

Same-Sex Marriage not an Equal Rights Issue, Yet

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Abstract:

The present paper takes its point of departure from “McDonough’s Logical Argument” (hereafter MLA) that “gays” have traditionally had the same marital rights as “straights”, namely to marry one eligible person of the opposite gender. The present paper argues that, although it might not seem so at first glance, MLA is consistent with full legal rights being accorded to “Same Sex Marriage” (SSM). That is, MLA takes no stand on the substantive issue whether SSM should be legalized, but is merely an attempt to make a purely logical point about the “individuation” (the precise specification) of the right to marry. An illuminating social science fiction example is provided to show that MLA is neutral on the legalization of SSM. The paper argues that philosophical argument *per se* is largely impotent on these kinds of issues, and that the justification for legalizing SSM is to be found, rather, in the democratic process.

Keywords: Same-sex marriage, equality, miscegenation, limitations of philosophical argument, democratic process

The blessedness of being little.
Shakespeare, *Henry VIII* (IV, ii, 66)

In response to an editorial in *The Economist* in 2004 that claimed that the case for allowing same-sex marriage (SSM) “begins with equality pure and simple”, Richard McDonough provides what he calls a “logical” argument that SSM is *not* an equal rights issue. He argues that “gays” have traditionally had exactly the same marriage rights as “straights”, namely, the right to marry any *eligible* person (not underage, not already married to someone else, not a member of the immediate family, etc.) of the opposite sex, and many “gays” have exercised this right, e.g., Rock Hudson was gay but he married Phyllis Gates and many other “gays” have done the same. Hudson was not permitted to marry anyone of his same gender but no “straights” had that right either. Call this McDonough’s Logical Argument or MLA! Various objections have been raised against MLA by Held (2007; 2009; 2013), Rajczi (2008), Drabek (2014), Reitan (2014), and Chambers (2107). These objections are mistaken, but for an unusual sort of reason. As a certain kind of logical point, MLA explicitly states that it does not argue for *any* substantial conclusion in this connection: It “does not argue against [SSM] ... or even address that issue” (MLA, 52, 56). MLA only purports to provide a “little” logical point the individuation of the relevant right.

§ I rehearses MLA's core argument. § II surveys the objections to MLA. § III employs a science fiction example to show that MLA inherently neither supports nor opposes legalizing SSM. § IV argues that although Held and Chambers appear to reject MLA, they tacitly accept its main point. § V shows that Rajczi's objection fails. § VI refutes Reiten's claim that MLA is committed to a "principle of Nondiscrimination" that permits discrimination and argues that MLA's point is logically prior to the question whether denying SSM is morally or legally discriminatory. § VII argues that although MLA holds that SSM *is* not justified on grounds of equal rights, it is *consistent* with the view that SSM could *become* justified on the grounds of equal rights - for it all depends on *how* one gets there.

I.) A Recapitulation of MLA

Held (2007, 228), who appears to reject MLA, summarizes the core argument,

The historical civil rights movements have been based on the idea that all people should have the same rights. So if men can vote then women should be afforded the same right. But gay marriage is different. As it stands, nobody has the right to marry a person of the same sex. Straights do not possess that right any more than gays. And the right that straights have, to marry one person of the opposite sex, is also shared by gays. Since nobody currently possesses the right to marry an individual of the same sex, denial of same-sex marriages is not discriminatory.

MLA's point is that rights are *individuated* in very complicated ways. One might think that there is some abstract "right to marry" granted to some groups and not others, but it is not this simple. In the United States, these conditions have, until the Supreme Court legalized SSM in *Obergefell v. Hodges*, 576 in 2015, been, roughly, that a marriage is a union of one eligible male and one eligible female. For simplicity, call traditional heterosexual marriage "Opposite Sex Marriage" or OSM! To specify the traditional OSM right to marry *is* to specify that complex set of conditions. Lara may feel she is being discriminated against when she is told that she cannot marry John, but the fact that John is her father nullifies that charge. No one has the right she wants. MLA claims that the Defenders of Same-Sex Marriage (DSSM's) by an appeal to "equality" fail to see this. Since in 1960 Bob and Ted do not satisfy the conditions specified in that right at that time, they are not being treated unequally when they are not allowed to marry any more than Lara and John are being treated unequally when they are denied that same right.

MLA also argues that the logic of DSSM's argument could be used by the Defenders of Polygamous Marriage (DPM's) and the Defenders of Incestuous Marriage (DIM's). For if, as DSSM's argue, the case for SSM is "equality pure and simple", then if adult siblings A and B love each other, one can argue that their being allowed to marry is also justified by appeal to "equality pure and simple". Similarly, if the already-married people C and D love each other, then one can argue that their being allowed to marry is also based on "equality pure and simple". In opposition to this, MLA argues that, as Hegel points out, if one is willing to consider things "under some abstracted aspect", i.e., apart from the complex nexus of social relations and conditions that *constitute*

that *concrete* right, then a “reason can be given for anything” (Taylor 1975, 283 n 1; MLA, 62 n 19). Mommy tells little Susie, age 6, that she can have any pet she wants, and she says she wants a bunny. Her brother, Johnny, age 7, asks if he has the *same* right, and mommy says Yes, whereupon little Johnny announces that he wants a Gaboon Viper (because it has the longest fangs of any poisonous snake). Little Johnny protests that he only wants equal rights with little Susie, but Mommy, perhaps a Hegelian, is not amused.

It is important that MLA (57-58, 62 n18) does *not* argue that one cannot change the set of conditions that individuate a legal right (the case of slavery or a woman’s rights to vote). MLA only claims that DSSM’s cannot justify their view *merely* on the basis of an appeal to equality, but, rather, must argue for a *new right* that, prior to 2015, no one had. For no one, neither gay nor straight, in 1960, had the right to marry in the same sex (Held 2007, 226; Chambers 2017, 32-33). MLA’s (57-58) point is *only* that a *good* argument for SSM must be a very different kind of argument and even alludes to one sort of argument that *might* be more successful.

II.) The Objections to MLA.

Held (2007; 2009; 2013) states the most detailed critique of MLA and so his objection is considered first. Note that Held, borrowing an expression of Stich’s (1982, 153), helps himself to “a healthy serving of assumptions.” Held (2007, 221) dismisses all objections that contradict United States politics and legal theory, e.g., people are entitled to their personal religious beliefs, but the religious view that homosexuality is a sin is not relevant to the *legal* question of *public* policy in the United States (Held, 221-222). Thus, questions of morality and ethics are not relevant (Held, 221-222, 224). Similarly, one cannot base one’s opposition to SSM on “metaphysical” views, like the view that males and females have complimentary “essences,” that appear to support traditional OSM (Held 2007, 223-114). Appeal to tradition, “though dicey,” is “not strong,” for slavery and the oppression of women were traditions, but they were wrong (Held 2007, 224). Held (2009) also rejects appeal to dictionary definitions of marriage (as a union of a man and a woman): “The last time I checked we did not refer constitutional issues or the matters of rights to *Webster’s* dictionary”. That is, Held (2007, 227) presupposes the *liberal* (in the broad sense) tradition tracing to Mill’s principle of negative liberty: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his [or her] will, is to prevent harm to others”. Our views “ought to be a positive force for progress rather than acquiesce to hatred and bigotry” (Held 2007, 225). By pointing out that Held helps himself to so many assumptions, the present author is not disparaging him. In fact, Held does a useful service in making explicit the assumptions that many writers on such topics make but fail to make explicit. Further, although the present author is broadly sympathetic to these assumptions, he does hold that some greater clarification and qualifications are required in some cases – and one of these, involving the role of dictionary definitions, is discussed later.

Against the background of such assumptions, Held (2007, 228) and Chambers (2017, 32-33) argue that MLA is flawed for the same reasons that the miscegenation laws (which require that a

person marry within their own race) were ruled unconstitutional. For MLA appears to be committed to the view that everyone was equal under the miscegenation laws in the sense that everyone, both black and white, has exactly the same right, to marry someone within their own race. Held (207, 228) references Koppelman's (2000) argument, which cites *McLaughlin vs Florida*, where *Supreme Court* "Justice White makes the obvious point that miscegenation laws treated married interracial couples differently without compelling state interest for doing so" and that "there is no reason for singling out interracial couples as different and inferior ... [which means that miscegenation] is discriminatory". For good measure, Held adds that "some" argue that "the 9th amendment implies a right to marry" and "others have referenced *Loving v. Virginia* to argue that the pursuit of happiness includes an implicit right to marry".

Since Held apparently takes MLA to hold that DSSM's must argue for a "new" right that no one, prior to 2015, has, rather than equal rights *per se*, he distinguishes two approaches one might take in order to get some kind "gay" marital parity with "straights",

One approach attempts to demonstrate that marital and family law is discriminatory in its exclusion of homosexuals and so marriage should also include homosexuals, and the other argues for equal treatment through the creation of equivalent rights. Often times this [latter] reduces to the view that both forms of marriage, straight and gay, should be subsumed under the same law, through a legal redefining of marriage as a union of two spouses. So even if this is not technically an equal-rights issue it is a matter of civil rights. (Held 2007, 228)

At this point, Held (2007, 229) declares victory and states that ultimately "the best case for gay marriage is that there is no compelling legitimate case against it." That is, whether, with, for example, the 2004 *Economist* editorial, one construes the argument for SSM as an argument for equal rights simpliciter, or whether one construes it, allegedly with MLA, as recommending an argument for a new but "equivalent" right that no one currently has, this all "reduces" to the view that marriage should be "redefined" in such a way as to include equality for both "straights" and "gays." Later in the paper, Held (2007, 230) adds supplementary arguments that mere civil unions or equivalent rights are not sufficient because those solutions would only grant "gays" some kind of *second class* union, which will be seen by society at large as unequal: Linda and Bruce are *really* married, but Fred and Jack, *only* have a civil union.

Similarly, Chambers (2017, 32), referring to MLA's conclusion that "same sex marriage is not then a requirement of equality, and so [the DSSM's claim] fails," argues, following Held, that "anti-miscegenation laws gave every person the right to marry someone of the same race, but that way of stating the right to marry does not capture its intrinsic importance". She then suggests that, to take just one of her examples, the intrinsic importance of the right to marry "may" involve the right to marry someone with whom one is in sexual love. Thus, both Chambers and Held, although in slightly different ways, use the analogy between the apparent commitments of MLA with the historical outrage of miscegenation to argue that MLA is wrong. One might think that since

Chambers argues against all marriage, and for “a marriage free society”, she is inconsistent in defending SSM from the alleged attack by MLA, but there is no inconsistency. Chambers may, in the final analysis, reject both SSM and OSM, but she might still be correct that MLA makes a distinction between SSM and OSM that is not there.

Reitan (2014) offers several criticisms of MLA. The first is that since MLA argues that the DSSM’s argument has the same logic as the DPM’s argument (for polygamy) and the DIM’s argument (for incestuous marriage), MLA “gestures” towards a fallacious “slippery slope” argument. The second is that MLA “segregates straights and gays into separate communities-which is ... a highly problematic way of putting things.” However, his most basic criticism is that MLA shares a misguided principle of non-discrimination with Michelle Bachmann’s rejection of SSM. To make this case, Reitan distinguishes between justified discrimination and unjustified discrimination. Bachmann, he claims, does not claim that denying the right to marry to gays is *justified* discrimination, but that is not discrimination at all. He then formulates the Bachmann-McDonough Principle of Non-discrimination (or BM-POND): “When laws subject all persons to identical restrictions and opportunities, no persons are subject to legal discrimination”. However, “all of us know intuitively” that BM-POND is false. Consider two hypothetical student lunch programs. P₁: A city adopts a school lunch program that offers a free lunch to all non-redheads. P₂: A city adopts a school lunch program that offers a free lunch consisting of a peanut butter sandwich and a carton of milk to all students, but anyone who wants something else for lunch must pay for it. P₁ is “overtly” discriminatory against redheads because it singles them out as a special group that does not get the free lunch. However, P₂ is also discriminatory, but in a more disguised, way. Consider “eight-year old Joey, a lactose intolerant redhead with a life-threatening allergy to peanuts”. Whereas P₁ discriminates against him “overtly”, by singling him out as a redhead, and, therefore, not eligible for the free lunch, P₂ also discriminates against him but in a hidden way. For though P₂ theoretically permits Joey to get the free lunch, he cannot take advantage of this “good” because, given his medical conditions, he may die if he eats it. Whereas P₁ is “overtly” discriminatory, the second is “formally discriminatory” because “it makes a good available in a form that is not equally accessible to all”. It is this kind of discrimination, Reitan observes, that is addressed by the *Americans with Disabilities Act*. Reitan concludes that BM-POND, and, therefore, MLA, is correct that denying SSM is not *overtly* discriminatory, but he holds that it permits “formal discrimination.” That is, the marital laws before 2015 make marriage available to all, but “in a form that is not equally accessible” to gay people. Marriage is here likened to the free peanut and butter sandwich and carton of milk and “gay” people to people that have life-threatening medical conditions. The government says to all citizens, both gay and straight, that they may feel free to get married but it is just too bad “gays” have a condition that prevents them from equal access to this “good.” MLA and Bachmann are correct that MLA does not endorse “overt” discrimination against “gays”, but both presuppose a faulty principle of Non-Discrimination BM-POND that commits them to permit “formal” discrimination against “gays.”

In the same vein, Rajczi (2008, 482) argues that “some opponents of” SSM, like MLA, are easily refuted by the following example: “Suppose a racist majority decided that citizens could only name Caucasians as the beneficiary of their social security ... [and defended this on MLA’s grounds that everyone, including minorities, gets that exact same right]. Would anyone seriously consider this to be a policy that was applied equally?” All are treated “equally” in a sense, but this bizarre law is “applied” unequally.

Finally, Drabek (2014, 126), signaling his general support for Calhoun (1997) and Cuomo (2007), rejects MLA because it couches opposition to SSM “in the language of philosophical argumentation”: “Social conservatives use the language of social effects, but SSM supporters are justifiably suspicious about that language when it comes from social conservatives.”

III.) Science Fiction: The Opposite-Sex Marriage Revolution of 2120

Consider the following scenario! It is the year 2120 and the United States has witnessed a massive social transformation. SSM is the law of the land and OSM is illegal and viewed with the same disdain once directed at SSM. But not everyone is happy. A small but passionate group of Defenders of OSM, or DOSM’s, brave the ridicule to propose a “brave new world” in which opposite sex couples can marry just like everybody else! Their core argument is that it OSM is justified by “equality pure and simple”. It is time to put an end to the discrimination and bigotry. Heterosexuals, as difficult as it is to get one’s mind around this unpalatable prospect (“Good Lord! They want to do what!”), deserve to be treated “equally” with homosexuals.

MLA is, in fact, committed to the view that DOSM’s cannot legitimately argue for their view on the grounds of “equal rights”. For, the DSSM’s (which is in 2120 the majority), reply that everyone already possesses the same marital rights, namely, to marry one person (at a time) of the same sex. The DOSM’s want a new right that in 2120 no one has and so they will need a very different kind of argument that everyone, including the “gay” people who do not want it, deserve to have. The fact that Bob, who suffers from the disturbing affliction of being attracted only to females, and is, therefore, not mollified by his right to marry Bruno, has the same SSM-rights as everyone else, is, 2120 DSSM’s claim, referring to MLA for support, not relevant.

This example shows that MLA is *logically neutral* with regard to the question whether SSM should be legal. For, properly understood, MLA only makes a “little” logical point about how the relevant marital “right” should be *individuated*. The reason MLA is important is that many people, illustrated by the 2004 *Economist* editorial, have a highly oversimplified idea of what it is to specify a right, and, consequently, of what it means for two people to have “equal” rights, leading to unnecessary bitter disagreements. Given this highly oversimplified idea, found on both sides of the SSM-debate, it is very difficult to determine precisely what is really at issue, each shocked that the other side cannot see the obvious truth. This is, perhaps, analogous to the sort of difficulty, pointed out by Kuhn (1970), that persons with different scientific *paradigms* have even understanding what their opponent is saying. However, nothing in any philosophical debate worth the effort is ever that “pure and

simple.” In the present case, MLA only attempts to clarify how one individuates the relevant marital right, and, with that, clarify what is required to produce a good argument *for or against* legalizing SSM.

Since MLA only makes a little logical point about the individuation of the relevant right, Drabek’s and Rajczi’s claims that MLA opposes SSM are vitiated by the fact that MLA does not oppose SSM any more than it opposes OSM. Recall that MLA explicitly states in several places that it does not argue against SSM. Similarly, unless there be liberal and conservative logics, Drabek’s claim that MLA advances a “socially conservative” view is mistaken. MLA makes a non-political *logical* point that might be employed equally by conservatives and liberals depending on the circumstances and the issues. MLA is “logic,” not social policy.

Indeed, both Drabek’s and Rajczi’s readings of MLA are refuted on even more basic grounds. For MLA purports to argue against one particular argument, the “equality” argument, for SSM. If a certain community has a poisonous snake problem, and someone A argues that one can solve the poisonous snake problem by killing all the snakes, and B argues against A that this would not be a good way to solve the poisonous snake problem, it does not follow that B does not want to solve the poisonous snake problem. MLA does not argue against SSM itself and even sketches one example of how one might provide a better substantive argument *for* SSM (MLA, 58).

Similarly, since MLA advances no substantive argument for or against SSM, it does not, as Reitan thinks, make, or even “gesture” at, slippery slope arguments against SSM. It is, however, easy to see why Reitan might think it does. For MLA points out that the “equal rights” argument for SSM could also be used to by DPM’s to argue for polygamy and by DIM’s to argue for incestuous marriage. However, as a purely logical exercise, MLA nowhere says that it would be *right* for DPM’s and DIM’s to reply: “Exactly so! We are happy MLA points out that our cases are just as strong as the DSSM’s case”. A real slippery slope argument would be of the form: “Good Lord! If you allow SSM then you will end up with polygamy and incestuous marriage and only God knows what else, which is unacceptable!” MLA mentions DPM and DIM only in order to display the *logical analogy* between these different kinds of cases. Held (2007) appears to see this, for though he discusses slippery slope arguments, he separates this into a different section. Similarly, Chambers’ discussion of MLA blends into a discussion of slippery-slope argument, but she does not explicitly attribute such an argument to MLA. Drabek and Reitan’s respective mistakes are to construe MLA as arguing for a substantive position on the legalization of SSM when, in fact, MLA only makes a “little” logical point.

IV.) Held’s and Chamber’s Objections to MLA

Perhaps the most compelling argument against MLA is Held’s and Chamber’s argument that MLA could be cited in defense of miscegenation laws. The present section provides only the first installment on the reply to this objection. The second installment is given in § VI.

In fact, though Held and Chambers *appear* to disagree with MLA on the basis of the miscegenation counterexample, they do not really do so. However, before moving on to that serious miscegenation counterexample, note first that Held’s claims, made in the context of his critique of

MLA, that “some have argued that the 9th amendment implies a right to marry” and that “others have referenced *Loving v. Virginia* to argue that the pursuit of happiness includes an implicit right to marry,” both beg the question against MLA. First, since MLA stresses that prior to 2015 everyone has the same right to marry, and, therefore, the same marital rights to happiness, Held would have to provide *additional* arguments that, for example, the right to marital happiness requires that the marital right be reconfigured in some specific way.

Consider now Held’s and Chambers’ important miscegenation counterexample. The moral that Chambers draws from her discussion of the miscegenation counterexample, namely that MLA’s “way of stating the right to marry does not capture its intrinsic importance,” whereupon she suggests the right to marry for sexual love as one possible example of the “intrinsic importance” of the marriage institution. However, this *admits* that the issues surrounding the question whether SSM should be legalized are not “equality pure and simple” but, rather, are based on what one sees as the “intrinsic importance” of marriage. Thus, she concludes that we cannot even debate this issue without out asking what marriage “means” and why it is valuable. Chambers here admits, therefore, that *these additional considerations go far beyond the limits of any simple appeal to equality*. Held’s position is even more explicit. For after his apparent argument against MLA, he concludes that “even if this is not technically an equal-rights issue it is a matter of civil rights,” and proceeds to argue that the rough edges in our concepts can be repaired by “redefining of marriage as a union of two spouses”. Held thereby admits that MLA is “technically correct,” but that this inconvenient logical point can be made more palatable by a bit of conceptual gerrymandering. But that admits that the eventual marital right that emerges from the creative *redefinition* is, in MLA’s terms, “a new right that currently no one has”.

One might also see why the miscegenation counterexample fails by considering the following hypothetical case. One can fill out this case in several ways, but, due to considerations of brevity, only one is undertaken here to illustrate the central point. Consider society S* which, like ours, is composed of both homosexuals and heterosexuals. The marital laws in S* are that everyone can marry anyone that matches their own sexual preference. Homosexuals can marry homosexuals and heterosexuals can marry heterosexuals. There is, however, a catch. Everyone must at age 18 declare their sexual preference. A “bisexual” must declare their *choice* at age 18, heterosexual or homosexual, after which they must abide by that choice. After all, everyone is for “choice”, and this society, obsessively devoted as it is to “equality pure and simple,” cannot abide the horror that some might have more choices than others. Predictably, however, there is trouble on the horizon (“The best laid plans ...”). Jake, who declared himself a homosexual at 18, when he was involved with Larry, has fallen in love with Barbara and now wants to change his declared orientation to heterosexual. Soon others join his crusade (some wanting to change from “straight” to “gay,” others from “gay” to “straight”). MLA’s point is that Jake cannot legitimately argue his case on the basis of an appeal to “equality pure and simple”. Although most of us would be sympathetic to Jake, he is not being treated unequally. S*’s laws were drafted precisely to ensure that everyone is treated precisely equally.

If we are sympathetic to Jake and these other rebels, it is because *we have very different views about choice (freedom), interpersonal relations, human development, and many other matters*. That is, we have a very different view about “human flourishing” (Putnam 1981, 148), and believe that our laws should not sacrifice our complex *multifaceted* ideal of human flourishing in the service of some monolithic ideal of “equality pure and simple.” Similarly, miscegenation laws, which, by the way, the present author is in violation, is an abomination, not because it is refuted by some principle of abstract equality, but because it is incompatible with our multifaceted ideal of a good human life that are far too complex for mere slogans about “equality pure and simple”.

V.) Reply to Rajczi’s Objection

It has already been shown that Rajczi errs in assuming that MLA opposes SSM. But the argument in the previous section shows that there is also a flaw in his counterexample of the law passed by a racist majority that all citizens have the equal right to donate money only to a Caucasian. Rajczi (2008, 482) asks: “Would anyone seriously consider that this is a policy that is applied equally?” First, there is a difference between the law and the way it is “applied”. There are horrific laws all over the world that are “applied” in a humane way. MLA is addressed only to the logic of the case, not issues concerning the “application” of laws. With regard to the logical question, it would have been preferable for Rajczi to end his argument with a proposition, rather than a question, but MLA can answer the question. It is consistent with MLA that Rajczi’s racist law, like miscegenation, is an abomination that should be rejected on civil rights grounds designed to promote our ideal of human flourishing, not by appeal to some abstract idea of “equality”. Rajczi fails to see that though this racist law is not rejected because it is “applied” unequally, it can be rejected on other grounds. Finally, it is argued in § VII that it is also consistent with MLA that *both* miscegenation and Rajczi’s racist law could *become* “equal rights” issues. This might seem to be a contradiction, but § VII shows why it is not.

VI.) Reitan’s Objection to MLA’s Alleged “Principle of Non-Discrimination”

Reitan’s criticism that MLA “gestures” at a slippery slope argument has already been refuted. Reitan also criticizes MLA on the grounds that it “segregates “straights” and “gays” into separate communities - which is ... a highly problematic way of putting things.” In fact, MLA (55, 58-59 n’s 3 and 4) makes this same point in some detail. A certain economic theory might divide people into buyers and sellers, but that does not mean that sellers are not also buyers. MLA does not make that mistake. However, it is illuminating to discuss Reitan’s more developed claim that MLA embraces a flawed “principle of nondiscrimination”.

The heart of Reitan’s objections is that MLA, with Michelle Bachmann, is committed to a certain Principle of Non-Discrimination called BM-POND: “When laws subject all persons to identical restrictions and opportunities, no persons are subject to legal discrimination”. First, the present author does not know much about Bachmann’s view on SSM except that she is against it and is so for, roughly, moral-religious grounds. By contrast with Bachmann, MLA does not oppose

SSM, but only opposes one particular kind of argument for it and allows that better arguments, presumably unacceptable to Bachmann's moral-religion, might be provided. The present author does not, therefore, undertake the burden of defending Bachmann's views (whatever they are), but only defends MLA. Second, and perhaps more important, the present author cannot find Reiten's BM-POND in MLA. Indeed, since MLA only deals with one case, SSM, and since MLA only makes a "little" logical point about the individuation of marriage rights, it does not undertake the formulation of *any* general principle" of non-discrimination. Perhaps, however, Reitan will claim that BM-POND can be gleaned from the text in MLA. However, this is not the case, and there is no better way to show this than by showing how MLA easily deals with Reiten's example of the formal, but non-overt, discrimination of the lactose-and-peanut-intolerant child.

Recall that in Reitan's example, the city's laws, P_1 , state that everyone except redheads at school get a free lunch of a peanut butter sandwich and a carton of milk. P_1 *overtly* discriminates against little Joey because it denies him the free lunch because of his overt characteristics (being a redhead). The case is entirely different for P_2 which, since it, offers Joey a free lunch that he, because of his special medical conditions, cannot eat, P_2 "formally" discriminates against him. Little Joey here represents "gay" people and his unfortunate medical condition represents a "gay" person's homosexuality. The analogy is that a pre-2015 United States laws offer a "gay" person a heterosexual marriage that s/he cannot, by analogy, eat. However, MLA does not deny that, just as there is a wrong against little Joey that needs to be righted, there is a wrong involving gay people that needs to be righted, and MLA (57-58) even suggests one possible solution, civil unions, as an example of a possible solution. It is true that MLA does not defend this or any other particular *substantive* solution to the problem, but that is because MLA only purports to make a logical point, not a substantive one. MLA's treatment of this case shows, therefore, that it does not accept BM POND. That is, MLA explicitly admits that the fact that everyone in the United States pre-2015 has exactly the same marital rights, to marry one eligible person of the opposite sex, is not the final word on the matter. MLA can consistently say that BM POND only states a *necessary* condition for nondiscrimination and endorse instead BM POND*: "When laws subject all persons to identical restrictions and opportunities, no persons are subject to legal discrimination – unless sufficiently weighty considerations can be adduced to show otherwise". The problem the present author has with BM POND* is that it does not say very much. For everything depends on what these additional weighty considerations might be like, and the present author assumes that these, like the various views about the possible "intrinsic" importance of the marriage institution that Chambers mentions, or the various different ideals of "human flourishing", might turn out to be of the most diverse and unexpected kinds. There is no way to survey what all of these might be in advance.

There is, however, an interesting issue raised by Reiten's remarks about discrimination. For Reiten lays great stress on the fact that Bachmann does not view her denial of gay marriage as justified discrimination, but as not discriminatory at all. As stated earlier, what Bachmann thinks about this, the present author does not know. However, there is an important sense, connected with Held's

dismissal of the importance of dictionary definitions, in which the definition of marriage as a union between a man and a woman is *not* discriminatory. Presumably the *Chicago Bulls* are not practicing legally unjustified discrimination when they hire Michael Jordan instead of someone who is 5 feet tall and uncoordinated because Jordan has basketball skills that better qualify him for the job. However, if the choice were between a Caucasian with decent basketball skills, and Michael Jordan with his massive skills, and the *Bull's* signed the decent Caucasian, that *would* be legally unjustified discrimination. There is no debate about that. However, there is another use of the word “discriminate” in English that is logically prior to questions about legal discrimination. This is the kind of case in which someone says that Jack has a “discriminating” judgment. An *Advanced Oxford English Dictionary* defines “discriminate” in this sense as the ability to make distinctions, to be able to see small differences, for example, between good and bad books (Hornby 1983, 246). It is, in this sense, often *good* to discriminate. In fact, for an English speaker to be able to discriminate in this sense, is, roughly, for them to understand the English language. Thus, in response to certain kinds of philosophical questions, Wittgenstein (1958, para. 381) says that “It would be an answer to say ‘I have learned English’?”

Recall the case in which little Johnny, apparently a philosopher in the making, replies to mommy that since she told little Susie she can have any pet she wants, she is discriminating against him because she refused his choice of a Gaboon viper. In fact, mommy is not discriminating against little Johnny in any moral or legal sense. For a Gaboon viper is not the kind of thing English-speakers *mean* by a “pet”. The *Oxford* dictionary defines a pet as a “companion, treated with care and affection, e.g., a cat or a dog” (Hornby 1983, 625). Thus, when mommy denies little Johnny a Gaboon viper for a pet, she is not “discriminating” against him. She is simply speaking English. Further, this kind of “discrimination” is logically prior to the kind of legal discrimination emphasized by Reitan or Held. For if one is even to be able to raise the higher order questions about moral or legal discrimination raised by Reitan and Held, one must first be able to make the kinds of *discriminations* inherent in the English language.

Thus, when MLA suggests that a prior to 2015 both gays and straights had exactly the same marital rights (the right to marry one person of the opposite sex ...), it is not “discriminating” against anyone. It is pointing out that this is how that right is individuated in English at that time. Held *overstates* the case, therefore, when he states that we do not decide “constitutional issues or matters of rights by appeal to *Webster's* dictionary.” That is surely true, but it neglects the fact that we do refer to *Webster's* dictionary to determine what mean by our words when we are discussing legal and constitutional issues. Indeed, since Held (2007, 221-222) stresses that the issue is *not* morality or ethics, but the *legal* question, and, since, “the last time [this author] checked,” the laws on the books prior to 2015 define a marriage as a union of one man and one woman that satisfy certain eligibility conditions, Held *must* acknowledge legal (if not the moral) significance of those definitions. MLA can (and does) consistently accept that there is a moral issue in this case that needs to be rectified, and that this *may* involve changing the relevant definitions of marriage, but that does not change

the fact that if one is to argue the legal case either for or against SSM, and if one is to represent the logic of the relevant arguments correctly, one must individuate the relevant rights the English language (that is, make the “discriminations” recorded in the dictionary) in which the legal code is written. This is why Held does and must admit that MLA’s core point is “technically correct”. One can only make a hash of the proposed conceptual changes without respecting those linguistic “discriminations”, not as the final word but as specifying how the concept is in fact individuated at a given time. Since MLA is about logic (broadly construed), not substantive legal (or moral) issues, the kind of “discrimination” required by MLA is only the kind required to understand the English language.

VII.) MLA’s Consistency with Equal Rights for SSM

Many commentators have understood MLA incorrectly by construing a “little” logical point about the individuation of the relevant marital rights as the assertion of a substantive position on legalizing SSM. Drabik and Rajczi think that MLA opposes legalizing SSM. Held (2007, 228), by contrast, understands MLA to support the strategy of arguing for SSM as an “equivalent” right, but not the full-fledged marriage right that Held himself supports. Are there not many passages in MLA that support Held’s interpretation, for example, MLA’s claim that “DSSM’s are free to argue for the right to marry persons of the same sex, but this must be an argument for a new right, for the right which they want is not the ‘same’ one already possessed by heterosexuals” (MLA, 53). Are not Held (2007, 228-228) and Chambers (2017, 32) on solid ground when they interpret MLA as endorsing, or at least suggesting, that the proper road to go is to argue for “equivalent,” but not fully equal, marital rights for “gays”? In fact, however, since MLA only makes a little logical point and does not propose any positive theory, it only mentions equivalent rights as one of the *possible* compromises one might propose to resolve the issue, but MLA itself is entirely *consistent* with the view that the final resolution of the problem is granting full equal rights to SSM. Indeed, the present author regards this as one of the most important points in the present paper, but it is a point, not about SSM *per se*, but about the limitations of most “philosophical” argument.

Note that MLA (51) begins with the assertion that it is concerned with the kind of argument proposed in *The Economist*, but in many other places as well, that the case for gay marriage “begins with equality pure and simple”. Those who employ this kind of *argument* are called DSSM’s. MLA argues that this argument fails. However, the fact that one cannot get to a certain point by this means does not imply that one cannot get there by some other route.

There are ways in which the SSM can *become* an equal right. One of these was illustrated in the United States in 2015 when 5 people wearing black robes, perhaps relying on a lot of bad “philosophical” arguments like those in *The Economist*, decreed that same sex marriage is an equal right. However, Romeo’s instincts were right when he said, “Hang up philosophy! Unless philosophy can make a Juliet!” (Shakespeare, *Romeo and Juliet*, Act III, Scene 3). Philosophy cannot conjure a Juliet any more than it can conjure an equal right, but that never stops people from trying. Perhaps there is some truth to

Hegel's (1967, Preface) remark that philosophy should content itself with painting "it's grey in grey", rather than attempting to conjure new rights and forms of life from sterile abstractions.

There are, however, other, and superior, ways to "make" an equal right. For the "rights" enunciated in the United States constitution were not found written on some tablets that "fell from heaven" into a burning bush. They were worked out in a broadly democratic process. Similarly, in November, 2015, predominately Roman Catholic Ireland voted by a huge and surprising majority, 62% to 38%, to legalize SSM (Healy 2017). Since the Irish authorities condescended to put the matter to a vote by "the people", someone having, apparently, remembered that they are there (that is, to settle the matter by genuine democratic processes), it is difficult to see how anyone, except a few extremists, can legitimately refuse to accept the verdict, if not in their heart, then at least in their public behavior. Since, by contrast, the ruling in the United States was made by 5 people in black robes, who, evidently, suffer from the belief they know better than "the people", their verdict is guaranteed to cause longstanding acrimony.

Since MLA only argues that one cannot justify legalizing SSM by a "pure and simple" logical inference, it is consistent with the Irish decision to *make* SSM a full-fledged equal right via the authentic democratic process. MLA only suggests that, with, perhaps, a few exceptions, it is an intellectualist illusion that such major cultural institutions as OSM are founded on some obviously fallacious logical inferences (e.g., about what "equality" means) that, because they are so simple, can just as simply be overturned when new "interpretations" of equality arise. For, despite the fact that *The Economist's* inference is so "pure and simple," 3,000 years of recorded human history, including such figures as Thomas Jefferson, John Kennedy, and Bill and Hillary Clinton, all somehow managed to overlook it – although Hillary's intuition of the newly minted inference conveniently emerged to fit the base of her party on the inception of her presidential run in 2015. In opposition to this intellectualist view that social institutions are based on simple logical inferences that can be easily brushed aside by trendy new "logical" intuitions, MLA (62 n 19) suggests that such cultural changes should grow *organically* in the development of a society, which will involve philosophical argumentation as a proper part, but which will also involve a plethora of historical and cultural issues that cannot be reduced to simple intellectual concepts. In a *democracy*, a genuine democracy, as opposed to the much more common mechanisms of mass manipulation, this would require going through the long and frustrating democratic process. However, the democratic process is, or used to be, *supposed* to take a long time to lessen the likelihood that hasty decisions will turn out to have unintended negative consequences. This is why genuine democracies, slow and frustrating as they can be, have tended to do better over the long run than political systems in which a few special people in impressive costumes can decide that views that have been controversial, even rejected, for 3,000 years of recorded human history, have suddenly been revealed, as if by a light from on high, to be "pure and simple". MLA sees it as an unfortunate fact in the United States has been overwhelmed by such a sense of haste to reach "social justice" that weighty cultural decisions can be decided by noticing that certain core cultural institutions, like OSM, rest on fallacies so obvious that any child can see them (though none

did until recently).¹ MLA, being consistent with democracy, is also consistent with the Irish route to SSM (or *whatever* the Irish might have chosen in the democratic process) because MLA does not place *any* restrictions whatsoever on the outcome of the democratic process, but only makes a logical point about the individuation of a concept that is useful to the rational working out of that process.

Summary

The objections to MLA are, for the most part, misguided because they misrepresent a “little” logical point as a substantive objection to SSM. Held and Chambers may be a partial exception because although they appear to object to MLA, they tacitly acknowledge its core point, and proceed to emphasize other approaches. Since MLA merely states a “little” logical point, it does not state any objection to SSM, let alone a “socially conservative” one. Since MLA does not state an argument against SSM, it does not state or suggest any slippery slope fallacy against SSM. MLA is not committed to defend miscegenation, but is consistent with the view that it is an abomination that is wrong, not on equal rights grounds, but, roughly, on larger civil rights grounds or views about “human flourishing.” Reiten’s Principle of Non-Discrimination is *not* presupposed by MLA and his counterexample (little Joey) can be easily handled by MLA. Held is certainly correct that we do not go to the dictionary to decide constitutional issues, but we do go to the dictionary to decide what words mean, and since, as Held stresses, he is concerned with legal, not moral issues, and since the relevant words, like “marriage”, were present in the law books before 2015 which defined marriage as a union between one man and one woman, it will still be necessary to give dictionaries their due. MLA is only an attempt to clarify how that fact about the individuation of the concept of marriage gets baked into the final wedding cake. There are different ways one might do so. Finally, although MLA seems to urge an “equivalent”-rights, rather than and “equal”-rights, solution to the SSM-question, MLA is consistent with full equal rights for SSM, so long as this is arrived at via the genuine democratic process. MLA is only opposed to the attempt to justify SSM by means of an abstract appeal to “equality pure and simple”.

Endnotes:

1. Brake’s (2016, §2) account of the history of marriage makes no reference to SSM. Further, although one can find references to various sorts of same-sex “unions” throughout history, “the precise meaning (and incidence) of such unions remains unclear” (Dabhoiwala Jan, 2015).

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