

# **The Meaning of Matrimony**



**The Meaning of Matrimony**  
*Debating Same-Sex Marriage*

**Brenda Almond**  
**Nicola Barker**  
**Lord Carey of Clifton**  
**Austen Ivereigh**  
**Roger N. Lancaster**  
**Conor Marron**  
**Brendan O'Neill**  
**Ben Summerskill**  
**Peter Tatchell**

with an Introduction by

**The Rt Hon. Maria Miller MP**

and Foreword by

**Frank Furedi**

**Anastasia de Waal (ed.)**

Civitas: Institute for the Study of Civil Society  
London

First Published June 2013

© Civitas 2013  
55 Tufton Street  
London SW1P 3QL

email: [books@civitas.org.uk](mailto:books@civitas.org.uk)

All rights reserved

ISBN 978-1-906837-54-9

Independence: Civitas: Institute for the Study of Civil Society is a registered educational charity (No. 1085494) and a company limited by guarantee (No. 04023541). Civitas is financed from a variety of private sources to avoid over-reliance on any single or small group of donors.

All publications are independently refereed. All the Institute's publications seek to further its objective of promoting the advancement of learning. The views expressed are those of the authors, not of the Institute.

Typeset by  
Civitas

Printed in Great Britain by  
Berforts Group Ltd  
Stevenage SG1 2BH

# Contents

	<i>Page</i>
Authors	vi
Introduction	
<i>The Rt Hon. Maria Miller MP</i>	ix
Foreword	
<i>Frank Furedi</i>	xi
The Destruction of Conjugal <i>Austen Ivereigh</i>	1
Marriage Is Not a Timeless, Unchanging Institution <i>Roger N. Lancaster</i>	24
A Liberal Critique of Gay Marriage <i>Brendan O'Neill</i>	40
The Final Piece in the Equality Jigsaw <i>Ben Summerskill</i>	56
Two Myths about Same-Sex Marriage <i>Nicola Barker</i>	69
Love Is Not Enough <i>Lord Carey of Clifton</i>	91
A Democracy, Not a Theocracy <i>Peter Tatchell</i>	102
Equal But Different – the Unanswered Questions <i>Brenda Almond</i>	114
An Ordinary Voice <i>Conor Marron</i>	125
Afterword: Standing the Test of Time <i>Anastasia de Waal</i>	134
Endnotes	141

## *Authors*

**Brenda Almond** is the author of *The Fragmenting Family* (2008). She is Emeritus Professor of Moral and Social Philosophy at the University of Hull and has served on the Human Fertilisation and Embryology Authority and on the Human Genetics Commission.

**Nicola Barker** is a senior lecturer in law at the University of Kent, teaching family law and public law. She has written a number of peer-reviewed articles on same-sex marriage and civil partnerships and is the author of *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave, 2012).

**Lord Carey of Clifton** was Archbishop of Canterbury from 1991-2002. He is President of United Learning, a group of 40 schools, independent and state, and also involved in interfaith dialogue in the Middle and Far East.

**Frank Furedi** is emeritus professor of sociology at the University of Kent and Visiting Professor, Institute of Risk and Disaster Reduction, University College London. An author and broadcaster, Furedi has written extensively about issues to do with education and cultural life. His book, *On Tolerance*, offers a restatement of the importance of this concept for an open society. His study *Authority: A Sociological History* is published later this year by Cambridge University Press.

**Austen Ivereigh** is director of Catholic Voices, created in 2010 to put the Church's case in the public square, above all the media; the project is now in seven countries worldwide. A journalist and author, Ivereigh was for a time (2004-2006) director of public affairs for the then Cardinal Archbishop of Westminster, Cormac Murphy-O'Connor, and before that (2000-2004) deputy editor of the international Catholic weekly,

## AUTHORS

*The Tablet*. He was educated at King's College, London and St Antony's College, Oxford.

**Roger N. Lancaster** is Professor of Anthropology and Director of Cultural Studies at George Mason University in Fairfax, Virginia. He received the C. Wright Mills Award and the Ruth Benedict Prize for his ethnography on gender, sexuality and family, *Life Is Hard: Machismo, Danger, and the Intimacy of Power in Nicaragua* (1992). His book, *The Trouble with Nature: Sex in Science and Popular Culture* (2003), maps scientific claims about gender and sexuality against a changing social backdrop. His most recent book, *Sex Panic and the Punitive State* (2011), tracks moral panics and their effects on US sex laws. It too received the Ruth Benedict Prize.

**Conor Marron** is your average, run-of-the-mill opinionated 30-year-old gay guy. He lives in Newcastle with his partner of six years and co-founded the Coalition for Equal Marriage in response to a much-publicised campaign attempting to derail the Government's plans to move towards greater equality for LGBT couples – the Coalition for Marriage.

**Maria Miller** is the Conservative MP for Basingstoke, and was appointed Secretary of State for Culture, Media and Sport and Minister for Women and Equalities in September 2012.

She has overall responsibility for strategy and policy across the Department for Culture, Media and Sport and overall responsibility for policy on women, sexual orientation and transgender equality, as well as cross-government equality strategy and legislation.

**Brendan O'Neill** is editor of the online magazine *Spiked* and a columnist for the *Big Issue* in London and *The Australian* in Sydney. He is also a blogger for the *Daily Telegraph* and a regular contributor to *The Spectator*. His green satire, *Can I Recycle My Granny and 39 Other Eco-Dilemmas*, was published by

Hodder & Stoughton and was described by the BBC as 'a skidmark on the gusset of environmentalism'.

**Ben Summerskill** has been Chief Executive of Stonewall since 2003. He has successfully led parliamentary campaigns for the introduction of civil partnership, pioneering protections for gay people against discrimination in the delivery of public and commercial services, and a new criminal offence of incitement to homophobic hatred.

**Peter Tatchell** is director of the human rights advocacy group, the Peter Tatchell Foundation. Together with his colleagues from the queer rights direct action group, OutRage!, in 1992 he launched the campaign for same-sex civil marriage in the UK. In March that year, he organised five lesbian and gay couples to file applications for civil marriage at Westminster Register Office. All were refused. The current move for marriage equality was sparked by his formation of the Equal Love campaign in 2010. ([www.petertatchellfoundation.org](http://www.petertatchellfoundation.org)).

**Anastasia de Waal** is a social policy analyst and Deputy Director and Director of Family & Education at the think tank Civitas. A regular contributor to broadcast and print media, she is a qualified primary school teacher and Chair of national parenting charity Family Lives.

## *Introduction*

Some people say that marriage is an outdated institution. They couldn't be more wrong. It is just as relevant today as it was hundreds of years ago.

That's because the principles of love, loyalty and commitment which are at its heart are vital components of a strong society. Marriage brings stability and it binds us together. It helps make our families stronger.

And much of the strength of marriage lies in its ability to change with the times. As society has changed, so marriage has changed, and become available to an increasingly broad range of people. In the twenty-first century marriage is an inclusive – not exclusive – institution. It is available to all adults who are prepared to make vows of life-long fidelity and commitment. Except, that is, if you happen to love someone of the same sex. I believe that simply isn't right, and that is why the Government is clear: we want to make marriage available to all couples.

I know this issue raises strong feelings on all sides. But if you ask, most people agree that marriage is a good thing, something to be welcomed and celebrated, a source of huge joy and happiness, and that it is wrong to exclude same-sex couples. I welcomed the new Archbishop of Canterbury's acknowledgment that gay people have loving and monogamous relationships of 'stunning quality'.

And I realise concerns have been raised by some faith groups and others about our plans and what they will mean for them. We've all seen the headlines suggesting all sorts of things – that churches will be forced to carry out same-sex weddings, that teachers and other workers will be fired if they don't agree with same-sex marriage, or even that religious freedom is under threat. None of this is true at all.

The European Convention on Human Rights already guarantees freedom of religion, and this cannot be breached. I

have put it on record many times, and I will say it again, that I would never champion a law that would impinge – in any way – on the Church’s power to decide who it marries and who it does not. No religious organisation, or individual minister of religion, would ever be forced to conduct same-sex marriages.

Additionally, our Marriage (Same Sex Couples) Bill introduced additional watertight legal locks on the proposed legislation, to ensure that these protections are upheld. No religious organisation can be compelled to opt in to marry same-sex couples or to permit this to happen on their premises; and no religious organisation or minister can be compelled to conduct same-sex marriage ceremonies.

Furthermore, the Bill amends the Equality Act 2010 to make clear that it is not unlawful discrimination for a religious organisation or individual minister to refuse to marry a same-sex couple.

I note that the Church in Wales have accepted the protections, and that the Church of England have acknowledged that these also uphold their wish for the status quo to be preserved.

Equally we have also been clear that no teacher will be required to promote or endorse views about same-sex marriage which go against their beliefs, and indeed that no employee should face the sack for expressing their views about same-sex marriage. It is simply wrong to suggest otherwise. Being able to follow your faith openly and being able to do so at work or elsewhere is a vital freedom in this country which I will vigorously defend.

But there are some religious organisations, like the Quakers, Liberal Jews and Unitarians, who have also said that they want to be able to conduct same-sex marriages, in the same way that they can conduct civil partnerships. I personally see no reason why we should stand in their way, especially if it means that those that don't want to will be even further protected. I have been very clear that it is not for government to dictate to

## INTRODUCTION

religious bodies on this matter, they must make their own decisions.

For me, far from being a radical departure, equal marriage is simply one more in a long line of reforms which have strengthened marriage, ensuring it remains a modern and vibrant institution.

*The Rt Hon. Maria Miller MP*

*Secretary of State for Culture,*

*Media and Sport and Women and Equalities Minister*



## *Foreword*

The views advanced in this collection of essays strikingly confirm the fact that there is little accord on the meaning of matrimony in contemporary society. The absence of consensus and indeed the deep divisions that cut across the discussion of marriage also suggest that it is unlikely that there will be agreement on this subject in the foreseeable future. The arguments outlined in this collection of essays not only differ in their interpretation of marriage but also assign a different moral and cultural significance to this institution.

All the contributors believe that marriage is important otherwise there would be little point in having a dispute about it. However they attribute a different meaning to its significance. For those of a religious or traditional disposition, marriage is a fundamental institution that possesses a sacred character. In contrast, some of their opponents claim that the significance attached by traditionalists to marriage is overstated. Nevertheless, despite their reservations about the value of this institution they claim that marriage is a right that should be available to all. It is evident that this divergence on the moral status of marriage is unlikely to be overcome through any legal or procedural innovation.

Competing accounts about the moral status of marriage were already in circulation before the emergence of the issue of gay matrimony. For many people marriage frequently meant a lifestyle choice that they could embrace or reject. For others marriage served as a defining moment where their relationship to another person, community, and way of life was both affirmed and formalised. With the legalisation of gay marriage, this difference in orientation towards the moral status of matrimony is likely to become more profound and will have a significant impact on the long-term development of this institution.

We will now have marriages that are underpinned by a different ethos. That means that it is only a matter of time

## THE MEANING OF MATRIMONY

before differences in ethos will crystallise into contrasting forms of marriage. An ethos describes beliefs that guide character and in today's conditions endows people with identity. And that is really the nub of the matter. The demand for same-sex marriage is motivated by the impulse of gaining recognition – cultural and legal – for gay identity. Those who oppose it are also concerned with identity. In this case they experience the loss of cultural affirmation for what they perceive as a unique union, as the unravelling of an identity they associate with marriage.

One final thought. The one point that most of the contributors appear to agree on is that marriage confers privilege. Yet, if that is so, millions of people appear to be unaware of the benefits of this privilege. From a sociological point of view, one of the most fascinating aspects of the tendency towards the institutionalisation of gay marriage is that it coincides with the gradual decline of this institution. This trend is clear – marriage is steadily declining and in the UK married couples now constitute less than half the population. At the same time the number of people cohabiting is on the increase. Clearly, its 'privileges' notwithstanding, marriage is in some trouble. Whether the legalisation of gay marriage will add to its woes or provide it with a boost is unclear. But after reading the essays in *The Meaning of Matrimony* it becomes impossible to avoid the conclusion that marriage will never be the same.

***Frank Furedi***

*Emeritus Professor of Sociology, University of Kent  
Visiting Professor, Institute of Risk and Disaster  
Reduction, University College London*

# The Destruction of Conjuality

## Austen Ivereigh

The UK Government in 2012-13 set out to change the nature and definition of marriage in law, stripping from it the conjugal, procreative element and reducing it to a gender-neutral partnership. These changes, announced out of the blue by the Conservative and Liberal Democrat parties at their annual conferences in Autumn 2011, were first debated and voted on in Parliament on 5 February 2013, following a six-month public ‘consultation’ in 2012 which asked not whether, but how, to change the law.

When the ‘consultation’ opened, the Government made very clear that same-sex weddings would not be conducted in religious premises; yet after it ended, the Government suddenly announced that it would allow gay weddings in churches and synagogues, but would not re-open the consultation. The question of whether marriage should be redefined to allow homosexual couples to enter it had never been put to the public at the time of the 2010 election. It had not been mentioned in the party manifestos. It was opposed in one of the largest petitions ever raised – more than 650,000 at the time of writing<sup>1</sup> – as well as in opinion surveys showing 70 per cent support for the existing definition of marriage as between a man and a woman.<sup>2</sup> When it came to the vote, a third of Parliament – including more than half of Conservative MPs – defied their party leaderships and voted against. Yet the Government never wavered or doubted.

When it was published, the Marriage (Same Sex Couples) Bill (hereafter ‘the Bill’) altering dozens of laws going back to the Submission of the Clergy Act of 1533, ran to more than 50 pages. When a government introduces major social legislation that requires modifying so many laws, it does so through a staged process of reflection and study: first a Green Paper to frame the debate; an authoritative guide in the form of a White

Paper; and eventually, a draft Bill. This deliberation allows the relevant evidence to surface, and for a thorough public debate to take place.

The Government, driven by an obsessive determination to deliver 'marriage equality' by the 2015 general election for strategic reasons, ignored this carefully staged process. Knowing that young people and urban dwellers fail to see the problem with gay marriage, the prime minister and his advisers looked to a Conservative electoral victory in 2015 on the back of these traditional non-Tory voters. The fact that Conservative voters, activists and MPs were appalled would only reinforce, they believed, the credibility of the Conservative Party's 'detoxification'.

### *Authoritarianism*

This political strategy requires the Government to clearly adopt one side of an increasingly polarised debate in society over the meaning and purpose of marriage, in which two basic understandings are at stake.

The first is traditional and conjugal and extends beyond the individuals who marry, to the children they hope to create and the society they wish to shape. The second is more privative and is to do with a relationship abstracted from the wider concern that marriage originally was designed to speak to. Some call this pure partnership or mere cohabitation. The latter is what marriage is becoming: a dissolvable contract between two individuals who partner purely for the sake of the partnership itself. It has little or nothing to do with children, general education or social stability.<sup>3</sup>

Those who oppose the redefinition of marriage believe it has an intrinsic, conjugal meaning as an institution which binds together a man and a woman, who become a mother and father to their children; marriage's ideals – sexual exclusivity, permanence, cohabitation – support this *telos*, or meaning, which is recognised, promoted and protected by both Church and state, who regulate it in order to safeguard those characteristics.

## THE DESTRUCTION OF CONJUGALITY

To overthrow this view of marriage in favour of an eviscerated ‘partnership’ model is to renounce the possibility, in the future, of the state promoting what is best for children and for society. It is also to introduce an incoherence into the law. The law ordinarily takes no notice of ordinary friendships, or indeed almost all forms of human relationships; love is not the business of the state. But it recognises and supports marriage, because marriages are the main and most effective means of rearing healthy, happy and well-integrated children.<sup>4</sup> Once the law severs the link between marriage and children, the question must be asked why the law supports marriage at all; and when it does, why it should support some kinds of non-conjugal union but not others.

The proponents of same-sex marriage (SSM) see in this conjugal idea of marriage an anachronism, the by-product of religious conviction with no relevance to public policy. The conjugal idea to them seems risible; what about those couples unable or unwilling to have children? For those with a partnership view of marriage, its purpose is to legitimate and endorse the love and commitment between any two people, who contract with each other publicly and legally for that purpose. It is entirely arbitrary (and therefore discriminatory) for the law to restrict marriage to a man and a woman; after all, isn’t the love of a same-sex couple just as good, or real, and deserving of state support?

In this view, the extension of marriage to same-sex couples is a matter of justice and equality – a further stage in the historic emancipation of an oppressed minority. This frame, successfully imposed by the powerful and wealthy Stonewall lobby, allows SSM advocates contemptuously (but no doubt sincerely) to dismiss SSM opponents as ‘bigots’, even awarding a ‘Bigot of the Year Award’ to church leaders and MPs who had spoken out in defence of conjugal marriage.<sup>5</sup> There is a logic to the contempt: if marriage is merely a partnership between any two people, surely only homophobia can explain why the two people concerned should be restricted by law to those of the opposite sex? Stonewall’s poster campaign in support of SSM

(‘Some people are gay: get over it’) takes this idea to its conclusion: opponents of ‘equal marriage’ are homophobes or in denial about the existence of gay people and the love between them.

At the root of the division between the pro- and anti-SSM lobby, in short, is not that one side favours equality, justice and tolerance, and the other side favours inequality, injustice and intolerance. It is a difference in view about what marriage is. The conjugal understanding is deeply rooted in civil society, and shaped by millennia of Western culture, faith, philosophy and tradition. The partnership understanding is fruit of a deracinated, individualised, secular urban culture shaped by gender theory and queer theory, in which sexuality is constructed and chosen.<sup>6</sup>

The UK Government consciously and deliberately identifies with the second view, agreeing with the assumption that there is no debate to be had about the meaning and purpose – the *telos* – of marriage, and indeed to identify wholly with the ‘partnership’ model.

When David Cameron, the prime minister, announced at the Conservative Party conference in 2011 that he favoured gay marriage, he said he did so not ‘in spite of’ but ‘because of’ being a Conservative; Conservatives, he explained, ‘believe in the ties that bind us; that society is stronger when we make vows to each other and support each other’. This thin, eviscerated, ‘partnership’ view of marriage is precisely the one put forward in the Government’s March 2012 consultation document, where children do not receive a single mention. The very thing which, in the traditional Western understanding, makes marriage distinct, unique, and socially beneficial – the ‘conjuality’ of marriage – has been entirely eradicated from the new official definition. In the speeches given by ministers, in all the government documents pertaining to the issue, there is literally nothing separating the Government’s view from that of Stonewall or other SSM advocates. (After it was revealed that the word ‘bigot’ was used in a forthcoming speech by the deputy prime minister to refer to opponents of SSM it was

withdrawn; but one of his advisers explained why it should have stayed in.<sup>7)</sup>

The combined power of an energetic, well-resourced drive by a wealthy lobby and a Government which has chosen, for pragmatic and ideological reasons, to agree with this highly contentious frame, has all but closed down the kind of public debate which should precede such significant social legislation. In a society which prides itself on its tolerance and its respect for rights, being branded an intolerant homophobe or bigot amounts to social excommunication.

No wonder, then, so few organisations have had the courage to oppose SSM. It has been left largely to the Churches, and some courageous and independent-minded MPs, to articulate, on behalf of a cowed civil society, that upholding marriage as a conjugal institution for the common good in no way implies any less commitment to justice, equality and the rights of gay people. For example, the Liberal Democrat MP Sarah Teather, a former children's minister with an outstanding record of commitment to equality and minority rights, explained after voting against the Bill that the vital link between marriage and family life would be gradually severed if it were redefined.<sup>8</sup> Such views are common, even mainstream, in Britain, yet the justice-equality bandwagon, backed by the Government and the leadership of all three main political parties, has made their expression rare and brave.

Thus have the political elites, captivated by the justice-equality frame, detached themselves from civil society, which remains even in the UK, where debate has largely been absent, overwhelmingly favourable to the conjugal idea of marriage.<sup>9</sup> In France, support for SSM has fallen following the intense discussion about SSM generated by the mass rallies of the *Manif Pour Tous* movement, from above 60 per cent to close to 50 per cent, suggesting that, once people have the courage to step out of the conversation-stopping justice-equality frame, they are able to grasp the important issues at stake. In the US, while SSM has overwhelming support from journalists, politicians, intellectuals and entertainers, most people remain unconvinced.

In 32 states where the issues have been put to a referendum – including ‘liberal’ states such as California, Maine and Wisconsin – the conjugal view of marriage has prevailed; in total, 44 states have affirmed the conjugal view through direct voting or their representatives. In six states where civil marriage has been redefined to include same-sex relationships, it has happened by judicial decree or legislation. Whenever the issue is put to the popular vote – as in Slovenia, for example, in March 2012 – a majority obdurately cleaves to the idea of marriage as conjugal.

Indeed it is hard not to be struck, as Brendan O’Neill has written, by ‘the disparity between mass feeling for the issue (which is best described as weak to non-existent) and elite passion for it (which is intense)’. He adds: ‘The proposed overhaul of marriage... is not a democratic reform, begrudgingly enacted in response to a democratic demand; it is better understood as voluntary elite tinkering with a traditional institution in the hope of presenting the elite as both daring and caring’.<sup>10</sup>

### *Why the Churches (and others) oppose SSM*

The fact that the Churches have led the organised opposition to SSM in the UK has served to reinforce another of the pro-SSM lobby’s frames: that those who oppose SSM are motivated by a ‘religious’ conviction which is by definition irrelevant to amending the definition of civil marriage. Religious people entering the debate have been lectured about the autonomy of the temporal sphere and told they have no right to ‘impose’ their ‘Biblical’ view of marriage. As has happened to me on more than one occasion in media debates, when a religious person articulates an entirely ‘common-good’ case for the state’s promotion of marriage – arguing that the institution, created by the life-long commitment of a male and a female bound together in a relationship of sexual complementarity, provides a uniquely stable and beneficial framework for the upbringing of children by their biological parents, and so, as a matter of public policy, is protected and promoted by the state –

## THE DESTRUCTION OF CONJUGALITY

he or she is assumed to be giving a 'religious' argument 'disguised' in the language of reason.

Rather than engaging with the substantial arguments the Churches put forward, the Government stresses its respect for 'religious', or 'strongly-held' convictions about marriage, and goes on to point out the ways in which the Bill protects those views – above all stressing that no faith organisation will be obliged to perform same-sex weddings.<sup>11</sup> As a response to the common-good case for conjugal marriage, this is on a par with Stonewall's, that if you are against same-sex marriage, you shouldn't marry someone of the same sex. The issue is not, however, one of individual preference; it is a question of what is right – for society, for children, and for the institution of marriage itself.

The very attempt by the Government to separate civil and religious marriage shows how little understanding they have of the institution. The Church of England and the Catholic Church in England and Wales have each pointed out how the Government's consultation confuses the institution of marriage with the ceremony, implying that there are two kinds of marriage, religious and civil. Yet in British law there is only one institution of marriage, with two pathways (and sets of regulations) into it. And in the case of the Church of England, the regulations are closely intertwined. 'For the purposes of civil law, it is the same legal commitment that takes place in a register office as in a Church. The civil legal status of marriage is only conferred because the priest has been authorised by the Registrar General to conduct weddings in the absence of a Registrar. So, in completing the Register of marriages, the priest carries out a civil function,' say the Anglican bishops, adding: 'The assertion that religious marriage will be unaffected by the proposals is therefore untrue, since fundamentally changing the state's understanding of marriage means that the nature of marriages solemnised in churches and other places of worship would also be changed.'<sup>12</sup>

We will come to the freedom of conscience and freedom of religion shortly. But the primary issue for the Churches is

## THE MEANING OF MATRIMONY

whether it is right for the state to adopt a 'partnership' view of marriage. That is the issue which the Churches feel strongly about; their freedom to disagree with the new state orthodoxy following the legal redefinition of marriage is a secondary matter. The Churches believe that the state should remain committed to the conjugal understanding of marriage, because law teaches culture, and the law in this case will teach culture that marriage is little more than a civil partnership. That is bad for marriage, bad for society, and bad for children.

The conjugal view of marriage is not a uniquely or particularly 'religious' viewpoint. Marriage is a civil institution, one that precedes both Church and state. It has grown up over time, with variables according to time and culture, but always with, at its heart, the binding together of a man and a woman in a union which, by its nature (but not inevitably), produces offspring, who are raised by their natural parents. (Even where procreation does not occur, husband and wife can still become father and mother through adoption.)

The bishops' concern is that recognition of SSM will transform the institution of marriage into a simple affirmation of the affections and concerns of those entering the marriage. The institution will no longer shape and direct those affections and concerns to support the natural family. Marriage will be associated with commitment only to the extent that the affections and concerns of those marrying anyway happen to support commitment. The connection of the institution with other elements which have traditionally supported marriage's conjugal nature – monogamy, fidelity, permanence – will also weaken over time, because the purpose they serve has been eradicated by law.

In giving legal recognition to SSM as full marriage, the state will be sending a very clear message. The natural family no longer has special importance – that is, an importance transcending satisfaction of the desires of those marrying. To send out such a message is very arguably a form of injustice, to children, whose interests are greatly furthered by the natural family and by its priority over other concerns.

## THE DESTRUCTION OF CONJUGALITY

Marriage encourages what is good for children, namely to know they are the product of a mother and a father. A vast majority of people believe that this is the ideal situation for the upbringing of children; and traditionally, the state has agreed. The ideal is not always realised in practice: death, divorce, childlessness (intended or otherwise) and infidelity all prevent it. But the meaning, the *telos*, of marriage remains valid: most people marry, and are faithful to each other; most marriages last for life, and produce children.<sup>13</sup>

The new form of marriage which the Government now proposes to create says none of this matters; and because law teaches culture, over time society will come to agree. The pro-SM lobby argues that the state has always changed marriage to reflect changing understandings; why not again, now, when 'gay love' has attained widespread social acceptance? But there is a vast difference between regulating an institution to ensure it retains its character, and attempting to (re-) create an institution on a wholly new basis.

The Church, having long recognised ('blessed') marriage as a good, began only in the seventeenth century to require public ceremonies to overcome the problem of men leaving their wives claiming that they had not said their vows; they were designed to make sure people couldn't later renege on what they had bound themselves to. Further regulations were introduced to protect other essential 'goods' of marriage – that the spouses had to prove they were free to marry, for example, and be of an age where they are capable of giving free consent.

The state became involved in marriage for the same reason – to protect the essential properties of the marriage, one of which was that all adults who were free to do so, should be able to enter it. (At a time when the Church of England controlled the institution, civil marriage became a means by which non-Anglicans could access the goods of marriage). The Government argues that marriage is an 'evolving' institution: citing nineteenth-century bars to Catholics, Baptists 'and others' from getting married in Anglican churches, it says these

## THE MEANING OF MATRIMONY

'inequalities' were addressed in the twentieth century when married men and women became 'equal before the law'.<sup>14</sup>

But attempts to restrict marriages on grounds of faith or race are exceptional and arbitrary; they go against the traditional nature of the institution, which allows any man to marry any woman if they are free to do so. Lifting such arbitrary restrictions, in other words, were means of restoring the true nature of marriage: the repeal of the anti-miscegenation marriage laws in the southern United States fall into the same category. Whenever Church or state have sought to address 'marriage inequality' in the past, it was to restore the essential or traditional nature of the institution, not to redefine it or change it, as the Government now proposes to do. The analogy drawn by SSM campaigners between opponents of SSM now and advocates of racial bars in 1950s America is, in other words, wholly wide of the mark. The racists then, like SSM advocates now, sought to redefine marriage; the Churches opposed both attempts.

The Churches do not object to SSM because of any religious convictions about homosexuality, but because of their conviction about the nature of marriage. The Catholic Church believes sex is for marriage and marriage is between a man and a woman; but it also believes in civil rights and civil freedoms, and upholds the dignity of all people, whatever their views or behaviour. The Catholic Church backed the 1957 *Wolfenden Report* calling for the decriminalisation of homosexual acts, and continues actively to oppose the marginalisation of gay people, or indeed any other group suffering marginalisation and discrimination throughout the world.<sup>15</sup> Church teaching holds that sex is reserved for marriage, and that marriage is between a man and a woman, but nowhere in the Western world will you find the Church calling for people who have sex outside marriage to receive temporal punishment or to be treated differently by the law. The idea that the Church opposes SSM because of church teaching on sexuality is simply wrong. As the Catholic bishops said in 2009:

## THE DESTRUCTION OF CONJUGALITY

(W)e want to make absolutely clear that our firm beliefs about marriage ... must not be misconstrued to be in any way a condemnation of homosexual people or an attack on their human dignity. Our Church teaches, and we affirm, that we must treat our homosexual sisters and brothers with dignity and love, as we would all God's children. Indeed the *Catechism of the Catholic Church* warns that any form of prejudice or hatred – 'every sign of unjust discrimination' – against homosexual people should be avoided.<sup>16</sup>

Secondly, the Church fully recognises and respects that the Bill redefines civil marriage, which is outside the Church's authority and provides a path into marriage for those who do not (necessarily) share any biblical, theological or sacramental views of marriage. Christians have no business opposing SSM on such grounds. And indeed, submissions by the Catholic and Anglican bishops have made a series of common-good arguments, based on prudential, public-policy considerations.<sup>17</sup>

Public policy makers considering redefining civil marriage have no need, *a priori*, to weigh Christian theological views of marriage. But by the same token, they should not adopt narrow ideological views of marriage as mere partnership. What the Government is proposing is to enthrone, by means of state legislation, a radically new version of marriage, one rooted not in civil society but a small but powerful lobby driven by misguided notions of equality.

### *The chimera of equality*

In the minds of SSM advocates, SSM is simply about levelling the playing field, ensuring that the law treats different groups fairly. To oppose it is to advocate discrimination. Yet the idea that what was never seen as discrimination in any Western nation before 2000 should suddenly, within a decade, have come to be seen as such is remarkable, especially as there is no human right to marry someone of the same gender.<sup>18</sup> It requires believing that the law should treat a same-sex couple and a man-woman union as if these are alike – an idea which in turn

requires starting from the assumption that marriage is merely a domestic partnership between any two people. And remarkably, conjugal marriage has come to be seen as a 'homophobic' institution targeting gay people for specific exclusion – even though nothing in marriage law comes anywhere close to suggesting such an idea.

The fact that 'all love is the same' is a non-starter. Loving a person does not give you the right to marry them: a man cannot marry a woman who is already married; a woman who loves two men cannot marry them both. We cannot, in the name of equality, allow to marry all those who love each other, unless, of course, we were to agree that marriage means nothing at all. 'Equal marriage' is merely a slogan. The legalisation of same-sex marriage would continue to 'discriminate' against all those people who love each other but who are not allowed to marry. What is proposed is not 'equal marriage' but a radical new vision of marriage to replace the existing one.

The equality claim is not that different groups of people should be treated as if they were the same: justice requires consciously discriminating between different groups and treating them differently. What equalities law seeks to overcome is unjust discrimination, namely the treatment of one group less favourably for irrational or prejudiced reasons. There is no reason except prejudice for paying a woman less than a man for doing the same work, for example. But there are good reasons, reasons not based on prejudice, for paying two people differently for different kinds of work.

When it comes to marriage, there is a very good reason for the law to exclude from it those who do not qualify for it, namely the preservation of those characteristics of marriage which give it its unique characteristics. 'Our present law does not discriminate unjustly when it requires both a man and a woman for marriage. It simply recognises and protects the distinctive nature of marriage.'<sup>19</sup> There is no reason, indeed, for the state to promote other kinds of relationship. As the Catholic bishops of New York said in 2009:

## THE DESTRUCTION OF CONJUGALITY

The state has a compelling legal interest in promoting marriage between men and women in order to create stable families and provide for the safety, health and well-being of children. The state has no such compelling legal interest in recognising a relationship between two people of the same sex.<sup>20</sup>

Upholding conjugal marriage requires 'discriminating' against many groups of people. Those under the age of consent cannot get married, because if they could the principle of free consent would soon evaporate. Those who wish to marry more than one partner cannot do so by law because one of the cornerstones of marriage is one man and one woman. And people of the same sex cannot do so because one of the essential properties of marriage is gender complementarity. In each of these cases, the law discriminates justly in order to preserve the good of the institution, a good which, in this case – the welfare of children, who fare best when raised by their natural parents – is obviously tied to gender complementarity.

There is nothing unjustly discriminatory in relying on genuinely relevant and reasonable distinctions. Two people of the same sex cannot marry; nor can a man and three women; nor can direct relatives, or people with certain physical or mental impairments, nor anyone incapable of freely choosing. No group of people is specifically excluded from marriage; anyone capable of fulfilling the conditions for marriage is able to enter it, just as anyone over 65 qualifies for a state pension. To claim that 'gay people are discriminated against' by being unable to marry someone of the same sex makes no more sense than to declare that young people are discriminated against by being unable to claim a state pension.

If it is discriminatory to exclude same-sex unions, then it must logically be discriminatory to exclude these others. Yet if marriage were extended to include these other groups, then it would be necessary to redefine the essential properties of marriage without which marriage ceases to be what it is.

## THE MEANING OF MATRIMONY

Far from introducing 'marriage equality', the Bill before Parliament creates a bizarre four-tier system of marriage, which is anything but equal, consisting of:

1. Marriages for opposite-sex couples requiring a) vows and b) a supposition of sexual activity and fidelity: hence both non-consummation and adultery invalidate the union. This traditional kind of marriage is reserved, in the absence of a clear definition of same-sex consummation, to heterosexual couples.
2. Marriages for same-sex couples requiring vows but not requiring sexual activity or fidelity (no clauses on consummation or adultery). This de-gendered and de-sexualised union requires no sexual difference and therefore looks only superficially like the first. Because it is only open to same-sex couples, on the other hand, it looks a lot like the remaining two.
3. Marriages for same-sex couples requiring neither vows nor sexual activity/fidelity. In this case, the Bill, following the Government's response to the recent 'consultation', envisages that civil-partnered same-sex couples can upgrade their status by filling in a form and paying a fee. In this case, they become legally married, but in a way very different from the first two.
4. Civil Partnerships, distinct from category three marriages only in name. Previously a separate category, functionally equivalent but clearly distinct from marriage by virtue of being exclusively available to same-sex couples, civil partnership has now been reduced to a kind of second-class entry-level sub-marriage for those unwilling to 'upgrade'.

The inconsistencies, iniquities, and contradictions implicit in this new system of marriage mean that it will be endlessly challenged in the courts, requiring an endless future of parliamentary revisions, as attempts continue to be made to adapt what is so obviously different in nature to the demands of 'equality'.

## THE DESTRUCTION OF CONJUGALITY

It is possible to argue, as some have done, that in a pluralist culture with a variety of narratives no 'fixed' meaning of marriage is possible, and that marriage should revert to being an essentially private contract which does not involve the state at all. But that is not a possibility currently being contemplated. As long as the state wishes to continue to promote marriage, the law must define it. In the words of the political philosopher Michael Sandel in his book *Justice: 'the case for same-sex marriage cannot be made on non-judgemental grounds. It depends on a certain conception of the telos of marriage – its purpose or point... The underlying moral question is unavoidable'*.<sup>21</sup>

If the proponents of SSM were advancing a rich new *telos* of marriage then it could be debated. But what is being proposed is a reduced, eviscerated version of marriage based on merely one of its elements, cohabitation. What is being proposed is the overthrow of a comprehensive understanding of marriage in favour of a truncated and impoverished narrative. What is being proposed is that marriage be redefined by government fiat to meet a demand by the gay rights lobby to enhance the cultural status of same-sex relationships. What is being proposed is an attempt to capture the state's consent for persuading society that 'gender-neutral' relationships have the same validity as opposite-sex ones.

The civil-rights argument for SSM is not rooted in human rights doctrine but an absolutist ethic of autonomy. The expansion of awareness that certain people or groups are part of our community, by virtue of their shared humanity, and that the law must expand to afford them protection, is one of the great achievements of modern Western culture. But human rights law is not a series of entitlements but a means of removing obstacles to the pursuit of goals or activities – work, education, paid holidays – which all people should be free to pursue. It is not a charter to promote cultural change. As Rowan Williams points out, the question of whether 'the existing legal status of civil partnership implies a more marginal social position than marriage' needs addressing 'at the

level of culture rather than law, the gradual evolving of fresh attitudes in a spirit of what has been called “strategic patience” by some legal thinkers’.<sup>22</sup>

As the bishops of the Church of England noted in their response to the Government’s consultation document:

The one justification for redefining marriage given to us by the Equalities Minister was that it met an emotional need among some within the LGBT community. Without wishing to diminish the importance of emotional needs, legislating to change the definition of a fundamental and historic social institution for everybody in order to meet the emotional need of some members of one part of the community, where no substantive inequality of rights will be rectified, seems a doubtful use of the law.<sup>23</sup>

Allowing gay people to marry adds no legal rights or privileges or protections that have not already been granted through civil partnerships. And in any event the restrictions in marriage law make no assumption at all about the legitimacy, inferiority, or morality of homosexual or indeed any other relationships. As the Catholic bishops point out ‘there are many other forms of relationship which demonstrate love and commitment yet are not regarded as having equality with marriage. An unmarried adult may share a home with an aged parent and care for them; this is a demonstration of love and commitment but is not akin to marriage’.<sup>24</sup> Similarly, two siblings may live together, pooling their financial resources and sharing their leisure interests; this too demonstrates love and commitment but is not akin to marriage’.<sup>25</sup>

Does our current marriage law imply, directly or indirectly, that the love that exists between siblings, friends, maiden aunts, and casual lovers is in any way inferior? Of course not; it implies only that marriage between a man and a woman is a unique and distinct institution whose unique characteristics need to be protected. Yet, in a grand irony, the attempt to open marriage to same-sex relationships immediately suggests that this is not so; and we must now explain to bigamists,

## THE DESTRUCTION OF CONJUGALITY

polygamists, and those in polyamorous unions, why marriage discriminates against *them*.

The danger is not that, following an SSM law, a future government will be faced with demands for the legal recognition of three-way relationships or polygamous unions – although this has already happened in the Netherlands, which has recognised three-way relationships through a ‘cohabitation agreement’. The danger is that society at large will become deeply confused about the nature and purpose of marriage, and the institution, as a result, will quickly weaken. Wherever, through an SSM law, a comprehensive, conjugal institution – the sexual union of man and woman, apt for procreation, and allowing children to be raised by their birth-parents in an environment of sexual exclusivity, commitment and stability – is replaced by a domestic partnership in which sex, fidelity and children are removed or optional, the rational basis for other defining elements is weakened in the public mind. In the Brazilian state of Sao Paulo, the law does not allow polygamy; but a notary who married a threesome, arguing that since introducing SSM in that state the law did not prevent it, had logic on her side.<sup>26</sup> In Mexico City, which legalised SSM in 2009, there are plans to introduce temporary marriage licences lasting just two years.<sup>27</sup> After all, if marriage can be changed in one particular (gender complementarity), why not another – the idea of marriage for life?

In Canada, meanwhile, a British Columbia court considered whether to introduce polygamy following an application by fundamentalist Mormons to have their union recognised. The Court rejected the application, saying that the idea of two parties to a marriage was a core element of Western tradition, leaving everyone wondering how gender complementarity could not also be ‘a core element of Western tradition’.<sup>28</sup> The lesson is that a society that institutionalises SSM won’t necessarily institutionalise polygamy – but only by ignoring principle, which is not a stable juridical foundation.<sup>29</sup> Far from strengthening marriage, as we shall see, SSM sets up huge confusion in the public mind.

*The evisceration of marriage*

The Western world's ten-year experiment with SSM has been too short to draw definitive conclusions about its effect on marriage over all. Yet what signs there are have been negative.

As time has gone on, the radical nature of the redefinition has become clearer. As the UK Bill indicates, the impossibility of defining consummation in SSM has led to the removal of the consummation clause: not only is marriage no longer necessarily between a man and a woman, it is no longer about sex. Nor is it about parenting: motherhood and fatherhood are now absent from the state's account of marriage. Spain, which legalised SSM in 2005, now refers in its birth certificates to 'Progenitor 1' and 'Progenitor 2'; in some Canadian provinces and US states which have legalised SSM, official documents speak of Parent A and Parent B.

One of the counter-arguments of the SSM lobby is that gay couples already adopt, and that therefore 'their' marriages can also be 'about' children. But that is to avoid the point. Bringing up children – as same-sex couples, unmarried couples, maiden aunts, foster parents and single parents already do, often with great love and dedication – is not a qualification for marriage. What makes marriage possible is both the rearing *and* raising of children who grow up, ideally, as the genetic offspring of their mother and a father within a relationship of lifetime commitment.

The fact that the ideal is often not attained – because of death, divorce, or separation – does not prevent this model from being normative. The institution incarnates that ideal; it is the prototype, the template, from which, as a society, we receive the blueprint for the best way of nurturing children. As the former Home Secretary, Jack Straw, put it, the evidence shows that children are 'best brought up where you have two natural parents in a stable relationship' and that 'stability is more likely to occur where the parents are married than where they are not',<sup>30</sup> evidence confirmed in the Government's own statistics.<sup>31</sup>

## THE DESTRUCTION OF CONJUGALITY

Unsurprisingly, where a unique conjugal institution has been turned into a gender-neutral, sex-less, adult-centred partnership involving merely commitment and support, people quickly cease to see the point of it. In Spain, which introduced gay marriage in 2005, the rate of decline in the take-up of marriage has been double that of Italy and France, while in Holland and Belgium, which introduced SSM in 2001 and 2003, there has been a marked decline. (In Britain and Germany, by contrast, which have not had SSM, marriage take-up has increased).<sup>32</sup>

Gay people, too, find the 'partnership' model of SSM largely pointless; they are largely indifferent to the great civil right of which they are allegedly being deprived. France legalised gender-neutral civil unions in 1999 and almost as many are contracted every year as traditional marriages; but only four per cent of those are among same-sex couples.<sup>33</sup> A 2005 Netherlands report indicated just 12 per cent of same-sex couples had married (as opposed to 82 per cent of male-female unions). In Canada, there are just 21,000 married same-sex couples out of 6.29 million total married couples.<sup>34</sup> And according to the Spanish National Institute of Statistics, the number of same-sex unions under the 2005 Act were: 1,275 (0.6 per cent of the total of marriages) in 2005; 4,574 (2.16 per cent of the total of marriages) in 2006; 3,250 (1.6 per cent of the total of marriages) in 2007, and 3,549 in 2008.<sup>35</sup>

A ComRes poll of gay people for Catholic Voices in June 2012 found that fewer than four in ten considered SSM a priority, and only a quarter would consider ever marrying. (The poll also found that fewer than half believe Stonewall's argument that a legal distinction between civil partnerships and same-sex marriage perpetuates discrimination).<sup>36</sup> The polls seem to show that for its advocates SSM is an iconic, symbolic victory for 'gay rights', rather than a state gay people seek to enter.

But do same-sex marriages, despite their low numbers, give a particularly fine example of longevity and commitment? Do they, as the Government suggests, 'strengthen marriage'? The

evidence here is all the other way.<sup>37</sup> In the Netherlands and Belgium the divorce rate among same-sex couples is far higher than among couples as a whole. Belgium is particularly striking: male same-sex couples are 21 per cent more likely to divorce than heterosexual couples – while lesbian married couples are an amazing 76 per cent more likely to divorce.

Whatever else SSM will do to marriage, it will not strengthen it.

### *A new climate of intolerance*

If the state were to cease to give legal recognition to marriage of any kind, leaving the matter to private associations, this debate would not arise. But no modern state has done so. In legalising for SSM, governments dethrone the conjugal understanding of marriage deeply embedded in civil society, history and culture, and enthrone the new, ‘partnership’ understanding, which assumes that any legal distinction between same-sex and male-female unions is arbitrary and discriminatory. Put simply, the law declares that all those who hold to the conjugal understanding of marriage are little better than racists.

The Government’s response to the Churches’ objections to its SSM Bill shows that it regards their moral convictions about marriage to be an expression of a subjective religious belief. If they are purely religious beliefs, in the liberal-secularist view, they cannot be rationally defended. And because they are not rationally defensible, they should be treated as a form of prejudice. In effect, 2,000 years of moral tradition and religious belief become a species of bias. And opposing same-sex marriage thus becomes religious-blessed homophobia.

This new, ‘tolerant’ definition of marriage would be the state’s official position, to be accepted by all public employees; dissenting individuals and organisations would face anti-discrimination lawsuits or the withdrawal of public funds. Michael Coren records how, in Canada, ‘if large numbers of gay people failed to take advantage of the law, the law certainly took advantage of its critics... it is estimated that, in less than five years, there have been between 200 and 300 proceedings –

## THE DESTRUCTION OF CONJUGALITY

in courts, human-rights commissions, and employment boards – against critics and opponents of same-sex marriage. And this estimate doesn't take into account the casual dismissals that surely have occurred.'<sup>38</sup>

The Churches and Christians have already been on the frontline of this 'crackdown': Catholic adoption agencies were forced to close in 2007 after the Government refused to exempt them from anti-discrimination legislation: allowing the agencies to exercise their preference for man-woman parenting had come to be seen as a concession to private prejudice, which in turn came to be seen as bigotry that harmed the public interest.

The list of public employees demoted, sacked, ostracised or in other ways punished for holding unfashionable views on gay marriage and gay adoption is growing all the time – even before SSM becomes legal.<sup>39</sup> Catholic schools have been fiercely criticised for publicising a letter from Catholic bishops drawing parents' attention to the Coalition for Marriage petition.<sup>40</sup>

A leading human rights barrister, Aidan O'Neill, has warned that following the legalisation of SSM, parents who object to gay marriage being taught to their children, will have no right to withdraw their child from lessons: on the part of the teachers, any refusal to comply would be 'grounds for her dismissal from employment' because of a legal ruling that religious belief cannot be used by employees 'to demand changes in their conditions of their employment'. O'Neill also warns that parents who object to gay marriage being taught would have no right to withdraw their child from lessons for religious conscience reasons. 'If gay marriage is introduced, the school would be in its own legal right to refuse the wishes of the child's parents, arguing it is under a legal obligation of its own to promote equality – whatever the cost,' he said, arguing that Government promises to protect churches and other faiths who object to gay marriage would be meaningless. While there is no human right to same-sex marriage, the European Court of Human Rights (ECHR) is clear that any government which introduces it must pay attention not to discriminate. 'Churches might indeed better protect themselves against the possibility of

any such litigation by deciding not to provide marriage services at all, since there could be no complaint then of discrimination in their provision of services as between same sex and opposite sex couples,' he says in advice commissioned by the Coalition for Marriage.<sup>41</sup>

In their briefings to MPs, the Catholic and Anglican Churches have spelled out at length the many ways in which the Government's reassurances that freedom of religion and freedom of conscience will not be threatened by the Bill are simply not worth the paper they are written on.<sup>42</sup> Without going into the specific ways in which the legislation is vulnerable, the broad fact is that discrimination law, especially where it borders freedom of religion, is a highly contested area of law, and ultimately these cases will be decided in Strasbourg, not London.

### *Conclusion*

Both the advocates of 'marriage equality' and the advocates of 'conjugal marriage' have this in common: they both claim to place a high value on marriage. Nor do the opposing sides differ about the imperative of equality: both sides agree that 'like cases should be treated alike' and therefore favour 'marriage equality'. The real disagreement is not about equality, or gay rights, but about what marriage is, and what the law should promote it as being – indeed which, among the vast spectrum of human relationships, it should recognise as 'marriage'?

The British Government has chosen, for strategic and political reasons, to recognise one type of hitherto non-marital relationship – the same-sex union – as qualifying for state recognition and support in the form of marriage. It declares that the exclusion of this group hitherto is arbitrary and discriminatory. And yet its exclusion of every other kind of stable, loving, cohabiting relationship now seems entirely arbitrary and discriminatory.

But more importantly, the recognition of same-sex unions as marriage in the name of the emancipation of gay people

## THE DESTRUCTION OF CONJUGALITY

requires radically redefining marriage in law, overthrowing the comprehensive, conjugal understanding which has served us so well, in favour of an eviscerated, weak narrative of marriage involving mere domestic partnership.

In so doing it will have reduced marriage in the eyes of society, by rendering marriage less distinct and important. It will have made it harder for future generations to see the point of marriage. And it will have made it extremely hard for people to see why, if one essential element of marriage has been stripped out, why the other elements should remain as well.

It will have put marriage on an unstable juridical foundation. It will have made the exercise of freedom of conscience and religion much harder. It will have overridden civil society in pursuit of a political gain with iconic value for some activists, but of no real interest to gay people. And it will have made it much harder, over time, for children to be raised as they should be – by a mother and father in a stable, committed, sexually exclusive relationship.

# Marriage Is Not a Timeless, Unchanging Institution

**Roger N. Lancaster**

Opponents of marriage equality stake their arguments on a few key ideas:

1. Marriage is, and has always been, solely and exclusively, the union of man and woman.
2. This universal form of marriage reflects natural or divine law: an unswerving imperative to populate the future, to 'be fruitful and multiply'.
3. Because marriage is the foundation of civilisation, and because it models the order of things, tampering with the institution would harm children or otherwise imperil society.

These ideas turn out to be quite unsound. In fact, it can hardly be said that monogamous heterosexual marriage is the sole form of union 'honored and encouraged in all cultures and by every religious faith', as President George W. Bush asserted when he advocated for a constitutional amendment banning gay marriage in the US. That's Anthropology 101. Nor can it be said that the idea of gay marriage runs counter to 5,000 years of moral teaching, as spokespersons for the Christian right insist. What careful scholarship and millennia of human experience actually show is that marriage cannot be forever fixed into a one-size-fits-all formula. There's more than one way to live, to love and to set up home and hearth. Various kinds of same-sex unions have coexisted with different types of heterosexual unions in many times and places.

In rebutting the objections of social conservatives to marriage equality, I propose to develop here three counter-arguments, which will be less about what marriage 'is' than about some of the things it 'does'. Far from being a unitary or

## MARRIAGE IS NOT A TIMELESS, UNCHANGING INSTITUTION

stable sort of thing, marriage is a varied institution that can serve many different social functions.

1. Ideals of equality, sociability and conviviality in marriage enjoy great authority today. What most people will regard as a 'good marriage' is a pact of mutual love and solidarity: the sharing of labours and resources to make a life.
2. Still, marriage is about standing and status; that is to say, it confers legitimacy, and not only amongst the in-laws. In announcing what sorts of ties will be acknowledged and celebrated, it marks what sorts of families will be disesteemed or stigmatised.
3. Lastly, marriage today continues to perform one of its oldest functions: it is about economic power. Marriage organises property and inheritance rights, and it conveys a host of other rights of access, transmission or denial.

It is of course unjust that gays and lesbians are denied access to an institution widely regarded as necessary for a good life. But it will be a question for advocates of gay marriage no less than for opponents which functions of marriage they will regard as just.

### *Just what is marriage?*

Defining marriage is no easy task. Marriage sometimes involves a formal union marked by a public announcement or a ritual – like a wedding. Or it might have the informal character of a union gradually acquired or consolidated over a period of time. What North Americans and Europeans call 'common-law marriage' is the prevailing form of union in many parts of Latin America and elsewhere. For these (and other) reasons, anthropologists avoid using baggage-laden terms like 'marriage' when describing the broad sweep of institutions related to affinity, residency and kinship, opting instead for more portable (if off-putting) technical terms like 'union' or 'alliance'.

## THE MEANING OF MATRIMONY

Heterosexual unions take varied forms; these include polygyny, polyandry, serial monogamy, and perhaps, in rare cases, 'group marriage'. These forms often coexist with other arrangements. Just how many forms of same-sex union one discerns across cultures and throughout human history will depend on what one counts as 'same-sex' and 'union'. Australian aborigines elaborate complex networks of kinship by a variety of means, some involving homoerotic play. In some cultures in the Amazon and Papua New Guinea, a man's erotically charged relationship with his brother-in-law eclipses his relationship with his wife. Female same-sex marriages are institutionalised among the Nuer of Sudan and in a wide belt of African societies. In the past, a large number of Native American societies allowed anatomical males to marry other anatomical males (provided one of them underwent ritual transformations to become a gender-mixed 'man-woman').<sup>1</sup>

Bonds of same-sex friendship, publicly announced and ritually marked by an officiating authority, amount to something very much like 'marriage' in a great number of cultures. So do other forms of same-sex group affiliation, such as orders of monastic nuns, certain priesthoods, any number of warrior castes, and highly organised groups of women who lived collectively on the Chinese Kwantung delta in the nineteenth century.<sup>2</sup>

But those are mostly 'exotic' societies or special situations, a social conservative might object. What about our own durable traditions? In fact, the dispassionate study of thousands of years of Western and Judeo-Christian traditions discloses long episodes of prejudice and repression, but provides no ready refutation that would make gay marriage seem facetious, *prima facie*.

Classical Greek sources celebrate the virtues of long-term, same-sex love, especially as it bore on martial training and military preparedness. *The Iliad* recounts the story of Achilles and Patroklos. Harmodius and Aristogeiton, who gave their lives attempting tyrannicide, became publicly celebrated role models of Athenian democracy. The Band of Thebes, lauded by

## MARRIAGE IS NOT A TIMELESS, UNCHANGING INSTITUTION

Plutarch as an 'army of lovers', seems to have functioned much like an extended same-sex marriage. Alexander's much-storied love for Hephaestion is unambiguous. We err if we gloss these forms of adhesion as 'mere' friendships, according to the modern understanding of friendship. When Plato asked, 'What is love?' he sought the answer in male same-sex relationships, while Aristotle took such relationships – *not* heterosexual marriage – as the model for justice and as the basis for politics and society. And don't forget about Sappho on the Isle of Lesbos.<sup>3</sup>

Judeo-Christian traditions are less welcoming than those of Greek pagans. The sexual and dietary prohibitions laid out in the Book of Leviticus were expressly designed to separate the Jews from the practices of surrounding Semitic peoples. (An antecedent Mesopotamian text, fragments of which found their way into the Book of Genesis, recounts how the gods created a male soul mate for the epic hero Gilgamesh.) Still, the Biblical story of David and Jonathan is suggestive: the two made an explicit covenant – they exchanged vows. David mourned Jonathan's death with the words: 'Your love for me was wonderful, more wonderful than that of women.' And a song that is often performed at evangelical denominations' wedding celebrations today derives from the Old Testament vows Ruth made to Naomi: 'Whither thou goest, I will go.'

Ironically, the very wedding vows that social conservatives want to 'protect' derive from early Greek Christian same-sex commitment ceremonies, as historian John Boswell documented in his final book, *Same-Sex Unions in Pre-Modern Europe*. Whether those ancient vows cemented friendship relations or sexual unions is difficult to say, but their existence scarcely implies that same-sex couples ought to be strangers to modern marriage laws. Rather, history suggests that same-sex relationships were the very models of ideal heterosexual marriages.<sup>4</sup>

A wide gamut of historical and anthropological evidence thus gives the lie to claims that gay unions will somehow undermine heterosexual ones. The institution of marriage has

been enriched, not degraded, by plural models involving same-sex unions.

*Modern love is a radical idea*

What most Christians think of as ‘traditional marriage’ actually turns out not to be a universal institution, but a relatively recent invention. If you read St Paul or St Augustine, for instance, you’ll see that the fathers of the early Christian Church were quite hostile to marriage. Far from celebrating the sexual union of one man and one woman, St Paul recommended celibacy for everyone and only grudgingly accepted marriage as a back-up plan: ‘Better to marry than to burn.’ The ascetic founders of Christianity were radical opponents of ‘family values’.

The development of official Christian heterosexual marriage stretched out over epochs. Although archaic texts sometimes refer to wedding feasts, marriage rituals involving the exchange of vows appear to have developed fairly late in medieval Europe. The idea that an officiating authority – a priest – ought to be present during those vows came later still. Later yet, the Church starts to keep records. And much later, the state becomes involved.

The notion that one might marry, not in the political or economic interests of extended kin groups, but voluntarily and out of love, is of distinctly modern vintage. This idea, which is ubiquitous today, developed not at the centre but on the margins of family life. It derives from knightly love, which was unambiguously adulterous, and it appears to have medieval roots in the practices of English common folk. Modern cultures continue to digest this revolutionary concept, romantic love, which undermined traditional forms of authority (based on age and corporate kinship) and continues to reverberate in the ways that people live around the globe.<sup>5</sup> And that’s where we find ourselves today: in the throes of ongoing changes involving gender relations, sexuality, and the meanings of love.

Of course, the idea that marriage is tied to class, legitimacy, patriarchy and other invidious social distinctions has a long history, too – and those who passionately advocate for same-sex

## MARRIAGE IS NOT A TIMELESS, UNCHANGING INSTITUTION

marriage today would do well to remember their own place in this history. Communist peasant movements throughout the Middle Ages wished to do away with marriage, seeing how it was tied to property and estate. From the late eighteenth century, feminists criticised the institution as the bedrock of women's oppression. By the nineteenth century, revolutionaries, free thinkers and social reformers advocated free love. And as recently as 50 years ago the tumult of ongoing changes involving gender, sexuality and love took more vigorous political form than they do today: feminists, gay liberationists and members of the youth counterculture extolled romantic love *as against* the institution of marriage.

Sex radicals were right when they said that gender inequality, homophobia and sexual repression were deeply rooted in family life; they were also right when they saw the institution of marriage as conferring certain privileges, including economic rights and the prestige of 'marrieds' over 'singles'. But they were wrong in viewing the institution as inflexible, and they were premature in declaring marriage obsolete. New, more flexible arrangements quickly came to coexist within and alongside the institution – many of them in response to the demand for greater gender equality and less institutional closure. Today, monogamous marriages and heterosexual nuclear families are but one sort of arrangement amongst others.

Social conservatives tap pervasive feelings of unease about the new arrangements when they lament the decline of 'traditional' families, the rise of divorce rates, the spread of cohabiting arrangements, the emergence of new family forms and, perhaps especially, the growing visibility of lesbian and gay relationships (which is sometimes portrayed as *causing* all of the other disruptions). But logically, it is difficult to see how modern marriage could remain vital and relevant by being anything other than unstable and plural. You can't have love without heartache. You can't have the freedom to make choices without the pain of choices badly made. And you probably can't have the idea that love is the sole legitimate basis for

marriage without also having modern divorce rates. (Level-headed people entered into the spirit of this arrangement in the 1970s, when they began vowing 'as long as we both shall love'.) All said, these aspects of sexual modernity would seem to follow, more or less logically, from the idea that our relationships, like other contracts in a market economy, ought to be entered into freely. They would seem to follow from the idea that marriage ought to be based on love.

And once you have a modern culture of love, linked to that consummate Lockean right, 'the pursuit of happiness', it becomes just as difficult to justify arbitrarily excluding some people from the right to marry as it is to contemplate locking up others in unhappy marriages.

*There's nothing 'natural' about natural law*

Comparative studies of kinship do not support the idea that heterosexual marriage is *the* universal and exclusive form of marriage practiced by all peoples everywhere. They show merely that it is statistically preponderant, with polygyny being more common than monogamy or polyandry, and with varied forms of same-sex unions coexisting with heterosexual ones in many societies. Sociological surveys of the present landscape show that varied forms (never-marrieds, cohabiting couples, single parents) coexist with heterosexual marriage and the nuclear family – which, in many affluent post-industrial societies, no longer represent the preponderance of households.<sup>6</sup>

Now in the absence of compelling historical, anthropological, or sociological evidence, opponents of gay marriage make much of the supposedly obvious facts of reproduction: heterosexual couples may (but do not always) biologically reproduce offspring. Same-sex couples do not (unless they involve someone of the other sex). This is said to make reproductive heterosexual marriage the more natural, desirable form of union, to be socially promulgated *even if* it has the effect of excluding minorities (gays, lesbians, couples without children, adoptive parents, and so on) from certain social goods

and recognitions. This line of reasoning does not withstand much scrutiny.

It is important to note, first, that for human beings, reproduction is always a *social* undertaking; it is framed by how we understand reproduction and tally kinship; it is supported by changing conventions, mediated by available technologies, and backed by a far-flung host of supporting characters. There is little that is 'natural' or self-evident about it, and even the most basic 'facts' of reproduction have been variously construed by humankind. Aristotle likened human reproduction to plant reproduction: he thought that semen contained 'the seed', the person in miniature, and this view prevailed in many parts of the ancient world for a long time. The Ache foragers of eastern Paraguay, like the Barí of Venezuela and Colombia, believe that a child can have more than one father – and that multiple inseminations by different men are a good thing. The Bedamini of Papua New Guinea associate same-sex intercourse with growth and fecundity, and heterosexual intercourse with decay. Modern practices of technologically-assisted reproduction push the social and technological elements in reproduction to a new level and are already changing our basic concepts of parentage and kinship.<sup>7</sup>

It is important, too, to remember that marriage serves many social purposes other than sexual reproduction. In point of fact, the anthropological study of kinship advanced enormously when Claude Lévi-Strauss pointed out that marriage was less about the biology of reproduction than about the negotiation of political relations amongst in-laws.<sup>8</sup> Marriage can be about social approbation, politics, and property, obviously: it confers upon spouses and offspring certain automatic rights of inheritance and legitimacy. It can be about romantic love; and when the embers of passion die, it can be about companionship. It can also be about the provision of social supports for individual members of society – that is, it serves as a bulwark against atomisation. This is why civil authorities do not bar infertile couples or heterosexuals past their reproductive years from receiving marriage licenses.

In view of these plural aims, the association between the promotion of marriage, as a vehicle for heterosexual fecundity, and the repression, containment, or marginalisation of homosexuality is anything but self-evident. Indeed, comparative cross-cultural studies find no correlation between 'pro-natalism' and prohibitions against homosexuality; some of the most pro-natal cultures in the world also institutionalise and celebrate same-sex love.<sup>9</sup> Thus, even if one accepts the notion that reproduction is a key function of *marriage*, nothing would preclude allowing other arrangements to coexist with reproductive marriages.

Arguments against gay marriage derived from 'natural law' become untenable if we consult the record of how human cultures have understood nature and elaborated their reproductive relations. These arguments grow wobblier still if we accept the notion that science, not religion, is the better arbiter of how nature 'works' and what its workings might mean. Dispassionate ethology confirms that animals of many species and both sexes engage in same-sex relations. These sexual relationships do not reproduce offspring, of course, but for certain birds, for bonobo chimpanzees, and for members of many other species, they sometimes do form the basis for long-term bonding. And in some species, some same-sex couples jointly rear offspring. Even in the lower orders of the animal kingdom, sex and bonding would seem to serve purposes other than just reproduction.<sup>10</sup>

So again: even if one accepts the idea that reproduction is a key function of *sex*, nothing in laws purportedly derived from 'nature', or at least from natural science, would preclude gay marriage.

It is difficult to see just how the legal acknowledgment of lesbian and gay relationships would 'harm' heterosexual marriages or imperil children. No respectable sociology supports this view, and it is painful to read that children will somehow benefit from having heterosexual marriage held up to them as *the* singular, ideal, 'healthy' model for life's career.<sup>11</sup> Never mind that contemporary psychology works from a more

generous and inclusive understanding of health. Proponents of the conservative view wilfully ignore the plain, obvious and inevitable fact: some of their children will not grow up to be heterosexual adults. Some will not find a home within the regime of coercive heterosexuality. Even if the language in which their arguments are cast is careful and polite, social conservatives basically advocate making the world hostile to and unsupportive of their gay children. They say, 'Your existence will be tolerated, but your most cherished relations will not be celebrated; you will not be allowed access to those things that others view as part of a good life.'

The only social 'harm' they can show, in the end, is that the social conventions which honour heterosexuality and stigmatise homosexuality will be undermined by gay marriage. Every straight person will no longer have claim to moral superiority over every gay person. This, we say, would be a very good thing.

Pushed on this very point, social conservatives sometimes make florid statements about non-negotiable values, intrinsically disordered sexualities, moral rot and the decline of Western civilisation. These are not so much arguments as tautological expressions of prejudice, and we pander to prejudice if we recoil from calling it by its name just because it takes refuge in religious belief. If social conservatives view marriage as a religious sacrament legitimately bestowed only upon heterosexual couples, they are, of course, entitled to place their membership in denominations and sects that refuse to marry same-sex couples. We respect the rights of conscience. Whether such private religious beliefs should hold sway over other people's legal rights is the real question in contention.

*If marriage is what we make of it, then where do we go from here?*

Today's arguments against marriage equality echo yesterday's justifications for slavery and sexual inequality: it has always been thus; God made it so; the natural order of things requires that it be this way, or great harm will befall us. It's easy enough

## THE MEANING OF MATRIMONY

to refute such arguments, based as they are on pseudoscience, fake universals, potted histories and outright prejudice.

The basic lessons from anthropology, sociology and history are clear: marriage, family and kinship are not timeless institutions written in the eternal heavens and handed down to humankind with other basic moral values. They are variable and ever-changing social relations, and they change along with other changing social conditions. They are what we make of them, and it does them no dishonour when free men and women remake them from time to time according to their changing needs and their desires for a better future.

Modern scholarship has gone a long way toward removing antiquated and imaginary barriers to lesbian equality. And legal precedents based on these understandings are accumulating. Writing for the majority, Justice Anthony Kennedy repeatedly acknowledged that social science and historical studies helped expose the US Supreme Court's faulty reasoning about norms and traditions in its 1986 *Bowers v. Hardwick* decision, thus paving the way for its *Lawrence v. Texas* decision in 2003, which struck down America's remaining sodomy laws – and, by any logical reading, also set the stage for eventual marriage equality. But as the Supreme Court decision also affirms, neither exotic cultures nor ancient traditions can serve as our guides. It's really the last 50 years of history that ought to weigh most heavily in our judgements about the meanings of freedom and the making of our modern institutions. By that measure, the facts are already in evidence. Millions of us practice durable same-sex unions, which we think the equal of heterosexual marriages. Do we not love, comfort and honour? Do we not keep each other in sickness and in health, for richer or poorer? Are our relationships not deserving of acknowledgment? Are our lives not worthy of respect?

Who's in and who's out of official kinship really matters. It counts in ways that are more than symbolic. This is why international conventions recognise the right to marry as a fundamental human right. Being locked out of marriage means

being deprived of social recognition, economic rights and other benefits. Although the mechanisms are not always well understood, we know that social exclusion and segregation harm people in a variety of ways, sometimes subtle, sometimes coarse. Although we cannot be sure about cause and effect, we also know that unmarried people have less social standing, earn less money, get sicker and live shorter lives than married people. Given such material correlations, a very high bar must be set for deliberate policies of social exclusion – that is, for laws that deprive citizens of rights and enjoyments that many people view as necessary for a good life. Opponents of gay marriage would need to show that permitting same-sex marriage would entail genuine harms and real dangers. That bar has not been met. I will return to this point in conclusion, for it seems to me to open into a wider discussion of social inclusion.

Here, invariably, social conservatives cast a furtive glance at the future. They will say that gay marriage puts society on a slippery slope: that it throws all moral values into question, and that next up, someone will propose to marry two spouses, or a child, or a dog, or a piece of furniture. This is but the late modern version of an earlier associative logic, which sprawled across religious dogmas, specious criminologies and pop-psychoanalytic nightmares. This way of thinking was cursorily depicted in James Barr's 1950 novel *Quatrefoil*, in which two gay men earnestly debate whether they might love each other: '*but if homosexuality, then why not incest, or murder?*' It took gay men and women a long time to shake themselves free of such illusions. It took Western societies a long time to realise that not all taboos are the same. In any case, social chaos has not broken out in Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa and Sweden, nor in those parts of the Brazil, Mexico and the United States that have legalised same-sex marriage.

At bottom, social conservatives know what they fear, even if they lose sight of all measure and proportion: *they dread change*. And of out fear, they propose a bad faith bargain with the

future: they wish to fast-freeze history into its present shape, to tie the family down to some received form, and to extort an agreement that will bind future generations to the practices of the past. But the past can fetter the future only up to a point. If institutions such as marriage and the family participate in a stream of constantly changing social relations, then we cannot say with any certainty where this stream of developments will take us tomorrow. We cannot say how our institutions will respond to the looming economic, demographic and environmental challenges of the future – challenges for which modern practices of production, consumption and reproduction seem ill matched. But we can trust that future debates on the shape of marriage will not abandon good reason and sound ethical judgements. And we have no reason to fear that the restraints on murder and mayhem will fall like so many dominoes if, cognisant of where we are in the stream of things now and of what demands history makes of us today, we officially recognise, accept and honour what Plato first told the world in *The Symposium*, at the dawn of what would come to be called ‘the West’: that human love comes in three forms: heterosexual, homosexual and lesbian, and that we and all of humankind are stronger when united with the one we love.

### *Two cheers for gay marriage*

I end on something of a dissonant note. In demanding marriage rights, we are not only demanding social inclusion; we are also demanding access to an institution that has exclusionary functions. What happens with gay marriage, then, is not the end but the beginning of questions. The struggle for marriage rights is but one front in a broader struggle for social inclusion.

Like most members of the gay and feminist left, I worry about the fetishisation of marriage and family in North Atlantic political cultures. Overwrought claims about the benefits of marriage, anguish over how to strengthen the family and endless talk about individual responsibility have become panaceas in an era of declining wages, rising health care costs, widening class inequalities and social *in*security in general.

## MARRIAGE IS NOT A TIMELESS, UNCHANGING INSTITUTION

These collective fantasies distil a distinctly neoliberal picture of the world: the nuclear family, shored up by monogamous marriage (and sometimes enhanced by ultra-religious ‘covenant marriage’), is to act as a sort of state within the state, a ‘haven in a heartless world’, providing for individual members’ wellbeing – precisely at a time when the state has renounced its historic responsibilities for social welfare.<sup>12</sup>

In this skewed and surreal context, advocates of gay marriage sometimes sound more conservative than the social conservatives. They sometimes present an astonishingly unrepresentative and unrealistic picture of gay and lesbian relationships. In a *Nation* article, Lisa Duggan pulls this quote from ‘The Roadmap to Equality’, published by the Lambda Legal Defense and Education Fund and Marriage Equality in California: ‘Gay people are very much like everyone else. They grow up, fall in love, form families and have children. They mow their lawns, shop for groceries and worry about making ends meet. They want good schools for their children and security for their families as a whole.’<sup>13</sup>

Now frankly, I doubt that this suburban picture of children, school worries, lawnmowers, and domestic bliss really applies to more than a minority of the gay and lesbian community. It doesn’t even apply to the lives of a lot of straight people! I certainly want no part of America’s deranged culture of lawn care, seeing how much environmental damage it will pass on to future generations. I also chafe at the idea, floated in the same guide, that ‘denying marriage rights to lesbian and gay couples keeps them in a state of permanent adolescence...’ I don’t feel like a permanent adolescent, and palaver like this makes me deeply ashamed for Lambda Legal Defense.

So I’m not going to make extravagant claims about the institution of marriage, or how it will solve all of our problems, or how it holds the key to happiness and personal fulfilment. I refuse to stake an argument for social inclusion based on normalcy, the silly idea that gay men and lesbians have to be just like their straight counterparts to be worthy of receiving their rights. And I have no interest in religious rigmarole or

moralising platitudes; I don't feel that the emotional quality of my long-term relationship would be enhanced by the exchange of vows or the benediction of a priest. My claims are modest, as are my demands: I just want the same rights as everybody else. I do not want to be told to go to the back of the line. I do not want special, second-class rights that have been cordoned off from those of other citizens. In a US context, then, I want the right to file joint income taxes as long as heterosexual married couples have that option. I want gay couples to have the right to share each other's hard-earned pensions, health insurance policies and social security benefits. I do not want to navigate a gauntlet of lawyers and paperwork in order to secure mutual inheritance rights with my partner. And I want to participate in the same welfare, housing and immigration rights as everyone else. The present set-up arbitrarily excludes gays and lesbians from these social and material goods. We thus need gay marriage, and we should accept nothing less than the same rights with the same names.

But – and this is a big 'but' – many of these 'rights' are *privileges*, which exclude someone *else*. We thus also need a more expansive social imagination: some legal recognition of and material support for the true existent variety of ways people live and love. Some women (and a few men) are single parents, not by circumstance but by choice; in either case, they strive to provide love, connection and a good life for their families. Their labours have earned our support, not moralising lectures about how they should get married. Some people never couple-up and never have children, nor do they wish to do so, but serve as caregivers for family members; others maintain long-term networks of mutual support with friends that resemble affinal or consanguineal relations. Their contributions are worthy of respect, not sympathy. Some never find their one true love, but instead finds ways to bless the lives of everyone around them. These are not small gifts, and they ought to be reciprocated.

We live together in myriad different ways, and we weave the social world out of these varied ways of relating. It would

## MARRIAGE IS NOT A TIMELESS, UNCHANGING INSTITUTION

be a shame if gay marriage were to make the world a drabber, more conformist place. It would be a net loss if we were to join the institution of marriage in order to offload the symbolic and material burdens of queerness onto someone else: unmarrieds, single parents, divorcees, the non-monogamous. It would be far better if gay marriage were to promote a more benign view of variation and respect for difference. It would be better, still, if gay marriage could lead to the consolidation of more forms of support for more forms of social mutuality.

And so I call for supporters of gay marriage to be more inclusive in their campaign for inclusion. A one-size institution won't fit all people, all needs. We need more options, not fewer. And everybody – whether they take the plunge or not – ought to have access to health care, education, affordable housing, partner visitation rights and a decent retirement after a life of work. We need to be as radical as reality about these matters.

# A Liberal Critique of Gay Marriage

**Brendan O'Neill**

One of the biggest mistakes we could make in relation to gay marriage is to take it at face value, to accept it as a straightforward, admirable expansion of homosexuals' rights. Because in truth, there's nothing straightforward about gay marriage. Indeed, looked at coolly, the elevation of gay marriage to the top of the agenda in various Western countries makes no sense in normal political terms.

Ours is an era in which both the institution of marriage and the ideal of civil rights are continually denigrated, with marriage looked upon by much of the opinion-forming classes as outdated, and liberty held in low esteem by vast swathes of the political class. And yet we are expected to believe that our leaders now have a burning urge to behave like modern-day Rosa Parks by signalling their support for both increased civil rights and more marriage, in the guise of gay marriage.

Very little about the gay marriage campaign, or its extraordinarily speedy journey into the centre of political life, adds up. As such it's now treated as perfectly natural that homosexuals should want to marry, to the extent that the so-called 'denial' of that right is seen as being on a par with the denial of basic rights to blacks in pre-1960s America. Yet for many years, the gay movement showed no interest in entering into the institutions of marriage or the family; indeed, many prominent gay spokespeople rejected those institutions and put the case for the right of homosexuals to pursue other, non-traditional lifestyles. As recently as 2002, Peter Tatchell, now a leading advocate of gay marriage, was attacking 'cuddly issues like gay marriage' and arguing that, historically, campaigners for gay rights did not want to 'embrace traditional heterosexual aspirations'.<sup>1</sup>

Likewise, the claim that the gay marriage campaign is the legitimate heir to earlier movements for civil rights also doesn't hold water. Gay marriage activists flatteringly compare their campaign to that pursued by black civil rights activists in 1950s and 1960s America. Or as the gay marriage supporter and comedian Julian Clary puts it, gay marriage activists are 'the Suffragettes of the twenty-first century'.<sup>2</sup>

But it is the *differences* between the campaign for gay marriage and those earlier campaigns that are truly striking. Most notably, there have been no mass protests or public street-fighting in relation to gay marriage. Instead, this issue was projected into the political and media worlds by small numbers of activists in the 2000s, and soon came to be seen as a key moral issue of our times without the need for any of the slog or suffering experienced by either the Suffragette movement or black civil rights activists. It has been spearheaded, not by protesters, but by elements within the cultural elite.

Then there is the claim that the reason leading politicians are getting behind this campaign is because they want to promote marriage, because they are keen to shore up the institution by expanding its base. Yet it is hard to take seriously the idea that the modern political elite is pro-marriage. The institution of marriage is in a pretty parlous state today, with married couples now making up less than half of the British population and marriage frequently depicted in both campaigning literature and popular culture as the site of abuse and sorrow; and politicians are at least partly responsible for this.

Consider, as just one example, the Government's recent overhaul of the definition of domestic violence to include everything from 'emotional harm' to making a partner feel bad about him or herself. In essence, the everyday emotional ups and downs of living together, of commitment itself, are now treated by officialdom as terrible instances of 'abuse' which might require the intervention of the state.<sup>3</sup> Like many policymakers of the modern era, the Liberal-Conservative coalition has a tendency to depict the domestic setting, and in particular the marital home, as a place of harm and depravity,

of bad parenting and rotten eating habits, of physical abuse and lax morals, which ought to be thrown open to the scrutiny of the authorities. The modern political class is torn between promoting marriage as a social good and fretting over what takes place 'behind closed doors', with the latter approach frequently undermining the former. It now sounds hollow to hear it champion the institution of marriage via its support for gay marriage.

In short, none of the political contexts that have been put forward to explain the rise of gay marriage stands up to scrutiny. So what is the true context of this issue? Why are leaders who aren't very interested in either rights or marriage fighting to institute the right to gay marriage? I think there are two key things driving this campaign. First, there are the deeper needs of the political elite, which, in these morally amorphous times, is continually hunting for an issue through which it might express some clear sense of purpose and simultaneously distinguish itself from those who are judged to be morally inferior.

Today, gay marriage plays that role, as a cultural signifier, an issue through which the political and media classes might demonstrate their enlightened outlook in contrast with the backwardness of what Nick Clegg calls the 'bigots' who oppose gay marriage. And second, there is the defensiveness of the gay movement, what we might even refer to as a crisis of homosexual love, with many gays now seeking external validation of their relationships, often in the form of state recognition. The gay movement's switch in recent years from pursuing liberty to becoming subsumed by the politics of identity has drawn it into an ever-closer, increasingly needy relationship with the state, since the cultivation of lifestyle 'identity' requires continual external support and flattery.

In essence, the gay marriage campaign represents an unholy marriage between the opportunism of an at-sea elite and the defensiveness of a gay movement that feels incapable of justifying gay love in its own terms.

*A non-mass movement*

The most striking thing about the gay marriage issue is its elitist nature. The architects of this campaign are drawn from the ranks of mainstream politics, the lawyerly set, and the media classes, even from the banking world: Goldman Sachs is a big supporter of the gay marriage campaign.

To the extent that there has been any political agitation for the right of gays to marry, it has been pursued through the legal courts rather than in the court of public opinion. One book on the emergence of gay marriage as a key culture war issue in modern America captures well the elitist underpinnings of the campaign. It describes how the early campaigners for gay marriage (in the late 1990s) consciously decided not to make 'open demands for gay marriage', for fear they would 'trigger a backlash', and instead did everything legalistically.<sup>4</sup> It describes one of the first 'major developments' in the gay marriage campaign – a 1999 conference at King's College London – as 'the first major international legal conference on same-sex marriage, [at which] lawyers and professors from the United States... benefited from the advanced conceptualisation and experience their brothers and sisters from other countries brought to the table'.<sup>5</sup>

These 'lawyers and professors' who spearheaded the campaign for gay marriage have actively counselled against broader public engagement on the issue. Campaigners have self-consciously sought to insulate themselves from public scrutiny or questioning. In the US, the campaign has been pursued almost entirely through the legal sphere rather than the political one. The central question that has been asked by campaigners is, in the words John D'Emilio, a former director at the US National Gay and Lesbian Task Force who is critical of aspects of the gay marriage movement, 'Will the courts set us free?' D'Emilio describes how much of the gay marriage movement has become obsessed with protecting gays and their rights from 'the tyranny of the majority'. Advocates of same-sex marriage, convinced that the public is made up of mostly hostile, possibly bigoted people, believe that 'the courts are the

place to go for the redress of grievances', says D'Emilio.<sup>6</sup> The gay marriage campaign is driven by a 'conviction that [the law] is the way to change the world', he says, even though such a belief 'would have been considered unusual for much of American history', when meaningful social change was achieved through sustained democratic struggle rather than through narrow legal victories.

In the UK, the campaign for gay marriage has taken place entirely at the level of the elites. It has consisted of little more than influential gay spokespeople putting pressure on government figures to institute gay marriage. There has been no protesting, no struggle, only an internal elite discussion about the finer details of future legislation on same-sex marriage. As in the US, British observers who support gay marriage have openly called upon political leaders to ignore potential public ignorance on this issue and to forge ahead with their plans. When a poll showed that 78 per cent of Britons do not think instituting gay marriage is a priority for parliament, a columnist said politicians should not feel tempted to 'respon[d] to majoritarian opinion'. 'A government enacts civilising measures because they are the right thing to do, not because they are mentioned frequently in focus groups', he said, creating a clear distinction between 'civilised' politicians who are capable of doing the right thing and the presumably uncivilised public which fails to see that gay marriage is 'a just cause'.<sup>7</sup>

Campaigners are particularly hostile to the idea of holding referendums. When a Scottish bishop proposed allowing the public to vote on gay marriage, there was outrage among activists. A referendum would be 'un-Scottish, unfair and a colossal waste of taxpayers' money', said a spokesman for the pro-gay marriage Equality Network.<sup>8</sup> It would be better, he said, to have 'confidence' in Scotland's political leaders to do the right thing.

In the US, the defeats suffered by gay marriage activists in referendums have generated extraordinary levels of hostility towards the electorate. In California, following the debates and

voting on Proposition 8, which said marriage should be restricted to a man and a woman, activists have railed against 'the tyranny of the majority'. One gay marriage supporter argued that referendums on gay marriage allow 'the majority [to become] the arbitrator for what is just', when 'that is the court's role'.<sup>9</sup> Other American gay marriage supporters have criticised the way in which 'the will of the people is erroneously portrayed in the public conservation as synonymous for what is right in a democratic society'.<sup>10</sup> Here, gay marriage advocates implicitly set themselves up in opposition to the fickleness and prejudice of the public, and self-consciously define themselves as an elite which, along with the courts, has a better idea than the 'tyrannical' masses about what is 'right in a democratic society'.<sup>11</sup>

American activists' hostility towards referendums spilled over into open contempt for voters following a referendum in North Carolina in May 2012. Sixty-one per cent of North Carolinians voted in favour of an amendment to the state's constitution to outlaw same-sex marriage. The response from gay marriage supporters was swift and ferocious. A writer for the *Los Angeles Times* compared North Carolina's support for traditional marriage with earlier Southerners' support for slavery, claiming that 'even by Southern standards, [this was a] remarkably mean-spirited initiative'.<sup>12</sup> The gay marriage group the New Civil Rights Movement said the referendum result confirmed that 'ignorance and hate have enveloped ordinary citizens', and exposed how 'ill-informed, mis-informed and just plain ignorant the citizenry... truly are'.<sup>13</sup>

The idea that the public is unenlightened in regards to gay equality – or rather has failed to have its 'awareness raised', to use modern parlance – is widespread among advocates of gay marriage. The gay marriage group Faith in America says the reason many voters reject the idea of gay marriage is because they have been 'duped', primarily by right-wing or religious propaganda, meaning they are 'uninformed or deceived'.<sup>14</sup> The US secularist magazine *The Free Thinker* referred to opponents of gay marriage as 'knuckle draggers'.<sup>15</sup>

## THE MEANING OF MATRIMONY

The insulated, anti-majoritarian, legalistic nature of the gay marriage campaign speaks to a clearly elitist, distinctly non-mass, movement. The gay marriage campaign has given credence to the idea that the best way to achieve social change is by appealing to the apparently refined sensibilities of judges and officials rather than by engaging with the easily deceived and ignorant public. It has redefined social progress to mean something instituted from the top down to correct the backward attitudes of the demos, in the process obliterating the view of social progress that was cleaved to by earlier generations of progressives: that is, as a form of pressure from below for the overhauling of elite laws and attitudes that prevented certain groups from engaging fully in society.

The gay marriage movement's redefinition of social progress to mean effectively enforcing an elite block against the 'tyrannical passions' of the majority explains why the political class warmed to this campaign. In the mid-to-late 2000s, following a decade of highly legalistic campaigning for gay marriage by small cliques of activists, politicians in numerous Western countries started embracing gay marriage. It isn't hard to see why: they were being implicitly invited by campaigners to make a public display of their enlightened sensibilities in contrast with the authoritarian impulses of the public, which is not the kind of invitation today's aloof political class is going to turn down.

From the outset, the gay marriage campaign flattered the political and cultural elites: it depicted judges and politicians in particular as the guardians of 'what is right in a democratic society'. In the words of one critical commentator, it 'focused on convincing, not the people, but the judiciary'.<sup>16</sup> Such flattery has won over large sections of the political classes, who spy in the gay marriage campaign a ready-made moral posture, useful at a time when the black-and-white moralities of the past are in disarray. The political class has responded to the gay marriage movement's depiction of gay marriage as a totemic moral issue by fulsomely adopting this cause as its own.

What we are witnessing through the mainstreaming of the gay marriage campaign is a process of elite reformulation, a kind of moral regrouping of elite elements around the theme of gay marriage. At a time when traditional political dividing lines count for little, and when the old taken-for-granted morality concerning what is Right and what is Wrong have withered, our elites are always searching for an issue through which moral seriousness and cultural superiority might once again be asserted. Gay marriage has become the prime platform for such public moral preening.

Gay marriage has become both a means for consolidating new political constituencies and also a barometer of moral decency. In both the US and the UK, political leaders have used gay marriage as a way of firming up their newer support bases. In the US, President Obama's very public declaration of support for gay marriage was an attempt to redraw the American political map, making it clear that the Democrats are now less interested in white working-class, rural or elderly voters and more keen on consolidating their support in the creative classes, among intellectuals and in public-sector circles. As the sociologist Frank Furedi put it, through asserting his support for gay marriage, Obama was signalling that the future of the Democrats does not 'lie with its traditional white, blue-collar supporters', but with 'a coalition of upwardly mobile urbanites, both white and African-American'.<sup>17</sup> In Britain, too, political leaders have used the gay marriage issue as a tool for internal political machinations. For David Cameron, supporting gay marriage is primarily about distancing himself and his coterie from the more traditional, outdated sections of the Conservative Party, and in the process making real the project referred to as 'New Conservatism'. For Nick Clegg, backing gay marriage has become a means of holding the frayed Liberal Democrat party together through forging a group mentality against 'bigots': opponents of gay marriage. That gay marriage can be used to such naked political ends demonstrates that this issue has gone way beyond the question of gay rights, and is

now largely a mechanism for political and moral rejuvenation among a rudderless elite.

At the same time, gay marriage has been turned into a yardstick of goodness. It has been transformed by its backers into a cultural signifier, with those who support it seen as Good, and those who oppose it branded as Bad. In the words of one *Guardian* columnist, 'There are some subjects that should be discussed in shades of grey, with acknowledgement of subtleties and cultural differences. Same-sex marriage is not one of those. There is a right answer.'<sup>18</sup> Here, we can see how supporting gay marriage has been turned into a kind of new religious stricture, a perfectly black-and-white issue where one's position reveals much about one's moral worth. Gay marriage is now both a mechanism for distinguishing between moral and immoral people, and also a means of rearranging the internal make-up and support bases of political parties.

The moralisation of gay marriage is clear in the way it is frequently used as a stick with which to beat allegedly backward sections of the public, from 'unenlightened' voters in referendums to archaic religious institutions and their adherents. Primarily, the usefulness of gay marriage for the political classes lies in its status as a social, moral badge. Gay marriage allows the modern elite to reject and scold, in a PC fashion, those parts of the population it despises: the religious, the elderly, the traditional, the blue-collar, and anyone else who fails to embrace the values and *lingua franca* of the modern elite. This is the first key component in the rise and rise of the gay marriage issue in political circles: its usefulness as a tool for political and moral reorganisation.

### *A crisis of gay love*

Then there is the question of why marriage is now promoted by so many gay rights groups as the ultimate goal of their historic movement. It's now so widely accepted that gays should want to marry that simply to question it, to point out that the idea of 'gay marriage' is a new and unusual development, is treated as strange. But the fact remains that for much of their history in

the mid-to-late twentieth century, the gay rights and gay liberation movements not only expressed no interest in signing up to the institution of marriage but frequently criticised marriage, and more broadly the family, as a highly problematic institution.

It is striking to contrast modern-day pleas by gay rights activists with the arguments put forward by campaigners for gay rights in the 1960s and 1970s. In 'Gay is Good', a manifesto-of-sorts for gay liberationists written by the American lesbian activist Martha Shelley in 1972, homosexuals were described as 'women and men who, from the time of our earliest memories, have been in revolt against the sex-role structure and nuclear family structure'.<sup>19</sup> In 1969/1970, 'A Gay Manifesto', written by Carl Wittman and Tom Hayden, described marriage as 'a rotten, oppressive institution'.<sup>20</sup> The liberation movement that was immediately born from the Stonewall riot against homophobic state institutions in New York in 1969 argued that 'complete sexual liberation for all people cannot come about unless existing social institutions are abolished'.<sup>21</sup> In 2002, Peter Tatchell sought to remind Britain's modern-day gay activists who had started calling for the right to marry – whom he described as 'sharp-suited middle-class professionals' – what the gay movement was originally meant to be about: not advancing 'safe, cuddly issues like gay marriage' but rather 'demand[ing] liberation'. Tatchell argued against the way in which, in the twenty-first century, 'equality has become the unquestioned political objective [of the gay rights movement]'.<sup>22</sup>

So why are gay rights activists, including Tatchell, now demanding the so-called right to 'conform' to the 'rotten, oppressive institution' of marriage? There are many complex historical reasons that the gay rights movement has developed in a more conservative direction in recent decades, including the demise of the politics of liberation more broadly in society and also the impact of the AIDS crisis of the late 1980s and early 1990s, which nurtured a politics of fear and caution among the once radical, hedonistic gay rights lobby. But probably the key driver of the gay movement's embrace of marriage has been its

adoption of the politics of identity, its shift from demanding liberation from state intervention into gay people's lives towards demanding state *recognition* of the worth of gay people's lives. Like all movements based on the cultivation of cultural or lifestyle identities, the gay movement has become reliant upon external validation, which has taken it a full 180 degrees from its original mission of fighting for the right of people to live how they chose without requiring the approval of officialdom or moral lobbies.

A striking aspect of gay campaigners' demand for marriage rights is their focus on the symbolic worth of their being granted the right to marry. Activists talk about the 'symbolic power' of gay marriages and about finally being brought into the 'family of state-sanctioned human relations'.<sup>23</sup> The philosopher Susan M. Shell has noted how much of this campaign seems to be driven by an urge to alleviate gay adults' own feelings of a lack of worth, their 'low-level discontent', as she describes it. This campaigning seems to be 'directed towards relieving adult anxiety', says Shell.<sup>24</sup> Indeed, in his influential book *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America*, Jonathan Rauch described his support for gay marriage as being partly driven by an 'elemental fear'.<sup>25</sup> One former radical gay activist says that, despite his earlier life as a member of 'the Stonewall generation' of the 1960s, who didn't care for tradition, he now finds that 'with each passing year of my own intimate relationship... the lack of legal recognition rankles more and more'.<sup>26</sup> Gay marriage advocates talk about how they are essentially seeking 'the sanction of the state for our intimate relationships' – that is, state approval for their lives, in essence for their existences.

What we can see here in this campaign aimed at 'relieving adult anxiety' is the politics of identity at work. There has been an immeasurably important shift in gay politics in recent decades. Gay rights activists have moved from defining homosexuality as a sexual orientation to defining it as an identity, a cultural character trait alongside all the other cultural character traits that abound in our identity-obsessed era, from

gender to race to disability. And where the treatment of homosexuality as a sexual orientation led largely to demands for the state to get out of gay people's lives, on the basis that it had no right to tell anyone how they should live, the treatment of homosexuality as an identity leads to an invitation to the state to get involved in gay people's lives in order to sanction their lifestyle choices. The 'elemental fear' experienced by agitators for gay marriage, the 'rankling' they feel upon the lack of 'sanction from the state', is a by-product of the gay movement's adoption of the needy politics of identity.

The politics of identity is an insatiable beast. It demands constant external affirmation. So where once the gay movement said, 'We're here, we're queer, get used to it' – a statement of their lack of concern as to what the state or the 'moral majority' thought of them – today they effectively say: 'We're here, we're queer, please tell us this is okay.'

There are two key ways in which the gay rights movement seeks external validation of gay love: the first is through science, and the second is through the state. These are the two key concurrent trends in gay politics today. The first concerns the seemingly endless pseudo-scientific search for proof that homosexuality is biological, that it is as rife in the animal kingdom as it is in the human world, and therefore is clearly little more than a genetic quirk that we should not judge harshly or punish. Aligned with the constant search for a 'gay gene', which scientists hope will bring about 'a better understanding of the innate differences between gay and straight people', the search for animalistic homosexuality is motivated by a highly defensive instinct to prove the naturalness of the homosexual disposition.<sup>27</sup> So various gay-themed studies of wild animal behaviour inform us that 'every species, from beetles to shrews to chimpanzees, has a consistent minority who prefer their own sex'. And this proves, says one gay writer, that 'gay sex is perfectly natural'.<sup>28</sup> This search for validation of human relationships through studying the behaviour of beasts speaks to a high level of insecurity and defensiveness among the modern gay movement, revealing, in

the words of one observer, 'a terrible lack of self-confidence and a rather sad, desperate need to justify [gay] desire'.<sup>29</sup>

The second way in which the modern gay movement seeks external validation is through the state, through demanding that officialdom welcome gay intimacies into the 'family of state-sanctioned human relations'. The campaign for marriage rights is likewise underpinned by a 'terrible lack of self-confidence'. The modern gay movement's desire to cloak itself in the authority of both science and the state speaks to a withering of the ideal of gay autonomy and its replacement by a politics of therapeutic recognition. The old conviction that gays had a right to live autonomously outside of traditional institutions has been replaced by a sad clamour for state approval and social praise.

In its turn both to science and the state for external legitimation, the gay rights lobby is overturning the arguments that originally underpinned its campaigning for liberty. Where gay liberationists once challenged the early twentieth-century argument that homosexuality was fundamentally a biological trait, caused by what some scientists and anti-gay moralists called a 'gay germ',<sup>30</sup> now they actively hunt for proof that gayness is mere biology and thus not susceptible to moral criticism – though they talk about a 'gay gene' rather than a 'gay germ'. And where gays once insisted on their moral right to live outside the nuclear family structure, now they demand acceptance into 'state-approved' family set-ups. The argument that gay love was justified simply by people's desire to pursue it has been replaced by an instinctual urge to prop up gay love with the authority of dubious biology and state favour.

This is the second key component of the gay marriage campaign: a desire for external flattery among a gay movement that seems increasingly incapable of celebrating gay love in its own terms. Once, homosexuality was 'the love that dare not speak its name'; now, in our identity-driven era, it has just as problematically become the love that needs to have its name bellowed from the rooftops by the state and the guardians of

morality in order to offset homosexuals' feelings of symbolic non-worth.

### *Cavalier about commitment*

In summary, then, the rise of the gay marriage campaign springs from a merging of the narrow moral needs of a cut-off political elite and the identity requirements of a post-liberation gay rights movement. There's one more, final reason why gay marriage has become so firmly embedded in the modern political firmament: because our society is now so casual about the ideals of commitment and child-rearing that it is happy to open up even the institution of marriage, once the embodiment of those ideals, to those whose relationships were traditionally seen as more relaxed and changeable than the relationships of married couples and parents: that is, gays.

The ease and speed with which gay marriage has been embraced by Western society speaks volumes about the modern attitude to commitment. The institutionalisation of gay marriage represents, not the meaningful elevation of gay relationships to the same status as traditional marriages, but rather a political accommodation to the demise of traditional marriage and the demise of the family, and more fundamentally to the problematisation of the traditional ideal of lifelong, familial commitment. That is, it is the recognition that marriage has in recent years been emptied of much of its meaning, and that the family, following decades of assault by the cults of relativism and state interventionism, has lost its standing as the key social institution through which adults independently raise and socialise the next generation, that is really motoring the modern argument that effectively says: 'Well, we might as well let gays get married too, then.'

Christopher Lasch, one of the twentieth century's most stinging critics of thoughtless top-down assaults on the family and other traditional institutions, argued that the so-called alternative living arrangements touted by modern liberal campaigners, even those referred to as 'marriages', were really built on the 'ruins of marriage'. Writing in 1987, he described

'single-parent families' and so-called 'gay marriages' (this was long before actual gay marriage was being campaigned for) as 'perfectly legitimate living arrangements... but they are arrangements chosen by people who prefer not to live in families at all, with all the unavoidable constraints that families place on individual freedom'.<sup>31</sup> He argued that 'the attempt to redefine the family as a purely voluntary arrangement, one among many "alternative" living arrangements, grows out of the modern delusion that people can keep all their options open all the time, avoiding any constraints or demands as long as they don't make any demands of their own or "impose their own values" on others'.

Lasch observed that 'progressive rhetoric has the effect of concealing social crisis and moral breakdown by presenting them "dialectically" as the birth pangs of a new order. The left dismisses talk about the collapse of family life and talks instead about the emergence of "alternative lifestyles" and the growing new diversity of family types'.

That is, instead of getting to grips with the demise and decay of marriage and the family, and with the question of whether this is a good or a bad thing, modern campaigners have a tendency to dishonestly depict such decay as the rise of 'new ways of living'. From this viewpoint, traditional marriage has not so much fallen into a historic state of disrepair as it has been superseded by alternative and apparently more enlightened lifestyles. Incapable of thinking seriously about the modern crisis of traditionalism and of adult commitment, observers instead disguise declinism as progress, the weakening of commitment as the glorious rise of 'alternative lives', and the hollowing out of the institution of the family as a shift towards 'diversity of family types'.

This fundamental dishonesty, this representation of the crisis of family life as a semi-conscious shift towards a new social order, is replicated in today's debates about gay marriage. Here, too, the driver seems primarily to be not a desire to institutionalise new civil rights, but rather a strikingly cavalier attitude to what marriage and the family have

traditionally represented. So once again, a social crisis – that is, the crisis of how we as a society signal our support for committed relationships through which children are conceived, raised and socialised – is packaged up as ‘the birth pangs of a new order’: the apparently glorious new era of gay marriage. In truth, it is the lack of value we now ascribe to long-term marital commitment and to the cultivation of independent family homes in which adults assume responsibility for socialising future generations which allows us to overhaul marriage in such a dramatic, unilateral fashion, and to open it up to those who never traditionally wanted it, and who in many ways are not suited to it.

We need to strip away the self-flattering language and imagery that has been attached to the gay marriage campaign, and be more honest about the political elitism, gay defensiveness and discomfort with the ideal and practice of traditional commitment that are really fuelling this peculiar modern phenomenon.

# The Final Piece in the Equality Jigsaw

**Ben Summerskill**

The strength of feeling in favour of gay marriage among many lesbian and gay people has undoubtedly been galvanised by the unpleasantness of the case put against it in recent months. Sadly, the more that opponents of marriage for gay people develop their arguments, the more that unpleasantness seems to surface.

One quite rigorous observer of the issue, because he is in the middle of the road to some extent, has been the former Bishop of Oxford, Lord Harries. He recently wrote a rather persuasive piece pointing out that if the Church of England had been a little more gracious, and indeed Christian, about being willing to bless civil partnerships when they were introduced, instead of constantly continuing to refer to them as in some sense less worthy than marriage, then they might not have been in a position where quite a lot of people of faith who are lesbian and gay are demanding to get married in the first place.

It's certainly faintly insulting to lots of gay people that the Church of England is willing to hold services to bless pets, and in one case not very long ago to bless a canal, but not to bless civil partnerships. Indeed just like the Roman Catholic Church, the Church of England is very happy to hold masses, and from time to time preside over weddings, in prison for murderers and rapists but still doggedly avoids countenancing the blessing of long-term gay relationships.

A significant difficulty for the Church of England – and I have some sympathy – is that the practical reality, regardless of whether a lot of clergy may or may not be gay themselves, is that there are very significant numbers of its congregants who don't agree with their leadership or indeed with the views of

those such as former Archbishop Carey. This is one reason why the issue has become slightly toxic for them.

We do feel uncomfortable that sometimes we seem to be at the heart of a maelstrom of a bigger culture war. Quite a lot of fundamentalists in some sense have put their tanks on the lawns of gay people and are getting very exercised about what, in theological or historical terms, is a relatively minor matter, but it's emblematic of a much bigger divide within some institutions.

Peter Tatchell, for example, acknowledged recently that when he started campaigning 40 years ago one of his principal concerns was not merely gay equality but the 'end of erotic shame'. He suggested that it comes as a great disappointment to him to meet people nowadays who are 'just' campaigning for gay equality. In this respect, in some senses, Mr Tatchell mirrors some of his opponents at the opposite end of the spectrum who are again campaigning over much more than the minor matter of whether a few hundred people might get married in church. These campaigners regard fighting against marriage for gay people as part of a much bigger campaign to protect what they deem to be 'Christian values' and to maintain Britain as a Christian country.

One of the oddities that I've become alive to in the decade that I've now been at Stonewall is that there are many people who oppose gay equality because they oppose secularism. One of the most extraordinary meetings I've had in recent years (and that's quite a high threshold when you consider some of the conversations I've had with some members of the House of Lords) was with a man from the Evangelical Alliance. I've always been a believer in dialogue and at one point during our discussion he observed, in relation to employment protections, that this must have pleased us together with an awful lot of people who want Britain to be a more secular nation. One of my colleagues had to explain that when we finally secured employment protections for the first time for gay people not a single person came back to Stonewall's offices thinking 'Hurrah there's another nail in the coffin of the Church of England.' We

just thought 'Hurrah isn't it nice that we'll no longer be forced out of employment just because of the way that we were born.' I think it genuinely had not crossed this man's mind that that might be the case.

There's no doubt that part of the appetite for marriage does come from gay or lesbian people of faith who want to put their religious beliefs into practice. For them it's an important matter of religious freedom that they should be able to do so in a religious environment that wishes them to do it as well. If you're a reform Jew or a Quaker, it's not just you and your partner who want to do this, it's your entire denomination. That is one of the most powerful reasons why marriage should be permitted for those religious denominations that wish to celebrate it. You cannot talk about religious freedom if you're a senior Roman Catholic, or indeed a Church of England cleric, if religious freedom involves you preventing other denominations from practising their faith in the way that they, as a matter of conscience, wish to do. In terms of organised religion – as it is currently organised in Britain at least – one of the discombobulating things about what's happened with the Quakers in particular, and there is a parallel in the election of the gay bishop Gene Robinson by the Episcopalians in America a decade ago, is that this wasn't just a decision of the leadership of the Quakers, as far as they have leadership. The decision was taken by a vote after tens of thousands of them had consulted their conscience and their God. I am almost convinced that were such a matter put to a vote of all people who define themselves as Anglican in this country there would probably be support for equal marriage in church.

### *Cameron's motivations*

The second argument, which gets into David Cameron and Conservative territory, is easily the most powerful in favour of extending the legal form of marriage to gay people. Quite simply, if you believe in the rule of law, and I think we acknowledge that most people in this country do, then there is common consensus that the only things you prevent people

from doing are the things that are in fact unlawful or criminal. So if you are not going to *criminalise* long-term gay relationships then you have to have a pretty powerful reason for saying uniquely there is one activity or status in civil society of which one tiny group of people should be deprived. I cannot think of any other and I do think that's why this issue has secured increasing traction with many people who are conservative.

I think actually that's probably the underpinning of where David Cameron has come from in terms of his intellectualising this issue, although I think he's also one of those individuals who has been on a personal journey in terms of his understanding of gay people too. I think one of the reasons that he finds this issue compelling is because he has genuinely changed his mind on it. That, of course, is something that many politicians have some difficulty coming to terms with because there are plenty of politicians who have spent an entire career never changing their mind about anything, and I truly think he has. We have been in contact with him for a number of years over these issues and it is an area where he has genuinely seen what the future looks like and doesn't want to be on the wrong side of history.

That's why he is where he is now and there is no doubt that whatever the outcome of the Commons Second Reading vote on marriage, it will have been historic by any standard. Even if only 75 Conservative MPs vote in favour of marriage, in other words a quarter of the Parliamentary Conservative Party in the Commons, that is a quite remarkable transformation from where we might have been 20 years ago when 75 Conservative MPs might *just* have been prepared to concede that we should have an equal age of consent.

I would suspect that in 20 years time there will be many 'small c' conservative parties around the world looking at the British Conservative Party with a faint sense of admiration that they were prepared to avoid putting themselves on the wrong side of history even if it meant some short-term discomfort. Post presidential election, among intelligent Republicans at the moment, that's the sort of thing causing quite a lot of mature

thought – they’re starting to unpick what is going on and where they stand on a range of fundamental issues of rights.

On this issue David Cameron and a number of his colleagues – because there is a group of them – have seen the future and are in some sense more committed to the long-term relevance of their party than they may be being given credit for. I’m old enough to recall the election of Tony Blair as Prime Minister and certainly old enough to remember the degree of observation that went well beyond the commentariat about how he was driven by focus groups and pleasing the general public and whether things would play well in the country. Of course that juggernaut shuddered to a halt in 2003 when he took the country to war in Iraq, rather disproving the idea that all he did was what focus groups told him. The thesis fell off the edge of a cliff and I think there is a parallel with David Cameron in that there wasn’t much evidence when his thinking evidently started to change, five or six years ago, that this was the kind of issue that would get substantive public support. And as it happens, and our polling evidence substantiates it, the mood around a lot of these things has changed very substantially, but we *hadn’t* seen those changes in public attitudes by 2005 and 2006.

### *The acceptance of homosexuality*

There has been acceleration in change in public attitudes and I think one of the key reasons was the advent of civil partnerships. When I arrived at Stonewall and we started planning our work around civil partnership, the default position was that we would feature couples such as Martina Navratilova and Elton John. I was keen that we didn’t do that at all. I was keen that we focused on the idea that civil partnerships would benefit a lollipop lady in Rotherham and a plumber in Exeter and in some sense so it came to pass. There are now very few people in this country, as a consequence of civil partnership, who could credibly say in the way that some Conservative MPs used to say rather ridiculously that ‘We have no gay people in our town.’ There were, at the time of Section

28, one or two Conservative MPs who did exculpate themselves by saying 'I'm not required to have a view on this because we don't seem to have any homosexuals in our area.' They would now look silly, not least because all their local newspapers have featured the lollipop lady and the plumber getting 'married', and if you haven't been to a civil partnership yourself then almost certainly someone you know has and – surprise, surprise – it turned out to be just the same as everyone else's wedding where two elderly aunts got into a tipsy argument and there was a fight in the car park afterwards.

It's been a remarkable act of what the old left would call political education, and I'm sure what some opponents of equality would describe as indoctrination – but it's not indoctrination if in fact it's merely a matter of observation of ordinary people's lives. It's something that happened as a consequence of people seeing what was going on right across Britain. That is partly what has driven, and is driving, public opinion.

The other thing that has driven public opinion around the issue of marriage is that most sensible people with children now fully acknowledge that there is a possibility that one of them might grow up to be gay. Consequently, they are concerned about the way that gay people might be treated.

When I grew up there were parents who genuinely thought that there were things they could do to stop their children growing up to be homosexuals. As long as a boy goes to the right school and plays rugby and his mother doesn't spend too much time with him he won't be gay. Nowadays if a parent said that, people would think they were slightly odd and, possibly, borderline abusive. I'm very mindful that it's almost exactly a hundred years ago, in 1905, that Freud published his theory of sexuality which was essentially predicated on the idea that if he had a bossy, domineering, directive mother, a small boy would almost certainly end up being homosexual. The most flamboyant disapproval of this has been in the household of our own former Prime Minister. If having a bossy, domineering, directive mother caused small boys to become

homosexual, then Sir Mark Thatcher would by now be the most homosexual man in the world. Miraculously he indisputably isn't. Although that particular case may not have jumped to everyone's attention, among families right across Britain there's now a recognition that one day you may well have gay children or gay grandchildren and with the exception of a small number of fundamentalists, the vast majority of decent people do think, on reflection, that they would rather live in a country where their children and their grandchildren are treated in exactly the same way as everyone else.

Something I'm always very clear about is that frequently there aren't that many differences if you are working to change things around sexual orientation, race or gender. However, public perception around sexual orientation is something that doesn't necessarily share the same territory as faith or ethnicity because you can have parents who think 'I will never have black grandchildren', for example, if they live in a rural area. What's happened around gender in the last couple of generations is that many parents have finally acknowledged that sexism might affect their own children and grandchildren, and that realisation has altered their own world view. Exactly the same is true with sexual orientation. I think, in terms of wider public attitudes, that's why it's been easier for the Conservatives to do something progressive.

Having been closely involved in a number of parliamentary campaigns over the last decade, I am certainly alive to the fact that the naked expression of homophobia is now much less commonplace. One member of the House of Lords said to me not long ago that 'They're all more house trained now.' But I'm not entirely convinced that the people expressing opposition to what is a basic measure of equality have changed their minds very much. Consequently, you might conclude that some opposition to marriage for gay people is still based on naked prejudice. Frankly, sometimes it would be much easier if people just said 'I don't like gay people, I don't think they should have the same privileges or be treated in the same way as everyone else.' However, the nature of the public domain is that people

know nowadays that they couldn't get away with that in a way that 20 years ago would have been unproblematic. Ultimately that's why, whatever the unpleasantness of some of the things said, you just focus on the outcome we're seeking. Homophobia means – precisely – an irrational fear of gay people and I do think that that is what a lot of the opponents of equal legal treatment for gay people actually have.

One of the evidential problems they have currently, and therefore one of the great usefulnesses of civil partnership, is that almost none of the things they insisted would come to pass as a consequence of civil partnership have happened. So opponents of marriage for gay people in this country point, for example, very enthusiastically to the fact that the number of weddings in Spain between heterosexuals declined after civil marriage for gay people was introduced. The reason for that was that civil partnership for heterosexuals was introduced at exactly the same time. It's regrettable that people like Lord Carey could use that as an argument. It's so obviously bogus that you feel a tad embarrassed about arguing against it. The simple fact is that there has been no decline in the number of heterosexual weddings in this country since civil partnerships were introduced even though it was firmly predicted; equally there is no evidence that there are now somehow more gay people than there were, although that was also firmly predicted. All there has been is a modest increase in the sum total of human happiness which on the whole, what with one thing and another, is probably not too bad a thing.

### *The social significance of marriage*

There certainly is a cohort of gay people who were absolutely delighted about civil partnership. We were closely in contact with many people at the time and they were absolutely determined to secure the same rights and entitlements that heterosexuals take for granted from birth. That was why Gordon Brown's initial refusal as Chancellor to include pensions in the proposal, solely for fiscal reasons, was so unwelcome. In the end we took him on over that and having

been told by a number of ministers, and indeed the secretary of state responsible, that we had no chance of defeating Mr Brown, astonishingly we did.

The advantage of that happy success was that when you did get civil partnership there wasn't an outstanding issue that had to be fought over; you got all the rights and entitlements of marriage. So in a contractual sense, that's been delivered.

I think what many lesbian and gay people have discovered in the intervening ten years is that there is actually something quite ephemeral and difficult to define about the social status of marriage. This, combined with the willingness of some to continue to insist that gay people are not equal, is precisely what has given a lot of gay people the impetus to say 'well if you still insist, Lord Tebbit and Lord Carey, that we're not equal then clearly you're the ones who have persuaded us that there is more work to do.' It is those people themselves who have suggested that while gay people may have acquired some new rights, civil partnership is not as good as marriage.

Marriage for gay people is a final modest piece of legislative equality. It is churlish when people like the Green Party say 'well the Labour Party never introduced it'. The Labour Party, what with this and that, and occasionally under some pressure, did change the law in 13 areas for gay people between 1997 and 2010. So when Peter Tatchell complains 'they failed to do this', the Labour Party is perhaps entitled to feel a little frustrated. The framework of civil partnership, the age of consent, gays in the military, goods and services protection, employment protection – an awful lot was changed and had the tone of public debate and the level of respect also not changed in exactly the same way, you might not have an appetite for marriage at this point.

### *Same-sex couple parenting*

It shouldn't surprise that people who are irrationally prejudiced against gay people are also irrationally prejudiced against gay people bringing up children, even though it might seem to be slightly rich for the Roman Catholic Church to seek to lecture

other people about the stewardship of children. The reality is that there are already tens of thousands of lesbian and gay couples bringing up children and those children, regardless of the views that anyone might have of their parents, have the right to be brought up in a social structure that can be described in the same way as that enjoyed by other children.

When people make that sort of connection, it does make one suspect there may be more base prejudice to their arguments than is usually conceded. We have a delightful couple in the public eye at the moment, one of whom in the fullness of time is going to become the supreme leader of the Church of England. Yet not a single one of these campaigners has uttered a word of criticism that, for seven years prior to their marriage, the Duke and Duchess of Cambridge very publicly lived in sin. If you were really concerned about the nature of marriage and the importance of it being conducted in a traditional way you might have had something to say about that over the last ten years. All these people have uttered not a peep.

Similarly there's a pick and mix approach to the idea of procreation as central to marriage. It's another of these cases where it's slightly embarrassing having the argument because if you then ask if the Church of England will refuse to marry 55 year-olds, they start coughing into their cassocks and getting rather uncomfortable. That's absolutely fine, but if you're high-mindedly taking a theological or ecclesiastical view on something then you need to be able to explain why it's not the case.

The reality is that it is widely understood that when people say 'Ah well two lesbians can't be parents because both of them are not the biological parent of the child concerned', most sentient folk recognise that there have been an awful lot of children who are not necessarily the biological children of the two parents they happen to be living with.

These are trying arguments because they are so evidently not valid. And the more they're prosecuted, just as the more we hear the hyperbole of how introducing gay marriage for a few thousand people will cause the greatest ructions in the Church

of England since the sacking of the monasteries, the more you sense the argument has been lost. Inevitably I think the public response to that, and people's intuitive understanding that some of these arguments are not very strong, is either that the people prosecuting them sound like something out of a Monty Python sketch or that they are just a bit prejudiced against gay people. That's a judgement individuals come to about people themselves. I don't think gay people have to make that accusation.

One of the oddest things in Britain's public space at the moment is the number of people who over many, many years have campaigned against equality for gay people but who now like to insist loudly that they are not homophobic and that this is a terrible slur. Twenty or thirty years ago they would have been saying 'I am proud to be homophobic, I don't like gay people.'

### *Retaining relevance*

At Stonewall we've never played the numbers game but it's worth pointing out that there are even fewer Jewish people in Britain than there are gay people. This is important in the face of, for example, Lord Tebbit's criticisms. Is he actually saying anti-Semitism is okay because there are only 300,000 Jews? Of course that's not what he's really saying and his real issue isn't with the small number of gay people. We have alighted on six per cent of the population being gay, which for the moment we think can be substantiated. But the moment you prosecute the 'tiny' numbers argument the more you abolish your own argument that this change will have some poisonous impact on society. If only ten gay weddings take place that's considerably fewer than the number of bogus opposite-sex weddings that take place with corrupt vicars running immigration scams. So this is another of those areas where the weakness of the argument is slightly embarrassing.

I fear the risk that the established churches run is that if they once again insist that same-sex marriage will cause the roof to fall in and that spiritual Britain will never be the same again,

and if once again the roof doesn't fall in at all and there appear to be no deleterious consequences, then the churches exacerbate the sense in the public space that they are out of touch. It is interesting that one or two of the more thoughtful bishops have registered the damage that this position may do to the long-term viability of the Church of England, not as an established church, which I don't think is the obsession of the most thoughtful clerics, but to it simply being relevant.

There was a letter a couple of weeks ago in the *Daily Telegraph* from a thousand Roman Catholic priests opposing marriage for gay people. What was not reported was that all Roman Catholic priests in the country had been instructed by their bishops to sign that letter. Happily, what that meant was that three in four priests in this country had *refused* to sign it, in a clerical environment where doing what you're told is pretty commonplace. These are priests who are thinking a bit harder about the relevance of their church in the twenty-first century than some of their bishops are.

There are dozens and dozens of clerics in the Church of England who make contact with us every year saying 'we just want you to know you're being heard'. They aren't necessarily gay but are just being very supportive. The first parliamentary campaign I was involved in at Stonewall was the successful one for the repeal of Section 28 in 2003. Six bishops wrote to *The Times* and said they supported Section 28. We managed to persuade six other bishops to write a letter to say that they opposed Section 28 and one of them said to me afterwards that he had been slightly worried because he came from a definitely non-metropolitan diocese and had been concerned that he was going to get a deluge of abuse from his diocese. In fact he got three letters saying he shouldn't have done it and almost a hundred letters saying thank you very much and this sounds very sensible and it was very moderate and we rather agree. He was clear that those were letters from Miss Smith who arranges the flowers in the cathedral and who said she had a gay uncle, she thought, and from the head teacher of a faith school.

## THE MEANING OF MATRIMONY

That is a Britain which isn't necessarily a Danny Boyle Britain. However it's a quite benign, traditional Britain where 'live and let live' has a powerful resonance. Live and let live is a profoundly conservative approach and means quite a lot to people as a fundamentally British and traditional imperative; through a twenty-first century prism, that also feels like an imperative to treat everyone with respect regardless of birth or background.

# Two Myths About Same-Sex Marriage

Nicola Barker

The issue of same-sex marriage provokes strong responses on all sides of the debate. The perspectives that receive the most attention in the media are those arguments for same-sex marriage on the basis of equality and human rights on the one hand, and those opposed on the basis that it would 'redefine' marriage and go against certain religious beliefs on the other. My own perspective does not fit neatly within either of these categories. As a legal scholar I cannot deny the injustices that were caused through the non-recognition of same-sex relationships before civil partnerships were introduced and, although I do not endorse the apartheid analogy used by some, I also cannot deny the negative symbolism of a separate yet virtually identical institution of civil partnership being created for same-sex couples in order to 'protect' marriage.<sup>1</sup> However, as a feminist it is also impossible to ignore the injustices and inequalities inherent within the legal institution of marriage. Rather than take a position 'for' or 'against' same-sex marriage, I therefore take this opportunity to address two myths that have recently been circulating about same-sex marriage since the publication of the Government's consultation document and the second reading debate on the Marriage (Same Sex Couples) Bill 2013 in the House of Commons.

During the summer a tweet appeared on my twitter homepage: 'I hate the word homophobia. It's not a phobia. You are not scared, you are an arsehole'.<sup>2</sup> The terrified hyperbole originating from some right-wing commentators on same-sex marriage would, though, suggest a great deal of fear. The *Daily Mail* reported a 'warning' from the Church of England that allowing same-sex marriage would 'lead to a constitutional crisis... [and] force churches to treat gay couples asking for a

wedding in the same way they treat heterosexual couples'.<sup>3</sup> This is the first myth and it has no basis in law. The second myth originates from those who advocate for same-sex marriage. It is that same-sex marriage would bring about equality. Marriage does not create equality; it perpetuates privilege. It is an institution designed to ensure paternity and keep the resources of the wealthy within the family. It fits comfortably within a conservative ideology and the new politics of state austerity. This is why I do not support marriage, gay or straight.

*Myth 1: Churches will be forced to marry same-sex couples*

The consultation paper issued in England and Wales attempted to allay fears that religious bodies will be compelled to conduct same-sex marriage ceremonies. It emphasised the distinction between civil marriage and religious marriage and said that same-sex marriages would not be permitted to take place during a religious ceremony or on religious premises because 'some religious organisations... believe that marriage can only be between a man and a woman'.<sup>4</sup> It would, however, be possible to have a civil marriage at a register office followed by a religious blessing on religious premises. The consultation paper also attempted to reassure religious bodies that they need not be fearful of litigation or prosecution for hate speech or discrimination if they refuse to perform, or if they speak out against, gay marriages.<sup>5</sup> The Marriage (Same Sex Couples) Bill 2013 takes forward these assurances by creating what has become known as the 'quadruple lock'.<sup>6</sup> This allows religious bodies to opt in to performing same-sex marriage ceremonies if they would like to, but prevents any religious body or individual representative from being required to do so.<sup>7</sup> It also prevents any discrimination claim being brought against a religious body or individual under the Equality Act 2010 for refusing to officiate a same-sex marriage.<sup>8</sup> Finally, it provides that the introduction of same-sex marriage does not alter Canon law and that the common law duty on the established church to

perform marriages on behalf of the state does not extend to same-sex marriages.<sup>9</sup>

However, the newly created Coalition for Marriage and the *Daily Mail* were not reassured.<sup>10</sup> Their concern that religious bodies may be compelled to marry same-sex couples appears to be genuine but is entirely misconceived for a number of reasons, which I suggest should land both of them on the legal 'naughty step'.<sup>11</sup> The Coalition for Marriage cite unnamed 'Church of England lawyers' who believe that the Equality Act 2010 'could force churches to perform gay weddings – or get out of performing weddings altogether'.<sup>12</sup> This claim is hyperbolic at the very least. I will address the Equality Act first, followed by the European Convention on Human Rights.

### *Equality Act 2010*

The Equality Act 2010 already contains an explicit exception for acts 'relating to a religion or belief or sexual orientation', specifying that religious bodies may restrict their membership, participation in activities, provision of goods, facilities or services undertaken under its auspices, and the use of their premises.<sup>13</sup> Therefore, a decision by a religious body to refuse to solemnise a same-sex marriage on its premises would be covered by this general exception to equality requirements.<sup>14</sup> This is different from cases of other bodies or private individuals, such as the bed and breakfast proprietors, who, as devout Christians, sought to discriminate against gay people on the grounds of their religious beliefs.<sup>15</sup> Similarly, in the famous Catholic Care adoption agency case, where the agency ultimately sought to exclude gay and lesbian adopters on the grounds that homosexuality was incompatible with its religious tenets, Catholic Care was dealt with as a charitable company rather than as a church.<sup>16</sup> Therefore, these cases may stoke the fears of religious bodies but they would not provide a legal precedent to challenge discrimination by a church itself, as opposed to discrimination by those who rely on the teachings of that church.

Additionally, the Marriage (Same-Sex Couples) Bill, clause 2(5) adds an explicit exception to the Equality Act 2010. This clause specifies that a person (or service-provider) would not be guilty of discrimination in the provision of services under the Equality Act for refusing to conduct, be present at, or participate in a same-sex marriage ceremony. This explicitly protects those who are individuals as well as religious bodies who do not wish to celebrate same-sex marriages from discrimination claims for refusing to do so.

*Civil partnerships on religious premises: protections for religious bodies*

More directly analogous to the question of religious same-sex marriages, the initial prohibition on civil partnerships being conducted during a religious ceremony or on religious premises has been repealed.<sup>17</sup> The Civil Partnership Act 2004 provided a comprehensive, marriage-like form of recognition for same-sex couples and was created to be a secular alternative to marriage, with both the use of a religious ceremony and religious premises specifically prohibited by the 2004 Act.<sup>18</sup> Ironically, given current discourse, during the passage of the Civil Partnership Bill the Bishop of Oxford had complained that this prohibition on religious civil partnerships interfered with the religious freedom of not only the couple but also the Church itself:

First, it infringes the proper freedom of religious authorities to control such premises. As a matter of principle, it is for those authorities and not for the state to decide whether or not their premises should be available to be used for registration purposes—unless there is some overriding national interest, which is very difficult to identify on this issue. Secondly, the ban would deny some couples the possibility of a religious celebration in close proximity to a civil registration, which they may see as a commitment with a religious dimension... Of course, that is not allowed in the Church of England and some other Christian denominations. But there

may very well be religious bodies which would not only permit but welcome such a development...<sup>19</sup>

The Equality Act 2010 also clarifies that religious bodies will not be obliged to perform civil partnership ceremonies if they do not wish to do so.<sup>20</sup> This amendment to the Civil Partnership Act 2004 has now been in force since July 2011 and to date there have been no legal challenges to the Church of England's continued prohibition on civil partnership ceremonies in their churches.<sup>21</sup>

That civil partnerships may now be religious while same-sex marriage (if enacted as proposed in the consultation paper) would have been strictly secular, would have created an ironic situation where civil partnership, an institution that was created to be secular, could be contracted on religious premises whereas marriages between same-sex couples could not. The Government appears to have had a change of heart on this issue, and the Marriage (Same Sex Couples) Bill 2013 does allow for religious bodies who wish to perform same-sex marriages to 'opt in' and do so.<sup>22</sup> The Canon law of the Church of England is explicitly protected in clause 1(3), which makes it clear that the Canon law definition of marriage remains as a union between one man and one woman.<sup>23</sup> The next question is whether a religious body that does not opt in, including the Church of England with its additional obligation as the established church to perform marriages, may be subject to a discrimination claim under the European Convention on Human Rights.

***The European Convention on Human Rights: discrimination claims against religious bodies refusing to perform same-sex marriages***

The actual Church of England response to the consultation, focusing on the European Convention on Human Rights rather than the Equality Act, is much more thoughtful and considered than either the Coalition for Marriage or the *Daily Mail* give it credit for.<sup>24</sup> However, I respectfully disagree with its conclusions. There are two possible human rights challenges to a

prohibition on religious same-sex marriages. The one that the Church of England identifies as having a 'serious prospect' of success is a discrimination claim under Article 14 of the European Convention on Human Rights (ECHR).<sup>25</sup> They claim that recent rulings in the European Court of Human Rights (ECtHR) mean that should the UK Government allow gay marriage, any government promise that churches would not be forced to perform gay weddings could be successfully challenged in Court.

They focus on the recent case of *Schalk and Kopf v. Austria*.<sup>26</sup> In this case, the ECtHR affirms that the right to marry and found a family, under Article 12 ECHR, does not require same-sex marriage, which remains a decision to be taken by each country. It also rejected the claim that the prohibition of same-sex marriage is discrimination in relation to private and family life.<sup>27</sup> However, the court held that a same-sex couple does constitute a family for the purposes of Article 8 (the right to a private and family life)<sup>28</sup> and that the issue of recognition of same-sex relationships is one of 'evolving rights with no established consensus, where states must also enjoy a margin of appreciation in the timing of the introduction of legislative changes'.<sup>29</sup> This means that the Strasbourg Court will not compel the UK to introduce same-sex marriage, but it may do so at some point in the future if a consensus on the issue emerges amongst the 47 member states of the Council of Europe. Given that a recent report from the Council of Europe notes 'inflammatory and aggressive discourse against LGBT persons' in several member states and prohibitions or administrative impediments on public LGBT demonstrations in 12 member states, including 'attempts to criminalise "propaganda of homosexuality"' in three member states, this would be very unlikely in the near future.<sup>30</sup>

The position of the ECtHR in *Schalk* has no direct application to the religion issue because it does not deal with the question of whether, should same-sex marriage be legal, it would be discriminatory for religious bodies to refuse to perform them.<sup>31</sup> However, the court did emphasise that 'differences based on

sexual orientation require particularly serious reasons by way of justification'.<sup>32</sup> This has been taken by some right-wing commentators to mean that if the UK did introduce same-sex marriage, it cannot be treated any differently than heterosexual marriage, including by religious bodies. This is not an accurate interpretation: the phrase 'require particularly serious reasons' does not prohibit all differences but rather requires that any differences must be justified by good reasons. As I discuss next, preventing a religious body from being compelled to perform same-sex marriages against their faith is likely to constitute a good reason.

In light of this, it is difficult to make sense of the Church of England's assertion that Article 14 could be used in conjunction with either Article 8 or Article 12 to compel religious bodies to marry same-sex couples. In rejecting *Schalk's* claim the Court appears to be unsympathetic to such arguments.

### *Protecting religious bodies from state interference under the Convention*

In any event, religious bodies themselves are protected under the Convention. Article 9 protects freedom of religion and the UK's Human Rights Act 1998 directs the UK courts to 'have particular regard to the importance of that right'.<sup>33</sup> The Church of England may point to cases such as that of Lillian Ladele, a Christian registrar who refused to perform civil partnerships due to her religious beliefs, to suggest that sexual orientation appears to take precedence over religious beliefs.<sup>34</sup> However, in that case, the prohibition of discrimination took precedence over the religious belief of a *civil registrar* who refused to perform civil partnerships in a register office. It was established in an earlier case that 'Article 9 [freedom of religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.<sup>35</sup> However, it is beyond question that Article 9 does require that one should be allowed to manifest one's religion inside a church during a religious service.

Although Ms Ladele lost her case, the European Court of Human Rights came to this decision based partly on the fact that where a state must balance conflicting Convention rights (in this case, Ms Ladele's freedom of religion and right not to be discriminated against because of her religious beliefs conflicted with the interest of her employer, Islington Borough Council, to protect the Convention rights of its lesbian and gay residents and employees), the state is awarded a wide margin of appreciation. This means that the UK was given some leeway to weigh up the correct balance of these rights, without the Strasbourg court overruling it. Applying this to the claim that the European Court of Human Rights might overrule Parliament's 'quadruple lock', the application of the wide margin of appreciation in the Ladele case by the Strasbourg Court should actually calm those fears. Despite the fact that the Christian applicant in that case lost, the reasoning of the Court, when applied to the Marriage (Same-Sex Couples) Bill 2013, would actually work *against* an attempt to use the Convention to compel religious bodies to perform same-sex marriages because applying similar leeway to the provisions of the Bill would be very likely to lead the Court to accept the balance that the UK Parliament struck between protecting the religious beliefs of the Church of England and protecting the Convention rights of same-sex couples.

Furthermore, in contrast to the manifestation of religious beliefs in the course of one's employment (as in the *Ladele* case), the European Court of Human Rights has emphasised that Article 9 does protect religious bodies themselves from state interference. This not only means that a state could not require religious bodies to perform same-sex marriages, it also means that any *blanket prohibition* on religious same-sex marriage ceremonies would be likely to constitute a breach of Article 9. In a case concerning the much more fundamental matter of which person would be recognised as the Chief Mufti in Bulgaria, the ECtHR held:

[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is

thus an issue at the very heart of the protection which Article 9 affords... Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.<sup>36</sup>

The court went on to hold that the failure of the government to remain neutral as to the internal organisation of the Muslim community in Bulgaria 'must lead' to a conclusion that their Article 9 freedom to manifest their religion was interfered with.

The Court has repeatedly ruled that the state must remain neutral in relation to the internal workings of religious bodies.<sup>37</sup> Although this neutrality is not unlimited, I suggest that this principle would also apply to an interference in relation to which types of legally permitted marriages a religious body may celebrate, particularly as the blanket prohibition that was initially proposed in the consultation paper appeared to be aimed at placating the leadership of the more conservative religious factions (one of which is also the established Church), thus implicitly favouring their interpretation of religious marriage over that of other religious bodies who do wish to celebrate same-sex marriages according to their beliefs. In other words, the potential challenge to the prohibition of religious same-sex marriages with the best chance of success would be one taken by members of a religious body whose religious freedom was infringed by a state prohibition on their celebrating same-sex marriages under circumstances where they are otherwise permitted to perform weddings in their religious premises. This is not, as the Coalition for Marriage, the *Daily Mail* and others imply, a case of gays attacking The Church,<sup>38</sup> but rather a case of competing religious beliefs. Freedom of religion means that it is not for the state to enforce or support one set of religious beliefs over another. It is important to emphasise, though, that any successful challenge on this basis would not *require* all religious bodies to perform same-sex marriages, it would merely find that the state cannot prevent those religious bodies who want to perform same-sex marriages from doing so. As it is, the Bill, as introduced in the

House of Commons, appears to have struck the right balance by allowing those religious bodies who want to celebrate same-sex marriages to opt in and do so, without requiring more conservative faiths/factions to do so. This appears to be an unimpeachably proportionate approach to balancing competing Convention rights and well within the UK's margin of appreciation. A challenge based on the European Convention on Human Rights would not be likely to succeed.

The way this issue has been reported in the right-wing press is very confused. The Bishop of Oxford understood in 2004 what the Coalition for Marriage and the *Daily Mail* have failed to grasp today: there is a significant difference between prohibiting something and not requiring it. If same-sex marriage on religious premises were prohibited then any religious body, such as Quakers, Liberal Jews and Unitarians, who wish to celebrate them, would have *their* religious freedom infringed. This could result in a legal challenge (which ultimately may or may not be successful) from members of these groups based on Article 9 of the ECHR. In contrast, specifying that religious bodies are not required to perform same-sex marriages (as in the Equality Act 2010 s202(4) in relation to civil partnerships) protects *both* those religions whose beliefs are opposed to same-sex marriage *and* those who would like to support their gay and lesbian congregants by performing marriage ceremonies for them. This is the approach that the Marriage (Same Sex Couples) Bill 2013 has taken.

In other words, religious bodies may choose to close their doors entirely rather than perform same-sex marriages but there is no legal reason for them to do so. The only potential legal challenge in relation to religion and same-sex marriage with a realistic chance of success would be one that sought to challenge any proposed blanket ban imposed by the Government on religious bodies performing same-sex marriages. Any restriction of religious freedom under the ECHR must be *proportionate*, which a blanket ban (as opposed to a clarification that they are not required to celebrate same-sex marriages) would not be. As the blanket ban proposed in the

consultation did not appear in the Marriage (Same Sex Couples) Bill, there is no likely prospect of a successful human rights challenge.

*Myth 2: Same-sex marriage will bring about equality*

There are many reasons to celebrate the Government's announcement that it intends to legislate for same-sex marriage. That the announcement was made by a Conservative prime minister makes it all the more significant and it is a turning point, perhaps, in the way that the state relates to lesbians and gay men as a minority group. The arguments in favour of same-sex marriage centre on principles of equality and dignity and there is no legitimate legal reason to deny access to marriage for lesbian and gay couples. Rather, my concern is with the institution of marriage itself. I argue that the institution of marriage, and particularly the way that it is deployed by the state, is fundamentally flawed and it should not be held out as an ideal and unproblematic institution for the lesbian and gay communities, or indeed for heterosexuals. Same-sex marriage, I argue, fits comfortably within conservative ideology and the new politics of state austerity.

The Conservative Party, which enacted the infamous Section 28 (Local Government Act 1988), describing gay relationships as 'pretended families', began to court the 'gay vote' in 2004 as part of their attempt to cast off their image as 'the nasty party'.<sup>39</sup> Despite this change in the party leadership's attitude towards gay relationships, there remains a split in the party, with a substantial number of more traditional socially conservative members continuing to oppose reforms such as same-sex marriage against the so-called 'modernisers', who see same-sex marriage as a way to appeal to a broader range of voters.<sup>40</sup> Opposition to same-sex marriage remains a key issue for social conservatives and the conservative media,<sup>41</sup> but I argue that same-sex marriage is inherently conservative. This is one thing on which the Prime Minister and feminists can agree. Examining the reasons advanced by Conservatives for introducing same-sex marriage alongside other Conservative

policies, particularly those relating to ‘family values’ and to the cuts to the welfare state (a primary target of austerity measures), highlights the ways in which same-sex marriage contributes to a broader conservative policy package. As the Prime Minister said in introducing his same-sex marriage proposal:

And to anyone who has reservations, I say: yes, it’s about equality, but it’s also about something else: commitment. Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don’t support gay marriage despite being a Conservative. I support gay marriage because I’m a Conservative.<sup>42</sup>

This language of commitment and mutual support used by the Prime Minister in his speech announcing his intention to legislate for same-sex marriage is remarkably similar to that of encouraging responsibility used by New Labour in introducing the Civil Partnership Act 2004.<sup>43</sup> These terms may not necessarily seem controversial but behind them is a troubling economic policy: the privatisation of care and dependency.

Privatisation can refer to a number of different processes, generally involving the transfer of the operation of public services to private sector bodies. This is a key platform of the Conservative Party and the Coalition Government has implemented or announced an intention to implement a number of examples. Most controversially, some aspects of policing and the National Health Service can now be contracted out to private companies. The privatisation of care and dependency refers to the burdens and costs of social reproduction (for example raising a child) being borne almost exclusively by the family unit as the state retracts welfare provision and support services. For example, an expectation that childcare will be done in the home for free by mothers, despite government policy being that mothers claiming state benefits must be available for paid work,<sup>44</sup> is linked to both childcare work being underpaid and the absence of publicly-funded day-care.<sup>45</sup> The privatisation of care and dependency can also refer to an

## TWO MYTHS ABOUT SAME-SEX MARRIAGE

expectation of mutual support between partners, which results in the reduction or withdrawal of state support such as unemployment benefits based on a partner's income. Yet those advocating for same-sex marriage tend to lose sight of this, focusing on the economic benefits of marriage for the wealthiest couples.

To take an early example, in lobbying for the Civil Partnership Act 2004, Stonewall's focus was on the devastation that can be caused by lack of access to inheritance tax breaks and survivor pensions:

Rex is 76. His partner, John, died after they had spent 45 years together. Their house was in both names and John left everything to Rex in his will. Rex faced a huge tax bill in order to be able to stay in his own home. He also lost John's pension. Had he married a woman for just one day, no tax would have been payable and Rex would have had a survivor pension.<sup>46</sup>

Such a situation is clearly unjust, particularly when there is a risk that an elderly person may lose their home. However, according to HMRC, in 2009-10 only 14,629 estates were liable for inheritance tax. In other words, contrary to popular myth, this tax affects only the richest three per cent of estates.<sup>47</sup> Inheritance tax is paid only once the value of the inheritance reaches £325,000. Assuming that a house in both names is jointly owned in equal shares, and therefore Rex is inheriting only the half that he does not already own, the value of the house combined with any other joint assets would need to be £650,000 before Rex is liable for any inheritance tax at all. He would be liable for 40 per cent of the inherited value *above* £325,000 and could pay that in instalments of 10 per cent per year over ten years. In the unlikely situation where a bereaved cohabitant is forced to sell their home to pay inheritance tax then that ought to be addressed for every cohabitant, not just those who are married. Civil partnership provided only a limited solution to this; an issue that was exploited by those opposed to inheritance taxation in principle<sup>48</sup> and in a

subsequent (unsuccessful) case brought by elderly, wealthy sisters.<sup>49</sup>

Nevertheless, this type of differential treatment compared to heterosexual married couples is difficult to defend and it is not my intention to do so. Rather, my point is to highlight the gender and class consequences of focusing on formal equality at any cost. Spousal status is clearly beneficial in reducing inheritance tax liability for the richest same-sex couples. But in order to make these arguments, Stonewall was forced to accept that same-sex couples should also be disadvantaged in exactly the same ways as similarly situated heterosexuals, regardless of the consequences of this for the poorest same-sex couples:

The taxpayer would actually save money in the area of benefit and tax credit payments. Same-sex partners currently claim benefits as two individuals, meaning that they will receive more money than if their needs had been assessed as a couple. This Bill will treat same-sex couples in the same way as heterosexual couples.<sup>50</sup>

As Stonewall acknowledged, spousal recognition for same-sex couples that are reliant on state benefits means that their income will be reduced. What is less clear from the quote is that it is impossible for low-income couples to avoid this by not becoming civil partners. Now that same-sex couples can be recognised by the state under the Civil Partnership Act, those who are not civil partners but cohabit and claim benefits are treated the same as heterosexual benefit claimants who cohabit: their partner's income is taken into account in calculating their benefit entitlement on the assumption that the partner will provide financial support to them, even though there is no legal requirement for the partner to do so. The discourse of accepting responsibilities alongside rights obscures both the fact that the economic consequences of spousal status are different depending on the income-level of the individuals within the couple and the economic vulnerability of a low-income partner or couple who have part of their income withdrawn in the process of the lesbian and gay community more broadly achieving formal equality.

That the institution of marriage (and now civil partnership) causes vulnerability and obscures care and dependency within the family unit has long been a central part of the feminist critique of marriage. Marriage has evolved; it has evolved to the point that rape within marriage is now, since 1991, recognised as a criminal offence.<sup>51</sup> But in terms of both individual marriages (for example the gendered division of household labour) and the role that the institution of marriage plays in society, the traditional feminist criticisms of marriage apply to same-sex marriage just as they continue to do to heterosexual marriage.

In the 1970s and 1980s, feminist critics of marriage primarily focused on the gendered division of labour, particularly that of the housewife/breadwinner model of marriage.<sup>52</sup> We should still pay attention to this: recent research by the Institute for Public Policy Research demonstrates that married women still do the vast majority of housework, even where both partners work outside the home, with only 13 per cent of married men doing more housework than their wives.<sup>53</sup> However, the key issue is the broader role that marriage plays in supporting the politics of state austerity and the rolling back of the welfare state. This is motivated not only by financial concerns but also by an ideology that reifies a small state. The shifting of responsibility for care and dependency away from the state means that the expansion of the legal family is necessary: the state must recognise same-sex relationships in order to encourage lesbians and gay men to take on these care burdens and financial dependency as part of the process of welfare retrenchment.<sup>54</sup> Welfare retrenchment means that responsibility for social reproduction under the neoliberal state lies even more heavily on the privatised family unit.<sup>55</sup> The legal recognition of same-sex relationships supports this privatisation. Though there is clearly some symbolic value in the recognition of same-sex relationships, the form that the family takes has become less significant to the neoliberal state than the functions it performs on behalf of capitalism.<sup>56</sup> In other words, the £18 billion cuts to the welfare state that are to take effect by 2014-15 need to be

absorbed by families.<sup>57</sup> It is not necessary for a homophobic government to recognise same-sex families through civil partnership and now marriage, but by doing so they are able to both demonstrate that they are 'not homophobic' and coerce more families to take on responsibility for privatised care and dependency. Civil partnerships already exist so what does the language of marriage add for this government?

Arguing that marriage is 'conservatising' and drawing heavily on the work of Andrew Sullivan, Tim Montgomerie, the editor of *Conservative Home*, provides the clearest example of why the language of marriage matters to the agenda of privatisation:

[The] social trinity of a good family, a good education and a commitment to work represent the superior conservative alternative to the socialist emphasis on a large welfare state.... If marriage is embraced as an institution of relevance to all people I hope we will begin to see the kind of pro-marriage public policy that exists in nearly all other developed countries. By making social conservatism if not fashionable again, but certainly acceptable, I think, for example, it will be easier to see the kind of pro-marriage tax policies that exist in almost every other European state.<sup>58</sup>

Montgomerie, who describes himself as 'not married but not gay',<sup>59</sup> highlights how same-sex marriage not only would support but also is *necessary* to justify explicitly 'pro-marriage' public policy. He also hints at the link between 'pro-marriage' policies and a smaller welfare state. Civil partners are treated the same as married couples for these purposes so there would technically be nothing to prevent such policies being created to apply to spouses and civil partners, thus also including same-sex couples, but the existence of civil partnership as a separate institution that also receives these tax breaks undermines the pro-marriage rhetoric. Conservative commentators in the United States have, for example, lamented the same-sex marriage prohibition for bringing about a 'proliferation of alternatives', such as civil union and domestic partnership, which marriage ought to be protected from.<sup>60</sup> One of the

objections to the creation of the UK civil partnership provision was that it would undermine marriage, particularly in relation to the earlier private members bills that would also have included heterosexual civil partnership. The consultation that preceded the Marriage (Same Sex Couples) Bill indicates that the Government still holds this view, as it emphasises that it is not considering making civil partnership available to heterosexuals, though it would remain available to same-sex couples alongside marriage.<sup>61</sup>

The idea that a 'good family' in the form of marriage will enable reduction of the welfare state was also adopted by the Bush administration in the United States. In that context, Priya Kandaswamy has demonstrated the link between work requirements (also one of the most controversial aspects of the UK Coalition Government's welfare reform) and sexual regulation in the form of 'marriage promotion'. Against the background of a racist moral panic about 'welfare queens', (sexually promiscuous women, racialised as black and Latina, who supposedly use welfare to both avoid the labour market and fund their life outside of the heteropatriarchal family) the Bush administration introduced a policy of marriage promotion. In this way, 'the language of marriage has effectively been used to undermine welfare rights and to depoliticize economic inequality altogether'.<sup>62</sup> In other words, the 'welfare queen' is in poverty not because of broader racial and class inequality, the difficulty of combining paid work (particularly precarious low-paid work) with raising children, or the difficulty of finding employment, but because of her own 'deviant' lifestyle. She herself is 'a sexualized threat to national well-being'.<sup>63</sup> Same-sex marriage advocates in the United States implicitly, and sometimes explicitly, accept the premise of such policies by, for example, highlighting how same-sex marriage would both 'civilise' gay males by discouraging promiscuity and encouraging responsibility<sup>64</sup> and contribute to the core message that the married state is morally superior:

Children, parents, childless adults, and marriage itself are all better off when society sends a clear and unequivocal

## THE MEANING OF MATRIMONY

message that sex, love, and marriage go together. Same-sex marriage affirms that message... And marriage, like voting and other core civic responsibilities, is strongest when universal.<sup>65</sup>

Jonathan Rauch, Andrew Sullivan and William Eskridge are not alone in deploying conservative arguments for same-sex marriage. Mainstream American gay rights organisations the Human Rights Campaign (HRC) and Gay and Lesbian Advocates and Defenders (GLAD) have used similar rhetoric. The HRC published an advert appearing in American national newspapers, the *Boston Globe* and the *New York Times*, with the text: 'When Americans like the Goodridges [the accompanying photograph depicts a white lesbian couple with a child] have access to marriage, it makes their family stronger and more stable. And it makes society stronger and more stable as well'. It was accompanied by the tag line: 'A marriage license: good for this family. Good for *every* family'. GLAD, in a publication entitled *Why Marriage Matters*, stated that:

Far from undermining marriage, the struggle for full equality for gay and lesbian couples is *an acknowledgment of the importance marriage has in society and the power it has over all our lives*. Increasing access to marriage for adults in committed relationships will strengthen the institution, not weaken it...<sup>66</sup>

Unlike the conservatives in the United States, who have evidently not connected anti-welfare rhetoric with this rhetoric of national belonging and citizenship of same-sex marriage advocates<sup>67</sup> and continue to emphatically oppose same-sex marriage, the 'social trinity' described by Montgomery, above, suggests that UK Conservatives have made this connection. If they had not, a recent article in the *Daily Telegraph* makes the connection clear. Mentioning also David Cameron's desire to introduce a tax allowance for married couples, Matthew d'Ancona argues:

The extension of marriage to include gay couples will entrench the idea of the married estate as a social good as

well as a private condition. Marriage encourages reliance upon a spouse rather than the state: a wedding is the ritual in which the individual recognises publicly that he or she is not alone, and that, choosing a spouse, promises love to, and accepts lifelong responsibility for, that person.<sup>68</sup>

The blame rhetoric behind the recent UK Government reforms to welfare<sup>69</sup> is not as explicitly tied to (racialised) sexuality as the ‘welfare queen’ discourse in the US, but, as the above quote suggests, it does bear some of its hallmarks. In response to the consultation question asking whether the obligations on benefit recipients (including the recipients of in-work benefits) should be increased, the Child Poverty Action Group (CPAG) noted the ‘disproportionate focus’ on the claimant without sufficiently focusing on ‘the ability of the labour market to create flexible, well remunerated jobs’.<sup>70</sup> The Social Security Advisory Committee also warned that an increase in ‘labour market flexibility’ has led to an increase in part-time and temporary jobs, many of which are ‘also very low-paid and insecure’, leading to ‘a cycle of low-paid work, to out-of work benefits, and back to low-paid work’.<sup>71</sup> The Government dismissed these concerns: ‘The labour market is highly dynamic. Jobs are being created all the time.’<sup>72</sup> Instead, the Government proceeds under the assumption that people are unemployed or underemployed either because they are insufficiently committed to finding work (they have raised the level of conditionality and introduced a ‘claimant commitment’ to ensure that claimants understand their obligations) or they are insufficiently skilled in the art of finding work. In response to the latter, the Government have introduced a more punitive ‘Work Programme’ to provide training: ‘We will also enable advisers to require benefit recipients to undertake mandatory work where they think this is necessary to instil the habits and disciplines of regular employment.’<sup>73</sup>

While this appears to lack the *sexual* regulation that Kandaswamy identified in the United States, marriage promotion is not absent from Conservative policy and sits comfortably alongside this individualisation (privatisation) of

responsibility for poverty, although it has not yet been implemented. The Centre for Social Justice, at the time directed by Iain Duncan Smith, recommended that a transferable tax allowance should be introduced for married couples that would provide an additional £20 per week, designed to encourage low-income couples to transition from cohabitation to marriage, 'and thereby increase the stability of their relationship'.<sup>74</sup> It also recommended that the 'couple penalty' in working tax credits be abolished.<sup>75</sup> Both of these recommendations were taken up in the Party's manifesto in order to, 'send an important signal that we value couples and the commitment that people make when they get married', as opposed to the existing tax and benefits system, which 'rewards people when they split up'.<sup>76</sup>

David Cameron highlighted 'commitment' as a key conservative value that was to be encouraged in order to strengthen society. Douglas Murray noted that those who object to the 'perceived promiscuity' of gay men ought to 'welcome gay acceptance into the marital fold'.<sup>77</sup> In other words, the increasing acceptance of gay marriage 'represents not the making gay of marriage but the making conservative of gays'. Both Murray and other commentators also note the need for 'renewal and restoration' of the institution of marriage itself, particularly at a time when heterosexuals are increasingly rejecting marriage. For example, Matthew d'Ancona notes the 'stabilising force' of gay couples being 'recruited to, and reinforcing, an ancient institution'.<sup>78</sup> This renewal of marriage would also be accompanied by the renewal of the Conservative Party, as noted above. For example, Tim Montgomerie argues that:

What David Cameron has embarked upon is an incredibly important project – to make social conservatism fashionable again. Marriage is civilising, stabilising, a hugely important institution for bringing people together. But if marriage is fossilised and exclusive, that has only limited reach. His attempt to enlarge and modernise the institution should not be seen as a threat to marriage but as its saviour.<sup>79</sup>

In other words, the Conservative proposal of same-sex marriage is also a proposal to the lesbian and gay communities to renew both the institution of marriage and the reputation of the Conservative Party to moderate voters. Behind that proposal lies an intention of sexual regulation of both low-income couples more generally and 'sexually promiscuous' gay men through financial incentives to marry and remain married.

### *Same-sex marriage will not transform marriage*

There are many perspectives on and arguments about same-sex marriage but the way that some right-wing organisations have reported on this issue is inaccurate. The myth that religious bodies will be forced to perform same-sex marriage ceremonies has been perpetuated despite the legal precedents suggesting otherwise and a reasonably measured, though I suggest incorrect, publication from the Church of England on this issue has been misreported and exaggerated. While neither the ECHR nor the Equality Act 2010 provide any grounds on which to suggest that religious bodies will be compelled to solemnise same-sex marriages, a blanket prohibition preventing *any* religious body from celebrating same-sex marriages in their religious premises would have had the potential to attract the attention of the courts. Any such action would be taken against the UK government and not against the Church of England or any other religious body. The 'quadruple lock' in the Marriage (Same Sex Couples) Bill 2013 is a proportionate measure that ought to survive any legal challenge on the basis of the European Convention on Human Rights or Equality Act 2010.

The symbolic value of state recognition for same-sex couples in the context of a history of criminalisation of gay male and, to a lesser extent, lesbian sex should not be underestimated. However, it is not possible to seek this recognition and at the same time critique the injustices inherent within the legal institution of marriage. Same-sex marriage will not transform the institution. If only it would. Rather, it will reinforce the existing inequalities and injustices *within* the institution, including the economic vulnerability of carers and those reliant

## THE MEANING OF MATRIMONY

on state benefits, and the stigmatisation of non-normative sexualities, whether those are homo- or hetero-sexual.

# Love Is Not Enough

## Lord Carey of Clifton

Patrimony is a rich word that expresses heritage in many different understandings of civic life. In any society the patrimony of its citizens includes its laws, faith, politics, religion, history and culture. At times the relationship between two or more may become testy and result in conflict. When this happens, time-honoured conventions will usually play their part in smoothing disputes and restoring harmony.

Governments and churches are also part of the patrimony of good societies. They exist to help nourish the wellbeing of all citizens and each knows, generally speaking, where the boundaries are and the dangers when they are crossed.

We are at such a cross-roads now with the Government's intention to redefine marriage. Such a move has most serious consequences, not only for the institution of marriage, but also for our society as well.

These are weighty accusations which need justification, which I hope to offer here.

We must recognise, first of all, the Government's well-intentioned and sincere intent in extending marriage to include homosexual couples. It serves no useful purpose for those opposed to cast doubts on the good faith of the Prime Minister and his Government. In my conversations with ministers I accept that they are committed to equality. I share that desire to a large degree, because the mark of a democratic society is the full participation of all citizens in both the privileges and responsibilities of membership. I also acknowledge the need of homosexual people for public recognition of their relationships. They have every right to be respected and churches, along with other groups in society, have not supported them as we ought to have done.

But not all relationships are the same. Those who are currently proposing to extend the understanding of marriage to

include same-sex partnership are doing so in the name of equality. Even if they acknowledge that they are doing something quite unprecedented, they believe they have the moral right to do so and the assent of the people.

In my view this is mistaken. This change assumes that marriage is simply a civil rite of passage which the state in its wisdom can change if it so wishes. Of course, if we take this point of view, it is entirely rational to do so, on the basis that, if homosexual relationships are the same as marital partnerships, then nothing fundamental is being changed at all.

Marriage, however, cannot be defined as simply as the Government supposes.

### *The meaning of marriage*

What then is marriage? I have already used the word 'unprecedented' of the Government's desire to extend marriage to civil partnerships; and it is because marriage has *always* been understood as a heterosexual relationship binding a man and a woman in an exclusive and life-long commitment. Of course there have been some cultural and religiously driven differences. Both in the early Hebrew and Middle East societies polygamy was acceptable. However, this was more for the protection of women in patriarchal communities. By and large, marriage has been accepted from the dawn of history as an institution that publicly marks out a relationship of man and wife in terms of sexual exclusivity and commitment. Furthermore, marriage is one of the most important, if not the most important, of the social relationships that nourish civic life. John Locke once referred to it as 'mankind's first society'. It is by far the most stable of family associations for the upbringing of children. It is also the most important of civil relationships in families rooted in the community.

From time immemorial marriage has been limited to the relationship of a man and a woman in a loving, faithful relationship 'until death us do part'. Although this is a strong and vital component in Christian teaching, it is not limited to Christianity: it is a fundamental element in Judaism, in Islam

and in other faiths. Marriage has been universally seen as a social and religious event that is heterosexual in nature. It is so enshrined in British law and set forth as Article 16 in the Universal Declaration of Human Rights.

Indeed, we can affirm even more: the family built around a man and woman is not only universal practice, it is the fundamental social unit of any society and on its foundation is erected the essential structure of social order. What it has not been seen as, and never has been, is as a rite that binds two people together of the same sex. And that is why the Government's intention to redefine marriage is radical, disturbing and wholly unprecedented.

### *Why redefine marriage now?*

However, it is worth standing back a little and asking, 'Why is the UK being pressed to make a decision of such profundity at such short notice?' Such a radical change was not in the Conservative Party manifesto and up until very recently there was hardly any demand for it. I recall being in the House of Lords when the Bill for Civil Partnerships was passed, and I heard the Minister reassure the churches and concerned individuals that marriage, as we understand it, would not be affected. It was only in 2012 that the Prime Minister announced that the Government would bring in same-sex marriages before the next election.

His mandate for doing so does not rest on a referendum or any wide-ranging examination of the pros and cons. We hear from time to time that public opinion polls indicate a ground swell of support. However, surveys of that nature are notoriously unreliable. A referendum would have provided an objective and thorough platform for examining in detail the consequences of making such a change. Instead, the Prime Minister's announcement was followed by a consultation which attracted great publicity as well as concern about the process and consequences. The response to the consultation showed how disturbed the general public is; especially as it seemed that

the consultative process was hardly more than a public opinion exercise.

Of course, as we well know, opinion polls cannot be the main element that leads a government to change its mind on something as fundamental as marriage. We know from the issue of capital punishment that opinion polls regularly show that the public would willingly bring back execution. Wisely, governments have refrained from following public opinion when it comes to such issues of justice. We expect the same on other issues also. Edmund Burke once said famously at a time when he was at variance with the public: 'I could not serve you if I had to court you.'<sup>1</sup>

There may not be an easy answer to the question 'Why now?' The truth may be traced in a number of trails: the influence of lobby groups, international pressure from the United States and elsewhere in Europe where the same issue is being debated, but also and unhappily, from the way the grip of the Christian faith is gradually slipping from the lives and behaviour of our citizens.

### *The role of state and church*

Here I must return to the relationship of governments and churches in their respective roles in the affirming and strengthening of marriage. Even though the churches in European and American societies have had important and historic roles in the 'marriage industry', the roles have not been identical. There is little doubt that the role of the churches over many centuries has strengthened the social value of marriage by its uncompromising focus on the lifelong nature of the relationship and its central role in raising children. Similarly, the state has played a major role over the last two hundred years through its management of civil marriages, which have complemented church marriages. Parliament has changed the age at which people may marry and has legislated on matters to do with the rights of women, divorce and financial considerations. However, the fact that marital laws have changed over the years does not suggest that the fundamental

nature of marriage has changed. Recently Katherine Jefferts Schori, Presiding Bishop of the Episcopal Church of the United States stated: 'The theology of marriage has evolved over time, with biblical examples including polygamy, concubinage and other forms of relationship no longer sanctioned in the Episcopal church.'<sup>2</sup> This is nonsense, of course, because polygamy and concubinage have never formed part of Christian theology, and she does not tell us what 'other forms of relationship' might be. It is this kind of hollow argument that seeks to give credence to the case that, as marriage has evolved, there is little to worry about when it comes to same-sex marriage.

It is certainly true that, up to now, the intention of both governments and churches has been identical – to strengthen marriage as the pivotal building block of society. But, in my view, this will change if same-sex partnerships are treated as being the same as traditional marriage. And the reason, as I have already touched upon, is that marriage is the way that families begin their existence, with procreation as its central component. We should remind ourselves that in the Prayer Book the rite of marriage is termed as 'The Solemnisation of Matrimony' with the assumed purpose that the rich, lifelong and faithful union of man and wife will have an outcome in motherhood (*mater/matris*).

As I said earlier, it does appear that so many of our current problems revolve around the all too narrow attempt to make 'equality' the controlling virtue. Thus, Theresa May, the Home Secretary, stated: 'Should two people who care deeply for one another, who love each other and who want to spend the rest of their lives together be allowed to marry? That is the essential question behind the debate over the Government's plans to extend civil marriage to same-sex couples.'<sup>3</sup>

But this is a wholly inadequate understanding of marriage. Love and commitment, of course, are vital elements in a marital relationship but they are present in many other relationships also. Theresa May has tossed out of the window a universal, biblical, historic and religious understanding of marriage that

requires it to be exclusively heterosexual, with procreation as a potential outcome, and with social and public benefits. She has replaced it by a rite that only demands love and commitment.

*Love and commitment are not enough*

Of course, it is the mantra of 'equality' that is driving the agenda. As Roger Scruton and Phillip Blond have argued 'equality no longer means – as it ought to mean – the equal opportunity to participate in the benefits of society. Instead it means the removal of all forms of social difference...'<sup>4</sup> As I and others have argued on many occasions, we do understand that those in same-sex partnerships love one another and are committed to each other. But this is a diminished definition of *marriage*. Thus, to make 'love and commitment' the *sine qua non* by which we define marriage is not only mistaken, it changes the fundamental nature of marriage. Sexual differences are removed and the break with procreation is complete. The irony is that the desire by homosexual couples to be married fundamentally changes the nature of the institution. Scruton and Blond again: 'The pressure for gay marriage is therefore in a certain measure self-defeating, for in seeking equality with something unlike yourself the thing that you join is no longer what you joined.'<sup>5</sup>

Indeed, equality should not automatically equate to the removal of differences. We are not all the same. Men and women are equal in the sight of the law, but that is a statement about our legal status not our identity. Same-sex relations are not the same as heterosexual, not least in the sense that they consign to the margins the significance of biological parenthood. Indeed, removing all differences in order to make everything the same may end up destroying or undermining the very thing we want to protect. When one contemplates that in 2010 for England and Wales there were only 5804 civil partnerships but 241,100 marriages, it is puzzling to see a government proposing such far-reaching changes with the potential for unintended consequences.<sup>6</sup>

*The impact of same-sex marriage*

'But', someone will say, 'no one is forcing the churches to change. You can carry on as you are. Your freedom and your practice are not being questioned. We only want equality for those in civil partnerships who want to call their unions marriage. How can that weaken traditional marriage?'

Well, the Government has already found out in the course of the consultation that there is no easy way to segregate civil from religious marriage. The change of definition affects all. So at one stroke the Government proposes to introduce division where there was once agreement leaving in its place mutually-incompatible understandings. The resulting confusion will undermine the importance of marriage as a social vehicle for the stable upbringing of children.

Other consequences follow.

First, two versions of marriage will exist side by side; a traditional/Christian/religious interpretation and a civil/homosexual version. When in the nineteenth century civil marriage ceremonies were introduced in Britain, attention was given to maintain the unity of understanding of marriage consonant with the inherited Christian understanding. Where there was once just one view of marriage, whether church or civil, there will now be two. This introduces permanent division and dispute to marriage and drives a wedge into a previously united institution. Extending marriage to include same-sex couples will not deliver greater social endorsements but rather it will imperil traditional marriage by a changed definition of the institution. As we shall see later in this chapter, a recent sociological study shows that marriage has declined in countries where same-sex marriages are recognised.

The second consequence of same-sex marriage is that, instead of traditional marriage being lifted up before younger people as one of the most healthy and natural of goals in their lives, it will be downgraded as but one of a number of equal partnerships. This has grave implications for the family unit. No recent government can say that it has been a great custodian of marriage. We have witnessed the devaluation of marriage

over the last twenty years. It is not difficult to disagree with the verdict that this is sheer madness when one contemplates the importance of the family for the wellbeing of children and society. The family is the oldest human social institution; the first and vital cell of society. However far back we trace the story of human beings in the long history of evolution, we find the family central to the care and protection of children, with a male and female attendant to their needs. The family is the source of elemental education; the central ritual unit; the link to the market place; the first hospice where our wounds are healed; and the place where we learn to differentiate right from wrong. As I said in a debate on the family in the House of Lords in March 2003: 'Marriage is by far the most significant factor in developing the social capital which makes any nation great.' And, in turn, as theologian Rita Nakashima Brock writes: 'The quality of care given to children is crucial to whether they grow into loving persons or destructive adults capable of monstrous acts. That care takes place in the family, which is itself shaped by society. The fragility of their earliest existence makes children easily broken.'<sup>7</sup>

In the light of these strong statements we should be disturbed by the decline of family life in the United Kingdom today. Fewer people are getting married. A report from the Office of National Statistics in February 2007 showed that the numbers of Britons choosing to marry had fallen to the lowest level in 111 years.<sup>8</sup> Those who are marrying are doing so later and those who are married are not staying married. In the view of Chief Rabbi Jonathan Sacks, 'the West, Britain especially, has embarked on an unprecedented experiment of sexual and reproductive anomie: cohabitation, a succession of step-parents, same-sex partnerships, limited committed marriages, children shunting between households, and above all single-parent households'.<sup>9</sup>

The consequences of this remarkable and sobering change are unsurprising: nearly one in two children are now born to unmarried parents, up from one in eight in 1980, and about 30 per cent of British children live in one-parent households.<sup>10</sup> The

main victims of the social revolution going on are, of course, the children. Research has revealed the uncomfortable truth that children who do not grow up in secure, stable homes with their biological parents suffer massive disadvantages.<sup>11</sup> It is extraordinary that the British Government is prepared to press ahead with this change when traditional marriage is under such strain and when all the evidence shows that marriage is the main engine that holds families together. It is difficult to avoid Jonathan Sacks' conclusion: 'Overwhelmingly the evidence points to the fact that the breakdown of marriage is slowly destroying Western civilisation.'<sup>12</sup>

The third and most disturbing factor is that there is evidence that extending marriage to include same sex-couples will undermine marriage itself. This has been denied by the Government which has argued that the changes will strengthen and enrich marriage. The Home Secretary, Theresa May, actually told the *Daily Telegraph* that '...homosexuals will be missionaries to the wider society and make marriage stronger'.<sup>13</sup> However, the evidence points the other way. In a thorough study of Nordic countries where homosexual marriages have been legalised, the sociologist Patricia Morgan shows that rather than strengthening marriage, the facts reveal a calamitous downward acceleration in the numbers of marriages – both same-sex and heterosexual marriages.<sup>14</sup> She argues that 'same- sex marriage is both an effect and a cause of the evisceration of marriage – especially the separation between this and parenthood'.<sup>15</sup> In her study of marriage trends in Sweden, Norway, Denmark, Spain, Belgium, Canada and some US states where homosexual marriages have been legalised, she argues that the facts give no comfort to those who argue that same-sex marriages will support marriage. The reverse is true; marriage in Scandinavia, Spain and elsewhere where same-sex marriage has been introduced is in deep decline. 'Cohabiting gay couples were twelve times more likely to separate than married heterosexual couples', Morgan noted.

Patricia Morgan's close and penetrating analysis reveals that there is absolutely no basis for any confidence that widening

the definition of marriage will result in strengthening it. The evidence points remorselessly the other way – marriage as we know it in Britain, as the heart of family life, will be emptied of its true meaning.

A fourth reason why we should be worried by the redefining of marriage is the unintended consequences of such a step. Once we let go of the exclusivity of a one man-one woman relationship with procreation linking the generations, then why stop there? If it is ‘about love and commitment’ then it is entirely logical to extend marriage to, say, two sisters bringing up children together. If it is merely ‘about love and commitment’ then there is nothing illogical about multiple relationships, such as two women and one man. Thus, William Eskridge, a leading supporter of same-sex marriage, argues that for many homosexuals limiting the number of people in a marital relationship is illogical. He asserted that when a coalition of gay organisations drew up a list of demands for reform of laws affecting homosexuals they asked for ‘the repeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of the legal benefits of marriage to all persons who cohabit regardless of sex or numbers’.<sup>16</sup> In no way do I mean to be alarmist about the possibility of this happening in a large scale way, but it is happening in the United States and there is nothing to stop the trend continuing.<sup>17</sup>

### *Respecting difference*

To conclude, as the debate on this crucial social matter continues, courtesy as well as tough thinking should enlighten the discussion. Homosexuals deserve our respect. We must listen to their concerns attentively and understand their desire to belong and contribute fully to community life. I believe it is possible to do this and still disagree.

Ultimately, the proposed legalisation of same-sex marriages represents a paradigm shift in our understanding of marriage. As Roger Scruton observed ‘...[W]e have always had in the back of our mind that the bond between husband and wife, like

that between parent and child, has a moral nature that transcends the sphere of contract. We resonate to the old rites of passage and wonder what business it is of the State finally to set them aside with no obvious reason, and with no clear mandate for doing so'.<sup>18</sup> Our Government's verdict on marriage is such a radical interpretation of marriage that it demands the closest scrutiny and a clear consensus before it becomes law. The new understanding of marriage is that of a long-term commitment between two people of any sex, in which gender and procreation are irrelevant.

In my view, the steps towards this conclusion and the Bill currently passing through Parliament have been undemocratic, hasty and ill-considered. The complex and rich links that strengthen the patrimony of a nation commits a mature democracy to listen to other parts of the body. Whilst this applies to each sector, it is particularly true of the role of an elected government. Its role must transcend that of merely accepting the most populist opinion of the day. It has a duty to treasure and safeguard our cultural heritage which includes all that strengthens marriage at the heart of our nation. Proverbs 32.28 warns: 'Remove not the ancient landmarks which your fathers have set.' There are few more crucial landmarks than marriage. Those of us accused of being on the wrong side of history on this issue can only plead with the Government to respect our concern that extending marriage to same-sex couples is not only unwise, but also sets a dangerous precedent.

It is surely time to think again.

# A Democracy, Not a Theocracy

## Peter Tatchell

*Archbishop Welby says homophobic discrimination is not a Christian value but he still opposes marriage equality.*

In April 2013, I met the Archbishop of Canterbury, Justin Welby, at Lambeth Palace. He had offered to meet in response to my open letter (see below), which criticised as homophobic his opposition to same-sex civil marriage.

I had written:

You claim that you are not homophobic but a person who opposes legal equality for LGBT [lesbian, gay, bisexual and transgender] people is homophobic – in the same way that a person who opposes equal rights for black people is racist.

I proffered the view that homophobic discrimination is incompatible with Christ's gospel of love and compassion. The church should therefore oppose discrimination against lesbian, gay, bisexual and transgender (LGBT) people, including the ban on same-sex civil marriage.

After all, if people of faith value love and marriage surely they should welcome the fact that many LGBT people love each other and want to get married? Same-sex marriage doesn't undermine marriage, as the defenders of the status quo often maintain; rather it strengthens it and should be welcomed by the advocates of married life.

From a religious perspective, surely it's wonderful that so many LGBT couples want to get married at a time when increasing numbers of heterosexuals are deserting wedded bliss in favour of cohabitation? Same-sex marriage will, in fact, boost marriage in an era of decline. Lamentably, however, Anglican leaders are in the forefront of the campaign to force the Government to abandon the current parliamentary bill that will allow lesbian and gay couples to marry in register offices. They

are actively supporting the existing legal ban, which enshrines homophobic discrimination in law.

The Church of England's opposition to same-sex civil marriage is a direct and un-Christian attack on the human rights of LGBT people.

Despite these trenchant criticisms in my open letter, or perhaps because of them, the Archbishop agreed to meet me – much to his credit. It was ground-breaking: the first ever meeting between the leader of a major international Christian denomination and a leading international LGBT human rights campaigner. Bravo! But apart from this symbolic milestone, did it achieve anything? Well, yes and no.

It was an illuminating dialogue; I now better understand Welby's thinking. I hope he may have a more informed understanding of my concerns too. Welby struck me as a genuine, sincere, open-minded person, willing to listen and to re-evaluate his position. He seemed to take seriously the points I made, writing notes as I spoke. I'm certainly ready to give him a chance.

Overall, I got the impression that the new Archbishop is struggling to reconcile his private sympathy for loving, stable same-sex relationships with his public opposition to same-sex marriage – an opposition that is not confined to his rejection of religious marriages for LGBT couples but also includes a refusal to countenance non-religious same-sex civil marriages in register offices.

My feeling is that Welby would, in his heart, like to support marriage equality but feels bound by centuries of church tradition and is fearful of the theological earthquake – and likely schism – that would result if he ended the Church's opposition to the legalisation of civil marriage ceremonies for same-sex couples. He seemed particularly fearful that his endorsement of same-sex marriage would undermine the unity of the global Anglican Communion, provoke a hostile reaction from African churches and be exploited by Islamists to incite anti-Christian hatred and violence in countries like Nigeria.

I understand these concerns but disagree. I suggested that his duty as Archbishop of Canterbury is to be a moral leader who stands for what is right (equality for all), not a pragmatic appeaser of homophobic intolerance. After all, I doubt he'd pull his punches if fellow Anglicans were promoting *racist* discrimination in marriage law.

This is a fundamental inconsistency in Anglican policy: it would never promote racial inequality but proudly and publicly promotes the denial of equal marriage to LGBT people.

I put it to Justin Welby that homophobic discrimination is not a Christian value. He concurred, without hesitation. Nevertheless, he could not bring himself to concede that banning lesbian and gay couples from getting married is discrimination – and wrong. He restated several times that history and tradition have dictated that marriage is between a man and woman. He did not therefore feel able to support a 'redefinition of marriage' to include same-sex couples.

Tradition is not, however, always a reasonable or moral justification for maintaining the status quo. Britain's long-standing traditions used to include monarchical despotism, slavery, colonialism and the denial of votes to women. We eventually abandoned these traditions because we evolved as a society and deemed them to be wrong. Moreover, marriage has been redefined many times, and very radically, down the centuries. It used to involve polygamy and child brides. There was a ban on divorce and the remarriage of divorcees. Wives were the property of men and, until recently, rape was legal in marriage. In some countries, inter-racial marriage was once prohibited by law and the marriage of close relatives was formally permitted. Quite clearly, marriage has changed and been redefined many times in the distant past and in the near present. So why can't it be redefined again to embrace loving, committed LGBT couples?

In fact, contrary to popular belief, the legal ban on same-sex marriage is not even 'traditional'. It is only three decades old. Until 1971, there was no prohibition on two people of the same gender getting married. The UK's main marriage law, the 1949

Marriage Act, even now does not stipulate that marriage partners have to be male and female. That requirement was first legislated under the Nullity of Marriage Act 1971 and later incorporated in the Matrimonial Causes Act 1973. If we repealed the relevant clauses of the 1973 Act, same-sex marriage would be legal. There is no need for the current separate, cumbersome legislation.

The Archbishop's key argument against equal marriage, as expressed to me, was the notion of 'intrinsic difference'. Although he affirmed that 'gay people are not intrinsically different from straight people', he insisted that there is an 'intrinsic difference in the nature of same-sex relationships'. This difference is, he said, a sufficient reason to deny gay couples the right to marry, even in civil ceremonies in register offices. When pressed to explain the nature of this 'intrinsic difference' his only response was: 'They are just different.' I asked him what aspect of this 'intrinsic difference' justified banning same-sex marriage. He again replied: 'They are just different.'

I was not convinced. I may be wrong but it sounded like his 'they are just different' response was a stock, default answer – that he has no credible, non-homophobic rationale for wanting to deny same-sex couples the right to marry.

Although I was expecting Welby to reiterate his opposition to same-sex marriage, I was somewhat taken aback when he claimed the ban on same-sex civil marriage is not discrimination. 'I don't accept the word discrimination,' he told me. When I challenged him he retorted that it is only discrimination if you are comparing like with like. Same-sex and opposite-sex relationships are not like for like, he argued. They are different. So, in his view, banning gay couples from marriage is not discrimination. This seems confused.

I don't accept his contorted argument and I suspect the average man and woman in the street would not accept it either. In our democracy, there are many different people and lifestyles but difference is not normally accepted as a basis for different laws for different people. Indeed, one of the cardinal

principles of a democratic nation is that all citizens are equal before the law.

Regardless of what the Archbishop believes, most people see banning LGBT people from marriage as discrimination. They oppose it. More than 70 per cent of the public, including 58 per cent of people of faith, reject discrimination in marriage law and support the right of same-sex couples to have a civil marriage, according to a YouGov poll published in June 2012.

Discussion between Welby and I got bogged down on the issue of whether the legal ban constitutes discrimination. To break the impasse, I proposed a theological third way to reconcile the religious belief that rejects same-sex love with the human rights principle of legal equality for all. I urged the Archbishop to 'embrace a new historic compromise and rapprochement' with the LGBT community, where the Church can continue to believe that homosexuality is wrong but will cease supporting homophobic discrimination, including in civil marriage law.

Anglicans should, I argued, make a distinction between their personal beliefs and the law of the land. They need to accept that Britain is a democracy, not a theocracy, and therefore stop attempting to use the legal system to impose their religious-inspired views on the rest of society by opposing marriage equality.

While Anglicans have a right to refuse to conduct religious gay marriages, it's time they halted their campaign against same-sex marriages hosted by civil authorities. The Church ought to recognise that in a democracy it has no legitimate jurisdiction or veto over marriages in register offices.

Society has indulged faith organisations by giving them the right to conduct religious marriages. Not content with such a privilege they now want to dictate the terms of civil marriages too – which is authoritarian, theocratic and plain greedy.

If churchmen and women disagree with same-sex marriage the solution is simple: don't marry a person of the same sex. And don't attend same-sex weddings or give wedding presents to married same-sex couples. That's the mature way to show

your disapproval, rather than demanding the law enshrine your homophobic prejudices by dictating to other people who they can and can't marry.

In response to my suggestion that he make a distinction between his personal view and the law, Welby offered a measured, guarded response. There was no outright rejection of the idea; only that he was 'apprehensive' and 'cautious' about the 'consequences of redefining marriage'. He added that he was unconvinced that it would be to 'the advantage of society'. This was disappointing but softer than the anti-gay pronouncements of some fellow church leaders, such as the former Archbishop of Canterbury, Lord Carey.

Welby seemed to be genuinely trying to be as liberal and gay-sympathetic as he felt possible, given the hostility to gay marriage among much of the church hierarchy. At one point he appeared to intimate that he might revise his view on marriage equality in the future. Over time, he said, 'marriage may evolve' in the direction LGBT people seek and the Church might move with it. But not yet. Unexpectedly, he explicitly affirmed that 'Parliament has a right to legislate same-sex marriage'. Indeed, it has a 'legitimate' right to do so, he noted. Moreover, despite his reservations, he said he was 'relaxed' about the legislation.

So why does he oppose the Marriage (Same Sex Couples) Bill?

The Archbishop said it was mostly because it is a 'bad bill'. He seemed to hint that if it had been better drafted he may not have opposed it; although that would not be consistent with his professed opposition to the 'redefinition of marriage'.

Leaving aside what looks like a contradiction in his position, his critique, which I share, is that the bill is needlessly complicated and doesn't recognise non-sexual relationships of care and commitment. Most significantly and regrettably, it introduces different rules for same-sex marriages, compared to the existing marriage legislation for opposite-sex couples.

For example, in contrast to existing marriage law, under the same-sex marriage bill non-consummation does not invalidate a

same-sex marriage and adultery with a person of the same gender is not grounds for divorce. While these two reforms may be a progressive advance in marriage legislation, they make the law unequal because they do not apply to married heterosexuals.

The Marriage (Same Sex Couples) Bill does not present marriage equality. It perpetuates separate laws for opposite-sex and same-sex couples. Separate is not equal. True equality would be to repeal the same-sex marriage ban in the Matrimonial Causes Act 1973 and thereby allow lesbian and gay couples to marry under the 1949 Marriage Act. This would be equality but it is not what the Government is doing.

Yet despite these flaws, the current bill is the only legislative option available, so I reluctantly support it.

On a more positive note, to my surprise and delight, the Archbishop of Canterbury told me that he 'supports' the parliamentary amendment that seeks to end the ban on opposite-sex civil partnerships. It is a reform that I have campaigned for ever since the Civil Partnership Act was legislated in 2004. I'm as passionate about heterosexual equality as I am about gay equality.

Unfortunately, although Welby commendably supports equal rights for straight couples in civil partnership law, he endorses gay inequality in civil marriage law. A tad inconsistent, I think.

He has adopted the Stonewall position in reverse. The main gay rights parliamentary lobby group, Stonewall, for many years refused to support same-sex marriage; arguing that civil partnerships were good enough. Eventually, after mass protests from its members, it came out in favour of marriage equality. Great! Except that Stonewall is now refusing to support straight equality with regard to civil partnerships, saying it is up to heterosexuals to fight for the right to have a civil partnership. In other words, Stonewall is glad that straight people helped us win LGBT equality but it doesn't feel obliged to reciprocate. This is a rather sectarian, selfish view in my opinion – especially

given that without heterosexual allies none of the many LGBT law reforms since 1999 would have been won.

But I digress.

At the conclusion of my meeting with Archbishop Welby, I asked him to consider making a gesture of reconciliation and atonement to the LGBT community. Perhaps an apology on behalf of the Church for the centuries of homophobic persecution it endorsed against gay people – including imprisonment, torture and execution? Or, if not an apology, then at least some expression of remorse and regret. To which Welby replied: 'I hear what you say. I will need to think about that.'

I also urged him to meet other LGBT organisations and campaigners from within the UK and in Africa; especially in countries like Nigeria and Uganda where the Anglican Church is actively stirring anti-gay hatred and supporting repressive homophobic legislation. He said he planned to address that issue. Excellent.

Our meeting was the first time any Archbishop has formally met me. Even a liberal such as Rowan Williams never welcomed me to Lambeth Palace. Justin Welby's invitation was progress, compared to the past when I'd had the door slammed in my face.

It was in response to such past intransigence that in 1997 ten of us from the LGBT human rights group OutRage! scaled the walls of Lambeth Palace, scrambled through the undergrowth, hid among the rose bushes and jumped out to confront the then Archbishop of Canterbury, Dr George Carey, as he entertained 16 Anglican primates in the garden.

We were protesting at his refusal to dialogue with the LGBT community and his opposition to an equal age of consent, fostering by gay couples and the legal recognition of same-sex relationships.

In 2013, by contrast, I went to Lambeth Palace through the front door, at the Archbishop's invitation. A welcome change. But will the dialogue change anything?

I'm an optimist and a believer in redemption. I entered Lambeth Palace in hope. I always want to believe that people

will do the right thing. That's why I am hopeful that, in time, the Archbishop may resolve his moral dilemmas in favour of LGBT equality. Time will tell.

***An open letter to Justin Welby on the occasion of his enthronement as Archbishop of Canterbury***

*Dear Archbishop Justin Welby,*

*Your enthronement as Archbishop of Canterbury and leader of the worldwide Anglican Communion will be an occasion for rejoicing by your faithful.*

*Like them, I wish you well.*

*I hope you will use your new authority to guide the church to accept equality and human rights for lesbian, gay, bisexual and transgender (LGBT) people.*

*Just over a decade ago, you expressed harsh homophobic opinions, condemning gay relationships and the adoption of children by same-sex couples. You may have since revised these views but even now you oppose marriage equality.*

*One of your first public statements, when you were confirmed as Archbishop of Canterbury last month, was to declare your support for discrimination against gay people: namely your support for the legal ban on same-sex civil marriage.*

*Moreover, although you have expressed your support for civil partnerships, it is reported that you have not approved civil partnerships taking place in churches or church blessings for same-sex couples.*

*You claim that you are not homophobic but a person who opposes legal equality for LGBT people is homophobic – in the same way that a person who opposes equal rights for black people is racist.*

*Homophobia has come to mean more than an irrational fear for gay people. It includes support for anti-gay discrimination and the denial of equal rights to people who are LGBT. In this sense of the word, you*

## A DEMOCRACY NOT A THEOCRACY

*are homophobic because you support discrimination in law against gay people.*

*Discrimination is not a Christian value; regardless of whether this discrimination concerns gender, race, faith, sexual orientation or gender identity.*

*You say that you are listening to the concerns of the LGBT community but you continue to ignore and reject our claim for equal marriage rights. It does not feel like you are listening. Or perhaps you listening but not hearing?*

*You are not without precedent with regard to LGBT equality, in the UK and abroad.*

*Sadly, successive Archbishops of Canterbury have failed to speak out clearly and consistently against LGBT human rights abuses worldwide and against the frequent collusion with these abuses by local Anglicans. Large swathes of the Anglican global communion actively support the persecution of LGBT people, mostly without rebuke.*

*The Anglican churches of Nigeria and Uganda are supporting draconian new anti-gay bills that are currently before their respective parliaments.*

*Uganda's Anti-Homosexuality Bill intensifies the criminalisation of LGBT people, including life imprisonment for mere sexual touching and the death penalty for repeat gay offenders. It also outlaws same-sex marriage, LGBT organisations and gay human rights advocacy.*

*Similar repression, excluding the death penalty, is enshrined in the Nigerian Same-Sex Marriage (Prohibition) Bill.*

*I urge you to speak out against these totalitarian homophobic proposals.*

*Such concerns aside, I note with encouragement recent statements by you that may indicate a softening of your stance and a greater openness to LGBT equality.*

## THE MEANING OF MATRIMONY

*Most commendably, you support strengthening gay relationships and recognising that love between people of the same sex is no less than that of heterosexual couples.*

*You are quoted as saying: 'I know I need to listen very attentively to the LGBT communities, and examine my own thinking prayerfully and carefully.'*

*Indeed, you have indicated that you are open to on-going discussion and dialogue with LGBT people, for which we thank you.*

*I urge you to show true moral leadership by standing against homophobic discrimination in favour of LGBT equality.*

*In the name of free speech, I have spoken out against the prosecution of Christian street preachers – even homophobic ones. I have defended persecuted Christians, especially in countries like Saudi Arabia and Pakistan.*

*I call on you to reciprocate.*

*It would, I believe, be wrong for you to collude – either consciously or by default – with those fellow Anglicans who reject gay equality.*

*I ask you: would you make such compromises on equal rights in the case of ethnic minorities? I expect not. So why should LGBT people be treated differently?*

*My mother is a devout Christian. She believes that homosexuality is, according to the Bible, a sin; albeit not a major one. Equally, she believes homophobic discrimination is wrong. She makes a distinction between her personal beliefs and the law of the land.*

*I would, respectfully, urge you to do the same with regard to marriage equality and other legislation.*

*I understand and appreciate that you want to maintain Anglican unity and prevent a split in the communion. But is sacrificing LGBT equal rights morally justifiable in order to secure this goal? Is it a price worth paying to keep the Church united? Should gay human rights be compromised to appease those in the worldwide communion who endorse homophobic persecution and legal discrimination?*

A DEMOCRACY NOT A THEOCRACY

*I urge you:*

*Be a moral leader for universal human rights, including the human rights of LGBT people.*

*Yours sincerely,*

*Peter Tatchell*

*Director, Peter Tatchell Foundation*

# Equal But Different – the Unanswered Questions

**Brenda Almond**

Same-sex relationships differ from heterosexual ones in ways that legislation cannot change. In particular, heterosexual reproduction is the result of nature, not law. Current proposals to redefine marriage leave open a number of questions, some of which are relevant to the welfare of children: what will be the consequences for children of redefining marriage? And how can we justify this untried macro-experiment with the social structure of communities and with the lives of children?

At a time when civil partnerships have a widely accepted and largely uncontentious place in many parts of the liberal West, the same-sex marriage project is an extraordinary example of the failure of both reason and logic. On several occasions discussion in Britain has been suppressed by illiberal and intolerant strategies such as the cancellation of venues for debate, and public opinion takes second place to political will.<sup>1</sup> At the same time, a conflict has been created between legislators, social theorists and religious believers. As in earlier centuries when state and church have fallen into conflict with each other, believers are now being forced to choose between compliance and conscience. In insisting on unqualified compliance in matters where there is reasonable moral controversy, the state is demanding that its own moral conclusions should be imposed on everyone.

But the redefinition of marriage is not only, or even primarily, a religious or theological issue. On the contrary, debate about church weddings is functioning as a useful confetti-cloud to obscure what is in fact a proposal to change the fundamental structure of civil society and to challenge the norms of childbearing and child-raising. Marriage can, of course, rightly be understood as a public statement of love and

commitment between two people and it does not always result in the birth of children. But the fact is that marriage is primarily a procreative institution. It is also, though people seem surprisingly reluctant to bring this into the debate, quite importantly connected with sex. There are a number of good reasons why civil society should stick with this understanding of marriage:

Europe's social and cultural framework is built on the notion of the family as founded by a man and a woman committed to each other and to the children that result from their union. Marriage is the key institution supporting that commitment.

Changing the legal definition of marriage means changing our understanding of the key family roles, so that biological concepts such as 'father' and 'mother' must be replaced with gender-neutral alternatives that cannot be synonymous with the terms they have displaced.

A household consisting of children and their two natural parents is the institutional arrangement that most benefits children and, for many reasons, households of this sort also benefit the community in which they live. Research supports these commonsense assumptions and also shows that marriage is an institution that protects and perpetuates this structure.<sup>2</sup>

Family relationships and biological identity provide individuals with the strongest possible link between themselves, their forebears, and their successors – between past generations and present and future ones.<sup>3</sup>

None of these are new truths, nor is this family-centered understanding of marriage new. It features in the stories and literature of ancient Greece, in Judaic history, and in the legends and practices of other ancient cultures. It is also an important part of the base on which modern Europe's social and cultural framework rests. There are, of course, other ways of providing for and raising children; chance and change mean that, if only for practical reasons, the so-called 'nuclear family' is not a possibility for everyone. But the combination of male

and female embedded in the established definition of marriage is rooted in the biology of sexual reproduction, and it provides one of the strongest of natural bonds between the generations.

A new and untested ideology of family has in the last few decades challenged this perception with the claim that the ubiquitous pattern of heterosexual pairing and child-bearing formalised in marriage threatens socially valued principles of equality and diversity. Various possible remedies are put forward by those who have been persuaded by this argument. They include, at one extreme, abolishing legal recognition of marriage altogether and with it the privileges people currently acquire by marrying.<sup>4</sup> A second and less drastic option, already available in some jurisdictions including, for example, the Netherlands, is to transfer some or all of the privileges and responsibilities of marriage to couples, both same-sex and opposite-sex, who are in civil partnerships. The UK has opted for a third alternative: civil unions that are only available for same-sex couples but which provide them with the same legal privileges as marriage. And finally, there is the option put forward in a Bill currently passing through Parliament: to seek to reinforce legal equality by redefining marriage itself as an institution that is open to same-sex as well as opposite-sex couples.<sup>5</sup>

Same-sex marriage has not been as widely adopted in this fully-fledged form as civil unions. Canada became the first country in the western hemisphere – and the third country in the world – to adopt it when, after much controversy, the Canadian Civil Marriage Act, which legalised same-sex marriage in all the Canadian provinces, was finally signed into law on 20 July 2005. The Canadian decision revealed some of the less visible consequences of the legislation. This included the need to remove mention of some biological family relationships such as grandfather and grandmother, as well as gender-related terms such as husband and wife, from legal documents.<sup>6</sup> The United Kingdom's proposed Bill creates a similar task for lawyers in this country, where it is estimated that family law contains more than 3,000 mentions of the terms

‘husband’, ‘wife’, and ‘husband and wife’. As these much wider, but barely noticed implications are recognised, it becomes increasingly obvious that this proposal is not just about individuals and couples; it is about social structure in a much broader sense. Perhaps it’s most important unpublicised consequence is that it turns ‘parent’, too, into a legal rather than a biological concept. Such a significant change in the child-parent link cannot but affect children and their well-being, and these overlooked but vulnerable stake-holders in the marriage debate deserve a broader place in it than they have so far reserved.

Advocates for change, however, insist that to defend the existing picture of marriage is to perpetuate a purely artificial restriction: marriage, parenthood and family structure, they argue, are essentially social constructions, created by language, law and custom. The inference they draw is that what law can create, law can change. But while it is true that the new reproductive technologies have indeed brought new opportunities for parenthood, the claim that human beings will be able to fundamentally control their own patterns of life and reproduction goes beyond any commonsense understanding of the situation. Nor has due weight been given to the fact that at least some of the claimed limitations that affect same-sex couples, particularly those involving parenthood and procreation, are not discriminatory; they are natural consequences of the human condition.

### *Words and meanings*

So do words matter? At the heart of the marriage controversy is the view that they do. But it is not only the word ‘marriage’ that is at issue. The redefinition of marriage has been linked in public discussion with the term ‘equal marriage’. But what is meant here by ‘equal’? According to one of several conflicting descriptions offered by Government spokespersons during earlier debates, it was suggested that ‘equal’ meant ‘the same’. But ‘sameness’, too, has proved difficult to interpret. It might, for example, be possible to avoid the awkward problem of

nature's gender diversity by abandoning the traditional assumption that marriage has a specific connection with sex, leaving both same-sex and opposite-sex couples to enjoy privacy and ambiguity in that respect. But this would turn marriage into a thin shadow of its original form, the terms of which are vanishingly unclear: no more than a feeling of two people for each other, an unenforceable promise of the 'long-term' nature of that feeling, some tax benefits, and a legal contract that might or might not involve a couple setting up house together.

The new Bill, then, is intended to retain the link with sex and to treat same-sex marriage in the way that marriage has so far been understood in tradition and law, as a sexual relationship. This, however, provides a new and even more challenging target for clarification and analysis. True, the notion of a sexual relationship is reasonably clear in law in the case of heterosexual marriage where, for example, adultery can be cited as a ground for divorce, but the natural characteristics of human beings mean that concepts are involved here that cannot be transferred without explanation or interpretation to the case of same-sex couples. It is reported that those tasked with drafting the present Bill have had to acknowledge defeat in attempting to square this particular circle.<sup>7</sup> Accordingly, the proposed solution to what is in essence a problem involving meaning, logic and reason, is to allow the notion of a 'sexual relationship' to be regarded as essentially the same but interpreted differently in different cases. The Bill, it seems, is to go forward on the basis that interpretations of this key term will be made by judges and lawyers in the courts on a case by case basis – a solution that builds ambiguity into the law in a way that can only breed confusion.

### *Money matters*

Perhaps this problem, though, will turn out to be less immediate than some other unthought-out bread-and-butter issues. These include, for example, the re-emergence of the notion of an adult dependent. At a time when the idea of a wife

or partner as a dependent hardly survives in the case of heterosexual marriage except, possibly, in the case of divorce arrangements amongst the super-rich, it seems to have made an unexpected return in the case of same-sex relationships. But most of the financial advantages accorded to a marriage partner have their origin in older assumptions about the need to provide support for children and for a home-based carer who has had no opportunity to acquire personal savings or a pension. But increasingly in the western world, where families are small and women are a major part of the work-force, recognition of the obligation of one partner to support the other is more likely to be linked to whether children are involved. Apart from this, of course, people are free as individuals to choose to provide out of their own resources for someone who has supported them in their personal or domestic life and whose long-term welfare they care about. But the provision of tax and welfare benefits is under constant critical scrutiny, and the wish to expand the pool of possible recipients, solely on the basis that they are married, might come, in the long-term, to be regarded as overgenerous.

### *What about the children?*

Of course, it is not the case that all same-sex couples are without children; some may have children from earlier heterosexual relationships and some may have adopted children or taken responsibility for children as foster-carers or as close relatives. Others will not have come together in order to have children – their primary priority will be each other. Some, however, will want their relationship to form the basis for a socially recognised unit that includes children. There is a common view that such a right is implicit in existing human rights legislation. Article 16 of the UN Declaration of Human Rights is often cited to support this view: ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.’<sup>8</sup> Article 8 of the European Convention may also be judged relevant. It specifies that: ‘Everyone has the right to respect for his private

and family life, his home and his correspondence.<sup>9</sup> But wording is important. Most European legal systems have seen marriage and family as necessarily connected – indeed, by always appearing in conjunction in relevant legal documents, the two rights do link the right to have children (to found a family) to marriage. But the assumption behind such statements at the time they were adopted would necessarily have been, not only that marriage was for a woman and a man, but also that only a male and female *could* found a family.

The difference now is that assisted reproduction has made it possible to create new family groups beyond the ‘traditional’ nuclear family – a man and a woman raising their own offspring. William N. Eskridge, an American advocate of same-sex marriage, confirms what he sees as a necessary first step in the argument – ‘the reconfiguration of family – de-emphasizing blood, gender, and kinship ties’.<sup>10</sup> It is not surprising, then, that some of its supporters also believe that same-sex marriage brings with it a right to donor-assisted reproduction and commissioned surrogacy. These include the American legal philosopher John Robertson who holds that there is a *prima facie* right to reproductive choice on an even wider scale – a right which he believes extends to various kinds of ‘collaborative reproduction’ and to commissioned pregnancies, paid adoptions and similar contracts. He writes: ‘An ethic of personal autonomy as well as ethics of community or family should... recognize a presumption in favour of most personal reproductive choices’.<sup>11</sup>

As regards the European context, it is now more than a decade since a Paris-based association of gay and lesbian parents dedicated to reform of family law in France set out to achieve equal access to assisted reproduction and the institution of a model of parenthood based on social rather than biological links.<sup>12</sup> Their aims included replacing the traditional birth-certificate, which gives the names of a child’s two natural parents as far as these are known, and creating the legal possibility of birth-certificates listing multiple ‘parents’.

Elsewhere, the idea that a child's birth certificate should report a child's actual biological parents – their genetic history – has become increasingly eroded and, in the USA and Canada, same-sex couples, adoptive parents, single people and infertile couples who have used donors now routinely petition to have one or both biological parents left off the birth certificate. English law, too, now allows the names of two people of the same sex to be entered as parents on a child's birth-certificate. In the case of one or both parents, then, birth certificates will provide only the child's legal parentage. These children will not, like people who have been adopted, be provided with a second more detailed birth-certificate that would give them as adults access to their biological parentage and hence their genetic heritage.

These developments should prompt a pause for thought about the 'libertarian' basis of reproductive choice. It is a common view amongst liberals and libertarians that their position provides a justification for all practices and choices not involving direct and immediate harm to others. But libertarianism (even Nozickian) does not entail this narrow interpretation of freedom – the minimal state must step in to protect the freedom of the vulnerable.<sup>13</sup> In the context of bioethics, and especially in the field of reproductive medicine, the vulnerable must include the children born by assisted reproduction, who will later find out that choices have been made for them that might not have been their own. Of course, these choices may have been good choices that have led only to welfare-rich outcomes. But in a situation in which a new and unfamiliar gulf has opened up between genetic or biological relatedness and social relatedness, it is easy to overlook the fact that children's interests are not confined to their welfare – they also have rights. As for welfare, it seems we must, in any case, wait longer for a consensus on long-term outcomes for children brought up by same-sex couples or in non-standard households. As is acknowledged in an influential study by two authors who are themselves openly gay, and who are advocates of same-sex marriage, social science cannot settle this question:

'There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them.'<sup>14</sup> A more recent major American study based on data from 3,000 adults is similarly cautious in its conclusions.<sup>15</sup>

These remarks are not intended to imply that welfare findings will be unfavourable. Many people have personal knowledge of couples, female or male, who have provided a sound and caring environment for children. The argument here is not about these empirical claims but rather about rights. It is about setting up systems which intentionally deprive some children of childhood's historic expectations – especially knowledge of, or contact with, their biological parents. The desire to have a child can be very strong, but the right *to* a child is not the same as the right *of* a child and questions arise that it has never before been necessary or possible to ask: do children have a right to a mother, a right to a father, or even a right to two parents one male, one female? Do they, at least, have a right to knowledge of their own genetic heritage? This is a new and untrodden area for society. It is also an issue that cannot be settled by appeal to the broad international recognition already accorded to family-related rights. For what the authors of the international declarations had in mind was not technological assistance in child-bearing, but rather the possibility that a totalitarian state might take forcible measures to *prevent* people having children.

The response to these questions is often to argue that it is not possible to violate the rights of children before they are born. But the idea of protecting future claims before their owner can assert them is well established in both law and ethics. For example, an infant's inheritance can be protected, and a child can apply for compensation for an incapacitating injury it has suffered at the foetal stage, providing it survives those injuries and passes the birth threshold. New possibilities bring new ethical considerations and in this case, there may well be a conflict between what some existing human beings want or appear to need and what another future person might be entitled to. The important point here is that some adults may

find that rights they consider important, and that other people enjoy, were taken away from them by actions and decisions made by other people before they were born.<sup>16</sup>

A simpler response, however, may be that provided by Maggie Gallagher: 'if we lose the idea that marriage is, at some basic level, about the reproduction of children and society, if our law rejects the presumptions that children need mothers and fathers, and that marriage is the most practical way to get them for children, then we cannot expect private tastes and opinions alone to sustain the marriage idea'.<sup>17</sup>

What emerges from these considerations is a picture of a kind of *de facto* alliance to create a new ideology of marriage and the family across the western liberal democracies. A broader perspective supports this perception.

In September 2001 a Commission on European Family Law (CEFL) was set up to add a specifically European voice to those of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform Laws (NCCUSL). Its declared aim was to look into means for harmonising family law across the European countries, linking this with parallel developments in other parts of the western world. We have now seen concerted moves by political leaders who are in a decision-making position to precipitate unplanned and sudden legislation onto the statute book in the face of strong public opposition in both Britain and France.

So what are being proposed are not, as many people imagine, a set of minor changes to conditions affecting only a small minority. On the contrary, it is an ambitious attempt to re-write the concept of the family in its entirety. This perception was clearly expressed by a Canadian judge, Justice Robert Blair. Commenting on the issue of same-sex marriage he said:

'This is not an incremental change in the law. It is a profound change. Although there may be historical examples of the acceptance of same-sex unions, everyone acknowledges that the institution of marriage has been commonly understood and accepted for centuries as the union of a man and a woman. Deep-seated cultural, religious, and socio-political mores have

evolved and shape society's views of family, child-rearing and protection, and 'couple-hood' based upon that heterosexual view of marriage. The apparent simplicity of linguistic change in the wording of a law does not necessarily equate with an incremental change in that law. To say that altering the common law meaning of marriage to include same-sex unions is an incremental change, in my view, is to strip the word 'incremental' of its meaning.<sup>18</sup>

Many have been won over by the original argument that a ban on same-sex marriage is discriminatory. But the issues are at the same time wider and also deeper than they may have appreciated. Re-defining and de-gendering the couple dramatically redefines the parent in relation to offspring; as a consequence, parents must be recognised by law and society in purely legal and social terms: a parent is a person who has recognised a child, intended its existence and accepted responsibility for it.

Without adequate discussion of the implications, radical legal changes are going ahead in many parts of the democratic West, not least the move to abolish the ancient presumption that there is something special about the relation between a child and its two natural parents – something that is deeply entwined with the idea of marriage as a procreative institution. It is open to question whether those who have promoted this Bill have understood that such fundamental concepts as husband and wife, mother and father, son and daughter were at stake. Did they understand, too, that while the same-sex marriage debate is governed by concern to promote equal rights for a minority, it cannot but have implications for those of the majority?

# An Ordinary Voice

## Conor Marron

I am no seasoned and published author. I've actually found myself doing a lot of things for the first time this year. One moment you're swearing and gesturing at the computer screen when reading a news article, the next you're fronting a national campaign for marriage equality. So whilst other contributions may well give you a well-structured and eloquent breakdown of their arguments, you can consider this your slightly more unpolished argument from the average type of guy that we need to keep in mind when debating whom this whole issue will and will not affect.

My argument for same-sex marriage is actually quite a basic one, but then I *would* say that, because it strikes me as a no-brainer. So rather than jump straight to the point and then pose triumphantly, I think it's probably best to give an overview of how I came to be writing this paper, the arguments I've heard along the way, and how I've come to be of the opinion that marriage equality for couples regardless of sexual orientation or gender identity is one of the most important issues facing us today.

My partner and I set up the Coalition for Equal Marriage originally as a parody of the Coalition for Marriage campaign – which is against same-sex marriage – as we were astounded both at how ridiculous and how offensive a campaign could be whilst managing to maintain such a level of national media coverage. That quickly snowballed into a genuine coalition of organisations up and down the country, all coming together to voice opposition to the most vociferous attack on equality in our time.

For the first time I had a taste of what it must have been like to have been one of my older gay friends growing up in decades past, to hear people discussing on national television how awful you are. Discussing how, somehow, you were a

significant threat to the stability of western culture and society and that, somehow, you are a threat to children.

Fortunately, I have been born into a somewhat more enlightened time (or so I thought) where all the people I know scoff at the idea that gay people are to blame for Hurricane Katrina and Sandy, or the Boxing Day earthquake in the Indian Ocean. So all the negative things I've heard have been accompanied with a comforting don't-be-so-silly undertone.

This particular subject is different, however, because the ridiculous and offensive things that are being said about same-sex marriage are being said in our own back yard, and are, for some reason, being given serious consideration. They are *not* being reported with the same don't-be-so-silly undertone.

We are being told that we are a danger to children. A danger to children that we haven't had and may have no intention of having, by being a danger to the children of other parents by somehow influencing the behaviour of said child's parents through our wish to live our lives freely.

It is quite something to be single-handedly blamed for the steady decrease in marriage rates and the increase in rates of divorce. OK, so we haven't been blamed for it as such, but 'they' have been saying that should same-sex marriage be legalised, these 'social problems' will then continue to get worse: so they're claiming there's a link there somewhere. You'll have to forgive my vagaries around the arguments that the opposition are screaming from the rooftops, but unfortunately they're actually *their* vagaries. They have sound-bites and headlines, but no actual material behind their scaremongering.

***By their logic...***

I think I'll continue to hover around that whole claim about opposite-sex marriage, its decline, and how we need to keep it unique and sacred by excluding others in order to try and reverse its decline and undoing by divorce. That's one of the central arguments I've come across in debates since we started the campaign. In an attached argument, we are told that same-

sex marriage should not be legalised because we need to protect marriage and that all children should have the right to a mother and a father.

That whole argument, apart from being a huge side-step, is a gross oversimplification of an issue and has absolutely no regard for the concept of the universal nature of rights under the law. We are told that children perform better when brought up by their own mother and father within a marriage, and so we owe it to the children of the future to ensure they are brought up within that environment of man, woman and marriage.

Those who pose this argument also conveniently ignore all other current scenarios that are impacted by this assertion.

So, if children do better when brought up by their own mother and father within a marriage, and we want to protect that using the legislature, then we should really be doing the following:

1. Outlawing adoption when either of the parents is still alive.
2. Forcing marriage onto unmarried parents.
3. Figuring out what to do with the scenario of children born through extra-marital intercourse.

That might, and should, seem totally over the top for you. However, these are the most direct ways of protecting the upbringing of children, if what opponents of gay marriage say is true. These are measures which deal with the parents who are directly responsible for children. A person with an appreciation of the reality of family life in the modern world would accept that forcing a child to stay with a couple who have been forced to marry might actually not be in the best interests of the child, and that outlawing adoption would be barbaric when adoption may be the best opportunity a child has. Equally, surely a person with half a brain cell would accept that a same-sex couple marrying in Inverness would have absolutely no effect on the upbringing of a child brought up by an opposite-sex couple in Dudley.

I could quite easily come up with a similarly built argument about the welfare of children when looking at crime rates in inner-cities, or school grades in relation to parental income. One might find, and I'm talking a whole load of generalising nonsense here (if it's good for the goose it's good for the gander), that inner-city families are more likely to commit crime than those in rural areas. So let's stop inner-city citizens from being able to form families. Alternatively, one might find that as parental income increases, so too do the grades and job prospects of their offspring. So for the good of all offspring why are we not preventing low-income families from having children, to protect those children yet to be born?

You may well ridicule those ideas, and I would hope you would. Unfortunately what we're being told in arguments against same-sex marriage is even more preposterous however, because it doesn't even have an extremely loose basis in fact. We are told that same-sex marriage somehow weakens families, and that weakened families are more likely to have abortions. The two are then connected to say that same-sex marriage is a threat to the lives of unborn children. All the while the fact that same-sex couples themselves cannot have children is ignored, leading to further confusion as to how we are responsible for the lives that *other* people have created, and for the decisions that those parents make.

In claiming that same-sex marriage weakens marriage for heterosexual couples, opponents are casually discarding the fact that same-sex marriage has been absent in the UK throughout the whole of the recent decline in marriage. In short – it's not our fault. It's the straights that have weakened marriage, because they're the only ones that have been allowed in the clubhouse.

The idea of restricting childbirth only to those in rural areas and/or of high income are equally as offensive as the argument against same-sex marriage for the benefit of opposite-sex marriage and the protection of children. They all ignore the universal nature of basic human rights, and they assume an elitist approach toward society, applying blanket rules to all.

People of all levels of income have the right to marry, and to procreate. People of all geographic areas have the right to marry, and to procreate. This is because the rights belong to the individual and not to a combination of the individual and their circumstances. We are free to marry regardless of barriers in financial position, race, nationality, religion or region. We are not always free to marry the one we love. I have the right to marry, but I only have the right to marry a woman. For me that is a pointless right. In debates we are told that we already have the legal right to marry, and so our campaign is misleading. I find that similar in intelligence to arguing against a case of abuse in locking vegetarians in a room full of ham and saying, 'Well they can eat. They can eat ham, therefore there's not a problem here.' They *could*, they physically could, it would serve a physical, chemical, nutritional requirement, but they wouldn't want to. The argument doesn't stand because it is an oversimplification which ignores the psychological and emotional harm it would do to them.

I could marry a woman, go along with the whole thing, all the way to consummation, and we could pretend that everything is just hunky dory (though I'd be wishing it was more hunky than dory), but there would be the inevitable fallout caused by the fact that I just wouldn't be happy. She probably wouldn't be either, as she'd probably pick up on it, and there's the nightmare scenario of using one person as a means to an end, using a woman's life just to cover up the cracks in my fake life. I respect myself and others too much to ever construct such a ridiculous facade, and I genuinely worry for the people living closely to people who propose such a counter argument.

### *Marriage matters*

I want to now touch on Ann Widdecombe's tired old rehashing of the argument that marriage appears over 3,000 times in British legislation and that therefore we can't just go changing it.

I'm fairly sure the word 'tax' appears quite a lot too, and for an ex-Conservative MP to make those comments is a bit rich since the Conservatives don't seem to have had any problem making changes to the tax system overnight to benefit their friends at the top. So here is yet another example of an over-simplified argument trotted out time and again as a sound-bite, just to give supporters something to nod at and applaud. Anyone with half a brain, an understanding of British history and culture, and a bit of national pride knows all too well that we don't shy away from things in Britain just because they are difficult. If we're faced with the opportunity to do the right thing, we should do the right thing regardless. I'm sure there was a bit of a kerfuffle when women got the vote, and I'm sure there were a lot of changes required, but I expect that Ann Widdecombe is glad that her line of argument wasn't given the time of day in that case.

Furthermore, if the word marriage does appear in British legislation over 3,000 times then this just goes to show the depth and breadth of the human and social institution, evidently central to British culture, from which gay people are still being excluded. If anything Ann Widdecombe has provided us with a corker of an argument *for* same-sex marriage.

Opponents of same-sex marriage would counter my earlier point about a same-sex couple marrying in Inverness having no effect in Dudley, by telling us that we are changing wider society to be inclusive of same-sex couples, which will have an effect on employment and education. I have a number of responses to that.

The first is that gay couples have been around for quite some time. We have been open and honest about our relationships and our lives for quite some time now too; open and honest at home, at work, with our friends, with our families, out in public. Wherever we are we have been ourselves and people have come to accept that and appreciate that we are just normal citizens going about our business. My point is that if there were any change to society by its

acceptance of same-sex couples it has already happened. We're already there. We're not *all* the way there, we're waiting for same-sex marriage equality so that we can pass that finishing line in terms of equality before the law, but as far as day-to-day interactions go for most people, there's no huge societal shift required. It's already happened.

The second point, in response to the idea that same-sex marriage could have an effect on employment is: good. If you are in a position, for example, where you are required to carry out a service on behalf of the state, but you want to be able to discriminate where the state does not, then maybe you should not be working on behalf of the state. There's a distinction that needs to be made here. If you work on behalf of the state, your own beliefs have no place, because they are not the beliefs of the state. Can you imagine an official working at a polling station refusing to accept the votes of women? Go back some decades and you'd see just that, but it has no place in 2013 and neither does a prejudice against same-sex couples.

The third point addresses concerns that same-sex marriage will have an effect on education, and that some children may be taught that same-sex couples can get married just like opposite-sex couples. This is one of the most alarming arguments, as it actually makes me fear for the children of those who oppose same-sex marriage. It confirms their willingness to pass on their prejudices to their children, both perpetuating the kind of hate we have to deal with and seriously narrowing the opportunities for the personal development of the children.

The whole point of education is to prepare children for when they move on into the adult world. We prepare them by broadening their minds with mathematics and an understanding of the sciences, literature, art, history, geography, and languages. We teach them about different cultures, but we also teach them about ours. To shelter children from an understanding of the real world, and how it and the people in it operate, is to leave them unprepared and disadvantaged. They are free to make up their own minds about the world, but they need to know how it is in order to put them on an equal footing

with others so that they may succeed in life. Not to do so is to intentionally disadvantage the child.

I believe in a society where all citizens are equal in the eyes of the law, meaning they are all of equal inherent value, and all have equality of opportunity. I believe in equality of civil and human rights, and that these rights belong to the individual and not to a combination of the individual and their circumstances. I also believe in the freedom to live our lives how we choose, so long as it harms no other individual, and in our right to pursue happiness in keeping with our nature. I also believe in humanity bravely facing the universe as it is. We are not facing the universe as it is when we try and argue the case for hiding truths from our children.

Gay people do not have equality in the eyes of the law if marriage occurs as frequently as Ann Widdecombe says it does, whilst we're excluded. We do not have equality of civil and human rights, as we do not have the right to marry someone we *want* to marry. We do not have the right to live our lives as we choose, to marry the person we love, and to pursue happiness in keeping with our nature. If we are to bother continuing with this whole civilised society experiment that has been going on for the past tens of thousands of years, then I think we should occasionally pause for a bit and reassess whether we've got those fundamental basics right. We need to walk the walk if we're going to talk the talk on the world stage and espouse human rights and civil liberties to other countries that are a little further back on their own paths.

For this reason I think that same-sex marriage is one of the most crucial issues facing us in this age. It is such a fundamental issue of equality, such a contentious issue and one with so much focus on principle that it is a true test of the qualities of our civilisation. It is the first such test we have had in my lifetime where we can really pause, look at what we have done and look at where we want to get to. We need to recognise that this is a turning point for our future and in the face of the condemnation from those who would drag us back, we need to nail our colours to the mast. We must reaffirm who we are,

AN ORDINARY VOICE

what we stand for, and plant ourselves firmly on the solid foundations of equality, freedom and pursuit of happiness, so that we may be a more united society, to help us face whatever the future brings.

# Afterword

## Standing the Test of Time

**Anastasia de Waal**

It is said that the survival of an institution depends on whether it stands the test of time. In the case of marriage, what *is* the test of time? Is it marriage's ability to withstand or to adapt to change?

Critics have argued that the Government's introduction of their legislation for same-sex marriage is arbitrary and irrelevant, not least in light of 'greater' economic priorities. There is perhaps something in the charge of ill-timing, but it is, if anything, on the grounds of the importance rather than the irrelevance of the move. The pace of the legislation has arguably served as a disservice to its significance, and risked some of its legitimacy. By not giving it enough room for discussion, same-sex marriage will be felt by some to have been achieved politically rather than socially. Furthermore, the feeling that opposition had been brushed aside rather than engaged with in the process was always likely to exacerbate the risk of creating a two-tiered institution: 'marriage' and 'gay marriage'. At the very least, it is fair to say that there should have been a fuller discussion.

For marriage to be the dynamic, rather than stagnant, institution it has shown itself to be, shifts within it need to reflect social as well as legislative change. Much of the discussion around same-sex marriage has operated in something of a vacuum, looking less at how modern marriage itself has evolved and more at rigid definitions of institutions and homosexuality. So where is marriage in twenty-first century Britain?

A key contributor to marriage's survival has been its adaptation to shifts in public attitudes. For example, the continued relevance of marriage in this country today has in

large part been to do with its ability to detach itself from past impediments to equality, most recently between the sexes. By evolving and mirroring society rather than being an impervious vessel of 'tradition', marriage has been able to survive – and reflect – diversity in choice.

Marriage has become increasingly detached from its past connotations and treated not as a vacuum in which either gender inequality or equality breed, but rather as a reflector of relations between men and women in wider society.

This extract is taken from a previous Civitas analysis of the popularity of marriage among young people in contemporary Britain, carried out in 2008. Based on a 2007 Ipsos Mori survey gauging the attitudes of young people (20-35 year-olds) towards marriage, we sought to understand whether or not they wanted to get married, and why. We found that, interestingly, the majority (70 per cent) did want to marry, with only 18 per cent actively not wanting to.

Our analysis aimed to unpick why marriage was so popular, even in a Britain where cohabitation was completely socially acceptable and widely practised. Our conclusion was that, in spite of alternatives, marriage hadn't been relegated to the past because by being responsive to social change it had remained very much relevant to the present.

There is an active demonstration of this. Marriage's modern separation from religion in British society demonstrates its adaptability to social change. Why has marriage not suffered the same fate as the Church of England: an institution present and symbolically still very much at large, but of waning relevance to many people's everyday lives? Declining church-going could be reflected in a decline in enthusiasm for marriage, but it isn't. Marriage has adapted.

Over two-thirds of weddings in the UK are now civil, and in line with the lesser prominence of religion in our society, the number of respondents in our 2007 survey who wanted to marry for religious reasons was very small (five per cent). Instead, the main reason for wanting to get married was commitment. Although it might be assumed that cohabiting

itself constitutes commitment, particularly in light of now common home co-ownership as well as co-parenting amongst cohabitantes, for the majority of the young people surveyed, marriage had a differentiating significance from other forms of adult relationships. Emphasising this distinction, we found that marriage was most popular amongst cohabiting respondents.

A further expression of this reverence for marriage has been the apparent *disinterest* in this country, as compared for example internationally, in heterosexual civil partnership: a parallel set of legal arrangements without the stamp of marriage. This highlights the demand for marriage *itself*, providing a notable parallel with distinctions between civil partnership and gay marriage. And, mirroring these attitudes, although increasing numbers of us divorce and increasing numbers of us cohabit, it is still the case that most of us do marry. When the majority of partners do access the institution of marriage, the minority who are unable to do so stand out starkly.

Whilst the 'slippery slope' argument is often cited by opponents of same-sex marriage (that is, it is only a matter of time before there will be other 'bizarre' additions to those allowed to marry), the reality is that there is no legitimate comparable scenario to extending marriage to same-sex couples. Sometimes polygamy and bestiality are given as examples of the next amendments to marriage if change is allowed; yet of course, these are not accepted in our society. Homosexuality and same-sex partnership, on the other hand, are.

But to go forward we need to go back and consider this affirmation: as a country, where are we in relation to our acceptance of homosexuality? It seems that at the heart of today's same-sex marriage debate is not so much the institution of marriage but our views on homosexuality and its place in society. To a certain extent at least, the same-sex marriage debate could be said to be providing a platform from which to express views questioning the homosexual *family*, albeit

anachronistically in legislative terms, given the availability of gay adoption and reproductive technologies.

In his contribution, Stonewall chief executive Ben Summerskill talks of Britain as a 'live and let live' society. Perhaps this approach resonates with our attitudes to homosexuality more than we recognise. Have we considered that 'tolerant Britain' might actually represent a difference between tolerating rather than actually embracing homosexuality? And is this encapsulated by differing receptions for civil partnership and gay marriage?

Might it be the case, in other words, that while there is little unease with a legal recognition of homosexual partnerships, as well as homosexuality itself, a bigger section of society than we are willing to recognise want to stop short of bringing these under the auspices of 'ideal' relationships? In particular, ideal relationships within which to raise children. Ultimately, the question to ask is: how far along the trajectory away from homophobia – bearing in mind its literal meaning of a fear of homosexuality – have we come as a society? We may not be a nation of 'homophobes', but can we claim to be a nation of 'homophiles'?

So who are the critics of extending marriage to gay couples? There has been a sense that reservations expressed by faith groups about same-sex marriage do not speak for wider society. As a result, the churches' comparatively small stake in both society and marriage (based on church-going and church-wedding numbers), but leading role in opposition of gay marriage, has reflected the stymied debate. First, associations with religion have fostered the idea that concerns about same-sex marriage legislation do not reflect the views of the faith-less, as well as holding no validity outside the parameters of religious teachings. Yet the latest polling on same-sex marriage reveals it to be supported by only 54 per cent (YouGov, May 2013), implying more widespread reservations than amongst the religious alone. Secondly, the centrality of faith groups in the debate could be said to be an indictment of the truncated way in which discussion around the concept of gay marriage

has unfolded. In short, the faith focus has both resulted from and entailed a diversion of the discussion away from broader society. The religious establishment cannot speak for marriage in its entirety, but nor can we easily conclude that only the religious have reservations about same-sex marriage. The nature of the debate, however, has risked pigeon-holing same-sex marriage as a somehow peripheral battle between 'the gay' and 'the religious', rather than the society-as-a-whole issue it surely should be. Needless to say, the limitations of the debate are not the 'fault' of either faith or gay rights advocacy groups, the fault lies in the debate's unsatisfactory unfolding. Furthermore, some sections of the religious community have actively supported the introduction of same-sex marriage.

Engaging with these reservations takes us somewhere that many do not want to go. But in the end, surely a lack of discussion on the subject of homosexuality is not curbing narrow-mindedness but perpetuating it. By not talking about homosexuality, we are in danger of encouraging a set of stereotypes rather than the heterogeneous sexual, companionate and familial relationship that heterosexuality is granted. Arguably, a more liberal and more progressive approach would be to stop treating all discussion around homosexuality as potentially promoting homophobia. Not least because discussion can break down barriers built on misinformation.

So what will be the eventual outcome when the Marriage (Same Sex Couples) Bill passes through Parliament? In five years' time, will there still be opposition to gay marriage? It is often argued that pushing through legislative changes paves the way for those changes to follow in society. While there is truth in this, the way in which 'political correctness' has become central to our daily lexicon suggests that such an approach does not necessarily achieve change on the ground, but risks leaving a chasm between the ruling elite and the man on the street. In the case of same-sex marriage, there is an argument that hurrying through the legislation, rather than allowing more discussion on the wider issues, may have missed opportunities

for social change on gay partnership, thereby *slowing down* potential change.

Debate is a central aspect of a liberal society – on the grounds of seeking a more consensual and *less* individualised society, rather than seeking permission for every individual to have their right to any opinion. Liberalism matters in this context for us to become a more cohesive society, rather than a ‘live and let live’ one in which lives are increasingly detached from one another. For that type of liberalism to be fostered, we need to back away from the ‘one-way street’ incarnation where ‘liberal’ views are allowed but not ‘illiberal’ ones. Nick Clegg spoke about the importance of allowing a free vote for his party’s MPs on the grounds that it would otherwise be an illiberal way to bring in liberal policy. Yet he earlier labelled opponents of same-sex marriage ‘bigots’ (a move he did later express regret about). If we are to genuinely move forward in society, we must surely engage in discussion with each other on how to improve it, not merely shut down sections of opinion. And nothing performs as great a disservice to dialogue as moral righteousness – whether you believe the moral right is on your side or not. However uncomfortable dialogue may seem, the opposite is potentially far more pernicious. After all, historically, anti-establishment dissent has achieved good *and* bad.

Ultimately, as vital as an open forum for discussion on the issue is, legislating for same-sex marriage serves two very important purposes. The first is access to the mainstream household unit for homosexuals; the second is access to social change for marriage. For both a broader acceptance of homosexuality and for the continued acceptance of marriage, enabling same-sex couples to marry is much more than symbolic. Marriage is an endorsement by society. We can see that enabling gay couples to marry therefore enables homosexuals to have their relationships and sexuality ‘endorsed’ by society, should they wish that. Just as in the case of heterosexual couples who do not wish to be part of the state-endorsed apparatus, gay couples need not marry; what matters

## THE MEANING OF MATRIMONY

is access to the institution and all its trappings. Unfortunately, the hurried nature of the Bill, without adequate discussion, undermines some of its legitimacy. Haste has hindered rather than helped our deeply held belief in the need for an open society, with the risk of dividing more than uniting us. An open society is an inclusive society, and that means not closing down debate, as well as opening up institutions to reflect social change.

## *Endnotes*

### **The Destruction of Conjugalit**

- 1 Coalition for Marriage petition; [www.c4m.org.uk](http://www.c4m.org.uk)
- 2 The survey was carried out for Catholic Voices in February 2012 by the independent pollster ComRes. Findings at: <http://www.comres.co.uk/poll/625/catholic-voices-marriage-poll.htm>
- 3 Scruton, R. and Blond, P., 'Marriage: union for the future or contract for the present? A ResPublica Green Paper', February 2013, p. 5.
- 4 Girgis, S., Anderson, R.T., George, R. P., *What is Marriage? Man and Woman: a Defense*, New York: Encounter Books, 2012, p. 7.
- 5 Muir, H., 'Stonewall's Bigot of the Year award prompts banks' threat to withdraw sponsorship', *Guardian*, 30 October 2012.
- 6 This is brilliantly exposed in the Chief Rabbi of France's paper: Bernheim, G., 'Mariage homosexuel, homoparentalité et adoption: ce que l'on oublie souvent de dire', 2012.
- 7 'Here's the thing: they are bigots. In the end, the only reason to deny a gay couple the right to marry is a belief that their relationship is in some way inferior to a heterosexual one. That's bigotry. I have no doubt that the opponents of same-sex marriages will be seen, in fairly short historical order, in the same light as those who opposed mixed-race marriages.' Richard Reeves, 'The case for a truly liberal party', *New Statesman*, 19 September 2012.
- 8 'I recognise that not all couples who get married have children for a variety of reasons, and similarly that many children are now born outside of marriage. My concern, however, is that by moving to a definition of marriage that no longer requires sexual difference, we will, over time,

ultimately decouple the definition of marriage from family life altogether. I doubt that this change will be immediate. It will be gradual, as perceptions of what marriage is and is for shift. But we can already see the foundations for this shift in the debate about same-sex marriage. Those who argue for a change in the law do so by saying that surely marriage is just about love between two people and so is of nobody else's business. Once the concept of marriage has become established in social consciousness as an entirely private matter about love and commitment alone, without any link to family, I fear that it will accelerate changes already occurring that make family life more unstable. (I should add, that I also suspect it will make marriage ultimately seem irrelevant. After all, how long before gay people begin to say, as many straight couples of my own generation have begun to say, "if marriage is just about love, why would I need a piece of paper to prove it?") Sarah Teather, 'Why I voted against gay marriage'; <http://cvcomment.org/2013/02/05/sarah-teathers-statement-why-i-voted-against-gay-marriage/>

- 9 The most statistically robust survey is the 2008 British Social Attitudes Survey (BSA): (n=3,000) which found 63 per cent oppose SSM when told about civil partnerships. A YouGov poll in March 2012 for the *Sunday Times* used the same three propositions as the BSA: it found 47 per cent against SSM and 43 per cent in favour. A ComRes poll for the Coalition for Marriage in January 2012 found 51 per cent against. In March 2012, a ComRes poll for Catholic Voices found 59 per cent support for civil partnerships and 70 per cent in favour of the current definition of marriage. Other polls which do not mention civil partnerships and ask if people favour 'marriage equality' have attempted to prove majority support for SSM. But the least that can be said is that British opinion is divided, with a clear majority opposing.

## ENDNOTES

- 10 O'Neill, B., 'Why gay marriage is a very bad idea', *spiked*, 22 March 2012.
- 11 The Bill, the Government tirelessly points out, makes clear that religious organisations which oppose SSM are under no obligation to perform same-sex weddings, and in the case of the Church of England a 'quadruple lock' has been introduced to prevent it from doing so. This, the Government says, should be sufficient to prevent the Churches from facing vexatious discrimination claims. The Churches, and their legal advisors, strongly beg to differ. Both the Catholic and Anglican bishops' submissions make clear the many ways in which the Churches will be vulnerable to endless legal claims, as well as increasing restrictions on their capacity, through their charities and schools, to witness to the value of conjugal marriage.
- 12 Church of England response to the SSM Government consultation;  
<http://www.churchofengland.org/media/1475149/s-s%20marriage.pdf>
- 13 'Cohabitation and marriage in Britain since the 1970s', Population Trends 145, Autumn 2011, ONS, p. 16; 'The proportion of marriages ending in divorce', Population Trends 131, Spring 2008, ONS, p. 28. According to the Statistical Bulletin ('Marriages in England and Wales', 2010, ONS, February 2012, p. 9) there were 277,740 marriages entered into in the UK in 2010, a rise of 4 per cent on the previous year.
- 14 'Myths about equal marriage: setting out the truth';  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/86497/Equal\\_Marriage\\_Mythbuster.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/86497/Equal_Marriage_Mythbuster.pdf)
- 15 'The Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal

- penalties against them'. Statement of the Holy See Delegation at the 63rd session of the General Assembly of the United Nations on the declaration on human rights, sexual orientation and gender identity, 18 December 2008.
- 16 'New York bishops on same-sex marriage', 9 June 1009; [www.zenit.org](http://www.zenit.org)
- 17 See Church of England responses to the Bill at: <http://www.churchofengland.org/our-views/marriage.-family-and-sexuality-issues/same-sex-marriage.aspx>; Catholic Church responses at: <http://www.catholicerald.co.uk/news/2013/01/29/bishops-briefing-on-same-sex-marriage-bill-full-text/>
- 18 Bowater, D., 'Gay marriage is not a human right, according to European ruling', *Daily Telegraph*, 21 March 2012.
- 19 Catholic bishops of England and Wales, letter on same-sex marriage, 5 March 2012.
- 20 Statement by Catholic bishops of New York, 1 June 2009; <http://www.zenit.org/en/articles/new-york-bishops-on-same-sex-marriage>
- 21 Sandel, M., *Justice: What's the right thing to do?* London: Allen Lane, 2009, p. 253.
- 22 Williams, R., *Faith in the Public Square*, London: Bloomsbury, 2012, ch. 13.
- 23 'A Response to the Government Equalities Office Consultation – 'Equal Civil Marriage' – from the Church of England', #16.
- 24 Response of the Catholic bishops of England and Wales to the Government consultation on 'equal civil marriage', June 2012.

ENDNOTES

- 25 CBCEW, 'Response from the Catholic Bishops' Conference of England and Wales to the Government Consultation on Equal Civil Marriage', June 2012, #16.
- 26 <http://www.christian.org.uk/news/brazil-allows-three-person-civil-unions/>
- 27 'Mexico City proposes temporary marriage licences', *Daily Telegraph*, 30 September 2011.
- 28 British Columbia Supreme Court judgement, 23 November 2011, para 1350; <http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm>
- 29 Miller, B., 'Same-sex marriage ten years on: lessons from Canada', *Public Discourse*, 5 November 2012.
- 30 'Labour defends family vision', *BBC Online*, Network, 4 November 1998.
- 31 'Social Justice: Transforming Lives', DWP, March 2012, p. 16.
- 32 'Desde que hay bodas gays, en España la nupcialidad baja el doble que en Italia o Francia'; [www.religionenlibertad.com](http://www.religionenlibertad.com), 12 July 2012.
- 33 Heneghan, T., 'French Church says gay marriage law just for the few', *Reuters*, 3 November 2012.
- 34 Miller, B., 'Same-sex marriage ten years on', *Public Discourse*, 5 Nov 2012; <http://www.thepublicdiscourse.com/2012/11/6758/>
- 35 Bazán, J.L., 'Report on the impact of the Spanish same-sex marriage act in national law', 22 September 2009; [http://www.academia.edu/1550436/Report\\_on\\_the\\_Impact\\_of\\_the\\_Spanish\\_Same-Sex\\_Marriage\\_Act\\_in\\_National\\_Law](http://www.academia.edu/1550436/Report_on_the_Impact_of_the_Spanish_Same-Sex_Marriage_Act_in_National_Law)
- 36 'CV publishes first ever poll of gay attitudes to same-sex marriage'; <http://www.catholicvoices.org.uk/monitor-blog/2012/06/cv-publishes-first-ever-poll-gay-attitudes-same-sex-marriage>. See also reports in *Daily Mail* ('Most

- homosexuals indifferent to David Cameron's drive for gay marriage', 8 June 2012) and *Daily Telegraph* ('Gay marriage: poll suggests doubts in gay community', 8 June 2012).
- 37 Morgan, P., Submission to Parliament on SSM Bill; <http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m94.htm>; see also: 'Gay marriage will destabilise family life, sociologist warns', *Daily Telegraph*, 4 March 2013.
- 38 Coren, M., 'Canadian crackdown', *National Review Online*, 11 June 2012.
- 39 For example, Adrian Smith, a housing manager demoted because of his views on marriage expressed on Facebook; the former leader of the SNP, Gordon Wilson, voted off Dundee Citizens Advice Bureau for supporting traditional marriage; and Islington Council, which effectively sacked a registrar, Lilian Ladele, for wanting to opt out of registering same-sex partnerships.
- 40 Bingham, J., 'Catholic schools face "indoctrination" claims over gay marriage', *Daily Telegraph*, 25 April 2012.
- 41 Paton, G., 'Teachers face sack for refusing to endorse gay marriage', *Daily Telegraph*, 10 September 2012.
- 42 See: <http://catholicvoicesmedia.files.wordpress.com/2013/01/cbcew-briefing-on-marriage-same-sex-couples-bill.pdf> and <http://www.churchofengland.org/media/1657614/ssmarriagebillbriefing.pdf>

### **Marriage is Not a Timeless, Unchanging Institution**

- 1 Ember, C. R., Ember, M., 'Marital Residence and Kinship', *Cultural Anthropology* (Eighth Edition), Upper Saddle River, NJ: Prentice Hall, 1996, Chapter 11, pp. 197-219; Pasternak, B., Ember, C.R., Ember, M., *Sex, Gender, and Kinship: A Cross-*

ENDNOTES

- Cultural Perspective*, Upper Saddle River, NJ: Prentice Hall, 1997; Gough, K., 'The Nayars and the Definition of Marriage', Grayburn, N., *Readings in Kinship and Social Structure*, NY: Harper and Row, 1971, pp. 365-77; Povinelli, E., 'Sex Acts and Sovereignty: Race and Sexuality in the Construction of the Australian Nation', Lancaster, R.N., di Leonardo, M., *The Gender/Sexuality Reader: Culture, History, Political Economy*, NY: Routledge, 1997, pp. 513-29, esp. pp. 521-23; Murray, S.O., 'Sentimental Effusions' of Genital Contact in Amazonia', *Latin American Male Homosexualities*, Albuquerque: University of New Mexico Press, 1995, pp. 264-73; Evans-Pritchard, E.E., *Kinship and Marriage Among the Nuer*, Oxford: Oxford University Press, 1951; Herskowitz, M.J., 'A Note on "Woman-Marriage"', in Dahomey', *Africa*, Vol. 10, 1937, pp. 335-41; Murray, S.O., Roscoe, W., *Boy-Wives and Female Husbands: Studies in African Homosexualities*, NY: St Martin's Press, 1998; Roscoe, W., *Changing Ones: Third and Fourth Genders in Native North America*, NY: St Martin's Press, 1998, and *The Zuni Man-Woman*, Albuquerque: University of New Mexico Press, 1991; Schneider, D.M., *A Critique of the Study of Kinship*, Ann Arbor: University of Michigan Press, 1984; Sahlins, M., *What Kinship Is – And Is Not* Chicago: University of Chicago Press, 2012.
- 2 Brain, R., *Friends and Lovers*, New York: Basic, 1976; Leupp, G.P., *Male Colors: The Construction of Homosexuality in Tolugawa, Japan*, Berkeley: University of California Press, 1997; di Leonardo, M., 'Warrior Virgins and Boston Marriages: Spinsterhood in History and Culture', *Feminist Issues*, Fall 1985, pp. 47-68; Faderman, L., *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present*, New York: William Morrow, 1981.
- 3 Ogden, D., 'Homosexuality and Warfare in Ancient Greece', *Battle in Antiquity*, Classical Press of Wales, 2009, pp. 107-68; Compton, L., 'An Army of Lovers – The Sacred Band of

- Thebes', *History Today*, Vol. 44, No. 11, 1994; Plato, *Lysis*, *Phaedrus*, *The Symposium*; Aristotle, *Nicomachean Ethics*.
- 4 Boswell, J., *Same-Sex Unions in Pre-Modern Europe*, New York: Villard Books 1994.
  - 5 Macfarlane, A., *Marriage and Love in England: Modes of Reproduction 1300-1840*, Oxford: Blackwell, 1986; Macfarlane A., 'Love and Capitalism', *The Culture of Capitalism*, Oxford: Blackwell, 1987.
  - 6 Stacey, J., *Unhitched: Love, Marriage, and Family Values from West Hollywood to Western China*, New York: NYU Press, 2011.
  - 7 Eller, C., *The Myth of Matriarchal Prehistory: Why an Invented Past Won't Give Women a Future*, Boston: Beacon Press, 2000, pp. 94-96; Angier, N., *Woman: An Intimate Geography*, NY: Anchor, 1999, pp. 382-83; Beckerman, S., 'The Bari Partible Paternity Project: Preliminary Results', *Current Anthropology*, Vol. 39, 1998, pp. 164-67; Hill K., Kaplan, H. (ed.), 'Tradeoffs in Male and Female Reproductive Strategies Among the Ache, Pt 2'; Betzig, L., *Human Reproductive Behavior: A Darwinian Perspective*, Cambridge: University of Cambridge Press, 1988, pp. 291-305, pp. 298-99; Sørnum, A., 'Growth and Decay: Bedamini Notions of Sexuality', Herdt, G. (ed.), *Ritualized Homosexuality in Melanesia*, Berkeley: University of California Press, 1984, pp. 318-96, p. 325; Kelly, R.C., 'Witchcraft and Sexual Relations: An Exploration of the Social and Semantic Implications of the Structure of Belief', in Brown, P. and Buchbinder, G. (eds.), *Man and Woman in the New Guinea Highlands*, Washington, DC: American Anthropological Association, 1976, pp. 36-53, pp. 43-44, 46; Strathern, M., *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies*, Manchester University Press, 1992 and *Kinship, Law and the Unexpected: Relatives are Always a Surprise*, Cambridge University Press, 2005.

## ENDNOTES

- 8 Lévi-Strauss, C., *The Elementary Structures of Kinship*, Boston: Beacon, 1971.
- 9 Greenberg, D.F., *The Construction of Homosexuality*, Chicago: University of Chicago Press, 1988, pp. 10-11, 77-88.
- 10 Bagemihl, B., *Biological Exuberance: Animal Homosexuality and Natural Diversity*, NY: St Martin's Press, 1999; Roughgarden, J., *Evolution's Rainbow: Diversity, Gender, and Sexuality in Nature and People*, Berkeley: University of California Press, 2009.
- 11 On gay parenting, in particular, see Stacey, J. and Biblarz, T.J., '(How) Does the Sexual Orientation of Parents Matter?,' *American Sociological Review*, Vol. 66, No. 2, 2001, pp. 159-83.
- 12 Lancaster, R.N., *The Trouble with Nature: Sex in Science and Popular Culture*, Berkeley: University of California Press, 2003, see especially pp. 285 -348; Whitehead, J.C., *The Nuptial Deal: Same-Sex Marriage and Neo-Liberal Governance*, Chicago: University of Chicago Press, 2011; Stacey, J., 'Unequal Opportunity', *New York Times*, 3 July 2011.
- 13 Duggan, D., 'Holy Matrimony!' *The Nation*, 15 March 2005.

### **A Liberal Critique of Gay Marriage**

- 1 Tatchell, P., 'The gay movement has retreated from radical idealism to cautious conformism', *Independent*, 6 July 2002.
- 2 'Clary: Gay marriage debate is the Suffragettes argument of the 21st century', *ITV.com*, 26 May 2012.
- 3 Barrett, E. and Johnson, W., 'Nick Clegg outlines new domestic violence guidelines', *Independent*, 19 September 2012.
- 4 Eskridge, W.N., Jr. and Spedale, D.R., *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence*, Oxford: Oxford University Press, 2006.

- 5 Eskridge and Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence*, 2006.
- 6 Rimmerman, C.A. and Wilcox, C. (eds.), 'Will the courts set us free?', *The Politics of Same-Sex Marriage*, Chicago: University of Chicago Press, 2007.
- 7 d'Ancona, M., 'The case for gay marriage is fundamentally conservative: it will strengthen Britain's social fabric', *Daily Telegraph*, 10 March 2012.
- 8 'Catholic equal marriage referendum a "colossal waste of money"', *Pink News*, 16 July 2012.
- 9 'Prop 8: tyranny of the majority', *Huffington Post*, 20 March 2009.
- 10 'Prop 8: tyranny of the majority', 20 March 2009.
- 11 'Prop 8: tyranny of the majority', 20 March 2009.
- 12 'Obama, gay marriage and a win for bigotry in North Carolina', *Los Angeles Times*, 9 May 2012.
- 13 'Report on NC Amendment One shows what politics-fuelled anti-gay hate looks like', New Civil Rights Movement, 7 May 2012.
- 14 Quoted in 'North Carolina approves ban on same sex marriage by wide margin', NBC News, 8 May 2012.
- 15 'Bigots unite against Obama over gay marriage', *The Free Thinker*, 10 May 2012.
- 16 Searls, H., 'The defeat of Prop 8 is a Pyrrhic victory', *spiked*, 11 August 2010.
- 17 Furedi, F., 'Gay marriage: redrawing the American political map', *spiked*, 14 May 2012.
- 18 Freeman, H., 'New York must pass the same-sex marriage bill', *Guardian*, 21 June 2011.

## ENDNOTES

- 19 Quoted in Rimmerman and Wilcox, 'Will the courts set us free?', 2007.
- 20 Quoted in Rimmerman and Wilcox, 'Will the courts set us free?', 2007.
- 21 Quoted in 'Stonewall: the birth of gay power', *International Socialist Review*, January-February 2009.
- 22 Tatchell, 'The gay movement has retreated from radical idealism to cautious conformism', 6 July 2002.
- 23 Strasser, M., *On Same-Sex Marriage, Civil Unions and the Rule of Law*, Westport: Praeger Publishers, 2002.
- 24 Shell, S.M., 'The liberal case against gay marriage', *National Affairs*, Summer 2004.
- 25 Rauch, H., *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America*, New York: Henry Holt & Co., 2004.
- 26 Quoted in Rimmerman and Wilcox, 'Will the courts set us free?', 2007.
- 27 See O'Neill, B., 'March of the gay penguins', ABC News, 16 December 2011.
- 28 Hari, J., 'The intriguing tale of the gay sheep', *Independent*, 4 January 2007.
- 29 Crawley, W., 'Peter Tatchell says homosexuality isn't natural', BBC News Online, 5 July 2008.
- 30 See O'Neill, B., 'The bus advert storm confirms that Christians are now more progressive than gay rights activists', *Telegraph Online*, 13 April 2012.
- 31 Lasch, C., 'What's wrong with the Right?', *Tikkun* (1), 1987.

## Two Myths about Same-Sex Marriage

- 1 See for example, Tatchell, P., (2005) 'Civil Partnerships Are Sexual Apartheid'; [www.petertatchell.net](http://www.petertatchell.net). The problem with the apartheid analogy is the implicit suggestion that recognising relationships through something called civil partnership rather than through marriage is analogous to the atrocities committed by the white minority state on black citizens during the apartheid era in South Africa. Such an analogy arguably derives from the unacknowledged white privilege of those making such arguments.
- 2 It appears to have originated from the Twitter account @MorgonFreeman, 16 August 2012. Two days later it had 44,221 re-tweets.
- 3 Doughty, S., 'Plans to allow gay marriages "could force Church to split from the state" for first time in 500 years', *Daily Mail*, 12 June 2012.
- 4 Equalities Office, 2012: para 1.7.
- 5 Equalities Office, 2012: para 2.12.
- 6 Miller, M., 'Why we need the quadruple lock on gay marriage', *Huffington Post*, 14 December 2012.
- 7 Marriage (Same Sex Couples) Bill 2012-13, clause 2(1)-2(3).
- 8 Marriage (Same Sex Couples) Bill 2012-13, clause 2(5).
- 9 Marriage (Same Sex Couples) Bill 2012-13, clauses 1(3) and 1(4).
- 10 Coalition for Marriage, 'Euro judges: gay marriage isn't a human right. But churches could end up being forced to do gay weddings', 22 March 2012 [www.c4m.org.uk](http://www.c4m.org.uk); Doughty, S., 'Plans to allow gay marriages "could force Church to split from the state" for first time in 500 years', *Daily Mail*, 12 June 2012.

## ENDNOTES

- 11 The legal naughty step was introduced by the Nearly Legal blog ([www.nearlylegal.co.uk](http://www.nearlylegal.co.uk)) and is also used by Adam Wagner of the UK Human Rights Blog ([www.ukhumanrightsblog.com](http://www.ukhumanrightsblog.com)) to reprimand those who misreport or misrepresent the law in the media.
- 12 Coalition for Marriage, 'Euro judges: gay marriage isn't a human right. But churches could end up being forced to do gay weddings', 22 March 2012 [www.c4m.org.uk](http://www.c4m.org.uk). The Coalition for Marriage do not specify their source for the 'Church of England lawyers' but it is noteworthy that the Church of England's response to the consultation (discussed below) does not mention the Equality Act 2010 at all.
- 13 Schedule 23, paragraph 2.
- 14 See also Norrie, K., (2012) 'Religion and Same-Sex Unions: The Scottish Government's Consultation on Registration of Civil Partnerships and Same-Sex Marriage', 16, *Edinburgh Law Review*, pp. 95-99.
- 15 *Hall & Anor v Bull & Anor* [2011] EW Misc 2. This case concerned a discrimination claim brought under the Equality Act (Sexual Orientation) Regulations 2007 after the bed and breakfast owners refused to let a double room to a gay male couple who had a civil partnership. The policy that they would only let double rooms to heterosexual married couples was found to be direct discrimination on the basis of sexual orientation.
- 16 *Catholic Care (Diocese of Leeds) v. The Charity Commission for England and Wales and the Equality and Human Rights Commission* [2010] EWHC 520.
- 17 The Equality Act 2010, s202 amends the Civil Partnership Act 2004.
- 18 The Civil Partnership Act 2004 section 2(5) provided that 'No religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership

- document'. Section 6(1)(b) provided that the place of registration 'must not be in religious premises'.
- 19 Bishop of Oxford, HL Hansard 22 April 2004, c.399-400; see also Baroness Thomas, HL Hansard, 22 April 2004, c.425-6.
- 20 Section 202(4): 'For the avoidance of doubt, nothing in this Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so.'
- 21 However, around 100 Church of England Priests have reportedly signed a petition to the General Synod demanding the right to conduct civil partnerships in their Churches: Pitcher, G., 'Why I signed the London clergy's petition for "gay weddings"', *Daily Mail*, 9 February 2012.
- 22 Clause 2 provides that a person or religious organisation may not be compelled to perform same-sex marriages, or to consent to same-sex marriages being conducted on their premises.
- 23 This is contained in Canon B30 (paragraph 1). This is necessary because, as highlighted in the explanatory notes to the Bill (para 26), Canon law cannot be contrary to general law.
- 24 Church of England, 'A Response to the Government Equalities Office Consultation – "Equal Civil Marriage" – from the Church of England', 2012.
- 25 Article 14 prohibits discrimination on the grounds of, amongst others, sexual orientation. Article 14 is not a free standing right and can only be used in conjunction with another Article. In other words, the discrimination must relate to ('fall within the ambit of') another right protected by the Convention. The Church of England suggests that it would be used in conjunction with the right to marry under Article 12 ('Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.'). Article

- 12 has so far been interpreted to only refer to men marrying women: see *Schalk and Kopf v. Austria* [2011] 53 E.H.R.R. 20, discussed below.
- 26 [2011] 53 E.H.R.R. 20. Occasionally *Gas and Dubois v. France* (Application no. 25951/07) (Judgement 15 March 2012) is mentioned as supporting the idea that if same-sex marriage is recognized, then it will need to be treated in exactly the same way as heterosexual marriages by religious bodies to avoid an Article 14 claim (see for example, Doughty, S., 'Gay marriage is not a 'human right': European ruling torpedoes Coalition stance', *Daily Mail*, 20 March 2012, subsequently corrected). This is a completely inaccurate reading of the *Gas* judgement, which is about adoption and adds nothing to the existing case law on marriage.
- 27 There was no breach of Article 14 in conjunction with Article 8, where same-sex marriage was not required under Article 12 (at para.101).
- 28 at para. 94.
- 29 at para 105. This suggests that the ECtHR may at some point in the future determine that a consensus has emerged and require the state recognition of same-sex relationships, though given that only a handful of the 47 signatory states currently recognise same-sex marriage this is not likely to be in the near future.
- 30 Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2<sup>nd</sup> ed.) 2011, pp. 7-8.
- 31 In legal terms, the case did not address whether there would be a breach of Article 14 in conjunction with Article 12.
- 32 at para. 97. This was established in earlier case law, see: *Karner v. Austria* (2004) 38 E.H.R.R. 24 at para 37, and was also confirmed in *Kozak v. Poland* [2010] ECHR 280, at para 92: 'When the distinction in question operates in this intimate and vulnerable sphere of an individual's private

life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.'

33 Section 13(1) Human Rights Act 1998.

34 *Ladele v. Islington LBC* [2009] EWCA Civ 1357. This case was initially decided by the UK courts but the European Court of Human Rights also recently confirmed that it is within the UK's margin of appreciation to determine how to strike a balance between the competing Convention rights of Ms Ladele (freedom of religion and non-discrimination) and the local authority's policy of protecting same-sex couples from discrimination on the basis of their sexual orientation: *Eweida and others v. the United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) decision on 15 January 2013.

35 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, para 50. Both this case and *Ladele* have been the subject of academic critique. See for example Stychin, C.F., 'Faith in the Future: Sexuality, Religion and the Public Sphere', 29(4), *Oxford Journal of Legal Studies*, 729, 2009; Cullen, H., and Malik, M., 'R (Begum) v. Governors of Denbigh High School' in Hunter, R., McGlynn, C., Rackley, E., *Feminist Judgments: From Theory to Practice*, Oxford: Hart Publishing, 2010. It is not my intention to suggest that these judgements are ideal, merely that they reflect current law.

36 *Hasan v. Bulgaria* (2002) 34 E.H.R.R. 55, at para 62.

## ENDNOTES

- 37 See: *Obst v. Germany* (Application No. 425/03); *Fernández Martínez v. Spain* (Application no. 56030/07); *Siebenhaar v. Germany* (Application no. 18136/02).
- 38 For example, Alan Craig, writing for the *Church of England Newspaper*, said: '... the UK's victorious Gaystapo are now on a roll. Their gay-rights stormtroopers take no prisoners as they annex our wider culture, and hotel owners, registrars, magistrates, doctors, counsellors, and foster parents... find themselves crushed under the pink jackboot'. Quoted in Butt, R., 'Anglican newspaper defends 'Gaystapo' article', *Guardian*, 8 November 2011.
- 39 McLean, G., 'Can you be pink and true blue?', *Guardian*, 26 March 2004.
- 40 See Cowley, P. and Stuart, M., (2004) 'Some not very civil disagreements: the Conservatives and the Civil Partnership Bill', 10 November 2004, [www.revolt.co.uk](http://www.revolt.co.uk); Grice, A., 'Tory MPs go to war over gay marriage', *Independent*, 17 January 2012; Shipman, T., 'We're still seen as the nasty party, says Tory minister', *Daily Mail*, 7 March 2012.
- 41 See for example Atkinson-Small, J., "'Right-on Dave" needs to wake up: there's no need to legalise gay marriage', *Daily Mail*, 5 March 2012.
- 42 Cameron, D., 'Conservative Party Conference 2011: David Cameron's speech in full', *Daily Telegraph*, 5 October 2011.
- 43 See for example Women and Equality Unit (2003) *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples*, p.30. For analysis of New Labour's discourse on civil partnerships see Stychin, C., F., 'Not (Quite) A Horse and Carriage: The Civil Partnership Act 2004' 14(1) *Feminist Legal Studies*, 2006, 79.
- 44 Mothers claiming state benefits must now be available for paid work once their youngest child reaches the age of five. The policy of compelling single mothers to work was

introduced in 2008, when Income Support was removed from mothers whose youngest child was aged 12 or older and instead they were required to claim Jobseeker's Allowance. In 2009, the age was reduced to 10. In 2010, it was reduced to seven. In 2012 it was reduced again to age five.

- 45 Boyd, S.B., *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, Toronto: University of Toronto Press, 1997, p.14.
- 46 Stonewall, 'Parliamentary Briefing: Civil Partnership Bill, House of Commons Second Reading', 2004, p. 2.
- 47 HM Revenue & Customs, 'Inheritance Tax Statistics 2009-10', 2012.
- 48 For example, there were a number of attempts during the Parliamentary debates on the Civil Partnership Bill 2004 to amend it to include those closely related, such as parent/child or siblings, in order to provide a method of inheritance tax avoidance. Those proposing such amendments included Baroness O'Cathain, Edward Leigh MP, and Christopher Chope MP.
- 49 *Burden and Burden v. United Kingdom* (2007) 44 E.H.R.R. 51; *Burden and Burden v. United Kingdom* (2008) 47 E.H.R.R. 38.
- 50 Stonewall, 'Parliamentary Briefing: Civil Partnership Bill, House of Commons Second Reading', 2004, p. 4.
- 51 *R v. R (Rape: Marital Exemption)* [1991] 3 W.L.R. 767.
- 52 See for example, Friedan, B., *The Feminine Mystique* London: Penguin, 1963; Hartmann, H., 'Capitalism, Patriarchy, and Job Segregation by Sex' in Eisenstein, Z.R. (ed.), *Capitalist Patriarchy and the Case for Socialist Feminism*, New York and London: Monthly Review Press, 1979; Kuhn, A. and Wolpe,

ENDNOTES

- A. (eds), *Feminism and Materialism: Women and Modes of Production*, London: Routledge & Kegan Paul, 1978.
- 53 Institute for Public Policy Research, 'Eight out of ten married women do more housework than their husbands', 10 March 2012. Research with same-sex couples revealed that they were not immune from the gendered division of labour. Instead of following biological sex, the division of household labour tended to map on to the gender of each parties' occupation: Carrington, C., *No Place Like Home: Relationships and Family Life among Lesbians and Gay Men*, Chicago and London: University of Chicago Press, 1999.
- 54 Conaghan, J. and Grabham, E., 'Sexuality and the Citizen Carer', 58(3), *Northern Ireland Legal Quarterly*, 325, 2007, pp. 332-33.
- 55 See Gill, S. and Bakker, I., 'New Constitutionalism and the Social Reproduction of Caring Institutions', 27, *Theoretical Medicine and Bioethics*, 35, 2006, p. 48.
- 56 Gavigan, S.A.M., 'Legal Forms, Family Forms, Gendered Norms: What is a Spouse?' 14, *Canadian Journal of Law and Society*, 127, 1999.
- 57 This figure was reported in Watt, N., 'Spending Review: welfare bears the brunt as extra £7 bn of cuts unveiled', *Guardian*, 20 October 2010.
- 58 Montgomerie, T., 'A conservative case for gay marriage' A Tory Diary: *Conservative Home*, 6 February 2012.
- 59 Grice, A., 'Prominent Tory disowns 'religious right' and supports gay marriage', *Independent*, 6 February 2012.
- 60 Rauch, R., 'Bush's Case for Same-Sex Marriage' in Baird, R. M. and Rosenbaum, S.E. (eds.), *Same-Sex Marriage: The Moral and Legal Debate* (2<sup>nd</sup> edition), New York: Prometheus Books, 2004, pp. 66-7.

- 61 Equalities Office, 'Equal Civil Marriage: A Consultation', March 2012, para 2.20.
- 62 Kandaswamy, P., 'State Austerity and the Racial Politics of Same-Sex Marriage in the US', 11(6), *Sexualities*, 706, 2008, p. 707.
- 63 Kandaswamy, P., 'Family Values and Forced Labor: Race and the Sexual Politics of Welfare to Work Programs in the U.S', paper presented at Welfare to Work: Critical Interventions, University of Kent, 15-16 September 2010 (on file with author), p. 3.
- 64 Eskridge, W.N., Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, New York and London: The Free Press, 1996; Sullivan, A., 'Three's A Crowd' in Sullivan, A. (ed.), *Same-Sex Marriage Pro and Con: A Reader*, New York: Vintage Books, 1997.
- 65 Rauch (2004) 'Bush's Case for Same-Sex Marriage' in *Same-Sex Marriage: The Moral and Legal Debate*, pp. 65-66.
- 66 Gay and Lesbian Advocates and Defenders (GLAD), 'Why Marriage Matters', 2006.
- 67 Kandaswamy, P., 'State Austerity and the Racial Politics of Same-Sex Marriage in the US', 11(6), *Sexualities*, 706, 2008, p. 707.
- 68 d'Ancona, M., 'The case for gay marriage is fundamentally conservative – it will strengthen Britain's social fabric', *Daily Telegraph*, 10 March 2012.
- 69 See: Department for Work and Pensions (DWP), 2010, '21<sup>st</sup> Century Welfare', Cm7913.
- 70 See: Department for Work and Pensions (DWP), 2010, '21<sup>st</sup> Century Welfare', Cm7913, p. 20.

## ENDNOTES

- 71 Social Security Advisory Committee (SSAC), 2010, '21<sup>st</sup> Century Welfare: A Response by the Social Security Advisory Committee', p. 2.
- 72 Department for Work and Pensions (DWP), 2010, 'Consultation Responses to 21<sup>st</sup> Century Welfare', Cm7971, p. 21.
- 73 Department for Work and Pensions (DWP), 2010, 'Consultation Responses to 21<sup>st</sup> Century Welfare', Cm7971, p. 21.
- 74 Centre for Social Justice, 2010, 'Green Paper on the Family', pp. 19-20.
- 75 Centre for Social Justice, 2010, 'Green Paper on the Family', pp. 22-23.
- 76 Conservatives, 'Invitation to join the government of Britain: the Conservative Manifesto', 2010, p. 41.
- 77 Murray, D., 'Why Conservatives should welcome gay marriage', *The Spectator*, 5 October 2011.
- 78 d'Ancona, M., 'The case for gay marriage is fundamentally conservative – it will strengthen Britain's social fabric', *Daily Telegraph*, 10 March 2012.
- 79 Grice, A., 'Prominent Tory disowns 'religious right' and supports gay marriage', *Independent*, 6 February 2012.

### **Love is Not Enough**

- 1 *The Works of the Right Honourable Edmund Burke*, 6 volumes, London: Henry G. Bohn, 1854-56, 1:446-8 Speech to the Electors of Bristol.
- 2 Episcopal Church, Office of Public Affairs, 'Presiding Bishop, President of House of Deputies Announce 12-Member Task Force on the Study of Marriage', 14 February 2013.

- 3 May, T., 'If marriage is good it should be for everyone', *The Times*, 15 March 2012.
- 4 Scruton, R. and Blond, P., 'Marriage: Union for the future or contract for the present', ResPublica, February 2013.
- 5 Scruton and Blond, 'Marriage: Union for the future or contract for the present', 2013.
- 6 Office for National Statistics, Statistical Bulletin, Marriages in England and Wales 2010, 29 February 2012.
- 7 Quoted in Slocumb, P.D., *Hear Our Cry: Boys in Crisis*, Highlands: Aha! Process, Inc., 2004.
- 8 Office for National Statistics, Statistical Bulletin, Marriage in England and Wales 2005, February 2007.
- 9 Sacks, J., *The Home We build Together: Recreating Society*, London: Continuum, 2007, p. 206.
- 10 Office for National Statistics, Social Trends 41, 2011 Edition, February 2011.
- 11 See, for example: Horn, W.F., 'Father Facts', 3<sup>rd</sup> Edition, National Fatherhood Initiative, University of Michigan, 1998, pp. 54-73; Whelan, R., *Broken Homes and Battered Children*, London: Family Education Trust, 1993.
- 12 Sacks, *The Home We build Together: Recreating Society*, 2007, p. 212.
- 13 'Gay marriage will destabilise family life, sociologist warns', *Daily Telegraph*, 25 February 2012.
- 14 Morgan, P., 'What happens to marriage and families when the law recognises "Same-Sex Marriage"?', Submission to HoC Marriage (Same -Sex Couples) Bill Committee, 1 March 2013.
- 15 Morgan, 'What happens to marriage and families when the law recognises "Same-Sex Marriage"?', para. 38.

- 16 Eskridge, W.N., Jr., *Equality Practice: Civil Unions and the Future of Gay Rights*, New York: Routledge, 2002, p. 6.
- 17 See, for example, Stuart, E., *Just Good Friends, Towards a Lesbian and Gay Theology of Relationships*, London: Mowbray, 1995.
- 18 Scruton, R., 'Don't sacrifice marriage on equality's altar', *The Times*, 15 December 2012.

### **Equal But Different – The Unanswered Questions**

- 1 A document issued by the Government Equalities Office in March 2012 entitled 'Equal Civil Marriage: a consultation' actually consulted the public not on whether, but how, same-sex marriage should be introduced.
- 2 Many researchers have commented on the adverse effects of marriage breakdown in Western countries. See Gallagher, M., 'What is marriage for? The public purposes of marriage law', *Louisiana Law Review*, vol. 62, 2002, pp. 1-37; Wallerstein, J., S., Lewis, J.M. and Blakeslee, S., *The Unexpected Legacy of Divorce: the 25 year Landmark Study*, New York: Hyperion, 2000; Amato, P. and Booth, A., *A Generation at Risk: growing up in an era of family upheaval*, Cambridge: Harvard University Press, 1997. For a UK-based summary of research on the social benefits of marriage see 'Every family matters', The Centre for Social Justice, London, July 2009, pp. 56-59.
- 3 For an informed and thoughtful philosophical essay on this aspect of the biological family, see David, J.V., 'Family History', *Philosophical Papers*, 34/3, November 2005, pp. 357-78.
- 4 See, for example: Clive, E., 'Marriage: an unnecessary legal concept' in Eekelaar, J.K. and Katz, S.N., *Marriage and Cohabitation in Contemporary Societies*, Toronto: Butterworths, 1980.

- 5 The proposed Marriage (Same Sex Couples) Bill 2012-13.
- 6 Canada, Civil Marriage Act, 1st sess., 38th Parliament (2005), 'Consequential Amendments'.
- 7 Woolf, M., 'Civil servants lost for words over gay sex', *Sunday Times*, 2 December 2012.
- 8 Universal Declaration of Human Rights, 1948, Article 16, *Basic Documents on Human Rights*, fourth edition, Brownlie, I. and Goodwin-Gill, G.S. (eds), Oxford: Oxford University Press, 2002, p. 21.
- 9 The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as amended by Protocol no. 11. 1998, Article 8. *Basic Documents on Human Rights*, Brownlie and Goodwin-Gill, p. 21.
- 10 Eskridge, W.N., Jr., *Gaylaw: challenging apartheid in the closet*, Cambridge, Mass.: Harvard University Press, 1999, p. 11.
- 11 Robertson, J., *Children of Choice*, Princeton: Princeton University Press, 1994, p. 24; see also Harris, J. 'Rights and Reproductive Choice' in *The Future of Human Reproduction*, Harris, J. and Holm, S. (eds), Oxford: Oxford University Press, 1998, pp. 5-37.
- 12 'De "la famille" au singulier aux familles plurielles', L'Association des parents et futurs parents Gays et Lesbiens, February 2000.
- 13 For a defence of this understanding of libertarianism by this author, see Almond, B., 'The Retreat from Liberty', *Critical Review*, 1994, pp. 235-46.
- 14 Meezan, W. and Rauch, J., 'Gay marriage, same-sex parenting, and America's children', Brookings Institution, *Future of Children*, Vol. 15, No. 2, autumn 2005, pp. 97-114. Merzan and Rauch describe several studies that have found no adverse results in physical or emotional terms for children brought up by same-sex couples: studies by

## ENDNOTES

- Golombok and others focusing on lesbian families in England, and two studies specifically involving assisted reproduction, one from California (Chan, Raboy and Patterson, 1998) and a Brussels-based study (Brewaeys and others, 1997).
- 15 Regnerus, M., *Social Science Research*, Vol. 441, Issue 4, July 2012, pp. 752-70.
- 16 For a fuller discussion of children and reproductive choice, see Almond, B., *The Fragmenting Family*, Oxford: Oxford University Press, 2006, 2008. Ch. 6. 'New Reproductive Technologies: whose human rights?' pp. 98-120.
- 17 Gallagher, M., 'What is marriage for? The public purposes of marriage law', *Louisiana Law Review*, Vol. 62, 2002, pp. 1-37, p. 18.
- 18 Justice Robert Blair in *Halpern v. Canada*, 215 D.L.R. (4th) 223 (Can.) par. 97-99 (2003).