

## IS SAME-SEX MARRIAGE UNJUST?

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*A response to James S. Spiegel's article in THINK 43 in which he argues that same-sex marriage is unjust.*

James S. Spiegel, in a recent article for this journal,<sup>1</sup> puts forward a new kind of argument against same-sex marriage, which he calls 'the argument from justice'. His argument, in short, is that heterosexual unions have special social value and hence deserve special social recognition. Since, he argues, allowing same-sex couples to marry would deny such recognition, it is inherently unjust. In this article, I put forward two criticisms of Spiegel's argument. I conclude that he has not shown that same-sex marriage is unjust.

### The Argument from Justice

Arguments against same-sex marriage tend to take one of two forms. First, some arguments are theological in nature, and seek to denounce same-sex marriage via Scripture or appeals to natural law. Others, however, are consequentialist in nature, claiming that same-sex marriage results in harmful or undesirable consequences. In presenting his argument from justice, however, Spiegel puts forward a different kind of argument, one that is not based on religion or outcomes but is instead based on considerations of fairness and desert.

The conception of justice that Spiegel employs is one of 'fairness' or the 'giving to each its due' (82). In claiming that same-sex marriage is unjust, he is claiming that

heterosexual unions are not treated fairly or given their due in societies in which same-sex marriage is recognized. A strength of this approach, says Spiegel, is that it avoids the standard theological and consequentialist arguments, for theological arguments 'controversially assume that theological views may properly serve as the foundation for civil laws', whereas consequentialist arguments 'lean heavily on predictive claims for which available supporting data is contentious' (81). Furthermore, the argument from justice is a clear attempt to turn the tables on marriage equality proponents, for such advocates frequently frame their case in terms of the demands of justice.

What reasons, then, does Spiegel provide for thinking that same-sex marriage is unjust? His argument for this is the following:

1. Heterosexual union is the indispensable means by which humans come into existence and therefore has special social value (indeed, it has the greatest possible social value because it is the first precondition for the existence of society as well as its continuation).
2. What has special value to human society deserves special social recognition and sanction.
3. Civil ordinances which recognize same-sex marriage as comparable to heterosexual marriage constitute a rejection of the special value of heterosexual unions.
4. To deny the special social value of what has special social value is unjust.
5. Therefore, same-sex marriage is unjust.

A common initial criticism of this argument is to challenge the first premise. Such criticisms rest on the claim that heterosexual unions are *not* the indispensable means by which humans come into existence. Given the emergence of new reproductive technologies, such as IVF and cloning, coitus has been rendered inessential for human

reproduction. Consequently, it is argued, heterosexual unions do not have special social value.

Spiegel provides three responses to this objection. First, he writes that while IVF is common today, it is far from being the standard means of human reproduction. Moreover, IVF still requires the combination of male and female germ cells, and thus heterosexual unions remain indispensable to the biological process. Second, it is not clear that cloning will ever be a real possibility (at least not when our concern is the production of a healthy human being). Third, and finally, there are historical considerations to appreciate, namely that 'human civilization began through heterosexual unions' and 'for millennia such unions have been the indispensable means of human propagation. For this reason, for as long as our species lasts, we will all be indebted to heterosexuality in the most profound sense.'

A second objection that Spiegel considers is that not all heterosexual marriages produce children. Indeed, some heterosexual marriages cannot produce children, whether for medical reasons or reasons of age. But if marriage cannot be extended to same-sex couples on account of their inability to produce children, should it not also then be withheld from infertile heterosexual couples? Since it is implausible to forbid marriage to such couples, it is argued, it is similarly implausible to forbid it to same-sex couples.

In response to this criticism, Spiegel cites Robert P. George's claim that while some heterosexual marriages are not reproductive in effect, they are nonetheless reproductive in type. The contention is that infertile heterosexual couples are still of the right type – namely, heterosexual – and it is this type of biological process that has special social value:

Reproductive-type acts have unique meaning, value, and significance because they belong to the class of acts by which children come into being. More precisely, these acts have their unique meaning, value, and significance because they belong to the only

class of acts by which children can come into being.<sup>2</sup>

These responses help to pinpoint what is intended by Spiegel's rather ambiguous expression 'heterosexual union'. What, exactly, does he mean by this expression? He cannot mean 'heterosexual marriage', for it is clearly false to claim that heterosexual *marriages* are the indispensable means by which humans come into existence. Does he, then, intend 'heterosexual intercourse'? But, insofar as his response to the IVF rebuttal appeals to male and female germ cells (in which no such intercourse takes place), it seems he must not mean even this if this instance is to count as a heterosexual union. This suggests that, at minimum and most plausibly, 'heterosexual union' means the union of a human egg and a human sperm; that is, it denotes human fertilization. It is this process, Spiegel claims, that is the indispensable means by which humans come into existence.

Despite the attention that these criticisms are likely to garner, I am disinclined to dwell on Spiegel's first premise. The reason is that even if heterosexual unions are the indispensable means by which humans come into existence, it seems most unlikely that such unions (and only such unions) deserve special recognition via the option to marry. If correct, there are more fundamental problems with Spiegel's argument, and it is to these that I now turn.

### First Criticism

Having outlined the argument and considered some initial objections to it, let us take a closer look at the third premise. It reads:

3. Civil ordinances which recognize same-sex marriage as comparable to heterosexual marriage

constitute a rejection of the special value of heterosexual unions.

Now why should we think that this premise is true? Spiegel presents an analogy, what I will call 'the Purple Heart analogy', which hints at an answer:

The Purple Heart is awarded to American soldiers who have been wounded or killed in battle while serving our country. Suppose a proposal was made to extend this award to all military personnel who see battle, not just those who are wounded or killed. Those who advocated this change might argue as follows. 'We believe that all soldiers who fight for their country are entitled to the Purple Heart. After all, they too demonstrate extreme courage and commitment, usually just as much as those who are wounded. And by extending this award to *all* who serve in battle we by no means intend to diminish the valor of those who are wounded. On the contrary, we affirm and honor their service as much as anyone.' Surely such an argument misses the point that extending the Purple Heart award in this way defeats the purpose of honoring those who have made a *special* sacrifice for their country, significantly greater than other soldiers because of the physical harm they have endured ... So it goes in the case of advocating for same-sex marriage. (85–6, emphasis original)

Spiegel presents the Purple Heart analogy for a very specific purpose: he wants to show that even if proponents of same-sex marriage do not *intend* to deny the special social value of heterosexual unions, they nonetheless do so when they extend marriage to same-sex couples. This is not something that I wish to challenge. However, Spiegel's use of the analogy provides a helpful illustration of why he

endorses the third premise. He appears to be relying on an argument of the following sort.

First, from the original argument's first premise we can infer that:

A. Heterosexual unions have special social value.

Then, in light of the Purple Heart analogy, we can discern the following sort of commitment:

B. The purpose of marriage is to recognize the special social value of heterosexual unions.

This corresponds to Spiegel's claim in the Purple Heart analogy that extending the award 'defeats the *purpose* of honoring' (emphasis mine) those who have been wounded or killed in battle. If, instead, the Purple Heart was originally designed to recognize the valour of all who serve, then there would be no problem in awarding it to all who serve. In addition, from the Purple Heart analogy we can discern the following sort of general premise:

C. For every X, Y and R (in which X is not identical to Y), if the purpose of R is the recognition of the special social value of X, then the recognition R of Y constitutes a rejection of the special social value of X.

This broad premise generalizes the idea that if the purpose of the Purple Heart is to honour the special sacrifice of those who are wounded or killed in battle, then extending it to all who serve would entail a rejection of this special social value. Turning to the issue at hand, then, when we substitute 'marriage' for 'R', 'heterosexual unions' for 'X', and 'same-sex unions' for 'Y', we get:

D. If the purpose of marriage is the recognition of the special social value of heterosexual

unions, then same-sex marriage constitutes a rejection of the special social value of heterosexual unions.

Accordingly, from (B) and (D), we can derive the third premise of Spiegel's original argument:

3. Civil ordinances which recognize same-sex marriage as comparable to heterosexual marriage constitute a rejection of the special value of heterosexual unions.

The problem with this argument, however, is the implicit endorsement of (B). What support does Spiegel provide for the contention that the *purpose* of marriage is the recognition of the special social value of heterosexual unions? Crucially, he provides none. Once more, this is not a minor point, for if this particular conception of marriage's purpose is not assumed – if it is not assumed that the purpose of marriage is to recognize the value of heterosexuality – then it is not clear how recognizing same-sex marriage would constitute a rejection of the special social value of heterosexual unions. In short, in assuming this as the purpose of marriage, Spiegel effectively begs the question.

The problem can be brought out most fully if we consider an alternative conception of the purpose of marriage. John Corvino, for instance, has argued that the purpose of marriage is the personal and social value of 'mutual lifelong caregiving'. He writes:

Perhaps the point of marriage is not to *celebrate* love, but to help sustain a certain form of it. After all, true love is challenging. It is not a mere feeling, but an ongoing activity. I'm referring here not to the love that gives you stomach butterflies when your beloved shows up (or leaves you waiting) at a candlelit restaurant early in the relationship, but to the love that keeps you up all night tending to him when he's so

sick that he can't keep dinner down. Surely a key part of the rationale for marriage is to support that kind of steady, enduring love even as romantic bliss waxes and wanes. Such love is good for people, and society has an interest in promoting, honoring, and reinforcing it. Marriage fortifies such love. It does so legally, by giving people tools for caregiving (spousal privilege, hospital visitation, bereavement leave, and so on). And it does so socially, by creating a web of expectation, encouragement, and support.<sup>3</sup>

This conception of the purpose of marriage, which Corvino calls the 'family-building rationale', is about providing reliable and committed caregivers. Arthur C. Danto, in a similar vein, identifies the good of marriage with the good of love. He mentions Aristophanes' discourse in Plato's *Symposium* to the effect that marriage is about finding someone 'who matches the jagged edges of our being'.<sup>4</sup> These are conceptions of the purpose of marriage that are at odds with Spiegel's own conception. To assume it, therefore, without argument, begs the question against those who view marriage as serving a different purpose.

There is also good reason to think that Spiegel's conception of marriage is not the correct one. Let us grant for the sake of argument that heterosexual unions deserve special social recognition. Nonetheless, there are numerous ways in which this can be brought about, and not all of them are equal. Imagine, for instance, that the right to vote is awarded to all and only those who serve in the military. We may grant that such individuals deserve state recognition, but deny that *this* – the right to vote – is the proper form that such recognition should take. The reason, of course, is that the purpose of voting is to enable citizens to choose their own leaders. Hence all citizens, including those who do not serve in the military, have a legitimate interest in the ability to vote. To restrict this to one such subgroup of citizens, even to one that deserves some kind of recognition, would be unjust.



Likewise, even if we grant that heterosexual unions deserve some kind of recognition, marriage does not appear to be of the appropriate kind. The legal provisions associated with marriage specify benefits and responsibilities more clearly associated with Corvino's family rationale than Spiegel's recognition of heterosexuality. This includes such provisions as spousal privilege, bereavement leave, and an obligation to pay alimony in the case of divorce. Given the nature of marriage, then, its purpose seems more clearly aligned with the support of mutual lifelong caregiving relationships.<sup>5</sup>

In this section, I have assumed for the sake of argument that heterosexual unions deserve some kind of special recognition. But even granting this assumption, we have seen that Spiegel's argument falls short. Civil ordinances recognizing same-sex marriage deny the special social recognition owed to heterosexual unions only if marriage is the appropriate mechanism for such recognition. But we have been given no reason to think this, and there is good reason to think otherwise. Such considerations are enough to rebut the argument from justice against same-sex marriage. Nevertheless, there is a nagging suspicion that we have still conceded too much. Is it really true that heterosexual unions deserve state recognition? In the next section, I explore and reject this contention.

## Second Criticism

We have seen that Spiegel's third premise begs the question. But even before we get to this premise, a sub-conclusion of his argument is that heterosexual unions deserve special social recognition and sanction. But is this true? To see whether it is, consider again the second premise of his argument:

2. What has special value to human society deserves special social recognition and sanction.

This is quite plausible on its face. It makes sense to think that if something has special social value, then it would be good for society to recognize it as such. The first thing to note here, however, is that the terms 'recognition' and 'sanction' are ambiguous. On the one hand, one may mean that members of society should *believe* ('recognize') what has special social value as having such value. On the other hand, and more to the point, one may mean that what has special social value deserves some kind of performative social or civil act, such as the extension of certain benefits. It is in this latter sense that Spiegel uses the term. It is important to keep these two senses distinct, however, for the proponent of same-sex marriage can agree that heterosexuality deserves recognition in the first sense (the doxastic sense), but deny that it deserves recognition in the latter sense (the performative sense). In what follows, I intend only the performative sense.

A second issue here concerns Spiegel's use of the term 'special'. What, for instance, distinguishes special from less-than-special social value? Spiegel, as we have seen, claims that heterosexual unions have superlative value, and this because they are *indispensable* for the existence and continued existence of society. Indispensability, however, cannot be a necessary condition. Suppose, for instance, that Candice is in a position to save the human race by the simple flip of a light switch. Even so, Cornelius is standing at the ready, eager to hammer a nail into a wall, for this too would save humanity from extinction. Nonetheless, Cornelius is not needed, as Candice chooses to flip the switch. Now her action, while not indispensable for humanity's survival (for Cornelius could save humanity too), is still of immense social worth. Consequently, indispensability is not a necessary component of something's having special social worth.

Spiegel of course never asserted that indispensability was required. But the aim here is to get a sense of what is intended by something's having 'special' social worth, and plausibly Candice's action qualifies. Candice's action is of

immense social value, as we have seen, but suppose she flips the switch while ignorant of its connection to humanity's fate. She simply just needed, we may suppose, some additional reading light. Here it seems evident that she would not deserve special social recognition; her action, after all, was a mere fortuitous event, albeit an incredibly fortunate one. Accordingly, this indicates that the second premise needs modification, for it does not take into account whether such acts are *intentional*; that is, whether they are done *for the sake of* the socially beneficial end. But this creates a problem for Spiegel's application of the premise to heterosexual unions. The problem of course is that heterosexual couples do not typically have children in order to furnish society with members. Rather, people have children, when they do so deliberately, because of the satisfaction that such children bring. Hence, heterosexual unions do not typically deserve special recognition.

But what about those outliers, that rare couple which decides to procreate *for* the benefit of society? Still, it is quite misplaced to claim that this couple deserves special recognition. To see this, return to Candice and her light switch. Suppose that it is not just Candice's light switch that could do the trick of saving humanity, but that any light switch would do. This time, however, one of these needs to be switched every minute. Throughout the years, different people have taken on the task, switching on and switching off their lights, while others have avoided light switches altogether. Do those who have performed this task deserve special recognition? Well, no, not if their reason for switching on their lights has nothing to do with the preservation of humanity, as the previous account of Candice showed. Suppose that these individuals simply wished to turn on their lights at times. An unintended effect of this, an effect that does not factor into their decision to flip the switch, is the preservation of the human race. Such people, clearly, deserve no such recognition. But now suppose that some of these light switchers are our outliers. Such individuals do flip their switches in order to preserve the human species.

Do they deserve special recognition? The answer again seems to be 'no'. The effect was bound to occur anyway, and for quite ordinary, unrelated reasons. Their good will, in a sense, was not needed.

In light of these considerations (no pun intended), I want to suggest the following alternative account of when something deserves special social recognition: something deserves special social recognition just in case it involves a *deliberate and extraordinary act of special social worth*. This account, for instance, would include the intentional assumption of personal risk or sacrifice when done for the sake of socially beneficial ends, as with those who are wounded or killed in battle. Likewise, it would include landmark achievements which promote socially beneficial ends, such as the garnering of a peace treaty by a public official or the influential work of a respected musician. What is relevant here is that the act in question is *extraordinary*. Heterosexual acts, even ones that result in procreation, however, are as ordinary as they come. If the situation were that few could or in fact wanted to procreate, then perhaps a heterosexual couple who decided to procreate for socially beneficial ends would deserve recognition (although marriage, given my first criticism above, would not be of the appropriate form). But that is not our reality. Since what deserves special recognition is that which is socially beneficial, deliberate and extraordinary, heterosexual unions fail on two fronts. Consequently, I see no reason to think heterosexual unions deserve special social recognition.

## Conclusion

I have attempted to show that same-sex marriages are not unjust. Spiegel begs the question in assuming that the purpose of marriage is the recognition of the special social value of heterosexual unions. In addition, it is doubtful that heterosexual unions deserve special recognition in the first

place. I have argued that only socially beneficial acts that involve extraordinary achievements deserve such recognition. But, so argued, heterosexual unions do not meet the bar.

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## Notes

<sup>1</sup> James S. Spiegel, 'Why Same-Sex Marriage Is Unjust', *Think* 15.43 (2016): 81–90.

<sup>2</sup> Robert P. George, "'Same-Sex Marriage' and 'Moral Neutrality'", in Christopher Wolfe (ed.) *Homosexuality and American Public Life* (Dallas: Spence Publishing, 1999), 141–53, at p. 144.

<sup>3</sup> John Corvino and Maggie Gallagher, *Debating Same-Sex Marriage* (Oxford: Oxford University Press, 2012), 15 (emphasis in the original).

<sup>4</sup> Arthur C. Danto, 'Philosophers and the Ritual of Marriage', *Think* 6.17/18 (2008): 7–14, at p. 9.

<sup>5</sup> Two points are worth noting here. The first is that what is really needed is a debate about what the purpose of marriage *should* be, and not merely what its purpose currently *is*. The second is that Spiegel would probably respond to my first criticism as follows: 'if same-sex marriage is permitted, then any extra endorsement of heterosexual marriages would be merely symbolic and therefore trivial'. But why should we think this? First, not everything that is symbolic is trivial. The Purple Heart and the Presidential Medal of Freedom are symbolic, but hardly trivial. Second, there is no reason to think that the only alternatives on offer have to be symbolic. The state's awarding free college education to all those who are in a heterosexual marriage would hardly be trivial or symbolic. Third, and more seriously, this response does not meet the criticism in the body of the text. Spiegel has given us no reason to think that his particular conception of marriage's purpose is the correct one.