

After Same-Sex Marriage . . .

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Abstract

It seems increasingly likely that the battle over same-sex marriage will be won in the near future – either because the U.S. Supreme Court will imminently declare that same-sex marriage bans violate the U.S. Constitution, or, if not, because the growing shift in public opinion will cause states to repeal same-sex marriage bans in the next years. But when it comes to a society premised on human dignity and equal justice for all, given that opposite-sex couples can marry, the question of whether to allow same-sex couples to marry has been an easy call. Once we move past that question, we confront more difficult issues about how the state should treat relationships among adults.

A number of possibilities have been proposed by commentators. Some call for disestablishing marriage and recognizing only domestic partnerships for those who want a formal relationship status. Some would get the state out of the business of formalizing adult relationships entirely, including not only eliminating marriage, but also domestic partnerships – leaving adult relationships to be regulated by contract. Others argue that all families – whether headed by one, two, or three adults – deserve respect and should be supported equally by the state. And a waning number of scholars argue that marriage should remain as the sole protected conjugal status for adults, even if the institution is opened up to same-sex couples.

In this talk, I set out principles that I argue should guide state regulation of relationships going forward. First, I make the case that the state should not be neutral to whether citizens enter relationships, but instead has an important interest in supporting certain relationships between adults – specifically, those that are long-term, mutual, caretaking relationships. This is because these relationships help meet the needs for caring and caretaking that must be satisfied for citizens to lead dignified lives and for a flourishing society. While the state could potentially support these relationships without providing any formalized statuses, it has become increasingly clear that the formal commitment to a long-term relationship itself helps facilitate the stability of these relationships, and that formalizing these rights increases partners’ understanding of the rights and responsibilities they are assuming.

Second, I argue that marriage should continue to be one of the formalized statuses offered by the state. I say this with significant reservations: Marriage certainly has many strikes against it in a society committed to equality. It was historically the marker for distinguishing between relationships considered legitimate from those considered illegitimate (indeed, this was literally the case with respect to children born inside and outside of marriage). It is an institution founded in sex inequality and that still sounds in gender complementarity, although that will hopefully wane in the wake of same-sex marriage. It has a long history of heteronormativity that has not yet been conquered. It was historically marked by racial exclusion and then racial separatism. Further, even as these formal exclusions have been removed, informal exclusions have begun to

take their place: Marriage is being increasingly defined by class – disappearing among the poor and working classes while remaining healthy in the professional class and among the well-to-do.

Yet while some exclusive institutions should be eliminated in the interests of equality, others should be opened up and democratized. Marriage, I argue, falls into the latter category. It is still the best institution that we have for raising sound children, as well as for ensuring the wellbeing of adults. Of course, the state could scrap marriage and provide domestic partnerships as the only formalized status; to do so would certainly further the important principle of democratic equality. What we know from the low rate at which same-sex couples entered civil unions, however, is that marriage draws couples into it because of its specific cultural meaning; couples would not enter into an institution without this significance at nearly as high a rate.

Third, accepting my first two points, that the state should actively support relationships among adults, and that marriage should be retained as a status, I argue that four rules should govern the state's treatment of these relationships:

1. The state should support a broad range of caretaking relationships.

- In that the state's interest is in long-term caretaking relationships, the category of relationships that the state has an interest in supporting is considerably broader than those whom the state allows to be married currently, including in those states that currently allow same-sex marriage. These include couples who are not necessarily monogamous, or, at the opposite end of the spectrum, those whose relationships are not sexual. It also includes groupings that involve more than two adults.
- This requires that the state make available alternative forms of formal relationships, including domestic partnerships for marriage resisters and others who want to enter into this status.

2. Marriage should be retained, but democratized.

- This means making marriage truly available across races and classes. Given that lack of economic security and job stability are a key factor that make marriage a privileged status, it is high time that the state does what it can to redress this situation.
- Democratizing marriage not only requires that marriage be made more available across different sectors of society, it also requires that it be a more equal institution. This requires more of a push for gender equality in marriage. In the U.S. this means regulating job structures to accommodate family responsibilities in a more equal way.

3. Some rights and responsibilities should be accorded to those in long-term relationships that have not been formalized, both for the purpose of granting public support for caretaking (such as family leave), and for the purpose of ensuring fairness between members of the couple (such as some property sharing at the end of the relationship).

- 4. Supporting long-term caretaking relationships is only one of many important goals that a fair-minded state should pursue. Other goals, including the principle of assisting citizens most in need of aid, should limit the extent and manner of state support for those in caretaking relationships.**