

THE CASE AGAINST SAME-SEX “MARRIAGE”

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Argues that same-sex “marriage” is a logical and practical impossibility and has serious implications for both other aspects of family law and the respect for human life and children in our culture. Asserts that the movement for same-sex “marriage” is a logical outgrowth of our culture’s separation of sex and procreation. Argues that the basis for opposition to this movement may be the residual reservoir of traditional understanding about marriage in the American public.

It is because of an abiding interest in marriage based in our culture and especially in our law that one cannot talk about the immorality of homosexual sexual acts without talking about marriage because one way—a perfectly adequate way—to describe what is immoral about sodomy is to say that it is a non-marital sexual act and that is because it is the teaching of the Catholic Church that marriage is the principle of all upright sexual activity. The position of marriage in our culture and in our law is quite degraded now. Most times it is difficult to get even a neutral audience to see the connection between the laws that prohibit consensual sodomy and marriage (i.e., why such laws are needed to help buttress marriage), although those connections can be made and should be made. What I address in this paper, specifically, are the dangers of the legal recognition same-sex “marriage.” The dangers have something to do with marriage. Legally recognizing same-sex “marriage” is dangerous, and it ought not to happen. It violates moral truth. It is not exactly right to say that same-sex “marriage” is immoral, although its not wrong to say that. It is not quite right to say that it is morally impermissible. This is because expressions such as these suggest that it is something that can be done, but ought to be prohibited—like abortion. Abortions can happen, but they ought to be prohibited and they are seriously immoral. Same-sex “marriage,” however, is impossible, given what marriage really is. It is simply not possible for two men to be married to each other or for two women to be married to each other. So the short answer is that the danger in recognizing same-sex “marriage” is that the law will recognize as valid and capable of being treated like any other marriage something which in fact is impossible.

To just illustrate with a familiar example of what I mean about the distinction between what is morally impermissible and what is impossible, we can consider the Church's teaching about ordaining women as priests. The Pope has said that the Church is without authority to ordain women. It cannot be done, it is impossible to do. It is not that there *could* be women priests, but we ought not to permit them to be ordained. The teaching is that it is simply impossible for a woman to be a priest. Similarly here, same-sex "marriage" is, as a moral reality, impossible.

The claim that in the nature of things same-sex "marriage" is impossible has not been well received by the courts. The issue of same-sex "marriage" is coming up in courts more and more. Typically when the argument I've been describing—that given the nature of marriage same sex marriage is impossible—is made, it is dismissed by judges as some kind of spooky metaphysical claim. One court dismissed it as circular or question-begging. Sometimes it is dismissed as Catholic teaching or, more broadly, as some kind of sectarian tenet which has no proper place in a legal argument. It is not only odd that this argument against same-sex "marriage" is brushed aside by judges, but that such an argument is brushed aside when it is upheld in other areas of the law and even elsewhere in the law of marriage when it comes to other kinds of disabilities. For instance, the law does not permit minors to marry, because they are held to lack a certain maturity and judgment. Thus, they are not capable of consenting to marriage. What the law really means here is it is impossible for a minor to marry. Another example of incapacity to marry is bigamy or polygamy. If you are married to one person and go through a ceremony which would appear to be joining you in matrimony to yet other individual, you are not really a bigamist—you are a person who has *attempted* to be married to two people. The law treats as null and void the second ceremony. It is not a question of a marriage having to be undone in order to protect the sanctity of matrimony. You simply cannot marry more than one person under our law. So, the argument I have made about same sex "marriage" being against the nature of marriage ought to have more traction in the courts than it currently does.

The latter certainly gives us reason to be discouraged. I think, however, that the discussion of same-sex "marriage" in our law should begin with the discussion of the stakes involved, and I think those stakes are almost unsurpassably high. Let me explain this. It seems to me that abortion is the greatest injustice in our society. It is the mainstay of the culture of death and it makes one wonder whether our society is basically a just society. Nevertheless, the almost total disintegration of the institution of marriage over the last generation or so in our society is the more startling historical development. It is also the greatest threat to the moral well being of people within our society, and

it is within this context of the disintegration of the institution of marriage in our law and culture that one has to situate any discussion of the morality of same-sex “marriage.” My interest in this paper, however, is mostly in talking about how we can argue against it within the law given the constraints that seem to have been imposed by courts. Now why do I think it is even more insidious, more of a threat to people’s well-being than abortion? There are a few reasons. One is that abortion does not, one might say, “inhabit” the entire culture. We are in a culture of death, but even so abortions occur in private. They are regarded even by people who support the right to abortion to be unfortunate necessities; some of them may even regard it as a *tragic* necessity. Even President Clinton said he wished abortion to be safe, legal and rare. Abortions do occur in private and there are few *visible* effects of abortion. I mean, the abortion clinics are housed in isolated parts of strip malls. They are always described by some innocuous title like “Women’s Health Center.” Women who have had abortions don’t often go around talking about it except perhaps to those close to them; it’s not something people advertise. So, abortion is not “in your face” in the culture even though it is prevalent and even though there may be a million abortions a year. Now, you can get your children to see what’s wrong with abortion. Being pro-life even on a secular campus is not considered a sign of “irrationality.” It may not be popular, but it doesn’t make you “irrational” or “disreputable” in the way that being what is called “homophobic” does.

Another reason why the disintegration of marriage is the greatest moral threat of our time is as follows. In our culture, the sort of moral compass-bearing when it comes to sexual activity is that if it doesn’t hurt anybody and if a person has consented to it, then it’s a matter of free choice. Now, when applied to abortion, that argument really has no grip because people vaguely understand that the question is whether the unborn child is a person. If so then they see that somebody is harmed by abortion, and so they can understand why people would want to be pro-life. So, this ethic of personal behavior—especially sexual behavior—of “so-long-as-it-doesn’t-hurt-somebody-who-didn’t-agree-to-be-involved-then-it’s-up-to-you-to-decide” does not really have any traction against pro-lifers. They are not viewed as making an *insidious* argument. What is important here is the reality about the unborn. On one episode of *Seinfeld* a while back some friend of Elaine’s was pregnant and they were having a baby shower. A couple of the characters referring to the other women’s condition asked how is the fetus doing. Now nobody really talks that way, that sounds ridiculous when you hear it. So, the arguments about abortion and for its permissibility always run up against a stubborn and hard fact. Anybody who’s seen a sonogram or held a newborn baby or felt a woman’s womb when the baby kicked or has any common sense, knows that there’s a baby there. To hear the unborn baby referred to as a “fetus,” I dare say strikes almost anyone as ridiculous.

The situation with regard to marriage and sexual morality, however, is very, very different. The argument that only uncontracepted marital intercourse is appropriate, and all other kinds of sexual acts are inappropriate, is difficult to show. That conclusion is not obvious, in our culture at least. There is certainly an argument to be made that that proposition is true, but it's not an easy one and certainly the conclusion is not obvious. That marriage is indissoluble is not obvious. It's true, but it's not obvious and the argument for it is difficult. That marriage is indissoluble often *seems* to fly in the face of people's welfare, of common sense. Divorce and remarriage are everywhere. It's in most people's families. Good people get divorced and remarried. Good people are obviously contracepting. Too many people are having no children or one child. It is clear that the culture is contracepting. So, the moral compass-bearing of "if-it-doesn't-hurt-somebody-who-freely-consents-to-do-it" appears to a plausible principle of sexual morality. Choice—consent—seems to work with regard to sex and marriage. So, again, if abortion is the greatest injustice, what's happening to marriage is the most insidious force in our culture. It is a threat in a way that abortion simply is not. I think the collapse of marriage is epoch-defining. It is a peril to every one of us. The temptation to violate the norms of sexual morality is great. A roar is everywhere. Sex is out of control in our society. Almost no one will correct you for a sexual sin. People I suppose are thinking that those without sin should only cast the first stone. Rationalizations for sexual misbehavior are delivered to you at your door, on your computer screen, on your TV set by the dozens every day. Thus, perhaps one might be inclined to ask, if marriage is already so degraded without same-sex "marriage," then why should the latter not be legally recognized? What could legally recognizing same-sex "marriage" do to further undermine morality? The response is that if same-sex "marriage" is finally legally recognized, then the law will have conclusively, finally, totally separated marriage from reproduction. There will be no sense left in which marriage is in some way about reproduction, that there is some essential connection between marriage and reproduction. Even though some married heterosexual couples will have children, there will be nothing about marriage as a legal enterprise that is necessarily tied to children, to reproduction. And when that happens, it will be the final step in this process of disintegration—it will be the end of the disaster—because then there will be no way in which the law will hold out marriage to be in any way, even an attenuated one, what it really is: a two in one flesh reproductive union of one man and one woman. Finally, obliterating marriage as it really is from the legal landscape will in addition affect arguments about things that remain entirely up in the air in our culture. These will not be marriage issues or even sex issues but life issues. The final collapse of marriage—its permanent conclusive separation from reproduction—will affect arguments about things like *in vitro* fertilization and cloning. So, fighting this fight matters.

Make no mistake about. Heterosexual folks, starting over thirty years ago, undid marriage in our culture. They undid it precisely to give themselves sexual freedom. The homosexual agenda—the gay rights agenda, the same sex marriage agenda—came along after this process of dismantling marriage was well under way. It is precisely the fact that heterosexuals have undone marriage to the extent that they have that homosexuals have a plausible argument for the legal recognition of their “unions,” their couplings. They say that homosexual couples can enter into sexually active, emotionally intense friendships or couplings, more or less sexually exclusive, and that they can endure for quite a long time—perhaps permanently (in truth, of course, most homosexual couples don’t last for a long time). Even if their relationships do last, this does not commit them to having and rearing children. So their claim is that they can do these things—sexual activity, emotionally intense friendship, set up a household together, intimacy, emotional security, a more or less sexually exclusive relationship of a limited but long duration—and, well, maybe even adopt some children. Well isn’t that what all too many heterosexual couples have in mind these days when they say, “I do”? And I think some—a few—homosexual couples do enter into “marriages” that are, except for the genders, indistinguishable from many marriages in our society. All too many heterosexual couples have no intention of remaining together forever or till natural death, and it is obvious that homosexual couples can benefit just as much from all the legal benefits that go with marriage (e.g. property rights, economic benefits, survivors privileges, life insurance coverage, etc.). These are obviously a benefit to homosexual couples the same way they are to any other couple. So, to put it bluntly, homosexuals look at this situation and say it is arbitrary to deny legal recognition of our “set-ups” when in all of these ways they are indistinguishable from that of the heterosexual couple next door. They say it is arbitrary—and sometimes it may well be. That is to say, many people who are averse to the homosexual agenda on this question may in fact be acting arbitrarily because they themselves define marriage in a way that is indistinguishable from the way a homosexual couple or the advocates of homosexual “marriage” define it. On this view, which is all too common, marriage just is a composite—a compound—of several independently valuable things that you kind of just put in together (i.e., friendship, sex, security, maybe kids.) Marriage itself it not of one unified thing; it’s just a whole bunch of other individual “pieces of stuff” that get put together. One can see the appeal of this argument.

In the end this argument is mistaken, of course. The way it should be responded to in the public realm is this: yes, there are many things in our culture and especially in our law which make your argument appealing, but there are many other things in our culture and in our law which still do cohere with our traditional understanding. I think that the argument against same-sex

“marriage” should pick up as many of these remnants as possible so that, even if the argument is not complete and thereby decisive, it is plausible enough to make us see that we are at the final point—perhaps a turning point—of the whole cultural debate about marriage. That is, the plausibility of the argument means that it is time finally to “have it out.” There are a few things that are still adhered to in the culture that support the traditional view. I think people still believe that, on a whole, adultery is wrong. People do still believe that marriage is supposed to be sexually exclusive. They may be too forgiving of adultery, but people *think* adultery is wrong. It is also clear that people think same-sex “marriage” is wrong. That is the most stubborn fact on this side of the argument. I think, too, that people still believe in our culture that children perfect a marriage, that somehow children are an embodiment of the couple’s marriage and an extension of their union in time beyond their lifetimes. I think couples still sense that un-contracepted intercourse is better. It actualizes their union in a way that other sexual acts do not actualize it. Now the problem, of course, is that this sense doesn’t lead many people to conclude that anything other than a true marital act is wrong. They have a sense that there is a sort of a scale of value regarding sexual activity—that is, that sexual activity with a view to procreation is valuable in a way that nothing else done sexually is. These fragments of traditional thinking are the resources or the ammunition to make the last stand in favor of marriage in the face of the onslaught of same-sex “marriage.”

There is one further point to make in setting up this argument, which is widely conceded by legal writers in the area of domestic relations. Their view is that something has happened to marriage which has never been clearly rationalized or thought out. Marriage has been battered back and forth by one wave or movement after another. One expression of this is seen in Homer Clark’s *Law of Domestic Relations in the United States*. He says “there has been a legal transformation of marriage from a clearly defined relationship to one whose incidence are either uncertain or left largely to the control of the parties to the relationship.” Then he says that “this transformation has occurred without, so far as it appears, any general consideration by either courts or legislatures of the total effect which these decisions [individual court decisions in different areas relating to marriage, the family, or sexual morality] will have on the institution of marriage.” What he is saying is that we have wobbled forward from point to point and from episode to episode and from engagement to engagement without any plan for the long term stability of marriage or without even a view of what a final and stable definition of marriage should be. This takes us back to the point again of asking our culture to consider with what the end of marriage has to do and especially whether it has some essential connection to reproduction, to children. Our culture has to ask itself what is implied in accepting same-sex “marriage.” If we do so, what then is our reasoned

argument against polygamy? If there can be two boys, then why not three? Why not two boys and one girl? What would be the reasoned argument against other even worse forms of marriage? Is there any argument against promiscuity? That is to say, if we accept same-sex “marriage,” what is the reasoned argument to show that consent is inadequate as a norm of sexual morality? To counter this whole line of argument, one must simply uphold marriage as a reproductive communion and hold that contraception is wrong. This is implied in the reasoned defense of marriage as a two and one flesh union. If one gives away the case against contraception, then one no longer has a coherent argument in favor of marriage as it really is. The culture, of course, can arbitrarily retain prejudices against the “gay” agenda and same-sex “marriage,” which for a very long time may stop their acceptance. They will not really have a coherent argument, however, as long as they accept the contraceptive mentality.

Finally, to move this side of the argument ahead about what is implied or entailed by accepting same-sex “marriage,” we must consider the effect on issues of human life. I propose that at stake in the debate about same-sex “marriage” is ultimately the legal treatment of *in vitro* fertilization. The connection between these is as follows. Children conceived in marital intercourse participate in the goodness, the good, of their parents’ marriage. As I have said before, the children are themselves non-instrumental aspects of marriage’s perfection. Thus, spouses rightly hope for and welcome children, not as products or things they make but rather—this is the traditional understanding—as gifts which, if all goes well, supervene upon their acts of marital love. This understanding of children as gifts to be accepted and valued for their own sake, rather than as objects that might be willed and brought into being for the parents’ purposes, coheres very well with certain metaphysical views, including Jewish and Christian views. It can also be accommodated by many other religious traditions. I think that some understanding along these lines of the moral relationship of parents to the children they may conceive is essential to the rational affirmation of the dignity of children as persons, as ends in themselves, and not as the means of the satisfying desires of their parents. That is to say, a view of children as gifts which supervene upon marital acts is essential to seeing children as subjects of justice or those to whom duties of justice are owed, including fundamental human rights (like the right not to be killed in abortion or infanticide). If they are seen as mere objects of will, it is more difficult to argue that we have duties to them. To the extent that our culture talks about children being wanted or unwanted signals that people have a radically different view of children than if we see them as welcome gifts. It implies a radically different view of the moral relationship of parents to their children—even if they want them. Such alternative understandings of how children are morally relative to their parents, as the wanted-unwanted

distinction expresses, run into very severe difficulties in explaining why children may not be treated as the property of their parents. Liberal moralists in our culture are often puzzled by the tendency of conservative moralists—very often natural law defenders, very often Roman Catholics—to object on moral ground to producing human beings by *in vitro* fertilization. After all, the natural law tradition strongly affirms the goodness of transmitting life to new persons. Why then, liberal moralists say, should couples who are incapable of begetting children in acts of marital intercourse not resort *in vitro* processes in order to become parents? By “manufacturing” children, no matter what their wishes and intentions and desires, parents undermine the basic equality and dignity of their children.

This is not to suggest that there is anything wrong with spouses engaging in marital intercourse specifically *because* they want a child. It is merely to say that they should want a child in a way which is consistent with the child’s dignity as a person. When we say that a couple “wants” a child in this context, we simply mean that they hope for one. Hoping for a gift is not base or immoral. Hoping for a delivery of a gift is not the same thing as treating the gift as a object of satisfaction of the desires of the parents. So, I think that upon a proper understanding of marriage rests a proper understanding of sexual morality and on a proper understanding of those two things rests a society’s idea of the terms, conditions, and circumstances under which people will come into being. Any society has a genuine common interest in the terms and conditions and circumstances in which people come to be. In the culture I fear might be ours in the future, children will come to be in circumstances and under terms in which they are on a very widespread scale seen as objects which satisfy the desires of other people. People who are positioned by wealth, authority, and power, will be able to call into being some “number of objects” to satisfy their desires. Now, this does not mean that someone born through *in vitro* or eventually through human cloning is less than a person. A person is a person no matter how he or she came into being. He or she will have all the rights attached to persons, with human dignity in the same measure that any person enjoys. What I am talking about is cultural slippage and how our culture is influenced by an attitude and how that attitude will seep into the law. I fear that a culture in which cloning has become permissible will have “gone over the line” finally in favor of viewing children as things. When that is let loose in a society it is certainly possible to predict the other consequences, but it surely cannot be for the good of that society. It then becomes a question of how bad the effects of such a view, when taken hold of the center of society, will be. The terms and conditions of people coming into existence by being “manufactured,” as opposed to their being seen as gifts supervening upon marital acts, are bad enough by themselves, but the further consequences could be even worse.