

A Public Reason Defence of Same-Sex Marriage

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GAH-KAI LEUNG, JUL 19 2015

How Do You Solve a Problem Like Marriage? A Public Reason Defence of Same-Sex Marriage

The rights of lesbian, gay, bisexual and transgender (LGBT) people have recently come under great scrutiny, to the extent that English law has granted marriage rights to same-sex couples from March 2014 (*Marriage (Same Sex Couples) Act 2013*). A majority of those surveyed in Australia (Johnson 2013), the United States (*Washington Post* 2014) and France (BVA 2014) agree with gay marriage[1]. Yet as same-sex marriage has gained traction throughout Western liberal democracies – most recently in the May 2015 referendum result in the Irish Republic (*BBC News* 2015) – it has simultaneously encountered significant institutional opposition. It is currently legal in fewer than half of all American states and not at all on the African continent except South Africa (Itaborahy and Zhu 2013); a Croatian poll rejected an amendment in marriage statutes to include same-sex couples (*BBC News* 2013); bills to legalize same-sex marriage were defeated in both the Faroe Islands (Roberts 2014) and Northern Ireland (McDonald 2014). These amount to deep-seated disagreements about the appropriateness of gay marriage laws[2]; how political institutions should be structured given these disagreements remains problematic.

Political theorists divide into two camps on the question of how institutions such as marriage should be organized. Perfectionists hold that the state should promote a particular conception of the good life. Thus perfectionist arguments for or against gay marriage will usually be in line with the view of the good the perfectionist has in mind. Anti-perfectionists argue that the state should remain neutral between competing conceptions of the good. Anti-perfectionists do not appeal to an idea of the good when they accept or reject same-sex marriage claims; rather their appeal is to what is right and not what is good. (For perfectionists the right and the good go together.) So when an anti-perfectionist defends gay marriage, her stance is informed not by the fact that it is morally good for same-sex couples to be married; rather, that it is right that political institutions are arranged such that same-sex couples are given the opportunity to marry[3]. This is the claim that I will defend.

My defence of same-sex marriage proceeds as follows. The first section shows how perfectionist accounts of marriage fail by including comprehensive doctrines in the gay marriage debate. The reasons these comprehensive doctrines give are nonpublic and so offend the political conception of justice. The second section explores the ramifications of my critique with respect to gay marriage. I elaborate on my defence by demonstrating the kinds of public reasons that could favour same-sex marriage: principally, arguments from non-discrimination, privacy and the development of justice in citizens. The third section rebuts critiques of the institution of marriage: that marriage is problematic and that marriage should be abolished. The conclusion summarizes my argument and submits two ideas for further research.

I stress that I do not attempt to offer a complete rejection of all the various arguments against gay marriage. I simply suggest that accounts of gay marriage that appeal to nonpublic reasons (and therefore are of the perfectionist kind) should not be pursued. Nor will I detail an account of marriage that: includes polygamous, incestuous or bestial relationships, or other forms of marriage that go beyond the conventional contract between two consenting adult humans;[4] or substantially treats the issue of gay parenting[5]. Instead I will limit my argument to the said conventional contract and suggest that any two consenting adult humans should be free to make that contract, regardless of their sexual orientation. Specifically, as I have already alluded, I will focus on same-sex couples as historically they have not been granted the right to marry and there are few judicial precedents for contemporary gay

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marriage laws.

Against Perfectionist Accounts of Marriage

Most accounts of homosexual marriage take the perfectionist route. Sandel (1989) for example argues that the justice or injustice of laws regarding homosexual activity – and same-sex marriage by extension – depends at least partly on the moral convictions we hold about same-sex relations. On his view, advocating gay marriage implicitly suggests that homosexual conduct is morally permissible and therefore the freedom to engage in homosexual activity constitutes part of the good life. More significantly, Girgis et al. (2011) offer a perfectionist critique of gay marriage: namely that it and homosexual practices in general are violations of natural law and therefore immoral.

These claims are examples of comprehensive doctrines (Rawls 2005: 441): a comprehensive view about morality and the good life. Perfectionist accounts of same-sex marriage usually invoke such comprehensive doctrines, be they religious (as with appeals to natural law theory) or secular (as with appeals to some nonreligious ideal of human flourishing). Such comprehensive doctrines comprise nonpublic reasons to favour or reject certain laws. Nonpublic reasons should be contrasted with public reasons, which are reasons that all “free and equal citizens might [...] reasonably be expected to endorse” (ibid.: 450) on the question of whether gay marriage should be legislated or not.

The idea of public reason turns fundamentally on a distinction between the moral and political domains[6]. Public reasons adhere to a political conception of justice separate from religious or secular views about morality and the good life. Such a political conception of justice has three features:

- its principles apply to basic political and social institutions;
- *it is independent of any comprehensive doctrine;*
- it flows from fundamental ideas implicit in the public political culture of a constitutional liberal regime, where society is mutually cooperative and citizens are assumed to be free and equal persons (ibid.: 453; my emphasis).

So when we consider whether homosexual activity in general should be criminalized for example, the question is not whether religious people regard same-sex relations as sinful or whether same-sex relations realize an ideal of human virtue specified by some philosophical or nonreligious view. Rather the question is whether the criminalization of homosexuality can reasonably be defended given that it has the potential to violate the civil rights and liberties of homosexuals and bisexuals (ibid.: 458). Civil rights and liberties in this context would be political institutions specified by the political conception of justice, which would interpret those rights and liberties as constitutionally essential (ibid.: 458).

The question of what should and should not be decided by public reason is controversial; what matters for the purposes of this essay is that public reason applies to the foundational institutions consistent with a political conception of justice and associated with a “well-ordered constitutional democratic society” (ibid.: 440), also known as the basic structure. Among these foundational institutions is the family because it allows for an orderly system of societal values to be transmitted from one generation to the next (ibid.: 467). Our views about what families should be permissible in a well-ordered constitutional democracy will therefore have at least some bearing on whether or not we think same-sex marriage should be legislated. So if we wish to legalize same-sex marriage, we should be guided by public reason.

This point becomes particularly salient when we recognize that although the domestic sphere is traditionally regarded as a private one, subject to non-interference by the state, it is the political institution of the legal system, as created by an orderly and functioning constitutional democracy, which actually licences the marriage contract. The institution of (same-sex) marriage represents an interesting but by no means unique case where the public and private spheres collide. It is at this collision, where public institutions govern the lives of individuals in their private worlds, that the notion of public reason as applicable to legally sanctioned same-sex marriages becomes relevant.

I disagree with perfectionist views of same-sex marriage because they introduce nonpublic reasons, such as those

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given from comprehensive doctrines, into the marriage debate. Hence they violate the political conception of justice outlined above, which should be independent of any comprehensive doctrine. The political conception demands that only public reasons are admissible when it comes to the question of state-sanctioned same-sex weddings.

Perfectionists might object that the (nonpublic) reasons given by comprehensive doctrines have been arbitrarily excluded from the debate. Thus the political conception does not take seriously those who possess comprehensive views, such as religious persons. This objection fails on three counts. Firstly, comprehensive doctrines are not arbitrarily excluded because they represent opinions that are not “reasons we can share”[7] (Korsgaard 1996: 275). They can only be taken seriously by those who agree with them. And yet agreement on political questions such as same-sex marriage is impossible on the basis of comprehensive views that are mutually irreconcilable. The reasons we give must be “politically reasonable” and targeted at citizens in the public square (Rawls 2005: 441). Justice requires public standards (Williams 1998: 240); comprehensive doctrines fail this publicity test and so do not obtain relevant standards of justice. Secondly, the objection presupposes that those reasons given in the public square are incomplete and fail to give adequate justifications for the protection of same-sex marriage claims (Quong 2013); this is far from the case, as I shall demonstrate in section two.

Thirdly and most importantly, same-sex marriage does not require that the state endorse a conception of the good as provided by a comprehensive doctrine. Gay marriage may favour some conceptions of the good over others, but this is also true of other institutions. A capitalist economy may favour consumerist conceptions of the good but it does not follow that it actively *promotes* such conceptions (Wedgwood 1999: 237); the distinction is between incentivization and explicit communication. Similarly, the state need not appeal to any controversial view of the good when it favours same-sex weddings (*ibid.*: 238).

What Public Reasons Could Justify Same-Sex Marriage?

At least three public reason arguments can be identified to support same-sex marriage: arguments from non-discrimination, from privacy and from the development of justice in citizens.

The argument from non-discrimination contends that confining marriage to heterosexuals arbitrarily discriminates against homosexuals and bisexuals. Discrimination is arbitrary when it violates the principle of fair equality of opportunity (FEO) (Rawls 1999: 72). FEO in this context occurs when marriage rights are open to all and everyone is fairly able to access them (*ibid.*: 86). Restricting marriage to opposite-sex couples does not follow this rule. In particular it discriminates by channelling bisexuals into engaging in heterosexual relations and relationships, thus threatening their sexual liberty (Boucai 2012: 416). I am not appealing to the moral wrongfulness of discrimination (for a morally-based account, see e.g. Hellman 2008); my claim is that free and equal citizens would agree that the just society obeys FEO (i.e. such that no arbitrary discrimination exists) and therefore institutions that offend FEO – such as where marriage is available only to straight people – should be rectified. In any case the concept of non-discrimination in a just society, at least formally speaking, is relatively uncontroversial (Demuijnck 2009: 83) and discriminating on the grounds of sexual orientation seems suspect (Eskridge 1993: 1426; Schaff 2004: 137).

The example of bisexuality (Boucai 2012) also motivates the second argument, which is from privacy. Limiting marriage to heterosexuals not only discriminates against bisexuals; the threat to their sexual liberty challenges their privacy. Privacy here refers to the ability of citizens to choose the values by which they wish to live, thus leaving them free to pursue their own understanding of the good (Sandel 1989: 523). Just as *Lawrence v. Texas* effectively decriminalized consensual same-sex intercourse in the United States by appeal to the right to privacy, it seems plausible to defend homosexual marriage on identical grounds (Ball 2004: 1187), particularly as it would allow LGBTs to pursue their conception of the good if it matches the institution of marriage. This is not a full-blown endorsement of the conception of the good that marriage provides: indeed it is questionable whether marriage reflects a sole conception of the good, given how marital conventions have varied and still vary across centuries and cultures.

My third argument concerns the development of justice in citizens. A just society requires that citizens obey mutually-shared principles of justice. Therefore citizens should not support laws that tarnish those principles of justice, such

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as those that discriminate or invade privacy. I submitted above that restricting marriage to opposite-sex couples violated those principles. The legalization of same-sex marriage might move individual understandings of justice towards those consistent with a common ideal. Citizens are likely to act more justly in general as a result (Smits 2009: 117). For example, acceptance of homosexuality is more prevalent among straight people when they personally know a homosexual (Dolan and Garrison, 2013; Herek 1997). Similarly, as same-sex weddings become more widespread, citizens will become accustomed to the diversity of families in a just society. Studies consistently show that same-sex parents are as competent as their heterosexual counterparts (Stacey and Biblarz 2001: 160); equally, no harmful effects have been found in children raised in same-sex families (Eskridge 2002). Gay marriage could increase citizens' tolerance towards same-sex families, as may be consistent with common principles of justice.

Against Critiques of the Institution of Marriage

Critics argue that the institution of marriage has been taken for granted and is unjustifiable. Polikoff, a lesbian feminist, objects that marriage is an "inherently problematic institution" and same-sex marriage is "an attempt to mimic the worst of mainstream society" (1993: 1536). For her, same-sex marriage replicates the patriarchal structures inherent in heterosexual marriage. Related criticisms (e.g. Card 1996; Warner 1999) of same-sex marriage run to the effect that it (1) is complicit in homonormative structures of oppression – that is, it mimics heterosexual privilege and fails to challenge heterosexual norms – and (2) economically advantages those already privileged in the LGBT community such as white wealthy middle-class urban male professionals. At the same time, it exacerbates the burdens felt by those who are marginalized or excluded from these groups.

Worries about the problematic status of marriage tarnish all same-sex marriage claims with the same brush. Some homosexual couples do not see their marriages as problematic; their desire to get married can be an empowering gesture (Wolfson 1994: 585) and even an act of protest against conservative agendas (Richman 2014: 91-93). Polikoff is mistaken not only to essentialize marriage as regressive, but also to assume that marriage 'causes' women's disempowerment when in fact gender inequalities may be a manifestation of social attitudes that have nothing to do with the formal marriage contract (Eskridge 1993: 1488).

Moreover, the objection that same-sex marriages reproduce heterosexual oppression gives away too much explanatory power to structural forces and sees them, in a paranoid fashion, as an external force governing the lives of same-sex couples everywhere (Brown 2012). At the same time as it overstates the real impact of structures of domination, the objection masks the possibility for human agency to redefine traditional conventions and instead deterministically condemns sexual minorities to patterns of subordination.

The allegation that hitherto-marginalized groups will be further disenfranchised by gay marriage is also suspect. Returning to the example of gender, even if marriage has historically been responsible for gender inequality, the norms of marriage may change as women recognize their oppression and resist it by altering the terms on which marriages are conducted (Eskridge 1993: 1434). Same-sex marriage is important in this respect as it represents a powerful shift in the way gender roles in marriage are constructed, at least in the West (Wolfson 1994: 598). In a male-male marriage, a man will be doing the housework, a role traditionally assigned to women; in a female-female marriage, a woman will be earning outside the home, a role traditionally assigned to men (Eskridge 2001). Even if perceived gender roles change slowly, the symbolism in same-sex marriages represents a profound challenge to gender conventions within marriage (ibid.). Evidence suggests that same-sex couples do make fewer assumptions about gender roles than their heterosexual counterparts (Blumstein and Schwartz 1983). The same may well be said for other historically oppressed groups such as ethnic minorities, as they revise previously uncontested assumptions about marriage. To say that we can have *either* marriage *or* social progress is therefore a false dichotomy (Wolfson 1994: 609).

Critics charge that pluralizing marriage in this way will open the door to polygamous, incestuous or bestial marriages. Such a reactionary position is vulnerable to the slippery slope fallacy (Corvino 2005) and also moves the conversation away from the above concern with oppression. Hence it misses the opportunity to develop a sense of justice in citizens by reforming illiberal institutions, as explained above.

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A stronger objection argues for the disestablishment of marriage (Kinsley 2003). This objection interprets the legal registration of marriage as a superfluous intrusion by the state on the private sphere. Thus the institution of marriage should be abolished. Even if choosing one's life partner is acknowledged as a fundamental civil liberty, it remains unclear why marriage should belong to the Rawlsian basic structure and thus should be constitutionally protected.

This objection fails for two reasons. Firstly, it ignores Rawls' explanation for why special protection for marriage and the family is justified. Rawls perceives the married couple as a basic unit of social cooperation for mutual benefit that instills the values of reciprocity needed to participate in the wider sphere of a well-ordered constitutional democratic society; reciprocity being one of the "political virtues that support political and social institutions" (Rawls 2005: 467). In order for other institutions of constitutional democracy to endure over time, it must include those fundamental institutions that safeguard the values necessary for it to endure, such as marriage.

Secondly, it fails because it does not respect certain interests that adults might have in choosing a spousal partner. These interests arise from the deep entanglement of lives that arise in a spousal relationship and the legal barriers that can occur as a result[8]. For example, without the legal protections that married couples enjoy, same-sex partners may not have access to hospital visitation rights, power-of-attorney agreements, 'next-of-kin' arrangements or the right to inherit if the partner dies intestate (Wedgwood 1999: 231). Often these legal rights and obligations exist to enable partners to sufficiently provide economically for each other; they also derive from a reasonable presumption that spouses have each other's best interests at heart and can represent authentically those interests (ibid.: 231). These protections and the interests they safeguard cannot be established without state endorsement.

Conclusion

The same-sex marriage debate has generated deep disagreement among political theorists and ordinary citizens alike. Finding a resolution is therefore a pressing question. I argued in this paper that public reasons exist to defend same-sex marriage. I countered perfectionist arguments which employ nonpublic reasons and are therefore suspect in terms of the political conception of justice. I then distinguished three public reasons to legalize gay marriage. Finally I addressed some objections to my argument: that marriage is problematic and that marriage should be disestablished. Two issues need further investigation. The first is whether a convincing public reason case to reject same-sex marriage can be found; the second is whether religious officials opposed to same-sex weddings should have to officiate them.

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[1] According to these reports, 65% of Australians, 59% of Americans and 61% of French people interviewed either support or strongly support same-sex marriage.

[2] I use the terms 'same-sex marriage,' 'homosexual marriage,' 'gay marriage' and 'same-sex wedding' interchangeably throughout this paper, to refer to the legal availability of marriage to same-sex couples.

[3] This distinction between the moral and political spheres of life is significant for anti-perfectionists, as we shall see later. Though it is an important and indeed controversial assumption, a full defence of this distinction would require a separate essay.

[4] Brake (2010) suggests that public reasons for monogamous same-sex marriage claims would also validate consenting marriage contracts between more than two people, though again I do not have sufficient space to address

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her argument here.

[5] For defences of gay adoption and gay parenting, see for example Reed (2013) and Stacey and Biblarz (2001).

[6] This distinction between the moral and political spheres of life is significant for anti-perfectionists, as we shall see later. Though it is an important and indeed controversial assumption, a full defence of this distinction would require a separate essay.

[7] I borrow this phrase from Korsgaard as it aptly expresses the idea of public reason. Note that in the context of her work, she is not actually talking about the problem of disagreement given irreconcilable comprehensive doctrines.

[8] I thank Patrick Callahan (University of Arizona) for this point.

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