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LET'S GET MARRIED: AN ESSAY IN HONOR OF MARI MATSUDA

*Richard Delgado**

INTRODUCTION

Most unbiased evaluations of marriage as an institution consider it an unmitigated benefit, at least for those who enter into it willingly and avoid the shoals of divorce. Married people report higher levels of happiness than their unmarried counterparts,¹ live longer,² and lead healthier lives.³ They are less depressed,⁴ drink less,⁵ and report more satisfaction with their status than those who have never married or are divorced.⁶ The benefits of marriage also accrue to the children of married couples. The children of intact couples, whether straight or gay, are happier and more well adjusted, on average, than those of either single parents or couples who are living together but are not married.⁷

Why, then, would anyone oppose extending these benefits to a group of willing individuals—gays and lesbians—who are otherwise qualified—that is, old enough, mentally competent, in love, and financially responsible? Oppo-

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1. E.g., ROBERT G. WOOD ET AL., DEP'T OF HEALTH & HUMAN SERVS., THE EFFECTS OF MARRIAGE ON HEALTH: A SYNTHESIS OF RECENT RESEARCH EVIDENCE 29–32 (2007), <http://aspe.hhs.gov/hsp/07/marriageonhealth/report.pdf>.

2. *Id.* at 39–41.

3. *Id.* at 36–39.

4. *Id.* at 1, 29–32.

5. KAY HYMOWITZ ET AL., THE NATIONAL MARRIAGE PROJECT AT THE UNIVERSITY OF VIRGINIA, KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 11 (2013).

6. Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J. L. & PUB. POL'Y 245, 281–83, 287 (2011) (noting that marriage can be a source of satisfaction and helps society develop worthwhile members).

7. *Id.* at 246, 257–58; Kathleen Parker, *The Middle Class Marriage Deficit*, THE SEATTLE TIMES, Dec. 17, 2012, at A9, available at http://seattletimes.com/html/opinion/2019906791_parkercolumnmarriage.xml (citing research showing that children experience better outcomes when raised in a home with two parents); Jonathan Haidt, *We Need a Little Fear*, N.Y. TIMES, Nov. 7, 2012, at A27, available at <http://www.nytimes.com/2012/11/07/opinion/after-the-election-fear-is-our-only-chance-at-unity.html>.

nents of same-sex marriage contend that, even if gays and lesbians would benefit from the ability to marry each other, allowing them to do so will harm the institution of marriage or redefine it in an undesirable manner.⁸ Some object that extending the right in this fashion contravenes their religious beliefs. Finally, some posit that such an extension would amount to stepping on a slippery slope. Gay marriage, they assert, is part of a homosexual agenda, and granting access to it will only embolden gay activists to demand further concessions. Each of these objections warrants examination.

I. WILL PERMITTING GAY MARRIAGE HARM HETEROSEXUALS?

Similar to Mari Matsuda's analysis in her article on accent discrimination,⁹ it behooves us to examine closely the contention that allowing same-sex couples to marry harms the institution of marriage or redefines it beyond recognition.

A. Tangible Harm

In a forthcoming article, Deirdre Bowen evaluates the possibility that laws or court decisions permitting gays and lesbians to marry each other will damage marriage as an institution, finding little evidence for this conclusion.¹⁰ A longitudinal comparison between states that have enacted Defense of Marriage Acts and those that have not demonstrates that recognizing gay marriage does not diminish either the quality, duration, or frequency of straight marriage.¹¹ Holding other factors constant, permitting gays and lesbians to marry each other does not correlate with divorce, disharmony, or

8. E.g., Girgis et al., *supra* note 6, at 260–61. See *infra* notes 22–28 and accompanying text. Issues like those discussed in this Essay were just before the Supreme Court in two very recent cases, *Hollingsworth v. Perry*, No. 12-144, 2013 WL 3196927 (U.S. June 26, 2013) (considering whether a state ban of same-sex marriage is unconstitutional); *United States v. Windsor*, No. 12-307, 2013 WL 3196928 (U.S. June 26, 2013) (considering the constitutionality of the federal Defense of Marriage Act, which defines marriage as the union of a man and a woman), neither of which fully resolved all of the issues. See Editorial, *The Future of Same-Sex Marriage*, N.Y. TIMES, Jul. 15, 2013, at A16, available at <http://www.nytimes.com/2013/07/15/opinion/the-future-of-same-sex-marriage.html>.

9. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (subjecting to close analysis the common argument for excluding clerks who speak accented English).

10. Deirdre M. Bowen, *I Wanna Marry You: An Empirical Analysis of the Irrelevancy and Distraction of DOMAs* (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209593 (manuscript at 2–3) (“This article offers an empirical investigation of that question and concludes that DOMA provides no measurable benefit to protecting ‘at risk’ families . . .”).

11. *Id.* (manuscript at 17–29) (explaining the author's methodology and study results).

nonmarriage by straights.¹² A state-by-state (horizontal) comparison using states that are similar in geographic location, wealth, and other respects yielded similar results: permitting gay marriage does not harm straight marriage and may even strengthen it.¹³

If disallowing gay marriage does not improve the straight version, what does? Bowen's study shows that states that want to enhance conventional marriage could take two simple steps. They could improve public education and eliminate poverty.¹⁴ Very poor people often do not marry, or, if they do, they end up divorcing multiple times.¹⁵ The same is true for those with less schooling. Divorce and nonmarital cohabitation are rife among those without a college degree.¹⁶ Thus, if a state were interested in improving the quality or longevity of marriages, it should provide increased school funding and generous job and income support for the poor. It should not, on the other hand, discourage gays and lesbians from marrying each other.

States where opposition to homosexual marriage runs deep are among the worst in providing well-financed schools, income support, and other resources that can enhance the prospects of successful marriage for any couple.¹⁷ Opposition to gay marriage based on the ground that it would harm traditional, heterosexual marriage is misplaced, at least if judged by ordinary criteria.

B. Intangible Harm

Opposition to gay marriage often takes a second form. In addition to the charge that it will discourage straight people from marrying each other, some opponents assert that it will injure the institution in less tangible ways.¹⁸ Thus, even if gay marriage does not reduce the number or duration

12. *Id.* (manuscript at 22–23).

13. *Id.* (manuscript at 25–27) (“DOMA states actually had a greater rate of decline [in marriage rates] compared with non-DOMA states . . .”). Moreover, the average decline in divorce rate was greater in non-DOMA states rather than DOMA states. *Id.* (manuscript at 25). The results, however, were not statistically significant. *Id.*

14. *Id.* (manuscript at 29–33, 47–49) (noting that poverty, religion, education, and economic opportunities are associated with the strength or weakness of marriages).

15. *Id.* (manuscript at 29–30); Parker, *supra* note 7.

16. Bowen, *supra* note 10 (manuscript at 29–30, 47–48).

17. That is, states in the Deep South, also known as the Bible Belt. *See id.* (manuscript at 15–16). *See also* MARK DIXON, U.S. DEPT. OF COMMERCE, U.S. CENSUS BUREAU, G11-ASPEF, PUBLIC EDUCATION FINANCES: 2011, at 8 tbl.8, (2013), available at <http://www2.census.gov/govs/school/11f33pub.pdf>.

18. *See* Girgis et al., *supra* note 6, at 249 (“[Revisionists seek] to abolish the [historic] conjugal conception of marriage in our law.”). *But see* David Cole, *The Same-Sex Future*, N.Y.

of straight marriages, some opponents of gay marriage contend that it might damage the current form in a hard-to-quantify fashion. For example, it might cheapen straight marriage in the eyes of those who currently enjoy it. It might also open the door to other, more drastic measures that would tear at the fabric of society.

1. The Ferrari Next Door

Since marriage confers numerous tangible benefits, how could extending it to larger numbers harm those who are already married? One possibility, opponents of gay marriage argue, is through a cheapening effect of some sort. Imagine that someone you know and like buys a Ferrari, of which he is very proud. He lavishes attention on it, washing and polishing it every Saturday and showing it off to his friends. One day, he awakens to find that his neighbor, whom he dislikes and considers uncouth, has bought a new Ferrari too. Your friend feels downcast. His Ferrari now means less to him precisely because his unpopular neighbor has one too.¹⁹

A similar mechanism may account for part of the resistance to gay marriage. Opponents realize that marriage is beneficial and that it makes married individuals happy. But some of them resist extending the same opportunity to gays and lesbians for precisely those reasons. Like the Ferrari owner who does not like his neighbor, they do not want gays and lesbians to be happy. Disliking gays, but unwilling to overtly say so, they oppose a measure that will bring gay individuals the same joy and satisfaction they derive from their own marriages. If gays and lesbians gain the ability to marry, their own marriages will seem less precious. This is, of course, no more sensible a reaction than that of the Ferrari lover who dislikes seeing his neighbor driving a car like his. Most of us believe that the owner should not devalue his Ferrari simply because his neighbor owns the same car. If he cannot do so, he should seek professional help to rid himself of this mental trait, with its overtones of sadism, *schadenfreude* (enjoying the discomfort of a rival), and envy. No reasonable policymaker should take into account the misgivings of straight individuals concerned that their own marriages would be less special if others enjoyed this status as well. Doing so would violate the principle of utility, according to which the main purpose of legal rules is to

REV. BOOKS, July 2, 2009, at 12 (noting that the argument that marriage has traditionally taken a certain form is circular and not a justification for further discrimination).

19. Movie starlets who show up at the Academy Awards ceremony wearing the same dress are said to be chagrined for much the same reason. See, e.g., *Anne Hathaway Oscar Dress Switch*, US WEEKLY, (Feb. 26, 2013, 1:20 PM), <http://www.usmagazine.com/celebrity-style/news/anne-hathaway-oscar-dress-switch-why-she-ditched-a-stunning-valentino-gown-last-minute-2013262>.

maximize net happiness.²⁰ And it would violate fundamental tenets of most deontological systems, which command us to treat others as we would have them treat us.²¹

C. Intense Beliefs and Pluralistic Democracy

An additional complication arises as a result of opposition to same-sex marriage stemming from religious belief. For some, if getting married makes gay couples happy, those couples' happiness is perverse, like reveling in drugs or alcohol. It violates God's dictates, so that even if marriage is generally a good thing, God does not want gay people to enjoy its benefits.²²

1. Hell, Heaven, and the Afterlife

Our society is highly diverse and composed of many different interest groups. Workers, for example, want higher salaries and better working conditions. Owners of the means of production want workers who are willing to accept salaries that are less than a fractional share of the value of the goods their labor produces. Women want an end to the glass ceiling. Minorities want to eliminate discrimination and racial profiling. School-teachers want to be able to unionize, and so on.

Our political system contains a variety of means—elections, free speech, coalition—by which interest groups may negotiate and resolve their differences. A group that feels strongly about one measure might be willing to compromise and logroll with another group interested in a different one. Many writers consider the resulting complex set of arrangements a strength of our system of pluralistic politics and encourage developing nations to follow our example.²³

A difficulty for such a system looms when a group places an inordinate value on a measure that others see in ordinary cost-benefit terms. When this happens, the group holding the value may be unwilling to compromise. For members of such a group, giving in means forgoing an infinite good—God's

20. See, e.g., WILLIAM FRANKENA, *ETHICS* 34–43 (2d ed. 1973) (explaining utilitarian ethics).

21. *Id.* at 23–28 (explaining deontological ethics).

22. E.g., Girgis et al., *supra* note 6, at 285–86. But see Cole, *supra* note 18, at 14 (“In fact, religious views on this question, like on so many others, are deeply divided. Some religions hold that marriage must be limited to the union of a man and a woman. But other religions, such as Buddhism, Unitarianism, and Reform Judaism, hold just as deeply that individuals should be free to marry those of their own sex.”).

23. On the virtues of pluralistic governance, see, for example, ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 196–218 (1985).

favor, an eternity in heaven, or some other such spiritual benefit.²⁴ If their belief system requires that they alone enjoy a commodity that others want, this may lead to a more serious impasse. If the Ferrari owner were a member of one of these groups, for instance, he would not be happy unless he received assurance that his neighbor would not be able to drive a Ferrari too.

We should resolve impasses of this sort in a fashion similar to the one Matsuda applies to service providers whose customers prefer not to deal with counter agents who are competent but speak in lightly accented English.²⁵ Her solution is to require the public to make an effort to understand the counter agent.²⁶ We all speak with an accent, Matsuda observes, even if the one we consider our own is called “standard English.”²⁷ Just as Matsuda proposes that patrons should be required to attempt to understand clerks who speak with accents, society should put little weight on the discomfort that a religious objector feels at the contemplation of sexual minorities marrying each other because just as everyone speaks with an accent, we all—gays included—have spiritual and moral values that shape our desires and behavior. In a system of pluralistic governance, no one is entitled to demand that others subscribe to or shape their conduct according to one set of values, particularly if these values are not widely shared.²⁸

2. Slippery Slopes and Imagined Agendas

By the same token, we should view skeptically the assertion that allowing gays to marry will constitute tacit approval of a broader gay agenda. As with religiously based objection, giving force to this concern would overvalue the wishes of a small faction and would constitute a type of double-counting.

24. The history of religious conflict is replete with examples, including witch-burning, book-burning, and religious wars. See, e.g., Haider Ala Hamoudi, *Religious Minorities and Shari'a in Iraqi Courts*, 31 B.U. INT'L L.J. (forthcoming 2013) (noting the difficulty of safeguarding a minority opinion in states that cater to religious orthodoxy); Melissa Bruynell, Note, *The Dangers of Modern Day Belief in the Supernatural: International Persecution of Witches and Albinos*, 35 SUFFOLK TRANSNAT'L L. REV. 394 (2012); Jim Yardley and Julfikar Ali Manik, *Anti-Blasphemy Protests in Bangladesh Turn to Violence*, N.Y. TIMES, May 7, 2013, at A4, available at <http://www.nytimes.com/2013/05/07/world/asia/two-days-of-riots-in-bangladesh-turn-deadly.html> (describing Islamist fundamentalists' fury over their government's refusal to pass an antiblasphemy law).

25. See Matsuda, *supra* note 9, at 1333–41 (analyzing the case of Manuel Fragante, a decorated ex-serviceman of Filipino extraction who scored at the top on a test of clerical aptitude but was rejected for a job by the Department of Motor Vehicles because of his foreign-sounding accent).

26. *Id.* at 1374–82.

27. *Id.* at 1329.

28. Cole, *supra* note 18, at 14 (noting that a number of religious traditions accept same-sex marriage and citing Robin West's assertion that these marriages can contribute to intimacy, trust, openness, and love).

Society is entitled to know what an objector finds troublesome about *a specific* proposal, such as that gays be allowed to marry. Pluralistic democracy works best when we weigh competing preferences, not the entire agendas we assign—correctly or incorrectly—to our adversaries.

If an individual opposes marriage rights for homosexuals on the ground that allowing gay marriage would then increase pressure to allow gay scoutmasters (leaders of Boy Scout troops), orgies, bigamous marriages, or sex with animals, the rest of us are entitled to respond that we will wait until someone proposes such a measure, which we will evaluate on its merits when the issue arises. A defender of gay rights could, with equal justification, ask what the next step in the religious right's agenda will be—mandatory prayer in public school or stone monuments depicting the Ten Commandments outside courthouses? Both approaches overvalue irrelevant considerations and impair our ability to make sensible, particularized judgments in a case at hand.

As other articles in this series will show, oppression often seems commonplace and normal to those who practice it. Matsuda's scholarship demonstrates how this happens and what we can do about it. The debate over same-sex marriage is a prime example. Her solution to the problem of accent discrimination—naming it, showing what is at stake, and analyzing the various parties' interests—can guide us through the brambles of a debate that otherwise threatens to ensnare us in implacable differences.