

What Is Marriage: Is that the question? A Reply to Sherif Girgis

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No-one will be surprised that Sherif Girgis was not persuaded by my review of his book, just as no-one will be surprised that I was not persuaded by his response. I write this further reply not in the forlorn hope that I can persuade him or his followers to change their minds, but primarily to expand upon the claims I made in my review in somewhat more detailed terms and to defend myself against various accusations of misrepresentation. As such, its tone will be somewhat more academic than my original review, so I apologize to interested lay readers in advance for this. That said, I hope that this reply might at least allay Girgis' concern that my objections in the review are based on uncritical lefty assumptions rather than arguments.

The argument of Girgis & co hinges upon the idea that marriage has an essence which excludes gay unions. I launch three attacks against this basic strategy. The first, explored in Part 1, takes up the question of how their chosen formulation of this essence is supposed to exclude gay unions without excluding various kinds of heterosexual relationships that Girgis and co like. Ultimately, for Girgis and co, this comes down to the significance of procreation. I defend this reading of their book against accusations of misrepresentation before asking whether their tweaks to their analysis are warranted or *ad hoc*. The second attack, explored in Part 2, backs up and asks whether it is sensible to investigate whether marriage has an essence at all. And the third attack, explored in Part 3, asks whether, even if, contrary to Part 2, marriage did have an essence; *and*, contrary to Part 1, Girgis and co had a plausible, non-ad-hoc candidate for what this essence is that gives them the results they want, any of this would matter for law and public policy. Note that if *any* of these attacks succeed, their argument fails. I maintain that all three succeed. Then, in part 4, I briefly address two further challenges of consistency – one issued by Girgis to me; and one by me to him. Throughout this reply, I also deal with various allegations of misrepresentation that Girgis levels at my review.

1. *How the essence of marriage is supposed to exclude gays*

In my review, I wrote:

“the key reason why homosexual unions are [on Girgis' view] said not to amount to “comprehensive unions” is that they do not involve procreation”

According to Girgis, this is a misrepresentation. Well, here is p. 23 of the book:

“Marriage is a comprehensive union of persons [...] first, it unites two people in their most basic dimensions, in their minds *and* bodies; second, it unites them with respect to procreation, family life, and its broad domestic sharing; and third, it unites them permanently and exclusively.”

I take it that two gay people can meet the first condition of being unified in mind and body. Pending any argument from the authors, I see no reason to deny that gay sex constitutes bodily union any less than heterosexual sex does, other than one that collapses into the fact that it cannot involve procreation. They do tell us several times that complete mind-body union can only be embodied, as they put it, ‘in coitus’, but unless this is itself a point about procreation, it just looks like prejudice: what is it exactly about a gay sex act that means that it cannot constitute mind-body union as a

heterosexual act can? I also take it that they meet condition three: gay relationships can be permanent and exclusive. And I also take it that gay people meet the second two clauses of the second condition: they can be united in family life and in broad domestic sharing. So, what does this leave? It leaves the fact that gay unions do not involve procreation. So I presume that this is the only candidate for what rules them out, on the authors' view.

Now, it's true that the authors do not leave it at that. They realize that if they left it at this, they would be ruling out many heterosexual marriages, such as those involving one or more infertile person, who does not – and, indeed, cannot – procreate. And they don't want that. So they say that *co-ordination toward* procreation, even without actual procreation, is good enough. (Contrary to what Girgis says, I actually explicitly recognized this in my review: “Conveniently, heterosexual marriages between people who are infertile, or do not wish to have children, are OK, since they are still “aimed” at procreation, in some mysterious and undefined sense.”)

Is there an intelligible notion here which genuinely classifies the cases as Girgis and friends want it to? Let's see what they say in replying to the infertility challenge:

“The kind of cooperation that makes a group into a baseball team is largely aimed at winning games. Teammates develop and share their athletic skills in the way best suited for honorable wins – for example, with assiduous practice and good sportsmanship. But such development and sharing are possible and inherently valuable for teammates even when they do not win a game. Just so, marital cooperation in both sexual and domestic life is characteristically ordered to procreation and childrearing...Such development and sharing, including the bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive.”

Certainly it is true that development and sharing are *valuable*, in both the baseball and marriage cases, regardless of whether one wins, or conceives. (So too, the development and sharing that gay couples enjoy, even by these authors' lights, surely has at least some value.) However, this alone clearly cannot establish that infertility involves “co-ordination toward procreation”. What Girgis *et al* need the analogy to show – and I think they'd recognize this, so I take myself to be reading them without disingenuity – is the claim that, just as the losing baseball team is still *co-ordinated toward winning*, the infertile couple are *co-ordinated toward procreation*.

Why should one think that? Well, the most obvious reason to count the baseball team as co-ordinated toward winning is that, even when they lose, they are *trying* to win. If this is right, then the analogy falls apart immediately, for at least some infertile couples are perfectly aware of their infertility and are in no sense trying to conceive. If you doubt that, then just switch to an even clearer example: that of heterosexual couples who choose not to have children. These people, who are actively trying to avoid conceiving, would be baffled to hear that they are, unbeknownst to themselves, really trying to conceive after all! Here, the analogy is not a baseball team who have *lost*, but a baseball team who have *thrown the game*. Of course one can try to win and fail, just as one can try to conceive and fail; but not everyone is even trying to win, just as not everyone is trying to conceive. But – much as Girgis and his co-authors may lament such couples' decisions – they do not, so far as I know, want the state to prevent such heterosexual couples from marrying each other.

So it seems that they must claim that the notion of *co-ordination toward* is not something that requires *trying*. The same argument holds for similar notions like intent, so it can't require those either. ‘Co-ordination toward’ thus remains obscure. (This is the “mysterious and undefined” sense of which I spoke in which, for Girgis et al, all heterosexual sex ‘aims’ at procreation.) The idea is presumably that even if you aren't *yourself* aiming at procreation, the activity in which you're engaged

– sex – *is* aimed at procreation – perhaps because this is its ‘function’. And that’s enough for your act to be ‘co-ordinated toward procreation’.

It’s still somewhat unclear to me how to interpret this claim, and what the argument for it is meant to be. Still, supposing we can make sense of it, let’s notice how odd a sense of ‘co-ordinated toward’ this arrives us at, by considering an analogy. The function of a gun (if you believe in such things as functions, and these authors clearly do), and of pulling a gun’s trigger, is to shoot bullets. This is what it has been designed for, and what it will do under the right conditions. Suppose I have a gun which I know not to be loaded, and the mechanism of which would not work even if it were loaded. Because it gives me a certain kind of thrill, but absolutely not with the intention of killing myself, I might put the gun to my own temple, look at myself in the mirror and pull the trigger. In Girgis et al’s sense, my act is “co-ordinated toward” killing myself. It seems that if a couple who don’t want children, use three different kinds of contraception, and have sex purely for pleasure are “co-ordinated toward” procreation, I count in just the same manner as “co-ordinated toward” killing myself.

Now, of course, Girgis et al are free to stipulate that this rather odd and non-standard of ‘co-ordinated toward’ is the one relevant to their view. Still, it’s starting to feel like an awfully ad hoc notion to invoke in a view of what makes for a marriage, and my suspicion is that it has just been engineered to exclude gay unions without excluding any of the heterosexual people that the authors feel uncomfortable leaving out. Since the authors think that marriage realizes a distinct kind of good, the question is: what is the distinct good that is realized by “co-ordination toward procreation” in this very particular sense? It is *not*, as in the baseball case, the value of trying, since this form of co-ordination is, as I have just shown, not a form of trying. Nor can it, for these authors, be any notion reducible to the enjoyment or fulfilment of the sexual partnership, since those goods can be enjoyed by homosexual couples too. And it’s just not to give an argument of any sort for the authors to stamp their feet and say that the value is that of the *distinctive union that only heterosexual sex can amount to*. After all, they are right at this point engaged in trying to say just what is distinctive about it in any important sense.

All this is not even to say anything of couples that do not even *engage* in sex – say, because they are elderly and do not wish to any more, and whether Girgis et al will, by some further tortuous route of reasoning, count them too as ‘co-ordinated toward procreation’, or argue that the state ought not recognize their marriages. Overall, we are in my view left with no reason to accept the authors’ ad hoc and idiosyncratic notion of ‘co-ordination toward procreation’ as carving out any distinction of import between gay unions and many instances of heterosexual unions.

2. *Does marriage have an essence at all?*

I call it a “central failing” of the book that “its authors never justify why we should think of marriage as even having a central function or nature”. Girgis points out that they do address a view which they call ‘constructivism’, which he says, is the denial of that claim. A few points. First, I take ‘justify’ to be a success-term – more later on why I don’t think their arguments, so far as they have any, succeed. Second, if I’m right that they don’t succeed, then this is more than a minor omission on their part: the arguments of most of the rest of the book crucially hang on their view here being correct, in a way that its brief treatment belies. But third, and by far most importantly, their characterization of what they call ‘constructivism’ jumbles together two very distinct ideas, only one of which I mean to endorse, and so in ‘refuting’ it they do not address it properly.

The first idea is that there is no fact about what marriage’s ‘essential nature’ is. This idea is the one I mean to endorse. The second is that there are no moral facts about the differential values that different legal arrangements would realize. That, I do not mean to endorse. One can reject both

the claim that marriage has an essence and the claim that this putative essence has its own distinctive kind of value without denying that some legal arrangements realize values that are objectively superior to others, precisely by rejecting the authors' assumption that we are to get our normative conclusions out of metaphysics or the 'essence' of marriage. In this way, one can be a constructivist about the social fact of what marriage *is* without being a moral constructivist.

A couple of pages later, they think, somewhat differently, that social constructivists must be ethical utilitarians, imputing to them the view that "marriage [is] a fiction designed to promote social utility". This is a confusion on two counts. First, constructivism about marriage is not the view that marriage is a *fiction*; that a social institution is something that we have invented does not make it fictitious. The British train system is, I assume, on anyone's view a human invention, but it is not a fiction. Second, nothing about constructivism about social institutions commits one to some particular ethical view such as utilitarianism: there's simply no connection between these two views. This is important because the authors try to use it to stick gay marriage advocates who want to make deontological rights-claims with their own method of starting with the metaphysical essence of marriage and moving from there.

Perhaps they struggle to see how could there be a right to marriage if marriage had no essence. But there is no contradiction here at all: one can simply claim that the right to marriage falls out of a more general right: to have equal access to central social institutions that we invest with meaning, however those social institutions are contingently constructed and invested with meaning. So, since social constructivists need not be utilitarians, non-utilitarian gay marriage advocates need not be forced away from social constructivism. These confusions allow the authors to illegitimately conclude that "most people on *both* sides of our current debate reject constructivism", and thus to dismiss it and continue to assume that marriage has an essence.

As for actual arguments against *social* constructivism in particular, I can find only one argument, which is an appeal to an analogy with friendship (pp. 47-48), which apparently, "no-one is fooled into thinking ... does not have an objective core" (even here, though, it is not clear if moral and social constructivism are being adequately distinguished). Well, count me fooled, because it's far from obvious to me that friendship has a mind-independent essence, and since the authors give no argument to think that there is, their claim that marriage has a mind-independent essence remains unjustified in their book, as I claimed it to be in my review.

In his reply to my review, Girgis tries to shift the burden on to me to give a positive argument against essences. He lists a number of philosophers who have defended essences, although it remains an open question whether these philosophers would defend essences for *social* institutions. It is true, however, that I am somewhat skeptical of essences in general. Far from being a 'blind spot' engineered in order to save my pinko liberal, gay-loving politics, this is born of a much more general frustration with essentialist metaphysics and ethics which has been a feature of my philosophical sympathies ever since my undergraduate days. However, for these purposes, we need only ask whether it is plausible that a social institution like marriage has an essence. I gesture at my bafflement at this idea in my review; and I maintain that bafflement can be a perfectly legitimate philosophical reaction to certain ideas. Every philosophical argument has to start from plausible premises, and there cannot be an infinite regress of arguments to support these premises, arguments to support *those* arguments' premises, and so forth. Indeed, like many epistemologists and metaphilosophers, I'm not sure there's anything worse that can be said against many false views than that they are drastically implausible. Still, I'll try to say something more about why I find the idea of marriage having an essence so baffling. In the course of introducing their view about the essence of marriage, Girgis *et al* appeal to a thought experiment:

“Suppose a man and woman build an exclusive relationship based on deep conversation. They pledge to talk about their most secret sorrows and joys with each other, and only each other, until death do them part. Have they married? Clearly not.”

Obviously these people are not married, but that’s because they haven’t undergone the legal ceremony of marriage! And the same would be true of *any* couple that underwent such a ceremony. Now, Girgis may object here that I am confusing *marriage*, the human good, with *marriage law*. Only the former, for Girgis, has an essence. There is a disagreement here, to be sure, but it is not that I simply confuse these two; rather, I claim that the facts about marriage itself (in any sense that I recognize there to be such facts) are constituted by the facts about marriage law (or, in societies with less developed legal systems, perhaps by the norms and practices of the society). How are we to adjudicate our dispute? The only way that I can see forward is to consider what fits best with ordinary, pretheoretical intuitions. To test this, we could describe scenarios designed to pry apart legal standing from some particular conception of marriage’s essence and see whether anyone would be tempted to answer the question “Are they married?” according to anything other than legal standing. I don’t have the resources to run such surveys right now, but I can gesture to what sort of cases we’d need and hope to make my view intuitively appealing through them.

First, we’d want a case which involves all the legal standing necessary for the law to count individuals as being married, but which does not satisfy the essence of marriage that Girgis et al believe in. We could have a case where a couple have undergone the legal ceremony of marriage, but are unfaithful, do not love each other, where the man is violent to the woman, and do not have children. Are the couple married? I think the vast majority of respondents would say yes. On the other side, we could have a case where the couple have privately made every commitment that Girgis et al want, but have not gone through the legal marriage ceremony. Is this couple married? I think the vast majority of respondents would say no.

Girgis et al might try claiming that, as a contingent accident of our current marriage law, it is actually impossible to pull apart legal standing and *genuinely being married*. Perhaps the case I gave above is one which does satisfy their essence of marriage after all. This strategy seems unsustainable, however, given that marriage law differs across borders; so it can’t be that every single jurisdiction managed to line up their legal institution perfectly with *marriage itself*. For example, jurisdictions differ in whether they require consummation for a marriage to count as legally binding. So, Girgis et al need to decide which of the two states got the essence of marriage right (I presume they’ll pick the one that *does* require consummation), and then we can simply run the thought experiment again, specifying that we are in the jurisdiction where consummation is not required, and then asking whether a couple who have not consummated are married. Again, I strongly predict that the ordinary response would be to say that they are.

Let me stress once again that I do not mean to say that all legal arrangements are equally good, or that ‘it all just comes down to preference’, or even social utility; when I say that the unfaithful, unloving couple whose relationship includes domestic violence are *still married*, this is not in any way to claim that their relationship has the same value as that of two people who love each other, are committed, and care for each other. I can say that precisely because I pry the question of what marriage *is* and that of what arrangements have *value* apart. Marriage *is* whatever we make it, but what we make it should be guided by considerations of the independent values (not necessarily merely utilitarian ones) that different arrangements realize. Analogously, that one has a positivist account of what the law *says* does not entail that one rejects the possibility of normatively evaluating the law. On the contrary, it is precisely what makes room for such a possibility.

3. *What's bad about violating an essence?*

In my review, I raised a further objection: even if marriage does have an essence, what's so bad about our legal arrangements failing to match that essence? After all, many bad things have essential features, and if (hypothetically) marriage were to have this essential feature of excluding gays, wouldn't this just be grounds for adopting a legal institution very similar to marriage, except more inclusive?

The authors treat the fact of what marriage *is* as being itself a 'moral truth' (p. 48). This is initially puzzling, given that their own gloss on the conjugal view does not appear to state any claims about obligations, moral reasons for action, rights, responsibilities, or even moral goodness. The question of what marriage *is* belongs to metaphysics rather than ethics, even if it is a putative metaphysical fact which the authors take to be of normative significance. What they really mean is that the thing which they think that the essential nature of marriage has its own distinctive kind of value; strictly speaking, however, that is an ancillary claim to the one about what the essential nature of marriage is. Compare Girgis' own favorite analogy in his reply, knowledge: one might hold that knowledge has a distinctive kind of value, but one wouldn't thereby make one's identification of what knowledge *is* – say, the proposition that knowledge is the ability to rule out relevant alternatives – even putatively normative in itself.

It's telling that, whilst to me the paradigmatic example of a moral claim is that one ought not to hurt others needlessly, theirs is, not to put too fine a point on it, that vaginal sex is superior to anal. I'm being facetious here, but this is the ultimate meaning of Girgis' coy statements that there is "a morally significant difference between (a) the mind-body union embodied in coitus and fit for family life, and (b) all other close bonds". Notwithstanding the prejudice involved in taking vaginal sex to be inherently superior to or of greater significance than anal sex (and other homosexual sex acts), and the unexplained sense in which the latter gives rise to a union that is inferior and unfit for family life, I find it hard to make sense of this way of thinking of *moral* significance. Following many contemporary ethicists, I tend to think of *morality* as being about obligations and that which we can hold each other accountable for, not as a rank ordering of the good things in life. So even if this rank ordering of sexual activities was correct, I find it hard to see what its moral significance would be. Even if I am wrong and the authors are right that heterosexual union has a distinctive value that homosexual union cannot share, how would any of the former's value be lost by allowing the latter to take place as well? It's not as though gays, by practicing their 'less valuable' sex acts, are going to drain the value and fulfilment out of the heterosexual act of coitus that the authors are so enamored of.

Girgis responds by pointing us back to the social harms that will result from enshrining in law the idea that marriages are about emotional union, regardless of permanence or exclusivity. But hold on a second! Didn't I refer in my review to "ill-supported assumptions that homosexual relationships cannot be permanent"? And didn't Girgis object that this is not the authors' view? Well, maybe they officially disavow it, but we see here how the view that there's a deep, non-contingent connection between homosexuality and impermanence does seem to play a role as an *assumption* behind other parts of their argument. After all, they think that setting it down in law that gays can get married is to enshrine in law the idea that marriages are not permanent or exclusive! In implicitly taking it that any move away from the conjugal view – a view which, I've already argued, is gerrymandered to exclude gays – involves a move away from a conception of marriage as permanent, these authors belie their own claim not to take there to be some kind of deep connection between homosexuality and impermanence of relationships.

The authors might here object that I have oversimplified their argument. The point, they might say, is that in order to permit gay marriage, we have to move away from the conjugal view to

the revisionist view, and in so doing we just incidentally end up promoting impermanence and non-exclusivity. But, unless you think that gay unions really can't be permanent, the idea that these two views are the only two to choose from is ludicrous. Why couldn't we have a vision of marriage which was characterized by permanence and exclusivity *without* excluding gays? Only, surely, because you think that somehow, heterosexual relationships and sex provide for permanence and exclusivity in a way that homosexual ones don't.

The authors are committed to claiming this because, if they did not, then they would not be able to argue, as they do on p. 56, that the *legal act* of recognizing gay marriage would teach the "lesson that marriage is fundamentally about emotions", and that marriage would "take on emotion's tyrannical inconsistency". If the authors recognized the possibility of a vision of marriage which allows gay unions but retains the idea of permanence, then this argument would just be a non sequitur, since nothing about the legal act of recognizing gay marriage would entail anything about permanence or impermanence. So, knowingly or not, the assumption that there is a connection between homosexuality and impermanence seems to be playing a large role here.

All of this is crucial because the idea that gay marriage will lead to impermanent, less exclusive relationships for all of us is the major harm that is supposed to explain why it would be bad to violate what Girgis et al take to be the essence of marriage. Now, they might retreat at this point. They might say that it is not that including gays *necessarily* forces into a broader revision of marriage to make it impermanent and less exclusive. Rather, it is just that in practice, this is what the movement for gay marriage is associated with, and so, rightly or wrongly, legalizing gay marriage will make people *think* that marriage is impermanent and non-exclusive. This, presumably, is the point they are driving at in citing advocates of same-sex marriage who have sought broader revisions to marriage, as well as statistics about the permanence of gay relationships (pp. 68-72).

However, this seems to be a case, at best, for urging for the case for same-sex marriage *not* to be made out in terms of a broader, drastically revisionist agenda. A mistaken association between homosexuality and impermanence – if the authors agree it is mistaken – should be corrected, not pandered to. And, for what its worth, I agree that gay marriage advocates harm their cause by associating themselves with drastic 'revisions' to marriage. As I put it in a previous article,

"Having tried to avoid the issue for years, Democrats now justify gay marriage by appealing to a rhetoric of modernity and pragmatism. Explaining his decision to vote in favour of the recent landmark bill legalising gay marriage in New York, State Senator Carl Kruger said, "What we're about to do is redefine what the American family is. And that's a good thing. The world around us evolves." This language feeds right into conservative claims that the legalisation of gay marriage is an attempt by a remote elite to, as Kruger himself puts it, redefine the family; an exercise of state control over ordinary peoples' wishes. Conversely, the language of freedom, with which the Democrats should make their case, is ceded to conservatives, who are allowed to get away with doing bloody violence to it."

All of this, however, speaks in favor of putting the case for gay marriage differently, not in favor of abandoning it.

4. *Challenges and analogies*

Girgis re-challenges me to explain how I can consistently oppose polygamy. (He accuses me of having misread him and his co-authors in attributing to them the challenge to explain *polygamy*, rather

than polyamory, but is it they who are confused about the meaning of the terms. The term 'polyamory' has no special connection to marriage at all, and refers to having multiple intimate relationships, whereas the term 'polygamy' can refer to any marital arrangement involving multiple individuals. The word for what Girgis calls 'polygamy' – “one man, several wives” – is in fact 'polygyny'.) This is odd, since I explicitly took no stand on polygamy in my review. Rather, I said it was a difficult case involving a balance of rights which requires detailed empirical data before we can make a judgment. There are, even with non-polygynous polygamous relationships, still potential issues about coercion, especially of women; but I formed no specific judgment one way or the other on this, not knowing enough about the empirical extent of this. Nevertheless, as I said in my review, were one to come to the judgment that these potential dangers of coercion were too great to warrant state-sanctioned polygamy, this would in no way be inconsistent with support for same-sex marriage.

On the other hand, I challenged Girgis to explain why his position does not lead to support for a ban on gay sex. Here he simply misunderstands my argument. He assumes that my argument is just this: Girgis et al think gay sex can't consummate a marriage, so they should also think it should be banned. That was not my argument. Rather, my argument was that one could run a *parallel* argument to the one they run against gay marriage against gay sex. Here it is, roughly: sex is co-ordinated toward producing children; that is (part of) its essence or function, and realizes a distinct value. If we allow sex that is not co-ordinated toward producing children, this will erode the view of sex as co-ordinated toward producing children, and thus erode that distinct value for us all. So we should ban gay sex. What I want to know is whether this argument goes wrong, according to Girgis, and why the analogous step in the anti-gay marriage argument does not. He may have an answer to this challenge, but his reply does not give it.

It's surely true that, as Girgis rehearses over and over again, we all have our blind spots. Dedicated and religiously-motivated opponents of gay marriage are no exception. I honestly believe that Girgis bears no malicious intent toward gay people in his attempts to find secular, philosophical grounds from which to deny them equality in the law. Nevertheless, there are no such grounds to be had.