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# *Legal Neutrality and Same-Sex Marriage*

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Professor J. Budziszewski and I are defending the position that the traditional understanding of marriage as the one-flesh union of a man and a woman should not be abandoned. Although we are fully aware that most of our fellow citizens, in fact, a vast majority of them, agree with us that marriage is a union between a man and a woman, we also realize that some of them do not believe that this understanding of the nature of marriage, the one we believe in fact is true, ought to have a privileged place in our laws. In other words, these citizens, though agreeing with us on what marriage is, maintain that the state ought to be neutral on this question, and permit its citizens to marry whomever they choose, regardless of gender, according to the dictates of their own conscience, religion, and so forth. It is that point of view that will be the focus of my comments.

So, whereas my colleague defends traditional marriage per se, I offer in my comments a different sort of argument, one that presses the point that on matters such as the one over which we are debating, there can be no legally neutral ground. In other words, the state, regardless of what position it may take on the nature of marriage, will place in its laws as a result of taking a position, a particular understanding of human nature, gender, and the good life that either implies or asserts that there is a correct way to think on these matters and that if you manifest your disagreement in particular acts or speech, the law will punish you in one way or another.

In order to better understand the case I am making, I need to define the point of view that I am critiquing, *philosophical liberalism.* It is the view that because reasonable people disagree on fundamental questions of the nature of reality, knowledge, human beings, and the good life, the state ought not to embrace any one of these views as correct. Its more sophisticated proponents include legal theorist Ronald Dworkin and the late philosopher John Rawls, both of whom have offered important political theories in

order to defend a political regime in which there is wide philosophical and religious disagreement among its citizens and yet a justified system of laws that does not collapse into moral relativism.[1] As understood and embraced in popular culture, philosophical liberalism accentuates the fact of *pluralism*, that there exists a plurality of different and contrary opinions on matters religious, philosophical, and moral. From this fact, many in our culture conclude that one cannot say with any confidence that one's view on religious, philosophical or moral matters is better than anyone else's view. Given that, it is a mistake to claim that one's religious, philosophical, or moral beliefs are exclusively correct and that fellow citizens in other religious, philosophical, and moral traditions, no matter how sincere or devoted, hold false beliefs. Thus, it is wrong to hold that political or moral positions derived from one's religious, philosophical, or moral tradition ought to be the proper subject of laws that constrain another's liberty.

This is why Ron Reagan, the son of the late U.S. president Ronald W. Reagan, can tell a national television audience in his speech before the 2004 Democratic National Convention that many who oppose embryonic stem cell research "are well-meaning and sincere," but this is based on nothing more than belief, "an article of faith," to which of course they "are entitled." However, asserts Reagan, "it does not follow that the theology of a few should be allowed to forestall the health and well-being of the many."[2]

This cast of mind was manifested in the comments of 2004 Democratic presidential candidate John Kerry, a Catholic who *believes* that human life begins at conception but does not think this belief should be reflected in our laws. This approach works because a "belief," in this philosophical taxonomy, never can in principle count as an item of knowledge that may defeat the deliverances of another person's equally subjective "belief." This is why Kerry, a U.S. senator, can scold Pope John Paul II for "crossing the line" when a document issued by the Vatican suggests that Catholic politicians, such as Kerry, not support legislation that would allow homosexual unions, for "to vote in favor of a law so harmful to the common good is gravely immoral." Kerry, in his reply, offers the requisite affirmation of faith—"I believe in the church and care about it enormously"—followed by the requisite disclaimer that it is, after all, just religion and has nothing important to say about anything of any consequence—"But I think that it's important to not have the church instructing politicians."[3] Apparently, however, politicians may instruct the church about what it should consider important.

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[1] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[2] Ron Reagan, "Text of Tuesday Speech," *Houston Chronicle*, July 27, 2004, http://www.chron.com/cs/CDA/printstory.mpl/ec/demconv/2705448/.

[3] Quoted in Steve Waldman, "By Their Fruits: How to Be a Catholic President in the 21st Century," *Slate*, March 11, 2004, http://slate.msn.com/id/2096910/.

Philosophical liberalism is a creed whose commitment to "openness" *seems* to prohibit our entertaining of the possibility that there is any such thing as an absolute good, true, and beautiful that may be reflected in our laws. The operative term is *seems*, for the philosophical liberal, as I will argue, embraces a doctrine with its own cluster of assumptions about the order and nature of things and how our laws ought to reflect them. This is why the proponent of philosophical liberalism is not the celebrant of diversity he portrays himself to be. Consider an example from popular culture.

In 1997, in her acceptance speech for an Emmy for cowriting the "coming-out" episode of *Ellen*, Ellen DeGeneres said, "I accept this on behalf of all people, and the teenagers out there especially, who think there is something wrong with them because they are gay. There's nothing wrong with you. Don't ever let anybody make you feel ashamed of who you are."

There are many who, after hearing or reading Ellen's speech, applauded her for her liberal sensibilities, concluding that the actress is an open and tolerant person who is merely interested in helping young people to better understand their own sexuality. If you think this way, you are mistaken. Ellen's speech is an example of what I call "passive-aggressive tyranny." The trick is to sound "passive" and accepting of "diversity" even though you are putting forth an aggressively partisan agenda, implying that those who disagree with you are not only stupid but harmful. In order to understand this, imagine if a conservative Christian Emmy award winner had said this: "I accept this on behalf of all people, and the teenagers out there especially, who think there is something wrong with them because they believe that human beings are made for a purpose and that purpose includes the building of community with its foundation being heterosexual monogamy. There's nothing wrong with you. Don't ever let anybody, especially television script writers, make you feel ashamed because of what you believe is true about reality." Clearly this would imply that those who affirm liberal views on sexuality are wrong. An award winner who made this speech would be denounced as narrow, bigoted, and intolerant. She would never work again in Hollywood.

Ironically, Ellen's Emmy speech does as much to those with whom she disagrees. By encouraging her viewers to believe there is nothing wrong with homosexuality, she is in fact saying that there is something wrong with those who don't agree with this prescription. This condemnation is evident in the script of the show for which Ellen won an Emmy. In that famous "coming-out" episode, the writers presumed that one is either bigoted or ignorant if one thinks that Ellen's homosexuality is not normative, that one is incapable of having a thoughtful, carefully wrought case, against homosexuality. Such hubris is astounding, since it not only presumes that Ellen's detractors are wrong but that they are stupid, irrational, and evil and should

not even be allowed to make their case. They are, in a word, diseased, suffering from that made-up ailment, "homophobia."

Ms. DeGeneres, of course, has every right to think those who don't agree with her judgments on human sexuality are wrong. The problem, however, is that she and her more sophisticated colleagues of more cerebral and refined cultural influence present their judgments as if they were not judgments. They believe their views to be in some sense "neutral." From their perspective they are merely letting people live any way they choose. But this is not neutral at all. It presupposes a particular and controversial view of human nature, human community, and human happiness. It assumes that only three elements, if present, make a sexual practice purely self-regarding and not of any interest to the wider community: adult consent, one's desire, and that it doesn't interfere with another's sexual practice (that is, "it doesn't hurt anybody"). This, of course, is not so obvious. Consider, for example, the phenomenon of wound sex. According to psychiatrist and philosopher A. A. Howsepian, there are consenting adults within our population who engage in this practice, which may involve the sexual penetration of surgically created orifices, such as an opening made for a colostomy bag.[4] Now, given the three elements mentioned above, there does not seem to be any reason in principle why the state ought to interfere with, or pass negative judgments on, such unions.

Consider another example. Imagine that we had discovered that the killers of Matthew Shepard, the young man who was brutally murdered several years ago because he was gay, died as a result of his consenting to engage in a private activity that he knew would result in his own death. That is, suppose that Mr. Shepard had asked his killers to torture him until he died, because it would bring him the most exquisite orgasm imaginable. Imagine that Mr. Shepard's ordeal in this imaginary case was identical to what occurred in the real case, except that in the fictional account Mr. Shepard desires the ordeal because of a certain end that he has in mind. Now, as a Christian theist firmly committed to the natural law tradition, I do not believe that the evil of the killing is lessened by Mr. Shepard's consent. This is because either consenting to participate in your own killing for mere orgasmic pleasure or being killed without your consent for another's pleasure, treats a human being who is intrinsically valuable as merely a means to physical pleasure. Degrading a victim does not become less degrading because the victim happens to consent to his own degradation. The fact that the victim consents and the act *is* sexual seems to have no bearing on the soundness of our judgment that the act in question is deeply immoral and that the state ought not to coerce its citizens to celebrate it.

[4] See A. A. Howsepian, "Fetophilia: A Study in the Metaphysics of Pregnancy," *Philosophia Christi* 7 (2005): 199–206.

Consider a third, less provocative, example. Imagine that identical twin brothers over the age of eighteen travel to Massachusetts and request a marriage license. Could the civil servant in charge of issuing these licenses have any grounds to reject their request? I suppose she can appeal to any laws on the books in Massachusetts that forbid incestuous relations and/or marriage between close relatives, and there is no doubt that identical twins are very close relatives, for they were once womb-mates. But it is not precisely clear why the three elements of sexual permissibility could not be employed in this case to declare the anti-incest laws unconstitutional.

So, here's the problem: on what principled ground could someone who accepts the three elements of sexual permissibility not accord these unpopular sexual practices the full protection of our laws? Of course, one could say that these practices are the result of disordered desires that the law either ought to severely condemn or at least not countenance. But that ground of principle is not open to one who grounds her jurisprudence on the three elements of sexual permissibility, for that ground of principle is precisely what had to be jettisoned to justify the legal imprimatur on homosexual practice in the first place. And it is that premise—that there is no disordered sexual practice as long as all the participant adults consent—that is a necessary condition for the state treating same-sex marriage as morally indistinguishable from traditional marriage. After all, traditional marriage is consummated at the completion of male-female copulation, but that implies that same-sex couples literally cannot consummate their union. However, if it is in principle wrong (or *irrational* as the Supreme Court opines[5]) for the state to recognize a proper function of sexual organs in self-regarding acts, as philosophical liberalism asserts, then consummation is no longer a necessary condition for a couple to be married. In fact, it is downright irrational and discriminatory to suggest otherwise. But the implications of this premise are not only daunting for our public life, but show the incoherence of philosophical liberalism.

(1) It instructs the nation's citizens that marriage is not a natural institution that the state recognizes, but rather, an institution socially constructed that cannot in principle be limited by what marriage actually is, because its actual nature is what we will it to be. Instead of marriage being an institution we may freely enter and to its nature submit, it is an institution whose nature we freely shape and submit to our will. Therefore, "laws recognizing gay marriage," as philosopher Michael Pakaluk argues, "imply the falsity of the view that marriage is an objective reality prior to the state." There are several implications that follow from this. For example, Pakaluk points out

[5] See *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court writes: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (578).

that "parental authority must stand or fall with marriage." For "if the bond of husband and wife is not by nature, then neither is the government of those who share in that bond over any children that might result." Consequently, "laws recognizing gay marriage imply, similarly, that parents have no objective and natural authority over their children, prior to the state."[6] This would mean that parents would have no natural right, no actual moral grounds, to object to the public schools teaching their children lessons about human sexuality that are contrary to the lessons taught in church and home. The state, of course, may grant an exception to these "backward" parents, but not because they have a prelegal obligation to care for and nurture their children in shaping their character and directing their moral compass. Rather, the state may consider it politically wise to tolerate these families and their religious traditions. But it would not be as a matter of principle based on the order and nature of things.

Ironically, if this view of marriage were dominant in our legal culture when the Supreme Court rejected the prohibition of interracial marriage in the case of *Loving v. Virginia* (1967), the moral grounds for its opinion would have been lost.[7] That is, in order for the Court to have concluded that forbidding interracial marriage is wrong, it would have to know what marriage is. But if marriage is merely a social construction and not a natural institution, the state of Virginia could have argued, like contemporary same-sex marriage proponents, that marriage is merely a social construction subject to our will and nothing more. It is only because the Court knew that marriage is between a man and a woman that it could say that *race*, like height, geography, or place of residence, is not a relevant characteristic for two people to marry.

(2) Hadley Arkes points out that a legal regime which does not withhold endorsement of same-sex unions sets into motion a certain moral logic that will likely result in the condemnation and marginalization of those, especially traditional Christians and Jews, who resist this endorsement in their communities and institutions. For example (this is my example, not Arkes's), a philosophy department at an Evangelical Christian college that refuses to hire "married" same-sex couples while receiving federal funds, may, according to this moral logic, have its government funding withdrawn because it would be engaging in unlawful discrimination based on marital status. This is why Arkes refers to one congressional bill that would have banned discrimination against homosexuals by private businesses, as the "Christian and Jewish Removal Act," "for it promises to purge serious Christians and Jews from the executive suites of corporations, universities,

[6] Michael Pakaluk, "Homosexuality and the Common Good," in *Homosexuality and American Public Life*, ed. Christopher Wolfe (Dallas: Spence, 1999), 189–90.

[7] *Loving v. Virginia*, 388 U.S. 1 (1967).

and law firms."[8] After all, why would a university hire a Christian philosophy professor who holds "discriminatory" views if the espousal of such views could put the school at risk of civil or criminal litigation? Arkes tells of the case of "the wife of a shop owner in Boulder, Colorado, [who] had given a pamphlet on homosexuality to a gay employee. For that offense, she was charged under the local ordinance on gay rights, and compelled to enter a program of compulsory counseling."[9] Imagine if "same-sex marriage" were to become legal in every jurisdiction in the United States. Does anybody seriously doubt that recalcitrant social conservatives, serious Christians, Jews, and Muslims, who resist this change in any public way, would receive the swift and certain punishment of the law?

In conclusion, a regime's understanding of the nature of marriage is wholly contingent upon a cluster of beliefs about human nature and gender, not to mention the good, true, and beautiful. If this were not so, then proponents of same-sex marriage would have no metaphysical ground for their position. But, as we have seen, a necessary condition for the permissibility of same-sex marriage is for the state to declare that the notion of proper function of sexual organs is irrational. The Supreme Court has already provided this condition last year in *Lawrence v. Texas*, declaring that Texas's antisodomy law does not even pass the Court's rational basis test.[10] Moreover, if same-sex marriage were to become legal, it would result in the criminalization and social condemnation of the actions of serious religious believers. Regardless of what one may think of same-sex marriage, a government that affords it the approval and protection of its laws is instructing its citizens on what they ought to believe is good, true, and the beautiful. This is hardly a legally neutral position.

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[8] Hadley Arkes, "Homosexuality and the Law," in *Homosexuality and American Public Life*, ed. Christopher Wolfe (Dallas: Spence, 1999), 165. For more on the "Employment Discrimination Non-Discrimination Act," or EDNA, see http://www.pflag.org/education/civil-rights.html.

[9] Hadley Arkes, "A Culture Corrupted," *First Things*, November 1996, http://www.first-things.com/ftissues/ft9611/articles/arkes.html.

[10] See note 5.