Meaning and Necessity: Can Semantics Stop Same-Sex Marriage?[1]

Think of this paper as an exercise in applied philosophy of language. It has both semantic and deontic concerns. More than about the meaning of 'marriage,' it is about how one goes about determining the meaning of social kind terms like 'marriage'. But it is equally about the place of philosophy of language in the legislative sphere, and inter alia, about the roles and responsibilities of philosophers in public life.

I. "Why Do They Want Our Word?"

Gays and lesbians are now marriageable in The Netherlands, Belgium, Spain, Canada and very tentatively in Massachusetts. This paper revisits an argument central to the case as it was argued in Canadian tribunals, an argument that dominated discussions in the Canadian Parliament, and that continues to dominate discussion as I write.

The case is especially fascinating for philosophers of language (and for the reputation of our discipline should anyone still hold philosophy of language to be a useless exercise in formalism). The arguments that caused and are still causing the most trouble revolve around the *word*: Why must same-sex unions be called "marriages"? And is it even possible for the meaning of 'marriage' to countenance gays and lesbians? In the Canadian trials, the Courts sought help with exactly these questions from philosophers of language.

Sociolinguist Sue Ehrlich argued in favour of the petitioners that excluding gays and lesbians from such a basic social institution as marriage contributes to their marginalization, and that calling gay marriages anything other than "marriages" –for instance, calling them "registered domestic partnerships" smacks of the discredited "separate but equal" doctrine, a doctrine all the more harmful, she argues, as it is embedded in a context of existing homophobia. Philosopher Rob Stainton argued against same-sex marriage, rejecting Ehrlich's claims as "inadequately supported" by cognitive science.[2]

Stainton claims that *because of the meaning of the word* "marriage" in contemporary Canadian English, it is logically impossible for gays to be married –"it is a necessary truth that gays cannot marry" [Stainton para 9]. Furthermore, he claims that institutions (like Courts) have no business changing the current meanings of ordinary words. I was called upon by the petitioners to evaluate Stainton's claims, a responsibility I undertook with great conviction.[3]

The case is philosophically interesting also because it is fully generalizable: formally identical cases exist in the 1928 Canadian "persons" case, where the issue was whether or not women were persons and hence could occupy seats in the Senate,[4] or in the 1866 *Civil Rights Act* in the US which declared blacks to be citizens, or in *Loving v. Virginia* 1967, where the issue was whether a mixed-

race marriage really counted as a marriage.[5] All deployed Stainton's semantic argument: all had in common the attempt by the State, sustained allegedly by ordinary intuition, to exclude by "definitional preclusion."[6] But while the latter have lost their intuitive availability (it being hard now to put oneself in the head of someone arguing that a woman is not a person, nor miscegenation a marriage), the same-sex case is alive and for this reason makes an ideal test case for certain claims in philosophy of language. In particular, it is useful in pointing to a fundamental fallacy in appealing to alleged analytical intuitions in substantive matters.

Furthermore, I hope this paper will reveal the extent –I think unrecognized– to which our philosophical views about language overlap with our moral perspectives. As a bonus, it may also clarify a thing or two about the role of Courts in our mental life.

II. The Meaning of 'Marriage'?

The first part of Stainton's argument to the Courts purports to establish the meaning of 'marriage' in contemporary English. I present it in full:

(1) 'Marriage' is a word reflecting a well-understood social concept in our common language. [Stainton, para 60]

(2) As a matter of empirical fact:

'Marriage' currently applies only to male/female pairs. [Stainton, para 16]

(3.i) The institution of marriage cannot be conceptualized independently of its history:

In my opinion, an understanding of the term 'marriage' necessarily entails [its] long and rich history. [Stainton, para 19]

We cannot divorce our understanding of the term from its history. When I say that marriage "is" a descendent of its history, this is essential to understanding precisely what the word 'marriage' actually means. [Stainton, para 20]

(3.ii) The history of the institution of marriage is derived from religion:

"To look at marriage as divorced from the religious interpretation of the practice and the historical background of the practice is, in my opinion, to miss the meaning of **marriage** altogether. Marriage just is a descendent of a highly particular, highly stylized practice with religious roots." [Stainton, para. 20]

I postpone to section VII(i) below a discussion of Stainton's sub-argument in support of premises (3.i) and (3.ii).

(4) Applying 'marriage' to gays and lesbians creates a semantic anomaly:

English does not allow us to say 'I now declare you husband and husband' any more than it allows us to say 'My boys are very close sisters.' These sentences violate semantic rules. [Stainton, para. 14]

I postpone to section VII(ii) below a discussion of Stainton's sub-argument in support of premise (4).

> **(5)** Extending the reference of 'marriage' to gay and lesbian unions would change the meaning of 'marriage':
>
> In my opinion, defining 'marriage' as being possible between two men, or between two women, really would amount to a difference of sense, not just a precisification. [Stainton, para 61]
>
> **(6)** Applying our (ordinary common) word 'marriage' to homosexual relationships is incorrect, indeed unintelligible:
>
> The common parlance term 'marriage' can only be sensibly applied to male/female pairs. [Stainton, para 14]
>
> I believe that a correct understanding of the semantic content of the term 'marriage' does not permit us to ask "whether or not same-sex couples should be *allowed* to be married". The correct semantic analysis suggests that we cannot sensibly ask whether men should be able to marry one another, any more than we can ask why two boys cannot be sisters, or why a bachelor cannot be married. The current semantics of our common language simply rule out these options. It is not a question of some official body *permitting* boys to be sisters, or not *permitting* bachelors to be married. Sisters *are* women, and bachelors *are* unmarried, as matter of present meaning. In the same way, I will suggest, matrimony *just is* the union of a man and a woman. [Stainton, para 10 –all emphasis here and elsewhere original]

All of which goes to support the following contention:

> **(7)** That 'marriage' applies only to male-female unions is due to the very meaning of the word:
>
> It is part of the present meaning of the word 'marriage' in our common tongue that it applies only to male-female conjugal unions. [Stainton, para 10]

Hence,

> **(8)** It is a matter of logic that homosexuals cannot marry; it is a semantic theorem:
>
> Given the present meaning, it is a necessary truth that same-sex couples cannot marry. [Stainton, para 9]

This is how Stainton derives the analyticity of "a marriage is the union of a man and a woman only."

In the second part of his argument, Stainton aims to dismiss suggestions that, were that indeed the current meaning of 'marriage', then we should simply change it in the interest of equal rights for

gays and lesbians. (As I do not believe that what Stainton claims to be the meaning of 'marriage' is, or even could be in a secular democracy, I do not believe that a change to its meaning is necessary to include gays and lesbians. See below.) Here is Stainton's argument against changing the meaning of 'marriage' to include same-sex unions:

(9) The Courts have no mandate to change the meanings of words for legal purposes:

The word 'marriage' is not a term of art in jurisprudence. Unlike the word 'tort', for example, it is not an item created by and for the legal system.[7] Nevertheless, it has important legal consequences: like many other words, it leads a double life. But this does not make it a purely legal term. Rather, it is a word reflecting a well-understood social concept in our common language, with a meaning that implicates a specific historically conditional status, understood by many as tied to religious practices. [Stainton, para 60]

Because 'marriage' is not merely an item of legal jargon, but is rather a term of ordinary parlance albeit with legal implications, I believe that a change to its meaning in English cannot simply be decreed. [Stainton, para 61]

(10) Court appointed changes in the meanings of words will inevitably cause unacceptable levels of confusion:

Where the legal sense of a term is markedly different from its common use, common users of the language will make mistakes. Needless to say, the consequences of such mistakes will vary. I can only opine as an expert that such mistakes will be inevitable because the stipulated change will not be reflected in the common tongue. [Stainton, para 59]

One can at best create an unacceptable cleavage between ordinary usage and the legal meaning. [Stainton, para 64]

(11) Changes in the meanings of words can only come from the grassroots:

From a linguistic point of view, wholly altering the definition of a term by decree is not possible. Such redefinition is in conflict with the normal use and development of language. [Stainton, para 64]

And in case that is not enough:

(12) Changing the meaning of 'marriage' to include gay and lesbian unions would be such a profound change that it would render the word 'marriage' as meaningless as an oxymoron:

To change the meaning (or nature) of 'marriage' such that we can sensibly use the term to also refer to same-sex unions would be a change equivalent to changing the meaning of the term 'bachelor' to also include married men. [Stainton, para. 11]

In my opinion, defining 'marriage' as being possible between two men, or between two women, would be like redefining 'sisters' to include pairs of boys. [Stainton, para 61]

[Implicit conclusion apparently not noticed by Stainton: neither Parliament nor Congress can pass laws lifting the ban against gay marriage. How could the government succeed where God Himself couldn't?!] With the result that:

> **(13)** The exclusion of gays and lesbians from the current institution of marriage is necessarily irremediable:
>
> The marriage ceremony is the method for becoming life partners which has a faith-based history, and must involve a man and a woman. [Stainton, para. 14]

This is how Stainton defends the unrevisability of the (allegedly) analytic definition of 'marriage.'

The argument deserves attention not only because it is widespread — why, even accomplished philosophers are defending it — but because its structure bears a revealing similarity to a famously plausible argument articulated by Putnam. Insight comes out of comparing them.

III. The Meaning of 'Meaning'

In 1972, Hilary Putnam presented a famous argument about natural kind terms now widely accepted among philosophers (and, with proviso, among linguists). I reconstruct its main premises in a nutshell, with some extra flourishes of relevance to what follows.

> **(Putnam 1)** Sociolinguistic observation:
>
> Since well before we discovered which chemical elements are constitutive of water, the word "water" has, as a matter of fact, always been applied (consistently and exclusively) to *this* (pointing to the currently existing stuff in rivers and lakes).
>
> **(Putnam 2)** Previous use imposes normative ontological commitments:
>
> Consequently, whether some stuff is rightly called "water" or not (proviso: when used as a chemical term) depends on whether or not it bears the *same-(kind of)-liquid-as* relation to *this* (the original stuff). *This*, the stuff in rivers and lakes, is a natural kind. Its essence is individuated by its chemical elements.
>
> **(Putnam 3)** Facts, as interpreted by experts, determine the extensions of our concepts:
>
> Chemists discover that water is constituted by chemical elements H_2O. So H_2O-ness individuates the *same-as* relation for (the natural kind) water.
>
> **(Putnam 4)** Metaphysical fact (trivial):
>
> Nothing but H_2O is H_2O.
>
> **(Putnam 5)** Metaphysical consequence (non-trivial):
>
> Therefore water *just is* H_2O: a necessary condition for a liquid to bear the *same-liquid-*

as relation to water is for that liquid to be H_2O.

The odourless, colourless, tasteless, potable thirst-quenching liquid XYZ on Twin-Earth that is indistinguishable to us from water may be very water-*like* (and perhaps for ordinary intents and purposes, water-like is just as good as water). But it isn't WATER. Seeming-to-us-as-if-it-were-water is not the same thing as *being water*. Fool's gold is not gold.

(**Putnam 6**) Modal consequence:

If x=y then (by necessitation) (x=y):
So water is *of necessity* H_2O.

Thus does Putnam derive the necessary *a posteriori*: Water is H_2O. *And that's why meanings ain't in the head*: 'water' (at least in its use as a natural kind term) means *this* substance, and *this* substance, know it or not, *is* H_2O. Of note here is the *a posteriority* of the claim, and the immutability of the (chemical) substance which is water.

We can extend Putnam's argument without prejudice to his views as follows:

(**Putnam 7**) Normative linguistic consequence:

Our word 'water', when used with its ordinary chemical meaning, excludes reference to XYZ. It is correctly applied (indeed, intelligible) only if it is used to refer to instances of H_2O.

(**Putnam 8**) Normative judicial consequence:

Given our actual understanding of the relation *same-liquid-as*, if inventors of XYZ petitioned the Court to have the word "water" apply to their product, the Justices on the Bench would be reduced to head scratching: to request that XYZ be declared water is as nonsensical as miners applying to the Courts to have fool's gold declared gold.

Like most, I find this argument largely convincing.[8]

It is easy –though some have thought it overly charitable—to recast Stainton's argument along Putnamian lines.

(**S 1**) Sociolinguistic observation:

The word "marriage" has always been applied (consistently and exclusively) to *these* (pointing to heterosexual married couples) relationships. (cf. (2), and (S 3A) below)

(**S 2**) Previous use imposes normative ontological commitments:

Whether some relationship is rightly called "marriage" or not depends on whether or not it bears the *same-(kind of)-relationship-as* relation to *these*, the original relationships.

This kind of relationship is a historical kind. Its essence is individuated by its origins. (cf. (3.i))

(S 3) Facts, as interpreted by experts, determine the extensions of our concepts:

(A) Religion

What individuates the *same-as* relation for (the historical kind) marriage is its religious past. (cf. (3.ii)) Religion tells us that the individuation condition for marriage is constitution by a man and a woman. [Here, Stainton presupposes implicitly –and apparently falsely-- that marriage has throughout history been exclusive to heterosexuals.]

(B) "Our common language"

The word for *this* kind of relationship is a word of our common language. Hence it is we, as users of "our common language," who individuate the essence of marriage (hence analytical truths derivable from it).

(C) Dictionaries

According to the Canadian Oxford Dictionary, "which dictionary is commonly accepted as reflecting common usage in Canada, as of 1998" [Stainton, para 12], the essential properties of marriage in the minds of Canadians are:

> the legal or religious union of a man and a woman
> in order to live together and often to have children.

As this dictionary definition makes clear, the common parlance term 'marriage' (in the requisite sense in which it is synonymous with 'wedlock' and 'matrimony' [as opposed to the figurative sense of "a marriage of minds"]) can only be sensibly applied to male/female pairs. [Stainton, para. 14]

Stainton does not appear to notice that individuative conditions stemming from the history of marriage, those stemming from "our" common language understanding of the term, and those stemming from dictionaries, might all pull in opposite directions: while sofas began their history as padded chairs on the backs of camels, most English dictionaries define them as carpeted raised floors or beds, yet none of those constitute "our" understanding of the term today; and while marriage began its history as bargaining females for chattel, the dictionary (conservative reflection of a previous age) defines it as a union in order to live together, yet neither of those are what constitute "our" understanding of the word today. Such examples are legion.

(S 4) Metaphysical fact (trivial):

A union of two men or of two women is not a union of a man and a woman.

(S 5) Metaphysical consequence (non-trivial):

Marriage *just is* the union of a man and a woman: a necessary condition for a relationship to bear the same-relationship-as relation to marriage is for that relationship to be heterosexual. (cf. (6))

"Sisters **are** women, and bachelors **are** unmarried, as a matter of present meaning. In the same way, matrimony **just is** the union of a man and a woman." [Stainton, para 10]

The intimate, sexual, loving, committed, long-term, even child-raising homosexual relationship that is indistinguishable to us from marriage may be very marriage-*like* (and perhaps for ordinary intents and benefits, marriage-like is just as good as marriage). But it isn't *MARRIAGE*. Seeming-to-us-as-if-it-were-marriage is not the same thing as *being marriage*.

A plastic tree is not a tree, a same-sex marriage is not a marriage. [Stainton, para.15]

I postpone, to section VII.ii below, a discussion of Stainton's sub-argument in support of this claim.

(S 6) Modal consequence:

Marriage is *of necessity* a union of a man and a woman.
It is a matter of logic that gays cannot marry (a semantic theorem):

Given the present meaning, it is a necessary truth that same-sex couples cannot marry. [Stainton, para 9]

(S 7) Normative linguistic consequences:

(A) exclusion

Our word "marriage", when used with its ordinary common meaning, excludes reference to homosexual relationships.

"It is part of the present meaning of the word 'marriage' in our common tongue that it applies only to male-female conjugal unions." [Stainton, para 10]

(B) senselessness

'Marriage' is intelligible only if it is used to refer to heterosexual relationships.

"The common parlance term 'marriage' can only be sensibly applied to male/female pairs." [Stainton, para 14]

(C) imposed semantic shift

Extending the reference of 'marriage' to gay and lesbian unions would change the meaning of 'marriage':

"In my opinion, defining 'marriage' as being possible between two men, or between two women, really would amount to a difference of sense, not just a precisification."
[Stainton, para 61]

(S 8) Normative judicial consequence:

Given our actual understanding of the relation *same-relationship-as*, if a same-sex couple petitioned the Court to have the word 'marriage' apply to their union, the Justices on the Bench would be reduced to head scratching: for two men to petition the Court for the right to marry is as unintelligible as for two brothers to petition the Courts for the right to be called sisters.

> "I believe that a correct understanding of the semantic content of the term 'marriage' does not permit us to ask "whether or not same-sex couples should be *allowed* to be married". The correct semantic analysis suggests that we cannot sensibly ask whether men should be able to marry one another, any more than we can ask why two boys cannot be sisters, or why a bachelor cannot be married. The current semantics of our common language simply rule out these options. It is not a question of some official body *permitting* boys to be sisters, or not *permitting* bachelors to be married. Sisters *are* women, and bachelors *are* unmarried, as matter of present meaning. In the same way, I will suggest, matrimony *just is* the union of a man and a woman." [Stainton, para 10]

Stainton argues that what the judges must decide is not at bottom a question of lifting legal barriers, but rather a question of imposing a language change from above to accommodate certain people:

> "the question before the court is not whether gay men and lesbians should be allowed to marry, but rather whether there is some reason why we should change the meaning (or nature) of 'marriage' such that we can sensibly use the term to also refer to same-sex unions." [Stainton, para 11]

Not only does Stainton perceive no reason for the Courts to allow 'marriage' to apply to same-sex unions, as doing so wouldn't eradicate homophobia [Stainton, para. 20; here, cf. fn 2]; he thinks both that the Courts wouldn't succeed if they tried, language change being a grass roots affair, and that it is not within the jurisdiction of the Courts even to attempt it. The Courts can no more rule that the institution of marriage extends to same-sex couples than they can rule that fool's gold is gold, presumably for roughly the same reasons.

Let us examine Stainton's argument in light of Putnam's.

IV. Nonsense and preference

In 1892, Gottlob Frege taught us that the senses of words determine their referents; senses, though abstract, are objective, public and shareable, and to speak the same language is to attach the same senses to the same words. Frege does not much discuss how it actually happens that individuals attach the same senses to their words so as to speak the same language. The question is taken up in

"The Thought" (1918), where Frege adopts a decidedly subjectivist position (with respect to proper names):

> If both Leo Peter and Rudolph Lingens mean by 'Dr Gustav Lauben' the doctor who is the only doctor living in a house known to both of them, then they both understand the sentence 'Dr Gustav Lauben has been wounded' in the same way; they associate the same thought with it. […] Suppose further that Herbert Garner knows that Dr Gustav Lauben was born on 13 September, 1875 in N.N. and this is not true of anyone else; suppose, however, that he does not know where Dr Lauben now lives nor indeed anything else about him. On the other hand, suppose Leo Peter does not know that Dr Lauben was born on 13 September 1875, in N.N. Then as far as the proper name 'Dr Gustav Lauben' is concerned, Herbert Garner and Leo Peter do not speak the same language. […] With a proper name, it is a matter of the way that the object so designated is presented [to one's consciousness]. This may happen in different ways, and to every such way there corresponds a special sense of a sentence containing the proper name."[9]

Frege is quick to treat proper names as the exception, however. Perhaps that is because he assumed, like most except Chomskians do, that words other than proper names, in the venerable words of David Kaplan, "come to us pre-packaged with their semantic value," that to understand such words at all is to grasp their socially customary sense.

But just as the latter half of twentieth century philosophy destroyed Frege's descriptivist account of the senses of proper names, it also attacked the prevailing understanding of socially customary senses. Putnam showed that if the socially customary sense of 'water,' for example, were to be understood to be, say, *the transparent, potable, odourless, colourless liquid flowing in rivers and lakes*, then senses don't determine reference, since this sense of 'water' determines H_2O as the reference of 'water' on Earth, but XYZ as the reference of 'water' on Twin-Earth. To save the reference-determining property of senses, and if the senses of our words are not what determine what they designate, what could be?, Putnam concludes, with Frege, that senses aren't in the head, but rather in expert extrapolations from factual instances of use.

Thus modern chemistry gives us a better understanding of water. Locke, like me, could not have recognized H_2O from XYZ, though, given the facts, he would have admitted that they were substances with distinct real essences. Locke, aiming at the transparent, potable, odourless, colourless liquid actually flowing in our rivers and lakes, would have taken himself to be using the same word "water" as we do, and to be intending by it the same concept of water as we do, but he did not understand the sense of the word in the language, or the nature of the concept, half as well as some of us now do.

Where should we look for a convincing understanding of the customary sense of 'marriage'? Stainton claims that 'marriage' is a word reflecting a well-understood social concept in our common language (cf. (1)). Now, this is either question-begging or demonstrably false. The vividness of the controversy surrounding the issue of same-sex marriage proves positively that, if there can be said to be "*a* social concept of marriage in *our* common tongue," it is *not* well understood by users of English. Much of this paper concerns what is involved in a claim to understand the concept of marriage.

Just to set it aside, the empirical claim that the English word "marriage" refers only to heterosexual couples (cf. (2) & (7)) is also likely false. Some anthropologists, *who report their findings in ordinary English*, assure us that in some historical, cultural and religiously conservative contexts, women have married women, and men have married men. Stainton is committed to the view that the translations involved in these anthropological reports are at best metaphorical, at worse mistaken (more on this below).

Except for a brief discussion of premise (2), I will assume, for the sake of the argument and in spite of the evidence, that homosexuals have never anywhere been married, and see what, if anything, should follow from this. (Nothing at all, I shall argue, as long as we countenance homosexuals as full and equal members of our civil community.) There are three points in the argument that I will focus on: these are premises (4), (5) and (6), since they largely sustain the conclusion in (7).[10] The relevant question here is: How do we know what 'marriage' really means?

Stainton claims that the very meaning of the word prevents it from applying to same-sex couples, so he had better be right about the meaning of the word. (I think he's wrong about the meaning of this word, as about meanings generally.) He cites the *Oxford Canadian Dictionary* (cf. (3S.C)) as an authority about our usage, so it is we here, the common speakers of the common language, who are being taken as the experts on the individuation conditions for marriage. I will come back to this later.

As linguists have long known, dictionaries are not reliable as repositories of usage, for it is in the very nature of dictionaries to lag well behind the living languages they purport to describe. It is a platitude that no matter how descriptively accurate they aim to be about current usage, because they take decades, often several decades, to compile, dictionaries are systematically behind by the time they are published.

Moreover, it is false that dictionaries typically aim to describe common acceptance. (The notorious controversy surrounding *Webster's Third International Dictionary* (1961) under the direction of Philip Gove, which proposed to do just that, proves the point.[11]) For instance, most English speakers use the expression "to beg the question" in the sense of "to force upon one the question..." but no dictionary that I know yet acknowledges this ubiquitous usage.

Dictionaries are not scientific documents, as is evident from their methodology. As a case in point, the *Oxford Canadian* was largely compiled by answers its editor received from whichever member of the public bothered to respond to postcards that were sent around willy-nilly requesting examples of uniquely Canadian uses of words.

In particular, the definition of 'marriage' cited by Stainton is an egregiously bad one if read as providing necessary and sufficient conditions for marriage. It is both overinclusive – merely religious unions are not legal marriages under Canadian (or US) Law – and underinclusive – married couples needn't ever live together in Canada or in the US and would remain just as married if all and only unmarried couples had children henceforth. Moreover, the union "of a man and a woman" would appear to preclude Hmong marriages among children well before they reach puberty: though such unions would not be legally sanctioned if they took place in North America, it cannot be doubted that North Americans use the word "marriage" with a meaning that encompasses

even such unions. It is precisely because we do so that such unions caused an uproar in the '90s in a Californian community home to Hmongs where such marriages were practiced. Moreover, that some same-sex couples are now legally married in the Netherlands, Belgium, Spain, Canada and, for the time being, in Massachusetts, is something that all dictionary entries for 'marriage' henceforth will have to acknowledge on pain of being factually wrong. So the dictionary entry cited by Stainton is inadequate even according to common usage. Without supplementation by 'typically' –which would reveal its status as a stereotype rather than a definition– it is inaccurate. But the inclusion of 'typically' would undermine the essential heterosexuality of the definition.

Dictionary entries are not definitions. The *Merriam-Webster Dictionary* (1989) entry under 'kangaroo' reads:

> "any of several large leaping marsupial mammals of Australia with powerful hind legs and a long thick tail".

Obviously, as a definition, this is astoundingly false: no kangaroo would be any less a kangaroo were we to discover that kangaroos actually originated in India, nor is it essential to any kangaroo's being such that it have any legs, much less powerful ones, any tail, much less a long and thick one, or that it be able to leap. If kangaroos universally evolved weak hind legs, straggly tails, and an inability to leap, they would perhaps be sickly kangaroos, but no less kangaroos for all that. At their best, dictionaries accurately represent stereotypes. And as Putnam spent a good part of his life demonstrating, but evidently still bears repeating: *stereotypes are not meanings*.

V. Bob and Ted and Carol and Alice: Beyond Rigidity

According to Stainton, the current dictionary entry for 'marriage' states a necessary truth. Hence it cannot be altered. All the Court could do –though according to him it can't even do that– is to create a brand new word 'marriage' with a new meaning (a homonym of the original, if you will, call it "marriage$_2$"), thus creating a concomitant change in the very nature of marriage. (Recall Stainton's summary of the issue: *"whether there is some reason why we should change the meaning (**or nature**) of 'marriage' such that we can sensibly use the term to also refer to same-sex unions"*.)

So what happened in 2001 in the Netherlands, according to Stainton, is this: *Per impossibile*, the Dutch government *replaced* the old word "*huwelijk*", the word correctly translated in English as 'marriage', with a new word "**huwelijk$_2$**", a word for which English has yet no translation.[*] But since '**huwelijk$_2$**' has replaced '*huwelijk$_1$*', '*huwelijk$_1$*' is no longer in use as of April 2001.

> Before April 2001: 'marriage' in English *equals* '**huwelijk**' in Dutch
> As of April 1st 2001: '**huwelijk$_2$**' in Dutch *does **not** equal* 'marriage' in English

...And in so doing, the Dutch government has destroyed, in the Netherlands, the institution we know of as *marriage*.[**] As of April 2001, even those previously "*huwelijk$_1$*" (as the Dutch used to say) become "**huwelijked$_2$**" (as the Dutch now say). There is nothing else for them to be but **huwelijked$_2$**, since *huwelijk$_1$* no longer exists as a recognized institution.[***] It is precisely Stainton's point that being *huwelijk$_1$* is not the same property as being **huwelijk$_2$**. For according to

Stainton: *Marriage-among-hetero-OR-homosexuals* is not the same institution as *Marriage-among-heterosexuals-ONLY*. So as of the aptly named April Fool's Day 2001 when Dutch law recognized same-sex marriage, *marriage* ceased to exist as a Dutch institution, every married Dutch couple ceased to be married as such (just as surely as Yugoslavs ceased to exist as such with the collapse of Yugoslavia).[****]

If Stainton's view is correct, then we must rewrite all Dutch-English dictionaries and retrain all Dutch-English bilinguals, for the word 'huwelijked$_2$' according to Stainton *does not mean* what the English word 'marriage' means – let's translate it as 'shmarriage'. Moreover, if Stainton is right, Canadians at the moment can no longer speak about huwelijked$_2$ Dutch couples, gay or straight, for English does not have a word for that concept: that is not what our word 'married' can mean according to him, and we don't have another word waiting in the wings to express the concept of *shmarriage* – though we could soon be saddled with "registered domestic partnerships" (but I am far from convinced the Dutch should accept that as a translation for 'huwelijk$_2$'). What is worse, Belgians no longer speak French, and Canadians no longer the same language as USAnians. The homophobic fanatics were right: all hell *has* broken loose.

Before dismissing this as just so much semantic shmaltz, consider that Stainton's argument here is exactly what underlies the argument oft repeated in right-wing rantings since June 10, 2003 in Canada, that *gays have destroyed marriage*. If Stainton is right, *they have*: extending the reference of 'marriage' to homosexuals, according to him, has caused an essential change in the Canadian institution of marriage (we used to have marriage, now what we have is shmarriage) – to say nothing of the fact that, according to Stainton, it has not only changed the meaning but has turned a meaningful term into an oxymoron ("shmarriage, SHshmarriage," as we might say...).

Stainton is aware that there are prima facie counterexamples to his claim (cf. (6)) that a gay marriage is as unintelligible as a married bachelor or a boy sister. People do use, apparently meaningfully, the expression "gay marriage". Indeed, the following sentences seem fully intelligible in English:

> Some married couples in the Netherlands are gay.
> The Massachusetts Court ruled that the ban on same-sex marriage was unconstitutional.
> Canada has just passed same-sex marriage legislation.

If they are, that alone entails that the definition of a marriage as a union *only* between members of the opposite sex is problematic.

Here is Stainton's reply to these counterexamples:

> One might suppose that when one sensibly uses "same-sex marriage" to apply to certain unions, it follows that the union referred to is both same-sex and a **marriage**. Thus, it might be argued that the term marriage is sensibly applied to a same-sex union. In which case, there are couplings which do not involve male/female pairs, but which are marriages; and the dictionary is just wrong. The problem with this line of argument is that it is simply not true that whenever a word-compound applies to a thing, it is because both words in the compound apply to that thing. Indeed, as formal semantics has long recognized, compounds like 'green car' are something of an exception. For

instance, 'plastic tree' applies to things which are not actually trees at all. Rather, a "plastic tree" is something which is **similar** to a tree, but is actually plastic. In the same way, we may speak of "gay marriage" because we recognize that such unions have some sort of relation to a marriage: they are like a marriage, but they are not a marriage because they involve same-sex unions. Thus, even if 'same-sex marriage' is a compound consisting of 'same-sex' and the word 'marriage', this still would not show that the meaning of the word allows for marriages that are of same-sex couples. [Stainton, para 15]

Stainton is suggesting in this passage

(i) that 'gay' and 'same-sex' are *non-restricting* adjectives, an example of which is 'fake'.

Non-restricting adjectives have the following entailment pattern:

a <u>fake</u> diamond is not a diamond
<u>fool's</u> gold is not gold
a <u>plastic</u> tree is not a tree

By contrast, a *restricting* adjective respects the following entailment pattern:

a <u>tall</u> surgeon *is* a surgeon
a <u>nasty</u> lawyer *is* a lawyer
an <u>Albanian</u> philosopher *is* a philosopher.

Stainton further claims

(ii) that restricting adjectives (as in "green car") are the exception. (!!)

He then suggests to the Court

(iii) that 'same-sex marriages' and 'gay marriages' are not intended in common parlance to mean real marriages,

witness the fact that the adjectives 'same-sex' and 'gay' *might* be understood by their users as non-restricting adjectives, in which case a same-sex marriage would no more be a marriage than a fake gun is a gun. (A better reason might simply be because gay marriages are not, yet, *legally recognized* marriages. But let that pass.)

Now, imagine running this with other qualifiers of marriage, say 'interracial' and 'second', where the mere possibility that these might be understood as nonrestrictive adjectives would be held as a reason to doubt that an interracial marriage or a second marriage really are marriages. There was a time when some people did treat 'interracial' as a nonrestrictive adjective because they couldn't fathom that an interracial marriage could be a *bona fide* marriage any more than a fake diamond could be a bona fide diamond. (We call them racists.)

Moreover, what Stainton claims to have "*long been recognized by formal semantics*" is actually

false. There is a positive presumption in favor of speakers *not* using 'same-sex' and 'gay' as non-restricting adjectives, witness the obvious fact that they satisfy the test case for restricting adjectives:

> a <u>gay</u> man *is*, after all, a man
> a <u>same-sex</u> couple *is* a couple
> a <u>lesbian</u> domestic partnership *is* a domestic partnership.

But what is more, according to semanticist Ed Keenan:

> There are a number of non-restricting adjectives, such as <u>alleged</u> and <u>fake</u>. However, there is a sense in which the prototypical function of a modifying expression is to be restricting; and, statistically, non-restricting adjectives certainly appear to be a small minority, limited to a few particular classes of expressions. Therefore, it does not seem incorrect to regard the set of restricting adjectives as being "almost" the whole set of adjectives.[12]

Moreover, as has been amply demonstrated in the linguistic literature, non-restrictive adjectives are a varied lot, and most of them do not have the implicational pattern of 'fake'. For example, in the sentence:

> The *lucky* Parisians live in the most beautiful city in Europe.

the adjective 'lucky' *is* being used non-restrictively. The sentence, in the intended reading, means:

> The Parisians, being so lucky, live in the most beautiful city.

and is attributing luck to Parisians generally. It does not mean (does not have to be read as meaning) what it would mean were the adjective to be used restrictively, namely:

> Those among the Parisians who are lucky live in the most beautiful city.

But even in its non-restrictive use, the adjective does not follow the implicational structure of 'fake':

> a fake diamond is not a diamond

but

> the lucky Parisians *are*, after all, Parisians. [13]

So a plastic tree may not be a real tree, but nothing as far as adjectives are concerned stops a gay marriage from being a real marriage. Stainton is just wrong about this.

Stainton supports his contention that a gay marriage falls short of a real marriage by claiming that:

> "our speaking of 'same-sex marriage' involves the use of the adjective at all times in addition to the noun" [Stainton, para 15]

This also is false.

> Mr. P and Mrs. Q request the pleasure of your company at Mary and Sue's wedding.
> Hans and Derk have had a fulfilling marriage since being legally allowed to be married.

are not sentences that lack a word.

Compounding confusions, Stainton claims that:

> "'common-law marriages' are not marriages any more than a 'same-sex marriage' would actually be a marriage" [Stainton, para 18]

The adjective "common-law" is non-restricting in the expression "common-law marriage" *only if* by 'marriage' one means a *legally registered* marriage. The problem with 'same-sex marriage' then relies not on confusions about the sort of the adjective, but on equivocation about the noun: it is precisely the case that 'same-sex' would act as the restricting adjective that it is, if only gays could legally register their marriages. The following test makes that clear:

> a <u>same-sex</u> marriage *is* a marriage, just not a *legally registered* marriage;< but
> a <u>same-sex</u> legally registered marriage *is*, after all, a legally registered marriage.

VI. Wherein is Marriage Social

Is Stainton right (cf. (5)) that extending the reference of 'marriage' to include gay and lesbian unions would change the meaning of 'marriage'? Does this extension introduce a new word 'marriage'?

Surely admitting women to law school extended the reference of 'lawyer', but just as surely it did not change the meaning of 'lawyer', any more than acknowledging women as persons changed the meaning of 'person'.[14] Whether 'marriage' can extend its reference to same-sex unions depends on what it means, not on what it has previously referred to. The first albino tiger was a tiger by virtue of satisfying the conditions of being a tiger, in spite of being the first albino tiger.

Putnam showed that words derive their senses from extrapolation from canonical referents to whatever bears the *same-kind-of-thing* relation to those canonical referents. In "Individualism and the Mental" (1975), "Intellectual Norms" (1986) and "Wherein is Language Social" (1989), Tyler Burge showed that it is not just any user of the language who can extrapolate from canonical referents to whatever bears the *same-kind-of-thing* relation to them. We all agree on canonical referents of 'marriage': our moms and dads, Charles and Diana, Henry VIII and Catherine of Aragon, Socrates and Xanthippe, Ike and Tina Turner, Edward and Mrs. Simpson… But what constitutes *being-in-the-same-kind-of-relationship-as-that*?

Frege was neither first nor last to show that *being-the-same-kind-as* is a different property than *being-thought-by-ordinary-users-of-a-word-as-being-the-same-kind-as*. At least in its use as a natural kind term, 'water' is for no one merely whatever seems to be the same substance as this potable, transparent, odourless liquid flowing in rivers and lakes. As a natural kind term, 'water' is for everyone whatever is the same (even Locke acknowledges real essences to be substances,

however unknown to us). What this potable liquid *is* (barring complications of a pragmatic-realist sort well-known to readers of Putnam) is determined by those most knowledgeable about the stuff, and those people (chemists) reveal its nature as H_2O. By 'water' (at least in its ordinary use as a natural kind term) we mean anything bearing the *same-stuff-as* relation to *this* (H_2O), regardless of its being potable (some water is not), transparent (some water is not), odourless (ditto), or flowing in rivers and lakes (water would not cease to be water if it never again flowed in rivers and lakes; and if whiskey henceforth and forever flowed in rivers and lakes, it would not for all that be water). It is a basic point of epistemic humility that we may not master the condition of individuation of the same-stuff-as this relation (being H_2O). Expert individuation of canonical instances yield senses, and senses yield references. That's exactly why meanings ain't in the head.

One can be a competent user of 'water', that is, apply it competently to the right cases, without knowing that H_2O is its condition of individuation. One does not have to be an expert about its meaning to be a competent user of the term ...as long as the identifying information one has in the head (potable, …, in rivers and lakes) overlaps in the real world with the individuating conditions (being H_2O). Our competence with the use of words is a matter of luck, really: it depends on how frequently in the real world the stuff satisfying our stereotype for water really is water, the condition satisfying our stereotype for arthritis really *is* arthritis, the stuff satisfying our stereotype for brisket really is brisket, relative to how frequently in the real world they aren't. If XYZ started flowing in rivers and lakes on odd Tuesdays, people would mistakenly call "water" stuff which, by their own lights, they would not mean to call "water" (stuff which, upon reflection and given the relevant information, they would judge themselves to have been mistaken in calling "water"). And the more mistakes they made, the less competent they would be, by their own lights, with the use of their own words. That's indeed why few people would consider themselves deeply competent with the use of the word "beech": the sheer number of kinds of trees satisfying our stereotype leaves too little chance for luck to succeed in picking out just the beeches.

As with natural and other kinds, so it is with social kinds. *Being-the-same-social-kind-as* is a different property than *being-thought-by-ordinary-users-of-a-word-as-being-the-same-social-kind-as*. Being a lawyer is different from being thought to be a lawyer, eating brisket is different from thinking one is eating brisket. Ordinary speakers are competent with the word "lawyer" because most of the people whom we think of as lawyers actually are. But none of what an ordinary speaker need know to use 'lawyer' competently determines the individuation conditions for being a lawyer; those are determined by Bar exams, as these are determined by those most informed about what one must know to be a lawyer.

Clearly, being married is a different property than being thought-by-ordinary-users-of-the-language to be married. This alone suggests that *being-in-the-same-kind-of-relation-as-these-married-people* is not the same property as *being-thought-to-be-in-the-same-kind-of-relation-as-these-married-people*. And the existence of this difference implies that some people understand marriage better than others. These are the people Burge is talking about: those who understand under what conditions one currently counts as being married.

What of the property *being marriageable*? Is there a difference between that and *being-thought-by-ordinary-users-of-the-word-to-be-marriageable*? The word "marriage" derives its sense from extrapolation from canonical referents to whatever bears the *same-kind-of-relation* to those

canonical referents. But are there any experts on what constitutes *being-in-the-same-kind-of-relationship-as-that*? Who decides what counts as a correct extrapolation when it comes to marriage?

One answer – let's call it the Chomskian answer – is that there are as many words "marriage" in English –as many concepts of marriage in the community– as there are coherent answers to this question. So there is a catholic concept of marriage – 'marriage$_{\text{Catholic}}$' – (which, as we speak, and among other things, disallows divorce and polygyny), an Islamic concept of marriage – 'marriage$_{\text{Islamic}}$' – (which, as we speak, and among other things, countenances divorce and polygyny), and a Canadian legal concept of marriage – 'marriage$_{\text{civil}}$' – (which, as we speak, and among other things, countenances divorce but not polygyny). We can also say that beyond these hyponymous terms, there exists in English the superordinate term 'marriage$_{\text{general}}$' (which applies to anything from catholic marriages to tree marriages – yes, in some cultures people marry trees). This is not only a reasonable answer, it is one to which Stainton himself is committed. But it is not the answer to our question. However, it does help us reformulate our question more precisely.

If we ask the question, "What counts as a correct extrapolation when it comes to the Catholic concept of marriage?," the answer is clear: the extrapolation countenanced by Catholic Canon Law, as interpreted by the relevant religious authorities. The same is the case, *mutatis mutandis*, with respect to the Islamic concept of marriage. But our question – the question before the Canadian Courts and Parliament facing a legal ban against same-sex marriage in a secular democracy such as Canada – is what counts as a correct extrapolation when it comes to the Canadian legal concept of marriage. Ours is uniquely a question about the meaning of 'marriage$_{\text{civil}}$'. (Neither the Courts nor Parliament have any jurisdiction with respect to the correct extrapolation of 'marriage$_{\text{Catholic}}$' or 'marriage$_{\text{Islamic}}$', or consequently 'marriage$_{\text{general}}$'.) So in citing the *Canadian Oxford* as authoritative about Canadians' usage with respect to the word "marriage", Stainton makes a mistake analogous to equivocation: as is evident from the dictionary entry ("the legal or religious union...typically..."), the *Oxford* is attempting to describe stereotypic cases of 'marriage$_{\text{general}}$' rather than of 'marriage$_{\text{civil}}$'; but it is only the latter word which is relevant to the court proceedings.

Thinking one is correctly extrapolating the meaning of 'marriage$_{\text{civil}}$' is not the same as correctly doing it. But if there is to be this difference, there must be some people in charge of setting the norms of correct extrapolation for the Canadian legal concept of marriage. I will have substantive things to say shortly about whom such people might be, but first let me restate for emphasis three points.

First. I agree with Stainton (as against Kaplan, say) on word individuation: when a word changes its meaning, it becomes a different word, designating a different concept.

Second. Meanings and words retain their integrity despite extensions (or diminutions) in reference. Our word "dog" will not undergo a meaning change when poodles, chihuahas and St. Bernards cease to exist and new species of dogs evolve.

Third. It is entirely possible for even the most competent speakers to come to realize that a word extends its reference to something previously unrecognized. Such recognition does not alter the

word's meaning, even in the mind of its potentially surprised user. The semantics of 'person' did not change one bit when women and blacks became so-called.

VII. Two Dogmas of Preclusionism

Stainton is guilty of two confusions, each inconsistent with the other. The first one is to think that our current language is coerced by its history, a thought hugely more compatible with Heidegger than with Chomsky. The second is to think that current speakers of our common language have an analytical grasp on the meaning of 'marriage', that we can intuit facts about marriage by virtue of our understanding of language alone.

VII.i. Historical Reductionism

Stainton claims before the Court that:

> The marriage ceremony is the method for becoming life partners which has a faith-based history, and must involve a man and a woman. [Stainton, para. 14]

> The key distinguishing feature of marriage is its history, including in recent history, its religious origin. This history is reflected in the highly specific ceremonies by which couples marry. It is true that one can now undergo a civil ceremony, and that such ceremonies were historically available, but even current civil ceremonies are clearly a descendent of older, specifically religious traditions: In civil ceremonies, one still stands before an appropriate official in a formal and solemn ceremony, recites vows closely analogous to those of the Judeo-Christian tradition, and signs highly conventionalized documents. Thus marriage is not *merely* a legal status even now. In my opinion, an understanding of the term 'marriage' necessarily entails this long and rich history. [Stainton, para 19]

> To look at marriage as divorced from the religious interpretation of the practice and the historical background of the practice is, in my opinion, to miss the meaning of *marriage* altogether: marriage just is a descendent of a highly particular, highly stylized practice with religious roots. To divorce marriage from its history in this way would be like trying to divorce being a nun or being an altar boy from their religious roots! Though the institution has been embraced by the State and marriage has a legal status, this has not erased its origins. So, when I say that marriage "is" a descendent of its history, this is essential to understanding precisely what the word 'marriage' actually means. We cannot divorce our understanding of the term from its history. [Stainton, para.20]

His argument implies the general premise that:

(**i.1**) institutions and practices are necessarily individuated by their history.

This general premise, instantiated to marriage, relies on an empirical claim:

(**i.2**) historically, marriage is an essentially religious institution.

Stainton's third premise links metaphysics to meanings:

(i.3) meanings are a function of causal origins.

And he concludes:

(i.4) we cannot understand the meaning of the word 'marriage' without reference to religion.

There are numerous things that are wrong with this argument.

It is hard to see how anyone can feel justified in believing that the very first marriages were religious, let alone essentially religious, (and much less Judeo-Christian!)[15] How would Stainton know that pre-religious hominids didn't marry? Nor is it any easier to see why anyone would take the history of marriage for Canadians to begin with the Judeo-Christian tradition. Canadians are a broad-minded lot, capable of conceiving of non- or pre- Judeo-Christian unions *as marriages*.

It is a platitude that institutions and practices evolve. Most every Canadian school, university and hospital was founded as a religious institution, yet we are not compelled to think of them as religious institutions today.[16]

In any event, Stainton's argument is inert with respect to the issue at hand. For *even if* religious intentions were essential components of the meaning of 'marriage', that would not constitute an argument against same-sex marriage without the corollary that *religion* has not changed, and *could* not change without altering what we mean by 'religion'. It is not because religion historically excluded female clergy and married priests that it is essential to religion that it exclude female clergy and married priests, and no more because religion historically excluded same-sex marriage that it must do so today. (*Pace* Stainton, even the Catholic Church historically performed same-sex marriages, but let that pass.)[17] The argument is invalid without the further premise that religion necessarily excludes homosexuals – in which case the Metropolitan Community Church of Toronto, which happily marries homosexuals, is not *really* Judeo-Christian, nor even religious, as we mean it, at all.

Stainton claims that we are all committed to the religious origins of marriage because there is only one word 'marriage' in our common tongue, "the one synonymous with 'wedlock' and 'matrimony'," a word allegedly leading back to religious origins. Notice, however, that if the meaning of the word 'marriage' that Stainton is talking about indeed involves religion essentially, then it follows *by his own lights* that there are already at least *two* words 'marriage' in common usage today, one designating a religious concept and another designating a legal concept –our 'marriage$_{civil}$'. For these have different meanings according to Stainton himself, witness the fact that an essentially religious concept of marriage is both overinclusive and underinclusive with respect to the legal concept of marriage in contemporary Canada: not all religious marriages are recognized as valid marriages by Canadian Law (eg. those not legally registered, those involving minors, polygamous marriages no matter how sanctioned by religion, etc.) and not all legal marriages are recognized as valid marriages by Canonical Law (post-divorce marriages for Catholics, marriages with a non-Muslim for Muslims, Dutch same-sex marriages for Dutch Catholic churches, etc.).

Whatever the meaning of 'marriage' may be said to be on the view under discussion, in order to

have remained unchanged throughout the ages, its original (allegedly only) meaning would have to have been all along compatible with rather distinct kinds of relationships, ranging from the often brutal woman bartering contracts not untypical of past (and present), even religious, marriages, to the loving intimate unions of equals that with any luck form the basis of marriage today. To maintain as Stainton does that a word with a meaning compatible with the kind of relationship some of us would communally understand as female enslavement, had *not* changed its meaning by the time it canonically extended to consensual, loving relationships between equals, but *would* change its meaning if extended to consensual, loving relationships between homosexuals, is nothing if not bizarre.

If the historical semantic markers of 'marriage':

religious, heterosexual, woman bartering, equal, consensual, procreative, dissolvable

   +   +   +   -   -   +   -

could shift to:

   +/-   +   -   +   +/-   +/-   +

without altering the meaning of the word, we are owed an explanation as to why it could not just as well (indeed much more easily) shift to:

   +/-

without altering the meaning of the word. How heterosexuality is supposed to be more individuative of the relationship of marriage than any other property does not, and cannot, fall out of the historical argument *per se*.

VII.ii. Analyticity

Religion aside, how do we know that heterosexuality is essential to the meaning of 'marriage'? Here Stainton appeals to the natural light of reason: that marriage requires a male and a female is a semantic theorem.

> Semantic content and language-based necessary truths. Certain necessary truths derive from meaning within a language. For instance, it is not just a contingent matter of fact that bachelors are not married. This is, rather, a necessary truth: it is simply not possible for bachelors to be married. This impossibility depends, in some very complex and poorly understood way, upon the fact that 'bachelor' currently has as a part of its semantic content "not married". True enough, if the sound 'bachelor' changed its meaning, it could eventually turn out that the sentence 'He is a married bachelor' could be true of some individual. But given its current meaning, this sentence cannot be true. This is relevant because, as I will explain below, it is part of the present meaning of the word 'marriage' in our common tongue that it applies only to male-female conjugal unions. [Stainton, para. 9]

Stainton's argument to the conclusion that heterosexuality is analytically tied to marriage is that same-sex marriage is intuited as a semantic anomaly:

> The common parlance term 'marriage' ('wedlock', 'matrimony') can only be sensibly applied to male/female pairs. Exactly why this is the case is complex. Notice, for instance, that the marriage ceremony involves a bride (female) and groom (male), each of whom typically has gender-specific vows. Also, after the ceremony, there is a wife (female) and a husband (male). English does not allow us to say 'I now declare you husband and husband' any more than it allows us to say 'My boys are very close sisters.' These sentences violate semantic rules. [Stainton, para. 14]

Let us review the argument.

(ii.1) It is a semantic rule of English that one cannot say:

> I now declare you husband and husband.

Stainton maintains that something semantic prevents us from saying this. He appears to derive from the claim that English (mildly) frowns upon such constructions, that there is a conceptual problem with *being* a couple in which there is a husband and a husband. But there is a simple explanation that accounts for the mild off-putting feeling about this sentence, an explanation which does not rest on there being a semantic or conceptual problem with being a husband-husband couple at all: the simple explanation is that (for reasons ranging from superficial morphosyntactic if not aesthetic constraints to formal requirements of binding), English shuns *any* construction of the form "an *x* and an *x*" where *x* are the same. For example, if Martha is looking for a husband and Mary is looking for a husband, there is no conceptual or semantic difficulty whatsoever, yet English is uncomfortable with:

> Martha and Mary are respectively looking for a husband and a husband.

English prefers that we pluralize and reduce the conjunction:

> Martha and Mary are looking for husbands.

Similarly, English has no problem with:

> I now declare you husbands.

Stainton moves smoothly from (ii.1) to the claim that marrying couples have to be pronounced "husband and wife"(!). Hence,

(ii.2) It is an analytic truth (true by virtue of meaning) that:

> A marriage ceremony involves a bride and a groom,

and

> After the ceremony, there is a wife and a husband.

Nowhere does Stainton state the semantic rules requiring marriage to issue in a bride and a groom.

We are expected to rest content with the claim that this is so for "very complex and poorly understood" reasons [Stainton, para 9] Now, since

(ii.3) It is an analytic truth that:

> Brides and wives are female,

and

> Grooms and husbands are male.

It then follows that

(ii.4) It is an analytic truth that:

> A marriage requires a male and a female.

Hence the common English usage as reflected in the dictionary entry states an analytic truth in current Canadian English.

Unless (ii.2) can be established, of course, the argument blatantly begs the question. If gays and lesbians can be married but men can't be brides nor women grooms, then *eo ipso* a marriage ceremony needn't involve a bride and a groom.

So how do we tell if 'marriage' *analytically* implies heterosexuality according to common usage? Who are the experts here, and what are they experts about?

Kant considers a statement analytic

(a) only if its truth is independent of fact,

a view echoed in Peirce's notion of

(b) a statement confirmed no matter what.

For Kripke, an analytic statement would be

(c) one expressing a metaphysical necessity which is knowable *a priori*.

In "Two Dogmas of Empiricism," Quine considers (in order to reject)

(d) several conditions, either of which would show a statement to be analytic:

> **(d.i)** if substitution of synonym for synonym within the statement yields a logical truth;
> **(d.ii)** if the statement is a meaning postulate, and so analytic by stipulation;
> **(d.iii)** if no possible experience can disconfirm the statement;
> **(d.iv)** if its denial is self-contradictory.

More recently, Boghossian has distinguished between

(e) epistemic and metaphysical elaborations of the phrase "true by virtue of meaning":[18]

> **(e.i)** epistemic: a statement is analytic "provided that grasp of its meaning alone suffices for justified belief in its truth;"

> **(e.ii)** metaphysical: a statement is analytic provided that "it owes its truth value completely to its meaning, and not at all to 'the facts'."

Let us then submit the claim that "marriage is heterosexual" is analytic to this arsenal of tests.

The failure of these types of arguments in supporting the analyticity of "a marriage involves a bride and a groom" and "a marriage is a union of a man and a woman," coupled with the sloppiness of the arguments proposed in its support and the generous evidence against it, should amply suffice to show that these are no more analytic than is "water is H_2O".

> "Water is H_2O" is not an analytic truth.

That water is H_2O is very much dependent on the fact that it is H_2O rather than anything else that flows in rivers and lakes – cf. (a) above. It owes its truth value to 'the facts' – cf. (e.ii). It is not true no matter what: it would be false if the stuff in rivers and lakes we had been calling 'water' had turned out all along to be XYZ rather than H_2O – cf.(b). It is not known *a priori* but discovered – cf.(c). It would be disconfirmed by discovering that it was XYZ after all – cf.(d.iii). 'Water' is not synonymous with 'H_2O': 'water' means *same liquid as this* H_2O whereas 'H_2O' means with molecular structure composed of two atoms like this (hydrogen) and one like that (oxygen). So 'water is H_2O' is not reducible to a logical truth by substitution of synonyms – cf.(d.i). That water is whatever experts count as the same liquid as H_2O is not a meaning postulate but rather follows from a meaning postulate – "'water' means this (water)" – along with the above further considerations – cf.(d.ii). Someone sceptical that water really is H_2O may be guilty of empirical inadequacy but not of self-contradiction (one can consistently believe that 'water' means *same liquid as this* and yet doubt that *this* is H_2O) – cf.(d.iv). Understanding the sentence "a molecule of water is composed of two atoms of hydrogen and one of oxygen" does not alone suffice for justified belief in its truth (else chemistry exams would be a cinch) – cf. (e.i). That my idiolect countenances the meaning postulate that 'water' means *same liquid as this*, is, I believe, something that I can intuit. That water is of necessity H_2O is not. That water is H_2O is necessary, but only if what we mean by 'water' is *same liquid as this* (water) and only if the *same liquid as* relation is individuated in terms of molecular structure. Individuate the relation *same liquid as* in, say, descriptivist terms ("counts as the *same liquid as this* whatever is of like colour, odour, taste, potability, and source" and what you then call 'water' can be H_2O or XYZ). Individuate that relation in sub-atomic-enough terms and the word "water" becomes a proper name for *this token* of water. Who decides where we draw the boundaries around the *same liquid as* relation for water? You and I decide which word 'water' we are each targeting at any moment of utterance (a chemical kind term, a functional kind term, a phenomenal kind term), but it is chemists who draw the boundaries around the *same liquid as* relation for 'water' considered as a chemical kind term. It nowise follows from the fact that I can intuit the meaning postulates of my own idiolect ('water' means *same liquid as this chemical kind*) that I know, much less intuit, the individuation conditions

of *same-liquid-as-this-chemical-kind*. Even Locke got this right.

> 'A bride is a woman' is an analytic truth (or some considerations to that effect, perhaps)

I am far from convinced of the analyticity of 'a bride is female' and of 'a groom is male'. But let me lend Stainton a hand in presenting two arguments for thinking it plausible.

An argument from French:

I do not side with Quine in rejecting all but logical truths as analytic statements. I am happy accepting that certain statements are analytic (or analytic-like), plausible examples of which might be:

> The word for a bride in French ("la mariée") is of feminine grammatical gender,

and

> The word for a groom in French ("le marié") is of masculine grammatical gender

which every speaker of French knows to be true by virtue merely of knowing the language, in particular of knowing the *morphological* fact that 'la' is the feminine definite article and 'le' the masculine and the *syntactic* fact that nouns in French agree in grammatical gender with their determiners.[19] Native French speakers needn't know what 'la mariée' means, to know that the noun belongs to one grammatical class rather than the other. This information is provided by the determiner.

More semantically involved is the fact that feminine animate grammatical forms generally associate with referents of the female sex while masculine animate grammatical forms generally associate with referents of the male sex.[20] Thus, if presented with: 'la + [animate noun]' and asked to choose a sex for the referent, a French speaker will generally presume a female referent. *Mutatis mutandis* with 'le'. Thus

> La + [animate noun] est une femme

and

> Le + [animate noun] est un homme.

can be intuited (almost) *a priori*. Because the definite singular (except in its generic use) forces one to choose a sex for the referent, it *almost* falls out of the language that:

> La mariée est une femme. – The bride is a woman.

and

> Le marié est un homme. – The husband is a man.

are true. These statements are possibly as close as it ever gets to analytical truths.[21]

If these count as truths by virtue of meaning (my hesitation comes from the admixture of syntax), then one could say that since 'une mariée est une femelle' in French *means* 'a bride is a female' in English and 'un mari est un mâle' in French *means* 'a husband is a male' in English, then 'a bride is a female' and 'a husband is a male' are also (as much) true by virtue of meaning. Granted it may strike one as bizarre that analytic truths of English should be dependent on a distinction between French determiners that does not exist in English... But weirder things have surely happened.

An argument from etymology.[22] Perhaps less weird is the following argument stemming from etymological facts about English.

When lexical synonyms are found within a language, it is usually because one of them is a borrowing from another language, and the loan-word typically receives a specialized application: thus 'mutton' and 'sheep' are in some sense synonyms, but 'mutton' (a loan-word from French 'mouton', meaning *sheep)* bears the specialized sense of dead-sheep-to-be-eaten; same for 'pig' and 'pork' (from French 'porc', meaning *pig*). This natural process of lexical specialization has a practical explanation: since the borrowing language already has a word for that kind of thing, it puts the loan-word to specialized work. This process explains why true lexical synonyms are so hard to come by.

Now, our current word 'bride' (meaning *bride*) derives lexically, by an uninterrupted causal chain of incremental phonetic transformations, from a Proto-Germanic word meaning **woman**.

> 'bride'
> Old English: bryd or bráád
> Old High German: brûût
> Proto-Germanic: *bruth
> Gothic: brûûþþs "woman"
> "bride, daughter-in-law"

It appears in Old English (borrowed from a neighbouring language) at a time when Old English already possesses a word 'wif' meaning *woman* (later to evolve to mean wife). Lexical specialization from *woman to bride* is exactly what we would expect from a word for "woman": *bruth $_{\text{Proto-Germanic}}$, appearing in a language which already has one with this meaning: wif $_{\text{Old English}}$. (later to evolve into 'wif-mann $_{\text{Middle English}}$' = woman-person, woman$_{\text{Modern English}}$). It is then no surprise that 'bryd$_{\text{Old English}}$' should have specialized from *woman* to bride (or woman-*being-married*). Likewise, our current word 'groom' (meaning bridegroom) derives from a word meaning (male) *man*.

> 'bridegroom'
> Old English: brydguma – bryd + guma
> "suitor" – "bride" "man"

Lexical specialization from *man* to *groom* (or man-*being-married*) is exactly what we would expect from a word for "man": guma $_{\text{Old English}}$, appearing in a language which already has one with this meaning: man $_{\text{Modern English}}$.

Now it would be a fallacy to maintain that the mere fact that 'bride' derives from a word for woman constitutes an argument that 'bride' today implies, much less means, woman. And *mutatis mutandis* for 'bridegroom'. Semantic shifts away from original meanings occur ubiquitously, indeed they are the norm. Our 'assassin' comes from an uninterrupted causal chain of slight transformations (phonetic, morphological *and* semantic) from the Arabic 'hashishim' meaning *hashish eaters*; yet because of the kind of transformations that have occurred, it would be a colossal mistake to infer, from the analytical truth that Hashishims ate hashish, that assassins eat hashish as a matter of logic!

Nevertheless, the onus may favour left-over implications of femaleness for 'bride' and of maleness for 'groom' in these particular cases. Historical reconstructions in linguistics systematically take their source from common household words expected to occur in all languages independently of borrowing (typical examples being: 'mother', 'father', 'water', 'fly'–as in the insect) precisely because common household words are the least likely to undergo semantic shifts.[23] A common household word like 'woman' could be expected to drift into the specialized sense of 'bride' far more than it could be expected to shift away from its core sense of 'female person'. Similar considerations apply in support of the implication of 'male person' for 'groom'.

Since lexical derivatives such as '*bruth$_{WOMAN}$ – bryd $_{BRIDE}$' and 'guma$_{MAN}$ – groom $_{GROOM}$' (provided there has been no dramatic semantic shifting along the way) stand in the relation of superordinate (more general) to eponymous (more specialized) concepts, it is no surprise that we can get from logical truths like:

A <u>woman</u> is a woman

and

A <u>man</u> is a man

by substitution of lexical derivatives (again, provided there has been no dramatic semantic shifting along the way) to:

A <u>bride</u> (bruth = woman) is a woman

and

A <u>groom</u> (guma = man) is a man.

Since lexical derivatives like: 'bruth – bryd ' in the right conditions are in some sense the same word, they are logically even closer than synonyms (likewise for and 'guma – groom'). And substitution of 'bryd' for 'bruth' would satisfy Quine's condition (12.d.i) for yielding an analytic truth.

It is crucial to understand what this argument does, and more crucially *does not*, say. I emphatically do not want to be interpreted as claiming anything remotely connected to the view that etymology determines the meanings of our words and thus compels us today analytically to tie femaleness to 'bride', any more than that the religious history of any institution compels us to think of it as a religious institution today. Mine is not a normative point about individuation by history like that

expressed in Stainton's premise (3). It is simply a *descriptive* point about word-*cum*-meaning transmissions, one too cumbersome to spell out fully here, but which can be summarized thusly: as words pass from one head to another, they keep and lose some of their properties (phonetic, morphological, syntactic and semantic).[24] This is due, according to me, and consistent with Chomskian (and Dawkinsian) premises, to individualistic aspects of our psychology, but here is not the place to argue for this.[25] Given the kind of stable deictic household terms that 'woman' and 'man' are, and the way words are generally transmitted over time, these words are, as a matter of empirical fact, less likely to shift in meaning over time. In Chomskian and Dawkinsian terms, if you will: the relation between trans-generational idiolects with respect to stable deictic household terms is likely on empirical grounds to be one of high copying-fidelity. The argument above, that a *prima facie* case can be made that the specialization of a word for *woman* (or for *man*) into a word for *bride* (or for *groom*) will not have caused them to lose their original semantic implications of *femaleness* (or *maleness*) in the heads of many speakers today, is perfectly consistent with their having indeed lost their original semantic implications in the heads of many speakers today, or with their doing so tomorrow. The argument is presented here only to explain as a matter of descriptive fact why some, perhaps many, English speakers today might analytically be tying femaleness with bridedom, and maleness with groomdom.

Note that the etymological argument above works (if it does) for English, and must be done on a case by case basis for other languages. To the extent that not all Canadians are English speakers, let alone native English speakers, it is far from establishing the sought-after premise that a bride is a female and a bridegroom is a male in the consciousness of Canadians. Crucially (in view of the Canadian context), the argument does not work in French, where the same word applies both to the bride and to the groom, both during the wedding ('mariés') and thereafter ('époux'), morphological differences between 'mariée' (bride) and 'marié' (groom), and between 'époux' (husband) and 'épouse' (wife) being required by the sex of the referents, not the other way around. If "all grooms are males" is an analytical truth in English, then so should be its correct French translation. Yet 'tous les mariés sont mâles' is false.

Be that as it may, note that to say that it is analytic that a bride is female and a groom is male does not for one second settle the question of under what conditions anything counts as a female or a male. For instance, some persons of XY chromosomal constitution have been declared female by Canadian Courts, indeed, even by the Ayatollah Khomeini (and allowed to marry males).

Before closing my remarks on the plausible analyticity of 'A bride is female' and 'A groom is male', let me point out the very different role of the expert in establishing these truths as opposed to the truth that water is H_2O. Where establishing the essence of water requires expertise about some stuff, establishing analytical connections between words, as I expect the preceding makes fully clear, requires expertise merely about language. What kind of expertise is required to decide whether or not 'Marriage requires a man and a woman' is analytic?

'A marriage requires a bride and a groom' is not an analytic truth

Let us begin by seeing how the previous two arguments, which established the analyticity of 'A bride is a woman,' fare with respect to 'A marriage requires a man and a woman.'

The argument from French:

That a marriage requires spouses is an analytic truth. To marry (French: 'épouser') is (at least) a two-place relation, the relata being spouses (from the French verb 'to marry', formerly espouser). But the French argument is silent about the required sex of the spouses. And surely English does not frown upon "I now pronounce you spouses."

The argument from etymology:

The English word 'spouse' derives from a verb meaning "to promise".

'spouse' (via French) Latin: spondre, "to promise"

The noun 'wedlock' comes from words meaning throughout "an earnest pledge", with 'lock' being a folk etymological reanalysis of Old English 'lak', meaning "a gift, an activity or proceeding to seal a deal".

'wedlock'
Old English: wedd
Old High German: wetti
Indo-European: wadi

'lock'
Old English: lak, "a gift, an activity or proceeding to seal a deal"

To 'betroth' comes from "faithfulness, truth, a pledge".

'betroth', bi- + Old English: treowððe, "thoroughly" "faithfulness, truth, a pledge"
West Saxon: triewðð
Mercian: treowðð, "faithfulness", triewe, treowe, "faithful, true"

Etymologies for the word 'marriage' are surprisingly hard to track down. It appears to issue from Latin agricultural language meaning "linked, united" (as a fruit to a vine), and develops later in the sense of "conjugal" in imperial poetic language. 'Maritus' "husband", and later 'marital' "wife", appear to be connected to a host of words designating men or women disposed to unite.

'marriage'
Latin: maritus; marital, maritus
"husband" "wife" "linked, united" (as a fruit to a vine) -lang of agriculture, "conjugal" -imperial poetic language
Old Lithuanian: marti, "young woman"
Ancient Greek: meirax, "girl, boy"
Ancient Indic Sanskrit: marya, "virile young male lover", Mari "the female goddess"
Old Persian: marika, "subject"

The source of 'matrimony' is in the Latin words "mother" and "money".

> 'matrimony'
> Latin: matrimonium = mater + -monium, "mother"
> Latin: moneta, "money"

The translation of matrimonium is "legal maternity". This may explain why English typically speaks of "holy matrimony" rather than "matrimony" *tout court*, marriage being a way of becoming a mother that is sanctioned by the Church, which says more about motherhood than about marriage.

Again, to the extent that memetic inheritance via lexical semantics explains our intuitions of analyticity, we find more notion of *faithful promise* than any requirement about sex in our lexical bequeathal of words meaning "marriage". If expertise on marriage is based on linguistic knowledge, then that expertise suggests that marriage has to do with commitment, rather than with the sex of those who commit.

Now, I have so far provided merely a negative argument about the lack of analytical connection between heterosexuality and marriage. What would count as a positive argument that a marriage does not analytically imply heterosexuality? Here, apart from the historical record suggesting that homosexual marriages have actually taken place, we have nothing more to rely on other than counterfactual intuitions. So let us review our desiderata for analyticity in light of such intuitions.

Is the heterosexuality of marriage independent of fact –cf.(12.a)? It is hard to state that heterosexuality is an empirical fact about marriage without begging the question at issue, so let us move on to (12.b): is it confirmed no matter what?

Here, it seems clear that it is not; for if we discovered centuries-old registers of Judeo-Christian marriages which had been tampered with and where gay and lesbian marriages had been deliberately struck out after an edict discovered to have been issued by a 16th century pope, we would surely take this as confirmation that gay and lesbian marriages had occurred. We would not conclude, as per the requirements of analyticity, that these had never been marriages in the first place; for such discovery would pull the rug from under the very argument from religious history. So some possible experience could disconfirm the statement that "Marriage is heterosexual" – cf.(12.d.iii).[26]

As shown by the etymological argument, substitution of synonym for synonym within the statement "Marriage is heterosexual" does not yield a logical truth –cf.(12.d.i); at best it derives the empirically dubious claim that a promise has something to do with the sex of those making it. Nor is its denial self-contradictory –cf.(12.d.iv): while I grant it might be hard to understand what a brother wants who wishes to be declared a sister, it takes bad faith of colossal proportions to purport not to understand what gays want who wish to be married.

Is the heterosexuality of marriage knowable a priori –cf.(12.c)? To think so would imply that we know *a priori* that it excludes homosexuals. And this in turn would presuppose that we know *a priori* of the existence of homosexuality, a most bizarre suggestion in light of the thousands of years of denial of its existence.

The empirical fact that homosexuals have seldom if ever been tolerated as equals gives extra weight to the analogy with the "persons" case: it seems absurd to us now to think that 'person' excluded

20th century women from its semantic reach *as a matter of meaning postulate* anymore than "lawyer" ever excluded women by virtue of its meaning –cf.(12.d.ii). Law schools and law institutions excluded women as a matter of fact, facts completely analogous in nature to those which explain the exclusion of gays and lesbians from the institution of marriage. This is fully evident both in the disingenuousness of the arguments presented by the Crown against the petitioners' right to marry,[27] as well as in their striking formal similarity to those presented in the "persons" case.[28]

VIII. Individualism and the Legal

Most ordinary English speakers in Canada understand the word "citizen". They do not, at least not *qua* ordinary speakers of our common language, understand for all that the correct individuation conditions for *being* a citizen of Canada. These are determined by Canadian Law, as constrained by the Canadian Constitution, as it is interpreted by Canadian Courts. Ordinary speakers know what these are, if at all, because they know the Law, not because they know the language. Canadian Law *defines* 'Canadian citizen,' because 'citizen' is a legal kind term. The Law can be changed, but the Law in this stipulative respect cannot be wrong.

The definition of 'marriage' under Canadian Law as "a union of a man and a woman to the exclusion of all others" does not *define* 'marriage' in Canadian English. Thus, both sides agree that 'marriage' is a social kind term, not primarily a judicial term of art. For this reason, Marriage Laws can be mistaken. For the Law is meant to reflect the social kind of relationship a marriage is, not to constitute it (even though, once in effect, the Law may become constitutive of civil marriage).

But even stipulative Laws do not end there. No law is self-interpreting. Canadian Law stipulates that a (non-immigrant) citizen is any person born in Canada, or outside Canada of at least one Canadian parent. But whether an arbitrary X counts as a citizen according to the Law depends on what counts as a person, what counts as a Canadian parent, what property being born in Canada amounts to, etc. These are not concepts whose extensions we can wholly predict in advance of all prompting from reality or from our philosophical imagination. Does being cloned on a Canadian-owned spaceship in outer space count as being born in Canada, or from Canadian parents? This was Hobbes's point: that Laws require interpreters, and since interpretation must come to an end, Laws require Sovereign interpreters. These are our Courts, ultimately our Supreme Court. Their role is to interpret the Law.

The Court cannot alter or prescribe the meanings of chemical kind terms. Courts cannot tell chemists what water is, nor order them to change what they mean by their chemical term "water." But a role the Courts do play is that of determining which word "water" is being used when. It's part of the Court's job to judge when a reasonable person would be expected to understand that 'water' was being used as a chemical kind term and when it was being used, say, in a looser functional sense.

Suppose a sign by the water fountain in a surgical ward reads: "Do Not Give Water to Pre-Operative Patients", and someone hands out XYZ to all, causing great operative havoc. We would turn to the Courts to determine whether the action was an indictable offence or an innocent misunderstanding. It would be the judge's job to determine the genuineness or disingenuousness of

a defence of "But Your Honour, XYZ isn't *water*!" Now suppose a sign on a jar in a chemical lab reads "Water Only", and someone spoils the experiment by pouring in XYZ. Again, it would be the judge's job to determine the genuineness or disingenuousness of a defence of "But Your Honour, you said last time that XYZ *was* water!" The Court may require expert help to articulate how the specialized chemical and ordinary functional senses differ, but it could not fulfill its function if judges themselves had no sense of the difference. (Imagine having to assess the damage done by an insult committed in a language you don't speak.) That is why ordinary humanity is among the highest virtues of a judge.

The Court's two roles, as interpreter and as lexical identifier, come together in the marriage case. The Court's purview in the marriage case is not to force a meaning change on the ordinary word "marriage" but to determine which of the many ordinary words "marriage" in circulation in Canada today is the one in use in the Law. Religious fundamentalists, supported by premise (3), argue that what figures in our Marriage Laws can only be *their* word "marriage" since it is their institution that antedates the Law; and their word "marriage" analytically precludes homosexuals.[29] What the Court is being asked to do is to say whether *that*'s the word, or given the constraints imposed by the rights and freedoms guaranteed in our Constitution, even *could be* the word, meant by the Law in Canada today. Others, supported by premise (4), argue that what figures in our Marriage Laws is the word of the Oxford Canadian. What the Court is being asked to do here is to interpret the lexical entry in light of the constraints imposed by our Constitution, to wit, which part of the entry, if any, is or can be a definition of marriage; and which part is or must remain stereotypic information about heretofore married couples.

And what the Ontario and Québec Courts, and the British Columbia Court of Appeal, have determined can be put in the following terms: that the word 'marriage' that occupies the subject position in statements of Law has not been (for at least as long as we have empowered our Constitution to constrain our concepts) and cannot in Law be *that* (religious) word, for the presence of that word in Law, or any other word precluding homosexuals, violates constitutional guarantees of equality for homosexuals. In the words of Justice LaForme:

> The submission [that the impediment to the legal recognition of marriage between same-sex couples lies in the language of the constitution itself] amounts to an attempt to freeze a meaning that may have been understood by the framers of the constitution back in 1867. *Such a proposition is unsupportable in law*.
> At the outset, such a proposition contravenes the basic principle of Canadian constitutional interpretation that "the B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits." (*Edwards v. Canada* 1930 AC 123 (PC)at 136) [*Halpern v. Canada* (A.G.) 2001, LaForme *Reasons for Decision*, p.81, emphasis mine][30]

The Court has no mandate to change or to prescribe the ordinary meanings of words. Its mandate is to individuate them, and to identify which may figure in our Laws. It is the Constitution, in the last instance, which determines the *same-as* relation for (civil) marriage. The reason for this is because, to the extent that we (individually or collectively) make the moral commitment to submit our concepts about the social to the constraints imposed by our Constitution, we *will* our concept of (civil) marriage to be consistent with these. That is part of what makes my concept of marriage the

one it is, regardless of the accuracy of my representation of it to myself, in exactly the way that H_2O individuates my concept of water, regardless of the accuracy of my conception of it (as a transparent, odourless, thirst-quenching liquid...), *provided that* I commit myself to a concept of water as a natural kind. (That is one reason why holding a referendum on gay marriage is such a roundly misbegotten idea.) We defer to the Court because, and to the extent that, we acknowledge the Court as the expert in the consistency of our *legal* concepts with the *moral* concepts embodied in constitutional provisions. We do not have analytic intuitions about this. That is why Justice McMurtry of the Ontario Appelate Court was so overwhelmingly right to say: "We are not interested in polls," something we would indeed be very interested in if the essential properties of marriage, or the consistency of our concepts with constitutional provisions, were available at our neuronal tips as analytical intuitions.

The Court does not prescribe which word "marriage" I should be using, but better individuates the moral (constitutionally constrained) concept which I already use –as long as the concept of marriage that I intend is the moral, constitutionally constrained, concept, the only concept of marriage allowed to figure in the Law. The judiciary is not only "the guardian of the constitution," as Justice Dickson once said, but the measure of the consistency of our concepts with constitutional guarantees.

What is analytic about my word "marriage" and necessary about my concept of marriage (or any word and any concept) depends not at all on its religious or other history, facts only contingently accessible to my consciousness if at all. It depends on what *category* of word (or concept) it happens to be in my mind, on what categorial role it plays in my language (as a natural kind term, a social kind term, a morally constrained kind term, a proper name, etc.). That, I think, we can have analytic intuitions about (though we can make mistakes about even what those are). However else chemists may represent water to themselves, *qua* chemists, they are compelled to think of 'water' as a natural kind term.

However much marriage may be a religious kind of thing in someone's mind, in the mind of anyone at the moment of contemplating whether there should be a *legal* ban on same-sex marriage, marriage is a legal kind of thing. The question before the Courts in our constitutional democracy is not whether same-sex couples are marriageable by Catholic Canon Law, by Sharia Law, or by the Law of Gravity, but whether they are by the constitutionally constrained Civil Law of a secular Canada.

Quine mocked the suggestion that analytical intuitions were somehow "primitively compelling." I disagree with Quine's blanket statement. I find the grammatical genders of French words primitively compelling indeed. Nothing would make me change my mind about a word's gender (or its syntactic category) except realizing that I had made a mistake in reporting my own intuitions about it. Even seeing it presented as other-gendered in a French dictionary would not move me: as a devout Chomskian, I would proudly assume the status of lone speaker of a language in which that word had the grammatical gender I ascribe to it.[31]

Nothing I have said so far prevents anyone from proudly ...or at any rate, from assuming the status of speaker of a language in which marriage analytically excludes homosexuals. But by which primitive compunction does any such person intuit a semantic fact such as that?

IV. Belief *de gay*

The chemist is not *primitively* compelled to exclude XYZ from the concept of water, but is compelled to do so *by theory*. In this, marriage is entirely like water. Theory, however primitively compelling it might feel to its owner, is also what would compel one to exclude same-sex couples from marriage. The Great Ape Project is dedicated to the inclusion of apes into the category of persons. People who would deny apes such status must do so based on their (implicit or explicit) views *about apes*; no conception of personhood can exclude apes all on its own. Likewise, no conception of marriage excludes same-sex couples all on its own. What we find primitively compelling about the notion of marriage is inseparable from how we represent to ourselves the moral status of gay and lesbian relationships.

State-sanctioned-but-not-marriage unions for gays and lesbians as are proposed under the "registered domestic partnership" scheme demean them just as surely as refusing to call women "persons" demeaned women. One of the intangible benefits of being married is precisely that of having one's union recognized *as a marriage*, to have *that* word apply to it. Nor does this proposal fare any better if *all* couples henceforth become registered domestic partners. Apart from scapegoating gays as responsible for the destruction of marriage, it fails full and equal respect for gay unions, just as surely as would telling women and blacks: "only white men are really persons, but fear not, we'll abandon that word and refer to all of us as 'humans' from now on."

The exclusion of gays and lesbians from marriage is, as the Lord Chancellor of the Privy council wrote in 1928 about the persons case, "a relic of days more barbarous than ours." And to paraphrase him further:

> To those who would ask why the word "marriage" should include gays and lesbians, the obvious answer is: why should it not?

One good reason why Stainton must revise his philosophical views on meaning is because they commit him to views about gays and lesbians which I am certain he does not hold.

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Quine 1961: "Two Dogmas of Empiricism" in *From a Logical Point of View*, Harvard UP.

Notes

1. For fruitful discussion at various stages of preparation of this article, I am grateful to Tim Stowell , the members of the Philosophy Department of the University of Rijeka, the participants of the Philosophy of Science Conference on Rationality in Dubrovnik, and the participants of the Third Barcelona Workshop on Reference; also to Queen's University for granting me a sabbatical leave, to the Government of Spain for generous financial support of my research, and to the University of Barcelona Logos Research Group for providing a warm and philosophically stimulating environment. My debt to Tyler Burge will be evident throughout. A special thank you to Gary Kibbins and Bryce Swerhun for useful comments, to Mark Johnston for a dose of courage, and to Steve Yablo for inspiring the sub-title.
This article is dedicated to the memory of Daniel Robillard (1956-2002).

2. See Erhlich and Stainton, Expert witness Affidavits in *Egale v. Canada* (A.G.), filed in the Supreme Court of British Columbia, in the matter of Applications for Licences by Persons of the Same Sex who Intend to Marry; and in the matter of The Marriage Act and The Judicial Review Procedure Act (Vancouver Registry No. L001944; L002698; L003197), August 2001; and in *Halpern v. Canada* (A.G.), filed in the Ontario Superior Court of Justice (Court files 684/00, 30/2001), November 2001.

> Ehrlich argued that calling gay unions for example 'registered domestic partnerships' fomented the existing (and harmful) conception of gays as less entitled, and the conception of their unions as inherently different and less worthy. Ehrlich defended the position that by extending the reference of the term 'marriage' to gays and lesbians, "courts would be helping to shape a social reality in which gays and lesbian unions are not stigmatized and marginalized." [Erlich, para]. *Pace* Stainton, it is difficult to disagree with this statement. By extending 'marriage' to gays and lesbians, courts would be shaping a social reality in which gays and lesbians are *married*. This would surely *help* to destigmatize and demarginalize gay unions.
> Despite his own acknowledgement that words *do* influence attitudes, Stainton concludes that applying the word 'marriage' to same-sex marriages "would not sufficiently influence our perceptions and our social reality as to remove harm [to homosexuals]." [Stainton, para 20] Stainton does not explain why efforts to *reduce* homophobia are worthless unless they eliminate it altogether.

3. See affidavit filed in the same courts. The present article is based on the arguments presented in these Expert witness Affidavits. I remind my readers that the relevant affidavits here are public, serious and lengthy documents, sworn under oath to represent their author's views, and aimed at influencing the Highest Courts of the land. Not since *Morgentaler v. Canada* (A.G.) have

philosophers in Canada participated so directly in decisions of such momentous importance.

4. In 1928, the Supreme Court of Canada, citing original intent, denied that the word "persons" in Section 24 of the 1867 *British North America Act* included female persons. In 1867, women did not vote, run for office or serve as elected officials. Only male nouns and pronouns were used in the *BNA Act*, and the British House of Lords had no female member. The five male Justices concluded that it was not the business of the Courts to change this tradition. Prime Minister W. L. MacKenzie King referred the petition to the Judicial Committee of the Privy Council of England, Canada's highest court of appeal at the time. In October, 1929, the Privy Council (rejecting the semantic argument) affirmed that women were indeed persons and hence eligible to become Members of the Canadian Senate.

5. *Loving v. Virginia*, 388 U.S. 1 (1967) Because their home state of Virginia outlawed interracial marriages in 1958, Richard and Mildred Loving married in Washington D.C., and later moved back to Virginia. In 1959 they were prosecuted and convicted of violating the state's anti-miscegenation law. They were each sentenced to one year in jail, but promised a suspended sentence if they agreed to leave the state and not return for 25 years. After moving back to D.C., they sued the state of Virginia in 1963, challenging the constitutionality of the anti-miscegenation law. In March 1966, the Virginia Supreme Court of Appeals upheld the law, but in June 1967, the U.S. Supreme Court unanimously ruled the law unconstitutional.

6. This insightful phrase is from Martha McCarthy and Joanna Radbord, lawyers for the petitioners in Ontario.

7. Stainton is wrong here about the origins of the word "tort". It is in fact no more a legal creation than the word "marriage", but, like it, an adaptation by the law of a common word. It is attested in the 11th century in Medieval Latin and Old French in the common sense of "a wrong, an injustice", and enters common English in the 14th century with this meaning. The word "tort" acquires the English legal sense of "a breach of duty whereby some person acquires a right of action for damages" only at the very end of the 16th century. Though obsolete in today's common English, 'tort' in its common usage survived for 160 years after the borrowing of the term by English Law, and it survives to this day in modern French in its common sense, as well as being the French word for tort. A French speaker has no trouble understanding the connection between the common and the legal sense, and uses context for disambiguation.

8. Putnam's argument must be understood carefully. It only implies that Courts cannot overrule chemists about natural kinds *considered as natural kinds*. It does not imply that Courts cannot overrule chemists about natural kinds considered as legal kinds. For instance, in 1893, the US Supreme Court ruled that the tomato, though botanically a fruit, is, for legal trade issues, a vegetable.

9. From *Logical Investigations*, ed. Geach, Yale UP, p.12. "But knowledge of language is a special thing when proper names are involved." [p.11]

10. Since (7) is presented as a semantic theorem, strictly speaking it follows from no premises, and (4), (5) and (6) can be taken as different ways of making the point in (7). But as (4), (5) and (6) do

play an epistemic role of substantiating the claim in (7), I present them as premises. Nothing I can see hangs on this mode of presentation of the argument.

11. "The publication of *Webster's Third New International Dictionary* in 1961 set off a storm of controversy both in the popular press and in scholarly journals that was virtually unprecedented in its scope and intensity. The *New York Times* ridiculed the new dictionary. [...] The attack was joined by Life magazine, the *Saturday Review*, the Atlantic, the New Yorker, and other magazines and newspaper across the country. Critics charged that *Webster's Third* had abandoned its responsibility to uphold standards of good English and that it would encourage permissiveness in the teaching of English. [...]
[*Webster's Third*] has come to be regarded by virtually all language experts as one of the great dictionaries of our time." See Herbert Morton, *The Story of Webster's Third. Philip Gove's Controversial Dictionary and Its Critics*. Cambridge University Press, 1994.

12. Edward Keenan and Leonard Faltz, 1985: *Boolean Semantics for Natural Language*, Reidel/Kluwer, p. 310.

13. Monotonic non-restricting adjectives have been much discussed by Noam Chomsky and Tim Stowell. My thanks to Stowell for the current example.

14. Though possibly extending the reference of 'person' to corporations may have. As John Ralston Saul says: "If you're a person before the law and Exxon or Ford is also a person, it is clear that the concept of democratic legitimacy lying with the individual has been mortally wounded."

15. Indeed, according to Yale historian John Boswell, the Christian Church got into the business of marrying only in the 13th century when it declared marriage a sacrament. Before that, the Church blessed the nuptials only of priests! See *Christianity, Social Tolerance and Homosexuality* and *Same-Sex Unions in Pre-Modern Europe*.

16. Queen's University was originally founded by Royal Charter of Queen Victoria in 1841 "for a [Presbyterian] ministry trained within the country, and for the education of youth in the principles of the Christian religion", but it is a secular institution today, the "last vestige of denominational control" having been explicitly removed in 1912. See Queen's University, *Faculty of Arts and Sciences Catalog 2001-2002* (Kingston: Queen's University, 2001), 490-93.
If Queen's University is the same institution today as it was at its founding, that alone shows that its religiosity is not essential to its individuation. If religion is essential to its individuation, then Queen's University became a different institution in 1912. Mutatis mutandis for the institution of civil marriage in Canada: either it belongs to the same institution of marriage as the religious institution of marriage causally connected to it (hence religiosity is not individuative of the institution of marriage), or else religion is essential to the individuation of marriage and hence civil marriage has *always* been a different institution than religious marriage. Either way, *civil* marriage is not an essentially religious institution.

17. See Boswell, who provides examples of same-sex marriages being performed in the Roman Catholic Church as late as the 17th and 18th centuries.

18. Boghossian 1997: "Analyticity" in *A Companion to the Philosophy of Language* (Hale &

Wright, eds.), Oxford: Blackwell.

19. Every French noun belongs to one of two grammatical classes (annoyingly called "the masculine gender" and "the feminine gender", but not to be confused with the male sex and the female sex). For further discussion, and implications of such distinctions for English, see Mercier 1996, "A Perverse Case of the Contingent *A Priori*: On the Logic of Emasculating Language (A Reply to Dawkins and Dummett)", *Philosophical Topics* (special ed. S. Haslanger), Arkansas University Press, and for implications for French, see Mercier 2002, "L'homme et la factrice: Sur la logique du genre", *Dialogue: Canadian Philosophical Review*, VOL. XLI, No. 3.

20. Importantly, I say *generally*, for almost all masculine occupation titles and names of animals and some feminine animate forms can refer to both males and females: 'la personne', 'le docteur', 'le professeur', 'le cheval', 'la vipère', etc...

21. These statements are only *almost* analytic truths, since possible experience can disconfirm them and their denial is not always self-contradictory (see previous note), and since the kind of analyticity involved is truth by virtue of a strange mixture of meaning *and* morphosyntax (of the sort discussed in my 1996 & 2001 cited above).

22. All etymologies herein are from *The American Heritage Dictionary of the English Language*, 4th ed. Boston: Houghton Mifflin, 2000; *The Compact Oxford English Dictionary*, 2nd Edition: Oxford University Press, 1991; the *Oxford English Dictionary Additions Series*, Volumes 1-3: Oxford University Press, 1993 & 1997; the *Shorter Oxford English Dictionary*, 5th Edition: Oxford University Press, 2002; or *Webster's Third New International Dictionary*, Unabridged: Merriam Webster, 1993.

23. See J.H. Greenberg, 1974: *Language Typology: A Historical and Analytic Overview*. Janua Linguarum, Series Minor, 184 The Hague and Paris: Mouton; and M. Ruhlen, 1994: *The Origin of Language: Tracing the Evolution of the Mother Tongue*. Wiley, John & Sons.

24. For details, see my "What is a Word?" (forthcoming).

25. For discussion, see Mercier 1998: "On Communication-Based *De Re* Thought, Commitments *De Dicto*, and Word-Individuation" in *Philosophy and Linguistics* (ed. R. Stainton), Westview Press.

26. According to John Boswell (*op. cit.*), precisely such experiences await us at the Vatican, where exactly such evidence is securely kept from the public eye.

27. Apart from the semantic argument, the Attorney General of Canada's case was also based on procreation as the essence of marriage. When reminded by judges of the fact that some couples who marry choose not to procreate, the AGC made central the fact of their having the potential to procreate. When reminded that some couples are infertile, the point was precisified as to their having the potential for the "rational capacity" [?!] to procreate. When asked: "Can't lesbians procreate? Can't gays father children?", the AGC's reply was that only heterosexual couples had the potential for the rational capacity to procreate without third party intervention. And when asked why, on such basis, heterosexual octogenarians should be allowed to marry, the AGC made the

point that they, but not homosexuals, belong to a group that has the potential for the rational capacity to procreate without third party intervention. (The Belongs-to-a-Group-that-has-the-Potential-for-the-Rational-Capacity-to-Procreate-Without-Third-Party-Intervention distinction did not much impress the judges. The AGC even found herself saying: "I know it sounds lame your Honours but..."!)

Lame to the point of bizareness is the argument presented in an affidavit by Katherine Young, professor of religious studies at McGill University, and reiterated on the eave of the Ontario Appeal in a commentary to the Globe&Mail (May 3 2003), which would leave even Freud speechless. It goes as follows: Humans have grown used to taking their heterosexuality for granted, and they trust that their heterosexuality is not vulnerable to cultural change. But humans are not ordinary animals governed by instincts and drives. What instincts and drives do for animals can only be accomplished for humans by culture. Heterosexual marriage is culture's way of fostering heterosexuality, to guarantee that humans mate and propagate the species. Allowing gay couples to marry would remove the cultural support necessary for heterosexuality, thus threatening our species.

28. In the "persons" case, a note by the presiding judge, handwritten in the margin of a brief and intended to close the case (and the subject) stated that women were not qualified for the Senate because the word "senator" does not apply to a woman, there being no Latin word for a female senator. On these grounds, he refused to hear the case.

29. Echoing Stainton, Justice Pitfield of the BC case held that the word 'marriage' in the 1867 **British North America Act** unambiguously meant "a monogamous opposite-sex relationship" (though he does not justify his claim to knowing this), and that the 1982 **Constitution Act** currently governing marriage in Canada simply borrowed that word. Hence, amending the constitutional definition of marriage to allow same-sex marriages would require a formal constitutional amendment process. Consequently, not even the Parliament of Canada can change the law and grant homosexuals the right to marry! Ontario Justice LaForme summarizes Pitfield's argument (to which he does not subscribe) thus: "The impediment to the legal recognition of marriage between same-sex couples does not lie in legislation –or in the common law– but rather *in the language of the constitution itself.*" (*Halpern v. Canada* (A.G.), cited in LaForme's *Reasons for Decision*, p.81).

The Ontario Justices unanimously disagreed with Pitfield's judgment.

30. Every Canadian should be proud of this "basic principle of Canadian constitutional interpretation" so often derided by the philosophically deaf as "judicial activism", not only because Canadian constitutional interpretations are the most cited the world over by legal scholars, but also because it expresses a deep and correct philosophical understanding of the relation between our moral concepts (expressed in our Constitution, "The Supreme Law of Canada"), our legal concepts (expressed in our Laws), and our language (interpreted by the Courts).

31. For phonological reasons having to do with differential pronunciation of determiners, many French-Canadians are wont to treat as feminine, nouns which Standard French dictionaries treat as masculine, especially but not only vowel-initial nouns. Some examples include: 'une orque' (*an orca*), 'une oreiller molle' (*a soft pillow*), 'ma grosse orteil' (*my big toe*), 'apporte-moi une sandwich avec une couple de biscuits ' (*bring me a sandwich with a couple of cookies*). No amount of prescriptive admonitions suffice to dissuade such users (myself included) from such practices, so anchored are they in their idiolects.

*The wordform 'hu-we-lijk' has undergone a meaning change:

   '*huwelijk$_1$*' means: Marriage-between-heterosexuals-ONLY.
   'huwelijk$_2$' means: Marriage-between-hetero-OR-homosexuals.

** After April 2001, Dutch heterosexual couples continue going to City Hall. "I now pronounce you *huwelijked*" says the justice of the peace, in Dutch. But (according to Stainton) that is no longer translatable by 'married'.

***Alternatively, the Dutch have merely realized in 2001 that their concept of *huwelijk$_1$* countenances same-sex unions after all (timelessly, as it were), in which case Stainton is committed to the view that Dutch-English dictionaries have all along been mistaken to translate 'huwelijk' as marriage.

****Alternatively, *marriage* (as we understand it) never existed after all in the Netherlands (though it took until 2001 to realize it), and Dutch couples we think of as *married* never were.