

Same-Sex Marriage?

John Witte, Jr.



The logical case for same-sex marriage seems nearly ineluctable today. In the course of the past three decades, American state laws have effectively reduced marriage to a terminal sexual contract between consenting adults. Prenuptial and separation contracts allow parties to define their own rights and duties within the marital estate and thereafter. Unilateral no-fault divorce statutes have reduced marital dissolution to a formality. Lump sum marital property exchanges provide many divorcing parties with a clean break to marry anew. Criminal prosecutions for fornication, adultery, polygamy, and other classic sexual crimes have largely fallen aside. Free speech laws protect all manner of sexual expression, short of obscenity. Privacy laws protect all manner of sexual conduct, short of exploitation of children or abuse of others. Given such generous freedoms of marriage and sexual privacy, many states may feel hard pressed to resist the next logical step to legalize same-sex marriages.

"A page of history is worth a volume of logic," however, Oliver Wendell Holmes, Jr. reminds us. And Western history provides very little support for extending the legal category of marriage to include same-sex unions. For nearly two millennia, the Western legal tradition has defined marriage as a heterosexual, monogamous union, designed for the procreation and nurture of children, the mutual help and companionship of husband and wife, and the mutual protection of both parties from sexual sin. This definition of marriage has been woven deeply into the fabric of Western law, and is still reflected today in thousands of discrete American laws.

To be sure, the Western legal tradition has radically transformed many aspects of marriage in the course of the past two millennia. But, for all this radical change, the Western legal tradition has not extended the legal category of marriage to include same-sex unions. Indeed, until recently, the Western tradition criminalized the acts of sodomy and buggery that are endemic to such unions.

The Western tradition has long taught that heterosexual monogamous marriage is good, does good, and has goods both for the couple and for their children. Hebrew, Greek, Roman, Catholic, Protestant, and Enlightenment writers alike have recognized the "natural" character of marriage: (1) the natural drive on the part of most adults toward the institution of marriage because of the inherent goods of individual survival, flourishing, happiness, and even perfectibility that it provides; and (2) the natural capacity on the part of most adults to engage in the expected performance of marriage—the unique combination of sexual, physical, economical, emotional, charitable, moral, and spiritual performances that become marriage.

The Western tradition has also long taught that stable marriages are good for the broader society. The ancient Greek and Roman Stoics called marriage "the private font of public virtue." The early Church Fathers called marital love "the seedbed of the city." Catholics called the family a "domestic church," a "kind of school of deeper humanity." Protestants called the household a "little church," a "little state," and a "little seminary" in which one learned the norms and habits of proper citizenship. American jurists and theologians taught that marriage is both public and private, individual and social, temporal and transcendent in quality--a natural if not a spiritual estate, a useful if not an essential association, a pillar if not the foundation of civil society. At the core of all these metaphors is the enduring conviction that stable marriages and families are essential to the survival and happiness of the greater commonwealth.

History alone, of course, is not reason enough to maintain traditional marriage laws. But history must be an essential part of any serious arguments for the maintenance of traditional marriage. And the enduring traditional arguments about the origin, nature, and purpose of marriage must be the starting point for any serious debate about the propriety of legalizing same-sex marriages. Law is, after all, both a steward of our traditions and a totem of our ideals. Especially when it touches on so tender and vital a topic as marriage, we should amend and emend traditional legal teachings only with ample trepidation, only with long explanation, and only with full ventilation of what is at stake on both sides of the debate.

We would be wise to exercise some humility and patience before rushing to radical legal change. Same-sex couples have already gained much freedom and acceptance in recent decades through the abolition of traditional fornication and sodomy laws and the formulation of new rights of association and sexual privacy. With patient and persistent argumentation and experimentation more salutary legal changes will come.

But we have just begun the serious discussion and the cultural experimentation that is needed. Many families and communities have just begun their experiences with gay and lesbian life. Many scholars have just begun to tackle the essential policy questions--whether homosexuality is an immutable norm, habit, and character, whether children raised in gay and lesbian households are indeed as well or better off, whether alternative forms of conception (artificial insemination, surrogacy, cloning, and others) will ultimately make the procreative potential and capacity of same-sex and heterosexual coupling any different. Many religious communities have just begun to rethink seriously whether biblical teachings against same-sex activities can be reinterpreted, whether the traditional goods and goals of marriage need necessarily be restricted to heterosexual couples, whether the church's strong support for individual liberty can be extended. Many states have just begun serious debates about alternative forms and forums of domestic association.

While this discussion and experimentation are pending, we need to stop throwing stones and start making bricks to help reconstruct a new cultural understanding of intimate association that honors both the counsel of our marriage traditions and the commandments of compassion and justice. *Roe v. Wade* taught us that on vital social issues a rush to legal change without ample democratic ventilation will bring savage cultural and legal backlash. It is far too early in the debate to resort to constitutional brinkmanship to force change on a reluctant majority or to close doors to a resilient minority.

John Witte, Jr. is Jonas Robitscher Professor of Law and Director of the Center for the Interdisciplinary Study of Religion at Emory University.