

THE CASE FOR MARRIAGE*

KEYWORDS: Marriage. Essence. Same-sex “marriage”. Interdisciplinary. Robert P. George.

PAROLE CHIAVE: Matrimonio, Essenza, “Matrimonio” Gay, Interdisciplinare, Robert P. George.

1. INTRODUCTION

OVER the years, certain segments of Western society have been gradually called upon to recognize that homosexuality represents just one more type of sexual orientation.¹ Any attempt to consider homosexuality a psychological disorder or disease has been frowned upon if not vehemently rejected. Some are of the view that the time has come when society’s attitude towards homosexuality can no longer be reduced to mere tolerance. There would be a pressing need to recognize the fact that homosexuality belongs to our present reality, and that homosexuals, therefore, have a right to be treated in the same way as heterosexuals. According to this current of thought, to act otherwise would amount to unjust discrimination. It is argued that heterosexuality is, in fact, no more than just another type of sexual orientation. Hence, if the law permits heterosexuals to marry legally, homosexuals should also have the same legal right: same-sex unions should, consequently, be legally recognized as marriage.

There is an ongoing public debate on whether or not this claim is justified. Some have posed the queries: Are we denying homosexuals their fundamental natural right to enter into marriage? Hasn’t the time come for the law on marriage and the family to take into account recent cultural changes by re-

* Commentary on Robert P. George and Jean Bethke Elshtain, eds. *The Meaning of Marriage: Family, State, Market, and Morals*. Dallas (TX): Spence Publishing Company, 2006.

¹ The issue of homosexuality and the moral evaluation of homosexual acts has increasingly become a matter of public debate, even in Catholic circles. The Magisterium of the Catholic Church has consequently felt the need to reiterate the traditional teaching as summarized in the *Catechism of the Catholic Church*, n. 2357-2359. It has also sought to provide arguments – drawn not only from faith but also from reason – in four documents published by the Congregation for the Doctrine of the Faith: “Declaration on Certain Questions Concerning Sexual Ethics, *Persona humana*” of December 29, 1975, “Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons, *Homosexualitatis problema*” of October 1, 1986, “Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons” of July 23, 1992, and “Considerations Regarding Proposals to give Legal Recognition to Unions between Homosexual Persons” of June 3, 2003.

vising the definition of marriage so as to include same-sex unions? Still others raise the question: given that our society is characterized by a pluralism of cultures, shouldn't the state refrain from endorsing a specific view with regard to this institution? Should the law be neutral? ... The list is endless.

Be that as it may, many authors have also acknowledged that in the past eighty years there has been a movement away from a sound understanding of marriage as a true conjugal partnership toward a conception of marriage as a sexual, romantic, domestic partnership in which children are just a matter of subjective preference. In this kind of relationship everything boils down to emotional union, and the sexual-bodily dimension in its rich significance disappears. Others consider that it is because marriage has declined to this point that you have a demand for same-sex "marriage". If the conjugal conception of marriage were secure in people's minds, nobody would think that same-sex "marriage" was marriage at all.

From the foregoing, it is evident that the publication of a book on marriage and its meaning has never been timelier.²

Robert P. George, prominent Professor of Jurisprudence and Politics at Princeton University, America's most influential conservative Christian public intellectual, and one of the editors of the book which I present in this note, is currently at the forefront of the debate on marriage. George holds that the only way to correctly respond to the queries raised hitherto is to discern the true essence of marriage, to appreciate what marriage truly is.

The second author of the book is Jean Bethke Elshtain, the Laura Spellman Rockefeller Professor of Social and Political Ethics at the University of Chicago. Elshtain is also a senior fellow of the Witherspoon Institute.

"*The Meaning of Marriage: Family, State, Market, and Morals*" brings together essays presented to an audience of scholars, journalists, public policy experts, and other professionals at a conference at Princeton University sponsored by the Witherspoon Institute. The Institute is an independent research centre located in Princeton and it works to enhance the public understanding of the moral foundations of free and democratic societies.

The authors are among the most eminent contemporary authorities on

² Other pertinent and important works on marriage have also been published in the recent past. Outstanding among them is Sherif Girgis, Robert P. George and Ryan T. Anderson. "What is marriage?" *Harvard Journal of Law and Public Policy* 34 (2010): 245-287. Others include: John M. Finnis, *Collected Essays*. Vol. III, *Marriage: A Basic and Exigent Good* (New York: Oxford University Press, 2011); Robert P. George and Gerard Bradley. "Marriage and the Liberal Imagination." *Georgetown Law Journal* 84 (1995): 301-320; Patrick Lee and Robert P. George. "Quaestio disputata: What Male-Female Complementarity makes possible: Marriage as a two-in-one-flesh union." *Theological Studies* 69 (2008): 641- 62 and Patrick Lee and Robert P. George. *Body-self Dualism in Contemporary Ethics and Politics*. New York: Cambridge University Press, 2008.

marriage and public policy in the English-speaking world. They constitute the best of scholarship on marriage from a variety of disciplines: history, ethics, economics, law and public policy, philosophy, sociology, psychiatry, and political science.

These thorough yet accessible studies aim, as the introduction to the book affirms, to “rethink and re-present the case for marriage as a positive institution and ideal that is in the public interest and serves the common good”. In so doing, these studies create a basis for the justification of marriage as a legal institution. The authors address the status of marriage in twenty-first century America. They seek to examine marriage in a context that is broader than the immediate same-sex debate as they sustain that marriage as an institution was already in crisis in the American society much before the rise of the same-sex marriage debates.

2. CONTENT

In the first essay entitled “Sacrilige and Sacrament”, Roger Scruton, a philosopher, begins by discussing the two perspectives from which an institution may be observed: the external and the internal. He points out that marriage is one of those institutions that we spontaneously see both from the outside, in terms of its social function, and from the inside, in terms of the moral and spiritual condition that it creates. Scruton then makes a brief historical presentation of the institution of civil marriage, its sacralization and desacralization. Following which, he examines the nature of contracts and vows so as to bring out the difference between marriage and the new kind of civil union. He concludes by considering the present situation as concerns same-sex marriage in light of what he has developed in the essay. Scruton shows that traditional marriage is justified both from the external and the internal perspective but that the political climate hinders the public recognition of this truth. The essay is rich in references to the thought of ancient philosophers and classical literary works which makes it at once academically persuasive and pleasant to read.

The second essay deals with three issues which the authors, Don Browning and Elizabeth Marquardt, sustain arise from the question regarding whether our present society should allow persons who believe that they have a homosexual orientation the privileges and responsibilities of civil marriage. The essay, “What About the Children? Liberal Cautions on Same-Sex Marriage,” addresses the character of our present society (modernization), the meaning of civil marriage and the nature of same-sex attraction. Browning, a scholar on marriage and the family, and Marquardt, an expert on family studies, observe that these three issues have often been ignored in recent discussions on same-sex marriage. Their approach is that of religious and

political liberals. In the essay, they argue that same-sex marriage is most particularly an infringement on the rights of children, whose voices are often neglected.

When examining the issue of modernization, Browning and Marquardt point out that the question of same-sex marriage should not be approached as a single issue isolated from a wide range of social trends. Modernization leads to increasing dependency on market, state, formal education, and peer groups, which tends to replace the traditional patterns of mutual dependency based on husband-wife and parent-child relationships. According to the authors, modernization has led to the introduction of a variety of separations and disjunctions into the complex range of goods that the institution of marriage legally and religiously has intended to integrate and hold together. As a result, the idea and reality of marriage has been reduced to an affectionate sexual relationship of tentative commitment and uncertain duration. The market, medicine and reproductive technology as well as the law are some of the areas where this disconnection among certain goods of the institution of marriage takes place. The authors illustrate this using examples.

While acknowledging that marriage is a complex social phenomenon, Browning and Marquardt state that the history of marriage has seen an exaltation of its unitive values at the expense of the procreative ones. Indeed, the present debate over same-sex marriage is in a way about whether the former values should now become almost completely separated from the latter, and yet still enjoy the legal privileges and protections of traditional marriage.

Next, Browning and Marquardt discuss four strategies for coping with the tensions between marriage and modernization, the last one being the position that the authors represent: "critical familism". By promoting a reconstructed view of gender and work-family relations in modern marriage, critical familism tries to retain the historic alignment of sex, affection, generativity, child care, and mutual assistance accomplished by the institution of marriage.

The authors then tackle the meaning of marriage. Using historical references, they demonstrate that philosophical and naturalistic views of marriage can be found in the Western religious marriage theory. This theory is said to have brought both religious and legal support to the consolidation of "kin altruism". This consolidation preserves the good of marriage, whether seen as a philosophically conceived intrinsic good or a religious sacrament or covenant.

After discussing the strategy proposed by Jonathan Rauch and Martha Fineman, Browning and Marquardt propose a two-part solution. The first one seeks to retain the historic child-centered view of marriage at the heart

of law and public policy as well as the consideration of other legal and cultural changes that help support marriage (apart from advocating the denial of legalized same-sex marriage). The second part is a proposal to meet the dependency needs of other classes of individuals through appropriately targeted legal contracts and social programs.

Finally, the authors discuss the concept of homosexual orientation. After briefly revisiting critical familism, they conclude by pointing out that the definition, renewal and reconstruction of marriage should be primarily in the hands of the institutions of civil society.

Economic historian, Harold James, in his essay "Changing Dynamics of the Family in Recent European History" looks at the interaction of the family, the state and the market from a historical perspective. In his opinion, the interplay of these three factors is characteristic of the last two or three centuries. A lot has been said concerning the efficient and just operation of the state and the market. The family has however, often times, been left out. In the rest of the essay, James examines the role of the family in the state and the market. In his words: "The claim of this paper is that the family is the central, and indeed only, social institution that is capable of assuring inter-generational and inter-temporal equity. The family is not only a source of stability, but also of dynamism, creativity and innovation; and its capacity to produce or stimulate innovation depends on its stability-generating functions. The paper tries to explain why this is the case."

The author starts by looking at the relation between family and enterprise. He focuses on family firms which he believes represent, in many national cultures, the most common form of enterprise. He points out that over three quarters of registered companies in the industrialized world are family businesses. The pros and cons of family businesses have been debated upon over the centuries. What James deduces from the examination he carries out is that the story of economic development is best understood as the narrative of the interplay of families, states and markets, and of the differing ways in which they understood themselves and each other.

In the last section of his three part essay, James discusses the nature of marriage. He begins by citing the widely accepted modern view of marriage as a search for satisfaction, for happiness. Children are considered a nuisance because the key relationship is that of the married partners. This interpretation does not, however, take into account what was at the core of the traditional view: that marriage is a particular kind of relationship which lasts until death and that it is concerned with reproduction.

Jennifer Roback Morse in "Why Unilateral Divorce Has No Place in a Free Society" seeks to show that unilateral divorce is not consistent with minimal government. The author, an economist, considers this the main reason why libertarians must discard the "laissez-faire" argument in favor of unilateral

divorce. It is also why the free choice argument in favor of gay marriage should be done away with, she adds.

Marriage is an organic social, pre-political institution that arises spontaneously in any society. As such it has its own intrinsic informal methods of enforcement. It is not a creation of the state. In fact it is the conception of marriage as a legalistic institution that leads to an increased interference by the government in its enforcement. The functioning of a minimal government presupposes the formation of social institutions, without which the individual would find himself naked and isolated before the state and completely dependent upon it. In addition, the stability of these institutions lowers the social costs of resolving private conflicts.

Morse discusses the undermining of the sanctity of the marriage contract in today's society. Nevertheless, she is of the opinion that considering marriage a contract is an incomplete view.

After stating – what for her is a well-established fact – that most divorces are initiated by women, she examines the reasons why women choose divorce. The author concludes by stating that to bring about a culture of life-long marriage, women need to see marriage in a more positive light.

Professor of Law, David F. Forte in “The Framers’ Idea of Marriage and Family”, examines the thought of the American founding fathers with regard to the family and marriage. He considers that although the founders seldom dealt with the family explicitly, they acknowledged the important social functions both the family and marriage have in the society. The silence of the founders is attributed to the fact that the family was the accepted substratum of society. They saw the family as the context in which the person grew in the virtues necessary for a free republic. Forte carries out a study of the sources the framers drew upon to understand the connection between family virtues and civic virtues: Aristotle and the Christian view, and later on, the inheritance of the Scottish enlightenment and a Protestant notion of the role of a providential God. The author concludes by pointing out that the family is the most important conflict-resolution mechanism in society, which is the reason why well-functioning families are so successful for forming persons possessing virtues necessary for the stability of the society.

The institution of marriage cannot be insulated from any attachment to the laws, or to the policy marked by those laws. This is what Hadley Arkes puts forth in his essay “The Family and the Laws”. Against those who seek to detach marriage from the civil law, he explains how the relationship between marriage and law has been relevant since the time of the Greeks, from the very time there have been laws. Marriage cannot therefore be relegated to the domain of the personal and private; it has a moral and public import in society. Consequently, neither can sexuality be purged of its legal and moral dimensions. The political scientist and professor of American institutions

observes that even those who are in favor of a new regime of marriage seek to have restrictions put into place once these new set-ups are included within the definition of the institution of marriage. He shows how the legalization of homosexual marriage threatens to vitiate nearly any regulation of sexuality. The author supports the traditional family structure; in this endeavor he acknowledges the importance of social scientific data but goes further to examine the principles at the base of his position.

“What’s sex got to do with it? Marriage, Morality, and Rationality” is the title of the essay written by Robert P. George, legal philosopher, and professor at Princeton University. George explores the topic of marriage from a practical philosophical viewpoint. He bases his thought on Aristotelian-Thomistic philosophy and draws from his own school of thought, the New Natural Law Theory. Given that the person chooses and acts in light of intelligible goods that provide basic reasons for choice and action, George concludes that philosophical reflection is necessary so as to capture the nature of these goods and reasons, understand their relationship and hence appraise social practices. Marriage is an intelligible good which, because it is an end-in-itself, is an intrinsic good, a basic human good. Understanding marriage in this way constitutes the starting point of practical reasoning. People have intelligible reasons for respecting its norms of permanence, exclusivity and sexual complementarity because marriage is a basic human good. Moreover, the one-flesh unity of marriage is not a merely instrumental good; it is also an intrinsic good. It is understood to be the central defining good of marriage. The fact that marriage is a one-flesh communion of persons shows that marriage is inherently heterosexual and monogamous. This two-in-one communion of persons is only made possible by the biological, emotional, and spiritual complementarity shared between man and woman.

With regard to the role of the law and the government in defining marriage, George affirms that they should not be neutral. Governments should embody in their laws and policy the soundest understanding of the institution of marriage. The justification for this is that the law is a teacher and the culture it creates is not indifferent to the concept of marriage held in a society.

In this essay, George presents an excellent succinct account of the philosophical arguments on which he bases his claim that same-sex marriage violates not only tradition but also human reason.

Seana Segrue, a political theorist, in her essay entitled “Soft Despotism and Same-Sex Marriage” seeks to establish that same-sex marriage will contribute to the demise of political liberty. This she attributes to the fact that the growing jurisprudence of privacy rights serves to augment state regulation in domains in which it is not fit to rule. To illustrate her thesis, Segrue examines the role of three institutions of civil society that mediate between

the individual and the state, and in so doing support the former's liberties. These institutions are the market, the family and religion. She makes a brilliant exposition on the nature and role of an institution of civil society. Concurrently, Sugrue shows the consequences of an excessive intervention by the state in these three institutions; most importantly, it leads to usurpation of the institution's power of self-governance and a gradual weakening of the freedom of the individual. In support of her argument, the author makes reference to two significant figures in the history of the American nation: John Locke (widely regarded as the philosopher of the American founding) and Alexis de Tocqueville.

Maggie Gallagher is the author of "(How) Does Marriage Protect Child Well-Being?" In this essay, using social science evidence, the writer looks into whether married heterosexual parents are important to child well-being. Gallagher also examines the social science literature on gay parenting. She concludes by discussing how and when marriage protects child well-being. Social scientists are in agreement that children do better, on average, when their parents get and stay married so long as those marriages are not high-conflict or violent. Citing a study carried out recently, Gallagher enumerates a number of the positive outcomes of marriage for children and adults. She mentions that there is a contradiction between evidence on social science consensus on family structure and evidence from social science literature on sexual orientation and parenting. In an attempt to resolve this inconsistency, the author shows, using examples, that reviews of the latter have led to the detection of serious scientific limitations. Gallagher makes it clear that the benefits of marriage are not a consequence of its existence as a legal institution. These flow from the very nature of marriage.

In "The Current Crisis in Marriage Law, Its Origins, and Its Impact" legal theorist, Katherine Shaw Spaht carries out a historical study of family and marriage in the United States. She records the development of the judicial and legislative approach to marriage. Using key court cases, Spaht shows how the institution of marriage has been changing in the American society both from a cultural and a legal point of view. She points out that those who have been at the forefront of this transformation are legal scholars, judges and lawyers rather than the populace. Spaht examines the historical impact of the law on the three main characteristics of traditional marriage: permanency, sexual complementarity and mutual fidelity. She holds that permanency was the first to be rejected by the law and the other two are currently under threat. Spaht concludes on a positive note by briefly making reference to different indications in the present society of attempts to safeguard and re-establish the traditional meaning of marriage. The essay is well-structured and gives a good overview of the milestones of family and marriage law in the United States. The author employs numerous bibliographical references

which, though they attribute scientific weight to the essay, may nevertheless make its reading slightly tedious.

W. Bradford Wilcox in "Suffer the Little Children. Marriage, the Poor and the Commonwealth" begins by considering that marriage not only serves private goods but also functions as a public institution with important public purposes. Marriage thus not only promotes social order by regulating sexual and emotional relations but also bestows considerable benefits to society, but especially, to children. The sociologist, on examination of studies carried out, concludes that a strong marriage culture protects the poor. He also looks into the consequences of the introduction of the contraception pill and the legalization of abortion on marriage, the family and the society as a whole. To support his thesis Wilcox has recourse to research findings of Robert Michael, economist at University of Chicago, George Akerlof, Nobel-prize winning economist and professor at University of California, Berkeley, and Sara McLanahan, a sociologist at Princeton University.

3. CONCLUSION

The essays published here were intended to bring about the rethinking and re-presentation of the case for marriage as a positive institution. The authors sought to convince their audience that marriage is an ideal that is in the public interest and serves the common good. Have they achieved this goal? I believe that the response to this question depends on the perspective from which it is addressed.

These studies could be examined from the point of view of the impact they have had on public opinion, and consequently on the public debate. If one were to consider the fact that since 2006, the year of the publication of this book, same-sex marriage has been legalized in at least six states in the U.S.A. and six countries in the world, their efficaciousness could be questioned. Moreover, arguments in favor of, and the social pressure for, granting marital legal status to homosexual couples are gaining strength and popularity not only in America but also in other countries across the globe. The situation is exacerbated by the gradual weakening of the institution of marriage and the family. One, nevertheless, cannot overlook the fact that, to date, about thirty states in America have introduced clauses in the state constitution that prohibit gay marriage.

From the viewpoint of its academic contribution, however, this volume brings together well-seasoned intellectual arguments. The essays focus on marriage from different perspectives thus giving the reader an all-round vision of marriage. The studies were aimed at examining the American society; consequently, this is the context in which the authors develop their thought. Their considerations and conclusions are, nonetheless, relevant

and applicable to any social order due to the fact that they are founded on universal principles of social, political and legal philosophy, sociology and law.

I am of the opinion that, even though these arguments may not have an immediate resonance in the public debate, they constitute a good foundation for further research which could serve to diagnose the problems facing marriage today and prescribe effective long-term solutions. Further investigation could be carried out, for instance, in the field of social sciences as this would serve to strengthen the arguments in favor of the social function of marriage. In addition, it is my view that a more thorough examination of the historical and philosophical understanding of marriage will contribute to a better comprehension of the essence of marriage. The enquiry into the canonical roots of marriage is another aspect that cannot be overlooked in this endeavor. In fact to be able to appreciate the essence of the Anglo-American marriage law, it is vital to appreciate its origin and roots in the law of the Catholic Church.

This book will prove to be useful for a wide range of readers: politicians, university professors and students, public policy makers, sociologists, historians, jurists, philosophers, journalists and religious leaders.

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