

Why Exclude Oedipus?: On the Incoherent Statism of Same Sex Marriage

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Shortly after the Americans liberated Iraq, they changed the Iraqi traffic code because it was enforced by Baathist-appointed traffic police who would pocket fines as often as they would properly enforce the code. But “cleaning up” the corrupt institution caused horrible traffic jams in a city where car bombs are the weapon of choice. William Langewiesche hauntingly describes how by simply changing one humble yet pivotal social institution, a government wreaks havoc on society.¹

When Canadian parliamentarians reconvene the same-sex marriage debate this fall, they may wish to ponder the enormity of changing a law whose simple change affects the basic functioning of society. The political battle to redefine marriage to include same-sex marriage (SSM) carries numerous implications about which no partisan can predict. As McGill professor Douglas Farrow argues, the fact that very few homosexuals have gotten married, or that the “sky has not yet fallen,” is irrelevant because the debate over SSM is over ideas and the very intelligibility of marriage. Farrow points to an implication overlooked by nearly everyone, except surprisingly the French government, which is that SSM silently removes the concept of natural parent from Canadian law, and “at a stroke, made parenthood a gift of the state – a legal construct – rather than a natural right.”² Legal constructs are creations of an activist state. A society that regards rights as legal constructs and not rooted in nature endangers its freedom. If rights are what Parliament or the Supreme Court say they are, then citizens have no legal or moral recourse to defend themselves against the arbitrary power of the state. No partisan on either side of the SSM debate wants to be put into that position.

Yet, the question of nature and the moral basis for our rights, is at the crux of the SSM debate. Both sides of this emotionally charged debate seek a way of sustaining institutions capable of offering protection and solace for individuals, as well as nurturing the next generation. This debate is also a microcosm of a fundamental transformation of our society that started in the sexual revolution of the 1960s. The revolution’s rejection of traditional sexual morality, which for centuries regarded erotic desire as something to

¹ William Langewiesche, “Welcome to the Green Zone,” *The Atlantic Monthly*, November 2004 (<http://www.theatlantic.com/doc/prem/200411/langewiesche>).

² Douglas Farrow, “Let’s Have a Responsible Vote on Same-Sex Marriage,” letter to *National Post*, 17 June 2006 (reprinted here: <http://www.marriageinstitute.ca/pages/RESPONSIBLE%20VOTE.htm>). More sustained political and legal analysis of SSM can be found in the essays in *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment*, eds., Daniel Cere and Douglas Farrow, (Montréal-Kingston: McGill-Queens University Press, 2004) and at the website for the Institute for the Study of Marriage, Law, and Culture (<http://www.marriageinstitute.ca/pages/articles.htm>). While many of these sources are so-called “conservative,” their arguments (and the one offered here) conform to the commitments to freedom and equality found in the liberal democratic tradition. Susan Shell provides a more explicit liberal case against SSM: “The Liberal Case Against Gay Marriage,” *The Public Interest*, Spring 2004 (reposted: <http://www.law.ucla.edu/williamsinstitute/issues/liberalcaseagainstgaymarriagesummer04.html>).

be educated and channeled, is predicated on an aggressive individualism that sees erotic desire as something to be “liberated” and “recognized” in its diverse manifestations. In the wake of this popularization of Sigmund Freud, no one wants to be labeled “repressed.” Instead, self-expression is the ideal. In requiring law to recognize desires, the sexual revolution induced the legal establishment of academics, judges, and lawyers to regard the law not as something needing to conform to natural law, but as a social construct, as something infinitely malleable to suit the needs and desires of the revolution.

Yet, as the sexual revolution attests, the law has a reality of its own and is not infinitely malleable. We know the consequences of other planks of the revolution. For instance, many fault no-fault divorce, the epitome social relation of this aggressive individualism, for high divorce rates and numerous related social pathologies. However, as legal scholar Frank Buckley notes, no-fault divorce is not even a contract because people expect contracts to be kept.³

Most Canadian proponents of SSM avoid the language of natural rights because they agree with the sexual revolution’s view that law is purely conventional. More thoughtful proponents of SSM, including Americans Jonathan Rauch and Andrew Sullivan, argue SSM is necessary to socialize male homosexuals especially. They regard SSM as a response to the ravages AIDS brought on by homosexuals having multiple and anonymous sex partners. Rauch and Sullivan want SSM to moderate homosexual desire and view marriage as playing a critical role in protecting the fabric of society.⁴

In Canada, proponents of SSM, including legal activist organizations EGALE and Equal Marriage for Same Sex Couples, are more likely to state their case in the name of equality instead of nature.⁵ Their view is aggressively individualistic, as they are more likely to focus on themselves rather than society or children, as Rauch and Sullivan do. Even so, Canadian proponents, with their equality argument, see no reason why homosexuals cannot marry, since heterosexuals themselves do not respect marriage. With high divorce rates, heterosexuals have difficulty claiming greater fidelity than homosexuals, and their low reproductive rates eliminate the need to restrict marriage to those who can procreate. With invitro fertilization, homosexuals (and any other adult)

³ F. H. Buckley, *Just Exchange: A Theory of Contract*, (New York: Routledge, 2004).

⁴ Jonathan Rauch, “Families Forged By Illness,” *New York Times*, 4 June 2006 (reposted: http://www.jonathanrauch.com/jrauch_articles/) and *Gay Marriage: Why it is Good For Gays, Good for Straights, and Good for America*, (New York: Owl, 2004); Andrew Sullivan devotes considerable attention to this issue on his blog: http://time.blogs.com/daily_dish/.

⁵ Egale Canada, “Equal Marriage for Same-Sex Couples: A Simple Matter of Fairness,” Egale Submissions to the House of Commons Standing Committee on Justice and Human Rights (<http://www.egale.ca/index.asp?item=35&version=EN>); Equal Marriage for Same-Sex Couples (<http://www.samesexmarriage.ca/>).

can reproduce anyway (though the rights of the third person who provides the sperm or egg have yet to be worked out, if indeed they can). Much of the criticism of the state of marriage in Canada by SSM proponents is on the mark, just as the Americans were right to criticize the corruption of Baghdad traffic police.

Yet, criticizing an existing institution differs from providing a coherent alternative. Even with their aggressively individualistic arguments, Canadian SSM proponents cannot escape considering the nature of marriage. If they regard SSM as simply an extension of the rights enjoyed by heterosexuals (those of children often go unaddressed), one must ask them what their new exclusionary rule must then be.

Yet, in that very same name of equality and fairness, participants in the argument must also recognize that even the new rule will exclude partnerships. This is what rules and categories do: they apply to a finite set of people and exclude others. Some critics have argued that the logic of SSM necessitates including polygamy.⁶ Proponents of SSM generally reject this claim as bigoted and scaremongering. Even thoughtful proponents like Rauch, resembling some opponents of SSM, invoke a “sky is falling” rhetoric to prognosticate what would happen if polygamy were to be fully legalized.⁷ Further, some proponents argue polygamy generally exploits women and girls, though that argument merely dodges the question of how many people can legitimately form a marriage.

However, proponents of SSM are slowly coming around to acknowledge that SSM does in fact legitimate polygamy and having multiple sex partners. These include a Queens University law professor and one of the authors of a recent government study of polygamy, and a group of American progressives whose membership includes feminist Gloria Steinem and numerous scholars from Princeton, Columbia, Yale, and Georgetown universities.⁸ In Canada, a recent Supreme Court case about a bawdy house run by a couple who had set up a household with a second woman has meant polygamy can no longer be associated with backwoods splinter Mormon groups.⁹ Polygamy fits nicely with the sexual revolution among urban liberals whereby desire establishes new modes and orders.

At issue with the association of polygamy and SSM is not to scare people into rejecting a change in law out of fear of what might be a consequence. Rather, at issue is the

⁶ Colby Cosh, “Gay Marriage and Polygamy, Hand in Hand,” *National Post*, 16 August 2004 (reposted: <http://www.christianity.ca/news/social-issues/2004/08.003.html>).

⁷ Rauch, “One Man, Many Wives, Big Problems,” *National Journal*, 1 April 2006 (reposted: <http://www.indegayforum.org/topics/show/27349.html>).

⁸ Martha Bailey, “Regulation of Cohabitation and Marriage in Canada,” *Law and Policy*, 126 (January 2004): 153; Angela Campbell et al., *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports*, Status of Women Canada, November 2005 (http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/index_e.html); “Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships” (<http://www.beyondmarriage.org>).

⁹ *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80; Barbara Kay, “Redefining Perversion,” *National Post*, 28 December 2005.

intelligibility, or nature, of a legal category. People who argue that SSM leads to polygamy point to the difficulty of restricting marriage to two persons when one redefines marriage to include SSM. The number two is based on the natural fact that it takes two people to beget a child. Erotic desire does not necessarily recognize such exclusivity.

Neither does the friendship ideal of those who would use marriage to tame homosexual erotic desire. Some proponents of SSM in the Anglican Church of Canada have tried to base their view on friendship-love instead of erotic desire, although such friendship-love comes “with benefits,” to borrow a well-worn euphemism.¹⁰ However, while many people have a single best friend, many also have several best friends. For instance, Jesus Christ, the epitome of love and friendship for Christians and many non-Christians as well, preferred Peter and James among the disciples (see Mark 9:2-9), but not one of them exclusively. Indeed, there are good reasons to think SSM would further erode the ability of people to practice friendship-love. For instance, consider how much, you, gentle reader, indulge in nudge-nudge, wink-wink when you see two males expressing physical affection for one another. Ask any woman whose male friend realizes he desires her in a romantic manner. If she does not reciprocate, she can no longer trust his friendly affections and the friendship is destroyed. Private friendships require such boundaries, as do social norms.¹¹

Hence, by restricting marriage to two, or by excluding marriage from those who are biologically related (i.e., maintaining taboos against sibling marriages and between parents and their children), proponents of SSM reveal how much their views rely on the philosophical positions of those opposed to SSM.

Thus, SSM proponents have no reason to exclude other types of unions from enjoying the right they wish to enjoy. Some have acknowledged this and take the more logically rigorous (and honest) path of advocating the abolishment of marriage altogether. This would allow a diversity of relations, including siblings and parents and children, to create unions. Yet, proponents of SSM resist extending that same right because they view SSM as a device to recognize their own unions. But to recognize something is to see it as unique and special, which cannot be maintained if everyone else, including Billy Bob and his sisters, Montréal swingers, and Oedipus and his mother, also demand recognition. Recognition is the sole purpose of legalizing SSM, as civil unions or domestic partnership arrangements, which are contracts, are as economically efficient.¹²

¹⁰ Gary Thorn, “Friendship and Marriage,” Primate’s Theological Commission, Anglican Church of Canada (<http://www.anglican.ca/primate/ptc/june06.htm>).

¹¹ Anthony Esolen, “A Requiem for Friendship,” *Touchstone Magazine*, September 2005. See also, Esolen, “Ten Arguments for Sanity, 5-6,” Mere Comments (http://merecomments.typepad.com/merecomments/2006/08/ten_arguments_f.html) and “Ten Arguments for Sanity, 7-8” (http://merecomments.typepad.com/merecomments/2006/08/ten_arguments_f_1.html).

¹² Frank Buckley, “Homosexuality and Marriage” in *It Takes Two: The Family in Law and Finance*, Douglas Allen and John Richards, eds., (Toronto: CD Howe, 1999); Rainer Knopff, “The Case for Domestic Partnership Laws,” *Policy Options*, June 1999: 53-56 (<http://www.irpp.org/po/archive/jun99/knopff.pdf>).

Hence, SSM, despite the libertarian and egalitarian rhetoric of its partisans, has nothing to do with a libertarian and egalitarian political ethic by which society allows its members to live and let live. The demand for recognition entails a state-enforced scheme of modifying beliefs and behavior. SSM entails, in Iain Benson's words, a form of "sexual conduct legitimacy," a public dogma requiring coerced belief.¹³

The case for SSM is plagued with inconsistencies. Logically and according to the principle of fairness which judges, lawyers, and legal activists purportedly defend, the case for SSM demands equality for other arrangements if one accepts its premises; politically, however, many of its proponents would reject others wishing to claim the right they want for themselves.¹⁴ Because SSM is essentially an empty category, either all unions or no unions must receive recognition. If all receive recognition, then marriage becomes meaningless.

Let's pursue the logic another step. If marriage is unlimited in terms of number and indeterminate in terms of the desires it recognizes, then why not apply the category of marriage to the social contract that founds and binds our nation? Indeed, as Farrow notes, many proponents of SSM have already argued themselves into the position that the state cares for us more effectively than we ourselves can. If the case for SSM provides no reason to limit marriage to the number two, it also provides no reason to limit marriage to 30 million. By a happy coincidence, adopting SSM might also solve Canada's longstanding national identity crisis!

However, we disappoint ourselves as soon as we realize that a national identity requires more than one generation to sustain itself, but we no longer possess an institution dedicated to the perpetuation of our society (unless that role gets taken over by the state, perhaps by an enhanced version of state-run daycare). As scholars including Phillip Longman, Pippa Norris and Ronald Inglehart have demonstrated, the sexual revolution has ended in a "baby bust," which requires Western democracies to rely on third-world immigrants, whose conservative viewpoints about family contradict those of the sexual revolution, to prop up their lagging population levels.¹⁵ The incoherence of an ideology can be seen in the degree that it undermines itself.

These reflections on SSM have led to some seemingly strange conclusions, but none that have been considered before. Long before SSM, Plato theorized that abolishing the family is a totalitarian project, and the Athenian comic Aristophanes parodied democratic

¹³ Iain Benson, "A Civil Argument About Dignity, Beliefs, and Marriage: Being a Brief for an Appearance Before the Special Legislative Committee of the House of Commons on Bill C-38, *The Civil Marriage Act*," 14 June 2005, p. 5 (<http://www.marriageinstitute.ca/pages/BENSON.pdf>).

¹⁴ Richard Kim, "The Wedding Crasher," *The Notion* (blog for *The Nation*) 1 August, 2006 (<http://www.thenation.com/blogs/notion?pid=107439>).

¹⁵ Phillip Longman, "The Liberal Baby Bust," *USA Today*, 13 March 2006 (http://www.usatoday.com/news/opinion/editorials/2006-03-13-babybust_x.htm); Longman, *The Empty Cradle: How Falling Birthrates Threaten World Prosperity and What to Do about It*, (Toronto: HarperCollins Canada, 2004); Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide*, (Cambridge: Cambridge University Press, 2004).

ideology and equality in a play in which he has the state (led by women) take over the family.

SSM does not simply add a group of people to an already intact legal category we call marriage. It sets up a new rule of exclusion that drastically redefines that category and renders it incoherent. No one can predict what might happen, just as the Americans may not have been able to predict the chaos of changing Iraq's traffic code. But predictions are beside the point. The debate over SSM is over the intelligibility of a legal, social, and political category that influences a myriad of corners and crannies of our social life. No amount of name-calling or proclaiming same-sex marriage as an article of faith for the new "secular religion" of human rights (as frequently asserted by former Justice Minister Irwin Cotler¹⁶) will make it coherent.

If we lack coherence on marriage, then we are as blind as Oedipus who poked out his eyes after discovering his wife was actually his mother. But our blindness would be more severe because at least Oedipus gained self-knowledge of what he had done.

¹⁶ For example, Irwin Cotler, Speech to Parliament of Canada, *Hansard*, (37th Parliament, 2nd session) October 28, 2002 (http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/016_2002-10-28/han016_1355-E.htm).