

This paper is currently under consideration by *Philosophy and Public Issues: A Journal of Moral, Political, Legal and Social Philosophy*. It is also a chapter of a forthcoming monograph *Meaningful Sex and Bad Language* (co-authored with Emily Caddick Bourne), which is part of a larger research project with Emily Caddick Bourne on interpersonal relationships, and especially how philosophy of language can help illuminate the nature of sexual relationships. We consider a variety of cases of this, from the structural parallels between sexual encounters and linguistic exchanges, to the nature of speech acts which try to make social progress on matters concerning sex. On the basis of some of this work, we were invited by Amnesty International to give a couple of talks in Cambridge during LGBT history month, 2013.

## **Does same-sex marriage show Church and state cannot sing from the same hymn sheet?**

### **Abstract**

One important conflict between Church and state in which there is much contemporary interest centres on same-sex marriage. More and more states are reforming marriage law to allow for same-sex marriage in the secular context. The extension of equal marriage from the secular to the religious context, however, remains fraught.

We respond to three arguments against same-sex marriage within religious contexts. The first says that same-sex relationships fail to realise the value of marriage because they do not lead to procreation. The second says that the attitudes expressed in a religious text justify not accommodating same-sex marriage. The third says that making marriage available to same-sex couples induces a change in the meaning of 'marriage'. We argue that none of these arguments succeeds. Religious representatives should, if they are open to reasons (see §3), endorse same-sex marriage.

Nevertheless, we argue that the state should allow individuals who perform religious marriages the option of declining to marry same-sex couples. This is because of the special role of sincerity in performing a marriage. The requirement of sincerity distinguishes the case of marriage from cases where a couple's right to equality of opportunity is violated, e.g. where an hotelier refuses a room to a couple because they are of the same sex. Representatives of a religion who believe that marriage is unsuitable for same-sex couples, however poor their arguments, are incapable of performing same-sex marriages. In that case, they should not be subject to state sanctions for refusing to marry a same-sex couple.

### 1. Same-sex marriage in secular and religious contexts

One important conflict between Church and state which has received much contemporary interest centres on same-sex marriage. There is some remaining opposition to same-sex marriage in the secular context, but more and more states are reforming marriage law to allow for it. The question of the extension of equal marriage from the secular to the religious context, however, remains fraught. How should a state which allows secular marriage between same-sex partners respond to representatives of religious institutions who refuse to perform religious marriage ceremonies for partners of the same sex?

We concentrate on two questions, and the relations between them. One is whether there is any good argument against same-sex marriage within religious contexts. We address three influential candidates, and argue that none succeeds. The other is how the state should legislate on same-sex marriage in religious contexts. If the arguments against same-sex marriage in such contexts are poor, should the state *require* the Church to extend its marriage practices to couples of the same sex? If not, why not? We argue that while representatives of religions *should* endorse same-sex marriage, the requirements for performing a marriage mean that those who do *not* should be allowed the opportunity to decline to marry same-sex couples on the basis of their sex, despite the fact that their reasons are likely to be bad ones.

### *1.1 The nature of marriage*

Persons may make any number of commitments to each other. To marry is to commit to upholding certain standards of behaviour (norms) which regulate the relationship in certain ways from that point forward.

Marriage ceremonies, being a public declaration of that commitment, serve to communicate that commitment to others. As such, they set up an expectation in others that those who have made a commitment by means of marriage subscribe to certain norms. This communicative function is also served by any subsequent wearing of rings, changing of names and titles, and so on.

For the purposes of our discussion, we can leave open whether marriage is best seen primarily as a matter of love and friendship or as a politico-economic relationship. All we need to note is that the expectation is that a marriage will include many of these features to a lesser or greater degree. Such relationships typically involve: the creation of a family unit; the creation of new family members (by means of a joint biological effort or otherwise); relations of dependence and of authority amongst those members; the subsequent creation of obligations towards members (e.g. of care, or of sexual exclusivity between the parents); expectations of favourable treatment (e.g. concerning which person(s) will inherit another person's assets), and a sharing of emotional and economic resources and burdens to various degrees across the lifetimes of the members.

Much time, effort and money is invested by those constructing family units (even by those who choose not to create any more family members); hence much of the reason why there is an expectation that those who marry have committed to a long-term relationship. Ideally, the benefits will more than match the costs of marriage. The long-term investment required, together with the worthwhile benefits received, is the incentive to make the family units successful and thus stable.

If the widespread belief is true that stable families make for stable societies, society has an interest in promoting marriage. So society offers additional support to that found within the family unit, and thus further incentivizes those who wish to take on a commitment to marry.

If marriage is good for those who are married and is believed to make a positive contribution to society, then withholding the opportunity to marry from certain couples risks disadvantaging them and barring them from (at least being credited with) making such positive contributions to society. (Notice that even those who deny that marriage makes positive contributions can agree that couples who are disallowed marriage are disallowed the opportunity of being *credited* with contributing.) Thus equality of opportunity across members of society provides a reason for making marriage available to couples regardless of whether the partners are of the same sex as one another, or are of different sexes.

### *1.2 A crucial first move to make in debates concerning same-sex marriage*

Issue concerning same-sex marriage are often approached using the label 'gay marriage'. This use of the adjective 'gay' is widespread both among those who are for and those who are against same-sex marriage. The label 'gay marriage' is inappropriate because it suggests the wrong conceptual resources for understanding what the fundamental issues are. Why? First, because 'gay marriage' clearly does not cover all of the orientations a person pursuing a same-sex marriage might have. Whether the opportunity for same-sex marriage is available impacts as much on e.g. some bisexual persons, some persons who identify as queer and not as gay, and so on.<sup>1</sup>

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<sup>1</sup> And on some heterosexual persons, since it is not as if sexual or romantic attraction is a requirement of a marital relationship. It is not too hard to imagine cases where a heterosexual person would have other reasons to marry someone they were not sexually or romantically attracted to (whether of the same or a different sex). But we need not hinge our argument on such cases.

Second, because gay marriage has been legal for as long as straight marriage. The reason is this. Gay persons do marry and are allowed to marry, so long as it is a marriage with someone of the opposite sex. Thus, the common claim that the restricted availability of marriage is unjust because it unfairly discriminates on the basis of sexuality is strictly speaking false. Rather, the injustice lies in unfairly discriminating against those who wish to enjoy the benefits of marriage with someone of the same sex.

Thus, in order to understand what is at issue, we must stop thinking of the debate in terms of 'gay' or 'straight' marriage. That sets up a conceptual confusion from the start. The expression 'gay marriage' frames the debate in a way that obscures which considerations should be brought to bear in arriving at a conclusion. Of course, there are gay persons who will be able to enter into overdue same-sex marriages once this is legal (just as there are plenty of persons who are not gay who will be able to enter into such overdue marriages). But the issue of same-sex marriage is not a gay rights issue. It is a *human rights* issue. It is an issue concerning the demands of equality and fair treatment of humans (whatever their sexual orientation). For these reasons, we shall use the less misleading term 'same-sex marriage' when we talk about marriages between persons of the same sex.<sup>2</sup>

### *1.3 Same-sex civil marriage ceremonies only?*

Although opposition remains to same-sex marriages even in the civil context, it is often within the religious context that opposition has consequences for the practical possibility of marrying someone of one's own sex. In the UK, for example, much of the public debate over same-sex marriage centres

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<sup>2</sup> We use the expression 'equal marriage' to indicate the availability of marriage both to couples of the same sex and to couples of opposite sexes. By 'religious marriages' and 'civil/secular marriages' we mean marriages performed in religious and in civil/secular contexts, respectively.

on whether same-sex marriage should be conducted within religious institutions.<sup>3</sup> Whilst marriage has recently been legalised both for couples of different sexes and for couples of the same sex within the civil context in the UK, same-sex marriage is not legally possible within the Church of England or Church in Wales, and representatives of other religious bodies are legally able to perform same-sex marriages only if that body officially 'opts in' to the provision of same-sex marriages.

This illustrates that if the state (whether the UK or another state) is not to *require* the Church to extend its marriage practices to couples of the same sex, then in legislating on same-sex marriage in religious contexts the state might employ one of two strategies:

(1) Legally disallow same-sex marriage within certain religions.

(2) Allow individuals who perform religious marriages the option of declining to marry same-sex couples.<sup>4</sup>

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<sup>3</sup> Note that our focus in this paper is on the philosophical issues which arise for states which do support equal marriage in some contexts (e.g. the civil context), or which are moving towards such a position. There are other types of state. One interesting case is those where state policy opposes same-sex marriage (in any context) precisely because of the influence of a religious institution on the very structure and values of the state. We do not propose to consider, here, the broader issue of the extent to which it is appropriate for state policy to be determined directly by a religious institution. But note that insofar as the arguments given against same-sex marriage by a religious institution are poor, they are poor justification for state opposition to same-sex marriage in general in such societies.

<sup>4</sup> In the UK, this is the option represented by the opportunity for a religious body to 'opt in' to the provision of same-sex marriage. Opting in constitutes an allowance that representatives can choose to marry couples of the same sex, rather than a prescription to representatives to do so. The fact that same-sex marriage remains illegal within the Church of England and Church in Wales is a result of those organisations wishing not to conduct marriage ceremonies for same-sex couples together with particular legal features of those organisations which other religious institutions in the UK do not share.

There is a problem with strategy (1). It does not adequately address the potential conflict of rights at issue. This conflict is between the right to equality of opportunity for same-sex couples, and the right to freely express one's religious beliefs (e.g. that marriage is suitable only for opposite-sex couples). Strategy (1) does not provide a framework for navigating this conflict. Rather, it removes any opportunity for navigating the conflict. Under strategy (1), when a representative of a religion does not marry a couple of the same sex, this will not be because they have chosen free expression of their beliefs over equality of opportunity. No such choice will be needed, nor will it be possible. While strategy (1) may deliver results which *accord* with certain religious beliefs of some persons, making it legally impossible to act otherwise does not, in our view, amount to the state giving representatives of the Church *freedom* of expression of such beliefs.

Further problems with strategy (1) can be brought out by considering those cases of religious beliefs the expression of which is actively *inhibited* by making same-sex marriage illegal within a religion. It may be an important part of a particular representative's religious outlook that same-sex partnerships can be legitimate candidates for religious marriage. Indeed, it often is – one reason for disagreement on the issue *within* a religion is that some representatives see in potential same-sex marriages the realisation of the same values which they endorse through performing opposite-sex marriages. It is clear that strategy (1) conflicts with the freedom to express these religious beliefs. Moreover, it does so whilst making no gain for the supposed other side of the conflict of rights (the right to equality of opportunity for couples regardless of their sexes).

Thus, freedom of expression of religious belief is an argument for strategy (2) but against strategy (1). (Whether strategy (2) conflicts with the right to equal opportunities is not obvious – we pursue this question further in §5.) Strategy (2) raises a practical concern of legal vulnerability of representatives who refuse to marry a couple on grounds of their being of the same sex (voiced in e.g. the Church of England's response to the UK consultation on same-sex marriage). The concern is

that if the option of marrying a same-sex couple is available but refused by the individual, the individual is at risk of accusations of unfair discrimination and, thus, of potential prosecution.

This is a concern only for those religious representatives who refuse to perform same-sex marriages. So one question is whether anybody should find themselves in this position. The next stage of our argument is to show that such persons have no good grounds for refusal. There is no good reason to think that same-sex marriage is incompatible with the grounds religious individuals put forward for supporting marriage.

We shall address three influential lines of argument against same-sex marriage within religious contexts. The *procreative argument* says that same-sex sexual relationships fail to realise the value of marriage because they do not lead to procreation. The *argument from textual interpretation* says that the attitudes expressed in a religious text provide reason not to accommodate same-sex marriage within the religion in question. The *argument from meaning* says that marriage should not be made available to same-sex couples because this induces a change in the meaning of 'marriage'.

## **2. The procreative argument**

The procreative argument says that same-sex sexual activity cannot be procreative, and so cannot serve the formation of a family through loving reproduction within the marriage. We shall call this the 'conservative' approach. We propose two responses. The first develops the observation that some opposite-sex couples cannot engage in sexual acts which are procreative; the second argues that same-sex couples can, in any case, procreate.

One of the most fully-developed conservative views is that of John Finnis (Finnis 1993). His argument is as follows. Persons should not use each other as instruments for the purpose of sexual gratification. The only way in which sexual activity can avoid this charge is if it takes place within marriage. This is because marriage is intelligible as a common good: it has the 'double blessing' of



friendship and procreation. Same-sex sexual activity does not have this intelligible common good and thus amounts instead to worthless self-gratification. Thus Finnis's conservative argument seeks to establish that same-sex sexual activity is starkly different from marital sex.

One thought at play in Finnis's argument is that marriage itself provides a framework within which sexual activity can be given a *point*. This may be correct. But that alone tells us nothing about sexual activity with a person of one's own sex. First, extending the institution of marriage to include same-sex couples would seemingly give them access to the point of sex which marriage provides. Second, there are aspects of sexual activity which are clearly of value and apparently do not rely on marriage, such as engaging in pleasurable activities with other persons, experiencing intimacy, and expressing love.

Thus Finnis's view appears to rest on the thought that there is some deep link between the components of the 'double blessing' found in marriage; that is, between procreation and friendship. Without the possibility of procreation, a sexual act cannot be a realisation of the friendship between the couple; on the contrary, it can only be for self-gratification. Those in same-sex relationships cannot succeed in expressing genuine friendship (including loving intimacy) through their sexual acts, because such acts cannot result in procreation. As such, those involved in the sexual act can only thereby be *using* the other as a means to their own self-gratification. The view Finnis arrives at is that the goods of marriage can only be realised where procreation is possible. This would seem to make marriage no place for same-sex sexual activity.

The strongest case against the argument, and against any similar conservative argument, is to be built by taking it on its own terms.

### 2.1 The 'double standards' response

We can begin by drawing out the consequences of a conservative position for sexual activity between married couples (young or old) who are infertile. Most conservatives such as Finnis do not wish to label sexual acts between such couples as cases of using the other for worthless self-gratification. Neither do those who oppose same-sex marriage on procreative grounds endorse denying marriage to infertile or post-menopausal persons.

This is the 'double standards' response, which says that advocates of the procreative argument unfairly apply double standards when considering same-sex and infertile opposite-sex couples. Since the conservative appeal to procreation does not distinguish sexual acts between couples one or more of whom is infertile from sexual acts between couples of the same sex, the conservative cannot take the latter to be worthless self-gratification, given that they do not say this of the former.

The conservative may try to respond by appealing to biological differences between same-sex sexual activity and opposite-sex sexual activity between infertile persons. For example, the two might involve different collections of genitalia. If these biological differences are to further the conservative's argument, they must be shown to have some relevance to procreation. Thus the conservative might say that procreation is a *possibility* for the infertile opposite-sex couple in a way it is not for the same-sex couple. Even if some particular coupling of a man and a woman cannot lead to procreation, the *type* of act they can engage in (penetration of a vagina by a penis) is the same type of act which can be procreative in other, fertile, couplings. Perhaps this is what Finnis has in mind when he asserts that 'the orgasmic union of the reproductive organs of husband and wife really unites them biologically' (Finnis 1993, 136). This, the conservative might say, means that same-sex sexual activity is somehow *further* from being procreative than is infertile opposite-sex sexual activity.

This argument does not stand up to scrutiny. It relies on the resemblance between certain sexual acts which can be engaged in by an infertile opposite-sex couple and sexual acts which can lead to procreation in a fertile opposite-sex couple.<sup>5</sup> But whilst these acts do resemble each other in many ways, they do not resemble each other in the crucial respect. One can lead to procreation, and the other cannot. It is not clear why any other resemblance should compensate for this, when what is crucial to conservative sexual morality is the possibility of procreation, and *that* is precisely the respect in which the acts differ.

The only option left for the conservative is to hold that sexual activity between infertile opposite-sex couples – including infertile opposite-sex *married* couples – has the same ethical status as sexual activity between persons of the same sex. Those conservatives who cannot swallow the conclusion that opposite-sex infertility is a barrier to rightful marriage must accept our conclusion instead: whether same-sex sexual activity is procreative shows nothing about its aptness to realise the goods of marriage.

It is worth also dealing with a further charge Finnis makes against same-sex sexual activity: that in not being procreative it 'disposes the participants to an abdication of responsibility for the future of humankind' (Finnis 1993, 137). It is not obvious that we should concede to Finnis that present persons do have such a responsibility for the future of humankind. But let us assume this for the sake of argument. First, it is not clear *why* we should *all* need to produce children in order to take responsibility for the future of humankind, so long as we do enough of it collectively to avoid dying out. Second, the argument from responsibility for the future is not an argument against same-sex sexual acts themselves. It is, *at best*, an argument that those who engage in same-sex sexual acts

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<sup>5</sup> Of course, either couple might choose not to engage in such acts anyway, perhaps preferring others. So far as activities such as oral sex and anal sex are concerned, this particular conservative argument makes no ethical distinction between engaging in them with a person of the opposite sex and engaging in them with a person of the same sex.

should take care to not let this stop them engaging in opposite-sex sexual acts *too*. (That conclusion is also a bad one, but the point is that even if it were correct that would not tell against same-sex sexual activities in their own right.) Third, no reason is offered for believing that just because a couple is not going to add to the *numbers* in future generations, neither will they be prone to take responsibility for any aspect of the welfare of future generations. Fourth, couples who have children without reproducing, as in the case of adoption, take on the same responsibilities for the lives and future contributions of particular individuals as are taken on when a couple produces a child biologically. Fifth – and this brings us to the next step of our argument – it is, in any case, perfectly possible for same-sex couples to procreate.

## 2.2 *Same-sex procreation*

The procreative argument is underpinned by an assumption that, for a couple to procreate, they must be of different sexes. For example, two men cannot procreate since they have, between them, no ovaries, no ova and no uterus. We think this assumption is wrong, and can be corrected by a proper understanding of reproduction.

There is a reading of 'reproduce' or 'procreate' on which it is something same-sex couples cannot do. This reading construes reproduction narrowly, as a particular biological process. Stages of this process include sperm being placed into the woman's body by ejaculation, fertilisation taking place near the womb, and the child developing in a way determined by the genetics of the couple who are to be the parents. But this reading is too narrow, both too narrow for the conservative's purposes and too narrow to reflect the focus of much of our everyday talk about procreating. This is because it fails to cohere with the sense of the related word 'family', and disregards the interpersonal characteristics of a reproductive process.

What we are interested in when we talk about somebody's starting or having a family is many things, not limited to genetic and biological links between the family-members. We do not have to consider alternative reproductive technologies in order to see this. Consider an opposite-sex couple who decide to add to their family and go about it through having sex without contraception. The formation of the family is not just biological, but *interpersonal*, including elements such as: attitudes of persons to one another (the man trusts the woman to raise a child he will love); decisions made (the parents make plans with the arrival of a child in mind); intentions (the couple deliberately do those things which will – they hope – result in conception); desires (the woman wants the man to raise her child), and reasons for action (the couple take steps to conceive because they want to have a child together; they make adjustments to their lifestyle in order to accommodate the needs of a new family member). Recall, too, the mutual expectations and other interpersonal attitudes characteristic of family which we began to catalogue in §1.1.

The defender of the procreative argument is concerned with who is able to form families. 'Reproduction', understood in a way which matches what we mean by 'family', is a matter not merely of bare biological processes, but of biological processes which are initiated for certain distinctive interpersonal reasons. Thus procreating involves a wide network of interpersonal attitudes and actions as well as biological processes. The crux of our argument against the conservative will be that these interpersonal elements allow for procreation between same-sex partners.

Of course, there are cases of procreation when some, even many, interpersonal elements are missing, such as some of the cases where a child results from casual sex. But these are not the cases the typical conservative wants to take as aspirational. More importantly, the fact that procreation can sometimes involve less of the interpersonal does not at all establish that the elements present in these cases are definitive of what procreation is. Rather, just as reproduction can take place with certain interpersonal elements missing, it can also take place without involving exactly those

biological processes which take place when an opposite-sex couple conceives through unprotected sex.

By taking reproduction through intercourse between a fertile man and fertile woman to be *the* paradigm (or even the *only*) case of reproduction, we overinflate the importance of a particular biological process in procreation. Reminding ourselves of the social and interpersonal aspects of reproduction allows for flexibility in what role is played by biology in an individual reproductive process. For example, some opposite-sex reproductive processes involve both parents' genetics, but conception happens outside sex. Some opposite-sex couples acquire children through a process whose biological element involves only one parent's genetics. The mother of the family may carry a baby who originates genetically from an egg donor. Fertilisation may not happen within the mother's womb. Or the baby may not even grow within her womb. This does not mean the reproductive process does not involve both parents. The mother is involved in the process because its interpersonal elements, such as the decisions taken and the reasons for taking them, are based on her as well as her male partner (who, let us suppose for simplicity, is also the child's biological father).

Same-sex reproductive processes, like opposite-sex reproductive processes, involve biology within an interpersonal setting. For example, female partners might use donor sperm together with ova and a womb provided by the couple; male partners might provide sperm to fertilise a donor egg to be carried by a surrogate mother. In some cases of procreation (same-sex or opposite-sex) the familial parents oversee a biological process involving two distinct genetic parents, neither of whom is part of the couple. It remains the case that the interpersonal significance of the biological process centres on the couple (the familial parents), and intimately so. This makes it *their* reproductive process, just as much as sex between a fertile husband and wife is that couple's reproductive process.

Biological elements of same-sex reproduction are integrated with interpersonal elements, as with opposite-sex reproduction. Biological processes are dependent on interpersonal reasons, decisions, attitudes, and so on. This is what we should expect from paradigm cases of reproduction insofar as it is *family*, not merely biology, that we are interested in. We can illustrate the point by considering counterfactuals about same-sex reproductive processes. These counterfactuals will also reveal the dependence of the biological process on *both* partners – even if only one partner, or neither partner, is a genetic parent. For example: Martha would not have become pregnant had it not been for the life she was living with, the attitudes she had towards, and the decisions she made with, her partner Jessica; Katrina would not have given birth to that baby had she not been a surrogate mother for John and Lewis, and would not have been asked to be a surrogate mother for John and Lewis had they not had certain attitudes towards having and raising a child together.

Note that in many cases there will even be indirect counterfactual dependence of the biological process on the couple's sexual acts together (though it should be clear from the discussion so far that we do not take this to be in any way a requirement of reproduction). Suppose it is partly in their sexual encounters together that Laura and Amy acquire the trust, expectations, hopes and desires which characterise their decision to have children together. Then it may be that, for example, the harvesting of Laura's eggs, the fertilisation of an egg with donor sperm, the implantation of the egg in Laura's womb, and the consequent birth of Laura and Amy's child is counterfactually and causally dependent on Laura and Amy's earlier sexual encounters.

Given these considerations, the claim that two people of the same sex cannot procreate is far too crude. Properly understood, the notion of procreation is rich enough to characterise interactions between persons of the same sex as procreative. Since same-sex couples can procreate, there is no procreative argument against same-sex relationships, and thus no argument against same-sex marriage can be given on this basis.

Indeed, the value which the procreative objection places on procreation within marriage, together with the possibility of same-sex reproduction, tells in *favour* of same-sex marriage within both civil and religious contexts. Since partners of the same sex are among the couplings which can and do procreate, marriage is appropriate for persons of the same sex.

Insofar as a religious attitude to marriage is underpinned by the view that marriage is connected to the possibility of procreation, the religious attitude should be that same-sex marriage is a good thing. Indeed, it may be that this endorsement of same-sex marriage should be all the stronger for the fact that same-sex procreation is *already* happening *outside* the framework of marriage. If marriage is the proper home of procreation, provision should be made to bring cases of procreation within the framework of marriage – rather than encouraging procreation to remain outside marriage.

The procreative argument thus provides no defensible reason for a representative of a religion to oppose same-sex marriage, nor to decline to perform same-sex marriages themselves. In fact, a religious representative who initially endorsed the procreative argument should take our discussion as a reason to *welcome* same-sex marriage. In that case, withholding marriage from persons of the same sex in the religious context would not freely express the religious beliefs such a person ought to have.

### **3. The argument from textual interpretation**

The failure of the procreative argument is also important to the prospects of another line of argument. It is sometimes argued that a religious text indicates attitudes which are in conflict with same-sex marriage, and that this is a reason against extending equal marriage into religious contexts. Appeals to (apparent) opposition to same-sex relationships within a text are often supplemented with a *rationale* for the opposition – that is, a reason *why* the text, or its source,



should oppose same-sex relationships. Thus textual arguments often come back to the procreative argument. For example, a defender of the argument from textual interpretation might claim that the Bible opposes same-sex relationships *because* it is sensitive to their procreative difference from opposite-sex relationships.

This illustrates a plausible principle of charity for the interpretation of texts – we should attribute attitudes to texts (or their implied authors) on the basis of a *reason* for such attitudes being held. Without such reasons, arguments from textual interpretation are vulnerable to defeat from better interpretations. There are all kinds of ways to avoid attributing irrational or strange attitudes to texts when we come across passages which seem incoherent or mistaken. Consider the alternative interpretations which could be offered by somebody who – like us – thinks that opposition to same-sex relationships is radically mistaken and morally misguided. Rather than attribute radically mistaken attitudes to a text, charity dictates that we should posit alternatives. For example, we might treat any apparent opposition as really being opposition to *other* features of same-sex activity (perhaps some hygiene risks for males contemporaneous with the text, for example). Or we might deal with a passage by positing metaphor, or some other device which allows us to distinguish what the text commits to from what appears to be stated. Or, if the text is supposed to express the attitudes of a deity, we can suppose that whatever human scribe has had the difficult task of translating and setting down these attitudes has misconstrued what the deity really thinks. In short, there are many more charitable approaches than to treat the text as seriously morally misguided.

In order to combat such rival interpretations, the defender of an argument against same-sex marriage from textual interpretation must be able to show that to attribute opposition to same-sex relationships to the text is *not* to attribute morally misguided attitudes. For this, they need an argument to the effect that it is not misguided to oppose same-sex relationships. And the most influential candidate – the procreative argument – fails to achieve this.

The defender of the argument from textual interpretation might attempt to escape this problem by rejecting the principle of charity as a principle for the interpretation of the religious text in question. On this view, interpretations need not incorporate any attempt to treat attitudes expressed in the text as stemming from appreciable reasons. This view, if plausible, would allow the defender of the argument from textual interpretation to deny that they need support from another argument giving independent reasons to oppose same-sex marriage or same-sex relationships.

The first task for this defence is to explain why they reject the principle of charity, in a way which is not an *ad hoc* response to the problems charity poses for them. But even if this can be done, there are reasons to doubt that textual interpretations which are divorced from the principle of charity can establish what their proponents need them to.

For the question is whether, in that case, the attitudes expressed in the text should be taken to reflect the beliefs of any agent the objector takes as a moral guide (such as God). This is because, as Donald Davidson has argued (see, e.g. (Davidson 1984)), we do apply a principle of charity in belief-attribution, and in attribution of mental states more generally. Charity to God (for example) suggests that we should take God's attitudes to be informed by *reasons* for having those attitudes. In the absence of independent grounds for charitably attributing to God opposition to same-sex relationships, the interpretation which says such attitudes are expressed by (e.g.) the Bible simply leaves it unclear why we should maintain that the Bible reflects the attitudes of God on this point.

One way of escaping this problem is to deny that the principle of charity in mental-state attribution applies to attributions of mental states to (e.g.) God. This version of the argument from textual interpretation goes like this: the Bible (for example) says that sexual activity between men (or whatever) is wrong. So God must think sexual activity between men is wrong, because that is what the Bible says. And what God thinks is wrong is wrong. So sexual activity between men is wrong.

At this point it is useful to recall a version of the famous Euthyphro dilemma. The dilemma is this: either the morally good is morally good because God approves of it (in which case, what makes God's approval non-arbitrary and a worthwhile guide?) or God approves of the morally good because it is morally good (in which case, there are independent grounds for doing some things and not others, and God's judgement becomes an apparently redundant epiphenomenon). The argument from textual interpretation which we are now considering takes the first horn of the dilemma. God's attitudes determine what is good, rather than responding to what is good. Contrast the results we get when we apply a principle of charity in attributing attitudes to same-sex relationships to God. In this case, we suppose that God's attitudes are based on, and thus reflect, independent facts or arguments concerning the nature of same-sex relationships. Thus, in the absence of facts or arguments which suggest that same-sex relationships are objectionable, we should resist attributing disapproval to God. So adopting charity leaves us on the second horn of the dilemma, while abandoning it leaves us on the first. Whether there are ways to defend the moral importance of God's judgement on the second horn is not our concern here. What we wish to show is that ending up on the first horn makes the argument from textual interpretation impotent in the debate over extending equal marriage to religious contexts.

What the argument from textual interpretation is left saying, at this point, is that it is simply in virtue of opposition to same-sex relationships being (supposedly) *God's* attitude that this attitude should guide *our* moral decision-making over the treatment of same-sex relationships. But then the question is *why* God's moral judgements should inform ours. Persons work within a moral framework where persons *are* expected to have their attitudes *for reasons*, and given that the argument resists applying this framework to God, it is hard to see how God's moral judgements could possibly have any relevance for our moral judgements.

At this stage, the only move the defender of the argument from textual interpretation can make is to attempt to place proper human moral judgements outside the normal framework of reasons, too,

saying that the only reason for which a human should make a particular moral judgement is simply that in making this particular judgement, he or she is making the same judgement as God. On this view, other apparent reasons we might have for forming moral judgements of acts – such as discernment of harm or of lack of harm, or coherence with other aspects of one’s moral outlook (such as what character traits are thought to be valuable in a person) – are not real reasons at all. Neither is a belief in the moral expertise of the source of a moral prescription – that is, the defender of the argument from textual interpretation cannot even say that we follow God’s judgements because we have grounds to trust God’s expert judgement. For moral expertise is, in turn, ascertained partly in terms of how *accurate* we take somebody’s moral judgements to be, and this decision is based on whether we think those judgements stem from reasons we could appreciate. On the view under consideration, this is not a measure of expertise which can meaningfully be applied to God.

This position is theoretically possible. Indeed, resistance to applying the principle of charity to God’s judgements, together with the attempt to divorce our own judgements from reasons other than replicating God’s judgements, may well be an aspect of what some people mean when they talk about the distinctive epistemological state of ‘faith’. But the position is dialectically weak, since it does not allow the defender of the argument from textual interpretation to interact fruitfully in the public realm of moral discussion and disagreement, whether concerning same-sex marriage or anything else. For this discussion and disagreement *does* work within the framework which the argument from textual interpretation has ended up rejecting. We do *look* for reasons, ones we can make sense of, when attributing attitudes to others.

This may help to explain why debates on state policy in which the Church is represented sometimes reach stalemate. Those who endorse a principle of charity in attitude-attribution to others expect others to have reasons for their attitudes – and, by the same token, to change their attitudes in response to the availability or unavailability of reasons. Thus we might expect that somebody’s

opposition to same-sex marriage can in principle be affected by, for example, pointing out that same-sex relationships are no different from opposite-sex relationships in their capacity to foster trust, love, stable families, pleasure, equality, respect, and so on. Or by pointing out that nobody is harmed by the existence of same-sex couples. When somebody does not respond to these reasons, this might be because they deem them irrelevant, through adopting the view of moral judgement we have sketched.

Of course, not all representatives or members of religions take this view of moral judgement. But the fact that some do explains why consultations on state policies which invoke religious perspectives on issues regarded as 'moral' do not necessarily make useful progress. Arguments from a perspective which operates with one framework of attitude-attribution (as secular perspectives do) will not be motivating for those who operate with a different framework of attitude-attribution (as some religious perspectives might). The fact that this difference of frameworks is philosophically complex and may be hard for either side to diagnose will likely make productive discussion between the state and the Church in such situations even harder.

In sum, this version of the argument from textual interpretation ends up in a very weak position. Because it uses a framework of moral guidance which does not characterise human moral debate and decision-making at large, its defender is rendered impotent when attempting to enforce their own moral outlook within the scope of this debate and decision-making. This version of the argument is powerless in a way the original version – which attempted to find *reasons* for the text to express certain attitudes – is not. The original version, on the other hand, is hostage to the success of arguments that there *is* such a reason – such as the procreative argument. Since we think these arguments fail too, *no* version of the argument from textual interpretation is a good argument against same-sex marriage. Thus no version of the argument successfully establishes the conclusion that the state should allow, in any context, for the withholding of marriage from same-sex couples.

#### 4. The argument from meaning

In the UK at least, one of the objections to same-sex marriage voiced most often is that extending marriage to couples of the same sex changes the meaning of 'marriage' by redefining the institution, and that this change of meaning is illegitimate. How we respond to this argument will depend on whether we agree with its assumption that making marriage available to couples of the same sex induces a change of meaning.

One response is to reject that assumption, saying that it confuses the question of what 'marriage' means with the question of who is married. It is true that the *extension* of the term 'married couple' will be different before and after equal marriage legislation within a given state. But the mere fact that the extension of 'married couple' was once coincident with the extension of 'opposite-sex married couple' does not necessarily establish that being of opposite sexes is, or has ever been, part of what it *is* to be married. To avoid begging the question, the defender of the argument from meaning must at least be able to provide evidence that the extension of 'married' is *necessarily* limited in the ways it has been historically, such that removing the limitation would be to stop using the original term.

The defender of the argument from meaning might respond that the facts about meaning are determined solely by what the institution has been historically, and historically it has been an institution open only to opposite-sex couples. But this fails to distinguish between the *definition of* marriage and the *regulations on* marriage.

Recognising the distinction between definition and regulation is, we think, seriously damaging to any claim that allowing persons of the same sex to marry changes the meaning of 'marriage'. Consider an analogy. Suppose it is a regulation that only men can play professional Association football (i.e. soccer), and that this regulation is then relaxed so that women can play too. We would not say that the players are not playing football. The meaning of 'football' has not changed, but rather football

(the same game) is being regulated differently. Some traditionalists may not like the change in regulation, but it would be a confusion for them to object that there is no longer any such game as football, and that what we mean by 'football' these days is something else.

Similarly, one institution of marriage can be regulated in different ways over time. Before the introduction of equal marriage, it is a regulation in a state that marriage takes place between a man and a woman. *Given* this regulation, something can only be marriage if it takes place between a man and a woman. So the extension of 'married' cannot include same-sex couples; but this is because of the regulation, not because of the meaning of 'marriage'. And this regulation itself is contingent; it can be removed, and has been removed in some states. This does not mean 'marriage' has changed its meaning. It means the same institution is differently regulated. Falling back on claims like 'Marriage is a union between one man and one woman' will not help the defender of the argument from meaning. For the 'is' need not be definitional, but may merely report a regulation – as in 'Football is a game played by men at the professional level', said in a society where professional football has historically been available to men only.

Thus we see no reason to believe the argument that extending marriage to partners of the same sex induces a change of meaning. But there is an additional reason to reject the argument from meaning, which is that even if we *were* to accept that the definition of 'marriage' is changed, this is no argument against same-sex marriage unless that change of meaning is a bad thing. Definition by itself carries no weight with respect to what should be done. Rather, *reasons* for defining 'marriage' one way rather than another carry weight. As Elizabeth Brake notes (Brake 2012), the question of how 'marriage' is defined at some time is different from the normative question of how it should be defined.

The reasons for taking marriage to be a union between a man and a woman – for example, that it allows the couple to express commitment, be recognised as sharing responsibilities, be a family unit, and so on – are really reasons for taking marriage to be a union *between two persons*, whatever

their sex. So *if* the limitation to people of opposite sexes was ever part of the *definition* of 'marriage', we say that shows that the old definition was only partially successful in capturing what we take to be important in marriage. For the old definition overlooks the fact that same-sex couples also have the attitudes to one another, and to their future, for which marriage is designed. In that case, we should take the opportunity to replace the old definition with one which is better fit for purpose.

Thus even if marriage *were* previously defined in a way which excludes same-sex couples – which, as we have argued, is dubious – we see no good reason to resist changing that meaning. The defender of the argument from meaning might try to provide such reasons, e.g. by saying that the change of meaning rids us of a concept which is historically embedded, and that this is some kind of loss to culture. But, first, this loss (if it is one) is well-compensated by the gain to culture of a new concept, one which will become historically embedded in its turn. Second, this new concept better reflects the fact that our cultural understanding of marriage is as something affording the opportunity to express commitment, share responsibilities, develop familial relations (economic, emotional, or otherwise), and various other such things to which the sex of the partners is irrelevant. Third, the 'new' concept (if it is a new one) is informed by, and historically and culturally continuous with, the old definition of marriage. Thus the cultural importance of the old version of marriage is not undermined by moving to the new version.

We have argued that making marriage available to couples of the same sex does not change the meaning of 'marriage'. But even if it did, this would be no reason to resist same-sex marriage. Either way, the argument from meaning provides no defensible reason for anyone, including representatives of religions, to oppose same-sex marriage, nor to decline to perform same-sex marriage ceremonies.



## 5. Consequences for state legislation on marriage in religious contexts

We have seen reasons to reject arguments against same-sex marriage. Given that the arguments are poor, what response should the state give to those individuals who refuse to marry same-sex couples? Given our discussion, it might be thought that the right response is that individuals who perform marriages in religious contexts should not have the option of declining to marry same-sex couples on the basis of their sex, any more than should individuals who perform marriages in the civil context.

But this is not so. The better course of action is still, we suggest, to allow individuals who perform religious marriages the option of declining to marry same-sex couples. For what is important in this context is not whether the arguments we have given *are* sound (which we think they are) but whether they are *believed* to be sound (which we fear they will not be by some of those in a position to perform religious marriages).

Our argument here is not that the right to freedom of expression of belief trumps other considerations. Neither is it that supporting freedom of expression requires accommodating the expression of beliefs which are ill-supported. Our argument rests instead on the nature of marriage in particular. Marriage ceremonies require those involved to be *sincere*. The ceremonies are interpersonal, and one of the persons involved is the one who performs the marriage. The expectation of a marriage ceremony is that the person who marries the couple has certain attitudes towards their marriage; he or she supports it, and endorses the couple's relationship. This interpersonal endorsement is the basis on which the individual who performs the marriage makes their legal endorsement available to the couple.

Those who cannot bring themselves to believe our conclusions in §§2-4 (for whatever reason) could not sincerely perform same-sex marriages. Forcing such individuals to perform marriages defeats the

objective. Since sincerity is crucial to the ceremonies which equal marriage aims to make available to all, nothing is gained by offering same-sex couples the opportunity of insincere ceremonies.

For this reason, the case of marriage should be distinguished from other equal opportunities cases.

Consider an hotelier who refuses a room to a couple because they are of the same sex, and is thus subject to legal sanctions. The hotelier acts on a mistaken belief that the relationship is illegitimate.

But this mistaken belief has no bearing on whether he or she can provide the service requested.

Sincere endorsement of a couple's relationship is irrelevant to the provision of an hotel service to them. Marriage requires special treatment, because it is an institution in which the sincerity of the person providing the service *is* crucial, and is assumed. A mistaken belief that a same-sex couple's relationship is illegitimate means this sincerity is missing. Thus the person who has the belief cannot provide the requisite service demanded by the institution of marriage.

Given this, the most appropriate response for the state to give to religious opposition to same-sex marriage is to allow individuals who perform religious marriages the option of declining to marry same-sex couples. Those who do decline should not be subject to legal penalties, insofar as they are declining to provide a service they are not able to provide.

In this way, the state's strategy can also respect the right to equality of opportunity for couples regardless of the sex of the partners. There is equal opportunity to marry, where marriage can be performed. Consider the case where an individual has the authority to marry opposite-sex couples but refuses to marry a *particular* opposite-sex couple on the grounds that they think features of the relationship make the couple unsuitable for marriage. In these cases, the individual's participation in the ceremony would be insincere. That the individual is thereby *incapable* of providing the service requested means that failing to provide it is not a violation of the couple's right to equal opportunity. Likewise, some individuals have the authority to marry opposite-sex couples but, because of their own beliefs, are not in a position where it is possible for them to marry any same-sex couple. For such an individual to refuse to marry a same-sex couple would not count as a

violation of rights, insofar as that individual, again, simply does not have the capability to marry the couple. (Contrast with the hotelier, who is capable of providing a room so long as one is available.)

In sum, a state which allows secular marriage between same-sex partners should not attempt to enforce the provision of same-sex religious marriage ceremonies by individuals who refuse to perform such ceremonies. Neither should it impose sanctions for such refusals. But the reason is not that any argument for opposing same-sex marriage is a good one. The reason is that some individuals and institutions mistakenly endorse bad arguments. This mistake means that certain individuals do not meet the condition of sincerity necessary for performing a marriage.<sup>6</sup>

For the state to expect or require same-sex marriages to be performed under circumstances of insincerity would be inappropriate, and a misunderstanding of marriage. It would only obscure what is demanded of the state by the right of persons to marry someone of their own sex.

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<sup>6</sup> Casting the discussion in terms of sincerity also sheds light on the tensions within institutions such as the Church of England. In deliberately remaining exempt from the legal possibility of marrying same-sex couples, the Church of England effectively holds that none of its representatives are able to sincerely marry a couple of the same sex whilst also representing that particular religious institution. Those representatives who know they could sincerely marry a same-sex couple are frustrated by this.

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