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Article

# Legalize Same-Sex Marriage

WHY LAW & MORALITY CAN PART COMPANY

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The question of the proper legal status of same-sex partnerships is at the moment lively. On June 10, the Court of Appeal in Ontario defined marriage as “the voluntary union for life of two persons to the exclusion of all others,” thereby including same-sex unions within the definition. On July 30, in his first full-scale news conference in four months, President George W. Bush said that he believes marriage to be proper only for opposite-sex couples, and that he is exploring legal means to maintain that restriction in the United States. And on July 31, the Congregation for the Doctrine of the Faith (CDF) issued “Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons.” Among its conclusions: that “all Catholics are obliged to oppose the legal recognition of homosexual unions”; that laws legalizing such unions are illegitimate, gravely unjust, and opposed to the common good; and that Catholics who support or advocate such laws are supporting or advocating evil.

Catholics are bound to show at least *obsequium religiosum*, religiously submissive respect or deference, to magisterial teaching like that found in the CDF’s document. It comes, after all, over the signature of Cardinal Joseph Ratzinger and with the pope’s approval. One element in showing such respect is to raise questions. The legal version of this is to submit a *dubium*, or doubt, about how best to understand and apply some part of the church’s canon law. The theological version is to suggest difficulties and (sometimes) to argue a counterposition, with the hope of contributing to the further clarification of the church’s mind over time while still maintaining submissive deference to what is taught. This is the ordinary process by which the church’s teaching develops. It does seem to me that, pace the CDF, it is possible for Catholics to support laws legalizing same-sex unions. That claim will be counterintuitive for many, I expect, and so perhaps it will be helpful to state briefly at the outset the assumptions that inform it. All of them are disputable, of course—everything interesting is. But one short essay doesn’t permit entry into all relevant disputes, so I’ll simply state the assumptions here.

The first assumption is that the public culture of the United States is now profoundly pagan, opposed in almost every significant particular to what the church advocates as a justly ordered society. Most Americans, including this one and almost certainly including you, the reader, spend much of their time worshipping the gods of blood, soil, money, sex, and autonomy. We may try not to, but we fail much of the time. If we think otherwise, we deceive ourselves. The second assumption is that what the church teaches about the nature of marriage and the proper expression of sexual desire within it is true. This teaching is complex, beautiful, and not susceptible to brief summary. Central to it is the idea that the human body has graven upon it by God’s creative act a

nuptial meaning, from which it follows that the fullest expression of sexual desire is only possible for those sacramentally joined in marriage, that those so joined can only be opposite-sex couples, and that most expressions of sexual desire outside those bounds (as well as many within) are disordered, lacking what philosophers and theologians call essential goods, and therefore sinful. This I'll call the traditional view.

The third assumption is that there is an important distinction, for Catholics, between judging some pattern of human activity sinful and judging that it should be illegal. This assumption also, of course, informs the CDF's argument: "The scope of the civil law is certainly more limited than that of the moral law." It is even more obviously true that thinking some pattern of human action morally good does not entail thinking that it should be required by civil law. It is, for Catholics, always an exercise of prudence to decide whether in particular cases to advocate the mirroring of the church's moral teachings in their state's law—for that law binds non-Catholics as well as Catholics. The decision for or against such advocacy depends upon many things, but most commonly upon judgments about two difficult questions.

The first question: Is it reasonable to expect non-Catholics to understand and assent to what they'd need to understand and assent to in order reasonably to agree to being bound by civil laws that reflect or approximate Catholic moral teaching? If the answer is no, or probably not, or in most cases not, this will begin to suggest to the prudent that it may be better not to advocate the passage of such laws, good though they may look from the viewpoint of Catholic moral teaching. It will at least be relevant to the consideration of whether to advocate such laws. When many citizens are bound by laws that seem unreasonable to them, laws whose justice and reasonability they cannot discern, they will feel themselves coerced by such laws and will resist. This will be most especially true when such laws regulate matters close to their hearts and minds. Prudence suggests restraint in the passage and maintenance of such laws. This, too, I take to be ordinary Catholic doctrine. We Catholics don't (or the more reasonable among us don't) advocate the legal restraint of, for example, literature or film we regard as commending evil; we also don't (mostly) advocate the passage of civil law that would make the sale and use of artificial contraceptives illegal in the United States, even though this, too, is an evil according to Catholic teaching (a teaching I personally affirm).

The second question: What is the character of the body politic in which the discussion takes place, and what is the character of the church's relation to that body politic? Is it largely Christian? Deeply pagan? Profoundly Muslim? Buddhist to its core? Post-Maoist? Answers to questions like those are important in considering which laws to advocate, for prudence suggests that if you find yourself in a society with a long history of, for example, practicing female circumcision for religious reasons, you'd better think hard before advocating laws that make such a practice illegal—and that this is so even if you think such a practice sinful. And, if Catholics form a tiny minority in a particular state, you will (and prudentially should) think differently about the character of public law in that state than you do in a state where Catholics are the majority.

So much for preliminaries. Now for application to the question of legalizing same-sex marriage.

Civil-marriage law, it will be no news to anyone, is rapidly changing in Europe and North America. Almost all the changes move what is recognized by the state as marriage further and further from what Catholic doctrine and canon law understand marriage to be. This is an old story—its roots go back at least as far as the legal recognition of no-fault divorce forty or so years ago—but it's been given a new force and urgency by increasing legal recognition of same-sex partnerships, sometimes called marriages and sometimes not, in various parts of the world.

Catholics in the United States are divided about these developments. Almost all recognize that there is a deep incompatibility between the laws and doctrinal norms governing Catholic marriage and the laws now governing civil marriage in most of the Western world. These incompatibilities include recognition of same-sex marriages: such marriages are impossible under canon law, and their occurrence stands in direct contradiction to the Catholic understanding of marriage summarized (much too briefly) above. But the incompatibilities extend to more than sexuality and its proper uses. They include also irreconcilable differences about what the married state signifies, how it is related to a just and healthy body politic, how the bearing and raising of children should be understood and regulated—and much more.

That there are these differences is not much in dispute. Catholic response to their increasing public visibility has been strident and mostly of two sorts. In the first camp are those who think that the Catholic understanding of marriage is right, and that changes in civil law that oppose it must be resisted. This is generally the position taken by the teachers of the church, from the pope on down to the bishops in Canada, the United States, and (most of) Europe. A peculiarly clear instance of it is evident in the CDF's new document. The second camp comprises those who have rejected (or never held) some or all of the traditional Catholic understanding of marriage, who support the direction in which civil-marriage law now tends in the United States and Canada, and who in some cases would like to see it go further.

These two camps agree in one important particular. They both think that their understandings of marriage should be reflected as much as possible in civil law. And they both tend to think this for the same reasons. These reasons are two. First, each camp thinks that there are good arguments for the truth of its position, arguments that should convince all rational people if presented with sufficient care and clarity. Second, each camp thinks that the body politic will be badly damaged if its view is not reflected in civil law. Each side therefore ceaselessly argues for its position. The traditional or "conservative" camp, where one would find intellectuals like Princeton's Robert P. George, argues from what is evident in natural law, or from the certainty about the heterosexual norm of marriage that "no ideology can erase from the human spirit," as the CDF puts it. The "liberal" camp argues from the right, in a pluralist democracy, to equal access to the benefits of civil law for people of different sexual proclivities. Perhaps Sidney Callahan's positive evaluation of same-sex unions is a good

example of this position. And each camp offers gloomy assessments of how bad things will get if their view is not enacted into law.

In my view, these agreements between the traditional and liberal are mistaken. I'll explain why from the standpoint of someone who thinks the traditional, or what I like to call the "orthodox" Catholic, understanding of marriage true, and with an eye to the CDF's claims.

Although I think the orthodox view true, and that it would finally be better for everyone if everyone thought so, I do not think it either sensible or useful to resist current changes in civil marriage law on the ground of these convictions. Why not? First, in the United States (to which the following remarks are limited) the body politic is deeply divided about the question of marriage, and there are not, as a matter of fact, arguments available that do or should convince those who do not hold the orthodox view (whether Catholics or non-Catholics) that they should. The lack of such arguments—I'll call them "public arguments"—is empirically obvious. Catholics have been offering public arguments about sex and marriage with increasing sophistication and stridency for decades. Many of these arguments are good—they are valid and they have true premises. The reason why they do not convince is, most fundamentally, that the premises are rationally disputable. The idea that the human body has graven upon it by God's creative act a nuptial meaning, whether given sophisticated expression through a phenomenology of embodiedness (as John Paul II has done) or crude expression through discussion of vaginas and penises, though true, is not obviously true.

This is only to say that the traditional Catholic view is a complex and subtle one. That's among the reasons why I called it beautiful. It assumes and implies many disputable claims about the nature of human embodied existence, as do its competitors. The truth about none of these things is obvious or self-evident, which is among the explanations for the fact that rational, thoughtful, and well-meaning people differ so profoundly about them. That this is so in the case of sex and marriage is abundantly obvious. I think those who disagree with what I call the orthodox Catholic view wrong; I do not think all or even many of them (Catholic and non-Catholic) stupid, mendacious, or malicious. Many, perhaps most, have views about sex and marriage rooted in deeply and passionately held ethical positions, and some have devoted substantial intellectual energy to working out the details of those positions. I hope that at least some of those who reject the orthodox position give those who hold it the same credit.

The CDF has a more optimistic view about the capacities of public argument. In its "Considerations," the CDF claims that the church's teaching about sex and marriage belongs to the natural moral law; the CDF also claims that there are good arguments to show that same-sex unions offend against the proper order of things in the rational, biological, anthropological, social, and legal spheres. I won't discuss the particulars of these arguments here, except to say that I think all of them are good: their premises are true, they are valid, and their conclusions are therefore also true. However, to say that an argument is good in this sense is not to say that those who doubt or cannot see its goodness are

thereby irrational. It is, of course, to say that they are wrong, but that's quite a different thing.

The doubt I'd like to put before the CDF, therefore, as well as the before the readership of *Commonweal*, is this: Is it part of Catholic orthodoxy to have a particular view about the nature and persuasive efficacy of public argument? This is a relevant doubt because much of what the CDF argues depends on the view that such argument is persuasive—or that if it is not, this is because of a fundamental failing in rationality among the errant few not persuaded. This, I submit, is itself not a reasonable thing to think. It is shown not to be by the (obvious?) fact that many thoughtful people find the premises of the CDF's arguments rationally disputable.

In cases of this sort, public argument cannot resolve disagreement. This is not to say that there is no truth of the matter, or that there are no good arguments about it. It is only to say what's also true, which is that public argument will not succeed in producing consensus in this matter. To think that it could is to overestimate its capacities. Catholics should not, therefore, advocate the embodiment of the orthodox view in U.S. marriage law because we think there are persuasive public arguments about the question. There aren't.

The CDF holds, then, a particular view about the nature and persuasive efficacy of public argument. It holds, too, that this view provides reasons for Catholics to oppose the legalization of same-sex unions. To what extent are these judgments binding as part of magisterial teaching? And what remains of the CDF's argument if they are not?

The other ground on which Catholics protest current changes in marriage law, as the CDF argues, is that they think the body politic will be badly damaged if they do not—that the innocent (especially children) will suffer, and that the fabric of social life will be cheapened, coarsened, and progressively unwoven.

It is a stronger ground. But here too there's a doubt. Appealing to the negative effects of changes in civil-marriage law as a ground for opposing such changes necessarily involves attempts to predict the results of changes in the law. This is not easy to do, as a quick look at the history of attempts to do it will show. Does anyone know, to take a relatively trivial example, whether keeping marijuana on the list of controlled substances increases or decreases damage to the body politic? Does anyone know whether increasing the minimum wage benefits actually does or does not benefit the poorest Americans? This difficulty in predicting results should produce modesty and reticence on the part of those who advocate public-policy decisions on the basis of such prediction. It is remarkable how rarely it does so at both ends of the political spectrum.

The doubt I offer to the CDF on this point, then, has to do with the appropriateness of the congregation's lack of modesty about its own predictive powers. Again, the question of the degree of conviction with which such predictive claims should be made is, I take it, a properly philosophical question, not itself part of the deposit of faith; I would be grateful for clarification as to the extent to which Catholics should feel themselves bound by particular positions on it.

But it is not only that there is a question about the degree of modest reticence proper to predictions in this sphere. It is also that it is possible to sketch, with some reasonable conviction, an alternative scenario in which current changes in marriage law are not only tolerated but advocated by Catholics, and in which the result is good for the church and so, eventually, good also for the body politic. This scenario, too, must be depicted and recommended with modest reticence. What is this alternative scenario? It is one in which the church's practice of marriage gets increasingly disentangled from the legal regulation of civil unions by the state. It is very likely that the present deep entanglement of the two has acted as a solvent upon Catholic marriage practices. Sacramental Catholic marriage is already understood and practiced by most U.S. Catholics on the civil model of a contract dissolvable at the will of either partner. The almost non-existent difference between the divorce and separation rates of Catholics and non-Catholics serves as some evidence for this. When, as is now the case, civil marriage is acknowledged by the church and sacramental marriage is recognized by the state, it is difficult to see how things could be otherwise. Civil marriage is pagan, and this has increasingly meant that American Catholic marriage practices have become pagan as well.

Progressive disentanglement of the two, to the point, finally and ideally, where they have nothing to do with one another, is what Catholics may—and in my view should—now advocate. This should eventually mean that civil marriage on the dissolvable-contract model would not be acknowledged by the church; it might also mean that sacramental marriage would not be recognized by the state. The fundamental point is that the contract law governing civil marriage should become additional to and conceptually and practically separable from the church's sacramental practice of marriage. Such an upshot would provide plenty of interesting difficulties for the church's canon lawyers to sort out—and no doubt also for the state's civil and constitutional lawyers. It would also create interesting and probably positive effects upon the church's practices with respect to remarriage after divorce.

There are many advantages to this way of thinking for orthodox Catholics. First, the picture just sketched might permit the presentation and appropriation of the church's understanding of marriage with renewed vigor. The distinctiveness and difficulty of this understanding—for it is both distinctive and difficult—would become clearer to Catholics and others if its contrast with the dissolvable-contract model were institutionally evident. One way to move toward this clarity about difference is to advocate extending the dissolvable civil contract to all who want it, including, certainly, same-sex couples. There is certainly no reason internal to the contractual model to deny such an extension. Second, increasing disentanglement might help more Catholics than is now the case to understand and attempt to live by what I've called the orthodox view. It might also make the seductive beauty of this view increasingly attractive to non-Catholics. These things are made difficult or impossible by the current union of incompatibles which is the intermingling of Catholic marriage practice with state practice. These results, should they happen, would be real moral and social goods. That they are a possible (even probable) outcome of allowing civil law to

recognize same-sex unions goes a long way toward meeting the objection that such advocacy damages the body politic. It goes even further if it is agreed (and it should be) that the trajectory of change in civil marriage law is now so hard to resist that what the CDF, bishops, and Catholic intellectuals have to say about it has virtually no chance of altering its direction.

The clarification of differences (to use an old-fashioned Marxist term) that would result from progressive disentanglement would likely be a powerful tool of evangelization. You understand better what you are if you have a clear picture of what you're not. This kind of clarification is something that all Catholics should want.

Not all questions in public policy should be approached in this way by Catholics. The abortion question, for example, should not be, and it's instructive to consider why not. The abortion question and the same-sex marriage question are alike in being beyond resolution by public argument, and the reason why this is so is the same in both cases. But they are not alike in the kind, extent, and immediacy of the damage inflicted upon the body politic by public-policy decisions about them. The current state of U.S. law about abortion makes impossible the legal restriction of the slaughter of more than a million innocent human beings every year. Nothing like this would happen were same-sex marriage to become legal. What would happen is that some people would be permitted by law to live in accord with their deepest convictions. There would be no shedding of innocent blood. The two outcomes are not commensurable. Catholics have no option but to resist and try to change current U.S. law about abortion. Matters are quite different with respect to the legalization of same-sex marriages. This question should seem to Catholics more like the question of the legal availability of contraceptives than like the question of the legal availability of abortion.

I conclude that Catholics may support the legalization of same-sex marriages, together with the progressive disentanglement of sacramental marriage from state-sponsored contractual marriage. It is likely that such support, together with the argument and clarification that would accompany it, would clarify Catholic teaching about marriage, help Catholics to live in accord with it, make it more attractive to non-Catholics, and so, in the end, conform the body politic more closely to Christ by making the church more seductively beautiful. This is a prudential judgment, of course, correctible and fallible like all such.