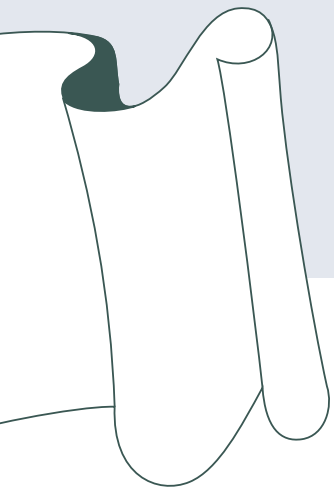


# Is Marriage the Government's Business?

On February 25, the *Journal of Law, Ethics & Public Policy* sponsored "Symposium on Marriage," which brought together three distinguished speakers to comment on the government's regulation of traditional and same-sex marriages. Each of the speakers presented an overview of his views on governmental regulation; at the conclusion of the three presentations, there was an energetic and thought-provoking discussion. The *Journal* will publish a special issue on marriage in the coming months.

The three speakers were Alan Sears, president, CEO, and general counsel for the Alliance Defense Fund, the nation's largest religious liberty legal alliance; Andrew Koppelman, professor of law and political science at Northwestern Law School; and Paul Griffiths, the Arthur J. Schmitt Professor of Catholic Studies in the Department of Classics and Mediterranean Studies at the University of Illinois at Chicago.



Sears began by stating that he sought to apply truth to law. He asked that each side's position be tested by rationality, coherence, and correspondence to truth. After observing that debate about marriage has existed for centuries, he noted that the existing rule of law in the United States recognizes marriage as the "union for life of one man and one woman," as stated in the Supreme Court's 1885 decision, *Murphy v. Ramsey*. To depart from that rule, he argued, requires significant justification.

In Sears' view, the relevant question in the current debate is whether sexual orientation matters. His response was to reject same-sex marriage, a position that he supported with two points. First, same-sex marriage cannot be considered without deconstructing the nature of marriage itself. In his words, "One might as well try to draw a square circle." Second, he argued that homosexual conduct is positively harmful to society and that the state should properly decline to endorse it.

In support of his conclusions, Sears summarized a number of legal points and noted the results of recent surveys. From the legal precedents, he emphasized that the Supreme Court has confirmed the definition of marriage in several instances. Even the recent decision in *Lawrence v. Texas*, which Sears argued was poorly reasoned, affords support for his position. The equal protection argument in *Lawrence* applied to private adult conduct. In Sears' view, marriage is anything but private, since it relates to property, inheritance, protection for children, and other public matters. Moreover, he argued, the trend of public opinion about same-sex marriages is exactly the opposite of that described in *Lawrence*. Every time the people have been allowed to vote, he noted, they have rejected same-sex marriages by a margin of 2 to 1 or more. In addition, in every legislature that has allowed a full vote, same-sex marriages have been rejected, with the result being that 38 states now have defense of marriage statutes.

Recent surveys in both the United States and Canada show that there will be tremendous costs for same-sex marriages, as Harvard Law Professor Mary Ann Glendon recently wrote in the *Wall Street Journal* [Mary Ann Glendon, "For Better For Worse?", *Wall Street Journal* (February 25, 2004, sec. A, p. 14)]. Given those costs, Sears concluded that the people should be allowed to debate and decide whether they want to assume the costs.

Sears concluded with two points. First, he argued that the debate is not merely about adults and their happiness: it is also about children. He pointed to studies that have shown that there is better care for children where a mother and a father are together in a family: there is less drug usage, lower arrest rates, less poverty, and fewer school failures and expulsions. Second, he warned that religious freedom is at risk in the debate. Too often, he said, tolerance means silence for those who think that they face disapproval. When laws differ from religion, those who practice religion are labeled intolerant or bigots or worse, as events in Canada and some nations in Europe have shown. Finally, he reminded the audience that law is a pedagogue, a teacher. In marriage, law can point us toward the ideal.



The second speaker, Professor Andrew Koppelman, explained that his remarks represented an effort to understand the debate by taking a broad view. He noted that the debate presents a confusing mix of issues: questions about matters such as health insurance and hospital visitation intersect with deeper questions about which family forms are valued, about who is a full citizen. He observed that at the center of the debate is the word *marriage*, a word that is emotionally fraught.

He argued that one cause of the muddled debate has been that there are two debates at once. The first is a religious debate, about what relationships are sanctified. The second is a secular debate, about which relationships ought to have consequences.

In the first, the religious debate, the question is what relationships are intrinsically valuable. Koppelman commented that the importance of this debate is reflected in the fact that it is occurring in most denominations in the United States, creating divisions in some that approach schisms. He identified the key question as being about objective moral reality: Is it the case that same-sex marriages are morally equivalent to heterosexual relationships? Those on the conservative side, who oppose same-sex marriages, have powerful resources, authoritative texts in the Bible and the Koran, longstanding traditions, the considered



views of clergy, and a primitive revulsion against homosexual sex. But they face the fundamental difficulty of having to maintain that there is too much love in the world and therefore they have to devalue love of the “wrong kind.”

The secular debate that occurs at the same time is about what relations between persons ought to be given legal recognition. The issue is not about intrinsic value, but about how resources ought to be allocated. What would members of a household want in an unexpected contingency? And how should unfair destruction of people’s lives be prevented? Koppelman concluded that society ought to maximize welfare by reflecting people’s preferences, by providing a default option that people would have chosen if they had thought about it. The maximization ought to occur in a way that protects third parties, especially children.

The concept of sanctification is very far from these points in the secular debate. Nevertheless, according to Koppelman, the two positions have become conflated. During the Reformation, Protestants moved marriage from sacramental status and handed it over to the state. The idea survives that the state is in the peculiar business of administering a sacrament. America has always thought of itself in religious terms—as a “city on a hill” and “doing God’s work.”

As a result, some are willing to split the difference in favor of civil unions, creating marriage without the name. Others, however, seem to see a threat to American identity in the state recognizing these relationships. The religious dimension is shown in polls reflecting that Protestants oppose same-sex marriage in much greater numbers than do Catholics. The difference is that Catholics understand that it is not the state that administers the sacrament. Protestants are much more dependent on the state for definition of marriage.

Still, Koppelman asked, why not compromise and enact the status without the label? He responded by explaining that there are two reasons why gay rights advocates resist civil unions.

First, they, too, value the sanctification of marriage. Authors have written that marriage is society’s most fundamental relationship and that marriage is the social institution that defines the most meaningful part of one’s life. It seems to be something that depends on recognition by the state to give it more than secular meaning.

Koppelman agreed that it is good for children to grow up in a stable, loving household. But that implies nothing against gay couples who have stable, loving households and raise children. He said that there is no evidence that those children turn out worse than children raised by heterosexual couples.

The second reason for rejecting civil unions is that gays do not want second-class status, which is what civil unions amount to. Massachusetts’s highest court recognized that status, referring to the “stigma of exclusion” caused by civil unions. Koppelman concluded by acknowledging that the religious and the secular can be kept apart—if there is anything absolute in the First Amendment, it is that the state cannot tell religions what to teach. At present, conservatives’ chief weapon is religious teaching, but that cannot last. In the long run, the refusal to allow gays to marry will be recognized as merely the manifestation of prejudice; many in religious denominations will conclude that there is no religious basis for halting these relationships and for holding that the relationships are inferior.



The third speaker, Professor Paul Griffiths, acknowledged that he argued explicitly from a Catholic position in favor of two theses, which he applies only to the United States. He said that arguing from a Catholic position meant that he assumed the truth of the Church’s dogmatic teaching about sex and marriage, and about the Church’s dogmatic teaching about what relations Catholics should bear to a non-Catholic state such as the United States.

His first thesis: The Church should begin to disentangle its practice of the sacrament of marriage from the civil law governing sexual partnerships. The goal should be a complete separation of marriage from such law.

He used two points to support that thesis. First, he clarified the Church’s teaching about marriage; second, he clarified what the current practice of marriage is in the United States. The Church’s teaching is that marriage is a sacrament enacted by the two principal celebrants, a man and a woman to be married. It is a condition that, once entered upon, cannot be dissolved, not at the will of either party or even if both wish for it. To underscore those points, he offered that: (1) marriage can only be between a man and a woman; it is incoherent to suggest otherwise, because of the intrinsically sexed nature of human beings; (2) marriage is

not a contract, nothing that is sacramental is a contract: the concepts are fundamentally at odds. Since marriage is not a contract, it cannot be dissolved as if it were one. On this understanding, marriage is a high and difficult vocation.

Griffiths next sought to explain the Church's teaching on the pagan state, a state that in its public functions does not explicitly acknowledge the sovereignty of the God of Abraham, of Isaac, of Jacob over that state's communal life. The pagan state acts as though it can worship other gods, such as wealth, power, and unrestrained appetites. It is beyond dispute that the United States is a pagan state. What does the Church say about the civil law of such a state?

The common thread is that there will always be a difference between the moral law and the civil law. Catholics who are citizens of such a state should not advocate as a matter of course passage of a civil law that mirrors moral law or repeal of those laws that do not. Catholics may do so, but not as a matter of course.

Why should we expect people who do not hold Catholic positions to act as though they did? It is not a reasonable expectation that all will do so; magisterial teaching does not treat moral and civil law as identical and Catholics cannot act as though they expect them to be. So, how do Catholics decide when to advocate the imaging of moral and civil law? They do so by the exercise of prudence.

When we look at what most people in the United States think concerning the legal regulation of their sexual and procreative lives, the data is complicated. But it is clear that what is done in the United States does not follow the Church's teachings about sacramental marriage. The norm is different; marriage is a contract either to be endured or dissolved by the parties. Catholic marriage practices in the United States are no longer statistically distinguishable from those of others in the United States. It is hard to be precise, but it is true that civil divorce is common among Catholics—21 percent of the Catholics now alive have experienced at least one civil divorce; civil remarriage without annulment is now common. There has been a decline in the practice and understanding of sacramental marriage.

In this situation in the United States, what does prudence suggest? Griffiths' speculation is that the similarity between Catholics and non-Catholics has causally linked civil marriage and sacramental marriage closely in civil law. As Catholics have become mainstream Americans economically and sociologically, so they have become mainstream in their experience of marriage.

If this analysis is correct, then the first move to reclaim the Catholic understanding of marriage is to begin the separation of the sacramental from the civil, to begin to insulate sacramental

marriage from the dissolvable contract marriage by indicating what is clearly true, that they have nothing in common. If the difference is to be made clear, then sacramental marriage must have a chance of being practiced. If same-sex marriage becomes legal, then it becomes only one more instance of civil marriage.

His second thesis: The state should move progressively away from regulating sexual partnerships by law and toward disentangling its laws about inheritance, procreation, responsibility for children, and the like, from legal regulation of such partnerships.

Griffiths commented on the poverty of the public vocabulary now available for argument about the legal regulation of partnerships. On this view, the question becomes on what grounds the state should or may discriminate between sexual partnerships, giving legal recognition to some, withholding it from others. The only publicly accessible reasons are consequential ones, harm to other rights-bearers. On grounds such as these, the state can regulate relations between adults and minor children. But there are no such grounds for regulating partnerships consisting of consenting adults. It has not proved possible to find convincing public rationales for treating sex and partnership differently. It is better for the state to be seen to withdraw from legal regulation of sexual partnerships between consenting adults and confine itself to contractual inheritance, responsibility for children, etc. That is profoundly wrong, but to be expected from the pagan state. It is better to be consistent and pagan than to be incoherent. The uses of sex in a pagan state are and ought to be very different from uses of sex by Catholics. Confusion by inappropriate legal linkages only muddies the waters.

According to Griffiths, separation will help Catholics understand who they are, will allow for the recovery in the United States of the Catholic sacramental marriage, and will overturn the pagan state as it begins to crack under the weight of its own contradictions, leading to the conversion of that pagan state. Or at least so the theological virtue of hope suggests.

