

The Natural Need for Public Standards: The Case of Marriage Law

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The conventional defense of same-sex “marriage” is that it frees men and women to choose the way they define marriage, but that calls for something that is quite impossible because marriage is a social reality. Like all such products of socialization, it is learned behavior, and it is learned from the established cultural norms. When we contemplate marriage, we confront an institution that we do not define for the simple reason that it does not matter to the individual what he means by marriage, what matters is what his or her mate means by marriage. That shared value is by necessity learned because it is a commitment that cannot otherwise be communicated in a credible way.

One of the mysteries of our human constitution is that while we are endowed with autonomous wills and conscious minds, we are social beings, and in many ways the world in which we operate is a construct of other men and women, embedded in the culture. As a result, so much of everything that is human about us is not defined by our persons, but is learned from our social context. No aspect of our lives more clearly and forcefully expresses this fact than the institution of marriage. Most treatments of this topic focus on the legal aspects, but here I will shift the focus to the logic of marriage law itself, in the context of the function of the civil law in that application.

Among the animals there is no marriage; there is mating. The rules of mating are not learned behavior, because they are instinctive behavior governed by a kind of socialization that has been built up throughout history and embedded in highly visible physical realities, like colorful plumage and internal but equally physical realities in the animal brain and powerful hormones. As far as providing for future generations is concerned, mating is quite adequate for animals. In some quarters, moreover, marriage of men and women is considered to be just another fascinating instance of mating behavior. But marriage is not mating for one simple reason: Marriage is learned behavior. This sharp contrast parallels similar differences between human beings and animals, because the root of all kinds of acculturation is learned behavior. At the heart of social learning, in turn, is communication, and the substance of what we learn is expressed in ab-

stractions like concepts of right and wrong. The noted geneticist Spencer Wells (viz., *The Journey of Man*, Princeton University Press, 2002) points out that as a result of very extensive but fruitless attempts, we now know that animals cannot be taught language. The simplest expressions of need and want—anything that immediately implies action, like a cry for help—are accessible to them, but nothing more. Those simple forms of communication are rewarded and therefore they propagate in nature because they are a basis for cooperative effort. It follows that only men and women are capable of having what we call ideas. For any individual man or woman by contrast, almost all of the ideas we understand were learned from someone else. Even if a chimp were physically capable of having ideas, there is no other chimp that he could have learned them from, because there is no way for them to communicate and share ideas.

Studies of selection of husbands and wives for one another exhibit a startling absence of biological selection. Illustrative of this area of research is the empirical and speculative work by Gary Becker, Nobel laureate (see *A Treatise on the Family*, Harvard University Press, 1991). The Becker hypothesis is that men and women rank prospective wives and husbands on a scale of which of them will add the most to the subject's goals. For highly money-motivated men, a woman's endowed wealth or excellent income prospects will dominate that man's ranking. As often happens, other men will have similar rankings, and this thesis allows for contention for wives. The contention is resolved by the parallel rankings that the women bring to the table. While the direct evidence for this theorized selection process is limited, one conclusion is immediate: The leading social scientists of today still puzzle over the way men and women are motivated to marry. Their speculations tend in the direction of selection on traits that are rewarded, but only in highly indirect and derivative ways.

Sociological research carried out by David Buss on the other hand, and consisting of very extensive opinion survey data, implies that men rank prospective wives on a single, nearly universal scale—beauty—and women likewise rank prospects on an almost equally uni-dimensional scale. (See David Buss, *The Evolution of Desire* [Basic Books, 2003]) What that is not is biological selection in any meaningful sense: When all men agree on who is the most desirable woman and women likewise agree among themselves, the selection is not a choice, it is chance. "Choice" as a matching principle would accord to most, at least, their preferred mate. While greatly oversimplifying the process in its entirety, we can convey the essential logic of this point by characterizing the results as if all the men agree with each other that only one of their number won the most desirable bride. The psychology profession, or that part of it that concerns

itself with matters of romance, on the other hand has generally agreed that the reality of attraction is what we call “Love at first sight.” If so, that certainly goes some way to explain the lack of evidence of the Beckerian hypothesis, that would demand rather extensive weighing and sifting of comparative potential advantages by both men and women. Love at first sight would seem to rule out comparative shopping.

One thing is in any case clear. The triggers of marriage are built in a learned, culturally defined framework. The dependence of individuals on that frame is, ironically, most evident in societies in which the rules familiar to us are violated. In places where polygamy is accepted and practiced, young men and women approach each other with expectations adapted to polygamy and its implications. There are no other widely practiced variations on the usual theme, but this exception alone demonstrates that the culture can conform itself to alternative rules. In the process, it proves the rule that marriage is learned: men and women of the culture adopt the forms that their culture approves even despite the disapproval of other cultures. That is not to say that the forms are completely interchangeable, or that some are not more successful than others. Even in societies that accept polygamy, for instance, it is in practice rare, and getting rarer over time. This is just an example of the kind of selection as it applies to cultures themselves, in which more successful forms gradually replace less successful ones. In all things, “learning” is by definition itself a mechanism of natural selection.

Systematic intermarriage is even rarer than polygamy, but has proved to be remarkably durable. Among members of the Mennonite sect, which traces its communal roots in America back to the seventeenth century, members who marry outside the community are removed from it, and as a result, all living Mennonites (in principle, because nothing in life is quite this simple) are descended exclusively from the small party of settlers who founded their church in America. Most Americans find that a strange custom, but notwithstanding the disapproval of the wider society, we are forced to concede that it has been remarkably durable. The variety and durability of marital customs that any given community clings to proudly, even as outsiders reject and often condemn them, illustrates the flexibility of what we learn as the practice and meaning of marriage.

The learned aspect of marriage is evident also when it visibly fails. There are other ways for men and women to interact, ways that are in various degrees disapproved or condemned by the society, because they are harmful to the parties. Forcible rape is the most obvious example, of course, and is the most vigorously opposed, being a major felony and, when it leads to the killing of the victim, understandably grounds for the death penalty. Less serious but still condemned are exploitive forms of

seduction in which a man uses someone for his own ends without concern for the needs and interests of the victim. Seduction when carried to extremes—Don Giovanni being a model of this type—is condemned socially though generally not legally.

Virtually every person grows from childhood to the first years of adulthood learning the meaning that his or her community gives to marriage and its deeper meaning and special demands. There is, moreover, great overlap among communities, which with few exceptions permits marriages to form across the lines that separate the communities. There is a very high degree of agreement all over the world about what are the goals of marriage and about what kinds of attitudes and expectations lead to success. Very commonly, the formulation of this generally unwritten code is left to women to communicate, with results that men find eminently satisfactory. The advocates of same-sex marriage seem, or at least claim, to believe that there is no such code, and presumably as evidence for their position they point to the fact that it is not written down. This commitment to the written word, so admirable in contexts like the study of Shakespearean drama, is irrelevant when it comes to this marriage lore that is not learned from hornbooks, but is fashioned from the stuff of the daily experience of parents and their children.

The point that we need to fix on here is not the detail of what marriage is, but rather the prior fact that it must be learned before it can be practiced. No one emerges in the world formulating those demands and expectations that mean “marriage” for that person. No one would be capable of defining marriage for him- or herself. There are simply too many things to decide, too many options to consider, too much information required. If moreover it is true, as the evidence suggests, that love really does ignite at first glance, the individual would find himself in the paradoxical position of trying to define after-the-fact what he is already experiencing and what it was that he wanted.

THE ROLE OF THE CULTURE

This recounting of the foundations of marriage is actually not very controversial, though it would be laughable to honor it with the name of “theory.” Its far more modest pretensions are to demonstrate the learned aspect of this incredibly complicated phenomenon, to demonstrate that it is defined culturally. That one bit of insight already illuminates the issue of same-sex marriage and the thesis that lies behind it as a politicized movement.

The central tenet of the movement for legal recognition of marriage between men and marriage between women is that those men and those women have a right to decide for themselves what marriage is, for them. The fallacy of this idea stands out starkly in the fact that marriage isn’t anything for a

man or for a woman. Marriage is not defined at the personal level; it is a cultural phenomenon. If, moreover, the community did not define it, it would be undefined. There is no other possible source of its definition. That seems on the face of it a bold generalization, so some supporting thinking is called for.

Marriage is one of those special kinds of phenomena that no individual man or woman can do for himself. No matter how clearly and firmly an individual is able to define marriage on terms that appeal to him, nothing will come of it unless he finds a like-minded partner. Now, in a perhaps better world these young people would be mind-readers, but not in this world. The divorce statistics remind us how difficult it is for two persons to work together successfully in marriage, and part of that problem is that they can't read each other's minds. (A cynic might interject here that if they could, there would be even more divorces.) Numerous studies in the marketing field point to one sobering conclusion: that husbands and wives actually know very little about each other. That is to say, they know amazingly little about their partners' preferences and attitudes. So it seems that knowledge is not the key. Here again we see how little we know about what marriage is, but one truth remains. All of this makes it even more imperative that husbands and wives have a shared understanding of what marriage is. They can disagree about where to go on vacation, but they have to come to terms with the prior question of how that decision is made.

When boy meets girl—to get right down to brass tacks—they have to understand that they have a shared understanding of what marriage is, and the psychologists don't give them much time to find out. Now, what would be the consequence of a world without a learned, common marriage culture? That is easy to say: it would be a world in which men and women would be unable to marry. How could any young woman be so trusting, to the point of irresponsibility, to think that this prospect has any idea what it is that she wants and reasonably expects from marriage? If marriage were mating, it wouldn't matter. Or to be more exact, that whole question would be undefined. There would simply not be any wants or reasonable expectations, because only human beings have such things and human beings don't mate. To repeat, there wouldn't be marriage. To repeal by force of law the culture of reasonable wants and expectations is therefore to make marriage impossible. Now, of course, human beings are clever and creative beings, perfectly capable of working around the law to find a marriage that works, but the fact remains that the law would have become—and would have made a conscious effort to become—an impediment to marriage. The law exists to support the community and its cultural norms. That is what it is tasked with because that is what the citizens want from it. What use would we have of a law that intended to do the opposite?

THE ROLE OF LAW

The essence of legalization of public and cultural issues is to promote uniformity, and thereby to promote predictability. Traffic lights are a model of this much broader phenomenon. By communicating a signal to stop or to proceed, they inform drivers about what they should reasonably expect other drivers to do. As a result, the individuals have useful information that they need in making driving decisions. The whole point of the exercise is that everyone shares the same expectations. In American history, we have learned an almost visceral fear of Puritan imposition, but we also recognize that the information signal that comes from the traffic light is not an imposition on our freedom, it is in fact the realization of our freedom. We are freer *because of* the traffic light.

In a more serious context, we don't accept the arsonist's plea of innocence on the grounds that he doesn't consider pouring gasoline around the premises and tossing in a lighted match to be what he would call *arson*. He fully accepts that others do consider it to be, but on this matter he and we will just have to agree to disagree. And if moreover we then choose not to wave lighted matches around under such circumstances, he thinks we should be free to abstain. This is not an effective line of defense for him because he is not free to redefine arson, he is only free not to set fires. The parallel is beyond obvious. There really is such a thing as Puritanism, as the founders of the Massachusetts colony can attest, but culture is not Puritanism. It is a recognition that we live by cooperating with each other in many vitally important ways, but ways that no single one can define. We as a race are in many ways defined by our shared culture, and it is the remarkable abilities we possess individually both to learn complex ideas and to communicate them with each other that make this possible.

At this point in time it is the failure of acculturation, rather than its ruthless imposition, that oppresses the nation. At last report, only 52% of Americans are married, a remarkably low figure by any historical standards. Some of this is due to the aging of the population, but the overwhelming influences are the direct and indirect consequences of divorce. The first wave of direct consequences is the surge in divorces that was so evident twenty years ago. Even more insidious is the indirect consequence in which our men and women are unwilling or unable even to marry at all.

It would be nice if everyone in our community instinctively adhered to our cultural values, but we are not creatures of instinct. Just as our socialization is externalized, so must the defense of our culture be externalized through the instrument of the law, and even through the forcible implementation of legal sanctions. That is the price of freedom.