use of contraceptives. That persuasive explanation cannot rationally be used to argue that society holds no meaningful interest in procreation.

Which leads to the first tactic (ignoring the real and relevant societal interest at work). The real and relevant interest is a component of what my article refers to as society’s *deep logic of marriage*, a component that the states’ briefs refer to as ‘the government’s interest in “furthering the link



between procreation and child rearing.” The phrase *deep logic of marriage* encompasses the complex of purposes and values that inheres in the social institution of marriage as now experienced in Canadian and American societies. The relevant “procreative” component is a response to two essential realities of man/woman intercourse: its procreative power and its passion. The component’s purpose is understood as the provision of adequate private welfare to children. (The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child bearing, has important implications for society. Societal interests are corroded when child bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter. Whereas rationality considers consequences nine months hence and thereafter, passion does not, to society’s detriment.

Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting (a social institution, actually) that will assure (to the largest practical extent) that passion’s consequences (children) begin and continue life with adequate private welfare. This purposive component of society’s deep logic of marriage I call the *private welfare purpose*. Although the immediate objects of the protective aspects of the private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.

Against this background, what is irrational is most certainly not the societal regulation of marriage as the union of a man and a woman but the conferral of “marital” status on same-sex couples, whose passion is not and simply cannot be procreative.

The courts sensed this problem inhering in their tactic, but their remedial efforts fail. One, they point to same-sex couples getting children by adoption and assistive reproduc-



tive technology. But both of those child-getting approaches presuppose not passion-based child bearing but very deliberative entry into child rearing, a presupposition not logically connected to the private welfare purpose of society’s deep logic of marriage. Two, the *Goodridge* court made a feeble effort to argue that the contemporary availability of contraceptives effectively eliminates the private welfare purpose, but the child-birth data undercuts that effort.

So there is something after all about the man/woman procreative power that renders quite rational indeed society’s use of marriage to regulate the union of a man and a woman and quite irrational indeed to regulate a same-sex relationship.

Another difference, besides that pertaining to procreation, relates to child rearing. Married mother/father child rearing is the optimal child-rearing mode when measured by outcomes beneficial to society, including the child’s physical, mental, and emotional health and development; academic perfor-



mance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct. This quality of married mother/father child rearing is not seriously contestable in the context of all child-rearing modes (except same-sex parents), and that includes unmarried mother/father, married parent/step-parent, cohabiting parent, single mother, and

single father. It is “contestable” in the same-sex parent context simply because there are a few studies on each side of the argument but no consensus yet. As the Ontario court put it, “[T]he social science research is not capable of establishing the proposition one way or another.” But that court and the other three courts did not say *why* the social science data is inconclusive. It is inconclusive because same-sex parenting is too recent



and therefore insufficiently studied. In other words, it is the very pace of the genderless marriage advocates' political and legal march that leaves contested whether same-sex couple child rearing—like all other modes—is less successful in rearing children from infancy to adulthood than is married mother/father child rearing.

Against this background, the four courts took the rather silly approach of declaring the party not responsible for the uncertainty (the state), rather than the responsible party (the gay and lesbian community), the “loser” exactly because of the existence of the uncertainty. The Ontario court did not remedy this silliness by invoking the notion of a “stereotypical assumption.” The assumption that married mother/father child rearing is the optimal mode—relative to *all* other modes—is premised not on some demeaning view of gay men and lesbians but on the social science data showing the superior outcomes for married mother/father child rearing relative to every other mode where circumstances have allowed adequate study (that is, every other mode except same-sex couple). The four courts' tactic of shifting the “burden of proof” to the state in these circumstances is problematic.

Likewise problematic is their reliance on the adoption argument: The state allows same-sex couples to adopt; therefore the legislature has decreed that same-sex couple child rearing is as beneficial to society as married mother/father child rearing. The short and simple answer is that the state considers and allows adoption only when married mother/father child rearing (the optimal mode) is not, for some reason, an option. The courts' “therefore” is therefore fallacious.

A rational, enlightened legislator could choose to limit marriage to the union of a man and a woman as a means of protecting, preserving, and promoting married mother/father child rearing and its optimal outcomes (for society as well as the child).

In tacit recognition of this last point, the four courts resort to the “no downside” argument: Even conceding that society has good reasons to prefer man/woman marriage, opening marriage to same-sex couples will benefit those couples greatly and will cause no downside to the “vital social institution”

(Goodridge's words) of marriage; therefore, with such upside and no downside, it is irrational to continue limiting marriage to the union of a man and a woman. But here the courts wreck most spectacularly. Marriage is a vital social institution, but a social institution is not brick, steel, and glass; rather, it is, in Ceres' words, something “constituted by complex webs of social meaning.” Thus marriage, like all social institutions, is changed by alterations in the social or public meanings that in large measure constitute it. Moreover, a social institution supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside. Thus, fundamental change in the institution first results from change in the public meanings that constitute it and then changes what its members think of themselves and of one another, what they believe to be important, and what they strive to achieve.

#### *Consequences of Change—Anything but Beneficial*

Profound changes in social conduct are the likely consequence of changing the meaning of marriage from the union of a man and a woman to the union of any two persons, with reason to fear that the changes will be anything but beneficial. To change the core meaning of marriage from the union of a man and a woman (with all the radiating implications of that limitation) to the union of any two persons is to transform profoundly the institution. If it is not immediately transformed, then certainly it will be over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions. Society, especially its children, thereby loses the ability to discern the meanings of the old institution. Humankind's body of knowledge on the nature and operation of social institutions refutes the courts' “no downside” argument.

#### PHOTO CREDITS

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