

Article

Prepared by: Patricia Hrusa Williams,
University of Maine at Farmington

Two Views of Marriage and the Falsity of the Choice between Them

JASON LEE STEORTS

Learning Outcomes

After reading this article, you will be able to:

- Identify the reasons for marriage in society.
- Understand legal considerations and perspectives in defining marriage.
- Explain the basis for opposition to gay marriage.
- Recognize the relationship between marriage and sexuality.

Our views about marriage are multifaceted, and the primary facets are two. On one hand, we think marriage has something to do with reproduction and its consequences; on the other, we think it has something to do with the experience of two people who are in love.

Opponents of same-sex marriage think the law should concern itself only with the first facet and must not define marriage other than in terms of its orientation toward procreation. I think the law has a legitimate interest in both facets and can reasonably address the public-policy considerations related to each.

I will call that position “traditionalist” according to which legal recognition of marriage should be restricted to unions of a man and a woman. The traditionalist holds that there is a pre-legal fact as to what marriage is, namely “comprehensive union” of two persons, and that only a “reproductive unit” can be a comprehensive union, although marriage qua comprehensive union is intrinsically valuable whether or not a couple reproduce. I use terms of Sherif Girgis and Robert P. George, both of Princeton, and Ryan T. Anderson, editor of *Public Discourse*, in their *Harvard Journal of Law and Public Policy* article “What Is Marriage?” They say that to exist as a person involves a bodily dimension as well as cognitive, volitional, emotional, etc. ones, and that any union which is not bodily will by that omission fail to be comprehensive. What unites the organs of a single person’s body is their coordination toward achieving the biological purposes of the organism as a whole. When it comes to one such purpose—reproduction—the organism is naturally incomplete. Only a man and a woman, and not

two persons of the same sex, are able to join their bodies in such a way as to achieve this purpose.

Coitus achieves bodily union, traditionalists say, whether or not the couple intend to reproduce or are capable of reproduction. It is because any instance of coitus belongs to the kind of act that is reproductively oriented that the relationships of infertile couples, but not those of same-sex couples, are potentially marital. Traditionalists also say that it would be practically difficult and/or wrongly intrusive for the state to assure itself that a couple are fertile before marrying them.

Why does the law concern itself with marriage at all? A conservative might feel special force in the question, for a conservative wants the state at large removed from his life. The answer, as the editors of *National Review* have put it, is that the legal institution of marriage exists “to solve a problem that arises from sex between men and women but not from sex between partners of the same gender: what to do about its generativity.” Sociology demonstrates that children are better off when raised by their two biological parents than when raised by single, cohabiting, or stepparents, although no methodologically rigorous research compares the former condition with that of being raised by two parents of the same sex. The norms of marriage—monogamy, fidelity, and thereby permanence—help bring it about that as many children as possible grow up with their biological parents. Legally recognizing marriage puts the force of the law behind the norms. It once did so by criminalizing behavior at odds with them and imposing a barrier to separation in the form of divorce. Today it is more permissive of liberty (libertinism?) and divorce, but its very existence reinforces the norms by focusing the public mind on the connection between sex, procreation, and marriage.

If the law called same-sex unions “marriages,” it would obscure that connection and make the norms seem to have no purpose. Additionally, gay couples are statistically more likely to flout the norms than heterosexual ones, so we must worry that their inclusion would by example encourage rebellion.

Traditionalists see no injustice in excluding same-sex couples from the institution because to discriminate is to treat like cases differently, and same-sex couples, not being reproductive units, are unlike heterosexual ones. Same-sex couples are

also mostly free to make whatever legal arrangements they wish concerning property, inheritance, medical care, etc. It is a hassle to make such arrangements piecemeal, and a same-sex couple is at greater risk not to have made them before times when they would be important, but some traditionalists meet this objection by endorsing civil unions.

I will call that position "revisionist" according to which the law should be willing to marry same-sex couples. The form of revisionism I will present agrees with traditionalism that there are pre-legal facts about what marriage is, but differs in its account of what the facts are and why the law should care about them.

The traditionalist finds a criterion of a certain intrinsic value in the simple fact that a married man and woman engage in the generative act. He cannot condition this value upon the *consequence* of reproduction, since he sees infertile heterosexual couples as candidates for marriage; nor can he condition it upon the *experience* of sexual intimacy as the bodily dimension of romantic love, since this would make candidates of same-sex couples. Contra this, the revisionist sees no difference of intrinsic value between coitus and the sexual acts of same-sex couples.

The revisionist may prosecute his view by challenging the traditionalist's claim that an infertile couple are a reproductive unit. A millennium or two ago, when the bodily means of reproduction were not well understood, every instance of coitus seemed to be of the same kind. But it is through instances that we see kinds, and we see more detail in the instances now, including physiological differences between fertile and infertile couples. These differences are natural facts no less than the macroscopic structures of sexual organs are natural facts, and when what is at issue is whether a couple are a reproductive unit, we will want our definition of that kind to overlap as precisely as it can with the facts about whether reproduction is possible. Confronted with the insistence that fertile and infertile couples are alike reproductive units, the revisionist might appropriate Bishop Butler's remark that "everything is what it is, and not another thing," and diagnose the traditionalist with descriptive myopia.

The more important point is that the traditionalist's "what it is" does not tell us why we should find value in "it." Let us ask the traditionalist: "Conceded, there are two kinds of sexual macro-structure, and a practice involving one of each that, depending on the instance, might or might not have the potential to generate children; would you now explain what good other than children or the hope or expectation of them, and other than the expression of a kind of love, depends on this practice?" Given that his judgment of value establishes no connection between the fact upon which it fixates and the experiences of human beings, what answer can the traditionalist make without turning his argument into a piece of dogma?

Against the traditionalist's "comprehensive union," the revisionist understands marriage as what I will call "maximal experiential union." This is two persons' sharing each other's lives—conceived not as the facts about their bodies plus the facts about their minds, but rather as the facts about their experienced unity of the two—as comprehensively and deeply as

possible. It satisfies in the strongest way the desire to escape the condition of facing life alone. It necessarily involves, and is consummated by, sexual intimacy, for the reason Roger Scruton identifies in his essay "Sacrilige and Sacrament": "Sexual desire is not a desire for sensations. [Nor, I add, is it a desire for children, even if it is accompanied by that.] It is a desire for a person: and I mean a *person*, not his or her body conceived as an object in the physical world, but the person conceived as an incarnate subject, in whom the light of self-consciousness shines, and who confronts me eye to eye, and I to I."

Scruton thinks that, the sexes being different, the experience of homosexual desire is dissimilar—and, we are to assume, inferior—to the experience of heterosexual desire. This claim is separable from his insight about the nature of sexual desire, and I find it not very compelling. Presumably indeed the experience of homosexual desire is different from that of heterosexual desire, but this does not entail that the former is less directed toward or compatible with existential commitment, or that the categorical difference is greater than differences between couples of either category. No one can know for sure, since each of us is trapped in his own experience. But homosexual and heterosexual persons show the outward signs of finding in committed romantic love the same kind of value. If we grant that they do, we must conclude that the traditionalist indulges an untenable dualism about body and mind as these relate to value. He assigns to the body's reproductive function a fixed value for two classes of person between whom that function's fulfillment in experience differs greatly, yet for whom the value of sexual intimacy as the expression of love is the same. He thus conceptually detaches the body from the natural, body-with-mind reality in which a large class of human beings exist.

When a fertile couple have children, they realize an even greater intrinsic value than that of maximal experiential union as such, for they now share experiences with their children as well as sharing with each other the experience of generating and raising children. If one were free to choose to whom one is sexually attracted and with whom one falls in love, one could simply choose the greater value. But these are not choices, and for persons unattracted to the opposite sex, as for infertile persons, the greater value is not available. Depths of experiential union, and their corresponding categorical values, are lexically ordered such that any union of two persons who are in love is deeper than that of any two who are not, even if they have reproduced. This is so not just because lack of sexual attraction will undermine and destabilize a union, but more deeply because only in romantic relationships can persons fully and reciprocally share themselves.

The norms of marriage apply to maximal experiential union. If a couple's relationship is permanent, each party will share more of his or her life with the other than if they separate, and the expectation of permanence will give rise to a quality of no-holding-back.

Monogamy and fidelity contribute their own qualitative depth, thereby conducing to permanence. In a case of polygamy, polyamory, bigamy, or infidelity, at least one party holds part of himself in reserve for another no matter whom he is with just now, and because he might give himself more totally to anyone, his

union with each is less than maximal. If they know this, it will probably dilute their disposition to give themselves fully to him.

It is only by deepening and enforcing experiential union that the norms achieve their child-welfare consequence. By ensuring that as many reproductive relationships as possible are maximal experiential unions, they ensure that as many children as possible are raised by their biological parents.

A final two norms. Maximal experiential unions should be of peers, for only peers can achieve mutual comprehension. One cannot form a maximal experiential union with another kind of animal or a child or a mentally impaired person.

Yet maximal experiential unions should be relationships of peers whose bodies/minds are complementary rather than overlapping. Part of what is stunting about facing life alone is the limitedness of one's resources of character and ability, and this is not helped by doubling up on what one has. This final norm goes some way toward explaining why incestuous relationships cannot easily attain the good of maximal experiential union. (There are independent and much stronger reasons, having to do with the nature of blood relations and the manner in which the intensity and possessiveness of sexual desire would destabilize them, to think incestuous relationships wrong or imprudent for the individuals themselves, as well as bad enough for society that the law should forbid them.)

What of the law? Has it any reason to concern itself with maximal experiential unions?

The revisionist, even if he is conservative, may say: The legal institution of marriage does not just protect children. It also protects the good of maximal experiential union. It does this by guaranteeing recognition of the couple as a couple in their commerce with the community. Sometimes this is not so important: *Will we get the couple discount at the dinner buffet?* But being in a maximal experiential union involves facing major life events jointly, even if this can mean no more than that one party makes decisions on the other's behalf, provides for the other's care, or, in the case of death, sees to it that the other's wishes are honored. Various social institutions play a role in deciding whether that is possible. We must ask whether, apart from considerations of child welfare, the state has any business requiring those institutions to recognize maximal experiential unions.

I think so. I think that even if human beings rose up fully formed out of lotus flowers, they would, if they felt romantic attraction and sexual desire, form maximal experiential unions and want the state to protect them. And if that is right, it is problematic—treating like cases differently, “separate but equal,” discrimination—for the law to recognize homosexual and infertile heterosexual couples differently, even if, as under a civil-union regime, the difference is only of name.

Let us now write our positive marriage law on a *tabula rasa*. How will the foregoing considerations of pre-legal realities guide us?

We have seen that monogamous same-sex unions possess a value equal in kind to that of monogamous infertile unions, and that the norms of marriage make sense for all maximal experiential unions—so there is no reason in principle not to include same-sex along with infertile couples. The traditionalist

might remind us that because the sociology of gay communities involves higher-than-average disregard for the norms of marriage, including gay couples would set a bad example for straight ones. As decisive against this, consider, first, that many heterosexual couples also flout the norms, and there is no principled standard as to what statistical deviance qualifies a group for exclusion. Second, the direct cause of the harm we wish to prevent is not childless persons who set a bad example, but persons with children who follow it. Finally, the law may enforce the norms upon all married couples, whether they have reproduced or not, to whatever extent we deem justified by the child-welfare consideration.

Yet this seems needlessly coercive of those who have not reproduced. It is true that the norms make sense for them, but if they flout the norms and destroy their unions the only parties to suffer will be themselves. Perhaps we must pour out a measure of liberty on the altar of child welfare, but why not set up a two-tiered system instead?

In the first tier, we confer on any maximal experiential union a group of rights more or less equivalent to those in civil unions. With one step common to all, couples secure recognition of their relationships in the laws governing property, health care, and other important pre-legal institutions. Marriages in this tier will be relatively easy to dissolve, along the lines of no-fault divorce.

A couple automatically pass into the second tier if they have children, biologically their own or not. (When it becomes clear how same-sex parenting affects children, we will apply this knowledge precisely via our laws governing adoption and fertility treatments, bearing in mind in the adoptive case that there is no option for the child to be raised by his biological parents, and in the case of fertility treatments that a person who comes into existence under less than ideal conditions may nonetheless prefer to exist and be valuable in his existence.) In the second tier, couples are not able to divorce as easily as in the first; a demonstration of fault and/or counseling could be required, and perhaps we should roll back the sexual revolution still further. We need not decide here to what degree the law should enforce marital commitments for the sake of children, but whatever the answer, the law could and should apply it to marital commitments involving children.

The virtues of such system are as follows. First, it does justice to the multifacetedness of our views of marriage by recognizing its experiential in addition to its reproductive dimension and creating appropriate legal categories for each. The law becomes a more precise instrument. Second and relatedly, it becomes more just, for it now treats nonreproductive maximal experiential unions equally. Third, it directly and vividly reminds heterosexual couples to think about their potentially reproductive acts as such. Last, it does this while honoring in the first tier that desire for freedom which motivated the sexual revolution. Note that merely adducing the facts about child welfare does not decide the conflict between wanting to avoid these consequences and wanting to maximize liberty; nor is there any clear way to decide, since the value of liberty cannot be expressed in terms of consequences.

Some couples may decline to enter the institution for fear of the second tier, but a single-tiered system of the type traditionalists favor would confront the same problem. In both cases, the solution is to impose on unwed parents strict obligations concerning such things as child support, so that not getting married does not appreciably shield them from risk.

A tiered system would not oblige us to recognize polygamous or polyamorous relationships, because these are not maximal experiential unions. On the other hand, if there is value in polygamous relationships, polyamorous relationships, or relationships of any other type, if legal recognition of some kind is needed to protect that value, and if we can confer it without causing unacceptable harm, then we have no grounds to withhold it. But let us at all times discuss these things directly—noting, for example, that polygamous unions tend to be exploitative for reasons intrinsic to their hierarchical structure, and that polyamorous unions are both reproductive and unstable. Everything is what it is and not another thing. When the traditionalist asks, “Once you allow same-sex marriage, how will you disallow such-and-such?” we should challenge him to explain why he would disallow such-and-such. If he can, he will have answered his own question, and if he cannot it deserves no answer.

It is all but impossible to separate judgments about marriage from judgments about sexuality. It is true that the traditionalist argument can be made without presenting any claim as to the value of same-sex relationships, but the traditionalist nonetheless holds that a special value inheres in a relationship between two heterosexual persons who are infertile but in love that cannot inhere in a relationship between two persons of the same sex who are in love. That is *just* what the revisionist rejects. He sees unique intrinsic value in maximal experiential union as such, and regards parental maximal experiential union—and the value that attaches uniquely to this subcategory—as its own kind of thing.

That the traditionalist’s position involves a moral judgment about homosexual relationships is evident in the following passage from Girgis et al.:

Because bodies are integral parts of the personal reality of human beings, only coitus can truly unite persons organically and, thus, maritally. . . . In this sense, it is not the state that keeps marriage from certain people, but their circumstances that unfortunately keep certain people from marriage (or at least make marrying much harder). This is so, not only for those with exclusively homosexual attractions, but also for people who cannot marry because of, for example, pressing family obligations incompatible with marriage’s comprehensiveness and orientation to children, inability to find a mate, or any other cause. . . . What we wish for people unable to marry because of a lack of any attraction to a member of the opposite sex is the same as what we wish for people who cannot marry for any other reason: rich and fulfilling lives. In the splendor of human variety, these can take infinitely many forms. In any of them, energy that would otherwise go into marriage is channeled toward ennobling endeavors: deeper devotion to family or nation, service, adventure, art, or a thousand other things.

But most relevantly, this energy could be harnessed for deep friendship. Belief in [the assumption that meaningful intimacy is impossible without sex] may impoverish the friendships in which single people could find fulfillment—by making emotional, psychological, and dispositional intimacy seem inappropriate in non-sexual friendships. We must not conflate depth of friendship with the presence of sex. Doing so may stymie the connection between friends who feel that they must distance themselves from the possibility or appearance of a sexual relationship where none is wanted. By encouraging the myth that there can be no intimacy without romance, we deny people the wonder of knowing another as what Aristotle so aptly called a second self.

The first sentence is what you get when you stop short of saying anything about homosexuality: Only persons who have sex *like this* can unite bodily and only if persons unite bodily can their relationship possess the value of marriage. But then we realize that the authors—though surely no bigots—labor in blindness to the value of maximal experiential union as such, and to the fact that romance and friendship are different kinds of intimacy possessing different kinds of value. We detect no recognition that “those with exclusively homosexual attractions” can, while those who remain single for “any other reason” cannot, experience the value of committed romantic love. We get that quasi-reverential description of the possibility that a homosexual person might “harness[]” his or her “energy” for a platonic, Aristotelian friendship—the prescribed course, apparently. And we witness a special sympathy for persons who are afraid of sexual involvement, or even the false perception of it.

I think much of the public finds these attitudes quite alien. But the point is rather that they are of a piece with the judgment that the value of a relationship between two persons in love depends, intrinsically, on the structure of their genitals.

Critical Thinking

1. What are reasons that marriage, as an institution, exists in our society?
2. Is a desire to reproduce a necessary function of all marriages? Why or why not?
3. Why is the gender of partners in a marriage of concern?

Create Central

www.mhhe.com/createcentral

Internet References

The Pew Forum on Religion and Public Life: Gay Marriage and Homosexuality

www.pewforum.org/Topics/Issues/Gay-Marriage-and-Homosexuality

National Council of State Legislatures, Defining Marriage

www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx