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The liberal case against gay marriage

Susan M. Shell

THE issue of gay marriage brings to a head, like few other issues of our time, a central conflict between two moral positions that interact like seismic plates beneath the surface of contemporary American political life. It is commonly thought that the issue of gay marriage pits secular liberals against religious conservatives. While this understanding is accurate up to a point, it is also seriously misleading. The most stubborn and intransigent opponents in the conflict are both in their way sectarian.

The first position is more or less a traditional Christian one. That is, it accepts the idea of an authority higher than human choice that must remain within limits set by that authority. New understandings of these limits have arisen in recent years, allowing the individual pursuit of happiness more leeway and removing much of the shame and guilt that once kept traditional sexual norms in place. Nevertheless, its basic familial ideal remains intact: a monogamous, heterosexual, and devotional relationship directed toward the rearing of children. For most proponents of this view, gay marriage represents a direct assault on the grounding authority by which life at its most serious and intimate is lived.

The second position, which takes human freedom as its central and highest good, could be classified as "liberationist" or postmodern. Distrustful of traditional rules as intrinsically oppressive, it seeks the individual's emancipation from all norms that might hamper the quest for spiritual and material autonomy. For the most radical liberationists, all universal norms are suspect, with the sole exception of something like a duty to "accept difference." Among the more moderate proponents, this suspicion is replaced by an uneasiness with respect to "moral judgment" that approaches or imitates humility of a more traditional Christian sort, at least when applied to others. Thus, for the liberationist camp, gay marriage is either a celebration of the individual's heroic struggle to find love and validation in a hostile world, or at the very least, it is no one else's business.

The debate over gay marriage is currently polarized by these two sectarian forces. It would be politically beneficial to define a genuinely liberal approach that is fair to both. Such an approach would include them in the ongoing and generally fruitful compromise between revealed religion and the principles of individual rights and freedoms from which the United States has historically drawn strength. The point is not to abandon the position formulated by Locke and other liberal thinkers, but to reaffirm and enhance it in the face of new conditions and challenges. Such thinkers have generally viewed marriage as a contractual arrangement between two individuals for the sake of mutual advantage and the generation and rearing of children to the point where they can be self-reliant (in Locke's thinking) and/or capable of exercising their individual rights in a responsible civic manner (according to Kant). How might such older liberal views be usefully adapted to the present?

The question is complicated by a common, relatively recent view that there is no one way to be a family--that all forms of family life are to be celebrated equally as products of individual choice, at least so long as they make people happy. Conversely, it is said, intolerance and lack of respect for "difference" breed unhappiness. Liberals typically uphold the right of individuals to pursue their own understandings of happiness, so long as they do not encroach upon the rights of others. What, then, can weaken an apparently liberal presumption in favor of allowing people to define marriage however they choose, other than an illiberal deference toward a particular religious norm that has no right to political establishment? The answer lies in marriage itself, as it has been understood and practiced almost universally.

The essence of marriage, liberally construed

Though it is often assumed that no principled liberal case exists against gay marriage, this is incorrect. In a liberal democracy, private groups may hold their own views on the desirability or reprehensibility of homosexual relations. But it is not the business of the state either to endorse or forbid such practices publicly. Neither is it the business of the liberal democratic state

to define marriage in a way that speaks to the special needs of a single sect. Liberalism proceeds by taking its fundamental bearings from certain basic human experiences about which sectarians can reasonably be expected to agree—for example, the general human aversion to violent death and the claims to which that aversion naturally gives rise. Thus the first step in defining a liberal approach to marriage is to find a way of understanding marriage that is similarly true to the human situation and at the same time relatively impartial with respect to present-day sectarian conflicts.

A suitable account of marriage might begin as follows: Most human societies have honored the notion that special responsibility for children lies with the biological parents. This has also been the view of almost all influential thinkers on the subject—including "liberal" ones. No known society treats the question of who may properly call a child his or her own as simply "up for grabs" or as a matter to be decided entirely politically as one might distribute land or wealth.

No known government, however brutal or tyrannical, has ever denied, in fact or principle, the fundamental claim of parents to their children. Denial of this claim always demands an excuse, such as parental incapacity, criminality, or "illegitimacy." (Even the infamous slaughter of the innocents, or the Pharoanic decree that landed Moses in the bulrushes, rested on fear of a future crime.) No known state or society treats the act of bearing a child—as distinguished from clearing a field or sacrificing a goat—as an entirely indifferent one for purposes of establishing a moral, legal, or familial claim. A state can override this responsibility by a variety of economic, legal, and cultural factors, but it cannot altogether cease to recognize them. This is so not only because children would likely suffer if they did, but also because most parents, among others, would not stand for it.

Families are not infinitely malleable, as even champions of diversity must concede. This does not simply owe to considerations of size: A government that distributed children randomly, for example, could not be other than tyrannical. Even if it had the best interests of society in mind—say, the principle of equal opportunity, radically understood—a government that paid no regard to the claims of biological parenthood would be unacceptable to all but the most fanatical of egalitarian or communitarian zealots. Beyond its other functions—limiting female fertility, transmitting property, or providing companionship, for example—marriage is a way of honoring this central fact, which limits one's ability to regard practices of marriage as either wholly dependent on belief in a particular divine revelation or as wholly "socially constructed."

But marriage is not merely a matter of biology. That children can be "illegitimate" suggests that the biological facts of parenthood are not enough for social purposes. Disputes over fatherhood, for example, or variations in parental attachment to their children, make it reasonable for societies to supplement and sometimes override the natural bonds established by and through the processes of human generation. Marriage is, before all else, the practice by which human societies mark, modify, and occasionally mask these bonds. Like death, and the funereal rites that universally accompany it in one form or another, human generation has a significance that is more than arbitrary, if less than obvious. Marriage is the primary way societies interpret that significance, and it is doubtful whether any other custom could substitute for it adequately.

Whatever else it may accomplish, marriage acknowledges and secures the relation between a child and a particular set of parents. Whether monogamous or polygamous, permanent or temporary, marriage never fails to address this relation—at least potentially. It establishes a legal or quasi-legal relation of parenthood that draws on, even as it enhances and modifies, the primary human experience of generation and the claims and responsibilities to which it naturally gives rise. A husband is, until otherwise proven, the acknowledged father of his wife's off-spring, with recognized rights and duties that may vary from society to society but always exist in some form. And a wife is a woman who can expect a certain specified sort of help from her husband in the raising of her off-spring. All other functions of marriage borrow from or build upon this one. Even marriage among those past child-rearing age or otherwise infertile draws on notions of partnership and mutual aid that have their primary roots in the experience of shared biological parenthood.

An inevitable question follows from this understanding of marriage: Can those who are not even potentially partners in reproduction, and who could never under any circumstances have been so, actually "marry"? It might seem that the answer is yes, especially given new reproductive technologies that allow some heterosexual couples to choose to be both sexually active

and childless, and allow others to have children whose biological relation to themselves takes new and unfamiliar forms.

This presumption is strengthened by notions, mainly Protestant in origin, that marriage is less about generation than about companionship. It is also buttressed by a new openness to adoption by some, such as single adults and gay couples, whose fitness as parents would in the not-too-distant past have been strongly questioned. What is more, the increase in divorce, extramarital cohabitation, and "blended" siblings have widely contributed to the revision of customary definitions of the family. It is now argued by many that all forms of family life are to be celebrated as products of individual choice, at least so long as they make people happy. Encouraged by these new technological possibilities, such critics of traditional marriage believe their case is so self-evidently justified that the only possible objection could arise from a baseless, and ultimately unconstitutional, endorsement of a particular religious norm that has no rightful claim to political establishment.

New technologies, however, can bend traditional notions of the family only so far. The right to one's own children, barring the circumstances discussed above, is perhaps the most basic individual right--so basic we hardly think of it. New reproductive technologies have not erased this fundamental claim, though in some cases they may have muddled it. The question of who inseminates or gives birth continues to be a pertinent matter. In any case in which it is overridden--a birth mother giving up parental rights or a man donating sperm, for example--it must be done by explicit contract. Perhaps, one day, corporations will come to "own" the DNA from which children are produced, entitling them to "licensing fees" (so that a child might "owe" its health or beauty to General Motors). Perhaps, in the not-too-distant future, faces will be patented, and particularly desirable genes will either be distributed universally or awarded to the highest parental bidder. What seems less likely is that the status of parenthood as such will simply disappear.

Generation and death

When considering the institution of marriage, a useful comparison exists between how society addresses the beginning and end of human life. Like death, our relation to which is shaped and challenged but not effaced by modern technologies, generation defines our human nature, both in obvious ways and in ways difficult to fathom fully. As long as this is so, there is a special place for marriage understood as it has always been understood. That is to say, there is a need for society to recognize that human generation and its claims are an irreducible feature of the human experience.

Like the rites and practices surrounding death, marriage invests a powerful, universally shared experience with the norms and purposes of a given society. Even when couples do not "marry," as is increasingly becoming the case in parts of western Europe, they still form socially recognized partnerships that constitute a kind of marriage. If marriage in a formal sense is abolished, it will not disappear, but it will no longer perform this task so well.

A similar constraint applies to death. A society could abolish "funerals" as heretofore understood and simply call them "parties," or allow individuals to define them as they wish. Were the "liberationist" exaltation of individual choice pushed to its logical conclusion, would not a public definition of "funeral" as a rite in honor of the dead appear just as invidious as a public definition of "marriage" as an enduring sexual partnership between a man and woman? If it is discriminatory to deny gay couples the right to "marry," is it not equally unfair to deny living individuals the right to attend their own "funerals"? If it makes individuals happy, some would reply, what is the harm? Only that a society without the means of formally acknowledging, through marriage, the fact of generation, like one without the means of formally acknowledging, through funeral rites, the fact of death, seems impoverished in the most basic of human terms.

Like generation, death has a "public face" so obvious that we hardly think of it. The state issues death certificates and otherwise defines death legally. It recognizes funeral attendance as a legal excuse in certain contexts, such as jury duty. It also regulates the treatment of corpses, which may not merely be disposed of like any ordinary animal waste. Many states afford funeral corteges special privileges not enjoyed by ordinary motorists. Funeral parlors are strictly regulated, and there are limits on the purchase and destruction of cemeteries that do not apply to ordinary real estate. In short, there are a number of ways in which a liberal democratic government, as a matter of course, both acknowledges "death" and limits the funereal rites and practices of

particular sects and individuals. I cannot call a party in my honor my "funeral" and expect the same public respect and deference afforded genuine rites for the dead. And it would be a grim society indeed that allowed people to treat the dead any old which way--as human lampshades, for example.

Once one grants that the link between marriage and generation may approach, in its universality and solemn significance, the link between funereal practices and death, the question of gay marriage appears in a new light. It is not that marriages are necessarily devoted to the having and rearing of children, nor that infertility need be an impediment to marriage (as is still the case for some religious groups). This country has never legally insisted that the existence of marriage depends upon "consummation" in a potentially procreative act. It is, rather, that marriage, in all the diversity of its forms, draws on a model of partnership rooted in human generation. But for that fact, marriages would be indistinguishable from partnerships of a variety of kinds. The peculiar intimacy, reciprocity, and relative permanence of marriage reflect a genealogy that is more than merely historical.

Seen in this light, the issue of gay marriage can be reduced to the following question: Is the desired union between homosexuals more like a marriage between infertile heterosexuals, unions that draw ultimate psychological and moral sustenance (at least symbolically) from the experience of human generation; or is it more like insistence on attending one's own funeral--a funeral, one might say, existing in name only? This question is not easily answered. Progress can be made, however, by attending to the stated goals of most gay marriage advocates.

Beyond sectarian advocacy

Many proponents of gay marriage generally seek a combination of legal, economic, and medical privileges ordinarily associated with marriage, as well as recognition of a certain civil dignity that current arrangements are thought to deny gays. Some advocates also specifically seek an easier road when it comes to adopting children. Few if any supporters of gay marriage, however, demand as a matter of central concern that each gay partner be automatically recognized as the parent of any child generated by the other. More simply, proponents of gay marriage do not seek the "essence" of marriage, as described above, in its most general and basic sense.

For example, Jonathan Rauch, in his recent book *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*, defines marriage as essentially a legally enforced, long-term relation of mutual aid and support between two sexual partners. Marriage, he says, "is putting one person ahead of all others." According to Rauch, "if marriage means anything at all," it is knowing "that there is someone out there for whom you are always first in line." We can here leave aside how odd this definition will sound to any married couple with young children, partners whose first responsibility is not obviously spousal. The more crucial point to note is Rauch's telling claim that marriage is primarily directed toward relieving adult anxiety--an "elemental fear," as he calls it, that should catastrophe strike, "no one will be there for me" (original emphasis). This belief may well express Rauch's personal needs and longings, but it has little to do with parenthood. Rauch views marriage as a response to the fears of adults that they might one day be abandoned, rather than to the fears of parents for their children, let alone the fears of children that they might actually be abandoned here and now. Not every proponent of gay marriage makes the same arguments as Rauch. Still, few centrally insist upon the automatic parental rights and duties intrinsic to marriage as it is almost universally experienced.

Keeping the goals that advocates emphasize in mind, one can reach a principled and liberal public policy toward gay marriage. Most, if not all, of the goals of the gay marriage movement could be satisfied in the absence of gay marriage. Many sorts of individuals, and not just gay couples, might be allowed to form "civil partnerships" dedicated to securing mutual support and other social advantages. If two unmarried, elderly sisters wished to form such a partnership, or two or more friends (regardless of sexual intimacy) wanted to provide mutually for one another "in sickness and in health," society might furnish them a variety of ways of doing so--from enhanced civil contracts to expanded "defined benefit" insurance plans, to new ways of dealing with inheritance. (Though tempting, this is not the place to tackle the issue of polygamy--except to say that this practice

might well be disallowed on policy and even more basic constitutional grounds without prejudice to other forms of civil union.) In short, gay couples and those who are not sexually intimate should be permitted to take legally supported vows of mutual loyalty and support. Such partnerships would differ from marriage in that only marriage automatically entails joint parental responsibility for any children generated by the woman, until and unless the paternity of another man is positively established.

As for the having and raising of children--this, too, can be provided for and supported short of marriage. If two siblings need not "marry" in order to adopt a child together, neither need two friends, whether or not they are sexually intimate. Civil unions might be formed in ways that especially address the needs of such children. The cases of gay men who inseminate a willing surrogate mother, or lesbians who naturally conceive and wish to designate their partner as the child's other parent, can also be legally accommodated short of marriage, strictly understood, on the analogy of adoption by step-parents and/or other relatives. As in all cases of adoption (as opposed to natural parenthood, where the fitness of the parent is assumed until proven otherwise), the primary question is the welfare of the child, not the psychic needs and wants of its would-be parents.

What gays have a right to expect when seeking to adopt children is that their homosexual relationship as such not be held against them when the state weighs their claim to parental fitness. A liberal approach takes moral condemnation of homosexuality out of the public sphere. Individuals remain free, according to the dictates of their religion or conscience, to abhor gay relations. But they may not publicly impose that view on others. The civic dignity that gays may properly claim includes the right not to be held publicly hostage to sectarian views they do not share.

That liberal sword cuts both ways, however: American citizens should not have the sectarian beliefs of gay-marriage advocates imposed on them unwillingly. If proponents of gay marriage seek certain privileges of marriage, such as legal support for mutual aid and childbearing, there may well be no liberal reason to deny it to them. But if they also seek positive public celebration of homosexuality as such, then that desire must be disappointed. The requirement that homosexual attachments be publicly recognized as no different from, and equally necessary to society as, heterosexual attachments is a fundamentally illiberal demand. Gays cannot be guaranteed all of the experiences open to heterosexuals any more than tall people can be guaranteed all of the experiences open to short people. Least of all can gays be guaranteed all of the experiences that stem from the facts of human sexual reproduction and its accompanying penumbra of pleasures and cares. To insist otherwise is not only psychologically and culturally implausible; it imposes a sectarian moral view on fellow citizens who disagree and who may hold moral beliefs that are diametrically opposed to it.

The deeper phenomenal differences between heterosexual and homosexual relations are hard to specify precisely. Still, these differences seem sufficiently clear to prohibit gay marriage without denying gays equal protection under the laws. Gay relations bear a less direct relation to the generative act in its full psychological and cultural complexity than relations between heterosexual partners, even when age, individual preference, or medical anomaly impede fertility. Gay relations have a plasticity of form, an independence from natural generation, for which they are sometimes praised, but which, in any case, also differentiates them from their heterosexual counterparts. No heterosexual couples have such freedom from the facts of generation, which they can limit and control in a variety of ways but can never altogether ignore. Intimate heterosexual partners realize that they might generate a child together, or might once have done so. This colors and shapes the nature of their union in ways that homosexual love can imitate, and possibly even transcend, but cannot share in fully.

A truly liberal solution

Such considerations, and others like them, suffice to sustain the "reasonableness" of a legal distinction between heterosexual marriage and forms of gay civil union that might perform many of marriage's tasks. It is neither irrational nor necessarily offensive to deem gay unions significantly less like a generative heterosexual union than is a marriage between infertile heterosexual partners. Demanding otherwise would require one to abandon the principles of liberalism in favor of a sectarian, "liberationist" understanding of marriage. Conversely, an unwillingness to compromise on the issue of civil unions would require one to insist that liberalism take a backseat to a particular understanding of morality that society at large may not

fully endorse. In both cases, liberalism must remain the primary concern, and sectarian wishes must conform to it, not the other way around.

Thus a liberal resolution to the issue of gay marriage, one that transcends sectarian advocacy with an eye to the broader public interest, would encompass at least four primary elements. First, a legally expanded definition of civil union (or partnership for mutual support and aid) should be advanced that includes, but is not limited to, gay couples. Such unions might provide some of the benefits now afforded married couples while withholding others. Second, gay individuals and couples should be allowed to adopt children without prejudice and with primary regard, as is generally the case, for the interests of the child. Third, marriage as such should be limited to heterosexual couples, given that a central role of marriage lies in the public recognition of certain responsibilities and claims arising from human generation. Finally, marriage is to be defined in terms of mutual parental responsibilities and claims that civil union does not similarly take for granted.

Such a liberal civic compromise is not without significant potential costs and complications. More important than the redrafting of tax laws or the calibration of some social policies, this resolution will undoubtedly leave many on both sides dissatisfied. On the one hand, many religious traditionalists will see in the absence of public strictures against homosexuality a threat to the very meaning of the family. This worry does not seem to be well founded. The natural mutual attraction of the sexes and the related desire to conceive and rear children has expressed itself over countless generations, and in all known societies, and it will continue to do so. If that desire is weakened in contemporary society, it is an exaggerated individualism, not gay relations as such, that should be blamed for it.

On the other hand, many who support gay marriage will deplore any solution they believe discriminates between homosexuals and heterosexuals. Such intransigence is neither politically reasonable nor just. Some who endorse gay marriage, including the Chief Justice of the Supreme Judicial Court of Massachusetts, equate its prohibition with earlier strictures against interracial marriage. This analogy is entirely unfounded. Antimiscegenation laws acted in the face of, and against the facts of, human generation and the bonds they establish; laws instituting gay marriage seek to defy them. Private groups may hold their own views as to the desirability or reprehensibility of marriage between people of different races, ethnicities, and/or religions. But it is not the business of the state in a liberal democracy such as ours either to promote or forbid such practices publicly. (Given the historical experience of slavery, though, even private discrimination based on race may raise thorny public issues.) It is also inappropriate for a liberal democratic government to define marriage in a way that favors a single sect. Those who endorse the view that homosexual unions require public celebration of a sort expressed in rites of marriage represent a kind of sect whose views should be tolerated but not politically established. In a liberal society such as ours, some proposals should be off the table. Liberal rights must trump even the majority's will.

Restriction of marriage to heterosexual couples gives reasonable recognition to the peculiar importance and solemnity of generation and a related complex of human experiences. It does not, in itself, constitute unjust discrimination on the basis of sexual orientation. The liberal case against gay marriage becomes even stronger if the category of civil union is expanded to permit gay couples and others to enjoy certain privileges from which they may in the past have been needlessly excluded. Unlike some more radical proposals, however, it would do so without doing needless violence to the peculiar character of marriage as it has heretofore been understood and practiced with good reason. That such privileges can be provided for outside of marriage is both a potential boon to gay couples and a sign that marriage in a strict sense is not in most cases what is essentially being sought.

There is a more serious objection that one might expect to hear: namely, that such a compromise on gay marriage, by giving expanded support to a variety of unconventional relationships, would weaken the status of marriage as a unique and rightly privileged domestic bond. While there may be some truth to this conservative charge, it is countered by the renewed emphasis to be brought about by articulating what sets marriage apart, irrespective of any particular religious understanding. Catholics, Protestants, Jews, and Muslims, more and less observant, differ in their understanding of marriage in sometimes crucial ways. An emphasis on what unites all Americans with regard to marriage might help stem the slide toward thinking that marriage

can be anything we choose. It might help remind us that liberalism is not only about choice; it is also about acknowledging reasonable political and moral limits.

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