

# Hang Together

"We must indeed all hang together, or most assuredly we shall all hang separately." Benjamin Franklin

## The State's Interest In Marriage Is Not Co-terminus With The Nature Of Marriage

Posted on **September 30, 2012** by **Daniel Kelly**

This title — “The State's Interest in Marriage Transcends Children because Marriage Does” — is known, in the trade, as Dan Kelly-bait.

Let me start by saying I agree with nearly everything Greg says in his post. Rebuilding marriage is a more extensive project than just rolling back some of the legal changes on which I have previously commented.

And I particularly agree with his observation that “the moral imperatives associated with reproduction alone are an insufficient basis for a sound shared morality of social ethics for sex . . . .” However, that does not necessarily mean the *state* (as opposed to, say, church or other cultural institutions) has something to say about the moral imperatives of sex beyond that of procreation. Each intrusion into the marriage relationship requires an independent justification. So let's see what we have.

Government, as we all agree, is not synonymous with society. It is a cultural player, but its writ does not run to every aspect of society. So before we say the state's interest in marriage transcends the third facet we have been discussing, we have to first determine whether this broader scope is susceptible to legitimate government action.

We base that determination on the nature and function of government. Government exists to protect rights, and it accomplishes that goal by exercising authority delegated to it by the people who together comprise society. Its tools are limited, and consist almost entirely of coercion — preventing people from doing what they wish and compelling them to do what they do not wish. Within proper parameters, this is extraordinarily valuable. Outside proper parameters, it is almost always destructive.

I identified the state's interest in marriage as creating a stable framework within which the couple's offspring will receive provision and protection (and I'm glad that means I'm running with the bigshot Christian intellectual pack!). Absent that stable framework, the children will become wards of the state and a burden on society, and the child will be deprived of his rightful claim on his parents for protection and provision. The state may legitimately act in these circumstances because in doing so it is protecting the rights of both the potentially abandoned children, and society's right to not bear the burden of raising someone else's child.

With that in mind, let's look at the child-transcending part of marriage in which Greg says the state has an interest. He observes that sex always and everywhere creates a permanent metaphysical union. I happen to think that is true, although the fact that it is metaphysical makes it difficult to verify.

But let's assume it's so. Why does this suggest the state might have an interest in that metaphysical union? The metaphysical nature of sex comes into play with two of marriage's three facets: The first (interpersonal relationships), and the second (the relationship of the union to God). But the very fact that these are metaphysical should suggest they must be free of the entirely physical reach of the law.

So why do we in society, through our representatives in government, have any standing to approach a couple and tell them that the metaphysical aspect of their sexual behavior is subject to our scrutiny and regulation? If they are doing nothing to injure someone's rights, or putting us at risk of shouldering their responsibility should they produce a child, there is no basis for our coercive intervention.

The law properly reaches marriage's third facet (cementing a union against the possibility of procreation) because the facet and the intervention both exist in the physical realm and deal with the protection of rights. So if the state's interest in marriage transcends that facet, we need to know what it is about that transcending part that subjects it to the state's coercive attention.

Back to you Greg.

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11 THOUGHTS ON "THE STATE'S INTEREST IN MARRIAGE IS NOT CO-TERMINUS WITH THE NATURE OF MARRIAGE"



Karen Rupprecht

on **September 30, 2012 at 11:01 pm** said:

I have to agree here...it's just not clear to me why the STATE should have an interest in the metaphysical aspects of marriage. Not to say that interest couldn't exist, just that I'm really not seeing it. And I guess I'm a little worried about saying that "the state's interest transcends x in y because y transcends x".

My thought is that marriage, like sex, is in its nature is both unitive and procreative. So we rightly protest efforts to destroy or undermine the unitive aspect by either trivializing divorce or ignoring the metaphysical aspect of sex. Not to get back on my soapbox (except that I'm climbing right back on it as I write this), but shouldn't we also be concerned about efforts to destroy or undermine the procreative part as well, if indeed it is the "nature of marriage" that we're interested in defending?



Greg Forster

on **October 1, 2012 at 7:51 am** said:

Before I get to a full reply (yeah, I'm buying time on this one because I still have yet to smack down Dan's Charlie Brown post) let me ask both of you a clarifying question: are you proposing whole hog libertarianism on everything sexual other than actual intercourse? To take the most extreme example, how about public nudity? What business is that of the state? It's not a hypothetical issue; pornographers and their ilk have been successfully pushing to expand the boundaries for how they advertise their filth for a generation now, and there seems no logical endpoint in sight. Moreover, many groups (and not just those with sexual causes – PETA comes to mind) have sought to use public displays of sexuality (but not actual intercourse) to advance their causes. Why should that be against the law? Or is it my business to shield my six-year-old daughter from all this 24/7?



Daniel Kelly

on **October 1, 2012 at 9:38 am** said:

The extreme cases are easier to address, so thank you for not tasking me too harshly on a Monday morning!

The justification for restrictions on public nudity arises from the fact that sometimes when person A does X, it necessarily prohibits person B from doing Y. Because the options are mutually exclusive, the state must intervene as referee.

Public nudity, at the very least, interferes with our ability to properly raise our children. Children should not be exposed to overt sexuality because they are not yet emotionally, morally, and physically mature enough to deal with it. Allowing the pornographers or exhibitionists to take over the public square, therefore, causes harm to the rights of others, and therefore the state has a legitimate interest in intervening.

Put another way, the pornographer or exhibitionist has no greater claim to the commons than those who wish to uphold a different morality. The libertarians, lacking a sufficiently fine-tuned understanding of the competing rights at issue, would simply allow the commons to become a cesspool. Well, there is no principle that says the lowest common denominator gets to rule the day.

I admit this is a tricky area, and it calls for a thorough examination of mankind's nature and wise application of the lessons we learn from that study. After all, there are those in the Middle East who insist that women cover themselves so completely that no skin shows at all. And their justification is that anything less arouses a prurient interest. We won't countenance this in America (at least, not yet – I have to wonder how far our elite cultural institutions will go in defending and promoting radical Islam in our country). But we also won't (at least for now) allow public nudity either.

So the line, falling between the two extremes, is discretionary. But its discretionary nature does not mean it is based any less on protecting rights and preventing one person from harming another.



Karen Rupprecht

on **October 1, 2012 at 10:38 am** said:

I'm not sure why I would need to go from "the state should regulate marriage at least in part because children ought of necessity to be involved" to "the state does not have a right to regulate anything sexual that is not intercourse."

My point is not "the state should stay out of private things" but rather that marriage is not a wholly private thing. Regardless of whether the state should stay out of all wholly private things (if such a category exists), then, there is at least one good reason why the state could be involved. I, unlike a libertarian, am agnostic on the question of what does constitute a wholly private thing; I'm just suggesting that children are one good reason why marriage is not a private thing.

I suppose I'm also questioning whether the metaphysical nature of sex is also a reason why marriage isn't private. My off-the-cuff thought is that that – i.e., the metaphysical nature of sex – is one reason why it is the Church's business, but not necessarily the state's (in a society with church-state separation, though this leaves room at the individual state level).



Greg Forster

on **October 1, 2012 at 2:11 pm** said:

Helpful responses! The important point from my perspective is to establish that the law has a legitimate interest not only in the material conditions of a child's formation (intact families) but in the metaphysical conditions of a child's formation (a cultural environment that creates space for humane sexuality by marginalizing, partly by force of law, inhumane sexuality). From this, it is easy to see that the state cannot carry out the latter function without a robust understanding of what constitutes humane and inhumane sexuality. Therefore the state must know more about sexuality than merely what pertains to reproduction. Since you have admitted that the state can forcibly marginalize inhumane sexuality from the commons in order to keep it from becoming a cesspool, I would ask you how the state can do that unless it is able to answer the questions, "What is inhumane sexuality? What is a 'cesspool'?" And these, manifestly, are metaphysical questions.

I'll let you chew on that while I go compose a rejoinder to Dan on football-yanking. Thanks for walking into my trap! 😊



Kyle Ferguson

on **October 1, 2012 at 2:30 pm** said:

Does social science state the homosexual marriages are 'bad' for society? I would agree that rampant homosexuality is, but what about lifelong gay partnerships? just curious.



Greg Forster

on **October 2, 2012 at 9:10 pm** said:

Social science can't directly render a verdict on what the social impact of stable lifelong gay partnerships would be because there aren't enough such partnerships for us to get a statistically valid analysis.



Daniel Kelly

on **October 1, 2012 at 2:55 pm** said:

Hold on a second, let's not move quite so quickly. The state's interest in the presentation of sexuality in the commons is not an interest in sexuality *per se*, but in refereeing the interests of two competing actors who have a claim on the commons.

When the state favors the parents over the pornographers, it is not doing so because it has made an independent moral determination that the pornographer is purveying a harmful metaphysical something. It is responding to the community's demand that the commons' floor be set at a certain level.

The state must take this role because the pornographers and the parents have mutually exclusive claims to use of the commons. And the state can, and does, draw the line without reference to an absolute moral standard. It simply references community standards.

That's about all it can legitimately do. Doing more would involve the state in determining what is orthodox. And that it may not do.

That is why culture is so important. On these types of questions, when both sides cannot simultaneously do as they wish, culture is the deciding factor. The state, although a cultural actor, simply enforces the decision made by all the other cultural actors.



Greg Forster

on **October 2, 2012 at 9:12 pm** said:

You are once again making the mistake of putting law and culture into hermetically sealed compartments. I had no idea you were such a Hunter fan!



More tomorrow.



Daniel Kelly

on **October 3, 2012 at 9:47 am** said:

I don't think law and culture are hermetically sealed. I understand that law has an impact on culture, and that other cultural elements impact the law. But I also understand that we do not describe the domain of legitimate state action by inquiring into its cultural effects.

I think your confusion on this point comes from misunderstanding the piece of the project this addresses. Whenever we consider state action, we must ask two fundamental questions. First, does the state have the authority to act in the intended arena? Second, is it prudential to act in the specific way contemplated?

We don't answer the first question by inquiring into whether it will have cultural effects or what they might be. Instead, we inquire into the nature and purpose of government, as John Locke did. Because the nature of government is coercive, and the only legitimate purpose for exercising coercion over co-equal members of society is to protect rights, that is the extent of the state's authority to act.

Now comes the second question. Once you have established the parameters within which the government may act, you may then account for its cultural impact. Thus, when making discretionary decisions within the proper scope of state action, the state can and should exercise its authority prudently, understanding there will be incidental effects for which it must account.

This is something that probably bears more than a comment, but for now it will have to do.

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