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# Why We Should Oppose Same-Sex Marriage

by David Novak
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*Same-sex marriage fundamentally alters the idea of marriage, expands government control of marriage, and ignores a child's right to a mother and father.*

The question of whether or not there should be same-sex "marriage" has stirred passions and launched debate across the nation. But this debate raises a larger question: why is there an institution called "marriage" at all in a secular society? That is, why should a secular state recognize and structure, even encourage, human associations that have traditionally been called "marriages"? Furthermore, if a secular state does institute marriage, how can that state deny equal access to that institution to any normal couple, physically and mentally, who wants access to it, who wants to be married?

The usual precedent cited to bolster the equal access argument is public education: that when the state provides—that is, when the state creates—public schools, then those schools cannot refuse to accept as students anybody who could be educated by them. Why? Because that is the reason the state has set up these schools in the first place: to make as educated a citizenry as is possible. Educated people make better, more discerning, and more productive citizens of a constitutional democracy than do uneducated people. And public schools, so the argument goes, are the best means to that end.

Yet even in this precedent, equal access is not provided to everybody. What about those persons whom the state cannot educate because of their severe physical, mental, or emotional impediments? Do these people have a right to equal access to public education? How can one have a right one cannot possibly exercise? (To be sure, most of us think the state does have an obligation to such disadvantaged persons, but that is the obligation to care for them as best it can.) Distinctions can be made if we make them for valid reasons rather than on the basis of irrational prejudice. In other words, there is nothing wrong with discrimination as such, because only arbitrary discrimination is morally objectionable. Indeed, discrimination is necessary. Any definition is necessarily discriminatory in the sense of saying "X applies to Y, but not to Z." Thus we see that, given differences among persons, not everyone merits equal access, even to public education.

One thing that distinguishes marriage from public education is that while the state created and instituted public education, it inherited the institution of marriage from traditions that predate the founding of the state. The fact that marriage is pre-political (in the sense that it predates the institution of any secular state) does not mean there are no reasons for the traditional institution of marriage, or that these reasons are not universal and publicly arguable. But, since traditional marriage already has reasons of its own, the state should not therefore supply new and different reasons for an institution it only inherited rather than created itself. Indeed, to supply radically new reasons for something old is to radically transform it by radically redefining it. The most the

state can honestly do to an institution that predates its founding (and in many ways transcends its operation) is to refine and reformulate the original reasons why this institution has deserved and still deserves social recognition and support.

By calling attention to the traditional origins and character of marriage, I am not arguing from or even for the authority of tradition. Instead, I am asserting that a tradition—in our case at hand, the tradition in the West of marriage being a union between a woman and a man—has good reasons for being limited to heterosexual couples, thus excluding all other relationships, such as homosexual couples or polygamous or polyandrous arrangements.

In what follows I argue for these reasons, that is, for the continued rational validity of traditional marriage, both for what it includes and what it has to exclude. That means explicating and arguing for the purpose or end (telos) of marriage itself. Accordingly, I shall try to show that the traditional restriction of marriage to two persons of different sex is not arbitrarily discriminatory, thus making it essentially different from prejudiced, irrational segregation or exclusion.

*Why Marriage?*

In a recent lecture at Stanford University Law School, the philosopher Martha Nussbaum argues that "marriage . . . supports several aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child-rearing, mutual responsibility." She then divides the purposes of marriage into two distinct categories. The first category is what she calls the "expressive aspect," which includes all of the purposes just mentioned, with the exception of procreation and child-rearing. And it is about this expressive aspect that Nussbaum states: "When people get married, they typically make a statement of love and commitment in front of witnesses . . . society, in response, recognizes and dignifies that commitment." One could say that this distinction is based on the difference between public reasons and private reasons for any human activity, even getting married.

The procreative aspect of marriage—starting and maintaining a family—is something publicly significant and certifiable. As such, it is and should be governed by the laws of the state. But the expressive aspects are the private reasons for marriage, which should not be governed by the laws of the state, however necessary they might be for the private happiness that makes getting married and staying married personally desirable. In today's parlance, these expressive aspects are about "relationships" rather than being about what in yesterday's parlance were called "family relations." Thus one used to carefully distinguish between one's relatives and one's friends (even when one privately valued the relationship with one's friends more than one's relations with one's family relatives).

The state has no valid interest in these private relationships and should not, therefore, interfere with them by attempting to govern them in any way. The state should be concerned with marriage's public effects, not its private affects. We should be wary of ceding control over these emotions to the state, for private affections become distorted when public interest in them inevitably leads to public control of them. The state should no more govern these private relationships any more than it should govern one's friendships, however long lasting they might be.

Like the lives of the human beings who have created it, the state seeks its own survival. In order

to regularly replenish its citizenry and ensure national continuity, the state has an interest in encouraging procreation and child rearing. Since procreation-with-child-rearing is the only truly public reason for marriage, I think marriage is essentially endorsed and structured by the state to best facilitate the procreation-and-rearing-of-children so born and raised in the society that purposefully maintains and supports that public institution. In general, parents have the primary right to raise the new persons they have brought into the world. Since these parents are responsible for bringing their children into the world and into society, the children have a right to their parents' attention to them —a claim on their parents to fulfill their parental duty as much as it is possible for them to do. Absent any severe physical, mental, or emotional impediments to parenthood that inevitably lead to abuse or neglect, children are best raised by their natural parents. The state has an interest in respecting and even enforcing the natural claim children have on their own parents. Thus I consider these rights to be natural, in the literal sense of their natal character; and they are natural in the sense of being pre-political and thus not entitlements from the state.

Rights are also socially justified desires, and it is the desire of the overwhelming number of children to be raised by their own mother and father, parenting in tandem as a married couple. Just ask children whose parents have divorced if they do not often feel that their natural rights have been violated. Aren't their feelings justifiable, even if they can rarely be justified in a court of law? (Children cannot sue their divorced parents for "home-wrecking.") It seems to be the desire of most people to raise the children they have enabled to come into the world, preferably in tandem with the spouse with whom the child was conceived. Just ask parents whose children have been taken away from them if they do not feel their natural rights have been violated. This is why custody hearings exist, to justify the feelings of parents deprived of their children. Finally, think of the social pathology of communities in which a large number of children are not being raised by both parents, and where a large number of parents, especially a large number of fathers, have abandoned their own children by fleeing from their natural parental responsibility. In all such cases, those having social power and responsibility have to ask themselves whether they could have prevented or at least alleviated some of this social pathology by providing better enforcement and encouragement of the natural rights of children, and the natural rights of their parents for them and their natural duties to them. (Surely, Aristotle's best criticism of the trans-familial social scheme Plato suggested in the Republic is his warning of the political havoc that is likely to occur in a society when the state attempts to totally displace and usurp the natural rights and duties of parents and children to each other.)

*Some Objections*

If the public reason for the institution of marriage is to facilitate procreation and the exercise of parental rights and obligations as well as filial rights and obligations, then it follows that marriage should be limited to heterosexual couples. Only they are capable of procreation. Neither two men nor two women can do that by themselves. Nevertheless, let us consider some of the objections that Nussbaum has raised that seem to call this normative conclusion into serious doubt.

One objection is that if marriage's sole public reason is procreation (and being responsible for those whom a couple has procreated), then why hasn't marriage been "limited . . . to the fertile, or even of an age to be fertile"? But I would answer that objection by citing the old legal principle: de minimis non curat lex, which could be translated (freely) as: The law is only made for what usually obtains. The fact is, the overwhelming number of people who marry are fertile

and are of an age to be fertile. And how could we reasonably establish a criterion to determine who is fertile and who isn't? Wouldn't any required test to determine one's fertile suitability for marriage be a colossally humiliating invasion of the privacy of couples engaged to be married? Moreover, in an age when new reproductive technologies are enabling persons heretofore assumed to be sterile to become parents, how can anyone be presumed to be incurably infertile?

Another objection accepts the defining purpose of marriage as being for the sake of procreation and the rearing of children, but extends the parameters. Thus Nussbaum argues that "gays and lesbians . . . can have and raise children (whether their own from a previous marriage, or children created within their relationship by surrogacy or artificial insemination, or adopted children)." Let us now examine some examples of how gays and lesbians can "have" or "create" children.

First, consider surrogacy or artificial insemination. This involves a violation of a child's natural right to have both natural parents raise him or her. In the case of surrogacy, two homosexual men ask (more often, pay) a woman to be inseminated from the semen of one of them, or from a mixture of semen from both of them. But here is a conspiracy ab initio to prevent the child so conceived from being raised by —often not to even recognize—his or her own natural mother. In the case of artificial insemination, two homosexual women arrange for a man to donate (often, sell) his semen in order to impregnate one of these women. And here is also a conspiracy to prevent the child so conceived from being raised by —much more often not to even recognize—his or her natural father. (Likewise, there is the same conspiracy on the part of a single woman who has herself inseminated, usually without even any future plans for a marriage that could at least provide her child with a stepfather, who might adopt her child.) Isn't all of this an intentional violation of a child's natural right to have either a father or a mother or both? All of these present moral violations which should goad people like myself to work for legal change in the whole area of family relations, including change of laws that permit an unborn child to be deprived of his or her right to life, which is the basis of all other rights, like the right of a living human being to have parents who are responsible for his or her upbringing.

Second, consider adoption. Despite all my talk about natural parentage and childhood, I am in favor of the institution of adoption. Surely, a child's right to being raised by adults is better upheld by adoptive parents than by natural parents, when these natural parents are unable or unwilling to raise their natural offspring. And, in principle, I am not opposed to a gay or lesbian couple being able to raise a child whose natural parents have abandoned him or her (whether voluntarily, or necessarily in cases of death or debilitating illness). Surely, a child is better raised by a couple who love him or her and each other than being raised in the less personal setting of an orphanage, or being raised by foster parents who are paid by the state to care for children nobody else wants, and who do so at less cost to the state than the cost of maintaining orphanages. Nevertheless, all things being equal, I think it is best that such an abandoned child be adopted by a heterosexual married couple rather than be adopted by a homosexual couple. That is because a heterosexual couple can better simulate—perhaps improve upon—the heterosexual union that produced this child and should be raising this child. It better simulates the duty of the natural parents to this child, a duty they would not or could not exercise. This, by the way, is not arguing empirically that opposite sex couples are necessarily better at raising children than same-sex couples. My arguments are based on the concepts of rights, not on the concept of utility. Thus my arguments are a priori, not a posteriori.

*Marriages or Civil Unions?*

I agree with Nussbaum when she says: "I personally favor the solution of leaving civil unions to the state and marriage to religions and other private entities." In fact, for me, such a move would greatly strengthen the social prestige of religious marriage. Yet neither of us is willing to give up on civil marriage, at least not yet. I suspect that giving up on civil marriage now would be an admission of political defeat neither of us is willing to make. In Nussbaum's case, that would seem to be an admission that the institution of civil marriage cannot be reformed to ever really include all those she wants included in it. In my case, that would seem to be an admission that civil marriage can never be restored to its richer and more coherent traditional meaning. However, since this society is so divided on this question, the disestablishment of civil marriage altogether and its total replacement by civil unions could well be the way this society might have to go for the sake of civil peace.

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