

Practical Implications of the Conjugal View of Marriage

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SHERIF GIRGIS, ROBERT GEORGE, AND I HAVE ARGUED that there is a comprehensive good called marriage.¹ And we engage in it by a comprehensive act that unites a man and a woman as husband and wife and then leads towards the comprehensive good of marriage: the creation and the raising of new life. It calls for comprehensive norms: monogamy, exclusivity, and permanency. But why should we care? And more specifically, why should we care for public policy? Why should we care for the law? Why should each state care? Why are the states in the marriage business in the first place? What, in other words, are the practical implications, and why does marriage matter for public policy purposes? What will be the consequences now that the states have been forced to redefine marriage?

To begin with, consider the fact that the state is not in the baptism or bar mitzvah business, even though those are also sacred events. So the state is not in the marriage business because of its sacred character, because it is a covenant or a sacrament. So why is the state in the marriage business? We argue that the government cares about marriage because of its secular social function.

The state cares about marriage because it is the institution that brings together a man and woman as husband and wife, to then be mother and father of any children that they might produce. Marriage

1. Sherif Girgis, Ryan T. Anderson, and Robert P. George *What is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012).

is based on an anthropological truth that men and women are distinct and complementary; it is based on the biological fact that reproduction requires both a man and a woman; and it is based on the social reality that children deserve both a mother and a father.

Whenever a child is born, a mother is always close by. Normally, she will be in the same room. That is a fact of biology. The question for law and the question for culture is: will a father be close by, and if so, for how long? The reason that societies across the globe and throughout human history have recognized marriage as a union of a man and woman is precisely to maximize the likelihood that that man commits to that woman and then the two of them, committed to each other, take responsibility for raising that child. This matters because when this does not happen, when spouses fail to commit to each other before having children or they fail to live out that commitment for the long haul, social consequences run high. If you look at the social science, you will see quickly that marriage has a public significance, and it impacts the public common good in a way that other types of friendships and relationships simply do not.

One reason why marriage matters is that there is no such thing as parenting in the abstract; there is mothering, and there is fathering. Mothers and fathers bring different gifts to the parenting enterprise. Professor David Popenoe summarizes the scholarship: “The burden of social science evidence supports the idea that gender different parenting is important for human development and the contribution to fathers to child rearing is unique and irreplaceable.”² He concludes: “We should disavow the notion that mommies can make good daddies, just as we should disavow the popular notion that daddies can make good mommies. The two sexes are different to the core. And each is necessary culturally and biologically for the optimal development of the human being.”³

What does Popenoe mean by this? Here we can do a simple thought experiment. Say I tell you it is Saturday morning, and a five-year-old boy is in the living room wrestling with one of his parents. This parent is teaching the boy to be masculine and aggressive, but not to be violent.

2. David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (New York: Free Press, 1996).

3. *Ibid.*, 197.

That it is okay to put people in headlocks, but it is not okay to bite or to pull hair or to gouge out eyes. Which parent is most likely in the living room? The father, of course. This not because we have engaged in gender stereotypes in which only fathers can wrestle with five-year-old boys; it is simply that this is what tends to come naturally to dads. This is how dads enjoy interacting with their five-year-old sons. In the same way, it is typically the father who throws the newborn baby up in the air, and it is the mother who says, “Honey, not so high.” That’s something that tends to come naturally to moms. They tend to be more protective, more nurturing. Maybe this is a result of having carried the child in the womb for nine months; there is a hard-wired connection to be more concerned about physical safety. Whereas for fathers there is a tendency towards what the sociologists call “rough and tumble play.”

So we consider what the father does for the five-year-old boy in the living room—wrestling, teaching that headlocks are good, but gouging out eyes is not good. We consider what the father does with the ten-year-old boy—perhaps throwing around the football in the backyard. We consider what the father does with the 15-year-old boy—preparing him for his first high-school dance. All of those things are helping that young man develop into a law-abiding, productive member of society, channeling distinctively masculine tendencies in a constructive rather than a destructive fashion. When we think about these anecdotes, we can better understand the social science that tells us that boys who grow up without their fathers are more likely to commit crime, less likely to graduate from school, more likely to end up in jail, and less likely to be employed. These anecdotes help illustrate all the ways in which fathers are shaping their boys into productive members of society.

Dads do something complementary for their daughters. Fathers, on average and for the most part, are larger than mothers and have deeper voices than mothers, and they were once young boys themselves. All of those things give fathers a unique capacity to scare away bad boyfriends and a unique interest in what sort of young man is pursuing their daughters, what sort of boy is taking their daughters on dates. A father who is married to his child’s mother also hopefully models what a good marital relationship looks like, and therefore what a daughter should be looking for in a husband. When you take a step back from the anecdote, you

better understand the social science that tells us that girls who grow up without their fathers are more likely to engage in sexual activity earlier and more likely to become pregnant outside of marriage. Even President Obama knows this to be true:

We know the statistics. Children who grow up without a father are five times more likely to live in poverty and commit crime, nine times more likely to drop out of school and 20 times more likely to end up in prison. They are more likely to have behavioral problems or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.⁴

This is Obama before he evolved. President Obama has spoken several times in a very moving way about the importance of fathers, and a couple of times he has explained why. When he gave the commencement address at Morehouse College (which is all-male), he said, “I have tried to be for Michelle and my girls what my father was not for my mother and me. I want to break that cycle.”⁵

That quote highlights why government is in the marriage business. It is not because the government is a sucker for romance. It is not because the government cares about your love life or my love life, because it is really concerned about the butterflies that we get in our stomachs when we fall in love. If that was all that marriage was about, the state could ignore marriage; the state could be out of the bedroom. The reason the government is in the marriage business is that that sexual union of a man and a woman can produce a child, and that child deserves the best shot of having a mother and a father to raise him or her to maturity. When this does not happen, social consequences run high—all of those statistics that Obama recited for us about crime, about drug use, about prisons, about not graduating from school, about not being employed, and about out-of-wedlock pregnancy turn into a vicious, self-perpetuating cycle.

What we have seen is that if you care about social mobility and you

4. “Obama’s Father’s Day Remarks,” *The New York Times*, June 15, 2008, available at <http://www.nytimes.com/2008/06/15/us/politics/15text-obama.html>.

5. President Barack Obama, “Remarks by the President at Morehouse College Commencement Ceremony” (Century Campus, Morehouse College, Atlanta, Georgia, May 19, 2013).

care about limited government, if you care about freedom and you care about the poor, if you care about social justice and you care about civil society—all of these things are much better served by a healthy marriage culture, by a healthy civil society that does what it is supposed to do. How do you fill in for that absentee dad? A welfare state provides a check, and a police state provides discipline. And they do not produce good outcomes, but they do cost a lot of money.

What we have seen in the past 50 years is the breakdown of the American family. Same-sex marriage didn't cause this problem; it is simply the latest iteration of it. None of the people who have been doing work on the marriage issue got into this primarily because of same-sex marriage; they got into this because of marriage. And 50 years ago, something started to change. Births to single mothers then were in the single digits. Today, 40% of all Americans are born to single moms—and the challenges for those children and for those families and for those communities are significant. We do not want to overstate what those challenges are; obviously President Obama did pretty well for himself. But he and his mom would be some of the first people to tell you that it was an uphill struggle.

So what are the consequences of redefining marriage? Many people understand that marriage is a comprehensive union of sexually complementary spouses, and the act that unites spouses also creates new life. They understand that the state is really in the marriage business because this new human life needs a mom and a dad, and we have to have an institution that encourages men and women to commit to each other and to be mother and father together. But many of these people then ask, how does redefining marriage in any way impact that? *What's the harm?*

There are three main consequences of redefining marriage, and all three fall under the general rubric of “ideas have consequences, and bad ideas have bad consequences.” These two different ideas, bad and good, are the two different visions of what marriage is: there is the “consenting adult romance” vision of marriage, where marriage is about an intense emotional relationship; and then there is the “comprehensive union” vision of marriage. The state will promote one or the other of these two visions of marriage, and the law will teach that one or the other is the truth about marriage. The law will then shape our culture; the culture in

which we and our children and our grandchildren live will then shape our beliefs; and then our beliefs will shape our actions. All three of these consequences follow from that general framework.

The first consequence is that when you redefine marriage to make it a genderless institution, there is no institution of public life left that can uphold even as an ideal that every child has a right to a mother and a father. Redefining marriage makes the institution more about the desires of the adults than about the needs or the rights of children. Redefining marriage sends the signal that men and woman are interchangeable, and therefore mothers and fathers are replaceable.

And if you doubt that the law has this capacity to teach, the case study that I would offer you is the case of no-fault divorce. Prior to the introduction of no-fault divorce laws in the United States, if you were to file for divorce, you would cite one of the “three a’s” from the common-law tradition: abuse, abandonment, and adultery. These were serious justifications for claiming that a relationship that was expected to be permanent now had to be declared over by a court of law. But with no-fault divorce, you could now abandon your spouse for any reason, even for no reason at all. You did not have to cite grounds for divorce. Some scholars refer to it as “unilateral no-fault divorce” because you also do not have to have your spouse’s consent—you can abandon your spouse for any reason, or no reason at all, without their consent. Some legal scholars have said that in many jurisdictions you have a greater legal obligation to your roofer or your plumber than you have to your spouse. There is no such thing as a unilateral no-fault get-out-of-your-roofing contract. Either your roofer has to consent, or you have to cite fault for why you are renegeing on that roofing contract.

Not so with the marriage contract. Over time, this understanding of marriage oriented people’s attitudes towards looking to that exit, looking to the way out of a marriage rather than working to salvage a marriage. Divorce rates more than doubled as a result during the first 20 years after the introduction of no-fault divorce laws.

Not all of this change in marital behavior is a result of the law, however. The law shapes the culture, but the culture shapes the law to begin with. One of the popular mantras from the 1960s was that “marriage should last as long as the love lasts.” It was that vision of marriage that

then gave rise to bad marriage laws, which in turn gave rise to even worse marital practice. Our understanding of marriage and the law will mutually reinforce each other, either for good or for ill. The same thing will take place in redefining marriage to include same-sex couples. I mentioned that right now 40% of all Americans are born to single mothers. This is what has inspired Obama to speak out about the importance of fathers. But how will we as a society insist that those fathers are essential when the law has redefined marriage to make fathers optional?

The second consequence of redefining marriage is that it will not stop with same-sex couples. If you really think marriage is just about the person you love, why would any of the three traditional Western marital norms be retained? Already, we are seeing activists who are challenging those three marital norms of monogamy, exclusivity, and permanency. There is a certain logic to what they are doing. So I want to acquaint you with three words that have been introduced by three mainstream, cutting-edge but not really far-out liberal publications—*New York Magazine*, the *New York Times*, and the *Washington Post*. These words describe where these publications would like to see subsequent marriage redefinitions go.

The first is the term *throuple*. A throuple is a three-person couple. This is the word that appeared in *New York Magazine* in a profile of a three-person relationship.⁶ This is called *polyamory*, and it is different from polygamy. *Polyamory* describes an entire ensemble, all married to each other. In *New York Magazine* it was the case of three men who lived with each other, loved each other, and took care of each other. They wanted to have joint bank accounts, wanted to co-own their property, all be on the deed to the car, *etc.* The basic argument was that if marriage is just about an intense emotional, romantic, caregiving relationship, why can't they be married? If you go before the Supreme Court and you say, "We demand marriage equality for the same-sex couple," why not marriage equality for the same-sex throuple, or the opposite-sex quartet? After all, the way that we arrived at monogamy in Western law and cultures is that it's the union of one man and one woman that can produce new life, and every new life has one mother and one father. Marriage is

6. Molly Young, "He & He & He," *New York Magazine*, July 29, 2012.

about uniting those people in a stable, exclusive, permanent relationship. But once you say the male-female aspect of the relationship is irrational and arbitrary and bigoted, what is magical about the number two? What is our basis for retaining marriage as the union of couples rather than of throuples or quartets?

The next term appeared in the *New York Times Magazine*, which is probably the most prominent publication in American public life.⁷ It was a profile of the gay-rights activist Dan Savage. And Dan Savage introduced the word *monogamish*. In other words, *kind of* monogamous. Savage wants to retain the number two. He thinks marriage should be the union of two people—he just does not think we should be so uptight about infidelity. His argument is that it is unrealistic to think that all of your sexual needs can be met by one spouse for the rest of your life; this is a holdover from an out-of-date Judeo-Christian moral tradition that we need to leave behind. Many marriages fail, Savage believes, because the couples are expecting sexual fidelity and sexual exclusivity, and when that does not happen it tears them apart. One thing that opposite-sex relationships could learn from same-sex relationships, he says, is the virtue of the open relationship, which he termed the monogamish relationship. He argues that, provided there is no coercion and no deceit, married couples should be free to seek out sexual relationships with people other than their spouse. The marriage could actually be enhanced. This would be a good further revision, a further redefinition of marriage. What used to be the vice of infidelity would now be the virtue of a monogamish relationship.

The last term conveniently appeared in the *Washington Post* right after the Supreme Court struck down the Defense of Marriage Act.⁸ It was written by Paul Rampell, a lawyer, who introduced the word *wedlease*. If *wedlock* denotes something that is strong and sturdy and permanent, *wedlease* is meant to denote the exact opposite. Just like you can lease a car or lease a house, Rampell was proposing that you should be able to lease your spouse, that we should have expressly temporary marriage

7. Mark Oppenheimer, "Married, With Infidelities," *New York Times Magazine*, June 30, 2011.

8. Paul Rampell, "A High Divorce Rate Means It's Time to Try 'Wedleases,'" *Washington Post*, August 4, 2013.

licenses. One of the problems with the way marriage is practiced in the United States is that we have this holdover out-of-date Judeo-Christian tradition that says marriage should be permanent. Rampell was saying, “No, maybe we should keep the monogamy part, maybe we should even keep the exclusivity part—but you shouldn’t think that you can live and love one person till death do you part. That’s unrealistic. That’s inhumane.” When marriage inevitably falls apart, because you cannot really live that out, that is what causes all of the heartache and all of the pain and suffering of divorce. But if you only signed up for a wedlease in the first place, if you only signed up for a five- or a ten-year marriage license, if it was going well at the end of the term you could renew it, just like you could renew the lease on your apartment or on your car. But if it was not going well it would just automatically dissolve. As a result, you would not be emotionally hurt; nothing wrong would happen to your family. Interestingly enough, not once did Rampell mention children.

Regardless of what you might think of the morality of sexually open, multi-partnered, temporary relationships, whatever you might think of the theology of such relationships, let us focus now merely on the policy implications. A state is (or once was) in the marriage business to get a man and a woman to commit to each other permanently and exclusively so that any children they create have the love and the care of a mother and a father. But the wedlease and the throuple and the monogamish relationship all directly undercut that purpose of marriage. The throuple, the wedlease, the monogamish relationship—they increase the number of sexual partners men and women have, and they decrease the amount of commitment that they have to each other. In other words, they increase the likelihood of creating fragmented families and fatherless children, and they decrease the odds of permanency, stability, monogamy. And yet all three of those revisions follow as night follows on day once you get rid of the male-female procreative aspect of marriage. Once you say that the conjugal comprehensive union view of marriage is irrational and arbitrary, what is principled about monogamy, exclusivity, and permanency? Why not throuples, monogamish relationships, and wedleases, if marriage is just about consenting adult love? Redefining marriage dissolves marriage into consent, and consent can come in as many different sizes and shapes as is imaginable, and as a logical matter why would an

impartial court stop such further redefinitions?

The third consequence of redefining marriage is for religious liberty. This is the consequence that we are living with most immediately. The law will teach something about marriage, either that people who believe that marriage is between a man and a woman are rational, reasonable, good citizens; or that people and institutions who believe that marriage is a union of a man and a woman are irrational haters who deserve to be marginalized from society and to be treated like we treat bigots. We saw this play out almost as soon as individual states began redefining marriage. Shortly after the Massachusetts court forced that state to redefine marriage, Catholic Charities was forced out of the adoption space. It has happened in Massachusetts; it has happened in Illinois; it has happened in Washington, D.C. Christian-run adoption agencies that wanted to find homes for orphans with married moms and dads were forced to stop.

In Massachusetts, they were told specifically that they would not be given a license to run the adoption agency unless they placed children with same-sex couples on an equal basis as with married mothers and fathers. And the charity said, "We have social science that shows that mothers and fathers aren't the same thing, and that children do best with a mom and a dad. We also have the First Amendment that protects our religious liberty to run our charities in accordance with our beliefs." But the state said, "No, you're violating our non-discrimination ordinance; if you don't treat the same sex couple in the same way as the opposite sex couple, we won't give you the license." It is illegal to run an adoption agency without an adoption license, so these agencies were forced to close.

Shutting down adoption agencies does absolutely nothing to help children find homes. None of those children who were looking for adoptive families were helped by reducing the number of adoption agencies. Adopting a child is not like getting your oil changed or renewing your driver's license at the DMV. It is a very intimate, personal experience, one in which you may want a faith tradition to guide you along the way of welcoming a new human being into your family. The Catholic Church has a long track record: they were taking care of orphans long before the state was taking care of orphans. And yet they were told, "Unless you do

it our way, we're going to shut you down." Those who believed marriage is a male-female relationship and that children deserve a mom and a dad were on the wrong side of history.

Since then, we have seen cases that involve bakers and florists and photographers. In all of these cases, the craftsmen and artisans were told, "You have to help celebrate the same-sex wedding, otherwise you're running afoul of our non-discriminatory statute." You are in trouble if you refuse to be the wedding photographer for the same-sex wedding, if you do not bake the wedding cake, if you will not do the floral arrangements, or, in the case of a farming couple in New York state, if you do not have the same-sex wedding in your home.⁹ The farmers lived on the second and third floor of their barn; they rented out the first floor about a dozen times a year for weddings. They were approached by a same-sex couple, and they responded that hosting a same-sex wedding at their home violated their belief of what marriage is. The farming couple was sued, and they were then fined \$13,000—\$10,000 to the state of New York, and \$1,500 to both of the women for their pain and suffering. Bakers in Oregon were fined \$130,000 for declining to bake a same-sex wedding cake. And a 71-year-old grandmother is being sued in Washington state—in both her professional and personal capacity—for declining to do wedding flowers for a same-sex couple. Never mind that she has employed gay people and served this particular gay couple for a decade; by not doing *wedding* flowers for them, she was sued for "discrimination."

The interesting thing in all of these cases is that all these people wanted was to be left alone. The bakers and florists were not trying to prevent other professionals from doing the same-sex wedding cakes and flowers. Catholic Charities was not preventing same-sex couples from adopting kids from the government-run agency or from the secular humanist agency. In the states of Oregon and Washington there are plenty of other bakers and florists, many of whom support same-sex marriage, all of whom are interested in making money. These people were not imposing their values on anyone, and yet in all these cases they

9. Andrea Peyser, "Couple Fined for Refusing to Host Same-Sex Wedding On Their Farm," *New York Post*, November 10, 2014.

lost. Their loss signals that those who believe these things about marriage are not welcomed as full members of our community.

Again, this is one of the bad consequences of bad ideas. On this issue, the left has hijacked the language of the civil-rights movement, and is saying that if you are against same-sex marriage it is the same thing as being against interracial marriage, even though those two cases have nothing to do whatsoever with each other historically, philosophically, or theologically. It is a very convenient club to use to beat up on people.

What to do now?

In January 1973, the U.S. Supreme Court created a constitutional right to abortion throughout all nine months of pregnancy in *Roe v. Wade* and *Doe v. Bolton*. Pro-lifers were told they had lost and the issue was settled. The law taught citizens that they had a new right, and public opinion quickly swung against pro-lifers by as much as a two-to-one margin. One after another, formerly pro-life public figures—Ted Kennedy, Jesse Jackson, Al Gore, Bill Clinton—“evolved” in their thinking to embrace the new social orthodoxy of abortion on demand. Pundits insisted that all young people were for abortion, and elites ridiculed pro-lifers for being on the “wrong side of history.”

The pro-lifers were aging, their children increasingly against them. The only people who continued to oppose abortion, its partisans insisted, were a few elderly priests and religious fundamentalists. They would soon die off, and abortion would be easily integrated into American life and disappear as a disputed issue.

But courageous pro-lifers put their hand to the plow, and today we reap the fruits. My generation is more pro-life than my parents’ generation. A majority of Americans support pro-life policies, more today than at any time since the *Roe* decision. More state laws have been enacted protecting unborn babies in the past decade than in the previous 30 years combined.

What happened? The pro-life community woke up and responded to a bad court ruling. Academics wrote the books and articles making the scientific and philosophical case for life. Statesmen like Henry Hyde, Edwin Meese, and Ronald Reagan crafted policy and used the bully pulpit to advance the culture of life. Activists and lawyers got together, formed coalitions, and devised effective strategies. They faithfully bore witness to

the truth.

Everything the pro-life movement did needs to be done again, now on this new frontier of marriage. There are three lessons in particular to learn from the pro-life movement that I explore at length in my new book, *Truth Overruled: The Future of Marriage and Religious Freedom*¹⁰:

1) We must call the court's ruling in *Obergefell v. Hodges* what it is: judicial activism.

Just as the pro-life movement successfully rejected *Roe v. Wade* and exposed its lies about unborn life and about the U.S. Constitution, we must make it clear to our fellow citizens that *Obergefell v. Hodges* does not tell the truth about marriage or about our Constitution.

2) We must protect our freedom to speak and live according to the truth.

The pro-life movement accomplished this on at least three fronts. First, it ensured that pro-life doctors, nurses, pharmacists, and hospitals would never have to perform abortions or dispense abortion-causing drugs. Second, it won the battle—through the Hyde Amendment—to prevent taxpayer money from paying for abortions. Third, it made sure government could not discriminate against pro-lifers and pro-life organizations.

Pro-marriage forces need to do the same: Ensure that we have freedom from government coercion to lead our lives, rear our children, and operate our businesses and charities in accord with our beliefs—the truth—about marriage. Likewise, we must ensure that government does not discriminate against citizens or organizations because of their belief that marriage is the union of husband and wife.

3) We must redouble our efforts to make the case in the public square.

We have to bear witness to the truth in a winsome and compelling way.

10. Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, D.C.: Regnery, 2015).

The pro-life movement accomplished this on different levels. Specialists in science, law, philosophy, and theology laid the foundations of the pro-life case with research and writing in their disciplines, while advocacy groups tirelessly appealed to the hearts of the American people. Pro-lifers did much more than preach, launching a multitude of initiatives to help mothers in crisis pregnancies make the right choice.

Now we must employ reason to make the case for the truth about marriage, communicate this truth to our neighbors, and embody this truth in our families and communities. Just as the pro-life movement discovered the effectiveness of ultrasound and letting women speak for themselves, the pro-marriage movement will, I predict, find the social science on marriage and parenting and voices of the victims of the sexual revolution to be particularly effective. Just as grassroots pregnancy centers exposed the lie that abortion is a compassionate response to unplanned pregnancy, we must show what a truly loving response is to same-sex attraction.

In *Truth Overruled*, I explain, in clear and sober terms, the enormous task before us of defending our families, churches, schools, and businesses from opponents who now wield coercive power in government, commerce, and academia. My goal is to equip everyone, not just the experts, to defend what most of us never imagined we'd have to defend: our rights of conscience, our religious liberty, and the basic building block of civilization—the human family, founded on the marital union of a man and a woman.

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