

## BEING FAIR TO THE FAIRNESS ARGUMENT FOR SAME-SEX MARRIAGE

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*According to the fairness argument, same-sex marriage must be permitted because without it there would not be equal treatment for homosexuals and heterosexuals. In (THINK 36), Piers Benn holds that the argument does eventually deliver this conclusion, but not as readily as intuitively appears. He concludes that some conservative points against same-sex marriage achieve at least a stand-off from the point of view of the argument. I argue that he accords the conservative points much more significance than they actually deserve and misconstrues the metaphysical dimension that is an important part of how the fairness argument operates.*

Think Autumn 2015 • 73

In 'The Gay Marriage Debate – Afterthoughts' (*THINK 36*), Piers Benn gives an analysis of the same-sex marriage debate that focuses on the fairness argument. This is the intuitive argument that same-sex marriage must be permitted because without it there would not be equal treatment for heterosexuals and homosexuals. If heterosexual couples can marry then fairness requires that homosexual couples be able to marry also. In explanation of the argument so stated, Benn says that fairness, in fact, requires equal treatment of equals but unequal treatment of those who are not equals. He then examines several reasons put forward by conservative opponents of same-sex marriage for thinking that same-sex relationships are not equal to opposite-sex ones, as well as responses on the other side. While ultimately agreeing that the fairness argument does apply to same-sex marriage, at least when viewed in a

certain light, he suggests that opposing arguments achieve a 'stand-off' at various points in the debate. However, his discussion often seems to accord to the conservative arguments much more significance than they actually deserve, when viewed fairly. (This is illustrated by the number of occasions on which he omits evident rejoinders to those arguments.) So, on the basis of his governing concern that fairness requires the appropriate level of equal treatment, it appears that his treatment of the conservative point of view is far more indulgent than fairness should allow. In what follows, I shall address some of the conservative reasons he considers, supply the evident rejoinders that are missing in his discussion and indicate how an implicit double standard appears at times operative in his analysis (one for homosexual relationships and behaviour and another for heterosexual). I shall end by discussing the metaphysical aspect of the debate and how an unfair view of that can lead to a distorted view of how the fairness argument applies. Ultimately, I conclude that the fairness argument applies in just the way the intuitive conception would have it.

The first conservative argument Benn addresses involves the claim that marriage is 'essentially' a union between a man and a woman with the central purpose of providing an optimal environment for bringing up children, the implication being that same-sex relationships do not measure up (24). Although Benn does not say so, both parts of this claim lack sufficient justification, the essentialist part and the implication. As for the essentialist part, Benn cites only certain religious claims, which themselves hardly measure up to the requisite level of scrutiny without substantive philosophical backing. In addition, he omits mention of the fact that a large and growing number of religious denominations support same-sex marriage. It is not fair to cite only a conservative religious account of the 'essence' of marriage as if there were no metaphysical account (based on religion or not) available on the other side but only a legal one. To put this point in historical perspective, one need only

remember how such a religious based metaphysics was held to exclude interracial heterosexual marriage because of a belief in the divine separation of races, or, indeed, to authorize the subordination of women or various races on the basis of divine intent. Surely, we would not now hold that there are only legal justifications to set in opposition to such problematic metaphysics. (I shall return to this point about metaphysics later.)

As for any purported deficiency with regard to children, empirical evidence indicates that same-sex families offer environments just as good as those in opposite-sex families for the raising of children. Benn does not mention this rejoinder. Instead, by omission, he seems to suggest here that the fairness argument must concede this point to the opposition. In fact, Benn gives short shrift to the fact that many same-sex marriages (and would-be marriages) *do* involve the raising of children. (He mentions it as a possible counter to the conservative focus on procreation and raising a family, but then seems to denigrate it as 'too obvious' (30), when, in fact, it is a substantive counter to the conservative point in this area.) Indeed, one of the major reasons same-sex couples with children might want to get married is to benefit their children in various social and legal ways. It may be of particular importance to same-sex couples as a means of combating the still lingering prejudice that same-sex relationships are distinctively 'sexual' and unstable in nature and, as such, not conducive to the welfare of children. The status of marriage can be viewed as a bulwark against such prejudice, both social and legal. A judge in a child custody case might be swayed (however wrongly) by the argument that a child's welfare could be adversely affected if he lives with his father and his father's partner because it would be too sexually charged and unstable an environment. However, it would be impossible for such an argument to pass muster if the same-sex couple were married.

What about the thought that 'the solemnity of traditional marriage vows has always been reinforced by a sense of

the great responsibilities involved in raising a family, and of the sacrifices that present generations must make for future ones', and that allowing same-sex marriage would detract from this solemnity (30)? Again, this line seems less than convincing, first, because many same-sex couples do share the mentioned interests and sense of responsibility, and second, because marriages are allowed involving heterosexual couples beyond the child bearing years. Indeed, in the United States, even a prisoner on death row can marry, although there will never be physical togetherness, children or much of a future of sacrifice or responsibility. Yet it is regarded as a fundamental right to have access to this status because of its central importance to the humanity of those involved.

The place where Benn thinks the fairness argument can finally be properly invoked is in the case of same-sex couples who reject the 'hedonism and promiscuity with which the "gay lifestyle" is popularly associated', and who 'long for an "official" recognition that their love has the same precious worth as that of heterosexuals' (31). The first thing to note about this is that it is unclear just what this proviso means. Does it mean a rejection of hedonism and promiscuity just for themselves while in the current (would-be marriage) relationship, for themselves forever, or for everyone and in general?

A second thing to note is that, of course, hedonism and promiscuity are different things, and presumably it is promiscuity that is more in point in regard to marriage since marriage involves a promise of fidelity. (But again, promiscuity is different from infidelity. Promiscuity is only at odds with fidelity when one is bound by a commitment to be faithful.) Now if promiscuity is thought to be a possible bar to permitting marriage for some group or other, then one would expect concerns to be raised about marriage for heterosexual people who have higher numbers of sexual partners, especially perhaps the young. Indeed, the group for whom such statistics are highest would be men, especially younger men. Yet there is little apparent enthusiasm for

increasing the legal age of marriage for men. In fact, the reverse seems part of conventional wisdom: marriage, and encouragement to enter it, can make men 'settle down'. Women are statistically at the other end of the distribution, so one would expect same-sex relationships between them to score highest of all on this measure.

The reason Benn finally does accept 'equal' status for same-sex relationships between individuals who reject hedonism and promiscuity seems to be a belief that only then is their yearning to have their love recognized as having the same worth as that of heterosexuals worthy of respect. But what seems wrong with this is that it renders judgement on the wrong basis. Given the concerns Benn is discussing, it should be the *quality* of love that is judged rather than any general inclination or past history that the lovers have or merit that they have achieved. And again, the principal feature that is relevant would seem to be a sincere commitment to fidelity. This is consistent with what is in practice on the heterosexual side. We do not, after all, see serious consideration given to any claim that promiscuity, past adultery (however frequent) or number of divorces should be a bar to (heterosexual) marriage. Sincere commitment, signified by the taking of marriage vows, trumps all those considerations. There is no question of having to pass some kind of test of past behaviour or current inclination before the desire to be treated equally is accorded respect.

In fact, if we found that heterosexual promiscuity among a certain ethnic or cultural group was high (perhaps even that a certain group encouraged promiscuity among couples as a way of finding compatible marriage partners), would there be any inclination toward restricting their access to marriage? It hardly seems likely. If so, then it seems as if a singular focus upon sexual habits in the case of (male) same-sex relationships may have some other, less appropriate, source.

Benn can appear, here as elsewhere, to be holding up the heterosexual as the gold standard to which the

homosexual can only, if at all, infrequently and in special circumstances measure up, despite the fact that this gold standard is unattained in a great many heterosexual cases – and that those heterosexuals who fall short, even dramatically, would not be held to be undeserving of marriage. A response to this point might be to claim that the cases are *statistically* different – that heterosexual relationships come closer to measuring up more often. One type of conservative argument might hold that statistics are important when we're talking about what is desirable for society (even though, as just observed, such statistics would not be used on the heterosexual side for an ethnic or cultural subgroup).

Here is where one must ask whether, if such statistics are so important, due consideration must not be given to how conservative social and legal forces have themselves contributed to those statistics. It would be wrong to think it acceptable to deny a group the right to marry on the basis of disqualifying statistics that that very denial has helped to produce. The systematic, historical exclusion of gay people from the benefits of social, legal and developmental support for their identities, affections and choice of potential family configurations (and instead, long-standing hostility to their very existence) must be acknowledged as a powerful factor contributing to the very behavioural and attitudinal features the conservative decries. To see how important this kind of thing is generally thought to be, one need only reflect on the enormous significance attached to giving (presumed heterosexual) adolescents social instruction and support in developing towards the possibility of heterosexual marriage and a family, and providing socially accepted role models for them.

Now let us return to some final observations about metaphysics. As already mentioned, Benn appears to load metaphysics, insofar as he mentions it, on the conservative side. Let us consider first the purported religious basis for it (which, as already mentioned, stands in need of philosophical scrutiny). It derives from conservative or traditionalist

religious views. But as has already been mentioned, they are not the only religious views on the subject. A growing number of churches support same-sex marriage and have a theology that allows it. In fact, strong currents in modern Christian theology (including scriptural exegesis) have moved in this direction. It is a misrepresentation to speak as if conservative religious groups speak for all religion, much less for any divine being that might be thought to exist.

As for other metaphysics besides that based on religion, there is no reason to believe, as Benn might seem to imply, that it would all be on the conservative side with nothing to oppose it on the other side except the law. Of course, if the subject is *legal* marriage, then metaphysics, such as it is in this area, may be deemed irrelevant. However, one might well argue that there is metaphysics on the side of same-sex marriage and that it is important (even legally as perhaps a source for legal argument). It derives from moral value, human dignity and worth, and the nature of human personhood, capacities and needs. Benn comes close to this at the very end when he talks about the precious worth of the loving relationship possible between same-sex couples. However, that should not be taken only as a subjective statement about what same-sex couples want or deserve to have from the law. It should be seen as part of a metaphysics that can more than stand up to the religious one regarded as deployed on the conservative side.

This provides a substantive answer to the question why a status 'upgrade' from same-sex civil union to marriage is so important: fairness requires that the same-sex relationships be recognized as having the same intrinsic dignity and worth as that of opposite-sex relationships. To put this in the terms used in another connection by the United States Supreme Court, separate is inherently unequal. Even if one attempts to get exactly the same legal rights and entitlements attached to both civil union and marriage, the fact that marriage is closed off to same-sex couples would make it an offense against their equal dignity and

worth and relegate them and their relationships to inferior, second-class status. This is where the fairness argument gets its intuitive grip and why it exerts such a powerful hold. It requires no behavioural test to make it apply since it is regarded as flowing from the very nature of the beings involved. To think otherwise in the homosexual case but not in the heterosexual case would be to employ a double standard, which is the very antithesis of fairness.

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