

What Consummates the Nuptial Bond and Why Homosexuals Cannot Marry

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Many same-sex couples ardently desire to have their unions recognized as true marriages. A substantial number of people in our society believe that this desire ought to be honored. They and same-sex couples with this desire also think that opposition to the public recognition of the marital character of their relationship is an unjust prejudice. They firmly believe that same-sex couples can live in a committed relationship and have a right to seal their commitment in marriage (e.g., Steven Macedo, "Sexuality and Liberty: Making Room for Nature and Traditions?" in *Sex, Preference, and Family: Essays on Law and Nature*, ed. David M. Estlund and Martha Nussbaum, New York: Oxford University Press, 1997, pp. 86-101). They emphasize that the actual capacity to generate children is not necessary for a valid marriage; after all, opponents of same-sex marriage acknowledge the validity of the marriages of men and women known to be sterile and incapable of having children. It seems that the principal reason why some oppose same-sex marriage is simply unreasonable prejudice.

I can appreciate how deeply many same-sex couples ardently desire to have their relationships recognized as marriages; I also think that many heterosexual married couples have, by their infidelity, recourse to divorce and remarriage when problems arise, and the growing claim that children are better regarded as "burdens" than as "gifts" undermined the credibility of claims that marriage is meant to be faithful and exclusive until death and open to procreation. It is imperative to offer intelligent answers to the questions posed by these concerns. I shall try to do so here.

1. Marriage and its "Consummation" by the Marital Act

How are marriages "consummated"? It is evident and has historically and legally been recognized that the marriages of men and women are consummated by the marital act. Such marriages have been and are now, at least in some States, "annulled" or declared "null and void" if they have never been consummated. The marital act is more than a genital act between heterosexuals who just "happen" to be married. Men and women are capable of having genital sex because they have genitals, and "significant others" and adulterers definitely engage in genital sex. But such heterosexual couples are *not* capable of engaging in the conjugal or marital act. The reason is simply that marriage itself is what enables wives and husbands to engage in the marital act, i.e., to become literally one flesh in an act wherein the husband personally gives himself to his wife by entering into her body person, and in doing so *receives* her; and wherein the wife personally *receives* her husband into her body person and by doing so gives herself to him (on this see Robert Joyce, *Human Sexual Ecology: A Philosophy of Man and Woman*, Washington, D.C.: University Press of America, 1980). Marriage enables man and woman to do this because in getting married a man and a woman give themselves to and receive one



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another as irreplaceable, non-substitutable, non-disposable spouses. By doing so they give to themselves and to one another a new identity: the man gives himself the identity of this particular woman's husband and she, in turn, gives herself the identity of this particular man's wife.

The Marital Act Is Intrinsicly “Apt” for Communicating Love and for Receiving Life

The marital act is the kind or type of act intrinsicly fit or apt both for communicating conjugal love and for receiving the gift of life (see Joyce, *ibid*, pp. 63-85, and my essay, “Marriage and the Complementarity of Men and Women,” *Marriage: The Rock on Which the Family Is Built*, San Francisco: Ignatius Press, 1995). This act is and remains a procreative kind of act even if it cannot actually generate new human life here and now because of non-behavioral factors over which the spouses have no control, for example, the temporary or permanent sterility of one of them. Their act remains the kind of bodily act "apt" for generating human life. In fact, it is the only bodily act so “apt.”

There are great differences between human persons' circulatory, nervous, digestive and similar systems and their procreative or reproductive system. Each human individual can exercise his/her circulatory, nervous, digestive and similar systems by himself/herself, but he/she can exercise his/ her reproductive system only in genital union with a person of the opposite sex (on this see: John Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Law Review* 69, 1994; Robert George and Gerard V. Bradley, "Marriage and the Liberal Imagination," *Georgetown Law Journal* 84, 1995).

In activity of this kind the body's "activity is as much the constitutive subject of what one does as one's act of choice is" (John Finnis, "Personal Integrity, Sexual Morality, and Responsible Parenthood," *Anthropos: Rivista sulla Persona e la Famiglia* 1.1, 1985, 46). Thus in the marital act, spouses freely choose to instantiate their communion of persons in one flesh open to the gift of life in and through an act in which their bodily activity is as much the constitutive subject of what they are doing as is their act of choice.

From this it follows that persons of the same sex cannot marry because they cannot do what married couples can do, i.e., consummate their union by a bodily act in which they become the common subjects of an act that, precisely as human behavior, is eminently fit both for the communication of spousal love and for receiving the gift of new human life.

2. Justice to Married Men and Women and the Common Good

Equating same-sex unions with marriage is also seriously unjust to married men and women, who provide an indispensable service to the common good of society. Genital coition, as noted, is the only bodily act intrinsicly capable of begetting new human life. Kissing, holding hands, fondling, and anal/oral sex cannot do this. And although children can be generated through the genital acts of “significant



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others” and adulterers, it is not good for children to be begotten in this way, as numerous socioeconomic studies have amply demonstrated (on this see *Why Marriage Matters, Second Edition: Twenty-Six Conclusions from the Social Sciences*, ed. W. Bradford Wilcox, New York: Institute for American Values, 2005. See also Wilcox, “The Facts of Life & Marriage: Social Science & the Vindication of Christian Moral Teaching,” *Touchstone*, February, 2005, with references to George Akerlof, Janet L. Yellen, and Michael L. Katz, “An Analysis of Out-of-Wedlock Childbearing in the United States,” *The Quarterly Journal of Economics* CXI, 1996; Akerlof, “Men Without Children,” *The Economic Journal* 108).

Although the new “reproductive technologies” make it possible to generate new human life through means other than genital intercourse, undoubtedly the vast majority of new human persons will come to be through genital intercourse; moreover, as noted already, welcoming new life as the crowning gift of the marital act, which is a specific kind of genital act, is the only way properly to respect new human life. And our society needs new human lives if the needs of all are to be met adequately in the future, as the numbers of elderly persons and their need for care dramatically increases.

Thus the marital union of a man and a woman who have given themselves to one another unreservedly in marriage contributes uniquely to the common good. It merits legal protection. Same-sex unions are not the same; unfortunately, they mimic the real thing and cannot be regarded as marriages in the true sense.

Moreover, as several scholars have shown, same-sex couples do not accept the norm of sexual exclusivity, a norm accepted by 65 to 85 percent of American men and more than 80 percent of American women. As two scholars, David Tubbs and Robert George, point out, “In a 1999 survey of such couples in Massachusetts, sociologist Gretchen Stiers found that only 10 percent of the men and 32 percent of the women thought that a ‘committed’ intimate relationship entailed sexual exclusivity. An essay called ‘Queer Liberalism?’ in the June 2000 *American Political Science Review* reviewed six books that discussed same-sex marriage. None of the six authors affirmed sexual exclusivity as a precondition of same-sex marriage, and most rejected the idea that sexual fidelity should be expected of ‘married’ homosexual partners. For more than a decade, a wide array of authors who favor redefining marriage to include same-sex partners have advanced similar views. In a 1996 essay in the *Michigan Law Review*, University of Michigan law professor David Chambers even suggested that marriage should be redefined to include sexual unions of three or more people--so-called polyamorous relationships” (see Tubbs and George, “Redefining Marriage Away,” in *City Journal*, Summer, 2004; available at http://www.city-journal.org/html/14_3_redefining_marriage.html.)

Those advocating the acceptance of same-sex marriage are well intentioned and sincerely think that denying them marriage is unjust. Unfortunately, this is not true. I also believe that it is possible and just for same-sex couples to be able to receive common health-care and other benefits, not *because* they are of the same sex but



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because they form a common economic and household unit, just as spinster sisters or bachelor brothers or widowed mothers and their sons and/or daughters can. On this issue see my article, “Magisterial Teachings Concerning ‘Non-Traditional Households,’” in *The Catholic Citizen: Debating the Issues of Justice: Proceedings from the 26th Annual Conference of the Fellowship of Catholic Scholars*, ed. Kenneth D. Whitehead, South Bend, IN: St. Augustine’s Press, 2004, pp. 46-52.

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