

Rauch
PP 169-181

SAME-SEX

MARRIAGE:

PRO AND CON

A READER

ANDREW SULLIVAN

WITH RESEARCH ASSISTANCE BY JOSEPH LARBAU

VINTAGE BOOKS / A DIVISION OF RANDOM HOUSE, INC. / NEW YORK

with all these issues under the added encumbrance of a contemporary outlook that makes law the search for rights, and responsibility the recognition of rights. Indeed, thinking of laws about marriage as documents that confer or withhold rights is itself an error of fundamental importance—one that the highest court in Hawaii has already committed. "Marriage," it wrote, "is a state-conferred legal-partnership status, the existence of which gives rise to a multiplicity of rights and benefits. . . ." A state-conferred legal partnership? To lawyers, perhaps; to mankind, I think not. The Hawaiian court has thus set itself on the same course of action as the misguided Supreme Court in 1973 when it thought that laws about abortion were merely an assertion of the rights of a living mother and an unborn fetus.

I have few favorable things to say about the political systems of other modern nations, but on these fundamental matters—abortion, marriage, military service—they often do better by allowing legislatures to operate than we do by deferring to courts. Our challenge is to find a way of formulating a policy with respect to homosexual unions that is not the result of a reflexive act of judicial rights-conferring, but is instead a considered expression of the moral convictions of a people.

For Better or Worse?

JONATHAN RAUCH

From *The New Republic*, May 6, 1996

Rauch delivers an almost Jesuitical analysis of why same-sex marriage makes sense for conservatives. He is particularly acute in making a social as well as a political argument for the virtues that marriage inculcates—especially in gay men. He is quite comfortable about using the threat of stigma to bring more social order into gay men's lives.

Whether gay marriage makes sense—and whether straight marriage makes sense—depends on what marriage is actually for. Current secular thinking on this question is shockingly sketchy. Gay activists say: marriage is for love, and we love each other, therefore we should be able to marry. Traditionalists say: marriage is for children, and homosexuals do not (or should not) have children, therefore you should not be able to marry. That, unfortunately, pretty well covers the spectrum. I say "unfortunately" because both views are wrong. They misunderstand and impoverish the social meaning of marriage.

So what is marriage for? Modern marriage is, of course, based upon traditions that religion helped to codify and enforce. But religious doctrine has no special standing in the world of secular law and policy (the "Christian nation" crowd notwithstanding). If we want to know what and whom marriage is for in modern America, we need a sensible secular doctrine.

At one point, marriage in secular society was largely a matter of business: cementing family ties, providing social status for

men and economic support for women, conferring dowries, and so on. Marriages were typically arranged, and "love" in the modern sense was no prerequisite. In Japan, remnants of this system remain, and it works surprisingly well. Couples stay together because they view their marriage as a partnership: an investment in social stability for themselves and their children. Because Japanese couples don't expect as much emotional fulfillment as we do, they are less inclined to break up. They also take a somewhat more relaxed attitude toward adultery. What's a little extramarital love provided that each partner is fulfilling his or her many other marital duties?

In the West, of course, love is a defining element. The notion of lifelong love is charming, if ambitious, and certainly love is a desirable element of marriage. In society's eyes, however, it cannot be the defining element. You may or may not love your husband, but the two of you are just as married either way. You may love your mistress, but that certainly doesn't make her your spouse. Love helps make sense of marriage emotionally, but it is not terribly important in making sense of marriage from the point of view of social policy.

If love does not define the purpose of secular marriage, what does? Neither the law nor secular thinking provides a clear answer. Today marriage is almost entirely a voluntary arrangement whose contents are up to the people making the deal. There are few if any behaviors that automatically end a marriage. If a man beats his wife, which is about the worst thing he can do to her, he may be convicted of assault, but his marriage is not automatically dissolved. Couples can be adulterous ("open") yet remain married. They can be celibate, too; consummation is not required. All in all, it is an impressive and also rather astonishing victory for modern individualism that so important an institution should be so bereft of formal social instruction as to what should go on inside of it.

Secular society tells us only a few things about marriage. First, marriage depends on the consent of the parties. Second, the parties are not children. Third, the number of parties is two. Fourth, one is a man and the other a woman. Within those rules a marriage is whatever anyone says it is.

Perhaps it is enough simply to say that marriage is as it is and should not be tampered with. This sounds like a crudely reactionary position. In fact, however, of all the arguments against reforming marriage, it is probably the most powerful.

Call it a Hayekian argument, after the great libertarian economist F. A. Hayek, who developed this line of thinking in his book *The Fatal Conceit*. In a market system, the prices generated by impersonal forces may not make sense from any one person's point of view, but they encode far more information than even the cleverest person could ever gather. In a similar fashion, human societies evolve rich and complicated webs of nonlegal rules in the form of customs, traditions and institutions. Like prices, they may seem irrational or arbitrary. But the very fact that they are the customs that have evolved implies that they embody a practical logic that may not be apparent to even a sophisticated analyst. And the web of custom cannot be torn apart and reordered at will because once its internal logic is violated it falls apart. Intellectuals, such as Marxists or feminists, who seek to deconstruct and rationally rebuild social traditions, will produce not better order but chaos.

So the Hayekian view argues strongly against gay marriage. It says that the current rules may not be best and may even be unfair. But they are all we have, and, once you say that marriage need not be male-female, soon marriage will stop being anything at all. You can't mess with the formula without causing unforeseen consequences, possibly including the implosion of the institution of marriage itself.

However, there are problems with the Hayekian position. It

men and economic support for women, conferring dowries, and so on. Marriages were typically arranged, and "love" in the modern sense was no prerequisite. In Japan, remnants of this system remain, and it works surprisingly well. Couples stay together because they view their marriage as a partnership: an investment in social stability for themselves and their children. Because Japanese couples don't expect as much emotional fulfillment as we do, they are less inclined to break up. They also take a somewhat more relaxed attitude toward adultery. What's a little extracurricular love provided that each partner is fulfilling his or her many other marital duties?

In the West, of course, love is a defining element. The notion of lifelong love is charming, if ambitious, and certainly love is a desirable element of marriage. In society's eyes, however, it cannot be the defining element. You may or may not love your husband, but the two of you are just as married either way. You may love your mistress, but that certainly doesn't make her your spouse. Love helps make sense of marriage emotionally, but it is not terribly important in making sense of marriage from the point of view of social policy.

If love does not define the purpose of secular marriage, what does? Neither the law nor secular thinking provides a clear answer. Today marriage is almost entirely a voluntary arrangement whose contents are up to the people making the deal. There are few if any behaviors that automatically end a marriage. If a man beats his wife, which is about the worst thing he can do to her, he may be convicted of assault, but his marriage is not automatically dissolved. Couples can be adulterous ("open") yet remain married. They can be celibate, too; consummation is not required. All in all, it is an impressive and also rather astonishing victory for modern individualism that so important an institution should be so bereft of formal social instruction as to what should go on inside of it.

Secular society tells us only a few things about marriage. First, marriage depends on the consent of the parties. Second, the parties are not children. Third, the number of parties is two. Fourth, one is a man and the other a woman. Within those rules a marriage is whatever anyone says it is. Perhaps it is enough simply to say that marriage is as it is and should not be tampered with. This sounds like a crudely reactionary position. In fact, however, of all the arguments against reforming marriage, it is probably the most powerful.

Call it a Hayekian argument, after the great libertarian economist F. A. Hayek, who developed this line of thinking in his book *The Fatal Conceit*. In a market system, the prices generated by impersonal forces may not make sense from any one person's point of view, but they encode far more information than even the cleverest person could ever gather. In a similar fashion, human societies evolve rich and complicated webs of nonlegal rules in the form of customs, traditions and institutions. Like prices, they may seem irrational or arbitrary. But the very fact that they are the customs that have evolved implies that they embody a practical logic that may not be apparent to even a sophisticated analyst. And the web of custom cannot be torn apart and reordered at will because once its internal logic is violated it falls apart. Intellectuals, such as Marxists or feminists, who seek to deconstruct and rationally rebuild social traditions, will produce not better order but chaos.

So the Hayekian view argues strongly against gay marriage. It says that the current rules may not be best and may even be unfair. But they are all we have, and, once you say that marriage need not be male-female, soon marriage will stop being anything at all. You can't mess with the formula without causing unforeseen consequences, possibly including the implosion of the institution of marriage itself.

However, there are problems with the Hayekian position. It

is untenable in its extreme form and unhelpful in its milder version. In its extreme form, it implies that no social reforms should ever be undertaken. Indeed, no laws should be passed, because they interfere with the natural evolution of social mores. How could Hayekians abolish slavery? They would probably note that slavery violates fundamental moral principles. But in so doing they would establish a moral platform from which to judge social rules, and thus acknowledge that abstracting social debate from moral concerns is not possible.

If the ban on gay marriage were only mildly unfair, and if the costs of changing it were certain to be enormous, then the ban could stand on Hayekian grounds. But, if there is any social policy today that has a fair claim to be scaldingly inhumane, it is the ban on gay marriage. As conservatives tirelessly and rightly point out, marriage is society's most fundamental institution. To bar any class of people from marrying as they choose is an extraordinary deprivation. When not so long ago it was illegal in parts of America for blacks to marry whites, no one could claim that this was a trivial disenfranchisement. Granted, gay marriage raises issues that interracial marriage does not; but no one can argue that the deprivation is a minor one.

To outweigh such a serious claim it is not enough to say that gay marriage might lead to bad things. Bad things happened as a result of legalizing contraception, but that did not make it the wrong thing to do. Besides, it seems doubtful that extending marriage to, say, another 3 or 5 percent of the population would have anything like the effects that no-fault divorce has had, to say nothing of contraception. By now, the "traditional" understanding of marriage has been sullied in all kinds of ways. It is hard to think of a bigger affront to tradition, for instance, than allowing married women to own property independently of their husbands or allowing them to charge their husbands with rape.

Surely it is unfair to say that marriage may be reformed for the sake of anyone and everyone except homosexuals, who must respect the dictates of tradition.

Faced with these problems, the milder version of the Hayekian argument says not that social traditions shouldn't be tampered with at all, but that they shouldn't be tampered with lightly. Fine. In this case, no one is talking about casual messing around; both sides have marshaled their arguments with deadly seriousness. Hayekians surely have to recognize that appeals to blind tradition and to the risks inherent in social change do not, a priori, settle anything in this instance. They merely warn against frivolous change.

So we turn to what has become the standard view of marriage's purpose. Its proponents would probably like to call it a child-centered view, but it is actually an anti-gay view, as will become clear. Whatever you call it, it is the view of marriage that is heard most often, and in the context of the debate over gay marriage it is heard almost exclusively. In its most straightforward form it goes as follows (I quote from James Q. Wilson's fine book *The Moral Sense*):

A family is not an association of independent people; it is a human commitment designed to make possible the rearing of moral and healthy children. Governments care—or ought to care—about families for this reason, and scarcely for any other.

Wilson speaks about "family" rather than "marriage" as such, but one may, I think, read him as speaking of marriage without doing any injustice to his meaning. The resulting proposition—government ought to care about marriage almost entirely because of children—seems reasonable. But there are problems. The first, obviously, is that gay couples may have

SAME-SEX MARRIAGE: PRO AND CON

The Debate on the Right

children, whether through adoption, prior marriage or (for lesbians) artificial insemination. Leaving aside the thorny issue of gay adoption, the point is that if the mere presence of children is the test, then homosexual relationships can certainly pass it.

You might note, correctly, that heterosexual marriages are more likely to produce children than homosexual ones. When granting marriage licenses to heterosexuals, however, we do not ask how likely the couple is to have children. We assume that they are entitled to get married whether or not they end up with children. Understanding this, conservatives often make an interesting move. In seeking to justify the state's interest in marriage, they shift from the actual presence of children to the anatomical possibility of making them. Hadley Arkes, a political science professor and prominent opponent of homosexual marriage, makes the case this way:

The traditional understanding of marriage is grounded in the "natural teleology of the body"—in the inescapable fact that only a man and a woman, and only two people, not three, can generate a child. Once marriage is detached from that natural teleology of the body, what ground of principle would there-after confine marriage to two people rather than some larger grouping? That is, on what ground of principle would the law reject the claim of a gay couple that their love is not confined to a coupling of two, but that they are woven into a larger ensemble with yet another person or two?

What he seems to be saying is that, where the possibility of natural children is nil, the meaning of marriage is nil. If marriage is allowed between members of the same sex, then the concept of marriage has been emptied of content except to ask whether the parties love each other. Then anything goes, including polygamy. This reasoning presumably is what those opposed to

gay marriage have in mind when they claim that, once gay marriage is legal, marriage to pets will follow close behind.

But Arkes and his sympathizers make two mistakes. To see them, break down the claim into two components: (1) Two-person marriage derives its special status from the anatomical possibility that the partners can create natural children; and (2) apart from (1), two-person marriage has no purpose sufficiently strong to justify its special status. That is, absent justification (1), anything goes.

The first proposition is wholly at odds with the way society actually views marriage. Leave aside the insistence that natural, as opposed to adopted, children define the importance of marriage. The deeper problem, apparent right away, is the issue of sterile heterosexual couples. Here the "anatomical possibility" crowd has a problem, for a homosexual union is, anatomically speaking, nothing but one variety of sterile union and no different even in principle: a woman without a uterus has no more potential for giving birth than a man without a vagina.

It may sound like carping to stress the case of barren heterosexual marriage: the vast majority of newlywed heterosexual couples, after all, can have children and probably will. But the point here is fundamental. There are far more sterile heterosexual unions in America than homosexual ones. The "anatomical possibility" crowd cannot have it both ways. If the possibility of children is what gives meaning to marriage, then a post-menopausal woman who applies for a marriage license should be turned away at the courthouse door. What's more, she should be hooted at and condemned for stretching the meaning of marriage beyond its natural basis and so reducing the institution to frivolity. People at the Family Research Council or Concerned Women for America should point at her and say, "If she can marry, why not polygamy?"

Obviously, the "anatomical" conservatives do not say this,

because they are sane. They instead flail around, saying that sterile men and women were at least born with the right-shaped parts for making children, and so on. Their position is really a nonposition. It says that the "natural children" rationale defines marriage when homosexuals are involved but not when heterosexuals are involved. When the parties to union are sterile heterosexuals, the justification for marriage must be something else. But what?

Now arises the oddest part of the "anatomical" argument. Look at proposition (2) above. It says that, absent the anatomical justification for marriage, anything goes. In other words, it dismisses the idea that there might be other good reasons for society to sanctify marriage above other kinds of relationships. Why would anybody make this move? I'll hazard a guess: to exclude homosexuals. Any rationale that justifies sterile heterosexual marriages can also apply to homosexual ones. For instance, marriage makes women more financially secure. Very nice, say the conservatives. But that rationale could be applied to lesbians, so it's definitely out.

The end result of this stratagem is perverse to the point of being funny. The attempt to ground marriage in children (or the anatomical possibility thereof) falls flat. But, having lost that reason for marriage, the antigay people can offer no other. In their fixation on excluding homosexuals, they leave themselves no consistent justification for the privileged status of *heterosexual* marriage. They thus tear away any coherent foundation that secular marriage might have, which is precisely the opposite of what they claim they want to do. If they have to undercut marriage to save it from homosexuals, so be it!

For the record, I would be the last to deny that children are one central reason for the privileged status of marriage. When men and women get together, children are a likely outcome; and,

as we are learning in ever more unpleasant ways, when children grow up without two parents, trouble ensues. Children are not a trivial reason for marriage: they just cannot be the only reason.

What are the others? It seems to me that the two strongest candidates are these: domesticating men and providing reliable caregivers. Both purposes are critical to the functioning of a humane and stable society, and both are much better served by marriage—that is, by one-to-one lifelong commitment—than by any other institution.

Civilizing young males is one of any society's biggest problems. Whenever unattached males gather in packs, you see no end of trouble; wildings in Central Park, gangs in Los Angeles, soccer hooligans in Britain, skinheads in Germany, fraternity hazings in universities, grope-lines in the military and, in a different but ultimately no less tragic way, the bathhouses and wanton sex of gay San Francisco or New York in the 1970s.

For taming men, marriage is unmatched. "Of all the institutions through which men may pass—schools, factories, the military—marriage has the largest effect," Wilson writes in *The Moral Sense*. (A token of the casualness of current thinking about marriage is that the man who wrote those words could, later in the very same book, say that government should care about fostering families for "scarcely any other" reason than children.) If marriage—that is, the binding of men into couples—did nothing else, its power to settle men, to keep them at home and out of trouble, would be ample justification for its special status.

Of course, women and older men don't generally travel in marauding or orgasmic packs. But in their case the second rationale comes into play. A second enormous problem for society is what to do when someone is beset by some sort of burdensome contingency. It could be cancer, a broken back, unemployment or depression; it could be exhaustion from work or stress under

pressure. If marriage has any meaning at all, it is that, when you collapse from a stroke, there will be at least one other person whose "job" is to drop everything and come to your aid; or that when you come home after being fired by the postal service there will be someone to persuade you not to kill the supervisor.

Obviously, both rationales—the need to settle males and the need to have people looked after—apply to sterile people as well as fertile ones, and apply to childless couples as well as to ones with children. The first explains why everybody feels relieved when the town delinquent gets married, and the second explains why everybody feels happy when an aging widow takes a second husband. From a social point of view, it seems to me, both rationales are far more compelling as justifications of marriage's special status than, say, love. And both of them apply to homosexuals as well as to heterosexuals.

Take the matter of settling men. It is probably true that women and children, more than just the fact of marriage, help civilize men. But that hardly means that the settling effect of marriage on homosexual men is negligible. To the contrary, being tied to a committed relationship plainly helps stabilize gay men. Even without marriage, coupled gay men have steady sex partners and relationships that they value and therefore tend to be less wanton. Add marriage, and you bring a further array of stabilizing influences. One of the main benefits of publicly recognized marriage is that it binds couples together not only in their own eyes but also in the eyes of society at large. Around the partners is woven a web of expectations that they will spend nights together, go to parties together, take out mortgages together, buy furniture at Ikea together, and so on—all of which helps tie them together and keep them off the streets and at home. Surely that is a very good thing, especially as compared to the closet-gay culture of furtive sex with innumerable partners in parks and bathhouses.

The other benefit of marriage—caretaking—clearly applies to homosexuals. One of the first things many people worry about when coming to terms with their homosexuality is: Who will take care of me when I'm ailing or old? Society needs to care about this, too, as the AIDS crisis has made horribly clear. If that crisis has shown anything, it is that homosexuals can and will take care of each other, sometimes with breathtaking devotion—and that no institution can begin to match the care of a devoted partner. Legally speaking, marriage creates kin. Surely society's interest in kin-creation is strongest of all for people who are unlikely to be supported by children in old age and who may well be rejected by their own parents in youth.

Gay marriage, then, is far from being a mere exercise in political point-making or rights-mongering. On the contrary, it serves two of the three social purposes that make marriage so indispensable and irreplaceable for heterosexuals. Two out of three may not be the whole ball of wax, but it is more than enough to give society a compelling interest in marrying off homosexuals.

There is no substitute. Marriage is the *only* institution that adequately serves these purposes. The power of marriage is not just legal but social. It seals its promise with the smiles and tears of family, friends and neighbors. It shrewdly exploits ceremony (big, public weddings) and money (expensive gifts, dowries) to deter casual commitment and to make bailing out embarrassing. Stag parties and bridal showers signal that what is beginning is not just a legal arrangement but a whole new stage of life. "Domestic partner" laws do none of these things.

I'll go further: far from being a substitute for the real thing, marriage-life may undermine it. Marriage is a deal between a couple and society, not just between two people: society recognizes the sanctity and autonomy of the pair-bond, and in

exchange each spouse commits to being the other's nurse, social worker and policeman of first resort. Each marriage is its own little society within society. Any step that weakens the deal by granting the legal benefits of marriage without also requiring the public commitment is begging for trouble.

So gay marriage makes sense for several of the same reasons that straight marriage makes sense. That would seem a natural place to stop. But the logic of the argument compels one to go a twist further. If it is good for society to have people attached, then it is not enough just to make marriage available. Marriage should also be *expected*. This, too, is just as true for homosexuals as for heterosexuals. So, if homosexuals are justified in expecting access to marriage, society is equally justified in expecting them to use it. I'm not saying that out-of-wedlock sex should be scandalous or that people should be coerced into marrying. The mechanisms of expectation are more subtle. When grandma cluck-clucks over a still-unmarried young man, or when mom says she wishes her little girl would settle down, she is expressing a strong and well-justified preference: one that is quietly echoed in a thousand ways throughout society and that produces subtle but important pressure to form and sustain unions. This is a good and necessary thing, and it will be as necessary for homosexuals as heterosexuals. If gay marriage is recognized, single gay people over a certain age should not be surprised when they are disapproved of or pitied. That is a vital part of what makes marriage work. It's stigma as social policy.

If marriage is to work it cannot be merely a "lifestyle option." It must be privileged. That is, it must be understood to be better, on average, than other ways of living. Not mandatory, not good where everything else is bad, but better: a general norm, rather than a personal taste. The biggest worry about gay marriage, I think is, is that homosexuals might get it but then mostly

not use it. Gay neglect of marriage wouldn't greatly erode the bonding power of heterosexual marriage (remember, homosexuals are only a tiny fraction of the population)—but it would certainly not help. And heterosexual society would rightly feel betrayed if, after legalization, homosexuals treated marriage as a minority taste rather than as a core institution of life. It is not enough, I think, for gay people to say we want the right to marry. If we do not use it, shame on us.

Let Them Wed
THE EDITORS

From the Economist, January 6, 1996

The sober, unsentimental, free market conservative British magazine weighs in—for the gay rights movement.

Marriage may be for the ages—but it changes by the year. And never, perhaps, has it changed as quickly as since the 1960s. In western law, wives are now equal rather than subordinate partners; interracial marriage is now widely accepted both in statute and in society; marital failure itself, rather than the fault of one partner, may be grounds for a split. With change, alas, has come strain. In the twenty-five years from 1960, divorce rates soared throughout the West—more than sextupled in Britain, where divorce appears inevitable for the world's most celebrated