On Marriage and Metaphysics

Robert E. Rodes, Jr.

There is a story, perhaps an urban legend, that a scholar, addressing the Académie Française or some other august body of French savants, was remarking how little difference there was between men and women when a voice came from the audience: "Vive la différence!" With the ongoing emancipation of women from the restraints of patriarchal society, the difference has often been discounted, and attempts to articulate it have typically failed. Still, it is generally conceded that the difference is important, and very few people would be content to be without it. It would seem obvious, therefore, that an association consisting of one person of each sex would be so different from other associations as to warrant calling it by a different name.

I

For this reason, there is a certain air of unreality in the ongoing debate about allowing persons of the same sex to marry each other. One side seems to be insisting that the distinction between same-sex and opposite-sex couples is gratuitous, the other that it is obvious. Since the supreme judicial court of Massachusetts decided in 2003 that the constitution of that state required the recognition of same-sex marriages,[1] many states (twenty-six at last count) have amended their constitutions to keep their courts from following suit.[2] Other states have rejected such amendments

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[1] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[2] Human Rights Campaign, a gay rights organization, maintains an up-to-date list on its Web site, www.hrc.org_

on the ground that there was no danger of their courts doing so.[3] Meanwhile, efforts to reverse the Massachusetts decision through the elaborate amending process set up by the state constitution have finally failed by five votes in a joint session of the legislature.[4] Proponents of the amendment seem to have relied on the importance of supporting the traditional family, and on the democratic appropriateness of submitting the issue to the referendum that would have been the next step in the process. Some legislative votes the other way were prompted by worry about the divisiveness of the proposed referendum, others by reflection on how nice some same-sex couples were. The *New York Times* has this to say about Senator Gale Candaras, who changed her vote between sessions:

> Most moving, [Senator Candaras] said, were older constituents who first supported the amendment, but changed after meeting with gay men and lesbians. One woman had "asked me to put it on the ballot for a vote, but since then a lovely couple moved in," Ms. Candaras said. "She said, 'They help me with my lawn, and if there can't be marriage in Massachusetts, they'll leave and they can't help me with my lawn.'"[5]

The air of unreality surrounding the debate is nowhere more apparent than in the various opinions in *Goodridge v. Department of Public Health*, in which the constitutional right of same-sex couples to marry was first established. The attorneys for the Commonwealth are attempting to prove the obvious, and a majority of the court are showing how they have failed to do so. Chief Justice Margaret Marshall begins her majority opinion by stating the question as "whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage."[6] With the question in this form, she proceeds to set forth a list of the benefits of being married,[7] and challenges the Commonwealth to come up with a justification for limiting one's choice of the person with whom to share these benefits. The Commonwealth offers three alternative justifications, which she has no trouble demolishing one by one. They are: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."[8] The third rationale is pretty far-fetched; it seems to suppose that two people of the same sex, if they were treated as married to each other, would have access to some kind of welfare payments for which they would otherwise not be eligible. I think we can disregard it and turn to the other two.

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[3] See the editorial "Gay Marriage Amendment Is Not Needed," *South Bend Tribune*, March 30, 2007, on the needlessness of the proposed Indiana amendment, which subsequently failed.

[4] Pam Belluck, "Massachusetts Gay Marriage to Remain Legal," *New York Times*, June 15, 2007, A16.

[5] Ibid.

[6] *Goodridge v. Department of Public Health*, at 948.

[7] Ibid., 954–957.

[8] Ibid., 961.

Marshall meets them both by denying the premises on which they are based. "Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family."[9] There is no legal obstacle to couples marrying who do not intend to have children, or who are unable to do so. There is no legal obstacle to unmarried people having children in the normal way. There is no legal obstacle to anyone, married or single, adopting a child or conceiving one through one of the technologies now available.

There is a concurring opinion by Justice John Greaney.[10] He relies on miscegenation cases such as *Loving v. Virginia*,[11] which are secondary in the chief justice's opinion.[12] These cases hold that it is an impermissible form of race discrimination not to allow people of different races to marry. That is, when we say that Sam cannot marry Susie because he is black, whereas he could marry her if he were white, we are discriminating against him on account of his race. Similarly, Greaney argues, if we say that Samantha cannot marry Susie because she is a woman, whereas she could if she were a man, we are discriminating against her on account of her gender. To distinguish the cases by insisting that marriage is by definition the union of a man and a woman "is conclusory and bypasses the core question we are asked to decide."[13]

Three justices dissented, each with an opinion joined in by the other two. Justice Francis Spina's opinion begins by redefining the question: "What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts."[14] Spina points out that the state does not interfere with anyone's private life by merely refusing to recognize his or her relationship as a marriage.[15] He distinguishes the miscegenation cases by saying that laws against miscegenation were intended to preserve white supremacy, whereas laws against same-sex marriage are not intended to make anyone superior. He does not get to the more basic (and, I should think, more obvious) point that the difference between male and female is more significant than the difference between black and white.

Justice Martha Sosman devotes most of her opinion to child rearing.[16] She argues that studies on whether children do better with a father and a mother are as yet inconclusive. The majority "opinion ultimately opines that the legislature is act-

[9] Ibid.

[10] Ibid., 970.

[11] 388 U.S. 1 (1967).

[12] *Goodridge v. Department of Public Health*, at 957.

[13] Ibid., 972–973.

[14] Ibid., 974.

[15] Ibid., 978: "The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage."

[16] Ibid., 978.

ing irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure."[17]

Justice Robert Cordy elaborates on some of the points made by the other dissenters, but devotes most of his opinion to the relation between marriage and procreation.[18] He recognizes that the state supports alternative family arrangements, but insists that it supports them only as second best.[19] He concedes that modern technology makes it possible to bring children into the world without conventional sexual intercourse, but he points out that it is only through conventional sexual intercourse that they are brought into the world inadvertently. He argues that society needs an institution to cope with this possibility, and marriage is that institution.[20] The fact that marriage is also available to infertile opposite-sex couples means only that the law is overinclusive, and overinclusiveness does not necessarily make a law unconstitutional.[21] Limiting the institution to fertile couples would not be practicable.

Part of Chief Justice Marshall's opinion responds to Justice Cordy's arguments. She says his " 'marriage as procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[22] She adds in a footnote that Cordy's stress on reproduction "hews perilously close to the argument, long repudiated by the legislature and the courts, that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated."[23] What this comes down to is a claim that there is no difference between men and women except the plumbing. I submit that anyone who thinks that has not been spending enough time in mixed company.

The footnote passage I have just quoted suggests, without actually saying so, that anyone who regards the difference between men and women as more than biological must be in favor of sending all women back to the kitchen. This is by no means the case. There is a strong and persuasive line of feminist thought that attributes the bloody-mindedness of so much of our public life to the fact that women have for so long been excluded from it.[24] It is precisely because men and women are different in so many ways that we can hope for a better world when both sexes participate fully in constructing it.

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[17] Ibid., 981.

[18] Ibid., 983.

[19] Ibid., 1000–1001.

[20] Ibid., 995–996.

[21] Ibid., 1002–1003.

[22] Ibid., 962.

[23] Ibid., footnote 28.

[24] See Jean Bethke Elshtain, *Public Man, Private Woman*, 2nd ed. (Princeton, NJ: Princeton University Press, 1993).

The attempt to prove the obvious can sometimes have the same air of unreality as the attempt to disprove it. The three dissents in *Goodridge* all seem to skirt the main issue. They argue that thinking up new ways to run society is for the legislature, not the courts; that we are not yet sure that bringing up children with a mother and a father is no better than bringing them up some other way; and that having children without meaning to needs more regulation than having them on purpose. These claims are all perfectly true, but they seem irretrievably peripheral. Perhaps, as the chief justice thinks, Justice Cordy comes close to saying that men and women are innately and fundamentally different, but he never goes all the way in saying so.

By now, the highest courts of several states have considered the constitutionality of limiting marriage to opposite-sex couples.[25] All of them have upheld the traditional limitation, generally using the same arguments as one or more of the dissenters in *Goodridge*.[26] Most of them have dissenting opinions along the same lines as the prevailing opinions in *Goodridge*.

II

The debate over same-sex marriage in the legal literature is a little different from that in the courts, but it too shows a good deal of unreality. On the one side, it is argued that same-sex couples are often as loving and as stable as opposite-sex couples, so that the only possible objection to their being married is that they ought not to be engaging in sex acts with each other. But the only possible objection to such sex acts is that they cannot be procreative. That objection proves too much, because no one has ever objected to infertile couples of opposite sexes marrying and having sex.[27]

The writers who have taken a stand against same-sex marriage have by and large accepted their opponents' view that the objection is corollary to the objection to sex acts between persons of the same sex. To support that objection, they argue that sex acts, to be morally acceptable, must be reasonable, and to be reasonable, they must be ordered qua act to procreation, within the context of an institution ordered qua institution to procreation.[28] The two "quas" finesse the problem of the

[25] The cases are collected in Robin Cheryl Miller and Jason Binimow, Annotation, "Marriage Between Persons of Same Sex—American and Canadian Cases," 1A.L.R. Fed.2d 1 (2005) and its periodic supplements.

[26] *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) is more stringent than the others in holding that all the benefits of the marriage relation must be made available to same-sex couples, even though the terminology is up to the legislature.

[27] See, for example, Andrew Koppelman, "Is Marriage Inherently Heterosexual?" *American Journal of Jurisprudence* 42 (1997): 51–95; Michael Perry, "The Morality of Homosexual Conduct: A Response to John Finnis," *Notre Dame Journal of Law, Ethics & Public Policy* 9 (1995): 41–74.

[28] See John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal of Jurisprudence* 42 (1997): 97–134; John Finnis, "Law, Morality and 'Sexual Orientation,'" *Notre Dame Law Review* 69 (1994): 1049–1076.

infertile couple: such a couple is no different from a fertile couple on an infertile day. These claims are not mere ipse dixits; they are supported by learned and complex philosophical arguments.

The elaborateness of the philosophical demonstration is certainly an element in the unreality of the whole debate. More important, though, is the rigidly biological—indeed, mechanical—ordering that the participants give to the whole subject. The upholders of traditional marriage pay some attention to the personal communion of husband and wife, but the primary thesis which they advance and their opponents deny seems to reduce the complementarity of male and female to a mere complementarity of bodily organs—the complementarity of lock and key, or of the interlocking pieces of a jigsaw puzzle. I was taught in Navy Damage Control School that a length of fire hose has a male end and a female end, and to combine two lengths into one you have to put the male end of one together with the female end of the other. There is a certain fey logic in applying this principle to the coupling of human beings, but in the end it fails to persuade.[29]

So I suggest that we return to square one and start over. And square one is this: men and women are different. No overcoming of traditional "gender stereotypes" will make them the same. Men can wash dishes, sew curtains, and stay up all night with sick children; they will still be different from women. Women can become soldiers, truck drivers, prime ministers, Supreme Court justices, and CEOs of multinational corporations; they will still be different from men. Any enterprise has a different and more subtle coloration if both sexes are involved in it. I call this difference between the sexes metaphysical. The term is often difficult to pin down, but I think it is needed here. What I mean by it is pertaining to a reality beyond (*meta-*) the physical, one that can be experienced or intuitively discerned, but that cannot be empirically demonstrated.

Dietrich von Hildebrand (1889–1977), a leading exponent of the theology and metaphysics of marriage, elaborates on the metaphysical difference. Man and woman, he says, "are two different expressions of human nature": "It is . . . important to see that this difference has a specifically complementary character. Man and woman are spiritually oriented toward each other; they are created for each other. First, they have a mission for each other; second, because of their complementary difference, a much closer communion and more ultimate love is possible between them than between persons of the same sex."[30]

Marriage, therefore, in its unique way of binding together a man and a woman, embodies a complementarity that is metaphysical as well as physical, and creative as well as procreative. It is the embodiment of this complementarity in a common life that the law protects through the institution of marriage. And, indeed, it needs

[29] The persuasiveness of the argument is not helped by the fact that it seems to stand or fall with the widely rejected condemnation of contraception. See Perry, "The Morality of Homosexual Conduct: A Response to John Finnis," 62–63.

[30] Dietrich von Hildebrand, *Man and Woman: Love and the Meaning of Intimacy*, rev. ed. (Manchester, NH: Sophia Institute Press, 1992), 37.

all the protection it can get. Samuel Johnson is more practical than cynical when he says, "Sir, it is so far from being natural for a man and a woman to live in a state of marriage, that we find all the motives that they have for remaining in that connection, and the restraints which civilized society imposes to prevent separation, are hardly sufficient to keep them together."[31] Sexual intercourse tends to establish and reinforce a permanent bond between two individuals who instantiate this profound and precarious metaphysical complementarity.[32] In traditional moral teaching, it is reserved for this purpose.

III

It is the character, not the intensity, of the bond that makes it appropriate for sexual expression. Therefore, the fact, often alluded to, that two men or two women are capable of having as intense an affection for one another as any man and woman is not really relevant. My claim is that in a relationship, however intense, between two men or two women, sex acts do not have the same metaphysical centrality that they have in a heterosexual marriage. The claim is basically philosophical, founded on the metaphysical difference between the two sexes. But I find a modicum of empirical support for it in the literature. Richard D. Mohr, a professor of philosophy at the University of Illinois, in an article titled "The Case for Gay Marriage," makes the following argument, supported by what he calls an ethnographic study: "Gay men have realized that while couples may choose to restrict sexual activity in order to show their love for each other, it is not necessary for this purpose; *there are many other ways to manifest and ritualize commitment*. And so monogamy (it appears) is not an essential component of love and marriage."[33]

I also find some anecdotal support for my claim in bits of biographical material. It is significant that a staged biography of Cole Porter, the songwriter, said that he and his best friend were both active homosexuals, but never had sex with each other.[34] It is significant that Martin Seymour-Smith, in a critical biography of Rudyard Kipling, insists that Kipling was a homosexual, but when he describes the most important friend-

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[31] James Boswell, *The Life of Samuel Johnson* (New York: Everyman's Library, 1993), 421.

[32] See Desmond Morris, *The Naked Ape* (New York: McGraw Hill, 1967), 64–65. In this zoological account of the human species, Morris sees in what appears to be the same bond a biological imprint essential to our evolutionary success. He argues that this "pair bond," reinforced by repeated sexual acts beyond those needed for reproduction, has made broader forms of cooperation possible by reducing sexual rivalries, and has permitted the participation of both parents in the prolonged process of child rearing.

[33] *Notre Dame Journal of Law, Ethics & Public Policy* 9 (1995): 233 (emphasis added).

[34] The show was *Cole Porter: No Regrets*, written and acted by Don Powell. I saw it in Chicago in 1994. I have not been able to find the text, but a review in the *Minneapolis Star Tribune*, December 7, 1993, 7E, supports my recollection of it. The most recent biography of Porter seems to bear out the same point: "His close friends … were rarely lovers, but companions with whom he could share confidences about his passions." William McBrien, *Cole Porter: A Biography* (New York: Knopf, 1998), 243.

ship in Kipling's life, he says that it does not matter whether Kipling and his friend had sex together: "Who is in the least interested in what they may have *done*?"[35]

My suspicion is that we owe to Sigmund Freud the prevailing tendency to regard all intense affection as sexual. Neither the treacliest nor the profoundest of nineteenth-century attachments between persons of the same sex was regarded as sexual until it fell into the hands of post-Freudian critics. Tennyson, in his long poem "In Memoriam A.H.H.," freely compares his grief at the death of his friend to that of a lover for a lost love, but none of his contemporaries thought on that account that the friendship was sexual. Seymour-Smith claims to distinguish between Victorian friendships like that between Wordsworth and Coleridge that we still do not consider sexual, and other friendships that we now regard as sexual although they were not so regarded at the time.[36] As he insists that the distinction has nothing to do with what they did or desired to do together, he seems too subtle to be persuasive.

Much as I respect people I know who think and act otherwise, I adhere to the traditional teaching that completed sex acts are morally acceptable only between persons of opposite sexes who are married to each other. But note that my objection to same-sex marriage does not depend on that teaching. While the biological argument against same-sex marriage makes the objection a corollary of the objection to homosexual acts, the metaphysical argument as I have just stated it is the other way around. It makes the objection to such acts a corollary of the objection to same-sex marriage. People of the same sex are incapable of the metaphysical bond that the sex act is meant to express.[37] People of opposite sexes who are not married to each other are capable of the bond, but have evaded or suppressed it. The moral objection as I see it is the same in both cases.

The metaphysical argument as I have stated it does not stand in the way of meeting the practical concerns of same-sex couples. Whatever moral objection can be made to the sexual encounters of such couples, they are shielded from legal interference by *Lawrence v. Texas*.[38] The participation of such couples in each other's lives is recognized in a growing number of states by laws covering "domestic partnerships" or "reciprocal beneficiaries" or "civil unions."[39] In fact, there seems to be no good reason why people who wish to live a common life should be required to have sex with each other in order to do so. People who live together are naturally concerned with each other's health, with the furniture of their common home, and with the groceries for their common table. The law can and should take account of these concerns without

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[35] Martin Seymour-Smith, *Rudyard Kipling* (New York: St. Martin's, 1989), 159 (original emphasis).

[36] Ibid. "We don't talk about the Wordsworth–Coleridge relationship as 'Platonic' because we don't feel the need to."

[37] See Dietrich von Hildebrand, *Marriage: The Mystery of Faithful Love* (Manchester, NH: Sophia Institute Press, 1984), 9–12.

[38] 539 U.S. 558 (2004).

[39] See Robert E. Rodes, Jr., *On Law and Chastity* (Durham, NC: Carolina Academic Press, 2006), 128–130.

considering the sexual practices of those involved. Thus, the House of Bishops of the Church of England said in a pastoral statement that "civil partnership," the British equivalent of a civil union, "is not predicated on the intention to engage in a sexual relationship."[40] Two elderly sisters have gone before the European Court of Human Rights complaining that the consanguinity provisions of the British Civil Partnership Act deprive them of the tax advantages of the relationship.[41]

IV

I have argued thus far that limiting marriage to couples of opposite sexes inheres in the metaphysical difference between men and women; that it does not depend on the moral objection to the sexual encounters of same-sex couples—although I believe that objection to be well taken—and that it does not interfere with measures to meet the legitimate wish of same-sex couples (or anyone else for that matter) to lead a common life. What remains to be considered is how this metaphysical argument can support a legal judgment on the question. The current debate is not over whether same-sex marriages should be considered philosophically or theologically acceptable,[42] but whether they should be legal—not over whether philosophy departments, churches, or even poetry readings should accept them, but whether the state should. Can the state legitimately adopt a policy based on a debatable metaphysical doctrine? In a word, yes. Otherwise, we could have no civil rights laws. The equality of the races is a metaphysical principle. That it is debatable is shown by some of the bloodiest wars in history, including our own Civil War.

The exclusion of metaphysics from public life is arguably supported by some of the language in *Roe v. Wade*, where Justice Harry Blackmun, after a quick canvas of historical attitudes toward abortion and an uncomfortable review of different opinions on the metaphysical status of the unborn, says, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[43] One might think that this language would lead to a refusal on the Court's part to interfere with the other branches of government. But

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[40] *Civil Partnerships: A Pastoral Statement of the House of Bishops of the Church of England* (July 25, 2005), n. 11, http://www.cofe.anglican.org/news/pr5605.html.

[41] *Burden and Burden v. United Kingdom*, Eur. Ct. H.R.13378/05 (2006). The women lost by a vote of 4–3 in the chamber that first heard their case. They made what seems to me a strategic mistake in asking for the tax advantages of civil partnership without becoming civil partners rather than asking to become civil partners despite being related. The case is pending before the Grand Chamber of the Court.

[42] There is, to be sure, a theological debate ongoing, but it is rather separate from this one. See Margaret Farley, *Just Love: A Framework for Christian Sexual Ethics* (New York: Continuum, 2006), 271–296. There are also some theological arguments included, more or less *obiter*, in some of the legal arguments for same-sex marriage. See Koppelman, "Is Marriage Inherently Heterosexual?" 92–95, and Perry, "The Morality of Homosexual Conduct: A Response to John Finnis," 66–74.

[43] *Roe v. Wade*, 410 U.S. 113 (1973), at 159.

that is not where Blackmun takes it. Rather, he says, "In view of all this, we do not agree that by adopting one theory [i.e., one metaphysical theory] of life, [the state] may override the rights of the pregnant woman that are at stake."[44] But note in passing that the state, by adopting one metaphysical theory of race—i.e., that all races are equal—can prevail over the right of the owner of a house to decide who may buy it, or the right of an employer to decide whom to hire. More important, note that the right which, for Blackmun, trumped the state's adoption of a metaphysical principle was not the right to have the state adopt a different metaphysical principle; it was a right of privacy.[45] *Roe* does not require the state to abandon the metaphysical view that life begins at conception; only to refrain from imposing it coercively. Justice John Paul Stevens, dissenting from part of the holding in *Planned Parenthood v. Casey*, made this point clear by being the only justice to disagree with it explicitly.[46] Three of the five justices who were not for overruling *Roe* said, "We permit a State to further its legitimate goal of protecting the life of the unborn … even when, in so doing, the State expresses a preference for childbirth over abortion."[47] Stevens, in response, said, "Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own view of what is best."[48] It might be noted that John Stuart Mill, the intellectual ancestor of all libertarians, says just the opposite. Although "in each person's own concerns, his individual spontaneity is entitled to free exercise," Mill adds that "considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, *even obtruded on him*, by others."[49] In short, there is no version of liberty, except perhaps that of Justice Stevens, that requires metaphysical neutrality on the part of the state. Still less does anyone have a right to have his or her resolution of a metaphysical question adopted in lieu of another. But that is the only right claimed at this point by the proponents of same-sex marriage. As we have seen, their right not to be interfered with in their sexual relation is secured them by *Lawrence v. Texas*. Their right to a common domestic life can be secured them in a number of different ways which different jurisdictions have adopted or are in the process of adopting. All that remains for them to ask for in seeking marriage eo nomine is metaphysical validation.

The validation they seek depends on denying any metaphysical status to the difference between male and female. Their claim is that the difference is in part social and in part biological. Insofar as it is social, it can be changed by law. Insofar as it is biological, it is irrelevant except with regard to the conception and begetting of children. This is a metaphysical claim, and the reason the state should reject it is a simple one: it is not true.

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[44] Ibid., 162.

[45] Ibid., 152–156.

[46] *Planned Parenthood v. Casey*, 505 U.S. 833, (1992) (Stevens, J., dissenting), at 911.

[47] Ibid., 883 (opinion of O'Connor, Kennedy, and Souter).

[48] Ibid., 916 (Stevens, J., dissenting).

[49] John Stuart Mill, *On Liberty* (1859), eds. John Gray and G. W. Smith (London: Routledge, 1991), 91–92 (emphasis added).