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What Makes for a Good Theory of Marriage? A Reply to Merrick

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Abstract: Merrick and I agree that Christians are in an epistemic crisis concerning their theory of marriage. We differ on the nature of the crisis and what it is about. I argue that our theory of marriage is a moral one, not a scientific one, and that neither Merrick’s proposal, nor the biologically-grounded conjugal view or the view articulated in *Obergefell v. Hodges* can justify the norm of monogamy in marriage. Nor is it obvious how we should go about justifying it if we want to conserve it.

Merrick thinks Protestant Christians and their identifiable institutions like the United Methodist Church are in an epistemic crisis concerning their “theory” of marriage (which I will call The Theory, hereafter). I agree. The sort of crisis she thinks Christians are in is like those faced by scientists who come to see their Kuhnian-style paradigms replaced by a different one after the accumulation of theoretical anomalies becomes intolerable. I disagree. I share the inclination of Stanley Hauerwas to bristle at the notion that the liturgical if not sacramental practice of marrying two and only two people of the opposite sex somehow flows from a theory that can be assessed in terms of its explanatory power and predictive success in our empirical inquiries. What is it supposed to explain? What is it supposed to predict? Merrick claims that The Theory cannot explain how intersexed individuals like Sherrie Morris can be married to her husband, the assumption being that the truth of The Theory depends on either there being no borderline cases whatsoever, or that it cannot accommodate them if there are. Second, The Theory is assumed to be committed to the claim that we can predict that couples made up of one unambiguously-sexed male and one unambiguously-sexed female are more likely to fulfill their marital vows than those in other arrangements. Neither of these assumptions is plausible, or so it seems to me. Since so much of Merrick’s argument from science depends on these faulty assumptions, I cannot see why her argument should make anyone worried about The Theory.

But we should be worried, including those who reject The Theory for the view of marriage that is currently legal in the United States. One of the striking

features of *Obergefell v. Hodges* is that it vindicates a key claim Elizabeth Anscombe made in her famous 1975 paper “Contraception and Chastity.” In that paper she argued that sex acts are of the reproductive type or they aren’t; if not, then there is no reason to restrict them to marriage or between two people of the opposite sex; if they are, then any act that renders them infertile is impermissible. While many continue to strongly protest her third claim, there is hardly any disagreement with the second. But this was not the case when Anscombe presented her paper; she was thought to be crazy on both accounts: how could permitting the use of contraception entail permitting sex outside opposite-sex marriage?

A look at the majority ruling in *Obergefell* answers the question. Justice Kennedy’s argument can be summarized like so:

1. The right to personal choice regarding marriage inheres in the value of individual autonomy no matter what one’s sexual orientation might be (from *Loving v Virginia* and *Lawrence v. Texas*).
2. Marriage is a fundamental good to human dignity, because it supports a two-person union unlike any other in its importance to committed individuals who are free to enjoy intimate association (from *Griswold v. Connecticut* and *Lawrence*).
3. The right to marry is protected because it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education (*Pierce v. Society of Sisters*).
4. Marriage is a keystone of the Nation’s social order because it is the mechanism by which “a constellation of benefits” is distributed (*Maynard v. Hill*).
5. Therefore, marriage is a fundamental good guaranteed by the Fourteenth Amendment that applies equally to same-sex couples.

Note that the second premise cites *Griswold v. Connecticut*, which struck down anti-contraception law on the basis that it violated the right to marital privacy, something the majority of the Justices thought the Constitution protected. Kennedy extrapolates from this that the fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs” (p. 10). Since it is apparently up to us to define the meaning and nature of sex for ourselves, and by extension, marriage, there is no reason why the state should limit marriage rights to unions that are the most likely to produce children. The logic of the legal train that boarded at *Griswold* could not help but power its way to *Obergefell*.

Premise [1] creates trouble for premise [2], of course. If the morality of marital relations is just a function of what informed and competent adults consent to, and if the rest of *Obergefell's* argument is sound, then it is unjust for the government to prohibit individuals from entering, in Elizabeth Brake's words, "legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the number and sex of the parties, the type of relationship involved, and which rights and responsibilities should be exchanged."¹ Thus, if two sisters named Jane and Jan want to enter into a sexless marriage for the health care benefits which could benefit one of their children, there should be no problem as far as *Obergefell* is concerned.

While the dissenting opinions were right to object that Kennedy's reasoning provides no basis for limiting marriage to two and only two adults, neither does a view of marriage that is built on a biologically-grounded conjugal view involving "bodily union" of a reproductive type.² I agree with Merrick that one only needs to look at Jacob the patriarch to see that plural marriage and the conjugal view are compatible (whether such an arrangement is *good* is another matter). What then justifies our commitment to monogamy? Why should our sacred and secular institutions limit their services to only authorize *couples* who enter into a life-long commitment to one another? As far as the state is concerned, there does not appear to be any compelling interest at stake that would give it the right to interfere with the free association of more than two consenting adults; but what about the church?

Merrick's paper does not adequately answer this question. We are given no good reason to think that the proposed Augustinian good of "spiritual friendship" cannot be shared among the members of marital parties greater than two. And since the good of spiritual friendship need not be enhanced by sexual relations, there should be no worry about marrying people like Jane and Jan. Indeed, it is one of the great virtues of Merrick's paper that she acknowledges Augustine's belief that the polygamy of the patriarchs served as a sacramental sign that signified there being a multitude of chosen people under the reign of God. That monogamy is the only permissible form of union for someone who bears the seal of ordination is irrelevant to the interests of the laity who could seek the clergy to bless their polyandrous unions in the sight of God. Therefore, *pace* Merrick, it does not follow from the view that marriage is

¹ Elizabeth Brake, "Minimal Marriage: What Political Liberalism Implies for Marriage Law*," *Ethics* 120 (2) (January 2010): 303.

² That there cannot be a single act of the reproductive type that unites three people at one and the same time is irrelevant. This is why advocates of the conjugal view must argue for something more "comprehensive" as Girgis, George, and Anderson do in their piece "What is Marriage?," *Harvard Journal of Law and Public Policy* 34.1 (2010): 245-287.

primarily a sacramental signifier of grace that lay people seeking pre-marital counsel ought to be instructed to be “open” to monogamy. To her great credit Merrick says that for people who settle for the “lesser goods” of marriage, “we should take seriously Augustine’s reminder that scripture does not obviously denounce consensual polygamy” (p. 15-16). The irony, though, is that in her effort to recover an Augustinian and Wesleyan belief that the procreative end of marriage is subordinate to the sacramental end, she unwittingly recovers one of the most patriarchal expressions of marriage there could be.

What, then, makes for a good theory of marriage? Should we engage in a metaphysical project first, deciphering the nature of marriage and then from that make normative claims? This seems to be broadly the method of those in the Roman Catholic tradition in which insights from Aristotle, Aquinas, and the natural law tradition are appropriated. Or should we leave deep metaphysical questions about human ontology aside and engage in some theo-normative project that mines the Bible and perhaps respected Christian thinkers of the past to work out a theology of marriage normative for faith and practice? This seems to be broadly the method favored by conservative Protestants who then have to wrestle with, if not reject, the scientific findings of the day.³ Or should we follow what social scientists tell us about sex and gender and then update our theologies accordingly so that our churches will remain viable in an unbelieving world? This seems to be favored by liberal Christians of all types. There is no doubt: Christians are in an epistemic crisis concerning their theory of marriage. But so is everybody else. For Christians, then, the “faithful way forward” depends in large part on what we take such faithfulness to imply. As far as I can tell, each of these groups can heed, in their own way, the advice of van Fraassen, whom Merrick quotes for our instruction, that “On the one hand, then, we are forced to acknowledge a chasm between the old and the new, and on the other, we must be able to see our present as a rationally endorsable continuation of the past.”⁴ How we do this, though, is precisely at issue. That Merrick tries to address these questions is admirable and makes her paper a pleasure to read, despite the problems I’ve noted.

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³ See for example Denny Burk, *What is the Meaning of Sex?* (Wheaton, IL: Crossway, 2013), chap. 6.

⁴ Bas C. van Fraassen, *The Empirical Stance*. (New Haven, CT: Yale University Press, 2008), 112. Quoted in Merrick, p. 12