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## Some Wrongs and (Human) Rights in the English Same-Sex Marriage Debate

*John Murphy*\*

### I. INTRODUCTION

There is a rather peculiar aspect to the debate about whether same-sex couples<sup>1</sup> should be allowed to marry; one, indeed, that singles out the issue from other related concerns that have been voiced at various times by or on behalf of the homosexual community in England. It is this: the claim for the extension of the right to marry to couples of the same sex commands no consensus among those to whom it would be extended. This is in marked contrast to the various equality claims—claims regarding the age of consent to sexual activity,<sup>2</sup> the freedom to serve in the British military,<sup>3</sup> and the treatment of employees<sup>4</sup>—that have all been aired with a unified voice. For some—including a number of prominent lesbian writers—the idea of same-sex marriage is just as repugnant as heterosexual marriage. It can be opposed, they argue, on ideological grounds according to which marriage is viewed as a distinctly patriarchal

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\* School of Law, University of Manchester, Manchester, England, UK. I am enormously grateful to my colleague, Jo Winter, for her many helpful comments on an earlier draft (though she should not be assumed to be in agreement with all of what is argued here). I must also record my gratitude to the Copenhagen Business School: they provided me with very congenial surroundings in which to write this paper as well as with invaluable research facilities.

1. Except where a necessary distinction is to be made, I shall throughout use what appears to be the ecumenically acceptable term “same-sex couples” rather than speak speciously of “gays,” “lesbians,” and “transsexuals.” Note that under English law, gender reassignment is not recognized for the purposes of the law of marriage. *See* *Corbett v. Corbett*, 2 All E.R. 99 (1970).

2. *See, e.g.*, *Sutherland v. United Kingdom*, E.H.R.L.R. 117 (1997). *But see* Sexual Offences (Amendment) Act 2000 (equalizing the age of consent between consenting males).

3. *See, e.g.*, *Smith v. United Kingdom*, 29 Eur. H.R. Rep. 493 (2000) (case involving military personnel unlawfully dismissed because of their sexual orientation).

4. *See, e.g.*, *Grant v. South-West Trains*, E.C.R. I-621 (1998). But for a compelling account of how discrimination based on sexual orientation may be recast in terms of a form of direct sex discrimination, see Robert Wintemute, *Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 344-53 (1997).

institution.<sup>5</sup> For others, the matter begins and ends not with the question of whether same-sex marriage would reinforce the patriarchal underpinnings of society, but with the simple question of whether, in normative terms, same-sex couples should possess a right to marry.

Yet even among those who would assert such a right, there remains a notable absence of consensus as to the proper foundations of that right. Some, such as the litigants in the *Goodridge* case,<sup>6</sup> would assert such a right in equality terms. According to this account, the right to marry is viewed as fundamental to securing a range of protections, rights, and responsibilities that many heterosexuals simply take for granted.<sup>7</sup> By contrast, a second group of proponents would identify the right to marry as being a sub-species of the right to privacy. A third view is that a right to marry a person of the same sex can be located within a broader set of autonomy rights.<sup>8</sup> This third view is a close relation of the argument that same-sex marriage can be legitimated in terms of classical principles of Kantian and Hegelian natural law theory.<sup>9</sup>

As we shall see in due course, these claims are either implausible or simply untenable in practical terms in the English context. However, this is not to say that a more specific equality claim grounded in English human rights legislation cannot be made in support of same-sex marriage. In fact, as I shall attempt to argue in due course, such a claim may indeed be made, but this is to get ahead of ourselves. First, we must appreciate that the divergence in opinion just indicated is in part explicable by reference to one important point that is occasionally overlooked. This is that many arguments both for and against same-sex marriage involve a curious admixture of the legal, the political and the

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5. See, e.g., Paula L. Ettlebrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); D. Herman, *Are we Family?: Lesbian Rights and Women's Liberation*, 28 OSGOOD HALL L.J. 789 (1990); CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* (1984).

6. *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

7. Mary L. Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 177, 177 (Robert Wintemute & Mads Andenæs eds., 2001).

8. See, e.g., Nicholas Bamforth, *Same-Sex Partnerships and Arguments of Justice*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 7, at 31, 41-46.

9. While Immanuel Kant speaks of the centrality in any free person of "human choice" and "freedom of choice," IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 13 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996), Hegel sees "free consent" as being of the essence, GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 201 (H.B. Nisbet trans., Cambridge Univ. Press 1991). For a detailed—probably misguided—discussion of these theories (because both Kant and Hegel saw marriage as a distinctly heterosexual union), see Alice Woolley, *Excluded By Definition: Same-sex Couples and the Right to Marry*, 45 U. TORONTO L.J. 471, 499-522 (1995).

(abstract) moral-philosophical.<sup>10</sup> It is small wonder, then, that there are so many different views, and that some appear to be only slightly nuanced versions of others. Yet general suggestions about what we should do with the institution of marriage—especially *vis-à-vis* same-sex couples—and what should be its legal incidents in the twenty first century (assuming we support its preservation),<sup>11</sup> can, it is suggested, be disentangled from the necessarily prior question of whether same-sex couples have or ought to have some kind of formal *legal* right to marry in the first place. To answer this preliminary and more fundamental question, we need only focus only on the current state of English law<sup>12</sup> and assess whether as a matter of statutory construction the legislation that currently prohibits same-sex marriage is properly consistent with England's subsequent legislative human rights commitments. In so doing, we shall perforce encounter arguments relating to equality and privacy, for these are central to the human rights framework. Yet it will be explained that these rights—whatever their boundaries may be—*must* be seen as quite different creatures in the English context than they are understood to be in the United States (at least so far as grounding a right to same-sex marriage is concerned).

First, however, it is best to explain why a number of rather popular lines of argument are unhelpful in the English context, even beyond the point (already made) that they often comprise a confusing cocktail of political, philosophical and legal assertions.

## II. UNHELPFUL APPROACHES

Before addressing the main strand of this article—that there may be a human right to marry the person of one's choosing regardless of gender—there are a few preliminary matters that require a little consideration. The first of these is that a definitional approach to the question of whether same-sex marriage should be permitted is not just unfounded (because it lacks substance), but also unhelpful because it

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10. For a fuller account of these “internally heterogeneous” stances, see Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS*, *supra* note 7, at 97.

11. Nancy Polikoff, among others, would not see the problem in terms of marriage *per se*, but in terms of its capacity to assume a dispositive role according to which certain rights and benefits are distributed according to marital status alone. See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalising Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure Gender in Every Marriage”*, 79 VA. L. REV. 1535 (1993).

12. The same analysis could be performed in relation to other parts of Britain. For while the law in Britain is not uniform—there are three main jurisdictions: (i) England and Wales, (ii) Scotland and (iii) Northern Ireland—the position in relation to same-sex marriage is the same in each jurisdiction. Thus, references in this paper to English law might equally well be regarded as referring to the law in Scotland and the law in Northern Ireland.

obscures the fact that, though we may think we have a broadly accepted notion of what marriage is and entails, we have but a specious understanding of a much more general phenomenon. The fact that certain types of atypical marriage—ones, indeed, that we would not even begin to countenance domestically—are perfectly well recognized according to our rules of private international law will be used to illustrate this point. We will see that a proper conception of the genus union, *marriage*, is rather less cluttered in essentialist terms than we have been culturally taught to suppose and that same-sex marriages do not sit ill with this minimalist conception of marriage.

The second preliminary point is that in our search for a more fundamental premise for same-sex marriage we must reject those accounts predicated on traditional notions of Natural Law. Those who would seek to ground such unions in principles of Hegelian or Kantian philosophy supply arguments that are at best indeterminate and at worst simply implausible. More recent accounts of what is commonly termed New Natural Law<sup>13</sup> do not remedy these problems. For, as is well known, the New Natural Lawyers—in particular Finnis—consider same-sex sexual activity and relationships to be fundamentally at variance with the basic goods and practical reasonableness they regard as central to their theses.<sup>14</sup> Even accounts centered on the autonomy ideal have little to commend them in the context of real-life litigation or political lobbying.

#### A. *Rejecting a Definitional Approach*

Despite the fact that the traditional definition of marriage in English law—“the voluntary union for life of one man and one woman, to the exclusion of all others”—was enunciated nearly 150 years ago in *Hyde v. Hyde*,<sup>15</sup> and despite the fact that this definition has become largely outmoded as a reflection of the prevailing realities concerning marriage in the late twentieth and early twenty-first centuries,<sup>16</sup> it nonetheless continues to be the usual starting point for any general doctrinal account of the law of marriage in this country. But in assessing any claim for the extension of the institution of marriage to same-sex couples, reliance on the traditional legal definition is distinctly unhelpful. There are at least two reasons for this. First, a definitional approach tells us nothing of the intrinsic worth of marriage—what it is, in other words, about a marital

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13. See, e.g., John M. Finnis, *Law, Morality and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049 (1994); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW, chs. 8 & 9 (1999).

14. Finnis, *supra* note 13.

15. *Hyde v. Hyde*, L.R. 1 P. & D. 130, at 133 (1866), *per* Lord Penzance.

16. See Sebastian Poulter, *The Definition of Marriage in English Law*, 42 MOD. L. REV. 4 (1979).

relationship that warrants specific legal acknowledgment. More bluntly, a definitional approach fails to identify any normative justification for regulating marriage in the way that we currently do (even though such justification is something that we may legitimately expect of a regulatory legal rule in a liberal society).<sup>17</sup> As Alice Woolley has put it: “[b]y relying on a stated definition, without exploring the concepts that justify or underlie it, the court gives inadequate legal grounding for its decision.”<sup>18</sup>

Concrete examples of the shortcomings of the definitional approach can be gleaned from the realm of private international law insofar as this approach applies to certain types of marriage that conflict with the traditional definition of marriage in this country. The first type is polygamous marriages. Naturally, such marriages are at variance with the “one man and one woman” limb of the *Hyde v. Hyde* definition; yet for most purposes the English courts are *now* prepared to recognize them. This recognition stems not from the fact that the courts apply a different definition of marriage in the conflicts arena: *Hyde v. Hyde* was, after all, itself a private international law case. Rather, the courts’ preparedness to recognize these unions derives from the application of “common sense, good manners and a reasonable tolerance.”<sup>19</sup> While these touchstones are undeniably vague,<sup>20</sup> it would nonetheless seem uncontroversial that it is their application (rather than the rigid application of a strict definition of marriage) that allows the courts to take account of the fact that in many societies in which polygamy is practiced, there are often very good reasons for permitting a plurality of wives. For instance, in some societies that do not permit women to own property in their own right, there has historically been a shortage of potential husbands (caused by frequent wars and fatal hunting injuries).<sup>21</sup> In other societies, polygamy is justified according to a high cultural regard for it stemming not only from the socioeconomic advantages that it can provide for husbands, but also from the fact that it helps to define their community standing and

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17. In the present context, the law may have regulatory (i.e., coercive) consequences for others such as (i) employers required to pay some form of pension to the surviving spouse of a same-sex marriage, or (ii) public or private landlords forced to recognize the survivor’s right to succeed to a tenancy.

18. Woolley, *supra* note 9, at 478.

19. *Cheni v. Cheni*, P 85, at 99 (1965).

20. For criticism of the vagueness of this test, see John Murphy, *Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages*, 49 INT’L & COMP. L.Q. 643 (2000).

21. See also JOHN MURPHY, INTERNATIONAL DIMENSIONS IN FAMILY LAW (2004) (forthcoming). For a more dated (but more thorough) account, see SEBASTIAN POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS ch. 4 (1986).

prestige.<sup>22</sup> The point is that a blinkered adherence to a hard-and-fast definition of marriage would take no account of these factors which are the very essence of broadmindedness and tolerance, and which supply the normative basis for a definition of marriage alternative to our own.

Equal justification can be found for the recognition of arranged marriages which, while frequently consensual, can certainly on one interpretation be said to strain the language of the *Hyde v. Hyde* requirement that the marriage be a “voluntary union.”<sup>23</sup> Notably, within Sikhism and Islam, arranged marriages are regarded as perfectly acceptable because they are sanctioned and affirmed by patriarchal religious doctrines prevailing in the relevant societies. And even beyond religious affirmation, some South Asian cultures make family honor, or *Izzat*, depend in large part on arranged marriages. This is because such marriages can be of instrumental worth in a way that could not be guaranteed if the spouses chose each other. As Ballard’s research reveals: “*Izzat* can be increased by overshadowing other families . . . [and by] contracting prestigious marriage alliances.”<sup>24</sup> As such, simply to maintain this *Izzat*, “a family must send its daughters in marriage to families of equal status” and “[t]o enhance its *Izzat*, it must do better.”<sup>25</sup> Again, these factors justify a concept of marriage that, at least potentially, conflicts with our own definition.

These examples demonstrate two things. First, and most basically, the genus union marriage is far more basic in nature than the English/Judeo-Christian definition tends to suggest. Without suggesting this to be a definitive description, marriage at its most basic seems to entail little more than a publicly sanctioned union of two or more persons.<sup>26</sup> If this is correct, same-sex marriages are no more at variance with this genus union than polygamous, arranged or even child marriages. The second thing revealed by these illustrations is that if we are to understand and attempt to legitimate any given form of marriage, we must be cognizant of the appropriate normative justification that can be offered. This normative justification will be inextricably tied to the prevailing social norms in any given society. Thus, as social norms change from one society to another, we must be prepared to accept different definitions and notions of marriage.

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22. See, e.g., EUGENE HILLMAN, *POLYGAMY RECONSIDERED: AFRICAN PLURAL MARRIAGE & THE CHRISTIAN CHURCHES* (1975). For Muslims, for example, polygamy is only acceptable subject to the proviso that the man is able to provide adequately and equally for all his wives. See POULTER, *supra* note 21, at 44-45.

23. *Hyde v. Hyde*, L.R. 1 P. & D. 130, at 130 (1866), *per* Lord Penzance.

24. C. Ballard, “Arranged Marriages in the British Context,” *NEW COMMUNITY*, Summer 1978, at 181, 184.

25. *Id.*

26. We cannot even restrict this to adults since certain parts of the world, such as Nigeria, permit child marriages. See *Mohamed v. Knott*, 1 Q.B. 1 (1969) (the case involved a 13-year-old girl who married a mature gentleman).

But social norms also change over time within our own society. This is important to bear in mind, for as John Eekelaar has observed, “there exists within society a network of social norms which is formally independent of the legal system, but which is in constant interaction with it.”<sup>27</sup> This means that we can properly expect that the legal rules and definitions that reflect these norms will also change over time; and this is especially so in the arena of family law.<sup>28</sup> One would hope, then, that those who feel emotionally tethered to the waning (if not exactly defunct) traditional definition of marriage might at least acknowledge the scope for change on this basis.

The second reason why decisions about the freedom of any given individual to marry another person of the same sex ought not to be taken on the basis of the traditional definition of marriage is that the reasoning involved would be self-referential and thus circular. As Beth Allen has put it:

The argument that, by definition, marriage can involve only a man and a woman because it has always included only opposite-sex couples, is tautological and reminiscent of anti-miscegenation laws. The fact that marriage has not included same-sex couples in the past does not explain why that cannot be so now anymore than anti-miscegenation laws that prevented interracial couples from marrying justified continuation of those laws.<sup>29</sup>

In summary, a definitional approach is wholly unsuitable not just in general terms, but especially when it is the very definition of marriage that is under attack.

### *B. Rejecting a Privacy Approach*

There are at least two reasons for suggesting that a privacy-based approach would be of no avail in the English context.<sup>30</sup> First, there is something profoundly ironic about framing a claim for formal, public recognition of a relationship in terms of privacy. Even if, as few would dispute, the sexual side of any relationship is a most intimate and private matter, there is still a world of difference between attacking the criminalization of same-sex sexual relations on the grounds of privacy and attacking the prohibition of same-sex marriage on that same basis.

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27. John Eekelaar, *Uncovering Social Obligations: Family Law and the Responsible Citizen*, in *MAKING LAW FOR FAMILIES* 16 (Mavis Maclean ed., 2000).

28. See John Dewar, *The Normal Chaos of Family Law*, 61 *MOD. L. REV.* 467 (1998).

29. Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 *WILLAMETTE L. REV.* 619, 635-36 (1996).

30. For more general criticism of a privacy-based approach, see Bamforth, *supra* note 8, at 33-38.

The marriage, as opposed to the sexual relationship it cements, bears an inescapable public element.<sup>31</sup>

Secondly, such as it is, the English law concerning privacy rights seems not to be concerned with homosexual relationships. The common law in England has never embraced any tort based on the invasion of privacy,<sup>32</sup> and it naturally provides no coherent guidance as to what such a right might entail.<sup>33</sup> And although cases decided on the basis of the laws of defamation, trespass and nuisance occasionally make passing reference to privacy rights, they do not do so in the sense necessary to substantiate a right to marry a person of the same sex. Indeed, the only source of a specific right to privacy in this country is Article 8 of the European Convention on Human Rights<sup>34</sup> which, along with most of the Convention, was given statutory effect in England by virtue of the Human Rights Act 1998.<sup>35</sup> Article 8 provides bluntly that “[e]veryone has the right to respect for his private and family life.” Ostensibly, this provision might be thought to embody a positive right to respect for one’s intimate same-sex relationship.<sup>36</sup> Yet the jurisprudence to emanate from both the European Court and Commission of Human Rights suggests a major problem with this interpretation. This is because Article 8 has repeatedly received a disjunctive construction which treats the right to respect for privacy and the right to respect for family life separately. Furthermore, it seems well established that cases turning in whole or in part on applicants’ same-sex relationships (as opposed to sexual activity

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31. According to the law in England, whether a marriage takes place in a registry office or a church (or other religious institution), statutory preliminaries (especially in relation to posting a public notice), solemnization and registration turn on the significance of adequate publicity. *See* Marriage Act 1949.

32. There have, however, been moves in this direction in recent years—see, especially, *Douglas v. Hello!*, Q.B. 967 (2001), *per* Sedley LJ. For a fuller account, see JOHN MURPHY, STREET ON TORTS ch. 1 (2003).

33. Bamforth, *supra* note 8, at 34, has suggested three possible interpretations: it might mean (i) a right to a *private space* (ie, peaceful enjoyment of one’s home), or (ii) a *private life* (ie, the lawful conduct of oneself in private is the concern of no other person or the state), or (iii) a right not to have one’s personal details made public without one’s consent (though this latter is in part covered by legislation dealing with medical records).

34. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. 005.

35. The very few provisions not incorporated into English law are of no significance in the context of this paper. Human Rights Act, 1998, c. 42 (Eng.).

36. Under Article 8 a citizen has the right to *respect* for his or her private and family life, not merely a right to privacy or family life. The inclusion of the word “respect” requires positive conduct on the part of the state, not merely that it should refrain from doing things that would undermine a person’s privacy or family life.

or inclinations) have consistently been viewed as sounding in terms of the right to respect for one's *family* (not one's private) life.<sup>37</sup>

### C. *Rejecting Abstract Approaches*

In England, university teachers are entitled to join a trade union known as the AUT (Association of University Teachers). During the latter part of the 1980s the AUT campaigned about government underfunding of higher education. The official slogan of the campaign was "rectify the anomaly." No doubt it was a suitably academic quip, yet it meant nothing to the general public or the media that might have been relied on to publicize it. Cuts in government funding have continued steadily ever since.

The implicit lesson here, of course, is that while high-level theorizing and conceptual debate have a rightful place in academia, they may not be the best tools to deploy when seeking to achieve a positive, practical outcome. Arguments before the courts or political campaigns aimed at legislators need to be couched in the kinds of terms to which judges and politicians are most likely to be receptive.<sup>38</sup> It seems doubtful—or at least so it is submitted—that arguments grounded in abstract theories of justice,<sup>39</sup> natural law,<sup>40</sup> and political morality<sup>41</sup> are likely to impress the lawmakers, even if they impress us as academics and help to advance the frontiers of human thought.

Let us take, for example, arguments in favor of recognizing same-sex relationships on the basis of the oft-vaunted principle of autonomy. In his compelling essay, "Same-sex Partnerships and Arguments of Justice," Nicholas Bamforth's fundamental claim is that "[a]utonomy/empowerment should . . . be advanced as the main philosophical argument of justice in favour of according legal recognition to same-sex partnerships."<sup>42</sup> He demonstrates ably that privacy and equality claims in the United States often in truth collapse

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37. See, e.g., *Karner v. Austria*, Application No. 40016/98; *X, Y, & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997); *Röösli v. Germany*, Application No. 28318/95.

38. William Eskridge, elsewhere in this special issue, has correctly identified that it is by either of these routes that change tends to come about.

39. See, e.g., CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* (1995); ANTHONY GREY, *QUEST FOR JUSTICE: TOWARDS HOMOSEXUAL EMANCIPATION* (1992); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS SOCIETY AND LAW* (1988); NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE* (1997).

40. See, e.g., Finnis, *supra* note 13 (opposing same-sex marriage on the grounds of *New* natural law theory) and Woolley, *supra* note 9.

41. See, e.g., Robin West, *Universalism, Liberal Theory & the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998); C. Pierce, *Gay Marriage*, J. SOCIAL PHIL. 5 (1995).

42. Bamforth, *supra* note 8, at 53.

into arguments about autonomy, and thus identifies autonomy as the central concern in this context. Yet he cannot but concede that:

[t]he constitutional provisions in force in any given society may compromise the extent to which autonomy can be of use. If, for example, there is no specific *constitutional* right to autonomy (or its near sibling dignity) in the society concerned [as is the case in Britain], it may be necessary to frame claims for legal recognition of same-sex partnerships, whether this is to be achieved through litigation or legislation, in terms of the constitutional rights that *are* recognised.<sup>43</sup>

With this concession in mind, it is certainly notable that English case law and legislation in the fields of family and health care law almost always shun the language of “autonomy” (or its synonym, “self-determination”) in connection with issues readily susceptible to its application. A particularly good example of this occurring may be observed in connection with children’s rights in relation to controversial medical procedures. Here, both Parliament and the courts have eschewed any recourse to the broad, abstract principle of autonomy. Unlike the language of the academic commentators, the relevant legal rules and decisions are couched in narrow, tightly defined terms with strict, legalistic concepts such as “battery” and “effective consent” comprising the relevant touchstones of adjudication in marked preference to the ethical principle of “autonomy.”<sup>44</sup>

Similar criticisms can be made of Woolley’s attempt<sup>45</sup> to justify same-sex marriage according to the alternative bases of *either* the Kantian categorical imperative that a person should marry to ensure that he or she is not merely a means for another, but is an end for the other,<sup>46</sup> *or* the Hegelian notion that love is “incomprehensible”<sup>47</sup> without a marriage that allows the individual properly to experience self-consciousness.

Rawls captures well the limitations of such philosophical attempts to advance legal causes when he states (albeit in connection with the application of his theory of justice to the endeavour to understand the underpinnings of freedom of expression) that:

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43. *Id.*

44. *Compare, e.g.,* Family Law Reform Act 1969, § 8, *and* *Gillick v. West Norfolk*, 3 All E.R. 402 (1985), *and* *Re R*, 4 All E.R. 177 (1991), *and* *Re W*, 4 All E.R. 627 (1992) (all using the language of effective consent), *with*, M. Brazier & C. Bridge, *Coercion or Caring: Analysing Adolescent Autonomy*, 16 LEGAL STUDIES 84 (1996), *and* John Murphy, *W(h)ither Adolescent Autonomy?*, J. SOC. WELFARE & FAMILY LAW 529 (1992); *and* C.M. Rogers and L.S. Wrightsman, *Attitudes Towards Children’s Rights—Nurturance or Self-determination*, 34 J. SOC. ISSUES 59 (1978).

45. *See* Woolley, *supra* note 9, at 499-523.

46. *See generally*, KANT, *supra* note 9, at 61-64.

47. *See* HEGEL, *supra* note 9, at 41.

[t]he conception of justice to which these principles belong is not to be regarded as a method of answering the jurist's questions, but as a guiding framework, which . . . may orient their reflections, complement their knowledge, and assist their judgment. *We must not ask too much of a philosophical view.*<sup>48</sup>

Woolley fully accepts the veracity of this observation, yet seeks to justify her own essentially philosophical account on the bases that “traditional legal analysis is proving entirely inadequate in confronting a modern problem” and that “there is no apparent method within the law for abandoning that analysis and moving forward.”<sup>49</sup> Her conclusion is therefore that, faced with this problem, “the law may have to step outside its own boundaries in order to acquire a framework through which the problem can be analysed.”<sup>50</sup> Yet, at least in the English context, there may well be grounds to rebut Woolley's assertion since the new legal order ushered in by the passage of the Human Rights Act 1998 arguably provides the necessary “method within law” of articulating a strong legalistic claim for the acceptance of same-sex marriage. Furthermore, unlike the more abstract accounts of a right for same-sex couples to marry, an argument rooted in a human rights approach centers upon the particular claimant and offers an individuated right rather than a general or abstract right claimed on behalf of actual or prospective same-sex couples.

### III. A HUMAN RIGHTS APPROACH

Having dismissed as probably ineffectual (though not necessarily unpersuasive) a number of familiar arguments, we turn now to the main contention of this paper: that there is a basis on which two of England's human rights commitments read in conjunction with one another can be construed as the foundations of a plausible rights-based claim to same-sex marriage. It is an argument that, unlike many others, does not turn on a conception of rights that hails from either the realms of legal or political philosophy. Rather, the edifice of this argument is constructed on the firm platform of two specific, constitutionally entrenched rights.

Like most arguments of a legalistic (as opposed to philosophical) nature, the contention I shall advance may be met by equally legalistic opposition. However, if my argument is found to be more compelling than the various counter-arguments, there is at least one distinct

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48. John Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY, AND LAW: SELECTED TANNER LECTURES ON MORAL PHILOSOPHY 84 (Sterling M. McMurrin ed., 1987) (emphasis added).

49. Woolley, *supra* note 9, at 490.

50. *Id.*

advantage to this approach: there can be no judicial opposition to it on the basis that the right claimed is not one recognized by the law. We might usefully recall here the fact that a string of lawsuits in recent years has failed for want of recognition by the English common law a constitutional right to privacy<sup>51</sup> and the fact that there is a marked reluctance on the part of the English judiciary to adjudicate “children’s autonomy” cases in those terms.<sup>52</sup> It is also worth noting that, in one case involving the claim of a homosexual man to succeed to the protected tenancy of his now deceased same-sex partner, the Court of Appeal was acutely aware of the constitutional constraints within which it could act. As Waite LJ said:

Few would support the potential for unfairness involved in a law which gives automatic succession rights to wives, however faithless, and children, however feckless, and at the same time denies any hope of succession to friends, however devoted their loyalty to the joint household. [However] [t]he judge was nevertheless right, in my view, to resist the temptation to change a bad law by giving it a new linguistic twist. He correctly acknowledged that such changes could only be made by Parliament.<sup>53</sup>

This acute awareness of the limitations of the judicial function—not uncommon in English case law<sup>54</sup>—was echoed in the House of Lords where there was an equal indication of a *personal* dislike for the content of the law in question. Lord Slynn, for example, questioned “[w]hether the result is socially desirable in 1999,” yet concluded that the decision to remove gender-specific terminology was “a matter for Parliament” rather than the courts.<sup>55</sup>

So to which specific statutory provisions must we direct our attention?

#### *A. Article 12 and the Domestic Prohibition*

The starting point for the present claim that a plausible construction of English *human rights* legislation might pave the way for same-sex marriage is actually the specific provision in the matrimonial legislation that clearly prohibits such unions stating that a marriage shall be void if the parties to it “are not respectively male and female.”<sup>56</sup> It is a fairly

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51. See *supra* note 32 and accompanying text.

52. See *supra* note 44 and accompanying text.

53. Fitzpatrick v. Sterling Hous. Ass’n Ltd., Ch. 304 (1998).

54. S.M. Cretney & F.M.B. Reynolds, *Limits of the Judicial Function*, 116 *L.Q. REV.* 181 (2000).

55. Fitzpatrick v. Sterling Hous. Ass’n Ltd., 1 A.C. 27, at 34 (2001).

56. Matrimonial Causes Act 1973, § 11(c).

plain and straightforward provision;<sup>57</sup> and it clearly aims to preserve marriage as an exclusively heterosexual institution. It is thus clear that the task at hand is to find within the Human Rights Act 1998 an opposing and superior position.

For the most part, the European Convention on Human Rights and Fundamental Freedoms was incorporated into the Human Rights Act 1998 as Schedule 1 to that Act.<sup>58</sup> As such, articles 12 and 14—the key articles for the purposes of this paper—now operate with full statutory force in England. Article 12 provides that “[m]en 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.” While this provision does not specify that men have the right to marry only women (and vice versa), it may initially be interpreted in this way since the Article affords the right to marry only subject to the national laws of each state party to the Convention. Thus, since English statute prohibits same-sex marriage, it ostensibly appears that the Convention cannot be read as conferring a general right to marry the *person of one’s choice*, but merely *the person of the opposite sex of one’s choice*. Indeed, the European Court of Human Rights has twice held that the English restriction of marriage to parties of the opposite sex is a legitimate impediment to marriage, validly created by national law.<sup>59</sup> Furthermore, it has also said, on an earlier occasion, that the right to marry afforded by Article 12 refers only to “the traditional marriage between persons of opposite biological sex.”<sup>60</sup> However, it would be wrong if the analysis were to stop there.

*B. Convention Mechanics, the European Court of Human Rights, and a Reinterpretation of Article 12*

Perhaps oddly to the common lawyer, the decisions of the European Court of Human Rights are not binding. The court is fully at liberty to

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57. There is an argument (thus far unsuccessful: *see* *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56 (1986); *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1991); *Sheffield v. United Kingdom*, 27 Eur. H.R. Rep. 163 (1999)) that since the subsection is framed in terms of a “male” and a “female,” as opposed to a man and a woman, there is scope for it to be interpreted so as to allow transsexuals to marry a person of their own pre-operative sex. For further discussion and a suggestion as to why psychological sex might be a better criterion than biological sex, see Ian McColl Kennedy, *Transsexualism and Single Sex Marriage*, 2 ANGLO-AM. L. REV. 112 (1973).

58. Human Rights Act, 1998, c. 42 (Eng.).

59. *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1991); *Sheffield v. United Kingdom*, 27 Eur. H.R. Rep. 163 (1999).

60. *Rees*, 9 Eur. H.R. Rep. at para. 49. This was repeated in *Cossey*, at para. 49, and in *Sheffield*, at para. 62.

depart—sometimes quite radically<sup>61</sup>—from its own earlier decisions. This is because the Convention is a “living instrument which . . . must be interpreted in the light of present-day conditions.”<sup>62</sup> Thus, as those conditions change, so might the interpretation of the Convention. As the court explained in *Marckx v. Belgium*:

It is true that, at the time when the Convention was drafted, it was regarded as permissible and normal in many European countries to draw a distinction between the “illegitimate” and the “legitimate” family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions.<sup>63</sup>

In addition to the acceptability of this protean interpretive technique, it was held in *Kjeldsen v. Denmark* that the Convention is an “instrument designed to maintain and promote the ideals and values of a democratic society.”<sup>64</sup> Among these ideals and values, the court later explained, are “pluralism, tolerance and broadmindedness.”<sup>65</sup> Taken together, the principles of pluralism, tolerance and flexible interpretation mean that a recognition of same-sex matrimony within Article 12 cannot be ruled out, especially in view of the fact that two European countries—the Netherlands and Belgium—have recently become the first in the world to permit same-sex marriage. Nor is it immaterial that a large and growing number of other European states have legislated to permit same-sex registered partnerships,<sup>66</sup> or that a later European instrument—the Charter of Fundamental Rights of the European Union—proclaims the right to marry in terms that make no reference to gender.<sup>67</sup>

Against such a background, it is suggested that the interpretation of Article 12 is ripe for revisitation. Moreover, given the fact that there has never actually been a direct application to either the Human Rights Court or Commission involving a claim that Article 12 (either on its own, or read in conjunction with Article 14) confers a right to contract a *same-*

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61. Within four years of its controversial decision in *Osman v. United Kingdom*, 29 Eur. H.R. Rep. 245 (2000), the Human Rights Court performed a complete *volte face* in the twin decisions of *Z v. United Kingdom*, 34 Eur. H.R. Rep. 97 (2002), and *TP and KM v. United Kingdom*, 34 Eur. H.R. Rep. 42 (2002). See also Conor A. Gearty, *Osman Unravels*, 65 MOD. L. REV. 87 (2002), and Conor A. Gearty, *Unravelling Osman*, 64 MOD. L. REV. 159 (2001).

62. *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, para. 31 (1978).

63. 2 Eur. H.R. Rep. 330, para. 41 (1979).

64. 1 Eur. H.R. Rep. 711, at 731 (1976).

65. *Handyside v. United Kingdom*, 1 EHRR 737, 754 (1976).

66. For details, see K. Norrie, *Would Scots Law Recognise a Dutch Same-sex Marriage?*, 7 EDINBURGH L. REV. 147, 147-48 (2003).

67. Art. 9 provides simply that “the right to marry and the right to found a family shall be guaranteed.” In *Goodwin v. United Kingdom*, the European Court of Human Rights assumed that this omission of any reference to men and women was deliberate. 35 Eur. H.R. Rep. 18, para. 100 (2002).

*sex* marriage,<sup>68</sup> there is certainly no absence of opportunity to test this claim. But what might this suggested reinterpretation of Article 12 look like? To begin with, and recalling the hugely increased legal recognition of same-sex relationships within European societies, it is at least arguable that Article 12 is fit to be interpreted as conferring a general right to marry, and that the reference to men and women alludes simply to the fact that the right exists in favor of adults and not minors. Certainly, the provision is sufficiently ambiguous to support such an interpretation, for it will be noted that the Article does not state that the right refers only to that of a man to marry a woman (or vice versa). Let us suppose (not unreasonably) that same-sex marriage legislation will proliferate around Europe in the next ten to twenty years. How then might we expect the next generation of law students to interpret this provision given that they will have been brought up in a Europe that widely permits same-sex marriage? Is it not entirely plausible that they will read it according to the norm that marriage should be confined to adults rather than the norm that marriage is purely for heterosexuals? In short, a major cause of the current tendency to give the ambiguous Article 12 a heterosexist interpretation is the fact that it is being read through culturally conditioned heterosexist eyes.

*C. Objections to Reinterpretation of Article 12 and the Relevance of Article 14*

Even if we accept that Article 12 *could* be interpreted as conferring a general right to marry, the obvious objection to reading into it the right to marry a person of the same sex in England is the fact that Article 12 is couched in terms that make the right it affords subordinate to domestic legislation. As such, the objection would be that, even if Article 12 could be construed as conferring a *general* right to marry, it must nonetheless be read subject to impediments imposed by English domestic legislation. And since there is a statute prohibiting same-sex marriage, the broad interpretation of Article 12 is to no avail. It is at this point that Article 14 of the Convention becomes relevant. There it is provided that, “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” If the statutory prohibition (dating from 1973) could be shown to

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68. The various cases involving transsexuals have been predicated on a right to contract a heterosexual marriage that involves recognition of a post-operative gender. See generally Wintemute, *Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 7, at 713-729.

be discriminatory according to the terms of the 1998 Statute, there may well be a strong case for the repeal of the 1973 prohibition. Certainly, where other statutes have been shown to be at variance with the Human Rights Convention, the legislature has been prepared to make the necessary repeals. As Fredman explains (in relation to the watershed *Dudgeon* case<sup>69</sup> concerning the improper prohibition of homosexual sexual conduct in Northern Ireland): “[t]he effect of *Dudgeon* . . . has been of crucial importance. The removal of criminal prohibitions in Northern Ireland triggered a chain of similar repeals within the UK.”<sup>70</sup>

Nonetheless, there are three possible difficulties associated with trying to show that the current prohibition of same-sex marriage is discriminatory in Article 14 terms. The first is that circumscribing the right to marry the person of one’s choice by reference to the gender of one’s would-be spouse is a matter which sounds in terms of sexual orientation discrimination rather than sex discrimination: it only affects gay men, lesbian women, or bisexuals of either gender and is thus not a matter of sex discrimination. Since Article 14 makes no mention of the wrongfulness of sexual orientation discrimination, the argument would continue, it might therefore be taken to be legal to discriminate in these terms (even if morally improper).<sup>71</sup> The second possible problem stems from the fact that differential treatment of certain people or groups is not per se wrongful. If sufficient justification can be shown, the differential treatment fails to qualify as (unlawful) discrimination. And since it can be argued that a number of strong and cogent reasons do exist for retaining marriage as an exclusively heterosexual institution, it may well be that the exclusion of same-sex marriage is therefore an example of differential (but not discriminatory) treatment. Thirdly, in the absence of any direct domestic precedents, there is a potential problem lurking in the fact that the guiding jurisprudence to have emanated thus far from Europe has been anything but favorable to the contention that there should be a right to same-sex marriage.

Not only must we attempt to meet each of these objections in turn, but in case there be any residual doubt, we must also consider the further line of argument according to which sexual orientation—quite apart from being a discrete form of discrimination—has the capacity to ground an argument premised on direct *sex discrimination* to which, importantly, none of these objections apply.

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69. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1982).

70. Sandra Fredman, *Equality Issues*, in *THE IMPACT OF THE HUMAN RIGHTS BILL ON ENGLISH LAW* 111, 128-29 (Basil S. Markesinis ed., 1998).

71. Recall here the absence in England of any general constitutional equality guarantee.

1. *Sexual orientation discrimination not within article 14?*

The fact that sexual orientation is not expressly mentioned within Article 14 is the easiest of the three objections with which to deal. For, despite the fact that there is no constitutional right in the United Kingdom to be free from sexual orientation discrimination<sup>72</sup>—it is clear that the list of forms of discrimination within Article 14 is not exclusive. The Article specifically permits equality arguments to be grounded on discrimination based on any “other status” of the applicant; and in the context of the Article 8 right to respect for privacy, the court has already acknowledged, on several occasions, that sexual orientation falls within this category.<sup>73</sup> Although the cases to date all refer to same-sex sexual conduct and the Article 8 right to respect for privacy, Wintemute’s study of the European Court’s recent decisions leads him to conclude that “the Court’s case-law appears to be evolving towards a general principle that all differences in treatment based on sexual orientation without a strong justification violate the Convention.”<sup>74</sup> It is also noteworthy that the appellate domestic courts have shown themselves to be receptive to sexual orientation discrimination arguments. For example, in the *Fitzpatrick* case we considered earlier, Waite LJ remarked upon the “modern acceptance of the need to avoid any discrimination on the ground of sexual orientation.”<sup>75</sup> As such, sexual orientation discrimination seems to be firmly recognized as falling within the Convention.

2. *Justifiable differential treatment?*

For Article 14 of the European Convention to be of any use, it is insufficient that there has been mere differential treatment. The differential treatment must also be unjustified in order for it to constitute discrimination. In the context of sexual orientation discrimination there has not yet emerged any clear standard to which putative justifications must aspire. However, in the parallel areas of sex discrimination,

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72. Even *sex discrimination* prohibitions are only specious. They are generally restricted to particular, clearly defined areas such as the field of employment. See the Sex Discrimination Act 1975; Treaty of Rome (also known as Treaty Establishing the European Economic Community), Mar. 25, 1957, art. 119, 298 U.N.T.S. 11 (as amended by the Treaty of Amsterdam, Oct. 2, 1997); Equal Treatment Directive, Feb. 9, 1976, Dir 76/207 EEC.

73. See *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1982); *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988); *Modinos v. Cyprus*, Series A, No. 259 (1993); *ADT v. United Kingdom*, 31 Eur. H.R. Rep. 33 (2001); *Smith v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

74. Robert Wintemute, *Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 7, at 713. See also, e.g., *Salgueiro da Silva Mouta v. Portugal*, 1 F.C.R. 653 (2001).

75. *Fitzpatrick v. Sterling Hous. Ass’n Ltd.*, Ch. 304, at 318 (1998).

discrimination based on illegitimacy, and discrimination based on nationality, the yardstick seems to be one of “pressing social need.”<sup>76</sup> Even without attempting to define this term, it must be conceded that arguments along these lines can be made in defense of exclusively heterosexual marriage. Lynn Wardle, for example, appears to view same-sex marriage as a threat to the institution of heterosexual marriage.<sup>77</sup> In similar vein, Nan Hunter has argued that single-sex marriage could “destabilize the gendered definition of marriage.”<sup>78</sup> More broadly, the European Commission of Human Rights has itself remarked that the intrinsic value to society of families founded on heterosexual marriages and cohabitation is such that they warrant special protection.<sup>79</sup>

But it is one thing to concede the pertinence of an argument, and quite another to concede its strength. Indeed, the force of the first of these arguments—that same-sex marriage would undermine traditional marriage—is highly questionable notwithstanding its (probable) ongoing popularity. As Norrie has pithily observed:

[c]hanging the terms of entry into the state-sanctioned relationship we call marriage is not in itself an attack on marriage as previously understood, otherwise parliament has frequently attacked marriage, such as . . . every time it loosened the forbidden degrees. Did the Supreme Court of the United States of America attack marriage when it struck down various states’ rules prohibiting inter-racial marriage in *Loving v Virginia* 388 US 1 (1967)? “Traditional” marriage is, in reality, an ever-changing, ever-evolving beast.<sup>80</sup>

In short, the strength of the argument derives merely from its ongoing apparent popularity. But even here we must be cautious, for as Gutmann has warned (albeit in another context), we must be prepared to accept that sometimes the dominant ideology may in reality be no more than the ideology of the dominant.<sup>81</sup>

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76. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 164 (1982) (citing *Handyside v. United Kingdom*, 1 E.H.R.R. 737, 753, para. 48). For further analysis, see Fredman, *supra* note 71, and Wintemute & Andenæs, *supra* note 7.

77. Lynn D. Wardle, *Same-Sex Marriage and the Limits of Legal Pluralism*, in *THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW* 381 (John Eekelaar & Thandabantu Nhalpo eds., 1998).

78. Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *LAW AND SEXUALITY* 9, 11 (1991).

79. *X, Y, & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997).

80. Norrie, *supra* note 66, at 156. For further counterargument, see John Murphy, *The Recognition of Same-Sex Families in Britain: The Role of Private International Law*, 16 *INT’L J.L. POL’Y & FAM.* 181, 186-87 (2002).

81. Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 *PHIL. & PUB. AFF.* 171 (1993).

The second possible suggested justification for maintaining the prohibition on same-sex marriage can be distilled down to a no-less-popular concern about the supposedly doubtful parenting capacities of same-sex spouses. Here, there is simply insufficient empirical data from the Netherlands, Belgium and Canada to either refute or confirm the assumption upon which this concern is founded. Same-sex parenting is just too new a phenomenon, and too sparsely distributed to provide any meaningful data. By contrast, however, registered same-sex partnerships—a close sibling of same-sex marriage—have been around for some time, and a number of these now permit same-sex couples to adopt apparently unproblematically.<sup>82</sup> There is, therefore, the strong suspicion that this “inappropriate parents” argument is unfounded.<sup>83</sup>

Even if these counter arguments do not convince everyone, hopefully doubters would at least concede the open and unresolved nature of this debate. That being the case, it is difficult to see how objectors could satisfy the required standard for their argument: a “pressing social need” for the retention of a prohibition on same-sex marriage. Unlike other impediments to marriage—such as a failure to be of the minimum age, or the (eugenically grounded) prohibited degrees of consanguinity which are demonstrably imposed for the benefit of children and society—the prohibition on marriage between persons of the same sex is at best only arguably of benefit to society. In the absence of an unequivocal threat to society, it is submitted that the threshold of “pressing social need” cannot logically be satisfied. If this is correct, then even the doubters must admit their failure to rebut the strong *prima facie* argument that the statute is discriminatory in the accepted manner.

### 3. *Significant countervailing earlier decisions?*

Article 14 represents a novel step in English law. For unlike the Fourteenth Amendment to the U.S. Constitution, English law does not provide any general equality guarantee. This means that, outside those areas specifically covered by statute—such as race, sex and disability discrimination—there has never before been such a broad guarantee of equality in this country. Nonetheless, Article 14 remains problematic in terms of interpretation and in its scope of application. In relation to claims based on sexual orientation discrimination *per se*, the English courts have no domestic authorities to which they may turn. Furthermore, they are obliged to bear in mind the case law emanating from the

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82. See also Polikoff, *supra* note 11.

83. A further problem with this putative justification is its misconceived assumption that marriage and parenting are somehow inextricably tied together. This is plainly not the case.

European Court and Commission of Human Rights,<sup>84</sup> which, hitherto, has not been entirely helpful to the argument advanced here. Indeed, in terms of the European case law to date, there has been a marked ambivalence as to the appropriate comparator to use in sexual orientation discrimination cases.

Stripped down to an uncontroversial proposition, equal treatment means that like persons should be treated alike. Yet this tells us nothing of who, for sexual orientation purposes, should constitute the relevant like persons. In order to deduce these persons we must determine the appropriate comparator for any given complainant: the person whom the applicant must taken to be “like.” In the light of past European decisions, it seems that there are two possible comparators to use in the context of claims made by persons seeking to enter into a same-sex marriage. Either a gay man must be compared with a lesbian woman (that is, the comparison is made with a person in a similarly positioned minority group) or the gay man must be compared with a heterosexual man.

The notion that a lesbian woman should be the appropriate comparator for a gay man has its origins in the reasoning of the European Commission. Equally, in *X, Y, and Z v. United Kingdom*.<sup>85</sup> There, the Commission heard a complaint brought by a gay couple. Yet it refused to accept any comparison between a gay couple and a heterosexual couple. Instead, it said that the gay couple could only compare themselves with a lesbian couple.<sup>86</sup> This may appear ostensibly fair, but in reality it is deeply flawed. An inter-sex comparison, such as this, is what is required to expose *sex discrimination* (not sexual orientation discrimination). In sex discrimination cases—such as those that typically arise in the employment sphere—we answer the question “Does employer X discriminate against women in qualification-based promotions?” by asking the question “Would men with the same qualifications be promoted?”. The key difference between the complainant and the comparator is their respective sexes, and this is why a comparison of the two allows us to reveal their gender difference to be the basis of the discrimination. If, by contrast, we are attempting to expose *sexual orientation* discrimination against man A, then the appropriate comparator must be man B who has a different sexual orientation. Any approach that attempts to use a lesbian woman as the appropriate comparator for a gay man’s claim of *sexual orientation* discrimination will necessarily collapse into self-referential circularity: discrimination

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84. Human Rights Act 1998, c. 42, § 2 (Eng.).

85. *X, Y, & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997).

86. *Id.* at para. 34.

against gay men cannot be justified by reference to precisely similar discrimination against lesbian women (and vice versa).

The second possible comparator has its roots in the contrasting later case of *Simpson v. United Kingdom*.<sup>87</sup> There, the Commission *did* permit the lesbian applicant to invoke a heterosexual comparator in order to found her allegation of sexual orientation discrimination. On the other hand, the sting in the tail in that case was that the Commission was prepared to accept the protection of “the family” as an adequate justification for differential treatment; and at that time, there was a substantial body of Strasbourg case law excluding same-sex couples from the definition of “family.”

Unhelpful though this guidance from Europe may appear, all is not lost. For a start, decisions of the European Court and Commission do not amount to binding precedents on the English courts. Indeed, the Human Rights Act 1998 was deliberately framed in such a way that the English courts should not be bound,<sup>88</sup> but instead permitted to be more progressive (but no more restrictive) than the Strasbourg court in interpreting the Convention.<sup>89</sup> Why, then, would the English courts choose to adopt an approach at variance with that so far evinced in Strasbourg? There are at two plausible reasons for so doing.

First, the reasoning in the 1986 *Simpson* decision could not possibly be replicated today. It is inconceivable that a current-day European Court of Human Rights could deny family status to a same-sex *married* couple from Belgium or the Netherlands. It is almost equally certain that a registered same-sex partnership would also be viewed as familial. It would thus follow that the “special protection for the family” argument could no longer be invoked to justify legislation prohibiting the formation of same-sex families. Secondly, the very particularized discrimination legislation that already does exist in Britain has built into it the concept of indirect discrimination. This means that, if the courts wanted to appear consistent, they would hardly be inclined to decide a gay man’s sexual orientation discrimination claim using the comparator

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87. 47 D.R. 274 (1986) (the case concerned the claim by a lesbian woman that she was entitled to succeed to a tenancy formerly held by her now deceased partner).

88. Under section 2 of the 1998 Act, the English courts are only required to take into account the decisions and opinions of the European Court of Human Rights and the Commission.

89. While the Human Rights Bill was before Parliament and it was being mooted whether Strasbourg decisions should bind the English courts, the Lord Chancellor said: “[w]e must remember that the interpretation of the Convention rights develops over the years . . . . We feel that to accept this amendment [in favour of making Strasbourg case law binding] removes from the judges the flexibility and discretion that they require in developing human rights law.” *Hansard* H.L., 19 Jan. 1998, col. 1271. The clear tenor of this statement is that the English courts *may* depart from Strasbourg case law, *but only* in instances where such a departure would *expand* the scope of any given Convention right.

of a similarly excluded lesbian. Using the logically appropriate comparator of a heterosexual man would, as Fredman puts it, “ensure consistency as between the law deriving from the Convention and that is already in force under domestic and EC Law.”<sup>90</sup> It might therefore be asserted that the English courts would wish to accept a modern notion of “family” and adjudicate sexual orientation claims on the basis of an intra-sex comparator.

Whether the English courts could uphold the sexual orientation argument articulated here might depend crucially on the question put to it. If the question took the form “May X marry the person of his choice?,” the court would be free to afford official vindication to the argument put forward here. If, by contrast, the question posed were to be “May Mr. X marry another man?,” then the prohibition in the 1973 statute may validly be shown to apply to all men equally and thus be no greater impediment to Mr. X, than to Mr. Y or Mr. Z. Neither question has ever directly arisen in English litigation, and it is not proposed to speculate on what the courts would do. The present aim is to demonstrate a strong, legalistic argument that there may be a set of human rights commitments that, read together, ground a human rights based claim to same-sex marriage. That said, it would not be within the spirit of the new human rights in England to dispose of the problems raised by the first form of the question by simple judicial prestidigitation whereby the question is reformulated so as to avoid the difficulties associated with sexual orientation discrimination. As Lord Browne-Wilkinson, one of the most senior members of the English judiciary, has explained: “[a]s these moral questions come before the courts in Convention cases the courts will be required to give moral answers.”<sup>91</sup>

But even if the question posed is in the second form—“May Mr. X marry another man?”—all is far from lost, for that, in essence, involves a question of sex discrimination: “can a man do what we all know a woman is permitted to do?” It is therefore to that question that we must now turn.

#### *D. Sexual Orientation as the Basis of Sex Discrimination*<sup>92</sup>

If a court were to be presented with the very specific question, “May Mr. X marry Mr. Y?” or the equally specific question, “May Miss A marry Miss B?,” a claim based on direct *sex* (as opposed to *sexual orientation*) discrimination is in issue. It thus follows that in such a case,

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90. Fredman, *supra* note 71, at 116.

91. Lord Browne-Wilkinson, *The Impact on Judicial Reasoning, in THE IMPACT OF THE HUMAN RIGHTS BILL ON ENGLISH LAW*, *supra* note 71, at 21.

92. Here I draw heavily on Wintemute, *supra* note 4.

none of the objections raised specifically in relation to a claim founded on sexual orientation discrimination *per se* will apply. The court would inescapably, therefore, have to decide whether the current prohibition on same-sex marriage is discriminatory in its terms.

But how, it may fairly be asked, can a claim ultimately turning on the claimant's sexual orientation be characterized as a sex discrimination case? If one asks the question, "According to English law, who may marry Mr. X?," a very likely answer that one will receive is "Any woman." If, similarly, one asks, "Who may marry Miss Y?," it is equally probable that the reply will be "Any man."<sup>93</sup> What lies behind these knee-jerk responses,<sup>94</sup> of course, is the well-known fact that same-sex marriage is prohibited. This prohibition therefore raises questions about sex discrimination since the excluded persons in either case belong to a single gender. Thus, unlike cases involving sexual orientation discrimination, the proper comparator is a person of the *opposite sex* to the claimant when the question posed relates to the freedom to marry a named individual. The natural objection to this choice of comparator is that like persons are not being compared. There is all the difference in the world, the argument would run, between, say, a gay man wishing to marry Mr. X, and a heterosexual woman wishing to marry the same Mr. X. The comparator is both of a different sex to the claimant and of heterosexual rather than homosexual persuasion. In so being, such a comparator, it would be argued, bears no resemblance at all to the claimant, and could hardly be thought to be a "like person." Nonetheless, it is demonstrably the case that a heterosexual female is the appropriate comparator for a homosexual male in cases of sex discrimination turning on the sexual orientation of the claimant.

As Wintemute has ably demonstrated, the erroneous foundation of the objection to this choice of comparator is the failure to appreciate that sexual orientation is ineluctably a sex-based criterion. As he puts it, "where a person is attracted to a partner of a given sex (eg male), whether or not that person's attraction is classified as same-sex or opposite-sex depends entirely on that person's own sex."<sup>95</sup> In essence, then, any discrimination based on sexual orientation is at one and the same time discrimination based on sex. But when focusing on the sex discrimination aspects, it is important to ensure that the chosen comparator is described *only* in terms that allow the crucial difference

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93. In neither case is the suggested response at all accurate. Further qualifications would, naturally, need to be added referring, for instance, to matters such as the soundness of mind and existing marital status of the relevant parties.

94. I assume satisfaction of other prerequisites such as competence and unmarried status.

95. Wintemute, *supra* note 4, at 346.

between the claimant and the comparator to be exposed. Thus, we must exclude from our comparison any reference to the sexual orientation of either party. We need ask, and ask only, "Is it discriminatory to prevent a man from marrying Mr. X when any woman could marry such a man?" It is plainly irrelevant that not all (indeed, very few) men would want to marry another man. No one, after all, would question the wrongfulness of sex discrimination turning on a woman's pregnancy even though not all women become pregnant or have the desire to do so. Similarly, as was recognized in the landmark case of *Loving v. Virginia*,<sup>96</sup> it was wrong to exclude a black person from marrying a white person (even though not all black people would wish to marry a white person). The point here is that the same-sex impediment to marriage prevents all men in theory, and some men in practice, from doing something that "any woman" could do. It is inescapably discrimination based on sex.

#### IV. CONCLUSION

I have attempted to show that the passage of the Human Rights Act 1998 has brought with it (through a combination of Articles 12 and 14 of the Human Rights Convention) the distinct possibility of a novel, non-theoretic, legalistic claim for the acceptance of same-sex marriage. The argument admittedly depends on a number of contingencies, not least of which is progressive jurisprudence at a European level. Nor can we realistically expect a sudden volte face in English law. Indeed, given that England still awaits the introduction of a facility for registered same-sex partnerships, it is clear that there is a significant legal mountain to climb on sexual orientation issues. Nonetheless, what is offered here is a form of discrimination-based analysis that combines the equality guarantees of Article 14 with a substantive right that has thus far not seriously been tested by transsexuals.

In a well-documented series of cases,<sup>97</sup> the Strasbourg court has been able to uphold the domestic courts' refusals of marriage rights by reference to the fact that parties did not, as they argued, have the right to have their birth registration details altered in order that they be legally recognized by their post-operative sex. In other words, they never questioned the prohibition of same-sex marriage; they were much more concerned to be recognized in law as belonging to their post-operative sex. In this paper, however, I have attempted to tackle head-on the question which technically only arose as a secondary issue in those cases.

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96. 388 U.S. 1 (1967).

97. See generally Wintemute, *Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 7, at 713-729.

It therefore enters new legal territory and a willing court need not feel unduly encumbered by the case law of the past, whether that be domestic or European case law.

On the other hand, there is an important practical limit to what the courts can do that must be recorded here. They do not have the independent power to strike down statutes—even unconscionable and discriminatory ones. At best, an appellate court has the power under section 4 of the Human Rights Act to issue a statement of incompatibility declaring the legislation to be inconsistent with one or more Convention rights.<sup>98</sup> It then falls to the legislature via the fast-track procedure provided for in section 10 and Schedule 2 of that Act to make the appropriate amends or repeal.<sup>99</sup> One would hope, however—especially in the light of growing explicit prohibitions of sexual orientation-based discrimination at the European level<sup>100</sup>—that the legislature would not be afraid to do so.

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98. Human Rights Act 1998, c. 42, § 4 (Eng.).

99. *Id.* at § 2.

100. *See, e.g.*, Treaty of Rome (also known as Treaty Establishing the European Economic Community), March 25, 1957, Art. 13, 298 U.N.T.S. 11 (as amended by the Treaty of Amsterdam, Oct. 2, 1997); Council Directive 2000/78/EC Nov. 27, 2000.