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The Normative Foundations of Civil Marriage

By

Jeremy Ray Garrett

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APPROVED, THESIS COMMITTEE:

George Shep, Herbert S. Autrey Professor
Philosophy

H. Tristram Engelhardt, Professor
Philosophy

Alastair Norcross, Associate Professor
Philosophy, University of Colorado-Boulder

Rachel Zucker, Assistant Professor
Philosophy, Northwestern University

David J. Schneider, Professor
Psychology

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ABSTRACT

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Marriage is an undeniably important institution of modern civilization. Indeed, among the fundamental institutions forming the basic structure of society, perhaps only law and property exercise a more profound influence upon citizens’ life prospects. Yet while the latter institutions have long been considered objects of primary importance to political philosophers, the institution of marriage has not received comparable philosophical treatment. In fact, despite the profound influence of marriage on the structure and quality of individual and social life, it is fair to say that, outside of explicitly feminist and natural law circles, the institution has rarely been treated as a topic of any philosophical interest since the nineteenth century.

In my dissertation, I seek to make some headway in exploring these relatively uncharted philosophical waters. Within the complex range of conceptual and normative questions surrounding marriage, I focus on arguably the central political-philosophical question concerning the institution: “Should the state establish, recognize, and/or maintain a civil form of marriage?” In addressing this question, I identify, analyze, and critically evaluate the most prominent arguments purporting to justify the state’s authority to legally establish and regulate marriage. I conclude that marriages in a pluralistic society ought to be mostly private affairs worked out between or among those party to the arrangements, with the state’s involvement limited to the enforcement of (1) general laws (e.g., regarding property, torts, crime, etc.) and (2) particular contracts that are individually initiated and designed within a defensible system of contract law.

The project, as I see it, produces at least three significant conclusions. First, the dominant form of civil marriage in contemporary Western societies, traditional civil marriage, derives from inherited beliefs and practices that are philosophically problematic. Secondly, and more abstractly, any substantive account of the basis for civil marriage in a pluralistic society will ultimately prove unsatisfactory for one reason or another. Finally, marital contractualism constitutes a promising and attractive alternative to a preformed, state-defined institution of civil marriage in political theory and practice.
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This project has been aided and improved by numerous mentors, colleagues, and friends. I want to begin by acknowledging the excellent committee that assisted me with its development and completion.

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learned much from Alastair who never ceases to impress me with his sharp wit and keen analytic mind. Perhaps even more impressive than these rare gifts is his generous and loyal spirit (consequentialists can learn much about virtue from this man!). Alastair never hesitated to save my meager graduate stipend by allowing me to stay with him at the many conferences we attended together. Moreover, he has always made me feel welcome within his circle of (intellectually impressive) friends and never suggested through word or action that I as a graduate student didn’t belong or counted for less. His support and friendship have meant so much since we began together at Rice in the fall of 2002. Here’s to many more Norcross cocktail parties!

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CHAPTER ONE

INTRODUCTION

There is widespread agreement that the institution of marriage is undergoing a fundamental and historically unprecedented transformation in Western culture. Simply put, and for better or for worse, the nearly unanimous consensus is that marriage has undergone more institutional evolution in the past century and a half than in all previous centuries, taken together.¹ From North America to Europe to South Africa, marriage has evolved from an institution rigidly defined by commitments to homoracial, heterosexual, hierarchical, gender-structured, and indissoluble partnerships (often) arranged by familial, cultural, and/or religious authorities into a much more expansive establishment which is at least open to considering, if not wholly endorsing, the equal value of heteroracial, homosexual, egalitarian, gender-neutral, and/or dissolvable unions (often) arranged by the spouses themselves. And this is only to look at changes in some of the more general properties of the institution and to say nothing of the vast quantity of more specific developments and changes that have taken place within particular systems of marriage and family law and policy over the same time.

Unfortunately during this time, much less philosophical attention has been given to analyzing and evaluating the normative foundations of marriage in a way that would provide appropriate critical space within which to make sound judgments about the moral

¹ This is not to suggest that the institution of marriage was, prior to the mid-nineteenth century, some invariant monolithic establishment—it certainly was not. Rather, the point is to underscore just how different the recent institutional history has been in terms of the scope, depth, and pace of change. For some representative expressions of this judgment, see the variety of cross-cultural sources cited by Coontz. Cf. Coontz (2005, pp. 2, 4).
quality of these dramatic social, political, and legal developments. This inattention is doubly peculiar, in that a good account of the foundations of marriage is as theoretically significant for moral and political philosophy as it is practically important for public policy.

Consider, for example, an important feature of the institution of marriage – namely, the fundamental and profound degree to which it structures individual and social life. This feature suggests (what no one would likely deny) that marriage has clear and wide-sweeping significance for practical politics – a fact that has not been lost on politicians and public policy analysts across the world. However, this same feature also would seem to recommend situating marriage just as prominently on the agenda of political philosophers, as an object worthy of serious political-theoretical analysis and evaluation. Moreover, one could go further in coupling this fact with another – namely, that the contemporary thinker whose work has largely established the research agenda in political philosophy for the past third of a century, John Rawls, explicitly includes the institution of marriage in his highly exclusive list of institutions constituting the basic structure of society. Certainly, then, a person unfamiliar with the field would be justified, on the basis of these two facts, in expecting to find marriage given roughly

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2 By the expression “philosophical attention”, I mean very strictly the sort of careful analysis that (ideally) characterizes academic philosophical research – namely, the clarification of key terms, the analysis of concepts, facts, and values, the drawing of relevant distinctions, and the construction and evaluation of arguments. Thus, I certainly do not intend the much stronger claim that the institution of marriage has been ignored by the larger community of intellectuals and academics – indeed, one does not need to look far to see that this more ambitious thesis is clearly false, as the institutions of marriage and the family are arguably among the topics most discussed by this wider network (most notably, by sociologists, anthropologists, and other social scientists, but also by legal scholars, historians, and many others). In fact, this asymmetry in the amount of attention given by academic philosophers and the rest of the academic community further reinforces my claim that it is a peculiar oversight on the part of philosophers to have failed to bring their distinctive methods and tools to bear on the conceptual and normative questions surrounding marriage.

approximate treatment to the other institutions forming the basic structure of society (e.g., law, property, etc.).

Unfortunately, such an expectation would be frustrated by even a cursory examination of the actual agendas of contemporary political philosophers. During the 20th century, a period in which most of the institutions forming the basic structure of society have received significant attention in the more prominent and systematic accounts of political morality, the institution of marriage has not received anything like comparable philosophical treatment.\(^4\) In fact, despite the pervasive and profound influence of marriage on the structure and quality of both individual and social life, it is fair to say that, outside of explicitly feminist and natural law circles, the institution has rarely been treated as a topic of any philosophical interest since the nineteenth century (when it was taken quite seriously by a preponderance of important philosophers).\(^5\)

\(^4\) Consider, for example, a brief list of some of the most significant works in contemporary political philosophy, each of which has quite a bit to say about the normative foundations of law and property, but very little, if anything, to say about marriage: Ackerman's (1980) *Social Justice in the Liberal State*, Dworkin's (1977) *Taking Rights Seriously* and (2000) *Sovereign Virtue*, Gauthier's (1986) *Morals by Agreement*, Nozick's (1974) *Anarchy, State, and Utopia*, Rawls' (1971) *A Theory of Justice* and (1994) *Political Liberalism*, and Raz's (1986) *The Morality of Freedom*. Among those influential works that do give significant attention to marriage, the explanation seems to lie more with the particular interests of their respective traditions (e.g., natural law, feminism, etc.) rather than with the general features of the institution: cf. Finnis' (1980) *Natural Law and Natural Rights* and Okin's (1989) *Justice, Gender, and the Family*. One exception to this general observation is Michael Walzer's (1983) *Spheres of Justice*, which devotes a (relatively short) chapter to discussing kinship, marriage, and love. There are, of course, other works which, through frequently mentioning marriage and/or the family in various examples, seem to suggest an awareness of the moral and political importance of the institution (and perhaps constitute a middle category in this rough taxonomy). Cf. Macintyre's (1984) *After Virtue* and (1988) *Whose Justice? Which Rationality?* and Galston's (1991) *Liberal Purposes*. However, these works never address the topic in the sort of systematic way that I take to be fundamental to political theorizing. Similarly, even one of the more notable works addressing the topics of marriage and the family, James Fishkin's (1983) *Justice, Equal Opportunity, and the Family*, does so only through the narrow (though admittedly, highly important) lens of how liberal commitments to family autonomy lie in tension with the ideal of equal opportunity.

\(^5\) Consider, by way of contrast with the preceding footnote, the extent to which marriage figured into the work of great 19th century social and political thinkers. Aside from the obvious and well-known examples, such as Wollstonecraft's (1792) *A Vindication of the Rights of Woman* and Mill's (1869) *The Subjection of Women*, one could note such important works as Kant's (1780) *Lectures on Ethics* and (1797) *The Metaphysics of Morals*, Hegel's (1821) *Elements of the Philosophy of Right*, Kierkegaard's (1843) *Either/Or* (to name just one of several works where he reflects extensively on marriage), and Nietzsche's (1883-85) *Thus Spoke Zarathustra* and (1887) *On the Genealogy of Morals*. Considerations of marriage
This neglect is not only surprising (at both the level of political theorizing and the level of lived political experience), but is in fact quite regrettable and for many reasons. For one thing, the conceptual and normative questions surrounding marital relationships would seem to be of intrinsic interest to those who take the purpose of social and political theory to be the explanation, justification, and critique of various patterns of social and political life. To pass over such questions without remark, let alone careful scrutiny and study, is to sequester a fundamentally salient dimension of the field. For another, overlooking or downplaying these questions serves to distort discussions of other important political concepts, such as justice, freedom, and rights, as these discussions must either (1) proceed (falsely) as if the lives of the citizens to whom their respective theories apply do not tend to be deeply structured by the institution of marriage or (2) rely (implausibly) upon idealized assumptions about how lives are shaped within marriages and families. Finally, in stark contrast with many other contemporary moral controversies such as abortion or euthanasia, philosophers unfortunately have not yet had much to contribute to current societal debates regarding the nature of marriage, the moral quality of alternative types of relationships, and the proper scope of state intervention in sanctioning and normalizing certain relational patterns to the exclusion of others.

Run throughout the work of Marx and Engels, the two of whom famously argued for the abolition of marriage in light of communist commitments. Cf. (1848) *The Communist Manifesto* and Engels' (1884) *Origins of the Family, Private Property, and the State*. Interestingly, perhaps the most famous philosophical essay of the late 18th century (considered in terms of its importance to the wider intellectual community), Kant’s (1784) “An Answer to the Question: What is Enlightenment?,” was based, in part, on an ongoing dispute in the *Berlinerische Monatsschrift* about the legitimacy of state interference in marriage. The participants are translated in Schmidt's (1996) collection, *What is Enlightenment? Eighteenth-century Answers and Twentieth-century Questions*. I am grateful to Lisa Ellis for pointing out the important extent to which questions regarding civil marriage figure into Kant’s treatment of Enlightenment.

6 This is closely related to Okin’s observation that most contemporary theories of justice suffer from distortions stemming from various presuppositions they make regarding gender, marriage, or the family or from simple neglect of these subjects altogether. Cf. Okin (1989).
The aim of this project is to begin to fill this lacuna. Within the vast and complex range of conceptual and normative questions surrounding marriage, I will focus on arguably the central, political-philosophical question concerning the institution: “Should the state establish, recognize, and/or maintain a civil form of marriage?” In addressing this question, I identify, analyze, and critically evaluate the most prominent arguments purporting to justify the state’s authority to legally establish and regulate marriage. I conclude that marriages in a pluralistic society ought to be mostly private affairs worked out between or among those party to the arrangements, with the state’s involvement limited to the enforcement of (1) general laws (e.g., regarding property, torts, crime, etc.) and (2) particular contracts that are individually initiated and designed within a defensible system of contract law.

The project, as I see it, produces at least three significant conclusions. First, the dominant form of civil marriage in contemporary Western societies, traditional civil marriage, derives from inherited beliefs and practices that are philosophically problematic. Secondly, and more abstractly, any substantive account of the basis for civil marriage in a pluralistic society will ultimately prove unsatisfactory for one reason or another. Finally, the view I shall be defending, marital contractualism, will be shown to have the theoretical advantage of compatibility with any number of larger theories of justice, making it a broadly attractive substitute for a more full-blooded institution of civil marriage in political theory and practice. Thus, neither political theory nor practical

7 In other words, the theoretical strength of marital contractualism lies in its minimal constitution. By limiting its conceptual and normative ambitions, the view delivers something close enough to civil marriage to capture most of its advantages, but distant enough to jettison most of its attendant complications. One notable complication of a state-defined institution of civil marriage is that, if suitably thick or derived in top-down fashion from a particular comprehensive theory of justice, it is liable to being incompatible with any number of alternative theories of justice (e.g., varieties of feminism, liberalism,
politics need be conceptually or normatively impoverished for lack of a more robust, state-defined institution of civil marriage.

Prior to moving into the main chapters of the dissertation, I want to lay out a brief chapter-by-chapter synopsis of both its structure and primary content.

- **Chapter Two** establishes the conceptual and normative framework for the rest of the dissertation. First, I focus on the analytical background, including an overview of the major concepts and distinctions which function as the conceptual geography for a discussion of civil marriage. Here I analyze two important distinctions, one between the concept of marriage and various conceptions of marriage and the other between marriage as a social or natural institution and as a civil institution, and then sketch out a working conception of traditional marriage along with a rough and ready account of what is involved in the state establishment, recognition, and/or promotion of civil marriage. I then turn to the normative background. After offering some brief remarks on how the burden of proof should be assigned in the political philosophical debate regarding civil marriage, I situate my own project using the useful heuristic device of an

perfectionism, communitarianism, libertarianism, etc.). Thus, the conceptual and normative usefulness of any such particular account of civil marriage will be relatively limited. However, marital contractualism need not be derived from, and therefore dependent upon the success of, any larger account of political morality. It is, as I shall argue, fully compatible with almost any prima facie defensible account of justice. [While it is relatively easy to see the theoretical fit between marital contractualism and theories like libertarianism or classical liberalism, the account is arguably additionally well-suited to serve in many other kinds of accounts. See, for instance, Kymlicka's (1991) defense of contractualism as appropriate to liberalism (in his review of Okin's *Justice, Gender, and the Family*) and Card's (1996) feminist defense of a broadly contractualist account.] Therefore, political theorists who wish both to defend some theory of justice or other and also to maintain a space for marriage and the family should find marital contractualism to be an attractive account. With a commitment to contractualism in hand, they can safely proceed to discuss how contract law itself, as well as other large-scale institutional frameworks, ought to be configured without worrying that such discussions will lie in tension with, or perhaps outright contradict, a politically defensible account of marriage.
institutional state of nature. This device encourages us to begin from the starting point of what life might be like in the absence of a preformed, state-defined institution of civil marriage. I conclude this chapter by arguing that such a condition has considerable prima facie justification and this in turn yields significant implications for any defense of civil marriage.

- **Chapter Three** constitutes the first of two chapters criticizing intrinsic value defenses of traditional civil marriage (i.e., arguments which conclude that states ought legally and exclusively to establish, recognize, and/or promote “traditional” marriages on the grounds that such partnerships are valuable in and of themselves and apart from any further consequences for individuals or society). Here I focus on the first of two kinds of intrinsic value defense – namely, *historical* defenses of traditional marriage that locate intrinsic value in the wider contours of *tradition itself* (i.e., in the historical pedigree of actually inherited beliefs and practices). I begin by considering the limitations of bald appeals to the value of tradition and identify three problems they face – the problem of tradition specification, the problem of historical fit, and the was/ought problem. I then consider three more sophisticated historical defenses – the argument from accumulated wisdom (associated with Edmund Burke), the argument from evolutionary fitness (associated with Friedrich Hayek), and the argument from cultural identity (associated with Lee Harris) – and argue that each is liable to the same basic problems raised against the bald appeal. From these results, I conclude that
historical defenses cannot supply sufficient justification to underwrite the state's exclusive recognition and promotion of traditional marriage.

- **Chapter Four** focuses on the second kind of intrinsic value defense – namely, *ahistorical* defenses of traditional marriage which locate intrinsic value in some *inherent, tradition-independent property* of the monogamous, lifelong union of two heterosexual spouses (i.e., in the philosophical caliber of idealized beliefs and practices). Here I begin by ruling out some popular, but immediately problematic, versions of this defense that appeal respectively to divine sanction, procreative potential, and organic complementarity. I then turn to consider the most developed and promising version of the ahistorical defense – namely, what has come to be known as the "new" natural law defense of traditional civil marriage. First, I attempt to interpret and reconstruct this defense in a way that clarifies its four central commitments and their relation one to another. Then, I transition from interpreting to evaluating each of the four theses of NNL sexual morality. Here my critical strategy is staggered and cumulative. After raising two general worries regarding the broader NNL orientation to sexual moral inquiry that weaken the initial motivation for all four theses, I develop particular objections to each thesis in order of weakest to strongest. My aim is to undercut each thesis both on its own and by undercutting the weaker theses on which it relies. I conclude by arguing that, *by their own lights*, the central commitments of new natural lawyers not only fail to make a convincing case for traditional civil marriage, but actually support the conclusion that the institution is unjustified.
• **Chapter Five** will criticize arguments that conclude that states ought legally to establish, recognize, and/or promote traditional marriage on the grounds that partnerships of this form are *instrumentally valuable* (i.e., valuable, not for their own sake, but for the sake of other important goods). Against the instrumental value defense, I describe four general ways in which different versions of the argument can be criticized – initial justificatory deficit, empirical credibility, normative adequacy, and policy efficacy. I then bring these critical tools to bear on three important instrumental value defenses – (1) the appeal to individual well-being, (2) the appeal to the social stability fostered by intermediary institutions, and (3) the appeal to the welfare of children. I conclude that whatever value the goods identified by these appeals have is insufficient for justifying the exclusive recognition and promotion of traditional marriages.

• **Chapter Six** attempts to move from the prima facie defense of marital contractualism (offered in Chapter Two) to a most-things-considered defense. Here I proceed in three stages, corresponding to the three kinds of reasons one might have for rejecting a marital state of nature. The first reason appeals to the unique and/or special value of marriage. Here I point back to the critical work accomplished in Chapters Three through Five, before turning to a brief look at the prospects for a more pluralistic form of civil marriage (which would include at least some forms of non-traditional unions). As a thorough examination of the case for pluralistic civil marriage would require another dissertation-length project, my primary concern is simply to suggest how the critical tools developed
against traditional civil marriage might generalize and be utilized successfully in such a project. I then turn to the final two kinds of reasons one might have for rejecting marital contractualism – namely, on the grounds that such a condition is morally problematic or too impracticable. Here I defend the view from the charges that it takes insufficient account of the history of gender or is otherwise impoverished or impractical, by showing that these criticisms tend to rest on a confusion about what marital contractualism is and what it is not. When it is viewed in its most plausible form as applying simply to the particular mode in which persons enter and exit a legally recognized and enforceable relationship with others and not as an instrument for more ambitious social or theoretical aims, criticisms of marital contractualism not only fail critically to exercise the position in the right ways, but actually reveal its comparatively advantageous and open-ended compatibility with a variety of theories of justice.

- Chapter Seven concludes by drawing out and expanding upon the three primary conclusions of the dissertation – namely, that (1) the peculiar forms of civil marriage prevalent in contemporary Western societies derive from inherited beliefs and practices that are philosophically problematic, (2) any substantive account of the basis for civil marriage in a pluralistic society will ultimately prove unsatisfactory for one reason or another, and (3) marital contractualism constitutes a more defensible and attractive alternative to a preformed, state-defined institution of civil marriage in political theorizing.
CHAPTER TWO
The Conceptual and Normative Framework

In this chapter, I provide some analytical and normative background for the rest of the dissertation, including an overview of the major concepts, distinctions, and presumptions that function as the conceptual and normative geography for a discussion of civil marriage. Section A overviews the conceptual terrain, laying out and describing several major analytical concepts and distinctions which can serve as useful tools for thinking about civil marriage. Section B overviews the normative terrain, establishing the burden of proof for the debate and making an initial prima facie case against the state establishment of civil marriage.

A. Mapping the Conceptual Geography

It will be helpful to begin by clarifying several of the central concepts and distinctions which should frame our approach to questions regarding civil marriage, including (1) the distinction between the concept and various conceptions of marriage, (2) the distinction between natural or social marriage and civil marriage, (3) a working conception of “traditional” marriage, and (4) the concept of exclusive (state) establishment, recognition, and/or promotion of a form of civil marriage. I will proceed with the most general of these, gradually working to narrow the discussion in a way that brings the precise nature of the debate into sharper focus.

1. The Concept of Marriage vs. A Conception of Marriage

A central distinction that figures prominently in political philosophy in general, and which certainly promises to be useful in our more particular goal of analyzing and
evaluating the normative foundations of civil marriage, is that obtaining between *concepts* and *conceptions*. This distinction is frequently traced back to Gallie’s discussion of “essentially contested concepts” and to Rawls’ elaboration of related issues in *A Theory of Justice*.\(^8\) The basic idea here is that the "concept" of X refers to the general (and relatively uncontroversial) structure and shape of X, while various “conceptions” of X are more particular, filled out, and controversial elaborations of the concept. In other words, “concepts” of X will be formal representations of X, while “conceptions” of X will be substantive interpretations or accounts operating within that formal framework.

To illustrate very briefly the way in which the distinction typically functions in political-theoretical analyses, consider the oft-discussed example of political liberty. Here we might follow MacCallum in identifying a single concept of liberty – namely, that liberty consists in the triadic relation that \(x\) is (or is not) free from \(y\) to do or become (or not do or become) \(z\).\(^9\) This *concept*, containing the essential elements of agents, constraints, and ends, can then be fleshed out by bringing substantive content to the three elements of its formal structure. So, for instance, we might distinguish between formal and effective *conceptions* of liberty by highlighting a substantive difference in their respective interpretations of what counts as a relevant constraint in the triadic relation. The *formal* conception views an agent as free (politically) whenever no one else is interfering with his (self-regarding or non-harmful other-regarding) actions. It takes liberty primarily to consist in the absence of legal or political obstacles that might impede an agent’s pursuit of various ends. The *effective* conception, on the other hand, recognizes the possibility that other types of obstacles (e.g., poverty, disabilities, etc.)

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\(^8\) Cf. Gallie (1956) and Rawls (1971).

\(^9\) Cf. MacCallum (1967).
arguably can be viewed as legitimate constraints on an agent’s pursuit of ends. It thus extends the scope of what counts as a relevant constraint to liberty and interprets that portion of the triadic relation much more broadly than does the formal conception. The important point of the example, though, is this: these two conceptions, while clearly distinct, are unified in their *formal structure* – namely, in that they both identify liberty with the concept of an agent being free from relevant constraints to do or become something. The differences between the two conceptions, then, are substantive matters; they arise out of competing accounts of how best to interpret the formal elements given by the shared concept of liberty.

With this example in mind, the question can be raised whether marriage might be analyzed usefully with the concept/conception distinction. Consider first whether or not there is a relatively uncontroversial concept of marriage. As with the example of the concept of liberty, we might seek to do this by establishing the essential elements that any relationship would need to have in order to be classified as a marriage.

We might first identify what is surely the most basic property of marriage, namely *unitive relationality*. Marriage, on even the most minimally reasonable analysis, is relational and necessarily involves at least two parts being combined in certain ways. Unitive relationality is what Fodor and LePore describe as an “anatomic property” – a quality that is necessarily shared and which cannot be individually possessed as with atomic properties. For all intents and purposes, then, a ‘one-person marriage’ is equivalent to a ‘square circle.’ Someone who claims the property of being married

\[\text{Cf. Fodor \\& LePore (1992).}\]
applies to him without also applying to at least one partner is either joking or in possession of an altogether different concept than marriage.  

Secondly, marriage seems equally clearly to involve formal relationality. The idea here is that marriage, unlike friendship, necessarily involves some explicit recognition on the part of those being brought together. While friends need never explicitly agree that they are friends, nor formally establish even minimal expectations regarding their relationship, marriage seems to require that both of these occur. To become married, then, persons must have the capacity to understand the basic features of the relationship and, in some clear way, to formally agree to them. (Many political liberals might want to thicken this second property even further by developing formal relationality into some more normatively robust condition of consent. I will leave this question to the side for now, as I take such a move to be appropriate to substantive moral debates between conceptions of marriage.)

Beyond these two conditions, however, matters become much more contentious. Though it is not terribly informative, we could, without much worry, postulate a further

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11 It is worth noting that the idea of someone marrying him or her self, while conceptually problematic, has served a variety of artistic ends. For example, in one of Rousseau’s seven plays, Narcisse, ou l’amant de lui-même (Narcissus, or the self-admirer), the protagonist, Valère, views a painting of himself dressed as a woman, falls deeply in love, and forms the intention of marrying himself. Of course, here the violation of ordinary conceptual boundaries is precisely the point – the absurdity of someone marrying himself serves to playfully amplify Rousseau’s exploration of human vanity, love, and fellow-feeling.

12 It might be wondered here whether and how this condition might be met by certain common law marriages where the partners have never explicitly agreed to the terms of civil marriage, but where the state recognizes and treats their union as such. There are a number of potential responses to this possible counter-example. First of all, it might simply be the case that the state’s policy of common law marriage is (possibly with good normative reasons) contrary to the best conceptual account of marriage. Secondly, it might be the case that the partners have tacitly given their formal agreement by continuing to live together in a way that they knew would lead to the state’s recognition of their union as a common law marriage. Finally, the example might recommend a modest revision to the proposed understanding of formal relationality. Here I have in mind the idea that it perhaps need not be the partners who explicitly agree to view themselves as married, but rather that there just be some authorized agent or agency who does so. Of course, we do not want to go so far as to say that any such recognition is sufficient to make the union a marriage. I cannot just make it the case that a set of persons is married by recognizing them as such. But since formal relationality is only a necessary condition, this modest revision should not be liable to this worry.
general and disjunctive property of marriage that reflects the expression that it involves "the open-ended sharing of a life"—namely, that marriage requires the establishment of at least one or more relational expectation(s). These expectations might include the sharing of romantic love, sexual expression and intimacy, economic interests, child rearing responsibilities, a mutual living space, or a common surname. The terms agreed to by the parties might include life-long, monogamous, heterosexual fidelity or the acceptance of certain religious beliefs about the nature of the union. However, none of these expectations or terms (or similar relevant others) is an uncontroversial necessary condition for a given formalized unitive relationship to count as a genuine marriage.\(^\text{13}\)

For any given candidate property, then, one can imagine examples of relationships lacking it, but manifesting others that intuitively seem sufficient for characterizing the partners’ relationship as marital in character. For instance, to take a rather recent candidate property in the history of marriage, one can easily imagine a marriage persisting without the sharing of romantic love. The same can be said of other potential candidates. The point, of course, is that the further we augment the two core properties stated above, the more and more controversial the terrain – and, since the concept of marriage, like the concept of liberty, is supposed to consist of only relatively uncontroversial properties, we ought to resist the temptation to single out any particular relational expectation for inclusion into the concept itself. With these limitations in

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\(^\text{13}\) Some might insist that a marital relationship must involve the creation of at least some non-economic expectation or otherwise the cluster of properties thus far pieced together would be insufficient for distinguishing marriage from purely commercial relationships, as the latter necessarily involve at least some economic expectation. This will not help things much though. For granting that it is true will still not give us any reason to insist on the presence of any particular non-economic property, while denying it entails that our shared concept of marriage is so thin as to be insufficient for distinguishing the relationship between married partners from that obtaining between commercial partners (which would make it implausible to claim that the concept normatively determines some unique and suitably thick conception of civil marriage).
mind, I am arguing that the concept of marriage can only be articulated as fully as this: *marriage involves a formally-recognized, multipurpose relationship between at least two agents that establishes one or more relational expectations*. [To go beyond this is to enter the terrain of competing conceptions of marriage. I will consider any additional conditions (e.g., heterosexuality, monogamy, etc.) with which some persons might want to further augment our concept of marriage, then, only insofar as they figure into substantive conceptions of marriage.]

It is important to realize here that, even if we agreed that there is a shared concept of marriage in many Western societies, this concept, *in and of itself*, is simply too thin and open-ended to fill the role that a political conception of the institution would serve in terms of being a useful, determinative guide to social policy. This is because the concept of marriage, no less than the concept of liberty, is simply insufficiently robust to do much normative work. The concept simply functions as a minimal establishment of conceptual parameters – it is what allows us to know for sure that we are at least starting with something in common and to rule out any seriously deviant candidates from the start. Very importantly, however, such treatment by the concept of deviant candidate conceptions is *always* conducted on conceptual grounds and *never* by citing the candidate’s normative defects. Thus, for example, the concept of marriage would allow us to rule out from consideration bestial marriage (i.e., marriage between human and non-human animals) or adult-child marriage (i.e., marriage where at least one of the purported spouses is, on the basis of some plausible account, not yet an adult) because non-human animals and children are, to the best of our knowledge, incapable of understanding and/or explicitly agreeing to the relevant relational expectations framing marriage. This
conclusion is grounded in purely conceptual premises and need not rely on any premises regarding the (im)moral quality of such “relationships.”

As I see it, then, the really interesting political philosophical question regarding marriage does not concern the conceptual foundations of the institution, but rather the normative foundations. Or, to put it more specifically, what really ought to interest political philosophers is not whether X form of marriage is most conceptually adequate, but rather whether X or any other form is sufficiently normatively adequate to serve as the legitimate and exclusive object of state interest for regulation and promotion. And knowing the first does not conclusively settle the second, just as knowing that having a Pope-like religious leader is essential to true worship does not conclusively settle whether Catholicism ought to be imbued with special legal status as the state’s civil religion or whether its practitioners ought to be extended special benefits. Simply put, to really make headway in arriving at a defensible account of civil marriage, we simply must engage in the kind of substantive moral argument that only is appropriate when evaluating competing conceptions of marriage that might serve as the basis for a civil form of the institution.

Hence, my task in this project – namely, analyzing and evaluating the normative foundations of civil marriage – will necessarily and almost exclusively involve analyzing and evaluating the leading candidate conceptions of marriage – those conceptions that work within the strict parameters set out by the concept, filling in the particular and more controversial characteristics of marriage in a way that takes the concept out of the world of the abstract and into the real world of empirically observable phenomena.
2. Marriage as a Natural, Social, and/or Civil Institution

Generally speaking, the question at hand is primarily about whether states have sufficient reasons to establish, recognize, and/or promote a civil form of marriage. However, the most obvious strategy for answering this question in the affirmative is to appeal to the special value of some given form of natural or social marriage. An argument for civil marriage will, thus, very likely have the following general form:

(1) Premises identifying some normatively momentous properties of a particular natural or social form of marriage X.

(2) A bridging premise that affirms legitimate state interest in establishing, recognizing, and/or promoting institutions characterized by the properties identified in (1).

(3) A conclusion that the state is justified in exclusively establishing, recognizing, and/or promoting X as the state’s civil form of marriage.

Since much of what I will say in this chapter, and in the dissertation as a whole, will depend on keeping the three varieties of marriage properly separated, let me here offer provisional definitions.

Natural Marriage refers to patterns of domestic partnership that might be thought to exist or have existed independently of their being recognized within a larger societal or legal framework (i.e., as an explicitly defined and/or recognized social or legal unit).

Examples of something like natural marriage can be taken from early theories in anthropology, as well as from more recent strands of evolutionary psychology. Coontz describes the first, as found in the work of Ernest Crawley, as the view that “marriage is simply an extension or elaboration of the biological functions of mating” and the second, as defended by Martin Daly and Margo Wilson, as holding that “the essence of marriage in both animals and humans is the individual relationship between a male and a female, who join together to mate, produce children, and divide tasks.” Cf. Coontz (2005, p. 320, fn. 2). Interestingly, then, accounts of natural marriage seem committed to defining marriage according to behavioral dispositions that non-human animals might possess and that can obtain in a social vacuum. Of course, many persons will view this account as fundamentally incoherent, concluding instead that marriage is an essentially human and necessarily social institution that only exists within certain interpersonal networks. Cf. Wedgwood (1999, p. 229). Indeed, such accounts might be questioned on the grounds that they do not even satisfy one of the core properties of our shared thin concept of marriage – namely, the requirement that marriage involves an explicit recognition between partners of certain basic elements of the formal structure of their relationship. However, I do not think that settling this matter is necessary for my account, for my statement of natural marriage should not be interpreted as a commitment to the legitimacy of calling such relationships “marriages,” but rather as an attempt to exhaust the conceptual space. Nothing I will say,
Social Marriage refers to patterns of domestic partnership that are recognized (perhaps through informal social norms) within particular communities of individuals as constituting a valuable mode of shared living, but which are not recognized, licensed, and/or regulated by some larger political body such as a modern state.

Civil Marriage refers to patterns of domestic partnership that are formally recognized, licensed, and/or regulated by some larger political body, but which do not necessarily cleanly overlap with any particular pattern of natural or social marriage.15

All three varieties are distinct, but potentially overlapping. To speak of “traditional marriage” as a social institution, then, is to suggest that lifelong, multipurpose, monogamous, and heterosexual associations constitute a distinct historical pattern of relationality that is socially, though perhaps not legally, recognized and which might or might not represent a naturally existing form of marriage.16 And likewise with natural marriage, which asserts that such associations form a natural kind that might or might not be recognized within larger social or legal networks.17 Again, the primary reason for introducing the distinction is to clarify the argument form underlying defenses of civil marriage – namely, that their conclusions about civil marriage are putatively supported by premises about the value of natural or social forms of the institution.

then, turns on one accepting the coherence of “natural marriage.” However, for those who do accept its coherence, the concept will function in exactly the same way as social marriage in this general argument – namely, as a primary element in the major premise of an argument for a certain form of civil marriage.15 These categories are primarily conceptual tools for analyzing and evaluating the normative foundations of civil marriage. However, it should be noted that, historically speaking, natural and/or social varieties of marriage significantly predate civil marriage, which is a quite recent invention in Western political life. For example, as the historian Stephanie Coontz notes, it was not until 1754 that the English state began licensing (and, hence, very carefully defining legally) marriage. Cf. Coontz (2006). Prior to that point, the dominant tradition in most of Western Europe was inherited from Roman law, where the “only difference between marriage and unmarried cohabitation was if the partners thought of themselves as married.”16 For a brief defense of traditional marriage as a naturally-existing social institution deserving of exclusive civil recognition, see Morse (2005).

17 Empirically speaking, then, “traditional marriage” (or any competing conception) will figure into one of the following eight categories: any of the varieties taken by itself (NM, SM, CM), any of four permutations (NSM, NCM, SCM, NSCM), or not at all (~NM & ~SM & ~CM). Normatively speaking, defenders of any particular conception of civil marriage are effectively limited to four options (CM, NCM, SCM, NSCM), of which the final three are the most likely to be put forward.
3. A Working Conception of Traditional Marriage

Having specified a number of general properties of the concept of marriage, we are now better placed to develop the conception of "traditional" marriage a bit more. This conception is obviously preeminent in any serious discussion of civil marriage, forming as it does the dominant choice of state-sanctioned relationality among Western industrialized nation-states. In fact, three chapters of this dissertation will be devoted to a critical examination of various kinds of defense that might be put forward in defense of a traditional form of civil marriage.

Here we can begin with a working conception of "traditional" marriage—namely, that it is a singular, thick, and exclusive conception of marriage with at least four fundamental properties: (1) lifelong, (2) multipurpose association (3) between two, and only two, persons – (4) one male and one female. Despite the fact that these properties might seem self-explanatory, it will be helpful to spell out exactly what is meant by each.

To say that traditional marriage is lifelong in character immediately reveals a subtle ambiguity in the conception, for this claim might be taken to signify one of two things: either relationships of this sort are (1) lifelong in aspiration, or they are (2) lifelong in achievement. The first of these options emphasizes the intentional property of mutually desiring that a marriage last until "death do you part", while the second

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18 This distinction, though subtle, does raise an important consideration when further questions of value are asked, such as, "From what does the value of lifelong unions derive – the aspiration to commit for life, the achievement of actually doing so, or some combination of both?" How one answers this question will have important ramifications in a number of contexts and, in particular, in the context of determining the extent of legitimate state interest in this relational property. For the purposes of debate and avoiding distractions from my central line of argument, and despite some worries about where this distinction leaves the traditionalist, I will simply assume that such an account can be located. It should also be noted that, given its emphasis, the second behavioral property might be instantiated by relationships of the sort often termed "common-law marriages," where, upon meeting certain criteria, the state treats two persons as legally married despite their never having formalized such an agreement in ceremonial vows or contract.
option stresses the *behavioral* property of actually having succeeded in maintaining a marriage until death, in fact, separates the spouses involved.

To say, next, that traditional marriages are *multipurpose associations* is to underscore the intuition (held even by most strict traditionalists) that marriages can take many different forms, at least with respect to the variety of ends that might (but, in many cases, need not) be sought cooperatively within the partnership. As noted above, a traditional list of possible, and frequently sought, ends includes romantic love, sexual expression, economic interests, child rearing, a mutual living space, and a common surname. The standard expectation is that marriages will seek some combination of these or related ends, but would not necessarily be disqualified as “marriages” if they failed to satisfy one (or even several) of these ends.\(^1\)

To say, further, that traditional marriages are *between two, and only two, persons* is, of course, to stress the dyadic and monogamous character of the institution. Marriage, on this conception, cannot obtain with a single isolated person (as captured by the core concept of marriage) or among three or more persons. Simply put, marriage, in and of itself, necessitates (either conceptually or normatively) a strictly two-party arrangement—no more and no less.

Finally, to say that traditional marriages are *between one male and one female* is to identify marital relationality with heterosexual composition. As with the previous property, this heterosexuality condition probably seems straightforward: marriage can

\(^1\) Historically, of course, several of the ends on this rough list were thought *necessary* to a genuine marriage. For instance, consummation through penile-vaginal intercourse was frequently thought to be an essential validating condition, at least for legal marriage. One might argue as well that certain economic conditions had to be in place, at least in systems where wives (along with any antecedent property they might possess) literally were transferred into the possession of a husband upon marriage.
neither obtain between two males nor between two females. It is limited to partnerships between two spouses of opposite sex.²⁰

4. State Establishment, Recognition, and/or Promotion of Civil Marriage

The cluster of conceptual and normative elements surrounding the “state establishment, recognition, and/or promotion” of various institutions lies at the heart of any analysis and evaluation of political institutional morality. This general fact is no less true of civil marriage. In order properly to understand whether states in fact have good reasons for establishing, recognizing, and/or promoting an institution of civil marriage, then, we first need to grasp what these several actions entail and the variety of forms they might assume.

a. State Establishment of Marriage

The establishment of a form of civil marriage involves a basic act of institutional creation. Its essence lies in moving from a condition where no civil institution exists at all to a condition where one does. Institutional establishment, then, can be usefully contrasted with institutional reform, where a freestanding, antecedent establishment is altered in any of a variety of ways.

b. State Recognition of Marriage

The recognition of a form of civil marriage involves a similarly basic act, though one more oriented by a perception, acceptance, and appreciation of the prior validity or reality of the form of relationality it picks out. Its essence lies, then, in the favorable

²⁰ Of course, the seeming straightforwardness of this property could be complicated by introducing questions about how sex or gender distinctions are to be established or by considering the issue of transgendered individuals. These questions are certainly worth pursuing, and indeed would even seem to pose additional problems for defenses of traditional marriage, but I cannot pursue them further here.
acknowledgment it attaches to what was previously a purely natural and/or social institution. Institutional recognition can be sharpened by two distinctions: first, its distinction from institutional establishment (with which it will often, but not necessarily, overlap\textsuperscript{21}), and, second, from institutional omission (where some state-independent form of relationality is simply overlooked and not explicitly accounted for within formal political and legal structures). A concrete example of institutional recognition would be the U.S. Supreme Court’s ruling in the 1967 case of Loving vs. Virginia that declared race-based restrictions on legal marriage to be unconstitutional. In this example, there already was a civil form of marriage established in all U.S. states; what Loving did was require the additional state recognition of an antecedently existing, but excluded, form of natural or social marriage.

c. State Promotion of Marriage

The promotion of a form of civil marriage involves a second-order political action that, like institutional reform, requires the presence of an already existing civil establishment. Its essence lies in a general effort to further the progress, growth, and widespread acceptance and adoption of its form of marriage as a way of life in society. Strictly speaking, the opposite of institutional promotion is institutional idleness, where a state simply recognizes an institution without encouraging its further growth and development. Of course, another useful contrast would be with institutional discouragement, where a state actively attempts to resist or undermine alternatives to the preferred franchise.

\textsuperscript{21} That is, most actual acts of (state) institutional establishment will not be ex nihilo in conception, but rather based on the recognition and initial enfranchisement of an antecedently existing social institution agreed to be valid, worthy, etc. However, this need not be the case conceptually. We can imagine a state deciding to establish a form of marriage that could not be recognized in the usual sense, because it has never existed in practice (e.g., a form of marriage limited to two or more persons over ten feet tall).
The institutional promotion of civil marriage can assume a variety of forms.\textsuperscript{22} A rough taxonomy of the conceptual space which these forms occupy and fill divides along two branches—(1) de jure promotion and (2) de facto promotion—and then into a variety of particular modes growing out of each branch. In the case of de jure promotion, each of the various modes involves the state \textit{intentionally attempting} to shape the choices of its citizens and incline them toward its form of civil marriage.\textsuperscript{23} On the other hand, de facto promotion involves the state \textit{actually}, but perhaps \textit{unintentionally}, shaping choices of this sort. In what follows, I will describe five modes of de jure promotion. While de facto promotion would likely need to be addressed in a comprehensive treatment, it would take us too far away from our central topic here\textsuperscript{24}—namely, a consideration of whether states have sufficient reasons \textit{intentionally} and \textit{formally} to establish, recognize, and/or promote a form of civil marriage.

The first mode of de jure promotion involves the manipulation of choices via the \textit{use of force and coercion}. The most obvious example of this would be if persons were conscripted involuntarily (to some degree) into living in a marital relationship of the state’s liking, though one could readily imagine other ways this mode might be operationalized. Employing this channel for influencing choices is obviously quite severe and not seriously defended as a justified method for promoting \textit{entrance} into an

\textsuperscript{22} For a useful overview of the rich variety of particular forms of marriage promotion, see the document, ‘State Policies to Promote Marriage’, a 2002 report prepared for the U.S. Department of Health and Human Services. It is available at: http://aspe.hhs.gov/hsp/marriage02f.

\textsuperscript{23} This portion of the taxonomy follows, in large part, George Sher’s model for distinguishing the methods of promoting the good that might be thought to be ruled out by a principle of liberal neutrality. Cf. Sher (1997, pp. 34-37).

\textsuperscript{24} This is because de facto promotion could arguably be associated with paradigm legitimate state activities (e.g., having a military might thereby have the unintended effect of increasing the number of marriages in a society). Obviously, it would be a highly difficult, if not impossible, task to even identify all such possible sources of de facto promotion of civil marriage, let alone to go further and include them in the fuller analysis and evaluation I am conducting here.
institution of civil marriage (though one could more easily imagine the defense of force or coercion in preventing persons from exiting the institution). I note it here, then, not so much for its political relevance, but simply for the sake of exhausting the conceptual space.

The second mode of de jure promotion, and one which is perhaps most politically relevant, is the shaping of choices via the use of incentives. Examples of this mode abound, from the fairly mundane (e.g., structuring the tax code to benefit those who choose to civilly marry) to the extremely salient (e.g., providing special rights to immigrate, to visit one’s spouse in medical settings, and to offer proxy consent for them). Employing this avenue of choice manipulation might strike many as rather innocuous (at least for those who stand to benefit from these special incentives), as simply offering better reasons (presumably extending to all persons) for doing something than would otherwise exist. This tendency, coupled with a belief that such actions, if well-designed, are likely to be the most effective means for securing the desired outcome, helps to explain why this second mode of choice manipulation is frequently endorsed.

A third mode would involve attempts to appeal to the rational determinants of choice (e.g., beliefs, inferences, etc.), but without the offering of additional incentives. Instead, the appeal is made to the benefits of marriage which ostensibly exist in the nature

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25 Hence, it is important to note that one way of promoting marriage (at least in the sense of having more people living under the terms of a valid marriage license) involves the structuring of divorce laws and procedures. By making it more difficult to exit a civil marriage, the state thereby promotes choices to remain in unions that might otherwise be dissolved. Whether this way of promoting marriage is coercive or incentivizing is somewhat unclear and probably depends on the particular character of the laws adopted.

26 As Sher notes, there is a tendency among some to conflate these first two modes of choice manipulation (based on the belief that the state’s monopoly on force is what makes possible its ability to incentivize a certain form of living, in the first place). However, such conceptual conflation risks obscuring the crucial differences between the two, such as the distinctive “ways they produce the desired results” and the “psychological effects of the two methods.” Cf. Sher (1997, p. 35).

of the enterprise itself and not because the state has attached these to that enterprise. Examples of this mode might include things like educational programs, promotional literature, or public service announcements which attempt to offer rational arguments why persons should consider entering the state’s preferred form of marriage (perhaps by publicizing statistics regarding the superior well-being of individuals participating therein or by drawing out various relevant inferences from factual premises). While this might offend those whose favored conception of marriage is being marginalized, it is likely to be viewed, on the whole, as similarly innocuous — as providing information that might otherwise not make its way into the lives of average persons and in a way that is explicit and public.

On the other hand, and unlike the first three modes of choice manipulation, which appeal directly in one way or another to the rationality of persons broadly understood (e.g., through appeals to their self-interest via threats, “bribes,” or arguments), the fourth mode of promotion involves the manipulation of the non-rational determinants of the preferences underlying choices. Sher describes this mode in the following way:

Whether someone engages in an activity depends not only on its expected effects, but also on whether he likes or approves of the activity and its effects. This means that we can also influence people’s behavior by altering what they like and approve of. Notoriously, what someone likes and approves of is often determined less by his exposure to reasoned argument than by the attitudes and actions of those whom he admires and wishes to imitate. It also often depends on the (positive and negative) reinforcement that the person has received.28

Examples of this channel of preference manipulation are more difficult to locate or specify, as they will often arise most powerfully within informal networks and associations. However, they might be taken to include state proclamations recognizing items like “the importance of marriage as a public good” (North Carolina, Utah) or

28 Sher (1997, p. 36).
“marriage’s special status as the foundation for healthy families” (Louisiana), the creation of promotional campaigns like National Marriage Day and Marriage Awareness Week (Louisiana, Utah), various initiatives in public education (e.g., home economics courses, student organizations such as Future Homemakers of America, abstinence until marriage campaigns), ubiquitous references to marriage and the family by political and other leaders (and, even more basically, the general insistence that publicly visible positions be filled by persons who are married in the first place), and attempts to encourage positive media coverage of the virtues and values of the state’s preferred form of family life. One interesting species of non-rational manipulation, and one with some historical precedent, involves the withdrawal of general legal protections for those participating in alternatives to the civil institution. This appears to have been common during the public controversies over anti-miscegenation laws in the U.S., where police protection for crimes targeting interracial couples was notoriously deficient, thereby having (one might argue) the indirect effect of discouraging such unions. It is unclear whether such historical practices could be traced back to some central agency and thus indicative of de jure promotion of homoracial partnerships, but this is certainly a conceptual possibility (that could be extended to other disenfranchised forms of marriage, including same-sex and polygamous unions).

At any rate, what all of the examples listed above share in common, then, is a concern to work somewhat indirectly to make persons more receptive to and expectant for life within the state’s preferred form of marriage, rather than to work through the more immediate channels of threats, legal and economic incentives, or arguments. Attempts to engage this mode might make persons more apprehensive than would the use
of explicit incentives, if for no other reason than persons tend (understandably) to be suspicious of organized (or even disorganized) government attempts to "subconsciously" configure the psychological make-up of persons. Nonetheless, one frequently hears calls for fostering a "marriage culture," which, in addition to its implications for the first three forms of de jure institutional promotion, seems especially suggestive of this fourth mode of choice manipulation.

The fifth and final mode of de jure institutional promotion involves the simple provision of options which otherwise might not exist and regardless of any additional benefits attached to them. This mode dovetails with, and constitutes a further potential property of, what I have called institutional establishment. What is being invoked here, then, is the potential for an institution not only to be brought into being, but also for doing so to immediately invite and facilitate participants as such. For example, simply instituting a form of civil marriage might promote the popularity of that form of relationality, not only because it tends to attach benefits that could be severed from it and granted on a different basis, but also because of the more fundamental fact that, by its very nature alone, it immediately grants access to a common system of social meaning.

The arguments I will be analyzing and evaluating will apply to all five modes of (state) institutional promotion. However, the degree of effectiveness obtained by these applications will perhaps be uneven, if not significantly disparate. For example, it almost certainly will be easier to convince readers that coercive modes of promoting a form of civil marriage are indefensible than to make a similar showing against incentivizing modes. That said, the ultimate desiderata of the dissertation involves locating reasons

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29 Allusions to Orwell and Huxley are almost certain to arise here for many people.
which are, in the end, sufficient for thinking that all de jure forms of promoting a civil form of marriage are indefensible.

5. Putting All of the Conceptual Elements Together

Putting all of these elements together, the fundamental issue at stake concerns whether there are good reasons for the state to establish, recognize, and/or promote a particular conception of the natural or social institution of marriage as its exclusive form of civil (or legal) marriage. Or, to put the matter in question form, do the proposed valuable properties of marriage in any of its natural or social varieties warrant special status by the state?

By way of preview, I will answer this question in the negative, arguing that no conception of marriage, traditional or non-traditional, ought to be legally established, recognized, and/or promoted by states. Each of the leading contenders to serve as the state's civil form of marriage is plagued by general and (so I shall argue) very costly problems, in addition to a host of unique worries attaching to its particular constitution. Instead, states should limit their involvement with natural or social varieties of marriage to enforcing more general laws (e.g., laws regarding property, torts, crimes, etc.) and particular relational contracts that are individually designed within a defensible system of contract law. In other words, I shall advance the thesis that states have good reasons not to use civil marriage for a variety of ambitious social ends and work instead through more general policies and institutions to achieve their legitimate purposes and aims. Doing so, I shall argue, represents a normative advance to the historical status quo and one that better serves the values of equality, liberty, pluralism, and efficiency. My
argument again will be normative in character and based on substantive moral analysis and evaluation.

B. Mapping the *Normative Geography*

The rest of this chapter will attempt to map the normative geography in which an investigation of the moral foundations of civil marriage can proceed. Here I will establish what I take the burden of proof to be in such an investigation and offer a prima facie case in favor of a position I call marital contractualism.

1. The Burden of Proof

There are two very different perspectives from which one might understand and evaluate the relationship between the state and the institution of civil marriage. The first sees its point of entry in political argument as actually pre-institutional, as coming prior to the establishment of a civil institution of marriage. The second takes the point of entry to be the present circumstances of Western civilization, as coming after and, hence, as having already inherited a civil form of marriage. These two perspectives, it might be added, issue in two distinct burdens of proof. From the first perspective, that of establishing a state or institution de novo, I will argue in the following section that the burden of proof lies with the person advocating an exit from what I will call an institutional state of nature. There I will lay out what I take to be a strong prima facie case against the de novo establishment of an institution of civil marriage. The strength of that prima facie case will, in large part, establish the strength of the burden that needs to be satisfied by the proponent of the state establishment of civil marriage.
However, from the second perspective, that of investigating and critiquing the defensibility of an already inherited institution, one might be inclined to see the burden of proof placed more squarely on the advocate of reform or abolition. That is, given the general costliness of such actions, the likely frustration of expectations formed and sustained under the previous order, and the risks to social stability involved in making large-scale institutional changes, one might think that the proponent of change is required to do more than simply one-up the defender of the status quo; rather, the reformer or abolitionist must gain a decisive argumentative advantage and also show why this clearly underwrites a moral prescription for the state breaking from its present institutional trajectory. This second burden, then, can be understood as requiring the critic of civil marriage to calibrate the quality and significance of reasons for reform or abolition to the expected higher costs of doing either. So if it seems justified to believe that transitioning away from the existing institutional structure of civil marriage would threaten social stability to such and such a degree, then the burden faced in arguing for such a transition will correspond to that degree.

I raise this matter here at the beginning because it is likely that some readers might understand the project differently — some as a de novo rejection of civil marriage and others as a case for disestablishing the current regimes of civil marriage existing in the world — and hence might evaluate its merits and successes quite differently. I want to make clear from the start that I am primarily attempting to analyze and evaluate the normative foundations of civil marriage from a de novo perspective. Though I will occasionally draw on examples that are taken from current forms of civil marriage as a way of adding some richness and concreteness into the discussion, I will not per se have
anything direct to say about the case for disestablishing existing institutions. At most, some of my arguments would have an indirect bearing on such a case (e.g., against arguments proposing to retain civil marriage in light of its historical pedigree, my evaluation in Chapter Three might have some indirect usefulness for those advocating disestablishment).

2. Starting from an Institutional State of Nature

Nozick has rightly noted that, “the fundamental question [in political philosophy]..., one that precedes questions about how the state should be organized, is whether there should be any state at all”.\(^{31}\) The same question must be asked not just of the state itself, but also of any of its institutions, whether it is property, punishment, education, or, as I will argue, marriage. Prior to asking how the state should organize civil marriage, we must ask whether and on what grounds the state ought to have such an institution at all.

In this section, I want to take inspiration from Nozick (and perhaps John Lennon) and “Imagine there’s no Marriage”, or more specifically, “no Civil Marriage”. What might life be like in a marital state of nature? Would such a state be preferable to or more defensible than one with civil marriage (of whatever form)? Or should we, moved by the spirit of Hobbes, conclude that life with any form of civil marriage is preferable to life with none (though perhaps not going so far as to draw a connection between “marriage” and a form of life that is “solitary, poor, nasty, brutish, and short”)?

It will be useful to begin, then, by setting out some of the more salient features of life under marital contractualism (henceforth MC). For present purposes, I want to draw special attention to the following three characteristics:

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\(^{31}\) Nozick (1975, p. 4).
a. No State-defined, Comprehensive Legal Status of Marriage

The most obvious place where MC differs from civil marriage is in its thoroughgoing rejection of a preformed, state-defined legal status of marriage. Historically, there have been many kinds of legal status defined and recognized by law – just a few of the more unsavory examples include titles of nobility, the classifications of “subnormal mentality” including “moron”, “low moron”, and “idiot” and the status of “wife” under coverture law (where women were not only denied access to property of their own, but in important respects were actually themselves the property of their husbands). What being legally “married” shares in common with these examples, and also with other more respectable categories like “parenthood”, is that it forms a comprehensive social identity that can have a wide set of important ramifications for one’s life; it does not “relate directly either to episodes or transactions...[as do] ‘agent,’ ‘mortgagee,’ [and] ‘harasser’.” However, unlike many other non-episodic personal statuses such as parent or guardian, marriage does not directly relate to a relationship of dependency. It is in this way a unique kind of status and just the kind of comprehensive state-defined marital identity that MC rejects.

b. Enforcement of General Laws

Under a regime of MC, laws governing torts, crimes, and property would be applied consistently to persons across the board and take no account of “marriage” per se (though

32 Civil marriage tends to have a complex identity, at once combining elements of preformed legal status with elements of contract law. On one hand, a preformed state-defined legal status of marriage is a conceptual prerequisite for any system of civil marriage. If the state is to recognize and support some form of union to the exclusion of others, it first must define in law the precise set of conditions that demarcate the preferred from the excluded relational-types. On the other hand, elements of contract law are not so much a conceptual, as much as a practical, necessity for civil marriage. For any state allowing even a small amount of freedom for persons to decide whether and with whom one can enter and exit a marriage, it would seem that something like a contractual understanding of the relationship will arise. Not surprisingly, the uneasy relationship between these two constitutive elements often is neither stable nor fully coherent.

33 Cf. Bernstein (2003, p. 133, fn. 8).

34 Bernstein (2003, p. 132).
perhaps elements of relational contracts could be overriding under a given regime). So for example the particular kinds of cover that abusive husbands historically have received from the fact that the abused happened to be their wives would have no place under such a regime. For the contractualist, abuse is abuse and it should not be redefined based on marital status or the lack thereof. And the same would hold for the requirements of other general laws and legal categories. I want to emphasize in particular that MC does not itself say anything about the nature or status of “parenthood” as a legal category; on my own account, I presume it still to exist and to define and regulate the status, rights, and responsibilities of parents and their children.\footnote{Moreover, as I also argue, this category is a much more appropriate means through which the state might work to secure the interests of children than is marriage, as it is more direct, efficient, etc. and likely to cover a substantial number of additional children (e.g., the millions of children living in homes without married parents or guardians).}

c. Enforcement of Particular Relational Contracts

MC presumes that many will still want the state to be a third-party enforcer to at least some aspects of their relationships. So long as the agreed-upon terms are consistent with a defensible system of contract law, the state is taken to have a legitimate role in enforcing these agreements.\footnote{It is worth responding here to a question that I am sure is lurking in the minds of some – namely, what makes for a defensible system of contract law (as well as a defensible system of tort law, property law, etc.)? Unfortunately, I cannot fully respond to that question in this project and for two main reasons that I hope will be well appreciated. First of all, and not to be discounted, is a simple matter of practicality – an adequate answer would involve writing a second dissertation on the normative foundations of contract law. Secondly, though, I actually want to be neutral with respect to larger theories of justice. I want the project to have direct relevance for those defending any number of such theories. In my considered judgment, the best way to think about marriage is to structure the legal system, including contract law, according to principles of justice (whatever one takes these to be) and then understand marriage as an ordinary contract that takes place within this system. So, both as a matter of practicality and as a matter of principle, I will leave larger questions about justice and political morality in brackets.}

Moreover, persons living under a regime of MC are understood to have the same \textit{freedom of contract} with marital partners as they would have with any other kind of contractual partners (i.e., the freedom to arrive at whatever
terms are mutually agreed upon so long as they are consistent with the wider system of contract law under consideration). Similarly, persons would have the same *freedom to contract* as they would have in other kinds of contracts (i.e., the freedom whether or not to contract at all and also with anyone from whom one can secure agreement). Hence, the state could not legitimately create a de facto kind of civil marriage by placing additional restrictions on contracts that apply *solely* to marriage-like relationships; any restrictions on contracts must be motivated by more general concerns that in principle would apply to a much wider range of cases.

3. The Prima Facie Case for Marital Contractualism

Having described a few of the more salient features of MC, I now want to construct a multi-faceted, prima facie case in favor of the position.

a. The Default-Justification of Marital Contractualism

The case for MC is strongest where two familiar and relatively uncontroversial presumptions are granted:

(1) Liberty is a default norm and any departure from that norm requires justification.

(2) Contracting is a benign activity when conducted within a defensible system of contract law.

In what follows, I will say a bit more about each of these presumptions and make a brief case for why each should be granted.

The first presumption is quite familiar in political philosophy. It holds simply that what requires defending is state regulation, control, and institutionalization, not their absence. Consider, for example, a representative expression of this presumption.
[M]ost writers on our subject have endorsed a kind of “presumption in favor of liberty” requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens and leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.  

Feinberg’s specific claim is directed toward matters arising in the criminal law, but need not be so duly restricted. In fact, the logic of the position seems to extend beyond just coercive state action to all state action, forming an initial presumption against the state regulating and organizing individual lives in any way (even if this presumption can often be outweighed in the case of certain institutions). And, of course, this is essentially what Nozick comes to in urging us to take anarchy seriously as a starting point for political philosophy (a point which, again, can and ought to be applied independently to particular social and political institutions and not just the overall state itself).

In the case of civil marriage, there are two possible targets against which this presumption might do work: (1) the legal category of marriage, and (2) the institutional administrative superstructure that supports and promotes this category. In the first case, the default position of law is one without special legal categories; the burden is on someone proposing that the law recognize and treat differently a certain category to give sufficient reasons why this ought to be the case. There are, after all, infinitely many categories of actions or relations that the law could create or recognize; it is entirely unreasonable to think that the burden is initially on those who would oppose some candidate category, rather than on those who would support its legal recognition. In the second case, any state use of limited social resources requires justification; the institutional superstructure of civil marriage is no exception. Hence, the presumption is

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37 Feinberg (1984, p. 9).
against the establishment of a political institution like civil marriage; it is on it, so to speak, to provide sufficient reasons for its existence.

I want to take a moment to try to head off an objection that I am sure is lurking here for many – namely, the objection that I am resting my presumptive case on a liberal or libertarian premise that will be unacceptable to many other theoretical perspectives. In response to this kind of objection, I want to clarify that the presumption in favor of liberty need not be understood as a substantive and positive statement about the “value” of liberty; rather, it can be treated as a “thin” methodological consequence of political theorizing. What I have in mind here is that for any given state, animated by whatever principles of justice one may conceive, it will still need to be shown that a particular institution or category will adequately and sufficiently serve its interests. Again, there are literally an infinite number of possible institutions and categories that a given society might endorse and promote; the reasonable procedure to follow is not to assume the prima facie validity of each example and then assign the burden of proof to the critics, but instead to start from a condition of institutional anarchy and look for or construct those institutions and categories which are necessary or sufficient for promoting whatever social and political values are held by that society. Thus, nothing in my presumptive case turns on one’s acceptance of distinctively liberal or libertarian premises; marital contractualism is the default-justified position, whatever “thick” theories of the good and the right one holds.

The second presumption that I will draw upon in defending MC holds that contracting is an essentially innocuous (if not beneficial) activity when it is conducted within a defensible system of legal and social institutions. According to this
presumption, none of the general formal properties (i.e., properties of any conceivable contractual act) of contractual acts can plausibly be understood as wrong-making properties. Thus, since there is nothing intrinsically wrong with two persons negotiating, exchanging and relying upon promises, etc., the act of contracting itself is never morally problematic (or at least not in a way that is of interest to the state). This means that any purported moral defects attaching to a contract (e.g., unconscionability, duress, exploitative or unfair terms, etc.) are not the fault of contracting itself, but are attributable instead to larger problems with particular legal and social institutions (e.g., bad contract law, bad social policies which produce conditions under which persons agree to exploitative or unfair terms, etc.).

Putting these two presumptions together, it follows that MC is default-justified; it is the justified starting point for inquiry into the proper relationship between the state and the institution of marriage. Unlike any form of civil marriage, which necessarily involves the creation of a special legal category of marriage, MC requires no further arguments in its defense in order to satisfy the first presumption regarding liberty as a default norm. And since, per the second presumption, there is nothing morally problematic about contractual acts themselves, it follows that there is no other general normative consideration which might mitigate the prima facie justified status of MC. Thus, it is not

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38 It is worth emphasizing just how central this distinction between system and act is to the case for MC, for it makes possible two of the view's cardinal virtues: (1) its moral innocence and (2) its open-ended compatibility with any number of theories of justice. Without the first virtue, the contractual act itself might be constituted by a wrong-making or bad-making property that would then be inherited by MC. Without the second virtue, the view would be far less useful as a tool for political philosophy. Separating system from act enables us to link MC (and its focus on the contractual act) with almost any given system of contract law (defined and animated by whatever normative principles), thus freeing theorists from the task of constructing any number of narrow and idiosyncratic accounts of civil marriage—liberal civil marriage, feminist civil marriage, etc. Instead, they can focus their attention on developing the contours of a broader and more far-reaching institution of contract law that in turn will structure the particular character of marital contracts as they play out within that system.
just one alternative position that might be taken on the question of state-marriage interaction, but rather the legitimate default against which any case for civil marriage must respond convincingly.

b. Beyond Default Justification, Part I: The Virtues of Marital Contractualism

Having articulated the presumptive default justification for MC, I now want to identify and tout some of its primary virtues, thus enriching the prima facie case in its favor.

i. Efficiency in Social Policy

Civil marriage is, at best, an indirect means of accomplishing many of the social goals frequently put forward to justify its promotion by the state. The circuitous connection between the institution and these goals can be questioned at a number of levels - they can be questioned in terms of their empirical credibility, normative adequacy, policy efficacy, etc. MC, by contrast, does not use an institution like marriage as a tool of social policy, as it does not by itself have any particular social policy to recommend; it is, as I shall elaborate upon momentarily, compatible with numerous approaches to social policy. What MC does instead is encourage the state to look for more direct, efficient, and effective means for accomplishing whatever goals it may have. After settling on any given desideratum, the state would then need to consider the most efficient and direct course of policy for achieving it. For example, in considering how it might secure the legitimate interests of children, the state would be encouraged to work directly through the categories of parenthood or guardianship to provide education, support, material resources of various kinds, etc. Since every child will be assigned parents or guardians
but not every child's parents/guardians will be married, this more direct approach to social policy should be more effective in achieving the desired goal.

\textit{ii. Treats citizens as equals}

Civil marriage, whatever its form, can be understood as a social program which awards special status and social support to some via imposing social and financial costs on others (i.e., those who do not seek out or qualify for this status). Hence, it constitutes a form of unequal treatment of citizens. This does not straightforwardly entail that civil marriage is unjustified; the military, for example, might be thought of as a social program with the same broad kinds of unequal effects, but its benefits arguably outweigh these burdens. Nonetheless, it does mean that a defender of civil marriage will face the task of providing sufficient justification that overcomes the broader presumption against unequal treatment by the state. MC faces no such justificatory burden, since it treats all citizens as equals. Under its regime, all have an equal right to initiate and individually design contracts that are consistent with a defensible system of contract law.\textsuperscript{39}

\textit{iii. Respects Diversity and Individual Freedom}

MC maximizes the extent to which persons are free to pursue their individual and relational projects and aims without pre-established legal regulations and expectations.

\textit{iv. Increases Likelihood of Informed Consent}

One of the more peculiar features of civil marriage in its present forms, according to Susan Okin, is that “the parties to it are not required to be familiar with the terms of the

\textsuperscript{39} It might be added that MC, unlike many forms of civil marriage, does not face the even weightier charge of treating persons unequally in paradigmatically wrong-making fashion – namely, by privileging the already privileged. I will discuss and defend this claim further in part C of this section.
relationship into which they are entering – or of its dissolution”. 40 Anita Bernstein follows Okin on this point, noting of preformed legal statuses in general that “legal consequences follow to status-bearers without consent; only a rare person who acquires a comprehensive status understands what it means before the label is bestowed”. 41 And the aptly named legal scholar Barbara Stark puts the matter in its starkest terms, noting that civil marriage involves plunging “blindly into legal relationships” that the parties “know little or nothing about”. 42

For example, many persons would be unlikely to know in advance that one can be bound by whatever responsibilities are assigned to legal marriage should one move to a new jurisdiction. This fact can have important ramifications for numerous terms of the marriage contract, including (but not limited to) such important terms as property and child custody arrangements (e.g., moving to a state that treats the property of spouses as “community” property from one that does not, or to a state that decidedly favors the mother in child custody considerations from a state that favors joint custody as the norm, etc.). What happens, then, is that one’s status of being legally married becomes the dominant consideration, not the particular terms under which one contracted. As such, civil marriage, and its comprehensive social identity status, makes obtaining genuine consent more difficult and less likely. 43

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41 Bernstein (2003, p. 133).
43 While the salience of this might vary from case to case, it clearly can have profound implications for many persons and, in some cases, seriously troubling results. For example, Claudia Card highlights the case of Betty Mahmoody who “found after arriving in Iran that she had no legal right to leave without her husband’s consent, which he then denied her, leaving as her only option for returning to the United States to escape illegally (which she did)”. Cf. Card (1996, p. 12). Here the facilitating element is clearly the status component of civil marriage, which allows for substantive differences in contractual terms to be brushed over in favor of a comprehensive social identity.
MC, by contrast, encourages substantive familiarity with the contractual terms under which one is agreeing to be bound, if for no other reason than the fact that one would be designing (though not necessarily creating de novo) the broad contours of those terms. This increases significantly the likelihood that the marital contract will be a “fully articulated act of will”.

v. Compatibility with Any Number of Larger Theories of Justice

MC is a highly flexible theoretical position that can potentially pair with any number of larger theories of justice. One could be a conservative, libertarian, liberal, feminist, utilitarian, etc. and still think that MC is an appropriate (or at least “acceptable”) way for society to be involved with the personal relational choices of its citizens and the best way of achieving social aims. Indeed, MC has received exactly this kind of multidirectional endorsement in the literature, where one, for example, finds the position endorsed by libertarians\(^{45}\), liberals\(^{46}\), and feminists\(^{47}\) among others. Accounts of civil marriage, on the other hand, will be much more limited in their application (with many thicker conceptions limited to a single kind of theory of justice).

c. Beyond Default Justification, Part II: The Costs of Civil Marriage

If what I have argued thus far is correct, then not only is a marital state of nature default-justified, but it is a condition with many independent virtues and advantages. However, I want to go further in bolstering and enriching the prima facie case in its favor by noting

\(^{44}\) Okin (1989, p. 123).
how any alternative to it (i.e., any form of civil marriage) will incur a variety of social and moral costs.

Many people might be surprised initially to learn that civil marriage has costs, since, for whatever reason, the institution often is only talked about in terms of its benefits. This inaccurate portrayal of civil marriage has led many to assume (incorrectly) that its benefits are Pareto optimal in character (i.e., they make some better off without making at least one other worse off). However, there actually are many explicit and implicit costs attaching to the institution (all of which are arguably Pareto non-optimal when considered against a baseline of equality). Here it will be useful to separate these into two broader kinds of detriment to the state and its citizens—direct and indirect. In what follows, I will say a bit more about each kind of detriment and also cite some of the more prominent examples of each.

Direct detriments are the clearest and most uncontroversial kind of cost incurred via the recognition and promotion of an institution of civil marriage. As legal scholar Anita Bernstein notes of these detriments in the U.S. situation, “the federal government alone – not to mention the dozens of state governments that follow similar policies – spends or declines to collect billions of dollars each year because of its recognition of

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48 This separation takes inspiration from Bernstein, who has analyzed the detriments of civil marriage into three kinds (2003, pp. 167-191):

(1) **Primary Detriments** – detrimental effects that are caused directly by the law’s recognition and special treatment of the category of marriage.

(2) **Secondary Detriments** – detrimental effects that, while not caused directly by the law, are facilitated by its partial regulatory involvement.

(3) **Tertiary Detriments** – detrimental effects encouraged by marriage-related norms, customs, or other extralegal forces.

I ultimately have decided to try to simplify this taxonomy by focusing on direct detriments (which on Bernstein’s account are primary in character) and indirect detriments (which include both Bernstein’s secondary and tertiary detriments).
marriage". For the sake of convenience, we can lump most of these detriments into two larger categories: (1) *administrative and promotional costs* (i.e., the sum total of resources directly expended in maintaining, promoting, and subsidizing the institution\(^5^0\)), and (2) *forgone income* that must be recovered by alternative means (e.g., lost tax revenue). These costs, of course, will depend on a number of factors. However, a plausible conclusion that can be drawn here is that the more effective civil marriage is in realizing various individual and social goals, the more social resources it will exhaust. And, of course, it is not merely the lost, expended, or foregone resources themselves that is important, but also what other social goods these resources could have been directed toward securing but were not.

It is worth emphasizing here that direct detriments are not solely incurred by the state; rather, its citizens (or some subset of them) also incur detriments as a result of civil marriage. Consider, for example, a society that adopts a policy of forgoing tax revenue in order to promote and reward marriage (as many actual societies do). Assuming the society’s expenses remain constant, and cannot be paid for by taxing married persons (by hypothesis), then non-married persons will be forced to pay at a rate higher than they would have if there were no marriage benefit. Thus, civil marriage policies like this constitute a kind of subsidy or redistributive transfer that moves resources from the non-married to the married, making the married better off at the expense of the non-married.

This direct detriment to a subset of citizens is even more problematic where this subset is

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\(^{4^9}\) Bernstein (2003, p. 141).

\(^{5^0}\) It would be very difficult to calculate the exact size of these administrative and promotional costs, which include (among other things) all the time, money, and labor invested in drafting, printing, processing, storing, accessing, interpreting, and enforcing marriage licenses/contracts and in efforts to promote the institution (cf. 'State Policies to Promote Marriage', a 2002 report prepared for the U.S. Department of Health and Human Services that is available at: http://aspe.hhs.gov/hsp/marriage02f). By contrast, MC has no promotional costs and any administrative costs associated with it more properly can be described as costs of a larger beneficial institution of contracting (and thus as requiring no special justification).
more likely to be poor and disadvantaged already. As Bernstein notes, this actually is the case in the U.S. where the allotment of “public funds to individuals on the basis of marriage tend[s] to subsidize the well-off at the expense of the less prosperous”.  

Moving on, indirect detriments also can flow from the state’s institutionalization of marriage. These detriments, while not caused directly by the law, are facilitated either by its partial regulatory involvement or encouraged by marriage-related “norms, customs, or other extralegal forces”. Though these detriments are slightly more removed from the institution, they often can be more salient in their effects on persons’ lives, effecting as they do access to fundamental goods and services and social status. For example, some familiar indirect detriments of civil marriage in the U.S. include its effects on access to employment, health insurance, and other benefits. Where non-married persons either cannot access these goods, or can do so only at higher costs than would exist in the absence of civil marriage, then again they bear the cost of benefiting those who are civilly married.

However, it is arguable that some of the less familiar or less publicized detriments are potentially the most worrisome, including as they do the costs to society and individuals of marriage-related norms and customs. Here we move from financial subsidies to what Bernstein refers to as “ideological subsidies”, by which she means the transfers of social currency in ways that work to the detriment of both the married and unmarried. For the unmarried, these detriments include the stigmatizing and devaluing of alternative ways of life, including living singly, cohabitating, and other forms of non-recognized partnering, which result from awarding higher social status and support to

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51 Bernstein (2003, p. 169).
married individuals. This can be especially worrisome where rates of civil marriage differ markedly along lines of race, ethnicity, and class such that historically privileged groups tend to benefit substantially (and largely at the cost of the poor and historically less privileged races and ethnicities). For the married, conferring legal status exclusively to some subset of families encourages and supports even the problematic aspects of these relationships. Potential detriments include the decreased welfare of those adults and children locked into households constituted by bitter, abusive, neglectful, or otherwise bad marriages. Civil marriage also may protect a private sphere where wrongdoers “get away with what the state would elsewhere remedy, punish, and deter” and reinforce, for example, the various ways that the traditional family structure tends to work to the disadvantage of women including the gender gap in gains from marriage and concealment of the work of caregiving.

Some will undoubtedly argue that the indirect detriments are only contingently related to civil marriage; particular versions of civil marriage could minimize or do without them. While this is, strictly speaking, true for any given detriment, it misses a larger point. Insofar as a regime of civil marriage is likely to do well in securing the goods it is enlisted to secure, it will be because the benefits of binding one’s self legally to another are sufficiently substantial in their financial and/or social benefits. And, as we have seen, there are no “free” marriage benefits to be had here. All benefits, whatever their nature, come at a cost that must be borne by someone or some group; the greater the benefit, the higher the costs. Thus, while a given form of civil marriage might outperform existing models in terms of minimizing or eliminating certain detriments, it will be impossible for them to work in the right ways (i.e., to secure and promote the
goods they are enlisted to serve) without incurring significant detriments in other ways. One way to sum this up is to point out that civil marriage will either have substantial costs (as a consequence of actually successfully encouraging a certain way of life) or insubstantial benefits (as a result of not costing enough). Hence, the costs of civil marriage further strengthen the prima facie case for its primary alternative in MC by offering additional reasons in favor of a marital state of nature.

4. Looking Ahead: Reasons to Hitch Marriage to the State?

In considering whether or not there are good reasons for establishing a form of civil marriage, one can usefully take cues from classic discussions of whether or not there are good reasons for exiting a state of nature generally. So, for instance, one might follow Locke in thinking that life in a marital state of nature would be mostly peaceful but also that the inconveniences of such a condition warrant an exit from it. Here one might locate something of great value (for Locke, property; for the defender of civil marriage, a certain kind of relationship), the security and prosperity of which is too uncertain to leave in a state of nature, and charge the state with a limited and well-defined role of protecting and promoting it. Or, for another example, one might take a decidedly Hobbesian line on the matter, viewing a marital state of nature as thoroughly and profoundly defective (normatively or practically) and concluding that any form of civil marriage would be preferable to life in such a condition.

As I see it, one can find inspiration in the traditional Lockean and Hobbesian accounts for three separate kinds of reasons that might be advanced in favor of establishing a form of civil marriage: (1) the value of marriage justifies special state interest, (2) MC (or life in a marital state of nature) is morally problematic, or (3) MC is
impracticable. I will examine these kinds of reasons in turn, looking extensively at the first kind of reason in Chapters III, IV, and V and at the second and third kinds of reasons in Chapter VI. Against each kind of reason, I will argue that, upon closer examination, they either do not get off the ground or do not ultimately outweigh the prima facie case in favor of MC.
CHAPTER THREE

Intrinsic Value Defenses of Traditional Civil Marriage: The Historical Approach

Certain abstract concepts and ideas are sometimes best approached through the lens of certain concrete persons and objects – for example, “tragedy” through the lens of Oedipus Rex. For the concept of “traditional marriage,” two particularly useful figures suggest themselves – (1) Tevye the Milkman, the memorable protagonist in the Broadway musical, Fiddler on the Roof, and (2) Thomas Aquinas, the quintessential medieval thinker whose elaborate philosophical system still structures the world view of millions. These two figures represent two very different ways of approaching the concept of traditional marriage – the first appealing to historical precedent and the second appealing to ahistorical principle. What both approaches share in common is a belief that the “traditional” form of marital relationality is intrinsically valuable (i.e., valuable in and of itself and apart from anything else that it might do for individuals or societies).

Those who have seen Fiddler will recall that Tevye is the father of five daughters living in a small Jewish town in Tsarist Russia at the turn of the 20th century. The plot turns around his efforts to retain his cultural traditions while adjusting to the demands brought on by increasing modernization. Things come to a head several times in the narrative, coinciding with the non-traditional decisions by Tevye’s three eldest daughters to arrange their own marriages. In each case, Tevye appeals to the value of “traditional marriage”, which at the time included arrangement of the union by parents. As Tevye sees things, this way of living has value not simply for what it does, but even more
profoundly for what it is, in and of itself — the way of the past, handed down across
generations, alive in the present.

Unfortunately, Tevye did not give much thought to the philosophical foundations
of his plea for traditional marriage — he was, after all, just a milkman. He simply
expressed, viscerally, his deepest convictions about the proper order of the world — or at
least his world. The precise opposite is true in the case of Thomas Aquinas. His
meticulous attention to detail and concern for foundations is perhaps unrivaled in the
history of philosophy. Moreover, he aspired to the model of philosophical detachment
from his subject matter, writing in the dispassionate, non-visceral fashion of a natural
scientist. Like Tevye, Thomas also takes the traditional mode of marital relationality to
have value not simply for what it does, but for what it is; though, as he sees it, this value
stems not from its historical pedigree, but instead from its philosophical caliber —
namely, from the fact that traditional marriage conforms to that which is "reasonable for
man." However, his defense of traditional marriage has its own problems, most notably
its reliance on outdated Aristotelian metaphysics and a rather harsh and invasive view of
the state's role in upholding the natural law.

Those initial problems noted, I think it is appropriate to take the differing
approaches of Tevye and Thomas seriously as starting points when considering the
intrinsic value of traditional marriage and to see whether satisfactory intellectual support
can be brought to either or both of these views. In this chapter and the next, I will
consider some prominent accounts which, in the spirit of Tevye and Thomas, attempt to
develop their differing accounts of traditionalism into respectable moral and political
positions. More specifically, I shall be ultimately concerned with whether such accounts
can offer sufficient reasons for thinking that political communities ought to award special legal status to traditional marriage. I claim that they do not, as problems obtain on a variety of levels and these problems recommend a fundamental rethinking of the normative foundations of the institution of civil marriage. Most generally, the defenses of traditional civil marriage fail (1) in their baseline ethical defenses of traditional natural or social marriage and, (2) in their attempts to employ these defenses as both relevant and decisive in their political/legal defenses of traditional civil marriage.

A. Two Ways of Defending Traditional Civil Marriage

Defenses of traditional civil marriage can be usefully partitioned into two general categories: (1) those which hold that traditional social marriage has sufficient intrinsic value so as to justify exclusive state establishment, recognition, and/or promotion and (2) those which hold that traditional social marriage has sufficient instrumental value so as to justify the same treatment by the state. Of course, one can consistently argue that traditional social marriage has both intrinsic and instrumental value. The point of drawing a division, then, is for the sake of cleaner analysis and more precise evaluation, rather than to suggest that these defenses are mutually exclusive or even in tension with one another.

As important as the differences between the two categories are, the commonalities are equally significant. Here I have in mind the conceptual presuppositions shared by both types of defense. These presuppositions include:

(1) A belief that there is some clearly definable class of marital partnerships that is “traditional” in just the right way.

(2) A belief that some normatively momentous property uniquely supervenes on this “traditional” class of partnerships.
A belief that this normatively momentous property warrants special attention from the state, such that traditional marriage ought to function as the civil or legal form of marriage.

Clearly, all three presuppositions recommend careful scrutiny. The burden I am assuming here ultimately requires me to offer good reasons for rejecting the third proposition. To do this, however, I will offer reasons for also rejecting the first and second presuppositions, in addition to making independent arguments against the third.

While I cannot examine every particular defense of traditional civil marriage within both fundamental categories, I will, in what follows, offer an analysis of the general lay of the land, including an initial statement of what seem to be the most prominent representatives on offer, before turning in the rest of this chapter and also in Chapter Four to a fuller critical treatment of intrinsic value defenses and in Chapter Five to a fuller critical treatment of instrumental value defenses.

1. Instrumental Value Defenses of Traditional Civil Marriage

In order to bring into sharper focus the precise nature of intrinsic value defenses of traditional civil marriage, I want to very briefly contrast these with the type of arguments that I will consider in Chapter Five – namely, instrumental value defenses of traditional civil marriage. Appeals of this instrumental sort pick out various ways in which the institution serves as a unique or especially effective vehicle for accomplishing certain important ends (for either or both individuals and the larger society in which they reside). In other words, the institution of traditional marriage is claimed, by these defenses, to have value as a means to some intrinsically valuable end (e.g., happiness, social stability,
etc.); its contribution to human well-being stems not from what it is, but rather from what it does.

2. **Intrinsic Value Defenses of Traditional Civil Marriage**

Consider, in contrast, intrinsic value defenses of traditional civil marriage. Defenses of this type seek to locate some source of *intrinsic* value in traditional social marriage and then offer this as a reason justifying exclusive state establishment, recognition, and/or promotion. Unlike instrumental value defenses, then, the crucial claim here is that traditional social marriage is good *in and of itself* and apart from any benefits it may have for individual persons or larger societies.

What properties of traditional marriage might be put forward as reasons for thinking that this form of unitive relationality is good in and of itself? Here it might be helpful to draw a further general distinction – namely, between:

1. **Historical** defenses of traditional marriage which locate intrinsic value in the wider contours of *tradition itself* (i.e., in the historical pedigree of actually inherited beliefs and practices).

2. **Ahistorical** defenses of traditional marriage that locate intrinsic value in some *inherent, tradition-independent property* of the monogamous, lifelong union of two heterosexual spouses (i.e., in the philosophical caliber of idealized beliefs and practices).

This distinction can be represented more clearly through counterfactual analysis. Looked at from this perspective, the structure of the first type entails that, had some other form of marriage (e.g., polygamy) occupied a central place in tradition, then that form of marriage would thereby be intrinsically valuable. It just so turns out, according to this type of defense, that the form of marriage which has been historically traditional is exclusively dyadic, heterosexual, and lifelong.
The structure of the second type of defense is fundamentally different. Since it locates intrinsic value in a historically-independent property of lifelong, heterosexual unions, the form of marriage that this type identifies as valuable is invariant. If some other form of marriage had been historically central, then defenses of this type would still be committed to the unique value of lifelong monogamous heterosexual dyads. Unlike the first, defenses of the second type would, under such counterfactual description, no longer be apologies for traditional marriage, but for non-traditional marriage.

B. Historical Intrinsic Value Defenses of Traditional Civil Marriage

The rest of this chapter will consider and evaluate the first type of intrinsic value argument for traditional civil marriage (henceforth TCM) – namely, that type which locates intrinsic value in the historical pedigree of tradition itself, rather than in the philosophical caliber of some inherent, ahistorical property (e.g., conformity with natural law) of the monogamous, lifelong union of two heterosexual spouses. My evaluation of this strand of argument will focus primarily on two questions:

1. What forms might an historical argument take?

2. Do any of these versions of the argument justify the exclusive state establishment and promotion of TCM?

To the first question, I will propose four potential answers, ordered increasingly in terms of sophistication and normative strength. To the second, I will argue that each answer, while of some merit, provides insufficient support for the exclusive status of TCM.

1. The Bald Appeal to Tradition and Its Discontents

The simplest answer to the first question takes the form of a bald appeal to tradition as a non-negotiable presupposition of cultural life. This response commends “the way things
have long been done" without explaining how or why this is intrinsically valuable. Such
an appeal is not without historical precedent, even in philosophical circles. Indeed, it
might be considered as little more than one species of an objective list theory of the good,
which simply declares something to be good without explaining why this is the case.\textsuperscript{53}

Moreover, the bald appeal is not entirely without charm. After all, what viewer of
\textit{Fiddler on the Roof} does not sympathize in some way with Tevye's lamentations that
something of value is eroding away in the transition from the society in which he came of
age to the society in which his children are doing the same? Regardless of how much
moral progress might be thought to be embodied in that transition, it is difficult to claim
without any reservation that it is \textit{all} for the best. Furthermore, we certainly have to start
with some set of foundational social premises that cannot themselves be justified via
appeal to even more fundamental premises. Why, it might be asked, cannot traditions, or
at least ones that seem really important, serve this cardinal function?

There is, of course, no logical or nomological reason why traditions cannot serve
as fundamental non-negotiable social presuppositions. However unsatisfying it would be
to accept that claim without explanation, there is nothing in the laws of logic or science
preventing a society from doing so. That said, even starting from the assumption that
\textit{something} has to fill the role of social axiom, Tevye's bald appeal is ill-suited to make
tradition the leading candidate. To see why, it will be helpful to consider three layers of
discontent facing this simple entreaty (besides the obvious deficiency that it does nothing
to \textit{explain} why tradition is in fact valuable). Each layer, in turn, constitutes a
recommendation for more sophisticated historical defenses.

\textsuperscript{53} Interestingly, Derek Parfit's initial attempt at providing (though not endorsing) an objective list includes
the relevant intrinsic good of "having children and being a good parent". Cf. Parfit (1984, p. 499). For a
more detailed analysis and defense of the goods proposed on Parfit's list, see Sher (1997, Ch. 9).
a. Discontent #1 – The Problem of Tradition Specification

The first layer, what I call the problem of tradition specification, is the most fundamental of the three and ultimately threatens all defenses of TCM. This problem takes the form of a necessary condition for any serviceable defense of tradition – namely, that it must precisely demarcate those features of a tradition which are essential from those which are merely contingent.

The motivation for insisting on the satisfaction of this condition is simple – without it, we lack the exactness needed to track the value of a given tradition, apart from its accidental accretions, down through history. Consider, for example, that had we been setting out the essential features of “traditional” marriage only fifty years ago, we might well have listed the property of being of the same race. Today, however, almost no one would include homoraciality. And yet it matters crucially which time-indexed judgment is correct, not the least because we are likely to issue very different conclusions regarding the value of traditional marriage depending on whether or not it entails this property.

Hopefully, then, the rationale for treating tradition specification as a necessary condition is clear. But why, one might wonder, does this constitute a problem for the historical traditionalist, rather than an invitation simply to develop his account more fully? To appreciate the reason why, it will be helpful to disentangle two ways of interpreting the essential properties of traditional marriage:

1. An empirical reading that treats as essential, from the perspective of some distinct moment in history, certain actual properties of the institution. Such an empirical reading might have either a forward-looking or backward-looking orientation (e.g., forward-looking from the perspective of some Edenic moment of marital “inception” that is then held constant, or backward-looking from a historically present point of view).
(2) A normative reading that treats as essential only those properties surviving certain moral theoretical analyses.

With this distinction in hand, it can now be demonstrated why tradition specification turns out to be a multi-faceted problem for traditionalists, and also why neither interpretation is well-suited to serve the historical approach to intrinsic value.

The normative reading is, to put things bluntly, simply unavailable to a genuinely historical defense. Any properties it identifies as essential to TCM fall out of ahistorical analysis, rather than historical survey. Hence, the methodological commitments held by the two approaches make them thoroughly discontinuous with one another.

The empirical reading, on the other hand, runs the risk of including a host of historically salient properties that, from a normative perspective, are frankly embarrassing (e.g., wives literally becoming the property of husbands, male access to child brides, the non-recognition of marital rape, the acceptance of males physically "punishing" their wives, the restriction on interracial marriage, etc.). This facet of the problem is only exacerbated by the fact that, from a purely historical point of view, we effectively are in the same epistemic position with respect to tradition specification as our forebears with whom we radically disagree. We simply lack a principled and historically-grounded reason for believing that certain properties included in our present analysis, even those in which we have the utmost confidence, will not ultimately end up in the dustbin of marital history, alongside homoraciality, indissolubility, and the like.

Needless to say, it is vital to keep the empirical and normative readings separate, both for conceptual clarity and because historical defenses will tend (illegitimately) to retreat to ahistorical ground when confronted with objections to the empirical reading.
b. Discontent #2 – The Problem of Historical Fit

The second layer of discontent, what I call the problem of historical fit, would obtain even if a given tradition could be adequately specified. This problem also takes the form of a necessary condition for any adequate historical defense – namely, that the properties it identifies as essential to TCM must actually be instantiated in the right way in the history of the institution. This condition, in turn, requires the specification of criteria that clearly and sufficiently establish the historical pedigree of a given property (e.g., the duration of time and extent of places in which it has been historically salient).

The motivation for insisting on the satisfaction of this condition is also quite simple – the very form of a historical argument necessitates it. For this kind of argument proposes to defend the value of a traditional institution by appealing to its historical pedigree – without that pedigree clearly established, the argument does not get off the ground. The problem this presents for the historical traditionalist is that there is often a poor fit, working in two directions, between the essential properties being defended and the plethora of actual properties that are historically salient.

In the one direction, the properties taken to compose the essential core of the institution are ones that might not be instantiated in history or at least not in the right way. So consider, for instance, a historical traditionalist wishing to include, as essential to the institution, the property of choosing spouses freely and primarily on the basis of love. Given the relatively short period that marriages have been based on such ideals, as opposed to the pursuit of improved social and economic status, one might well question whether marriage for love has the appropriate pedigree or not. The same question also
might apply to any traditionalist aspirations to include as essential to TCM the properties of gender equality/neutrality and the prohibition of no-fault divorce.  

In the other direction, the fit is likely worse for historical traditionalists. Contrary to the sanitized and monolithic picture of traditional marriage painted by many contemporary traditionalists, there are numerous historically salient features of the institution that even the most zealous conservateur would not want included within the set of essential properties. For instance, polygamy, concubinage, temporary marriage, and prostitution were, during various substantial periods of history and across numerous political bodies, widely accepted as outlets for (married) male sexual desire. Similarly, “nobler” efforts of finding romantic love were often (approvingly) pursued outside of marriage. Many other historically salient features offensive to modern sensibilities could also be added to this list (e.g., child brides, arranged marriages, anti-miscegenation, etc.).

These two directions of fit can be juxtaposed and neatly distilled into a pattern of “exclude A/include B” scenarios. For instance, we can imagine a traditionalist wanting to defend a historical account of traditional marriage which (1) excludes access to no-

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54 It should be noted that no-fault divorce is no novelty of recent U.S. or Western history. Indeed, historians find essentially the same practice in Roman civilization and in the early Western kingdoms of Christendom, just to name two interesting examples. Cf. Coontz (2005, pp. 80-81; 104-105). Thus, the prohibition of no-fault divorce might have poor historical fit because it has now been 40 years or so since it was in place (at least in the U.S.) or because large sections of relevant history failed to include it.

55 As Coontz points out, if precedent alone were our guide, then polygyny (i.e., the species of polygamy where one male has multiple female spouses) would be the definitive choice as a form of marriage, as it “is the marriage form found in more places and at more times than any other.” Cf. Coontz (2005, p. 10). This is not to issue a judgment (either way) at this point regarding the moral quality or acceptability of polygamy, but rather to point out that it would be an open-and-shut case in favor of its status as traditional par excellence if the criterion was (as it might plausibly be taken to be) an appeal to which practice has been most widespread. And, since this would simply be unacceptable from the perspective of most Western traditionalists, it would seem to highlight a fundamental problem facing these types of defense.

56 Coontz illustrates this claim through enlisting the support of classic examples, like Andreas Capellanus’ famous twelfth-century treatise, The Art of Courty Love, but also finds remnants of the view persisting into the eighteenth century and attributable to no less a figure than Montaigne. Cf. Coontz (2005, pp. 16-17).
fault divorce, but which (2) includes access to interracial marriage. In the U.S., at least, the transition from fault-based to no-fault divorce and the full transition away from state laws banning interracial marriage occurred at roughly the same time (late 1960’s and early 1970’s). Thus, from a purely historical perspective, it is unclear how to construct a defense that achieves both of the aforementioned desiderata. Any account proposing that the relatively short period in which no-fault divorce has been socially prominent is insufficient for establishing it as a tradition seems committed to a similar judgment regarding the period in which interracial marriage has been socially acceptable. And, of course, it is easy to locate many other pairings that come to much the same effect.

The problem, then, is that the traditionalist must identify a pedigree test that picks out all and only those historically salient properties that are normatively defensible, but all of the obvious candidates for such a test are too indiscriminate. They either are overly promiscuous, allowing in too many unsavory properties, or they are overly chaste, capturing too few desirable properties. In one way or another, though, the historical traditionalist seeking to move beyond the bald appeal will need to surmount the problem of bringing history and an adequate account of tradition into a stable equilibrium.

c. Discontent #3 – The Was/Ought Problem

Of course, even if the traditionalist managed to offer a clean and compelling specification of tradition, and even if that specification were historically instantiated in just the right ways, he still would not have responded to what is likely to be the preeminent discontent with the historical defense – namely, that layer of problems stemming from the gap between facts and values, between ‘is’ and ‘ought’ (or, more precisely, ‘was’ and
‘ought’). Bracketing various complications that have arisen in the post-Humean debates regarding the fact/value gap, the following is a preliminary statement of the problem:

No fact, in and of itself, translates immediately into any particular value judgment. From the mere fact that something is or was the case, we cannot justifiably conclude that something ought to be the case.

This gap does not diminish the worth of facts or imply that they play no part in a larger normative argument; on the contrary, it is hard to imagine a normative argument without at least one premise taking the form of a factual claim. Rather, the fact/value gap is intended to show that, by itself, a fact cannot guide our actions. It must be supplemented with a defensible normative principle to perform this function. Thus, even granting Tevye his factual claim that X, Y, and Z are “what have always been done,” we should still insist that an adequate normative principle link this fact to a judgment regarding the value of X, Y, and Z. Of course, certain facts are much more relevant, morally speaking, than others and some will need only to be placed alongside the most uncontroversial normative principles in order to prescribe certain actions. Nonetheless, the fact/value gap further complicates the traditionalist’s project, effectively creating two more necessary conditions – namely, that any fact put forward is (1) supported by sufficient evidence for its truth, and (2) adequately connected to a defensible normative principle.

d. Summing Up the Discontents of the Bald Appeal

What the three discontents of the simple historical defense reveal, then, is the need for an account of the intrinsic value of tradition consistent with the spirit of Tevye, but which develops his appeal to tradition in a more intellectually satisfying way. Specifically, such an account needs to satisfy the following necessary conditions:

(1) It must precisely identify the essential properties of a tradition;
(2) Those properties must actually be instantiated in the right way in history;

(3) It must support with sufficient evidence any fact put forward as relevant; and

(4) It adequately must link any facts or properties to a defensible normative principle.

The task of identifying potential historical accounts might seem quite daunting initially. After all, the philosophical literature is not exactly teeming with straightforward examples to draw upon. Fortunately, however, the task is not as difficult as might first appear, as Lee Harris has already navigated the relevant path to the most plausible candidates in a very illuminating, if not widely circulated, article on the future of tradition. In what follows, I will articulate, in order of increasing sophistication, the two most credible defenses of the intrinsic value of tradition identified by Harris, scrutinizing each account carefully before turning to Harris' own proposed advance.

2. The Argument from Accumulated Wisdom

The first candidate, following Edmund Burke, maintains that even our best and brightest will always have an incomplete understanding of our traditional inheritance. This permanent epistemic gap stems from the very nature of traditions as latent with the accumulated wisdom of past ages. As Burke puts it in an important passage of his Reflections, “we are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages”. Since the wisdom of any one person, or even group of persons, looks remarkably narrow when placed alongside the wisdom of the ages, we ought to strongly presume the general superiority of the latter.

57 Burke (1990, p. 138).
Moreover, Burke warns, efforts to tamper with traditional institutions not only represent a kind of hubristic dismissal of a generally superior source of knowledge, but they also can threaten (1) the loss of (perhaps) centuries worth of accumulated wisdom, (2) the collapse of institutions, which, at the very least (and in contradistinction with the abstract models of alternative institutions), have the virtue of being known to work, and (3) the upheaval of the conditions necessary for stable and civilized social interaction. Taken together, these worries clarify the intrinsic value of tradition for the Burkean— it is nothing less than the stable embodiment of a society’s accumulated collective wisdom. In this way, tradition becomes a precondition, not merely a means, for the pursuit of any further value. Might this defense of the value of tradition provide sufficient justification for TCM?

While there is certainly a great deal to take seriously in Burke’s account (which is much more subtle and interesting than any gloss can convey), it cannot provide a general defense of a particular traditional institution like civil marriage. Indeed, in societies without established systems of TCM, as all societies once were and some still are, the Burkean argument would seem to constitute an argument against establishing civil marriage of any kind, as this would involve a fairly radical transition that might threaten the achievements and accumulated wisdom of traditional social marriage. Moreover, even when the argument is put forward in contexts where a system of TCM is historically salient, it raises a host of unavoidable problems. To see this, consider that, in its strongest form, Burke’s argument serves as a general presumption in favor of

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58 See, for example, his classic 1790 Reflections on the Revolution in France (Burke, 1990), as well as his responses to critics in, for example, his 1791 Letter to a Member of the National Assembly (Burke, 1990) and his later, more mature meditations on the French Revolution expressed in his 1795 A Letter to William Elliot and the four Letters on a Regicide Peace written between 1795-97 (Burke, 2005, Part I).
institutions and practices that have stood the test of time. This presumption will be proportional in degree to the duration and scope of favor its object has enjoyed. Presumably, then, the weightiness of the reasons sufficient for reforming or abolishing an institution or practice will need to be adjusted appropriately to the degree of presumption in its favor. The older and more widespread a tradition, then, the greater the presumption for its continuation and the weightier the reason needed to justify disposing of or changing it.

However, understood as such, the argument from accumulated wisdom is vulnerable to at least two objections. The first stems from the implausibly strong character of the Burkean presumption itself, while the second would arise even if the presumption were perfectly acceptable. I will consider each in turn.

The first objection is really just a variant of what I earlier called the problem of historical fit. It follows Nozick in seeing that “a conservative presumption in favor of institutions, traditions, and biases that have existed a long time is extremely implausible on its face, unless it is severely restricted”. This is because lots of morally bad institutions, traditions, and biases have not only survived, but even flourished, throughout much of the history of the world or any particular region, nation-state, etc. As Nozick notes, a very short list of examples at least would include involuntary slavery, the subordination of women in society, racial intolerance, child abuse, incest, and warfare. It would not take too much imagination or investigation to list many other examples. Conversely, any institution that is now widely admired was at some point a novelty – limited government, the rule of law, representative democracy, individual rights, etc.

60 Ibid.
and often the product of sudden and sweeping changes to the traditional order (e.g., the American Revolution and the replacement of monarchy with a republican form of government). Within the context of marriage, plausible relatives to this list might include gender equality or spousal arrangement. In many cases, it simply is not clear that the items on these lists would have yet, or ever, taken hold in the world if the Burkean presumption were followed closely and consistently throughout the ages.

To become more plausible, then, the Burkean presumption needs to be weakened considerably and tested in light of a number of important criteria. Nozick suggests that "how much weight we should give to the fact that something has long endured depends on why it has continued to exist, upon the nature of the selective test it has passed, and upon the criterion embodied in that test".\(^\text{61}\) If, for example, what best explains the persistence of a given tradition is fraud, force, superstition, etc., then it is entirely unclear why we should care that it has enjoyed long or widespread acceptance in history. Weakened and complicated as such, the Burkean presumption turns out to be much less robust and, hence, much less suited to defend a particular institution like TCM.

However, even if this presumption was not liable to the first objection, it would still face a second—namely, that it is, after all, just a presumption, not a blanket ban on change (which would make it even more implausible). It does not condemn all efforts at social reform, but only recommends, to one degree or another, careful attention to the potential consequences of such endeavors. Accepting the presumption requires that due caution be exercised when tinkering with entities as complex and potentially fragile as a political society, but does not translate into a "do not disturb" order for the status quo.

\(^{61}\) Ibid.
It is worth briefly investigating the logical structure underlying this objection. Since societies arise and persist because they are at least minimally well-adapted to the particular circumstances they confront, the only way that a Burkean traditionalist could turn his general presumption into an argument against all change would be to treat as fact the proposition that the future will strongly resemble the past. But, we actually have much stronger reasons to believe that the historical circumstances facing any society will change significantly over time (with changes in technology, modes of social, cultural, or economic production, religious or philosophical attitudes, etc.). Thus, it must regularly be asked if the traditions which served well or adequately in meeting the challenges of past circumstances might simply be inadequate or even detrimental to attempts to meet present or future challenges – a conclusion that was not lost on Burke himself, who noted that "a state without the means of some change is without the means of its conservation". That is, even assuming that inherited institutions have at least been shown to "work," the properly cautious society will still want to analyze the likely factors that led to such achievements, for such analyses very well might recommend reforming the institution in light of very different circumstances in the present or looming in the future.

The Burkean argument from accumulated wisdom, while certainly containing some genuine insights, simply is incapable of defending adequately the state's exclusive privileging of a particular institution like TCM. By appealing to a general presumption in favor of traditional institutions, it either defends too much (falling prey to the problem of historical fit) or too little (establishing only a condition of caution which presumably can be satisfied by careful evaluation).

62 Burke (1990, p. 72).
3. The Argument from Evolutionary Fitness

The second candidate for an historical defense of tradition, associated with Friedrich Hayek, attempts to move beyond the Burkean argument by using evolutionary concepts to more precisely explain the nature and value of traditional institutions.63 For Hayek, traditional institutions result from “natural, spontaneous, and self-ordering processes of adaptation to a greater number of particular facts than any one mind can perceive or even conceive”.64 This characterization, in turn, suggests that such institutions have more to recommend them than a simple, general presumption owing to their age or popularity. Rather, he asserts that we actually can have knowledge, roughly analogous to that of the evolutionary biologist, with respect to answering certain basic questions about the institutional fitness of long-standing traditions. Specifically, “a tradition’s very oldness – its survival through the vicissitudes of centuries and adaptability to so many social and historical “environments – [is] prima facie evidence that it was ‘fit’ to survive, just as a species that has survived a variety of environmental challenges may be said to be ‘fit’ in terms of the evolutionary struggle”.65

As such, Hayek’s account seems to suggest the availability of a genuinely objective standard for judging the suitability of traditions – cultural survival or extinction. As he puts it, traditions have “evolved because the groups who practiced them were more successful and displaced others”.66 In this way, the mechanism of cultural selection might

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63 His primary attempts to apply evolutionary concepts to social change are set out in three works. They are first raised in his (1960) The Constitution of Liberty, prior to being elaborated upon more fully in his (1973) Law, Legislation, and Liberty, Vol. 1: Rules and Orders and (1988) The Fatal Conceit.
64 Hayek (1988, p. 73).
65 Harris (2005, p. 8).
66 Hayek (1973, p. 18).
appear, prima facie, to offer the substantial theoretical advantage of providing a culturally neutral way for distinguishing good traditions from bad.

However, this prima facie judgment cannot survive more rigorous scrutiny. To see this, we first must attend to a subtle, but important, ambiguity facing the Hayekian defense – namely, whether what is selected for is the tradition itself or the population that adopts it. Interpreters might dispute which of the two understandings is Hayek’s, but such an exercise here would be superfluous, as I shall argue that both interpretations of cultural selection are insufficient for mounting a successful defense of TCM.

Consider first the proposal that the selection effect is conducted at the level of the tradition itself. In this case, traditions will function and evolve like Dawkins’ “memes”⁶⁷; as units of cultural information, they will survive only to the extent that they are able to adapt to their environments and replicate themselves in an often competitive marketplace. Evaluated from this perspective, the value of tradition might seem quite uncertain. After all, why, divorced from any connection to human welfare, should we value a tradition just because it has managed to reproduce itself enough to survive? Moreover, what reasons exist for believing that a tradition’s success does not portend the demise of the society or culture that adopts it (since successful memes, like their genetic counterparts, are often detrimental to their hosts)? Happily, we need not determine whether there is a satisfying answer to either question, since it is unlikely that any defender of TCM will want to defend the tradition-level perspective. As they see things, traditional civil marriage is intrinsically valuable for those human beings participating in it. Absent such value, they will find nothing leftover warranting special recognition or promotion from anyone, let alone a state.

On the other hand, the other interpretation – that the selection effect is conducted at the level of the *population* adopting the tradition – does not fare much better. First of all, while a culture’s extinction might well be linked back to its adoption of some detrimental tradition (e.g., mass suicide in conjunction with certain astronomical events), it might just as well be linked to factors that are not obviously cultural in character (e.g., geography, plagues, diseases, natural disasters, etc.). Indeed, some of the most deeply entrenched debates among historians concern precisely this question of how best to isolate the causal factors leading to cultural decline or extinction.\(^{68}\) Needless to say, in cases where the culprit is fairly clearly the adoption of an unsuitable tradition (e.g., mass suicide), we probably would not need to appeal to evolutionary concepts in the first place in order to gain widespread consensus on the value of that tradition.

Secondly, even if these epistemic constraints could be removed or mitigated, the present criterion (i.e., reproduction of a *population*) turns out to be too indiscriminate and, thus, liable to the problem of historical fit. What we need an analysis of tradition to do here is to lend adequate support to the view that the “traditional” form of marriage, and only this form, ought to be legally established and promoted by the state. However, population reproduction is compatible with judging any number of marriage traditions as intrinsically valuable (and, hence, as potentially viable candidates for civil marriage). The worry, in a nutshell, is that insofar as Hayek’s argument is actually an argument for traditional marriage (among other inheritances), it is not an argument for the *exclusive* validity of that form, but is also an argument for polygamy, open marriages, etc. In other words, it plainly will not do the work here that the historical traditionalist needs it to do.

\(^{68}\) One might consider, as a recent example of such controversy, Jared Diamond’s (2005) *Collapse*, and the critical responses to it.
Thirdly, even if this analysis of cultural fitness were more discriminating, all of its conclusions would still be of *apriori* and *backwards-looking* character. These provisional conclusions might represent plausible initial judgments about the fitness of various traditions for negotiating past social and environmental challenges, but cannot, by themselves, take us all the way to all-things-considered convictions about their suitability for solving problems regarding future needs and wants. Instead, they require appropriate supplementation with supportive evidence, as well as the resolution of potentially countervailing data or explanations. In this way, the empiricist evolutionary argument does not suitably resolve the was/ought problem and its twin requirements for adequate factual support and normative principles.

Thus, at best, the Hayekian defense of the intrinsic value of traditions can only get an adequate defense started; it cannot finish the job by itself. At worst, and as seems likely in the particular case of TCM, it will be fairly insignificant in helping us make the judgments we really need to make (e.g., “polygamy, monogamy, both, or neither”).

### 4. The Argument from Cultural Identity

This brings us to the most promising historical defense – Harris’ own account of tradition as “cultural DNA”. I will spend considerably more space reproducing this account, both because it is the most sophisticated historical defense on offer and also since it is unlikely that many readers will be familiar with the rich texture of Harris’ position. It is arguably on a different order of magnitude than the previous defenses in terms of its nuance, insight, and creativity. Indeed, Harris may well have correctly and profoundly described the *psychology* of traditionalism, even if he fails sufficiently to defend its *normativity*. His effort is especially valuable for the present inquiry, as there is no need to speculate on
how its general contours might structure a more specific defense of TCM – Harris actually concludes his defense by explicitly linking it to traditional marriage.

Harris begins by citing two common failures of the previous accounts: (1) “each looks upon a tradition as a set of declarative sentences passing on information that may be evaluated as true or false”, and (2) each judges a tradition to be “rationally justifiable only to the degree that it is the means of conveying such a truth”.69 These arguments fundamentally distort the nature of tradition, which cannot be reduced without remainder to a set of propositions, but instead persists on two basic levels.70 The first is constituted by a society’s “visceral code” or ‘unthinking gut,’ the basic program which wires the participants in a tradition to act automatically and instinctively in certain ways and not in others. The second level is the “ideological superstructure” or ‘thinking mind,’ the “system of myths and statements and arguments that are used by the community to justify obedience” to the content of the visceral code. This distinction, at the very heart of Harris’ defense, suggests further that the evaluation of a tradition cannot be reduced adequately to a single task – rather, such evaluations must consider the value of both the visceral and ideological manifestations of the tradition.

This dualistic understanding of tradition, while illuminating, does raise a serious worry – namely, it makes possible a fundamental conflict between the two levels. At the very least, then, a healthy tradition will need regularly to bring its ‘mind’ and ‘gut’ into a stable equilibrium. More disconcertingly, the potential exists for consequences to arise of the most perverse sort, where the ideological superstructure of a tradition not only fails to protect the visceral code, but also actually facilitates its disintegration. In such moments,

69 Harris (2005, p. 11).
a fundamental threat is posed to the tradition—namely, the loss of its ethical obviousness.\textsuperscript{71} The gravity of such crises, a visceral code in peril, explains the "often violent reaction" of various cultures "against those who were perceived, fairly or unfairly, to be subverting the traditional order through the mere use of words".\textsuperscript{72}

In the post-Enlightenment world, such resistance on the part of cultures facing deep threats to their traditional order is not likely to be looked at approvingly. The culture that refuses to investigate and root out "injustice," in order to safeguard its visceral code, is typically judged to be backwards or reactionary. Yet, Harris asks:

[I]sn't it permissible for a community to wish to guard its own cherished habits of the heart against the same endless skeptical interrogation, especially when the intent of the interrogators is to subvert the visceral code that embodies these habits of the heart? The visceral code is like the DNA of the community. . . We cannot ask whether the visceral code is useful to the community when it is in fact constitutive of the community: It is the foundation on which the community is built. It is a necessary precondition of achieving community at all, and hence it is improper to evaluate it in terms of its mere utility.\textsuperscript{73}

Harris' introduction of the provocative concept of tradition as cultural DNA is, I will submit, what constitutes a serious advance over the previous historical defenses. This metaphor gives us our most perspicuous treatment of tradition as intrinsically valuable. Physical DNA is not merely instrumentally valuable in 'what it does for me,' but rather is, in an important (though admittedly incomplete) sense, 'what is me.' It does not merely serve my identity in various ways, but rather profoundly constitutes that identity. Thus, insofar as I regard myself as valuable, I must also regard it as valuable for its own sake.

Likewise, Harris is claiming, tradition is intrinsically valuable in light of its structurally

\textsuperscript{71} MacIntyre (1988, pp. 7-8) remarks in a similar vein that traditions in good working order will find the "facts" underlying the tradition to be "unarticulated presuppositions which are themselves never the objects of attention and enquiry. Indeed, generally only when traditions either fail or disintegrate or are challenged do their adherents become aware of them as traditions and begin to theorize about them."

\textsuperscript{72} Harris (2005, p. 13).

\textsuperscript{73} Ibid, p. 14.
similar function of constituting cultural identity. As such, tradition represents not merely what a culture does, but, more fundamentally, what a culture is.

Tradition is, for Harris, the "only possible mode for transmitting a community’s habits of the heart, and it does this by providing the recipe for making the kind of human beings who will viscerally feel and respond to the same habits of the heart as the community to which they belong." Treating traditions as "recipes" sets up the transition to the next stage of Harris’ defense – namely, to his description of how properly to understand and evaluate cultural change. As with recipes for food, traditions do not “demand to be rigidly or mechanically followed,” but allow room for some experimentation provided the essential elements are accounted for otherwise. Traditions tell us what must be done if a certain type of community is to be achieved, but then suggest open-endedly a variety of options available afterward.

Conceptually speaking, understanding traditions as recipes for culture reveals “how pointless it is to debate their truth or falsity,” as each of the previous arguments had assumed must be done. As he puts it in a particularly apt rhetorical question, “Is Julia Child’s recipe for Bouillabaisse true or false?” Clearly neither one. To treat food recipes

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74 Of course, this presupposes a number of things: (1) that there is some settled and coherent account of “cultural identity,” (2) that tradition or various traditions are in fact constitutive of that identity, and (3) that all of this is morally significant. The first presupposition is a notoriously difficult philosophical puzzle, where a clear resolution does not appear at all forthcoming. The second raises an interesting question – namely, is tradition (construed broadly as a placeholder for “whatever we have done hitherto”) what is constitutive of identity or are traditions (taken as referring to the concrete practices of a particular culture)? If the former, then it is unclear how this is supposed to justify any particular tradition that might currently be holding the place. After all, while we might need some practice to hold the place, this does not in itself tell us why we need the particular one we have had most recently. If, on the other hand, the latter is constitutive of cultural identity (and if that is a normative trump card against reform or abolition), then does this not amount to what I have previously described as a “do not disturb” order for the status quo”? Finally, the third presupposition assumes the plausibility of the first two and is not at all defended here.

75 Harris (2005, p. 14).

76 Ibid, p. 15.
as propositional is to commit something on the order of a category mistake. And the
same goes, Harris wants to say, for an analogous treatment of tradition.

*Normatively speaking,* the recipe metaphor recommends a strategy for addressing
the looming problem of cultural relativism. In the same way that we might be favorable
to “objective” evaluations of food dishes or culinary traditions within kinds, but not
across kinds, so might we approach the objective appraisal of competing social traditions.
We usually have little problem asking whether there is an approximately objective
ground for preferring our new recipe for spaghetti to the old one we used, but likely will
resist making a judgment with similar objective aspirations between the new spaghetti
and the new Pad Thai. Similarly, we can translate this into comparisons of traditions:

>[W]e can ask ourselves as individuals whether we like ourselves the way we are
today, or whether we liked ourselves better in the past. And we can do the same
thing collectively. More generally speaking, a community can judge for itself
whether it prefers the habits of the heart by which it now operates to those by
which it operated in the past. Both the individual and the communal mind can
make comparisons between their before and their after.⁷⁷

For Harris, our experience of ethical superiority is diachronic, not synchronic; we surpass
“what we ourselves once were,” rather than other cultures or their traditions.⁷⁸

At this point, Harris introduces concepts that take us explicitly in the direction of
TCM. Specifically, he cites the “ethical family” as the safest, most certain, and most
compelling way of “passing on these transformative customs”.⁷⁹ He supports this claim
within a broadly Freudian analysis of psychosocial development.

The ethical, as opposed to the merely biological, family is the site for the making
of civilized human beings out of id-governed monsters. It turns man’s purely
animalist collection of impulses and urges into a vehicle for passing on not merely
accidental memes, but deliberately engineered transformative customs across

⁷⁷ Ibid.
⁷⁸ Ibid, p. 17.
⁷⁹ Ibid, p. 18.
generations. It is, in a sense, a meta-custom — the transformative custom that is responsible for the existence of all other transformative customs. You must first be trained to pass on the ethical family itself before you can hope to transmit what the ethical family finds so valuable, namely, the civilizing process by which men and women obtain self-mastery. Seen from this perspective, marriage has nothing to do with biology: It is an elaborate social construction that has been erected against the anarchy of the human id, not merely to keep it from doing damage, but for the purpose of transforming the id nature into the highest ethical ideal — the father who raises his son to be a good father, so that his grandson will have a life no worse than his own, and hopefully better.\textsuperscript{80}

The strongest recommendation for giving the ethical family the highest social status lies in its unparalleled track record for negotiating successfully the transitions of civilization from one generation to the next. As such, the ethical family is an indispensable social institution for any culture aspiring for the stability and continuity of its civilization.

This raises an important point of contrast between Harris’ emerging account and the argument from evolutionary fitness defended by Hayek:

For Hayek, a tradition was viable if it was well adapted to the past circumstances of the society; in the view outlined here, a tradition is viable if it effectively keeps future generations from backsliding to a lower ethical or civilizational state. The track record of a tradition is irrelevant here; it may have been supremely useful in the past, but if its continuing embodiment in the rising generation begins to lower the society’s civilizational standards, the tradition must be discarded and replaced, and it makes no difference how many evolutionary challenges it may have successfully overcome in the past.\textsuperscript{81}

In other words, though clearly grounded in a culture’s past, the overall orientation of Harris’ own defense of tradition is forward-looking. This feature of the ‘cultural DNA’ defense of tradition gives it a distinctive personality — one that is both pragmatic and dialectic. It also makes clear what the cultural recipes known as traditions are recipes for: civilization itself. More precisely, they are the cultural directions for achieving the twin goals of “keeping us civilized and in offering us a foundation for becoming even more

\textsuperscript{80} Ibid, p. 18.
\textsuperscript{81} Ibid, p. 20.
civilized”82 – goals requiring the successful inculcation of a fundamental and
tragenerational duty of “making sure that the ethical baseline of their society does not
move in a manner that their visceral code instantly tells them is wrong”.83

Here Harris directly inserts his account into current debates over the nature and
value of marriage. He begins by characterizing these debates in the following way:

[A]dvocates [of gay marriage] are cast in the role of long-oppressed suppliants
demanding their just due. Indeed, the whole question is put in terms of their legal
and moral rights, against which the opponents of gay marriage have nothing to
offer but “residual personal prejudice,”... 84

This portrayal of the debate simply repeats a fundamental mistake – namely, it views the
matter as turning simply and essentially on the traditionalists’ possession of a faulty set of
propositions. However, Harris wants to replace this view with a richer depiction (and
ultimately defense) of the traditionalist’s response informed by his two-level model.

But it is a mistake to conflate the automatic with the irrational, since, as we have
seen, an automatic and mindless response is precisely the mechanism by which
the visceral code speaks to us. It triggers a rush of emotions because it is designed
to do precisely this. Like certain automatic reflexes, such as jerking your hand off
a burning stovetop, the sheer immediacy of our visceral response, far from being
proof of its irrationality, demonstrates the critical importance, in times of peril and
crisis, of not thinking before we act. If a man had to think before jumping out of
the way of an onrushing car, or to meditate on his options before removing his
hand from that hot stovetop, then reason, rather than being our help, would
become our enemy. Some decisions are better left to reflexes — be these of our
neurological system or of our visceral system.85

Here Harris draws a critically important analogy between (1) the response of someone to
a highly unpleasant physiological stimulus, and (2) the response of traditionalists to what
they perceive as a noxious cultural stimulus. One would seriously err in confusing the
instinctiveness of the first response with its being irrational or prejudicial and so to, he

82 Ibid.
83 Ibid, p. 22.
84 Ibid, p. 27.
claims, with the latter. Instead, we should treat the latter case as an appropriate visceral response to a fundamental challenge to a culture’s traditional order:

This is why for most people, including many gay men and women, the immediate response to the idea of gay marriage came at the gut level — it somehow felt funny and wrong, and it felt this way long before they were able to spare a moment’s reflection on the question of whether they were for it or against it. There is a reason for that: They were overwhelmed at having been asked the question at all. How do you explain what you have against what had never crossed your mind as something anyone on Earth would ever think of doing? This invitation to reason calmly about the hitherto unthinkable is the source of the uneasy visceral response. To ask someone to reason calmly about something that he regards as simply beyond the pale is to ask him to concede precisely what he must not concede — the mere admissibility of the question.86

Thus, not only is the traditionalist’s deep and automatic hostility to challenges reasonable and justifiable, but so too is his continued resistance to merely considering alternatives.

Harris concludes his account with traditional marriage very much at the heart of his thinking, bringing his ideas into focus in the following way.

The shining example of a happy marriage and its inherent ideality was something that we once could all agree on; but now it is a shining example that has been subjected to the worst fate that can befall one: It has become a subject of controversy and has thereby lost its most essential protective quality: its ethical obviousness in the eyes of the community. Once the phrase “gay marriage” was in the air, marriage was suddenly what it had never thought to be before: a kind of marriage, a type — traditional marriage, or that even worse monstrosity, heterosexual marriage.87

He ends his defense of tradition then exactly where we want to pick up – with the question of whether it might ultimately serve as adequate justification for TCM.

5. Testing the Cultural DNA Evidence

In what follows, I develop two fundamental criticisms of Harris’ account that locate indefensible privileges extended at key moments in his analysis and defense of tradition.

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86 Ibid.
87 Ibid, p. 29.
The first criticism targets the overall orientation of Harris' defense – namely, the way in which it privileges the “givenness” of the conception of tradition he is trying to defend. I take this problem to be exemplified quite clearly in the final quote in Section D above and will start from that point and work out to a generalized statement of the objection.

Recall that Harris concludes his defense of tradition as cultural DNA by noting the drastic ways in which the very idea of “gay marriage” has upset the traditional conception of marriage, so much so that we now actually have to place the qualifier “traditional” in front of it. There he invokes the concept of a “we” who were once in unanimous agreement regarding what a “happy marriage and its inherent ideality” consisted in, so much so that “we” did not even need to recognize that “we” were in agreement since “we” did not know that there was anything to even agree upon or against in the first place. As with our knowledge of our own existence, our grasping of Descartes’ cogito, “we” simply took it unconsciously as axiomatic that marriage was the union of... Well, what exactly? This is part of the problem of privileging the “given” – an inherent blindness to the problem of tradition specification. Harris never offers us a clear or complete account of the essential properties of the tradition he takes himself to be defending. Heterosexuality is clearly one of the properties; probably monogamy also. But what about others? Homoraciality? Wives as property? Divorce as sin? Child brides? Arranged by parents for economic benefit? Sanctioned by God’s one and only true church? We simply do not know which of these, or other controversial features, are included in this unarticulated but once unanimous conception of marriage and why.
One might be tempted, in a philosophically familiar move, to try to deduce the essential properties of traditional marriage from its function. However, this just delays the problem at hand, since Harris provides only a very general picture of in what this function might consist. He seems to be urging that the function of traditional marriage is to preserve and further human civilization, but without a much more precise account of civilization, we are reduced to mere speculation about which of the above properties, among many others, are essential to the successful execution of this function.

Moreover, the general orientation of his project serves to make such an explicit statement of the function superfluous. As Pickett puts the point in a related discussion on the morality of homosexuality (with certain words altered):

Since [tradition] is the natural [or ethically obvious] condition, it is a place that is spoken from but not inquired into. In contrast, [the non-traditional] is the aberration and hence it needs to be studied but it is not an authoritative place from which one can speak. By virtue of this [traditional] privilege, [Harris] is allowed the voice of the impartial, fair-minded expert.  

Whether a conscious strategy or not, Harris’ defense assumes the orientation described here. As he sees it, we were all once in agreement on what marriage is, as well as its ethical obviousness. From this perspective, same-sex marriage is an aberration and something that needs to be critically examined and dispatched. We need not, and in fact should not, ask whether the same manner of investigation also would pose fundamental difficulties for the “given”.

Consider for a moment what it would be like if Harris were to relax this privilege. This can be done by substituting certain properties for others in his arguments against same-sex marriage and asking whether such substitutions compromise the conclusions he is trying to draw out. So, for example, take his claim, “Once the phrase ‘gay marriage’
was in the air, marriage was suddenly what it had never thought to be before: a kind of marriage, a type — traditional marriage, or that even worse monstrosity, heterosexual marriage". Here Harris is trying to illustrate the consequences of what he takes to be a regrettable shift in “our” understanding of marital relationality. However, there have been many major shifts in understanding throughout history – a short list includes the transitions from purely social or religious to civil marriage, marriage for economic or social reasons to marriage for love, arrangement by authorities to arrangement by spouses, homoracial to heteroracial, and hierarchical and gender-structured to egalitarian and gender-neutral. Plugging any of these into the form of Harris’ claim, we can ask: once the phrases “Protestant marriage” or “spously arranged marriage” or “marriage for love” were in the air, did marriage then suddenly become what it had never thought to be before – a kind of marriage? Or, with the questioning of anti-miscegenation laws, that even worse monstrosity – “homoracial” marriage?

If the answer to these questions is “yes”, then this relieves much of any sting that his criticisms would have for advocates of marriage reform. Since almost everyone agrees that putting up with the “monstrosity” of homoracial marriage, for example, is an acceptable cost of social progress, it is unclear why we should think so differently of the looming “monstrosity” of heterosexual marriage (if, indeed, it also involves removing unjust restrictions). The simple fact that a proposed reform would complicate a society’s inherited conceptual/linguistic database is, in and of itself, insufficient warrant for preserving institutions that are judged unjust, inefficient, or seriously deficient in some way.

89 Harris (2005, p. 29).
On the other hand, answering “no” to the questions represents an egregious privileging of the given and the existence of a double standard. For whereas Harris has a very clear target against which to argue (e.g., allowing same-sex couples equal access to the status and privileges of civil marriage), his critics would only have the vaguest idea of which of the rich plethora of potential properties attributable to “traditional marriage” he intends to be defending and why. After all, what conception of marriage can possibly explain why all the previous major transitions in our understanding did not cause us to see that there is more than one kind of marriage, but the specter of same-sex marriage suddenly and uniquely threatens such a gestalt switch? This obfuscation, in turn, unfairly immunizes the defense against a number of viable and serious criticisms.

What the problem of the ‘given’ reveals is that, at best, Harris’ account assumes an undefended orientation to the value of traditional institutions and is thus incomplete. At worst, the problem suggests that it assumes an indefensible orientation to such value and is thus thoroughly misguided. Either way, however, the problem constitutes the first fundamental difficulty with the defense of tradition as cultural DNA.

b. Exhibit B – The Problem of Privileging the “Gut”

The second objection I want to pose to Harris’ defense concerns not its general orientation, but rather a foundational assumption – namely, the radical priority of the “gut” to the “mind”, that in turn presupposes the presence of a clean and significant rift between the two. Here challenges can be made to both aspects of this assumption.

On the one hand, there are good reasons for questioning the radical separation of the gut and the mind in the first place.\textsuperscript{90} On Harris’ account, these two organs seemingly

\textsuperscript{90} I am grateful to Simona Goi for pressing me to develop this part of my critique of Harris in this way.
occupy non-overlapping magisteria. The realm of the gut is concrete through and through, while the realm of the mind is hopelessly abstract. But why should we accept either this strict bifurcation or Harris’ mapping of concrete to visceral and abstract to rational? Here returning to a discussion of culinary traditions might be useful in motivating resistance to both claims.

Imagine, for example, an average person reared on the Standard American Diet encountering a culinary tradition that gives a prominent role to seaweed in many of its dishes. In all likelihood, this average devotee of the SAD culinary tradition will experience a visceral repulsion at the thought of consuming seaweed. However, unlike the instinctive reaction of a person yanking a hand off of a burning stove, this immediate response does not track any real danger to the individual and is not grounded in a previous concrete encounter with the noxious stimulus — for our imagined SAD traditionalist, seaweed remains an abstraction entirely constituted by negative cultural prejudices and assumptions. As such, the likely remedy for dislodging this abstraction and its attendant negative emotions is a reflective concrete encounter with actual seaweed (and probably with actual seaweed that is presented in one of its better manifestations). But, if that is the case, then the rigid dichotomy between gut and mind begins to break down, as a visceral reaction comes to be understood as anything but concretely grounded and concrete experience is seen to have rational elements running throughout it.

Can this alternative mapping of concrete to rational and abstract to visceral shed any critical light on Harris’ defense of traditional marriage? It seems to me that the answer is quite clearly “yes”. For many traditionalists (though certainly not all), gay and lesbian relationships are total abstractions, usually constructed of the most uncharitable
assumptions about their nature and tendencies. Where these abstractions begin to give way generally has less to do with rational arguments than with a kind of reflective concrete encounter with gay and lesbian couples as relatives, fellow citizens, and even friends rather than as mere cultural tropes. If indeed this is correct, then not only does Harris’ general separation between gut and mind dissolve, but this breakdown seriously weakens his overall defense of traditional marriage.

However, even if it is granted that there is a serious chasm between the “gut” and the “mind”, it would not follow that, to spin Hume’s famous expression just a bit, ‘the mind is and ought to be the slave of the gut’. Just how far Harris wants to defend the priority of the gut is unclear. At times, Harris appears to be turning Plato on his head, arguing for a kind of totalitarian rule by the lower part of the tripartite soul. Other moments in Harris’ defense of tradition lend themselves to a softer interpretation. Here again difficulties are inherited from the problem of the given – no explicit account of the strictness of the priority relationship is on offer and, according to the privilege of the given, none need be provided. Any would-be interlocutors must proceed analytically, then, dividing up the logical space and looking individually at each interpretive option.

The first interpretation of the “priority of the gut” holds, in a move akin to Hobbes’ absolute prohibition of attempted revolutions against the Sovereign, that it is always wrong to override the immediate response of one’s visceral code. But, whatever one’s take on the analogous claim in Hobbes’ theory, it is unlikely that anyone will want to defend this portion of logical space here. This interpretation would mean that the visceral response of slaveholders to the abolition movement, or of Nazi leaders to the mere existence of Jewish persons, takes priority over the plentiful supply of moral
reasons against their practices. Indeed, such an interpretation would effectively reduce to the crudest and baldest form of cultural relativism – a culture’s traditions are right simply because they feel so in their collective “gut.” It would license almost every form of historical immorality and injustice, as it is likely that almost all were at one time or another deeply connected intimately with some visceral code.

The second, and prima facie more plausible, interpretation of the “priority of the gut” suggests that it would be wrong to override the immediate response deriving from one’s visceral code on the basis of abstract principles. Perhaps, then, not all efforts at reforming traditions are bad, but only those motivated by abstract notions of justice, rights, utility, etc. Again, though, it seems immediately obvious that this will not work. For one thing, since motivations can be redescribed in numerous ways, one would need to know how to determine that it is in fact someone’s abstract principles that are leading them to challenge the traditional order, rather than her own individually-calibrated visceral code. For another, it would seem that many of the actual (widely-valued) achievements of civilization were themselves motivated by abstract principles. Were the American revolutionaries wrong to overthrow British rule (and the visceral code supporting it) on the basis of the “abstract” appeal to inalienable rights? Was it wrong to overturn slavery on the basis of similar appeals? What about movements seeking full legal equality for women? And religious tolerance? The list could go on and on, but the point should be clear – if this second interpretation is correct, then Harris’ case is either seriously underdeveloped or normatively indefensible.

An even more fundamental problem can be posed in this vein – what about the principle “don’t mess with tradition”? Is this not an abstract principle in its own right? If
so, then how does it differ in kind from the problematic ones? If not, then why not? We can note here a peculiar weakness of Harris’ defense – namely (and ironically), that despite describing his comments as addressing the “modern culture wars,” he seems to assume that there is only *one* gut or visceral code. But even the most casual observer of the very culture wars Harris claims to be commenting on realizes this is not the case. To invoke the crude partitioning of left and right politics, it is clear that both sides are, at times, animated by visceral reactions (e.g., “liberal disgust” or “conservative outrage”) that seem to arise out of very different guts. Since competing visceral codes are bound to arise in diverse societies, it seems entirely plausible to put to Harris the question of which one ought to win out when we invoke the “abstract principle” of “go with your gut.”

Perhaps then we should narrow the interpretation in a third way – namely, by proposing that it would be wrong to override an immediate visceral response *on the basis of the wrong abstract principles*. Well, surely everyone will agree with this as stated, but that very fact makes it perfectly useless. What we need to know is which principles are wrong. This was supposed to be settled by an appeal to tradition, but such a resolution now appears unlikely. Instead, this appeal has only taken us to a higher order of abstraction – the search for a stable principle by which to judge the moral quality of historical institutional change – that appears to be the terrain of *ahistorical* defenses.

This interpretive exercise seems to reveal that Harris’ defense does not and likely cannot satisfactorily resolve the was/ought problem. Even assuming (what we should not) that there is a single collective gut, we cannot justifiably move immediately from our viscerally-motivated *belief* that some course of action is right to the conclusion that it is *actually* right. Simply put, an adequate normative principle is needed to connect the
premise to the conclusion. However, each way of interpreting the relevant principle here (i.e., the priority of the gut) seems to have significant and intractable liabilities.

All of this is made even stranger, given two of Harris’ primary commitments: (1) his suggestion that, like food recipes, traditions do NOT demand rigid conformity, but allow for a fair amount of experimentation, and (2) his purported contrast with the Hayekian evolutionary model and its purely backward-looking orientation. Given the first commitment, one might be inclined to think that Harris would be open to same-sex marriage, for example. Since the core of marriage might plausibly be thought to consist in the exclusivity and permanence of the marital bond, it would seem prima facie that same-sex partnerships are not a replacement of the cultural recipe but rather just another way of experimenting at its edges. And the second commitment would only seem to reinforce this prima facie judgment, as one might plausibly judge that history will look back at the formal recognition of same-sex marriage in much the same way that it now does at interracial marriage (the comparative value of which is frequently affirmed even by many who formerly experienced visceral disgust toward it). Indeed, one might construe both developments, in the language of MacIntyre, as making the claims of the tradition “less vulnerable to dialectical questioning and objection than were their predecessors” or, in other words, as making the tradition stronger and healthier than before. Prior to Harris’ fairly surprising application of his analysis to traditional marriage, one very well might have concluded that the expansion of civil marriage to

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91 At the very least, one would expect this to be a possibility open to sincere and honest discussion. As MacIntyre notes, this would only be a mark in favor of the vitality of the tradition, for “when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its point and purpose.” Cf. MacIntyre (1984, p. 222).
include same-sex spouses, like previous expansions, would only make the institution more defensible and better positioned to withstand further criticism.

At best, and despite all its virtues as an analysis of the psychological contours of traditionalism, Harris' account seems radically incomplete as a moral defense. At worst, it profoundly misses the standards of conceptual coherence and/or moral plausibility.

C. Concluding Remarks

I have considered several attempts to defend TCM via an appeal to its historical pedigree. In each case, these accounts were found insufficiently motivated. Interestingly, almost every objection raised in this chapter instantiates or bears a strong family resemblance to either the problem of tradition specification, the problem of historical fit, or the was/ought problem. What this suggests is that, regardless of how sophisticated the analytical or descriptive machinery employed by a historical defense of the intrinsic value of traditional institutions, this kind of defense is permanently liable to the tripartite general argument I raised against the bald Tevyean appeal to tradition. This realization, in turn, counsels the traditionalist to look elsewhere for a defense of the intrinsic value of TCM – namely, to ahistorical accounts that appeal to the philosophical caliber, rather than the historical pedigree, of the institution. Versions of this kind of defense will be identified, analyzed, and evaluated in the following chapter.
CHAPTER FOUR

Intrinsic Value Defenses of Traditional Civil Marriage: The Ahistorical Approach

In this chapter, I will critically examine a second type of intrinsic value defense of traditional civil marriage – one that appeals not to the historical pedigree of such unions, but rather to the philosophical caliber of some inherent ahistorical property. Examples of such defenses could focus on ahistorical properties of traditional marriages such as procreative potential, organic complementarity, divine sanction, or conformity with natural law. Once again, it is important to maintain the rigid distinction between the intrinsic and instrumental potential of any given candidate properties. So, for instance, the instrumental value of a property like procreation, in both its individual and social dimensions, must be put off until the next chapter.

In what follows, I will briefly consider and rule out three of the above candidate properties – procreative potential and organic complementarity (which are just examples of a broader category – the single, non-clustered natural property) and divine sanction. My reasons for doing so point in the direction of the final property – namely, conformity with natural law – as forming the most promising element in an ahistorical defense. I begin my analysis and evaluation of this property by first considering the efforts of a group of “new” natural lawyers (henceforth NNL) who have sought to revive Aquinas’ classical natural law defense of traditional marriage by jettisoning some of the more unpalatable parts of the Thomistic account, while retaining the general natural law approach to marriage as a basic good of human life. Here I attempt analytically to reconstruct, by piecing together arguments and claims made by a number of
contemporary defenders of NNL, what I consider to be the four most important theses of NNL thought that bear on marriage and sexual morality and which ultimately culminate in a claim about the justification for TCM. I conclude by offering independent objections against each of the four theses (i.e., I assume with each thesis that the preceding thesis on which it partly depends for its own support has been granted), but in a way that builds a cumulative case against the most ambitious NNL thesis in support of the exclusive state support of TCM.

A. Ruling Out a Few Versions of the Ahistorical Defense

In the introductory paragraph to this chapter (directly above), I mentioned some examples of ahistorical properties to which one might appeal in defense of TCM. I want to rule out three of these quickly, noting a general problem with each, before turning to the candidate property that seems to me to have the most initial promise.

The first initial ahistorical candidate features prominently in what is perhaps the most popular appeal made by traditionalists in contemporary debates over civil marriage – namely, the appeal to divine sanction. In one sense, an appeal to divine sanction would presumably be taken to be historical in character. That is, it seems safe to assume that someone making such an appeal believes that at some point, or at all points, in history, the referenced deity has explicitly approved of or commanded a pattern of traditional marriage. But clearly what is doing the work here is not when such a sanction was laid down, nor in how longstanding that command is believed to have been in place, but rather simply that it was laid down and by a being of the exceptional qualities generally ascribed to divine agents. Clarified as such, then, the basic thrust of this defense is that traditional marriages have at least one morally relevant property not possessed by non-
traditional unions, i.e., they have the approval of some transcendentally superior being or entity.

The main problem with appealing to divine sanction is that it comes with too much baggage, including many perennial and seemingly intractable problems (such as how to negotiate and resolve fundamentally conflicting claims about divine truth and the proper interpretation of texts, teachings, revelations, legends, etc.). However, even assuming that these sorts of problems could be resolved adequately, unless one is also willing to support the installment of each and every institution or practice for which divine sanction can be claimed, then one cannot depend solely on the appeal to divine sanction to support any given institution or practice (here I will spare the rather familiar, lengthy, and at times embarrassing list of practices and institutions that appear to have received "divine sanction" at one time or another by some deity or another). If purported divine sanction alone, unsupplemented with more particular support, is sufficient for installing and maintaining TCM, then it also is sufficient without supplementation for installing and maintaining any other practice claimed to be divinely prescribed (at least by the same deity invoked in favor of TCM).

The two other initial candidates – procreative potential and organic complementarity – are, as I mentioned previously, examples of single, non-clustered natural properties. That is, each constitutes an individuated property residing in, rather than beyond, the nature of a relational-type, the presence or absence of which by itself is claimed to be morally significant. The advantages of this approach readily can be appreciated when contrasted with the appeal to divine sanction, in that the features to which it directs attention are less ethereal and do not require a host of fundamental and
seemingly intractable problems to be settled prior to even being in a position to evaluate the merits of the appeal.

However, the problem with any single, non-clustered natural property, such as procreative potential or organic complementarity, is that it will never be sufficient by itself for supporting the traditionalist’s exclusion of all non-traditional relationships. For example, premarital and adulterous heterosexual relationships have procreative potential and organic complementarity; hence, they cannot be excluded by appeals to those properties alone (or even joined together). Hence, any property adequate for ruling out all non-traditional relationships will need to cluster together properties that are jointly sufficient for this task. One might call this clustered property the “good of marriage” and, indeed, that is just what we find the defenders of natural law theory doing in many cases. That this strategy has been pursued already is fortuitous, as it spares the need to try to construct such an account de novo; what is even more significant is the fact that the natural law defense of TCM also represents the most developed and sophisticated ahistorical attempt to justify the exclusive value of traditional, as opposed to non-traditional, marriage. Hence, I will consider the natural law argument for TCM to be the most promising ahistorical defense of the institution and will, in what follows, spend the rest of the chapter identifying, analyzing, and evaluating its central claims and arguments.

B. The New Natural Law Defense of Traditional Marriage

As Tevye’s bald appeal to history is to historical defenses, so Thomas Aquinas’ appeal to natural law is to ahistorical defenses. The value of both appeals is very similar – each has a certain amount of philosophical precedent and independent merit, but, more importantly, also indicates a starting place from which to evaluate how succeeding
versions of its type might develop and advance. However, unlike Tevye’s, Thomas’ defense of traditional marriage emerges in hundreds of pages of dense and complex argument and across numerous works of philosophy and theology. Trying correctly to interpret his particular account of marriage could itself easily constitute a dissertation-length project. Fortunately, however, we need not engage in this daunting interpretive task, since a school of new natural lawyers has recently defended an updated version of Aquinas’ account that retains its most plausible commitments while discarding some of its less savory elements, such as the rather harsh and invasive role it reserves for the state in upholding the dictates of natural law. Hence, not only do these new natural lawyers relieve us of the need to “get Thomas right”, they also offer us the prospects of a prima facie more plausible defense of TCM, one that is sensitive to modern concerns regarding privacy and state restraint.

New natural law theory (henceforth NNL), as articulated in the work of Finnis, George, and Germain Grisez among others, understands the whole of sexual morality to be structured around the contrast between “marital” and all other sexual acts. Its central commitments can be represented propositionally in the form of four theses about sexual morality, ordered by the strength of their respective claims.

Weak Practical Thesis (WPT): Only marital sex acts (i.e., acts of uncontracepted penile/vaginal intercourse between monogamous lifelong spouses) can realize the basic good of marriage; hence, such acts are the highest and most valuable expressions of sexual intimacy.

Strong Practical Thesis (SPT): Non-marital sexual acts, even when undertaken within a traditional marriage, cannot realize any basic good for the participants therein; hence, such acts are always unintelligible and valueless expressions of sexual intimacy.
Moral Thesis (MT): It is always immoral to participate in non-marital sexual acts, or even conditionally to will them, since doing so always shows disrespect for basic human goods.

Political Thesis (PT): The value of marital sexual acts, combined with the detrimental character of non-marital sexual acts, gives the state sufficient reason exclusively to recognize and promote traditional civil marriage.

Significant gaps exist between these four theses; one cannot move without additional premises from WPT to SPT, nor can one move immediately from either of those to MT or from there to PT’s conclusion about TCM. How, then, do the new natural lawyers go about trying to fill these gaps?

Broadly speaking, NNL employs the general method of applying “the relevant practical reasons (especially that marriage and inner integrity are basic human goods) and moral principles (especially that one may never intend to destroy, damage, impede, or violate any basic human good, or prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good) to facts about the human personal organism”. In what follows, I will attempt analytically to reconstruct, in turn, the particular case that NNL (as represented by its several, though largely interchangeable, defenders) makes for each of the four theses in terms of supporting facts, practical reasons, and moral principles.

1. NNL and the Weak Practical Thesis (WPT)

The central claim underlying the NNL account of marriage and sexual morality is that “marriage, considered not as a mere legal convention, but, rather, as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the

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93 Finnis (1995, p. 31).
reproductive type, is an intrinsic (or, in our parlance, 'basic') human good". Two key commitments animating WPT can be separated from this focal statement and summarized in turn: (1) the NNL account of basic goods (which embody \textit{practical reasons} for certain actions) and the place of marriage therein, and (2) the NNL account of the nature of marriage as a two-in-one-flesh communion (which, roughly, describes some facts about the institution).

a. The Basic Common Goods of Practical Reason

The first commitment relies on a particular understanding of the basic goods of practical reason. According to NNL, a basic good is:

1. **Self-Evident** – it "cannot be demonstrated, but equally it needs no demonstration"\footnote{George & Bradley (1995, p. 301).} \footnote{Finnis (1980, p. 65).} \footnote{By "self-evident", Finnis does \textit{not} claim (and, in fact, explicitly denies) that the practical principles given by the basic goods (e.g., "knowledge is a good to be pursued") are innate (1980, p. 65), inferred from facts (1980, p. 66), the objects of universal or ineradicable desire (1980, p. 66), or grounded in a feeling of certitude (1980, p. 69). Rather, he means that "such principles ... are not demonstrable, for they are presupposed or deployed in anything that we would count as a demonstration; ... they are obvious—obviously valid—to anyone who has experience of inquiry into matters of fact or of theoretical (including historical and philosophical) judgment" (1980, p. 69).}

2. **Objective** – its "validity is not a matter of convention, nor is it relative to anybody's individual purposes"\footnote{Finnis (1980, p. 69).}

3. **Intrinsic** – it is "considered to be desirable for its own sake"\footnote{Ibid, p. 62.}

4. **Irreducible or Fundamental** – it cannot be reduced to some more fundamental good (e.g., aggregate well-being), form of experience (e.g., pleasure), or set of experiences (e.g., happiness); it is a basic building block of practical reason\footnote{Ibid, pp. 92-97.}

5. **Incommensurable** – it cannot be compared to or exchanged with other goods, as there is no common standard of comparison or exchange\footnote{Ibid, p. 112.}

6. **Known to People of Ordinary Experience** – identifying and appreciating it does
not require any sophisticated training or special capacities or insights

(7) Relatively Open-Ended – capable of being embodied in any number of commitments, projects, and actions

A good meeting all criteria is “an aspect of authentic human flourishing, and … the principle which expresses its value formulates a real (intelligent) reason for action”. The practical reason embodied in a basic good may be conclusive or defeated, but it always at least makes intelligible attempts to realize the good.

Finnis has defended the following list of basic goods (a list commonly accepted and utilized by other defenders of NNL): knowledge, play/skillful performance, bodily life, friendship, aesthetic experience, practical reasonableness, harmony with the ultimate source of all reality, and marriage (importantly, this last entry was not included in Finnis’ original list described in his classic *Natural Law and Natural Rights*). Each of these goods is purported to make intelligible (though not necessarily reasonable-all-things-considered) actions taken in its pursuit; so, for example, writing a dissertation on *The Canterbury Tales* can be understood and properly appreciated, even where separated from any extrinsic goals, as participating in the basic good of knowledge. NNL claims that the good of marriage, when added to the original list of goods, makes intelligible a “unique type of relationship”; one that is “unified by its dual point {finis}: the

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101 Ibid, pp. 63, 155.
102 Ibid, p. 64.
103 For example, the practical reason to pursue a basic good might be defeated by a moral principle forbidding certain ways of pursuing it, such as seeking knowledge of human anatomy by cutting open an innocent and non-consenting third-party. While the knowledge to be had from such an action is indeed good, and one’s desire to have such knowledge intelligible, the action is ultimately unjustified because it violates a fundamental moral principle.
104 I shall have more to say about this original omission in Section C, Part 2 of this chapter. We might also note that this list of purported basic goods is as significant for what it does not contain as it is for what it does. Importantly, though certainly controversially, pleasure is explicitly denied entry.
procreation, nurture, and education of children, and the full sharing of life in a home”, but which, controversially, cannot be reduced to either.107

b. The Nature of Marriage

According to NNL, marriage is a tightly constituted relationship characterized by the satisfaction of several necessary conditions. Stephen Macedo usefully encapsulates these conditions and their relation one to another by integrating several choice quotations from Grisez.

The sexual act should be subordinate to the real goods that are relevant to the kind of act that it is; and those real goods are the complex of goods united in a permanent heterosexual marriage. Our understanding of proper sexuality should take its bearings from the “specific, intrinsic perfection” of relations between man and woman, which perfection is found in marriage: “for marriage realizes the potentiality of man and woman for unqualified, mutual self-giving,” oriented toward not simply the “begetting and raising of children,” but also the spouses’ own “open-ended community” of mutual love, companionship, willing and loving cooperation, help, and comfort, all of which fulfill the spouses’ marital good, even if procreation does not occur on account of infertility, sterility, or some other unchosen condition.108

The first necessary condition we might separate out from this list is the permanence of the marital bond, its endurance through time without essential change. For the sake of space, I shall presume that this condition is relatively straightforward.

The second necessary condition is the total mutual self-giving of the marital partners. What precisely NNL theorists mean by this concept is a bit tricky to discern. The most literal interpretation of the condition is clearly ruled out metaphysically and morally: metaphysically, because a person cannot ever literally give him or her self over “totally” to a spouse, such that no part of their former self survives the giving; morally,

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107 Cf. Finnis (1997, p. 108). This peculiar feature of the “good of marriage” – namely, that it alone among basic goods is claimed to be an irreducible compound of two other basic goods – will be critically examined in Section C, Part 2.

because “the complete absorption by the family of its members would radically emaciate their personal freedom and authenticity, which are also basic aspects of human full-being.” However, this still leaves us with a number of possible readings of the metaphor. Finnis provides a bit more content in claiming that, “sexual acts cannot in reality be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other – in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive – which like Plato and Aristotle and most peoples we call marriage.” Perhaps, then, what the NNL theorists mean here is simply that, for each dimension of a relationship, be it physical, emotional, or volitional, both spouses give themselves to each other (entirely and to no one else?). Since I have been unable to locate a clearer expression of this necessary condition by defenders of NNL, I propose to go forward with the somewhat vague definition of “total mutual self-giving” as involving a significant amount of self-giving across each of a number of matrices – physical, emotional, volitional, etc. – and see how far we can proceed.

The third condition NNL theorists place on genuine marriage is that it consists in an open-ended community. This entails, among other things, that the relationship be a multi-purpose association, contributing significantly to each spouse’s needs for “mutual love, companionship, willing and loving cooperation, help, and comfort, all of which

\[109\text{ Finnis (1980, p. 146).} \]
\[110\text{ Finnis (1995, p. 30).} \]
\[111\text{ Though my emphasis at this point in the chapter is more on accurately interpreting NNL claims rather than raising problems for them, one might wonder what implications “total mutual self-giving” has for a person’s relationships with friends and other family members, at least emotionally. After all, if marriage requires the “total” giving of ones emotional self to his or her spouse, then how can that be squared with the normal tendency of most people to reserve at least some portion of their emotional output for relatives and friends?} \]
fulfill the spouses’ marital good”. As for the particular implications this condition places on sexual expression, NNL theorists understand it to reinforce traditional Roman Catholic teachings prohibiting contraception. A genuinely open-ended marital community, in their judgment, always is oriented toward the possible begetting of children; contraception closes off this orientation of openness toward the potential fruits of their genital union. As George and Gerard Bradley put it, “children conceived in marital intercourse participate in the good of their parents’ marriage and are themselves non-instrumental aspects of its perfection; thus, spouses rightly hope for and welcome children, not as ‘products’ they ‘make,’ but, rather, as gifts, which, if all goes well, supervene on their acts of marital union.” The marital good, on the NNL account, has many non-instrumental aspects, then, including the possibility of children; realizing the marital good, as such, requires never closing off this possibility through the use of contraceptive devices.

A final and absolutely indispensable condition (for NNL) is that a marriage be characterized by its organic complementarity. Consider, for starters, the following expressions of this concept:

[T]he organic complementarity of man and woman in respect to reproduction is the necessary condition for the very possibility of marriage, and the requirements of human parenting specify the characteristics of marriage as an open-ended community. Therefore, marital acts must realize both the spouses' open-ended community and their organic complementarity.

[Aquinas' reasons for judging certain types of sex acts wrongful] are concerned rather with the preconditions for instantiating, and the ways of disrespecting, the good of marriage, viz. the way of life made intelligible and choiceworthy by its twin orientation towards the procreation, support, and education of children and

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the mutual support and amicitia of spouses who, at all levels of their being, are sexually complementary.\footnote{Finnis (1997, p. 118).}

In the case of the sexual act of a married couple, their act of physically or organically becoming one (organic unity) is the common good, the shared pursuit of which (unity of action) also brings about or enhances their interpersonal unity (unity of persons). But if the participants in a sexual act do not become physically or organically one, then, whatever goods they may be seeking as ulterior ends, their immediate goal is mere pleasure or illusory experience.\footnote{George & Lee (1999, p. 172).}

At least two important features of the concept of organic complementarity are revealed in these statements. First of all, there is the claim, most clearly expressed by Grisez, that organic complementarity necessarily relates to the function of reproduction. To say that a particular type of marital union embodies an organic unity, then, it is requisite that the biological organs suitable (though not always sufficient) for reproduction be in place within the union itself. While unions might be judged complementary in any number of respects, if they are intrinsically (as opposed to accidentally) incapable of organic procreation, then all the other dimensions of complementarity will fail to make them instances of genuine marriage – hence, the NNL belief that same-sex “marriage” is less like a homosexual sex act than it is a square circle; strictly speaking, it is not so much immoral, as it is literally impossible.\footnote{Cf. George & Bradley (1995, p. 310).}

Secondly, organic complementarity is described as a type of unity or completion obtaining at various levels of being, including both physical and personal. Physically, as was just mentioned, one male and one female complete each other by providing the biological organs that the other lacks for reproduction. However, the new natural lawyers seem to want to avoid what Paul Weithman describes as a “crudely physicalist account of human sexuality” by making the further claim that one male and one female complete
each other personally as well.\textsuperscript{118} This latter dimension of complementarity is not, to my knowledge, spelled out fully in their respective accounts; however, one might assume from the earlier discussion of "total mutual self-giving" that they intend this statement to refer, at the very least, to things like emotional and volitional complementarity and perhaps also to a complementarity of domestic roles.\textsuperscript{119}

A "marital" sexual act, then, consists in uncontracepted penile/vaginal intercourse between monogamous lifelong spouses that realizes the intrinsic good of marital union itself; any other sexual act is judged to be "non-marital" in character. This initial brightline contrast between "marital" and all other acts, and the goods each kind of act is able to realize, ends up decisively shaping, to use Macedo's colorful expression, "the old sexual morality of the new natural law".\textsuperscript{120}

c. Putting the Two Commitments Together

The basis for WPT, then, derives from a synthesis of the NNL understanding of the nature of marriage (the "facts) and its account of basic human goods (the practical reasons), as represented in the following argument:

(1) The highest and most valuable expressions of sexual intimacy are those sexual acts that contribute to and realize the basic good of marriage.

(2) Only those acts that are consistent with the nature of marriage can contribute to and realize the basic good of marriage.

(3) Only marital sexual acts are consistent with the nature of marriage; all other acts fail to satisfy at least one of the necessary conditions for genuine marriage (e.g., contracepted sexual acts fail the open-ended community condition, "sodomitical" acts fail the organic complementarity condition, etc.).

\textsuperscript{118} Cf. Weithman (1997, p. 229).
\textsuperscript{120} Cf. Macedo (1996).
(4) Therefore, only marital sex acts can realize the basic good of marriage; hence, such acts are the highest and most valuable expressions of sexual intimacy.

2. NNL and the Strong Practical Thesis (SPT)

According to NNL, non-marital sexual acts not only rank beneath their marital counterparts in the hierarchy of sexual value (per WPT), but also actually are claimed to be altogether \textit{valueless} and, hence, pursuing such acts is thoroughly \textit{unintelligible} (per SPT). To understand the rationale for SPT, we need to further analyze the NNL claim that organic unity is a necessary condition for realizing any common good in sexual intimacy.

a. Organic Unity in Sexual Intimacy

The concept of organic unity in sexual intimacy plays an important explanatory role in an analysis of NNL. For it both explains (1) why marital sexual acts are able to achieve the good of marriage (WPT) and also (2) why non-marital sexual acts are incapable of realizing any basic good (SPT). In what follows, I will briefly analyze the concept into two parts, “organic” and “unity”, both of which track and speak to a division between the physical or biological aspects of a person and the psychological or personal.

In describing the physical uniting of husband and wife in sexual intercourse as “organic”, NNL theorists might emphasize at least two important points. First, and as we have already noted, a necessary condition for “organic sex” is that the partners be physically complementary – that they have the right organs to unite them as a single reproductive unit (i.e., one penis and one vagina). However, looking beyond this purely biological condition, NNL theorists likely would want to urge that “organic sex” must also involve an organic personal and psychological dimension as well. So it might be the
case that genuinely “organic” intercourse must issue from naturally arising desires and interests and cannot be forced, feigned, or artificial in any way.

As for the “unity” facet, we also might note how it relates to both dimensions of a person. Physically or biologically, we might note that to be properly unified in sexual intercourse, it takes more than the mere presence of complementary sexual organs. Instead, these organs must be brought together in the right way (i.e., uncontracepted penile/vaginal intercourse) and not employed in a wrong way (i.e., masturbation, anal or oral intercourse, etc.). Psychological or personal unity, on the other hand, might indicate the need for mutually shared aims and purposes to underlie the act of biological union. Here NNL theorists note the requirement that “there must be a commitment to a stable personal relationship suited to acts of this sort (in other words, marriage”).

Bringing these two parts back together, we have the concept of organic unity. Robert George and Patrick Lee describe how this concept, in turn, figures into an explanation of the bases for both WPT and SPT.

In the case of the sexual act of a married couple, their act of physically or organically becoming one (organic unity) is the common good, the shared pursuit of which (unity of action) also brings about or enhances their interpersonal unity (unity of persons). But if the participants in a sexual act do not become physically or organically one, then, whatever goods they may be seeking as ulterior ends, their immediate goal is mere pleasure or illusory experience.

WPT is explained, then, by the fact that the organic unity of marital sexual acts forms a common good realizable as an intrinsic aspect of the act. SPT, on the other hand, is explained by the fact that, absent the common good of organic unity, no other good is possible in a sexual act. Hence, any pursuit of sexual intimacy that fails this necessary

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121 George & Lee (1999, p. 175).
condition of uniting the partners organically (both biologically and personally) will also fail to realize any basic good.

b. Representing the NNL Argument for SPT in Numbered Steps

The structure of the NNL argument for SPT can be represented in numbered step format:

(1) Any sexual act that fails to organically unite the partners both biologically and personally is incapable of realizing any basic good.

(2) Non-marital sexual acts fail to organically unite the partners therein across both biological and personal dimensions.

(3) Therefore, non-marital sexual acts, even when undertaken within a traditional marriage, cannot realize any basic good for the participants therein; hence, such acts are always unintelligible and valueless expressions of sexual intimacy.

Understood properly, this conclusion issues its own practical principle: since non-marital sexual acts are incapable of organic unity and, hence, of realizing any basic good, there is no good reason for an agent to choose to participate in such acts.

3. NNL and the Moral Thesis (MT)

Despite their ability to make intelligible a person's pursuit of marriage and avoidance of non-marital sexual acts, neither WPT nor SPT, by themselves, morally prescribe specific actions, such as "one ought to marry" or "one ought not perform non-marital sexual acts". Commands of this kind require a moral, not just a practical, principle to underwrite their prescriptions. In MT's case, a principle of respect for basic goods performs just this supportive function.

a. The Principle of Respect for Basic Goods

Though single in nature, I will analyze the principle of respect for basic goods as dual-pronged. Both prongs are embodied in what is arguably the clearest statement of the full
principle: “one may never intend to destroy, damage, impede, or violate any basic human good, or prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good”. First, in what I call the harm prong, the principle of respect requires always refraining from acting in ways that disrespect a given basic good by “harming” it in one way or another (I use the term “harm” here for lack of a better grouping term to describe an action that destroys, damages, impedes, or violates a basic human good.). Second, in what I call the debasement prong, the principle holds that one may never “debase” the intrinsic superiority of basic goods by preferring “an illusory instantiation of a basic human good to a real instantiation of that or some other human good”. As George and Lee put it, “our choices ought to be in accord with a respect and love for real human goods, precisely because such goods are intrinsic aspects of the well-being and fulfillment of human persons – ourselves and others.”

These two prongs, in turn, strongly inform the NNL tripartite taxonomy of “what sex can be”: (1) an instantiation of the good of marriage [two-in-one-flesh communion], (2) an act that harms the good of personal integrity by separating the “person as bodily” from the “person as intentional agent” and instrumentalizing the

124 It should be noted here that there is an ambiguity in the language of NNL at times when discussing basic goods. Some times its defenders speak as if non-marital sexual acts damage “what is good for a person” and at other times as if they damage “the good of marriage or personal integrity itself”. In an independent discussion, George seems to indicate that the only kind of good that can provide a reason for acting is the first kind (i.e., a good for someone) – cf. George (1999, p. 21). I will not bother here with trying to sort this out (despite the fact that it might further problematize the NNL theses), but shall instead argue that, on either reading, the NNL theses are not justified.
125 Finnis (1995, p. 31). It is worth noting again that, because of the NNL commitment to the incommensurability of basic goods, one does not disrespect a basic good by choosing to pursue another basic good; hence, debasing occurs only when one’s action constitutes a choice for something that is not a basic good to something that is.
former in service to the latter\textsuperscript{128} [self-alienation], or (3) a preference for a merely illusory experience of interpersonal unity rather than the real and basic good of marital union [illusion]. For NNL, then, non-marital sexual acts always constitute an act of the second (self-alienating) or third (illusory) kind.\textsuperscript{129}

The way in which non-marital sexual acts can disrespect the basic good of personal integrity (which, on Finnis’ list, is an aspect of the good of practical reasonableness) involves reference to a notion of wrongful “instrumentalization”.

Consider the following two statements of this concept:

For want of a common good that could be actualized and experienced by and in this bodily union, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.\textsuperscript{130}

In choosing to perform non-marital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies and those of their sexual partners (if any) as means or instruments in ways that damage their personal (and interpersonal) integrity; thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other non-marital sex acts.\textsuperscript{131}

According to NNL, non-marital sexual acts disintegrate persons into two parts – the body and the consciously experiencing self – and then subsequently facilitate the use of the one

\textsuperscript{128} Ibid, p. 162.

\textsuperscript{129} Interpreting the precise NNL commitment here is difficult because, at times, its defenders seem to suggest that the “or” in this sentence is inclusive between the second and third option – that it might be the case that all non-marital sexual acts always violate both of these goods. However, George and Lee’s 1999 paper, perhaps the most focused NNL treatment of this specific matter, analyzes sex into the three kinds described above and seems to imply that each non-marital sexual act violates either one good or the other, where the “or” is exclusive. One possibility is for a layered reading that proposes that all non-marital sexual acts involve instrumentalization and disintegration (and hence harm to the good of personal integrity) and some go still further in debasing the good of marriage as well. Whatever the case may be, I will, for the purposes of giving the NNL theorists the most charitable reading, understand the claim here to be the exclusive “or” since it issues a weaker burden of proof.

\textsuperscript{130} Finnis (1995, p. 29; original emphasis).

\textsuperscript{131} George & Bradley (1995, p. 302).
(the body) as a mere instrument of the other (the consciously experiencing self). To make the putative harm to personal integrity more concrete, consider the following application of NNL concepts to masturbation:

The masturbator treats his body as a mere means in relation to a feeling, a feeling regarded not in its reality (as a bodily act), but simply in its aspect as feeling. And so the body is regarded as a mere extrinsic means in relation to the goal of a certain type of feeling. The body is regarded as something outside the self, not as an aspect of the subject, and so as a mere object.

Importantly, NNL views all non-marital sex acts as masturbatory in character and in precisely the way described here. For NNL, when sex disrespects basic goods in this way — by harming personal integrity — it becomes an instance of self-alienation.

The good of marriage is violated whenever actions or judgments debase its intrinsic superiority to non-marital sexual acts. This occurs primarily and most obviously whenever non-marital sexual acts are pursued as if they might realize genuine human goods. Since one either could have engaged in a marital sex act, or read The Canterbury Tales, or pursued any number of other genuine goods, one’s choice to engage in a non-marital sexual act fails to respect the good of marriage. When sex disrespects basic goods in this way — by debasing marriage — it takes the form of an illusion.

One obvious upshot of NNL’s analysis is that one should never actually engage in non-marital sexual acts, whether with homosexual or heterosexual partners, as doing so always involves one in either illusion or self-alienation. However, Finnis extends the analysis even further, going so far as to declare that one is “conditionally willing” non-

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132 I should clarify one potential source of confusion here. In discussing MT, NNL sometimes neglects to properly qualify its descriptions of how certain sexual acts might use the body as a “means or instrument”. Cf. George & Bradley (1995, p. 302). The problem is not simply that the body is used in such acts as a means or instrument; presumably, one could argue that the body is used similarly as a means during play, bodily life, etc. Rather, it emerges in acts that use the body as a mere means without participating in any basic good.

traditional sex acts unless "one regards those kinds of acts as excluded by reason (i.e., as immoral)."\textsuperscript{134} This entails that even limiting oneself strictly to "sexual acts of the reproductive type" within the confines of a traditional marriage is insufficient for meeting the demands of sexual morality. If one does not, in addition to refraining from non-marital sexual acts, also and always judge through the use of reason alone, \textit{all} such acts to be without value, then one both debases the good of marriage generally and incapacitates the possibility of genuine marriage in one's own case.\textsuperscript{135} In effect, then, the upshot of this further condition is that one violates the good of marriage if (1) one ever intentionally proceeds toward orgasm outside of penile-vaginal intercourse with one's lifelong spouse, or if (2) one ever even thinks that such orgasms are not always forbidden by reason alone.

\textbf{b. Linking SPT to MT via the Principle of Respect for Basic Goods}

By combining the NNL principle of respect for the basic goods with SPT, we can now appreciate the basis for MT, as represented in the following argument:

(1) If a sexual act does not contribute to and realize the good of marriage, it either involves an agent in self-alienation (disrespecting the basic good of personal integrity) or illusion (disrespecting the basic good of marriage). [THE NNL TAXONOMY OF "WHAT SEX CAN BE"]

(2) Non-marital sexual acts, even when undertaken within a traditional marriage, \textit{cannot} contribute to or realize \textit{any} basic good for the participants therein, including the good of marriage. [SPT]

(3) Therefore, non-marital sexual acts either involve an agent in self-alienation or illusion and, hence, always disrespect a basic human good. [FROM 1 & 2]

(4) Moreover, failing to fully appreciate and assent to this fact (#3) entails a conditional willingness for human participation in a damaging act and this failure itself always disrespects a basic human good. [CONDITIONAL WILLINGNESS]

\textsuperscript{134} Cf. Finnis (1997, Footnote 106; emphasis added).
\textsuperscript{135} This is because sexual morality, for the NNL theorist, is not solely a matter of choice and action, but also a function of right judgment and a proper appreciation of the dictates of practical reason and moral principle.
(5) One may never intend to destroy, damage, impede, or violate any basic human good, OR prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good. [PRINCIPLE OF RESPECT FOR BASIC GOODS]

(6) Therefore, it is always immoral to engage in non-marital sexual acts, or even conditionally to will them, since this always disrespects a basic human good.

MT is the strongest (purely) moral claim among the three theses and also is the fullest extension of NNL thinking into sexual moral inquiry. What remains to be examined, prior to critically evaluating the three theses already considered, is how the defenders of NNL move from these ethical judgments to a conclusion regarding their political import.

4. NNL and the Political Thesis (PT)

For many, the three previous theses, even if accepted in full, would have few, if any, implications for a political body. After all, according to a doctrine of neutrality widely accepted in various liberal, libertarian, and other circles of political philosophy, the legitimate authority of the state does not extend to efforts to promote the good. So the fact that marriage is a good way to live, or that non-marital sexual acts are immoral, are never sufficient by themselves to motivate state promotion or discouragement. NNL summarily dismisses this doctrine of state restraint. In their view, the very purpose of government is to promote the good, both by enforcing those moral principles and norms dictated by reason and by securing the common good of the community. Hence, NNL sees the previous three theses as supporting a further political thesis — namely, that the value of marital sexual acts, possible only within traditional marriage, combined with the detrimental character of non-marital sexual acts, gives the state sufficient reason exclusively to recognize and promote TCM. Here it will be helpful to consider briefly
certain NNL commitments regarding the purpose and limits of government, particularly with respect to its role as the moral supervisor of public space.

a. The Purposes and Limits of Government According to NNL

NNL understands the purpose of government to consist in securing and promoting the common good of the political community.¹³⁶ This common good, in turn, is claimed to be instrumental – “to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual [in that community] of his or her personal development”.¹³⁷ In other words, NNL sees the point of government as creating and/or managing the conditions necessary for persons to realize the basic goods – it is instrumentally valuable in facilitating what is intrinsically valuable, so to speak.

The common good, as such, places limits on legitimate state activity – the state cannot (justifiably) act in a way that would frustrate or damage the common good or violate “the moral principles and norms which natural law theory considers to be principles and norms of reason”.¹³⁸ However, NNL theorists might urge that, where all particular considerations make it prudent, government ought to take the further step of legislating and enforcing these principles and norms as much as possible.

These purposes and limits come together in the task of creating and managing a public realm that facilitates the leading of good lives, even if prudence recommends that it leave some private and consensual vices alone. Finnis characterizes this task as demanded by reason, summarizing it in the following way: “the political community’s

¹³⁷ Finnis (1980, p. 147).
rationale requires that its public managing structure, the state, should deliberately and
publicly identify, encourage, facilitate and support the truly worthwhile (including moral
virtue), should deliberately and publicly identify, discourage and hinder the harmful and
evil, and should, by its criminal prohibitions and sanctions (as well as its other laws and
policies), assist people with parental responsibilities to educate children and young
people in virtue and to discourage their vices..., though not necessarily to "direct people
to virtue and deter them from vice by making even secret and truly consensual adult acts
of vice a punishable offence against the state's laws". 139

The NNL case for PT is fairly straightforward then. If, as WPT, SPT, and MT
claim, marital sexual acts are intrinsically valuable and non-marital sexual acts are
intrinsically valueless and, indeed, always disrespectful of the basic goods, then any
government acting for the common good will have good reasons to publicly encourage
the former and discourage the latter. At the very least, NNL theorists will urge that a
legitimate state "ought not to institutionalize (or otherwise support or promote) same-sex
or other intrinsically non-marital sexual relationships or recognize 'marriages' between
people of the same sex or others who cannot consummate marriage as a one-flesh
communion". 140

However, many NNL theorists 141 would join Finnis in defending the exclusive
social and legal institutionalization of traditional marriage on the grounds that "marriage
deserves a kind and degree of legal support which other partnerships do not". 142 In
support of this claim, NNL theorists might argue that, if the state is to discharge its

142 Finnis (1997, p. 102, fn. 17).
instrumental obligation of creating the conditions whereby citizens can realize the basic goods, they first must create the conditions whereby citizens can understand and appreciate the nature and value of these goods. With respect to the good of marriage, then, this implies that the state must foster a public culture (and "critically, a legal culture") that "promotes and supports a sound understanding of marriage, both formally and informally" and makes it much easier for large numbers of people to appreciate "the true meaning, value, and significance of marriage". Making traditional social marriage the state's exclusively preferred form of civil marriage is a legitimate and important step in creating a publicly supportive culture.

b. Representing the NNL Argument for PT in Numbered Steps

We can clarify the simple structure of the NNL argument for PT by representing it in a numbered step format:

1. The purpose of government is to secure and promote the conditions necessary for persons to realize the basic goods.

2. Securing and promoting the conditions necessary for persons to realize the basic good of marriage requires (a) publicly promoting only sexual acts that can realize that good (i.e., marital sexual acts), while (b) publicly discouraging all non-marital sexual acts, which even within a traditional marriage, cannot realize any basic good for the participants therein and always disrespect a basic good.

3. A sound and important way of publicly promoting marriage and discouraging non-marital sexual acts is for the state exclusively to recognize and promote TCM.

4. Thus, the state has sufficient reason exclusively to recognize and promote TCM.

We can summarize the NNL argument for TCM, then, as an ahistorical, intrinsic value defense of the institution. It is *ahistorical* in that it appeals not to the historical pedigree of traditional marriage (natural, social, or civil), but instead to its philosophical caliber –

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namely, its conformity with the dictates of natural law and its injunction to pursue genuine basic goods. It is an *intrinsic value* defense in that the value it attaches to TCM is not merely instrumental, but rather the intrinsic value of the basic good of marriage. With an account of all four theses now in hand, we are in a position to critically evaluate the NNL case for TCM.

C. Evaluating the NNL Case for Traditional Civil Marriage

The NNL account of marriage and sexual morality is dense, complex, and, at times (at least to an outsider) quite circuitous. It employs and places great weight on a number of distinctions, abstract principles, concepts, and terms that are not frequently encountered in philosophical discourse outside of the natural law tradition. To some working with more mainstream contemporary philosophical commitments, these facts taken together will likely encourage a rather hasty dismissal of the position, either through the blunt and mechanical application of competing principles (e.g., neutrality, equality, etc.) or through an overly narrow concentration on one or two particular claims that appear to be so outrageous to the non-NNL reader as to warrant wholesale dismissal of the view.

In my judgment, this likely reaction would be quite unfortunate. The NNL account, despite its idiosyncrasies, has much to offer the patient reader, even if she finds herself puzzled at every turn. In short, it is a serious account that calls for a serious response – one that is calm, measured, careful, and thorough.

My task thus far has been to put myself in a position to offer such a response and to do so in a way that fairly represents the strongest version of each argument and thesis. In particular, I have sought to interpret and reconstruct NNL in a way that clarifies the central commitments of the view and their relation one to another. I now want to shift
from interpreting to evaluating each of the four theses of NNL sexual morality. My critical strategy will be staggered and cumulative. After raising two general worries regarding the broader NNL orientation to sexual moral inquiry that weaken the initial motivation for all four theses, I develop particular objections to each thesis in order of weakest to strongest. My aim is to undercut each thesis both on its own and by undercutting the weaker theses on which it relies.

1. Some General Remarks on NNL Sexual Morality

The general strategy of the NNL account of sexual morality involves drawing moral distinctions that could provide a basis for legal distinctions between sex acts. Many critics would undoubtedly want to cut off their examination of NNL upon learning this, content in their prior conviction that basing legal distinctions on such controversial moral distinctions violates substantive constraints on political deliberation, such as neutrality. This is not how I will approach the critical task here. I will not impose any prior substantive constraints on NNL theorizing, but instead will point to the unsoundness of its moral distinctions and also its violation of formal constraints like consistency, universality, economy/efficiency/effectiveness, etc. In other words, I will argue that NNL cannot make its own case even on its own terms and, what is worse, that the very commitments of NNL actually advise against TCM.

That said, I do want to note at the outset two general features of the NNL account that warrant a degree of wariness. First, consider the highly intellectualized and abstract conception of sexual morality with which it operates. As we have seen, sexual morality

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for the new natural lawyer is not simply a matter of behaving properly in one's sexual pursuits. Rather, if the NNL idea of conditional willingness is to make sense, it must be because the morality of one's pursuits is itself a partial function of believing and judging rightly and in two directions: (1) one must never assent to any false beliefs about sexual morality or act on any improper motives, and (2) one must always assent to correct beliefs about sexual morality and act on proper motives. In other words, behaving in all the right ways is never sufficient for satisfying the threshold dividing moral from immoral sexual status. If one does not always and at the same time judge rightly about sexual morality, then, according to NNL, one acts immorally and damages basic goods. As such, one might well question the relevance of this highly intellectualized account to actual ordinary persons and legislative bodies.

Secondly, we can note the peculiar way in which NNL approaches the task of sexual moral inquiry. One might think that the way one would go about locating basic goods relevant to sexual activity would be to start with a broad quasi-anthropological investigation of the wide variety of sexual practices in the world. Indeed, such an assumption seems warranted in light of Finnis' claim that the "disciplined acquisition of accurate knowledge about human affairs" is "an important help to the reflective and critical theorist in his effort to convert his own (and his culture's) practical 'prejudices' into truly reasonable judgments about what is good and practically reasonable". One might then take the data derived from such an investigation and subject it to analysis, looking for larger patterns that might suitably simplify an undoubtedly complicated picture. At that point, one would be better positioned to reflect on the basic goods available in different practices. The task could even be guided by a prior

146 Finnis (1980, p. 17).
conceptualization of sexual morality, so long as this is not rigidly retained when it does not fit well with the facts on the ground, a judgment that even Finnis seems to share:

There is thus a movement to and fro between, on the one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions (using all appropriate historical, experimental, and statistical techniques to trace all relevant causal interrelationships) of the human context in which human well-being is variously realized and variously ruined.\(^{147}\)

Nothing turns precisely on the details of method here; I am more interested in noting a broader orientation to inquiry that one could presumably assume largely from the philosopher's armchair – an orientation that does not start with narrow and immutable assumptions (possibly inherited from religious or other doctrines) about the basic good(s) of sexuality, but which rather is, from the beginning, open to many possibilities.

NNL does not assume this orientation to sexual moral inquiry. Rather, it begins from what even one "friend" of the view concedes is a "heavily fortified definitional base"\(^{148}\) and then, taking that as a sort of non-negotiable Archimedean point, proceeds not to inquire genuinely into, but instead to judge other practices as unintelligible and immoral based on the standards assumed in its definitional base. Macedo notes the fundamental problem with this methodology:

It certainly does not settle matters to define the relevant good as the "marital good," and in turn to define the marital good as uncontracepted, one-flesh union in a monogamous, lifelong, heterosexual relationship. This definition of the basic good relevant to sexuality simply begs the crucial question. If it turns out that there are other forms of sexual relations in which sexual acts can be integrated into larger projects, and in which the sexual acts intrinsically embody and realize some real goods in common, then these other sexual acts need not be examples of self-disintegration, for there are noninstrumental reasons for choosing such acts.\(^{149}\)

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\(^{147}\) Ibid.


Macedo’s criticism suggests that NNL, if it is not to continue to beg the crucial question of sexual moral inquiry, must change its orientation to the task at hand. It must be willing to go out into a world filled with a wide variety of sexual practices, unarmed with its definitional base, and see what it finds.

Of course, this sort of open, searching, good-faith approach to sexual moral inquiry might come at a hefty price for NNL – namely, were new natural lawyers to adopt such an orientation, it would leave open, in principle, the possibility of discovering other goods that can be realized in sexual acts that it presently judges to be non-marital. However, the costs of not doing so arguably are higher. For not only does the present mode of inquiry prove philosophically unsatisfying by begging the crucial question(s), it also establishes a dangerous argumentative precedent that threatens to undercut other (and arguably more central) NNL commitments.

For example, and in advance of the more particular objections I will raise against it, consider how the question-begging character of the NNL argument for MT creates space for others to mimic its strategy in the service of theses antithetical to those held by new natural lawyers. Here it will be useful to recall the precise NNL argument for MT:

1. If a sexual act does not contribute to and realize the good of marriage, it involves an agent either in self-alienation (disrespecting the basic good of personal integrity) or illusion (disrespecting the basic good of marriage). [THE NNL TAXONOMY OF “WHAT SEX CAN BE”]

2. Non-marital sexual acts, even when undertaken within a traditional marriage, cannot contribute to or realize any basic good for the participants therein, including the good of marriage. [SPT]

3. Therefore, non-marital sexual acts either involve an agent in self-alienation or illusion and, hence, always disrespect a basic human good. [FROM 1 & 2]
(4) Moreover, failing to fully appreciate and assent to this fact (#3) constitutes a conditional willingness for human participation in a damaging act and this failure itself always disrespects a basic human good. [CONDITIONAL WILLINGNESS]

(5) One may never intend to destroy, damage, impede, or violate any basic human good, OR prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good. [PRINCIPLE OF RESPECT FOR BASIC GOODS]

(6) Therefore, it is always immoral to engage in non-marital sexual acts, or even conditionally to will them, since this always disrespects a basic human good.

In my judgment, this argument has two significant features. First, premises 1 and 2 are the only premises with content specific to marriage and sexual morality. Premise 3 is simply the conclusion of a modus ponens argument and depends for its truth on premises 1 and 2, while premises 4 and 5 formulate general principles that apply to all the basic goods. The second significant feature of the argument is that premises 1 and 2 do precisely what Macedo warned against – namely, they, in essence, “define the relevant good as the ‘marital good,’ and in turn to define the marital good as uncontracepted, one-flesh union in a monogamous, lifelong, heterosexual relationship’. Premise 1 constructs a taxonomy of what sex can be which could be true only if the relevant good is presumed to be the narrowly-defined version on offer from NNL, while premise 2 is equally dependent on the two question-begging definitions Macedo identifies. Put together, these two features of the argument for MT create a ready template for defending any number of possible theses, including many that NNL should find very troubling.

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150 Even if NNL sufficiently defended all of its theses about sexual morality and marriage, this taxonomy likely would be incomplete. One obvious additional category of what sex can be is a form of violence or harm (e.g., rape). Acts of this form cannot be reduced without remainder to acts of self-alienation or illusion – e.g., any description of rape that understands its moral character to be fully captured by the category of self-alienation either is radically impoverished or operating with an implausibly loose conception of self-alienation. There may well be other categories as well, but I will not pursue this point any further here.
Consider, for example, how this template might be used by those advancing an alternative to the NNL conception of the purported good of "religion" or, as it is also described, "harmony with the ultimate source of reality". Here the NNL taxonomy of what sex can be – participation in a basic good, self-alienation, or illusion – actually mirrors quite nicely the taxonomy many skeptics have constructed for religious belief and practice. Religious skeptics often argue that religion incites self-alienation (e.g., Ludwig Feuerbach) or illusion (e.g., Sigmund Freud) and only the acceptance of a universe without gods constitutes a truthful good-realizing engagement with the world. Within such a framework, it follows that instantiating the good of harmony with the ultimate source of reality requires rejecting the actual existence of gods. From these initial premises, combined with the modus ponens inference and two general NNL principles, skeptics might defend their own variant of MT:

**Skeptical Thesis (ST):** It is always immoral to participate in religious acts, or even conditionally to will them, since doing so always shows disrespect for basic human goods.

ST perceives religious acts to be intrinsically incapable of actualizing true human goods and, moreover, to always damage the good of knowledge and harmony with the ultimate source of reality. Its defenders might, aroused by Finnis, emphasize that illusion and superstition, readily found in religions, are "evils that no one should wish for, or plan for, or encourage in himself or others". They might, inspired by George and Lee, write papers entitled, "What Religion Can Be: Alienation, Illusion, or Harmony with the Godless Universe". They might even seek to advance their own version of the political thesis, holding that the state has sufficient justification for awarding special legal status

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and benefits to non-believers as a way of promoting the basic goods of knowledge and harmony with the ultimate source of reality.

Now I presume that NNL will want to resist ST, as the vast majority of new natural lawyers also accept the general religious and moral framework of the Roman Catholic Church. However, it is not clear how they could go about doing so without calling attention to the question-begging character of their own argument for MT. Since the form of the argument for ST, like that for MT, is valid, and since they cannot challenge the truth of premises 3-5 in the skeptic’s argument for ST (as again each is either a valid deductive inference or a general principle affirmed in the argument from MT), new natural lawyers are left to try to undermine premises 1 and/or 2.

(1) If a religious act, belief, or pro-attitude does not contribute to and realize the basic good of harmony with the ultimate source of reality, then it involves an agent either in self-alienation (disrespecting the basic good of personal integrity) or illusion (disrespecting the basic goods of knowledge and harmony with the ultimate source of reality). [THE SKEPTIC’S TAXONOMY OF “WHAT RELIGION CAN BE”]

(2) Religious acts, beliefs, and pro-attitudes which presume the existence of some deity or other cannot contribute to or realize any basic good for the participants therein, including the good of harmony with the ultimate source of reality. [THE SKEPTIC’S VERSION OF SPT]

Against these premises, new natural lawyers understandably might want to echo Macedo in noting that it will not do to make “harmony with the ultimate source of reality” the defining and prerequisite good of all religious acts, beliefs, and pro-attitudes and then in turn to define that good as the full and uncompromised acceptance of the non-existence of deities. But in making this quite reasonable charge, NNL only would reveal itself to be uncharitable if it did not in turn relax its own attachment to the heavily fortified definitional base underlying premises 1 and 2 of MT.
Alternatively, new natural lawyers might marshal anecdotal or statistical evidence regarding the prima facie good-realizing properties of various religious acts, beliefs, or pro-attitudes. For example, they might note studies which locate some positive correlation between religious belief/practice and the good of health and argue that such goods obtain even despite the skeptic's insistence that skepticism/atheism is a prerequisite to a religious act's realizing any other good, including health. But since new natural lawyers do not seem open to considering similar kinds of evidence to be relevant to the status of premises 1 and 2 of MT (e.g., it is doubtful that new natural lawyers would be moved to give up [or even revise] one of their four theses were well-designed studies to provide strong statistical evidence that associated improved health outcomes with masturbation or oral sex), they cannot reasonably expect the skeptic to be moved by either anecdotal or statistical evidence.

A final class of arguments that new natural lawyers might look to in trying to resist ST is philosophical in nature. For example, new natural lawyers, typically already inclined toward the Thomistic "ways", might attempt to construct or employ arguments for the existence of God. However, even here, the skeptic can borrow a page from NNL itself. In addition to noting familiar potential problems with such arguments, skeptics can simply further fortify their definitional base underlying premises 1 and 2 by gerrymandering what they mean by "gods" or by attaching ad hoc conditions to the good which would rule out precisely the kinds of religious acts which really bother skeptics. They might, for example, make an impersonal and fairly powerful creative force consistent with being in harmony with the ultimate source of reality, but rule out any acts,

153 E.g., the premises of such arguments are false, their conclusions do not follow, their appeals to reason alone support at best the existence of an impersonal and fairly powerful creative force and not the omni-God of classical theism, etc.
including the vast majority of religious acts, which further personify or perfect that force beyond what reason and evidence alone can support. Or alternatively they might construct their own carefully-designed condition akin to "organic unity" which has the effect of legitimating exactly the kinds of acts, beliefs, and pro-attitudes toward and about the universe that they favor and delegitimating those they oppose. Other options may well be available as well, but the basic point should be clear – the new natural lawyer has little (and uncharitable at that) ground to stand on in challenging this kind of definitional fortification since he so readily makes use of this general strategy in defending MT and other NNL theses.

To summarize, and to put the general problem with the NNL orientation to sexual moral inquiry in a nutshell: the new natural lawyer is left with two options when faced with arguments like ST. He can (1) challenge the question-begging character of the argument for ST and numerous other arguments which are opposed to NNL commitments (and hence give up any claim to question-begging in his own account), or (2) accept the question-begging of the argument (and give up any grounds for challenging ST and other theses undermining core NNL commitments). At the end of the day, the general worry presents NNL with two persuasive reasons for reorienting its approach to sexual moral inquiry – (1) such a shift would have the effect of making NNL both more philosophically satisfying, and (2) it would prevent a dangerous precedent of question-begging from being established.

With these two general problems for NNL noted\textsuperscript{154}, I turn now to evaluating each of the four theses of NNL sexual morality.

\textsuperscript{154} Of course, one also could raise additional general problems for NNL, such as with the quite profound and extensive ramifications of its immediate appeals to the self-evident character of its list of basic goods.
2. Evaluating the Weak Practical Thesis

In this section, I argue that an independent investigator, not already committed to the "heavily fortified definitional base" of NNL, would have good reasons for excluding marriage from the list of basic goods based on the very criteria NNL supplies. As far as I can tell, no earlier critics of NNL have used the particular point of entry that I want to engage here. Indeed, most have tended even to accept that marriage is a basic good and, from that point of agreement with NNL, argue that this good is not exclusively available to married heterosexual couples. Oddly enough, the nearest I can come to a prior partner in the more fundamental criticism I want to pursue here is Professor Finnis himself in his impressive 1980 treatise on (new) natural law theory.

Given the vigor with which Finnis has defended marriage as a distinct basic good from the mid-1990’s on, and the overall importance he seems to attach to it in his several articles from this period, one might be surprised to learn that he does not place marriage on his original list of basic goods. Moreover, in reflecting on sexual intercourse as a

So, for example, one could note that, absent a unifying explanation of the good-making property of fundamental goods (e.g., they successfully realize 'near-universal', 'near-unavoidable' goals - cf. Sher, 1997, Ch. 9), no resources exist for resolving disputes over which candidate goods to include on that select list. Thus, if two persons disagree about a good’s claim to being basic, there are no independent resources for determining who is right – one either "perceives" one way or the other (and these perceptions will be strongly influenced by any number of wide-ranging contingent factors). This has the philosophically unsatisfying result of leading us too quickly into a discursive impasse. However, this kind of criticism, unlike the second general problem (bringing together a number of quotations from Finnis – cf. footnotes 146 and 147), cannot so readily be put into terms and aligned with commitments already accepted by NNL. Hence, my concern to argue against NNL from within its own view recommends leaving unaddressed these and other general worries.

155 Cf. Macedo (1995, p. 330) and Koppelman (1997, pp. 46-50). Both Macedo and Andrew Koppelman construct a version of what has come to be called the “sterility argument” (Weithman, 1997), which attempts to discredit the force of NNL’s good of marriage by showing either that it implies (unacceptably) that sterile heterosexual couples cannot achieve the good (and hence act unintelligibly and immorally in their sexual acts) or that at least some non-marital sexual acts can also achieve this good. This argument, then, does not fundamentally and unconditionally challenge the attempt by NNL to include marriage as a basic good in the first place. It should be noted that Gareth Moore has objected to the inclusion of marriage as a basic good in a way different from me, by challenging the coherence of the “two-in-one-flesh” metaphor (what I have here described as the concept of organic unity) (2001, pp. 224-26). Richard Posner (1999, p. 77; n. 43) and John Corvino (2005, p. 518) have also endorsed this strategy.
“human action, pursuit and realization of value”, Finnis claims that it may be “play, and/or expression of love or friendship, and/or an effort to procreate”, but never even hints at the possibility that such pursuits might also realize (let alone as the prerequisite to the others) the later appended good of two-in-one flesh communion.\textsuperscript{156} What is more, “marriage” does not so much as receive a single entry in the index to that work.\textsuperscript{157} Still yet, Finnis considers and explicitly rejects Aquinas’ list of basic goods on which marriage appears.\textsuperscript{158} Reflecting on whether his original seven entries – life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion (harmony with the ultimate source of reality) – constitute an exhaustive listing of basic goods, he claims:

There are countless objectives and forms of good. But I suggest that these other objectives and forms of good will be found, on analysis, to be ways or combinations of ways of pursuing (not always sensibly) and realizing (not always successfully) one of the seven basic forms of good, or some combination of them..., it seems to me that those seven purposes are all of the basic purposes of human action, and that any other purpose which you or I might recognize and pursue will turn out to represent, or be constituted of, some aspect(s) of some or all of them.\textsuperscript{159}

Taken together, these several facts and claims, drawn as they are from the foundational philosophical work of new natural law theory, are hardly promising indications that marriage forms a distinct basic good that “needs no demonstration” and around which turns all matters of sexual (im)morality.

I raise this not to “catch” Finnis in a contradiction, nor to claim that he is forever beholden to all and only those goods given in his original list. Rather, taking inspiration

\textsuperscript{156} Finnis (1980, p. 86).
\textsuperscript{157} In fairness, the word “marriage” and the locution “husband and wife” do occur a few times in the book, but almost always in descriptive rather than normative contexts.
\textsuperscript{158} Ibid, p. 94
\textsuperscript{159} Ibid, pp. 90, 92; emphasis added.
from the early Finnis, I want to construct an objection to the later Finnis that employs a very sensible principle of legitimate augmentation to adjudicate marriage’s status as a good. This principle holds that any candidate additions to the original list of basic goods must be (1) extremely well-motivated and (2) bear a strong family resemblance to the original members of the list. Marriage is not such a candidate. It fits poorly within the original list and fails at least one necessary criterion for inclusion. It is arguable that marriage is neither “self-evidently” nor “intrinsically” a basic good\(^{160}\); at the very least, the fact that neither St. Augustine\(^{161}\) nor the early Finnis understood it this way gives one room for pause. But what is absolutely undeniable is that marriage (as NNL understands it) is far from being “open-ended”.

It is worth taking a closer look at the variety of ways in which marriage as a purported good fails the necessary condition of being “open-ended”. This failure is particularly palpable and striking when NNL marriage is evaluated alongside the other seven basic goods with respect to how well it satisfies several dimensions of this condition:

(1) Whereas all the other goods can be participated in to some degree throughout a life, including early in childhood, NNL marriage can only be participated in after puberty (since only then is one capable of performing sexual acts of the reproductive type and thereby consummating and actualizing the good of marriage).

(2) Whereas all the other goods can be participated in spontaneously and without formal barriers, NNL marriage requires negotiating a formal and narrowly-defined agreement and its concomitant transaction costs prior to being realizable.

\(^{160}\) This is a difficult matter to determine conclusively, since the way in which Finnis and other new natural lawyers use these terms (cf. footnote 96) rules out many of the criteria by which one might test their claims.

(3) Whereas all of the other goods can be "participated in ... in an inexhaustible variety of ways," NNL marriage can only be realized in the narrowest of ways. Consider, for example, the marked contrast between NNL marriage "as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type" with Finnis' description of "the common good in play relationships" as involving a 'good play of the game' (in a broad sense of 'game').

With respect to each of the three dimensions of being open-ended, NNL marriage radically underperforms the seven basic goods originally identified by Finnis. The failure of NNL marriage to satisfy this condition for membership as a basic good provides conclusive reason for excluding it.

Moreover, marriage would be entirely anomalous amongst the basic goods for another reason – namely, that it would be the only good which is itself claimed to be an irreducible compound of other basic goods (i.e., procreation [the good of life-in-its-transmission] and friendship). No other basic good has this conjunctive character and it is not difficult to surmise why – the basic goods are supposed to be the basic atomic elements of practical reason. Once a good is shown to consist in multiple basic goods, there is no explanatory or justificatory need to make the larger compound itself a basic good. Just as we would resist adding a basic good of "sports" that claimed to be the irreducible compound of the goods of play and health, so too should we resist the addition of a compound good of "marriage".

162 Finnis (1980, p. 155; emphasis added).
165 One understandably might view with suspicion the deep asymmetries between marriage and the other original goods. In fact, given the radical differences in character between marriage and, for example, knowledge, one might very well question whether the later addition of marriage to the list of basic goods is less motivated by intellectual, than political, reasons, such as giving NNL a point of entry into the contemporary "culture wars" over marriage. Whatever motivation might have played into the late addition, though, it is not philosophically justified.
At the end of the day, marriage appears to be, at best, what the early Finnis describes as one of the “other purpose[s] which you or I might recognize and pursue” that turns out to “represent, or be constituted of, some aspect(s) of some or all of [the seven basic purposes]”. Unlike the seven actually basic goods, then, the good(s) of “marriage” are reducible and precisely to one or more of the real goods (e.g., friendship, transmission of life [potentially], etc). It does not form its own distinct basic good and cannot do the conceptual and normative work NNL wants it to do.

3. Evaluating the Strong Practical Thesis

The previous objection entails the falsity of WPT and severely undercuts any initial motivation for the remaining three theses. However, even if we grant that there is a distinct marital good to be found in certain sexual acts, it would not at all follow that this is the only good related to sexual activity (or the only gateway through which other goods may be accessed). In this part, I will challenge SPT by arguing that NNL defenders are simply wrong to conclude definitively both that (1) organic unity (i.e., sexual/reproductive, personal, and domestic complementarity) is a necessary condition for realizing any basic good in a sexual act, (2) pleasure is not a basic good (that could be instantiated in a number of possible sexual acts), and (3) other goods (including knowledge, bodily life, friendship, and play or skillful performance) cannot be realized independently in sexual acts, including what they refer to as non-marital acts.

a. Organic Unity is Not a Necessary Condition

The NNL case against treating organic unity as a necessary condition for realizing basic goods in sexual acts is simple and very similar to the case against including marriage in

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166 Finnis (1980, p. 92).
the list of basic goods - namely, that doing so would be entirely anomalous and
seemingly ad hoc. Two persons enjoying friendly conversation, or tossing a baseball
back and forth, do not need to achieve a state of organic unity requiring biological
complementarity in order to experience the goods of friendship and play. To hold, then,
that the same two persons would need to satisfy this peculiar condition to realize those
same goods in sexual acts would be quite strange and unmotivated. Indeed, no other
kind of activity requires anything like organic unity as a condition for instantiating basic
goods. So an appeal to nothing more than the formal constraint of consistency (i.e.,
treating similar cases similarly) can rule out viewing sexual acts as uniquely special
among action types and as requiring numerous ad hoc conditions, such as organic unity,
to be satisfied.

b. Pleasure Arguably is a Basic Good

Pleasure is an important good to which sexual acts are often immediately and naturally
linked - after all, for many people, the most intense and meaningful kind of pleasure is
realized precisely in sexual acts. And pleasure itself is an intrinsic good on many
hedonistic and pluralistic accounts of value. As such, there are plausible initial grounds

167 Of course, organic unity might be required for participating in the good of (natural) procreation, but this
does not translate into a requirement for every other good available in sexual acts.
168 One anonymous reviewer for the journal, Social Theory and Practice, has suggested that perhaps it
could be argued that organic unity is unique to the basic good of marriage. This suggestion raises two
questions: (1) has an argument of this kind been made and (2) if not, could one be made. In my own
extensive investigation of the new natural law account of sexual morality and marriage, I have been unable
to locate any argument for why organic unity should be understood and accepted as applying only to the
purported good of marriage and not to the seven originally listed goods. As for whether a successful
argument to this end could be formulated, it is not clear. One thing is certain, though - NNL would need to
offer an argument and not simply a stipulation. Moreover, given how dissimilar this would make the
purported good of marriage, and given how nicely it would immediately serve the theoretical interests of
the NNL account, any argument would need to satisfy very high standards of evaluation.
169 Among notable recent philosophers who have given such an endorsement to pleasure, we might note
Jeremy Bentham, John Stuart Mill, G.E. Moore (1903, p. 188), W.D. Ross (1930, p. 140), and William
Frankena (1973, pp. 87-88). Importantly, NNL proponents have, at times, seemed to suggest that treating
for thinking that something's being pleasurable, in this case sex, provides a reason that, whether conclusive or defeated, always at least makes intelligible attempts to pursue it. NNL denies this judgment and it does so sweepingly and without any hesitation. There are two distinct kinds of rationale put forward for NNL's exclusion of pleasure and I will critically evaluate each in turn.

The first rationale is that pleasure does not motivate action in the right way. George and Bradley describe this rationale for omission as such:

Pleasure can motivate people, but it does not provide a basic reason for acting. Pleasure motivates by appealing not to the practical intellect of the deliberating and choosing subject, but rather to some sentient part of the self. Thus, pleasure must be distinguished from basic human goods, such as knowledge and, as we argue, marriage, which provide rational (as well as emotional motivation). So, for NNL, pleasure cannot by itself constitute a proper and basic reason for acting in a particular way since it appeals only to the sentient and not the rational part of the self. George and Bradley are quick to clarify that their view does not entail that pleasure is intrinsically bad; rather, "its value depends on the moral quality of the acts in which pleasure is sought and experienced." The crux of the claim, then, is that pleasure is conceptually distinct from the basic goods, not because it is inherently bad, but because it is incapable of providing rational motivation for its pursuit.

There are at least two levels at which one might want to criticize this account of motivation and its assumptions about pleasure. We might begin by noting that a central presupposition of the account – namely, that there is a hard and fast division between reason and emotion – has come under considerable scrutiny in recent neurobiology.
According to Damasio, for example, this age old dualism is no longer tenable – any serious attempt to explain human rationality as distinct from human emotions will be thoroughly inadequate. While not treating this as a conclusive consideration, we might note that any rationale for excluding pleasure that relies heavily on their being just such a division warrants a certain amount of empirically-grounded caution.

A second presupposition of the account also seems problematic, though on philosophical rather than empirical grounds. Here I have in mind NNL’s rather casual (some might say simplistic) understanding of the nature of pleasure. According to NNL, pleasure is straightforwardly seen as a kind of experience that necessarily appeals only to the sentient parts of the self. But the simplistic model of pleasure is not the only account of pleasure, nor is it the most compelling. Attempting to weigh in on the debate regarding whether the defining and good-making properties of pleasure are experiential or non-experiential here would require too much of a tangent, but again a certain amount of skepticism about the success of the NNL claim is warranted here. At the very least, if NNL is committed to excluding pleasure via the “basic goods must motivate rationally” condition, then they owe us more explanation for why not one of the many accounts of pleasure, including those emphasizing the non-experiential dimensions of pleasure, can successfully meet such a condition. Simply saddling the inclusion of pleasure position with the least plausible account of pleasure will not suffice.

The second rationale for omitting pleasure as a basic good invokes the seductive character of pleasure. Unlike with the later inclusion of the good of marriage, Finnis has defended the exclusion of pleasure on these grounds since Natural Law and Natural

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Rights and has developed this defense further in his 1983 *Fundamentals of Ethics*.\(^{173}\) In both works, Finnis relies heavily on the famous “experience machine” thought experiment put forward by Nozick.\(^{174}\) The gist of the experiment, of course, is to challenge the belief that pleasure is the sole criterion of well-being by effectively giving one the choice to plug into a machine that could produce all the pleasurable experiences one wants for the rest of one’s life, but with the significant catch that none of these experiences will ever “really” happen or at least not by one’s own self-directed choices in the real world. One might have the experience of climbing Mount Everest, for example, but in reality one’s body will be hooked up to a number of high-tech experience-generating devices in a lab. Nozick (and Finnis) believe that, given the choice of whether to hook up to the machine for life or to altogether forgo the opportunity, one will and should resist hooking up at all.

The interesting philosophical question is probably not whether this is the right decision (for almost everyone, they get this right if there are really only those two options), but rather what it ultimately shows to be the case. At best, I will argue, it shows only that pleasure cannot be the *unconditional sole* criterion of a good life. Since we are not given the choice, at least in the original presentation of the experiment (and also in the way Finnis puts it to use), to hook up for a more limited period of time (e.g., an hour, a day, etc.), it cannot be used to support any more ambitious thesis than this.

However, it is possible to challenge even this more limited thesis about value. One might coherently (if not compellingly) argue that only pleasure that is associated with real, authentic, self-directed activities is valuable and that such pleasure is the sole

criterion of well-being. In other words, one might defend a conditional form of hedonism that understands authenticity to serve as a necessary condition for realizing what is good, rather than as a good in its own right. On such a view, Nozick’s experiment does not show that pleasure cannot be the sole criterion of well-being, but only that pleasure is not unconditionally the sole criterion of well-being. My point in raising this is not to defend such a view, but only to point out that Finnis might be unable to defend even the weakest thesis that might be taken from Nozick’s thought experiment.

However, Finnis clearly wants to use it in the service of a much more ambitious thesis – namely, that pleasure, in and of itself, never provides a good reason for doing anything. According to Finnis, then, the lesson to be taken from the experience machine is not to hook up at all, even for a brief period of time.

[W]e should warn anyone contemplating a limited period on the machine that he had better arrange in advance for someone else to unplug him. For anyone plugged into the machine is unlikely to be capable, de facto, of understanding the desirability of those goods of activity, authenticity and reality which give reason for unplugging; or, if he can in some sense understand those goods while submerged in his world of mere experience, he is unlikely to be motivated by them. Both our powers of intelligent discernment and our intelligent desire to act intelligently (i.e., for the sake of understood goods) are likely to be overwhelmed by the massively possessive experience of feelings, satisfactions, etc. Some such submerging of reason by passions is well-known to us in our own daily life, is it not? For Finnis, even a limited engagement with the experience machine is ill-advised, as it might lead to addiction or some other impairment or distortion of judgment.

However, this is clearly a bad argument if it is meant to support the extremely strong thesis that pleasure is, in itself, never a good reason for doing anything. As

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175 This is consistent with a remark that Finnis offers regarding the proper separation of basic values from their necessary conditions: “A sound brain and intelligence are necessary conditions for the understanding, pursuit, and realization of truth, but neither brainpower nor intelligence should appear in a list of basic values: knowledge is the relevant value.” Cf. Finnis (1980, p. 82).
176 Finnis (1983, p. 48; original emphasis).
Koppelman correctly notes, Finnis' argument here does not show that pleasure is not good in itself, but only something to be approached with caution and judgment.\textsuperscript{177} Thus, the second rationale for excluding pleasure is clearly insufficient for the required task.

Before turning to the next objection to SPT, we might note additionally that the NNL exclusion of pleasure, supported by either rationale, just does not feel right at the gut level—it runs directly contrary to the common experience of almost everyone.\textsuperscript{178} After all, and whatever pleasure turns out to be on a non-simplistic account, is it really likely to be the case that reference to the pursuit of pleasure never "makes intelligible any particular instance of the human activity and commitment involved in such pursuit".\textsuperscript{179} Would it really be unintelligible and wrong to prefer to be in the experience machine for five minutes rather than in a dentist’s chair or waiting in a lobby somewhere with nothing else to do? Do we really want to say that the person seeking the pleasure of a backrub or enjoying the sensations of warm sunlight is acting in a way that, quite literally, cannot be understood?\textsuperscript{180}

NNL might want to urge that a description of such ordinary and innocent activities as involving only the pursuit of pleasure is too thin; such activities and their attendant pleasures, it might be claimed, are usually integrated with other basic goods, such as bodily life or aesthetic awareness, or "into people's larger worthwhile

\textsuperscript{177} Cf. Koppelman (1997, fn 39).

\textsuperscript{178} Common sense and gut feelings are, of course, not conclusive. But if the problems noted above have left the NNL rationale staggering a bit, then perhaps these are sufficient for a knockout.

\textsuperscript{179} Finnis (1980, p. 62).

\textsuperscript{180} We could note, for example, the following counterintuitive implication of SPT—namely, that it treats as unintelligible the pursuit of a massage for pleasure, not to mention that a masseuse turns out to be the moral equivalent of a prostitute for NNL. Here the key criterion is given by George & Lee (1999, p. 166) [with certain words interchanged to make it applicable to the case of massage]: "With two parties: John uses Susan's body to obtain [personal] gratification. In that case her personal presence is irrelevant; that it is Susan, and not some other [masseuse], is irrelevant—is not essential—to the intentional action he is performing, which is obtaining gratification or pleasure."
projects”. Non-marital sexual acts, however, can (if the argument is to work right) never be integrated with other basic goods or into larger projects. So we find George and Bradley making the following distinction:

Chewing gum, rocking in a chair and taking a walk are examples of ‘innocent pleasures.’ For most people these activities present no hazard to any aspect of the person’s well-being... The important point is that in the activity of chewing gum, no existential separation of the bodily self and the consciously experiencing self is typically effected. In that activity, the body is not typically commandeered into the service of a project that is fully and accurately described (and, thus, morally specified) as producing pleasure, whether as an end in itself or as means to other ends. In other words, NNL wants to distinguish between two categories of pleasure – innocent and harmful (because disintegrative) – and claim that the pleasures of non-marital sexual acts always are properly placed in the latter category. Any other non-sexual pleasure that might serve as a compelling counterexample to the NNL account of pleasure (e.g., chewing sugarless gum) can then be safely placed in the former category.

However, the distinction between categories of pleasure cannot work in the way that NNL would like it to work. For either the kinds of pleasure can be determined a priori (and hence we can know for certain, at least according to the current way the distinction is drawn for NNL, that all non-marital sexual acts are of the harmful kind, but at the expense of having no empirical credibility) or they must be determined a posteriori (and hence we leave open the possibility that some non-marital sexual acts are not of the harmful kind). Unfortunately, the NNL account gets sloppy here and tries to work on both sides of the dilemma. It wants to claim (sensibly), on the one hand, that most non-sexual pleasures cannot be classified conclusively as innocent or harmful a priori; we need to fill in the abstract characterizations with what Macedo describes as a “more
‘existential’ understanding of what is actually going on in particular acts”. However, it wants, on the other hand, to be “far more categorical about sexuality”, claiming in advance and without any investigation into particular acts that all non-marital sexual acts are of the harmful type. Hence, the NNL treatment of the pleasures of non-marital sexual acts as harmful comes at a hefty price – namely, the sacrificing of all empirical credibility. NNL merely assumes without argument what it needs to support with compelling data.

If my arguments have been compelling, then it would follow that NNL has not successfully demonstrated that pleasure is not a basic good or that the pleasures of non-marital sexual acts are of the wrong type. Of course, our efforts to resolve this “he says/she says” about intrinsic value are likely to terminate in a discursive impasse. The new natural lawyers will hold that they do not perceive pleasure to be a basic good, while most of humanity will line up on the other side and hold that they do. We cannot resort here to a crude form of majoritarianism to settle the matter, but neither do we seem to have any other mechanism for resolving the dispute. However, since NNL is trying to defend SPT, the burden of proof clearly falls to it to break the impasse. And here it is simply insufficient to ask others to adopt its peculiar views on pleasure solely on the basis of its “perception” of basic goods, unsupported as it is with compelling arguments or data.

c. Variety of Goods Possible in Sexual Acts Even Without Organic Unity

Of course, even if pleasure is not granted admission to the list of basic goods, it could still be a permissible and even welcome aspect of participating in other basic goods. The

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184 Ibid.
next objection to SPT, then, is to advance the possibility (if not exceedingly strong probability) that at least some non-marital sexual acts participate in at least one or another basic good (even when pleasure is not considered to be a candidate good). Since SPT puts forward the strong thesis that non-marital sexual acts cannot realize any basic good, it is sufficient for rejecting it that we have a compelling case for even a single counterexample.

Here we can start with a wholly reasonable statement of the possible goods available in at least some sexual acts, taken from the work of the early Finnis: "[A]s a human action, pursuit and realization of value, sexual intercourse may be play, and/or expression of love or friendship, and/or an effort to procreate".\(^1\)\(^{85}\) Aside from the previous worries this statement raises for WPT (given the conspicuous absence of the good of marriage), it also suggests a deep problem for SPT — namely, that its very reasonable and open-ended list of possible goods realizable in sexual acts seems prima facie compatible with a wide variety of non-marital acts as well.

Sex, whether marital or not, makes possible a variety of basic goods, including knowledge, friendship, aesthetic experience, life, and skillful performance/play. Here I will consider briefly the case for each good in turn.

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\(^{1}\)\(^{85}\) Finnis (1980, p. 86). One might note that Finnis' claim sounds much like a claim made by Macedo (1995, p. 278) for which he is taken to task by George and Bradley (1995, pp. 304-305) for treating sex purely instrumentally: "What is the point of sex in an infertile marriage? Not procreation: the partners (let us assume) know that they are infertile. If they have sex, it is for pleasure and to express their love, or friendship, or some other shared good. It will be for precisely the same reasons that committed, loving gay couples have sex." If one removes the reference to pleasure, and adds in the possible good of procreation were the couple not infertile, the two tentative lists sound very much the same — sex can participate in love, friendship, etc. George and Bradley fail to see that each of these goods (and others) can be intrinsic aspects of the sexual exchange; they, and not Macedo, are assuming that Macedo's list must be understood only instrumentally. This reflects a larger and unfortunate tendency of traditionalists to assume "that all of their opponents are consequentialists, and in particular, hedonistic act-utilitarians. They need not be (and, indeed, many of us are not)" (Corvino, 2005, p. 525).
(a) **Knowledge** – In sex, knowledge is attained, not just of the flesh, but also, through the flesh, of the self. The intimacy of sex provides a unique forum of knowledge that cannot be achieved any other way. In fact, as far back as the Old Testament, the concept of “carnal knowledge” and “knowing” another is synonymous with sex.

(b) **Friendship** – Many persons find, explore, consolidate, and solidify new areas of friendship by means of sex. If we include in this category “love”, then we can add with Corvino that “sex can be a powerful and unique way of building, celebrating, and replenishing love in a relationship”.

Finnis describes the conditions for friendship in the following way: “In the fullest sense of ‘friendship’, A is the friend of B when (i) A acts (or is willing to act) for B’s well-being, for the sake of B, while (ii) B acts (or is willing to act) for A’s well-being, for the sake of A, (iii) each of them knows of the other’s activity and willingness and of the other’s knowledge, and (iv) each of them co-ordinates (at least some of) his activity with the activity (including acts of friendship) of the other so that there is a sharing, community, mutuality, and reciprocity not only of knowledge but also of activity (and thus, normally, of enjoyment and satisfaction).”

Nothing contained in Finnis’ description is incompatible with seeing non-marital sexual acts as capable of participating in the good of friendship.

(c) **Aesthetic Experience** – Few experiences can engage our sense of the beauty and wonder of the human body in the way that sex does. This also relates back to knowledge: the beauty of another as a self is also appreciated in the sexual capacity.

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(d) *Life* – In addition to procreation (life-in-its-transmission), it is arguable that at least some non-marital acts can participate in other aspects of the good of life, including bodily health and vitality. Ordinarily, we do not think that the continued frustration of basic urges contributes to health and vitality; rather, and unless satisfying these would lead to clear harm to others, we think it healthier that these urges be satiated at least some of the *time*. Koppelman’s example of scratching an itch shows how responding to urges need not require “abusing my body or regarding it as ‘a lower form of life with its own dynamism,’” but can instead be a way of “tending respectfully to its needs, which are my needs”.\(^{188}\) Thus, the onus clearly seems to be on the person saying that masturbation, for example, could *never* be understood as the pursuit of health and vitality.

(e) *Play and Skillful Performance* – The ways in which these goods may be participated in during non-marital sexual acts might be thought to be self-explanatory. However, we might note the useful analysis provided by Finnis: “The common good in play relationships is, thus, that there be a ‘good play of the game’ (in a broad sense of ‘game’). Beyond that, neither of the participants need have any interest in the other participant, even when, as in some games or play relationships (e.g. swopping jokes), one party’s evincing pleasure or satisfaction is a necessary condition of the other party’s finding the game satisfying”.\(^{189}\) This analysis seems fully compatible with treating non-marital sexual acts as capable of instantiating the basic good of play – as Finnis himself rightly appreciates, this good (1) can be understood “broadly”, (2) requires no deep interest in the other participant(s), and (3) sometimes requires the evincing of pleasure as a necessary condition. So while there is a real good here, and one that Finnis captures well,\(^{188}\) Koppelman (1997, p. 53).

\(^{189}\) Finnis (1980, p. 140).
it is not restricted by any of these three characteristics simply to marital sexual acts.

Indeed, if anything, these properties quite naturally support the conclusion that many (but certainly not all) kinds of sexual acts could instantiate the good of play.

At the very least, we should want a compelling account of why all of these goods are foreclosed from all sexual acts unless or until one is involved in a traditional marriage – an account that has not yet been given by NNL. However, it seems fully justified to conclude further that such an account cannot be located. Here we can combine two very important facts: (1) there have been trillions of non-marital sexual acts (give or take a few), including many within otherwise traditional marriages, and (2) unlike the trillions of instances of murder, rape, and other paradigmatically immoral actions, a wide variety of these acts seem prima facie compatible with realizing any of at least five basic goods.

To conclude definitively that none of these trillions of prima facie good-realizing acts have ever actually realized any basic good is quite unreasonable and displays a thoroughly unfounded faith in what abstract principles can accomplish.

Unfortunately for NNL, the case against SPT does not end there. For we can pick up right after the early Finnis’ prior claim about the variety of goods that may be participated in during sexual acts and note the following:

So, likewise, we need not be analytically content with an anthropological convention that treats sexuality, mating, and family life as a single category or unit of investigation; nor with an ethical judgment that treats the family, and the procreation and education of children, as an indistinguishable cluster of moral responsibilities. We can distinguish the desire and decision to have a child, simply for the sake of bearing a child, from the desire and decision to cherish and to educate the child. The former desire and decision is a pursuit of the good of life, in this case life-in-its-transmission; the latter desires and decisions are aspects of the pursuit of the distinct basic values of sociability (or friendship) and truth (truth-in-its-communication), running alongside the continued pursuit of the value
of life that is involved in simply keeping the child alive and well until it can fend for itself.\textsuperscript{190}

We could note here the very interesting and reasonable claim by Finnis that the good of procreation can be separated from marriage and treated independently as the pursuit of the good of life-in-its-transmission.\textsuperscript{191} As such, it follows necessarily that sex need not have any connection to marriage in order to participate in a common good (procreation). This \textit{alone} and apart from other considerations is \textit{sufficient for rejecting} SPT, which claims that no non-marital sexual act can ever participate in any basic good.\textsuperscript{192}

To summarize, then, even if we grant NNL what we should not – namely, that marriage is (by WPT) a distinct basic good – we still would have good reasons to reject SPT. One way to do this is to show the anomalous character of organic unity as a necessary condition for realizing any basic good in sexual acts; another is to argue for the inclusion of pleasure as a basic good that can be realized in non-marital sexual acts; and still another and independent way of doing this is to argue for the possible participation of non-marital sexual acts in other basic goods, such as knowledge, friendship, aesthetic experience, life, and skillful performance or play. As we have seen, Finnis makes the latter strategy especially easy by separating the good of procreation from marital sex, thereby allowing at least some non-marital sexual acts to participate in this good.

\textsuperscript{190} Finnis (1980, p. 86).
\textsuperscript{191} This judgment fits well with a common experience shared by many unmarried women facing the impending biological ceiling of child bearing years. Very few would find their desire to bear children unintelligible (even if it is thought ultimately unadvisable in certain cases), despite the fact that it might involve non-marital sex for its realization.
\textsuperscript{192} Additionally, though, Finnis' claim explains why many infertile and gay couples might want to adopt a child, since educating and rearing a child participates in its own distinct aspect of the good of life. As a good that is \textit{good for anyone}, their pursuit of adoption always provides an intelligible (if not conclusive) reason for action. As such, and assuming with NNL that the state has sufficient reason for promoting the realization of basic goods, one might argue that gay adoption ought to be supported by the state on the grounds that educating and rearing a child is a basic good for anyone.
4. Evaluating the Moral Thesis

The argument for MT, as I have represented it, contains five premises that are arranged in logically valid form. If the general worry I raised against NNL (and specifically against the question-begging character of premises 1 and 2), as well as the specific case I mount against SPT, are both compelling, then there are good reasons for rejecting premises 1, 2, and 3 and, ipso facto, MT. However, I have committed myself to the general strategy of giving reasons for rejecting each NNL thesis that are independent of the reasons for rejecting earlier theses. Thus, my argument against MT here will need to be conducted against premises 4 and/or 5. In what follows, I will focus on premise 5, which the truth of the dual-pronged principle of respect for basic goods: one may never intend to destroy, damage, impede, or violate any basic human good, OR prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good.

a. The Principle of Respect is Either Underdetermined or Counterintuitive

One promising way to test the plausibility of the principle of respect is to apply it to other basic goods and see whether it yields fully determined and intuitively correct answers. In what follows, I argue that doing so reveals the principle to have either underdetermined or counterintuitive implications.

Here I want to focus on how the principle fares when applied to the basic good of “life”, which includes bodily health and vitality.\(^\text{193}\) Presumably participating in this good requires, at the very least, the occasional exercise of the body’s fundamental capacities and drives. Depending on the capacity or drive in question, the frequency of needed exercise might vary considerably, of course; but regardless of differences in frequency,
one’s health could not reasonably be described as achieving “vitality” if one were to altogether refrain from attending to fundamental bodily needs. This is all uncontroversial when it comes to needs like hunger or urination; failure to satisfy these needs within a certain timeframe constitutes a paradigm example of unhealthy inactivity. If anything, it is the choice to refrain from satisfying these needs that would violate the principle of respect for basic goods.

However, NNL takes an entirely different approach to needs arising from the human sexual capacity. Here they contend that all acts satisfying these needs that take place outside the context of a traditional marriage are immoral and altogether unintelligible. On NNL’s account, the choice by a fourteen year old post-pubescent boy to eat a sandwich in order to satisfy his hunger pangs every three to five hours is altogether pedestrian; it raises no issues whatsoever and is passed over for scrutiny entirely. However, if the same boy (bound by cultural limitations from entering a traditional marriage for at least three or four years and more likely eight to ten years) chooses through masturbation to satisfy his always powerful and often overwhelming urge to ejaculate every five to ten days, his decision elicits the intense and unrelentingly certain criticism of new natural lawyers. His action, it is claimed, can only constitute an illicit instrumentalization of his body for the experience of pleasure and this is so even when, for whatever reason, he is ashamed of his action and would not perform it if not for the fact that its overwhelming intensity prevents him from concentrating on anything else (such as his copy of The Canterbury Tales which he eagerly wants to read). But why must this be so, even for NNL? Why is it impossible for the non-marital act of masturbation to participate in the good of bodily health and vitality? Why is it always
considered to be exclusively about pleasure and never, as with urinating, about simple relief and the innocent exercise of a fundamental human capacity? If such acts can be understood innocently, then a worst case scenario emerges for NNL: the principle of respect might actually require certain non-marital sexual acts insofar as such acts do in fact participate in the goods of bodily health and vitality. As it stands the best case scenario for NNL is that the argument against masturbation is underdetermined if it relies solely on the principle of respect to do its prohibitory work.

However, a deeper problem exists even under the best case scenario. For depending on how NNL answers the underdetermination charge, the principle of respect might turn out to be radically counterintuitive when applied to ordinary innocent activities in the same way that NNL uses it against non-marital sexual acts. For example, consider and compare the acts of masturbation and non-therapeutic professional massage. According to NNL, masturbation disrespects the basic good of personal integrity by disintegrating persons into two parts – the body and the consciously experiencing self – and then subsequently facilitating the use of the one (the body) as a mere instrument of the other (the consciously experiencing self). But if the wrong-making properties of masturbation are general in this way (i.e., not specific to the sexual character of the masturbatory act), then they also obtain in ordinary encounters with a professional masseuse. In most cases of non-therapeutic massage, the customer is primarily interested in enjoying an experience facilitated by the use of his or her body and the presence and uniqueness of the other person is largely irrelevant (if you could do it yourself, many would; and, where technical abilities are equal, one masseuse is just as good as another). Other innocent activities that might be threatened by NNL’s principle include eating
unhealthy foods (since one would be preferring either pleasure or an illusory good to the
good of health), playing contact sports (since one could have engaged in a form of
exercise with less risk of harming health), and pulling an all-nighter on a project (since
one could have organized one’s schedule in a way that did not result in one’s health being
compromised).\textsuperscript{194} In each case, where ordinary moralists only would see an act of
imprudence at worst, NNL seems committed to viewing such acts as thoroughly and
profoundly immoral.

There are other problems that could be raised against MT, but the two above are
sufficient for making the basic point: even if we grant NNL what we should not –
namely, that marriage is a distinct basic good (per WPT) and that no other goods can be
realized in non-marital sexual acts (per SPT) – we still would have good NNL reasons to
reject MT since the principle of respect on which it depends is either underdetermined or
counterintuitive when it is applied to other goods as it is against non-marital sex.

b. An Aside on NNL and Polygamy, Incest, and Bestiality

Before turning to an evaluation of the political thesis, I want briefly to consider what
might be viewed as a possible last ditch effort to salvage MT. Here I have in mind the
familiar appeal to the conceptual slippery slope running from (1) any departure to
traditional marriage, toward (2) “polygamy, incest, and bestiality” or “PIB”.\textsuperscript{195} The
upshot of this appeal, as NNL employs it, is that if we reject WPT, SPT, and MT, then we
lose all principled bases for rejecting the legitimacy of PIB. This is obviously a very

\textsuperscript{194} Obviously, there are identifiable instances of each activity where the substitution of a basic good is not
an option (e.g., if one is stuck at the gate on an airplane, there may be no other option besides the low-
nutrition, high-sodium, bleached flour pretzels). However, in the vast majority of cases, one can easily
substitute an activity or option that more fully respects the basic goods.

\textsuperscript{195} Cf. Corvino (2005).
strong claim and one that demands careful consideration. Do we really have no other
grounds for rejecting all or some instances of PIB than to accept these three theses of
NNL sexual morality and all their baggage?

To see why not, I think it is helpful to begin with a general problem with the NNL
proposal here and then move to consider each part of PIB on its own terms. According to
NNL, every instance of PIB is unintelligible and wrong for the exact same reasons that
solitary or mutual masturbation, contracepted (though otherwise “marital”) sex,
uncontracepted (though premarital) sex, adultery, and oral or anal intercourse are claimed
to be unintelligible and wrong. Taking no apparent account of the vast phenomenological
and moral differences between, for example, contracepted sex between a loving
heterosexual couple on their fifteenth wedding anniversary and sex between a person and
an animal, NNL simply, mechanically, and with little delicacy lumps them both into the
same category of unintelligible and wrong action. Most people will find this approach
deeply unsatisfying and thoroughly unconvincing. If forced to choose between (1) the
ordinary belief that “if uncontracepted (but otherwise “marital”) sex and bestiality are
both wrong, they are wrong for very different reasons” and (2) all the abstract principles
of NNL, most persons would surely feel more confident in choosing the former. Here
they agree with Corvino:

Insofar as prohibitions of PIB are cogent, they will not stem from a bright-line
category that includes properly motivated uncontracepted heterosexual
intercourse and excludes everything else. Rather, they will stem from a careful
consideration of the relative goods and harms that each practice may realize.196

Following Corvino’s advice, I want briefly to consider each aspect of PIB on its own
terms. I will argue that, far from providing the only source of philosophical resistance to

PIB, NNL actually does not have any distinctive resources, short of question begging, for ruling out many instances of PIB. And where things can be said against some instances of PIB, they can be said on the basis of reasons available to persons who reject the coherence and normativity of the NNL “good of marriage”.

We can begin by noting that, for each instance of PIB, one of two things will be the case: either (1) the act participates in a basic good, or (2) the act does not instantiate any basic good. Where an act participates in a basic good, then, by its own standards, NNL is forced to accept its' in principle legitimacy. However, where acts fail to instantiate a basic good, one can reject their legitimacy without needing to appeal to the good of marriage. One can appeal instead to a much more compelling reason – namely, the fact that such actions are unintelligible, since they do not instantiate any basic goods. And, since one can always instantiate a basic good (e.g., one could pray or meditate and instantiate the good of religion, or perform mathematical equations in one’s head and instantiate the good of knowledge, etc.) instead of participating in an act of PIB, one would always be violating the principle of respect for basic goods (if that questionable principle is still maintained) in choosing a PIB act over a good-instantiating alternative. Thus, we need look no further than a stripped-down version of NNL to locate reasons for rejecting at least some instances of PIB.

Of course, nothing I have said guarantees that all PIB acts will fail to instantiate at least one basic good. And, for many persons, that is just fine – our method should not presuppose that such acts are in principle incapable of realizing basic goods (at least not without good reasons), but instead should consider the individual merits of particular claims to such status. As we have seen, though, the NNL approach is quite contrary to
this—what it wants in this context is a single, blanket, and a priori consideration that rules out all PIB acts in principle and without any empirical investigation. And this is what its defenders think an appeal to the “good of marriage” can do.

There must be some feature of sex which distinguishes it from activities which are appropriately shared with one’s children, one’s parents, in groups, and so on. But what is that feature? Being an intense and pleasurable sign of affection—the only trait distinctive of sex according to many who oppose our view—provides not the slightest reason to refrain from sexual acts in those contexts. Our view, on the contrary, provides an intelligible answer: sexual acts are such that they either embody a marital communion—a communion that is possible only in reproductive-type acts between a man and a woman, in a marital relationship—or they involve instrumentalizing the body for the sake of an illusory experience or fantasy of marital union, an illusion or fantasy that is especially inappropriate with children, one’s parents and so on.

However, this appeal is fraught with problems. First, as Corvino notes, the view against which NNL is contrasting itself—the view that holds that sex is never anything more than a intense sign of affection—is not one that is widely held (and certainly not by Macedo, who was the intended target of the remarks) and, in any case, is only one of many non-NNL accounts. Since the appropriate contrast is between the NNL answer and all others (not simply the NNL answer and the straw man view with which they contrast it), there are literally an infinite number of possibilities, including the stripped down (and hence more plausible) natural law position I sketched just above (essentially NNL minus the good of marriage). Secondly, and as Corvino also notices, NNL seems to assume that there will be a “single feature” that will delegitimate all instances of PIB, rather than the much more likely scenario that, given the radically different character of conceivable acts (e.g., X having two wives versus X engaging in bestial intercourse with a goat), there will

be "different features in different cases." Finally (for present purposes), and as we have seen, both sides of the NNL "answer" are problematic: there is no coherent and independently-motivated good of marriage and the instrumentalization claim is dubious at best (i.e., the claim that PIB or any other type of sexual acts "involve instrumentalizing the body" is either underdetermined or counterintuitive. Despite these considerable general problems and the hefty amount of skepticism they support, I want to turn briefly to consider the individual kinds of PIB acts and note even more difficulties for the specific NNL case against each.

We can start with bestiality, since it is the easiest case and one that provides a model that can be generalized to the other two cases. Here we need only note with Corvino that to lump together as a single kind (1) sexual relations with animals and (2) the myriad of non-marital sexual acts between only humans is "to ignore the distinctively human capacities that sexual relationships can (and usually do) engage. As such, the analogy embodies the sort of reductionist thinking about sex that traditionalists typically attribute to gay-rights advocates." In other words, the NNL critique of bestiality does not even get off the ground (even by the standards of NNL itself), given the reductionism informing its a priori bifurcation of sexual acts. Once we find bestial acts lumped together with the contracepted acts of faithful heterosexual spouses, we realize that NNL is relying on a thoroughly unacceptable phenomenology of sex. If the only thing NNL can locate in contracepted (but otherwise marital) sex is an experience that could be achieved in sex between a person and his goat, then it is quite obvious that an impoverished reduction has been conducted.

But even aside from the charge of reductionism, the NNL appeal to the good of marriage is too cumbersome and hence unsatisfactory. We need not posit an anomalous compound good that measures poorly against the criteria of basic goods in order to rule out most, if not all, instances of bestiality. Here Corvino provides a very useful five-fold taxonomy of potential wrong-making features of bestial sex that assumes (generously) that some instances could satisfy a plausible threshold of consent (which is, even for NNL, a necessary, though insufficient, condition for legitimate sex).\textsuperscript{201}

(1) harm to the animal via the sexual act, despite the animal's consent;
(2) harm to the animal as a necessary precondition for the act (e.g., involuntary domestication);
(3) harm to the person via the act, perhaps by damaging his or her capacity for fulfilling human relationships;
(4) harm to the person as a necessary precondition for the act (e.g., a warped psyche); and/or
(5) failure to achieve the much greater goods available in human relationships.

We might add that anyone of these potential wrong-making features would be a better choice for demonstrating the immorality of bestiality than would its purported (but essentially unverifiable) damage to the good of marriage.

The case of polygamy is not much more difficult to handle, although here it is because the moral case against all instances of polygamy is not nearly as convincing prima facie. Here we can start by asking what is \textit{intrinsically} wrong with polygamy. The usual charges brought against the practice are that it disadvantages women, is bad for children, etc., but these are not intrinsic defects. Nothing in the concept of polygamy requires or even suggests such worries. Polygamy (having more than one spouse) can take many forms and cannot be evaluated intrinsically on the basis of the forms of polygyny (one man having more than one female spouse) usually associated with the

\textsuperscript{201} Ibid, p. 532. Of course, if we take seriously the idea that consent from animals is not possible, then one could argue against bestiality on grounds that are acceptable even to those NNL refers to as "liberationists".
Biblical Patriarchs, Islam, Mormonism, and a variety of tribal cultures and religions. The particular vices of polygamous marriage in examples like these, where they exist at all, more easily can be explained by the larger cultures in which these relationships were initiated and maintained (e.g., cultures where women had very little social status, where children were valued for economic reasons as much or more than anything else, etc.) than by some alleged intrinsic defect of polygamous relationality. Indeed, one might argue that these polygamous relationships were not different in kind, but only in degree, to their ostensibly monogamous counterparts in these same eras – women and children usually got a pretty bad deal in each. So, if there is an intrinsic moral defect with polygamous relationships, it is not immediately obvious in what it consists.

Even if there is an intrinsic moral defect, though, it will not be because of any distinctive and independently-motivated feature of the NNL account of sexual morality (even where the dubious “good of marriage” is granted to be coherent). After all, sexual acts in a polygamous marriage are, in principle, “prima facie capable of achieving the biological complementarity and friendship constitutive of the marital good”\(^{202}\). The only possible consideration that might be able to do some work for NNL here is the total mutual self-giving condition, but even that is not so clear. For example, while procreation ultimately can only involve a single male and a single female in a given act, neither rearing and educating a child nor friendship require exclusivity. And it is not clear why procreating with more than one partner at different times is intrinsically wrong – here we need only recall Finnis’ point that procreation can always be understood independently as the pursuit of the good of life-in-its-transmission.\(^{203}\) Thus, if polygamy

\(^{202}\) Ibid, p. 525.
is intrinsically wrong, then both NNL and its critics stand in equal need of an account of its wrongness.

NNL would likely appeal to the “bright-line” division between “properly motivated uncontracepted heterosexual intercourse” and “everything else”\(^\text{204}\), where polygamous sexual acts are treated as “instrumentalizing the body for the sake of an illusory experience or fantasy of marital union”.\(^\text{205}\) However, as we have already seen, the claim that these or any other type of sexual acts “involve instrumentalizing the body” is either underdetermined or counterintuitive. Thus, we seem to be left without any plausible account of the intrinsic wrongness of polygamy and certainly without any uniquely NNL account. Instead, we are forced to conclude that polygamy, where wrong at all, is wrong on the basis of contingent features obtaining in particular relationships.

That brings us to what is likely the hardest case among the three – incest. Right away we face the analytical puzzle of how to draw lines with respect to what counts as incest and what counts as (at least in principle) a legitimate relationship. These boundaries are usually established through cultural convention, such that certain cultures only consider relationships between parents and children and between siblings to be incestual where others expand the possible examples to include more extended intrafamilial relationships (e.g., between cousins, etc.). Since NNL is not usually too sensitive to cultural conventions of this sort, it would be interesting to see how its defenders might go about establishing these boundaries via an appeal to “reason”. Could reason alone convey that sexual acts between siblings are always unintelligible and immoral but that sexual acts between cousins (first, second, third, or however far

removed) could be okay in principle? Where and how would it possibly draw such a line? It is certainly not obvious and this supports a healthy amount of initial skepticism about the prospects for a distinctive NNL account of the wrongness of incest.

One useful way to divide up the several possibilities here is to distinguish between two broader kinds of incest – adult/child and adult/adult. I need to qualify this statement some – for most people, this distinction will seem useful, tracking as it does an important moral difference between two kinds of incestual acts. However, as might be expected by now, NNL does not see any important difference between the two kinds of incest (i.e., they are “just” two more examples lumped into the indiscriminate category of “non-marital” sex) and claims that you cannot oppose either kind if you deny its theses of sexual morality.

In examining this bald and prima facie implausible position, I think it is important to begin by asking whether there is anything intrinsically wrong with adult/adult incest. In other words, even if many instances of adult/adult incest are wrong for some reason or other, is there an intrinsic defect shared by all such relationships that makes them wrong in principle? If so, then the human race was born of immorality it would seem, as incest appears to be present in a literal interpretation of the biblical account of early family life (if all humans descended from the single pairing of Adam and Eve) and very well might have occurred under various evolutionary scenarios as well. But even aside from that point, is it really the case that all conceivable instances of incest are unintelligible and wrong? Would a sterile pair of heterosexual siblings or first cousins living in a remote setting necessarily act unintelligibly and immorally if they were to commit themselves fully and exclusively to each other for life and occasionally actualize and consummate
their loving commitment with sexual acts of the reproductive type? It is not obvious to me at least why the answer would definitely be "yes".

However, even if this is the answer, one thing seems fairly clear – it will not be because of any distinctive and independently-motivated feature of the NNL account of sexual morality (even where the dubious "good of marriage" is granted to be coherent). After all, the sexual acts of such a couple seem "prima facie capable of achieving the biological complementarity and friendship constitutive of the marital good". And, short of an ad hoc premise or stipulation, no other consideration that might motivate revising this prima facie judgment appears to be looming. If adult/adult incest is intrinsically wrong, then both NNL and its critics stand in equal need of an account of its wrongness.

Turning to adult/child incest, we find NNL predictably relying on the "bright-line" division between "properly motivated uncontracepted heterosexual intercourse" and "everything else" that Corvino wisely advised against. As NNL sees them, such adult/child interactions or relationships are wrong because they "involve instrumentalizing the body for the sake of an illusory experience or fantasy of marital union, an illusion or fantasy that is especially inappropriate with children, one’s parents and so on". Unfortunately, we are not told why this is "especially inappropriate" with kin. What internal feature of the NNL account would make this the case? If "instrumentalizing the body" is the wrong-making property of the act, then it is entirely unclear why sex with one’s child or parent would be in anyway more inappropriate than sex with one’s cow or same-sex neighbor. In all of these cases, the two parties are claimed to be altogether incapable of marrying each other (either because they are of the

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207 Cf. Ibid, p. 525.
same family or gender or because they are not of the same species). Thus, that cannot be the relevant difference to capture the special “inappropriateness” of sex with children or one’s parents. But no other relevant difference that is distinctive to NNL seems forthcoming either. Absent an explicit statement of such an account, then, we are justified in concluding prima facie that it will be available in principle to those not sharing a commitment to NNL.

However, as we have already seen, the claim that these or any other type of sexual acts “involve instrumentalizing the body” is either underdetermined or it is counterintuitive. Thus, not only does NNL lack distinctive and independently-motivated resources for judging adult/child sexual acts to be “especially inappropriate”, they do not even have the right kind of resources for judging these acts to be wrong at all. If they are to find these acts wrong, it will almost certainly be for the same reasons that everyone else would focus on – namely, the harms to children (e.g., violation of trust, emotional

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209. In describing Aquinas’ account of the good of marriage, Finnis (1997, p. 98) seems to endorse the following principle: “wrongful sex acts are more seriously immoral the ‘more distant’ they are from marital sexual intercourse”. However, this principle cannot do any work for the new natural lawyer here without being supplemented with a plausible and non-arbitrary account of what makes one act more distant from marital intercourse than another. Here it is important to recall that there are a number of distinct axes along which ones sexual act could depart from marital intercourse: Adulterous and premarital sex depart along the axis of lifelong fidelity and permanence; contracepted (but otherwise marital) sex departs along the axis of open-ended community; homosexual sex departs along the axis of organic complementarity; polygamy possibly departs along the axis of total mutual self-giving; bestiality departs along the axis of species; and masturbation perhaps departs along every axis but species (indeed, one might indeed question the coherence of the “distance” account of sexual wrongness on the grounds that it would seem to imply that solitary masturbation is the worst kind of sex since nothing could be further from marital sex than an act that does not even involve two individuals). Thus, one cannot just fall back on a vague principle like “evaluate an act’s wrongness on the basis of how far it departs from marital intercourse”; rather, one must have a plausible and non-arbitrary ranking of which axes are more distant from the normative paradigm. Count me among the skeptics who conclude that no such non-arbitrary account can be found via an appeal to reason alone. To return to the question of incest, though, it is not at all clear along which axis incest is supposed to depart from marital intercourse, since again it can satisfy prima facie any of the normal necessary conditions for marital sex. And even if we knew which axis it departs along, we would not know that axis’ relative distance ranking in order to underwrite the NNL claim that it is “especially inappropriate”.
exploitation, the abuse of power, etc.) and the character or psychological defects of pedophilic parents.

Thus, there is no reason to accept WPT, SPT, and MT in order to rule out instances of PIB. As we have seen, (1) it is not at all clear that all such instances are intrinsically wrong in the first place, (2) it is not at all clear that NNL has distinctive and independently-motivated resources to rule out many instances (e.g., the isolated incestuous siblings) of PIB, even where the incoherent good of marriage is allowed in, and (3) where plausible indictments of PIB can be issued, they can proceed on grounds that are available to those outside of the NNL tradition.

5. Evaluating the Political Thesis

In this section, I want to go further and raise some particular challenges for PT. First of all, even where WPT, SPT, and MT are granted, we can coherently deny that they give the state any conclusive reason to organize civil marriage in one way or another (or even to have any form of civil marriage in the first place). At best, the NNL theses only support making some legal distinction between marital and non-marital sex acts. However, this distinction need not be embodied in a full blown institution of traditional civil marriage (TCM), but could also be expressed in any number of other ways (e.g., making non-marital sexual acts illegal). Thus, PT claims more than can be supported by its premises. We would need to hear good (and, as of yet, unstated) reasons for thinking that, out of all the possible modes of embodying the distinction, TCM is a particularly apt choice and worth the various moral and social costs it might impose on the state (e.g., administrative costs, forgone revenue stemming from tax incentives, etc.).
Secondly, though, there are good NNL reasons for thinking that TCM is not the appropriate way legally to embody a distinction between sexual acts. For one thing, TCM is, at best, a very indirect strategy for promoting the (sexual) common good. Since what TCM directly incentivizes is the signing of a marriage license, any defense that appeals to its efficacy in promoting the good turns out to be underdetermined. Absent some good reason for thinking that there is a strong causal link between signing a marriage license and engaging in a greater balance of marital over non-marital sexual acts, TCM will not be justified sufficiently by such an appeal. To illustrate this using a different example, suppose that believing truly in matters of religion is a common good. It would not follow simply from this fact that the state ought to establish an official institution of civil religion. Such actions have been undertaken historically and it is not at all clear that, for all the public professions, this had any positive influence on the frequency of genuine true belief (supposing that any such belief is in fact true). In fact, one might note the precise opposite – namely, that in societies that have a state-sponsored civil religion, belief tends to decline. Likewise, establishing and promoting TCM will not necessarily or even likely lead to more persons living in the desired ways, even if it does lead to an increase in the number of marriage licenses signed.

This point is all the more salient in light of the NNL account of all the ways the good of marriage can be damaged or incapacitated (i.e., through non-marital sex acts and even the conditional willing of such acts). Given the radical fragility of this good, we might in good faith ask the defender of NNL whether it is really likely that a government program will promote the actual common good given all the forces which he takes to be countervailing. And given that TCM would, in practice, always incur some (likely
significant) costs for the state, the uncertainty of achieving any good via its establishment and maintenance might point to using its limited resources in other good-producing ways (e.g., in efforts to promote the good of knowledge through education, or the good of life through medical research, etc.).

However, even if TCM were an efficient way of promoting the (sexual) common good, we still arguably have conclusive NNL grounds for rejecting its institutionalization by the state. In fact, Finnis makes this point about as clearly as can be made:

[S]uch regulation of these associations should never (in the case of the associations with a non-instrumental common good) ...be intended to take over the formation, direction, or management of these personal initiatives and interpersonal associations.

Here we can emphasize with Finnis that, even if the proper range of state regulation includes marriage, it does not include taking over its formation, direction, or management. Since TCM is arguably nothing if not such a takeover, it could be objected that PT is problematic for this reason.

Hence, the case for PT is seriously underdetermined, even bracketing the compelling arguments against the three NNL practical and moral theses on which it depends. Put together, however, the independent and cumulative objections constitute a decisive case against the NNL defense of TCM.

\[210\] For a brief look at the far-ranging costs that civil marriage imposes on the U.S., see Bernstein (2005). The costs of civil marriage, of course, will depend on a number of factors. However, a plausible conclusion that can be drawn here is that the costs of maintaining the institution will correspond roughly to its effectiveness in achieving various desiderata. That is, the more effective civil marriage is in realizing various individual and social goals, the more social resources it will exhaust.

D. Concluding Remarks

Defenders of NNL are notoriously unimpressed by any objections to their position that proceed along liberal moral and political lines. They also seem to imply, on the basis of a false trichotomy that sees all positions on sexual morality falling into one of three camps (traditionalist, liberal, and liberationist), that such arguments are the only plausible ways to oppose their project. In this vein, George claims that, “the arguments for [WPT, SPT, and MT] are, as Macedo says, complex, but, we argue, only an unreasonably narrow conception of public reason – one rigged in advance to generate liberal conclusions – could exclude them as illegitimate”.

As my arguments make clear, George’s claim simply is not true. I, for one, have no interest (at least here) in generating liberal conclusions. Moreover, a sufficient objection to the view does not require any appeal to liberal doctrines such as public reason, equality, or state neutrality. By their own lights, the central commitments of new natural lawyers not only fail to make a convincing case for traditional civil marriage, but actually support the conclusion that the institution is unjustified.

Given that NNL offered the most initial promise for underwriting the state’s exclusive establishment of a traditional form of civil marriage via an ahistorical intrinsic value defense, and in light of the problems afflicting the historical defense raised in Chapter Three, there are good reasons for thinking that a successful defense of TCM will need to be instrumental in character. And it is to arguments of this kind that I shall turn in the next chapter.

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213 George (1999, p. 6).
CHAPTER FIVE

Instrumental Value Defenses of Traditional Civil Marriage

As I noted in Chapter Three, defenses of traditional civil marriage can be usefully partitioned into two general categories: (1) those holding that traditional social marriage has sufficient *intrinsic value* so as to justify exclusive state establishment, recognition, and/or promotion and (2) those holding that traditional social marriage has sufficient *instrumental value* so as to justify the same treatment by the state. In Chapters Three and Four, I argued against two types of intrinsic value defenses – historical and ahistorical – exhausting that category of argument. I now want to analyze and evaluate instrumental value defenses of TCM. Appeals of this instrumental sort pick out various ways in which the institution serves as a unique or especially effective vehicle for accomplishing certain important ends (for either or both individuals and the larger collectivities in which they reside). In other words, the institution of traditional marriage is claimed, by these defenses, to have value as a *means* to some intrinsically valuable end (e.g., individual well-being, social stability, etc.); its contribution to human well-being stems not from what it is, but rather from what it does.

Again, my primary concern in the present chapter is with whether or not instrumental value defenses offer sufficient reasons for thinking that political communities ought to award special legal status to traditional marriage. In what follows, I develop a general case for thinking that they do not and try to show how each instrumental value argument can be challenged along at least four different dimensions of evaluation.
A. The General Structure of Instrumental Value Defenses

The kinds of intrinsic goods for which TCM might be thought instrumental can be separated into two classes: (1) *individual goods* (goods which primarily are good for *someone*, such as individual well-being, virtue, or autonomy) and (2) *collective goods* (goods which primarily are good for *society as a whole*, such as social stability).

However, despite the fact that this distinction might be useful in certain analytical contexts, I will proceed without attending to it much in what follows. One important reason underlying my decision is the blended character of goods; any individual good is arguably of some interest to a larger society, while any collective good will also be a good for some individuals.

However, even if the analytical distinction were perfectly clear, it is not clear that anything normatively momentous rides on it. Regardless of which kind of good TCM is thought to be instrumental in securing or promoting, the form of the instrumental value argument will be more or less the same. It most likely will be constituted by at least one principle of political morality, one value claim, and one empirical/factual claim, as in the following argument pattern:

(1) The state is justified in securing or promoting (some or all) goods that are intrinsically valuable. *(Principle of Political Morality)*

(2) Good X is intrinsically valuable. *(Value Claim)*

(3) (All or some) traditional marriages are instrumentally valuable in securing or promoting X. *(Empirical/Factual Claim)*

(4) Therefore, the state is justified exclusively in recognizing and/or promoting (all or some) TCM's as a means for securing or promoting X. *(Conclusion)*

This common structure of argument makes it possible to critique instrumental value defenses of TCM with a unified critical strategy, which is precisely how I will proceed throughout the rest of the chapter.
B. General Strategy for Criticizing Instrumental Value Defenses

In the rest of this chapter, I will try to show that the burden facing instrumental value defenses is considerably more onerous than the standard argument structure might suggest. Indeed, if the objections that follow are successful, then the argumentative structure just described (which underlies almost all instrumental value defenses) is radically insufficient for justifying its intended conclusion. In addition to particular problems that might be raised against any given example of the instrumental value defense, all instances of the argument can be challenged in at least four general ways.

1. *Initial Justificatory Deficit*

The instrumental value argument, whatever good or goods it picks out, terminates in a conclusion underwriting the legitimacy of civil marriage. As such, the first general problem it faces arises from the fact that an institution of civil marriage already inherits an initial justificatory deficit (as was described in Chapter Two when I laid out a prima facie case for marital contractualism [MC]). This deficit is significant and multi-faceted, in that any institution of civil marriage must be shown to outweigh the default justification of MC, the prima facie virtues and goods which MC is instrumental in securing or promoting, and also the variety of social and moral costs of civil marriage (whether or not it actually is successful in securing or promoting any goods). Thus, it is important to note that the principle of political morality employed in the argument form above stands in need of some qualification. For even granting that the state is or could be justified in securing or promoting intrinsically-valuable goods, it would not follow that any particular means for trying to secure or promote them is in fact justified. Rather, at least one necessary condition needs to be satisfied if a given state pursuit of intrinsic
value is to be justified – namely, that the means used to secure or promote an intrinsically-valuable good (i.e., the various institutions, programs, and policies developed for this task) must at least overcome any initial justificatory deficit of institutionalization. In the case of TCM, then, any given example of the instrumental value defense in its favor will need to show that TCM (1) effectively secures or promotes a given intrinsically valuable good and (2) does so such that, on a final accounting, the total goods realized exceeds the initial justificatory deficit and any additional costs incurred by the selected means.

2. Empirical Credibility

Any version of the instrumental value defense ultimately depends on the truth of at least one empirical claim:

\[ \text{Empirical Claim} \rightarrow \text{Traditional marriage is in fact instrumentally valuable in securing or promoting intrinsic good } X. \]

Unfortunately, because the general structure of this proposition is both quite familiar (e.g., traditional marriage is instrumentally valuable in securing the best interests of children, social cohesiveness, etc.) and, at first glance, deceptively simple, it often does not receive the critical scrutiny that it really deserves.

In order to prepare the ground for such scrutiny, closer attention must first be given to the precise role that the empirical claim is playing in the instrumental value argument. Broadly speaking, its primary role consists in providing sufficient \textit{factual} support for the conclusion that traditional marriage, and not some other kind of arrangement, is exclusively worthy of state support; more specifically, it consists in supporting the conclusion that \textit{all} and \textit{only} traditional marriages are worthy of state
support). With this role in mind, several sources of complexity and vulnerability confronting the empirical claim readily present themselves.

a. The Problem of Quantification

There are two ways of quantifying the empirical claim:

1. **Strong Interpretation** → *All* traditional marriages are instrumentally valuable in securing or promoting intrinsic good X.

2. **Weak Interpretation** → *Some* traditional marriages are instrumentally valuable in securing or promoting intrinsic good X.

While each interpretation has a significant advantage over the other, they both face, I will argue, serious difficulties that call into question the possibility of defending successfully an instrumental value defense of TCM.

There would seem to be a clear rationale for the traditionalist to adopt the *strong interpretation* of the empirical claim – namely, because it seems best suited for providing the requisite kind and quantity of support for the desired conclusion regarding the justification of *all* TCM’s. Recall here the common structure of instrumental value defenses (with the empirical premise now updated to align with the strong interpretation):

1. The state is justified in securing or promoting (some or all) goods that are intrinsically valuable. (*Principle of Political Morality*)

2. Good X is intrinsically valuable. (*Value Claim*)

3. **All** traditional marriages are instrumentally valuable in securing or promoting X. (*Empirical/Factual Claim*)

4. Therefore, the state is justified exclusively in recognizing and/or promoting **all** TCM’s as a means for securing or promoting X. (*Conclusion*)

214 Here I am assuming the stronger claim not for the purposes of making the critical task easier, but because this seems genuinely to be the claim that defenders of TCM want to support. I should emphasize, however, that my arguments do not depend on the claim being interpreted in any rigidly literal sense (such that if even one traditional marriage lacks instrumental value, the defense should be rejected). Rather, I am assuming what might be called a “functional” universal claim, where very nearly all traditional marriages are purported to be instrumentally valuable in some way and the expression “all and only” is treated as a term of convenience and not literally.
It should not be difficult to appreciate the attractive fit between Premise 3 and the Conclusion – if what the traditionalist wants is to justify the conclusion that the state is justified in supporting all and only traditional marriages, then it would be ideal if all and only such unions actually shared some common value-conferring property.

But in that very rationale for the strong interpretation lies its obvious disadvantage. For the task of identifying some property $P$ that is both instrumentally valuable and also shared by all and only traditional marriages is considerably more difficult than identifying a property that is shared just by some (or even most) such unions. Since traditional marriages vary so widely in their respective natures and aims, the most likely sources of candidates for $P$ will derive from the only common intrinsic properties that all traditional marriages (ostensibly) share in common – that is, from their heterosexual composition and commitment to lifelong monogamy. But even narrowing the search in this way does not appear promising, however, given that many non-traditional unions can share these same properties (e.g., polygamous unions can be heterosexual and same-sex unions can be monogamous). Hence, the best candidate on offer would seem to be a composite property – lifelong heterosexual monogamy. This leaves the traditionalist adopting this interpretation of the empirical claim with a formidable burden – namely, demonstrating that all and only lifelong heterosexual monogamous unions are instrumentally valuable in securing or promoting some intrinsic good $X$. Faced with this burden, it is understandable why a traditionalist might be tempted to look instead to the weak interpretation in constructing his particular version of the instrumental value defense.
However, despite making one burden easier, the weak interpretation does so only by creating another more significant burden. To see this, consider the common argument structure updated with the weak interpretation of the empirical claim included:

(1) The state is justified in securing or promoting (some or all) goods that are intrinsically valuable. (Principle of Political Morality)

(2) Good X is intrinsically valuable. (Value Claim)

(3) Some traditional marriages are instrumentally valuable in securing or promoting X. (Empirical/Factual Claim)

(4) Therefore, the state is justified exclusively in recognizing and/or promoting all TCM's as a means for securing or promoting X. (Conclusion)

The newly created burden emerges clearly in the poor fit between Premise 3 and the Conclusion. Since we do not always (or even ordinarily) infer from a “some” to an “all”, the validity of the argument depends on successfully locating a defensible principle underwriting (at the very least) the occurrence of this inference in the weak interpretation of the instrumental value defense.

The burden implicit in seeking such a principle ultimately is two-fold. The first aspect of the burden consists in overriding the ordinary presumption against inferring from a “some” to a well-defined “all”, while the second aspect requires sufficient motivation for defining the “all” one way rather than another. I will elaborate on both aspects of the burden in turn.

First, then, the defender of the weak interpretation of the empirical claim must provide a rationale for violating the ordinary presumption against inferring an “all” from a “some”. To illustrate this presumption in operation, consider the example of distributing grades in a course. Let us suppose that in a class of 10 students, 9 do well enough to earn A’s, while 1 does so poorly as to fail the course. Let us suppose further that we want to defend the conclusion that the teacher is justified in recognizing and
rewarding all students taking this particular course with A's (thus, we are presuming a well-defined and motivated "all"). While there might be several potential ways to justify this conclusion – e.g., by appealing to some terrible state of affairs which would result from not giving the failing student an A – one way that clearly will not work is to appeal to the empirical premise that some (or even most [90%]) of the students taking the course earned A's. At most, it seems, that premise only supports inferring the conclusion that the teacher is justified in recognizing and rewarding some students with A's – namely, those whose work was judged to be of a certain quality and value. It simply is not the right kind of premise to justify the intended conclusion that all students should receive an A. The first aspect of the burden faced by the defender of the weak interpretation, then, requires locating a normative principle that can bridge a similar gap between the empirical premise that some traditional marriages have instrumental value and the conclusion that the state is justified exclusively in recognizing and rewarding all traditional marriages with a privileged status.

However, there is an even deeper problem confronting the weak interpretation and that involves how we can non-arbitrarily specify the relevant "all" as "traditional marriages" in the first place. This problem can be converted straightforwardly into the following necessary condition – the traditionalist adopting the weak interpretation must identify a clear rationale for specifying the relevant class of "all's" as "traditional marriages" as opposed to some narrower or wider class (e.g., "white Protestant traditional

215 Defenders of TCM who utilize instrumental arguments often bolster their case with just this kind of claim. As a way of hedging between the strong and weak interpretations, they claim that some TCM's have instrumental value but if the state did not support all TCM's some terrible state of affairs would result. However, the claim that all TCM's must receive state support to avoid dire consequences is simply another strong empirical claim subject to the same objections raised against the strong interpretation.
marriages” or “lifelong intimate human relationships”). The rationale for insisting that this condition be satisfied will require a bit of detailed discussion.

First, it is important to realize from the beginning that the weak interpretation is really just one species of the second-best strategy known as a “kinds” argument. Its defenders want to award (or deny) special legal status to any given relationship, not by appealing to its actual value, but on the basis of its purported membership (or lack thereof) in a certain kind (namely, the “kind” of traditional marriages) of which, some or most members are instrumentally valuable in securing or promoting some $X$.\(^{216}\)

With that in mind, let us imagine that the state is trying to determine whether to recognize and reward a particular relationship (or set of relationships) with the legal status and benefits of marriage. According to the weak interpretation, the state need not consider the actual value of this given relationship (or set of relationships) in order to make a justified determination; rather, it need only consider whether the relationship is or is not a member of a certain kind that tends to secure or promote $X$. The problem with this proposal is that (1) any given relationship is or is not a member of an infinite number of “kinds” and (2) each kind differs with respect to its tendencies to instantiate value. One worry, then, is that we can never make any headway in sorting through the infinite number of kinds to which a given relationship might be granted or denied membership. There is no “single definitive kind” to which each relationship belongs. The more serious worry, though, is that we do make some headway with membership assignments, but that these lead to contradictory results. For example, imagine, for the sake of simplicity, a

\(^{216}\) As such, and again, this indirect strategy of defense (i.e., appealing to a particular union’s tendency to produce value, or its kinship with actually valuable relationships, or its potential value, etc.) is clearly less ideal than the more direct strategy at play in versions of the instrumental value defense adopting the strong interpretation (i.e., appealing to a particular union’s actual value).
relationship that is a member of two kinds—"traditional marriage" and "childless traditional marriage". Imagine further that the state is trying to secure and promote the intrinsic good of the well-being of children and that members of the kind "traditional marriage" tend to be instrumentally valuable in bearing and rearing healthy children but that members of the kind "childless traditional marriage" are never instrumentally valuable in this way. How ought the state to determine whether this particular relationship should be recognized and rewarded with the legal status and benefits of marriage? It would appear that it ought to be both awarded and denied access to this status and set of benefits because it is both of a kind that is instrumentally valuable and of a kind that is not instrumentally valuable. Moreover, it would also appear that such will be the predicament for almost any given relationship with respect to any given value (i.e., it will be of at least one kind that tends to be instrumental in realizing value and at least one that tends not to be instrumental in realizing it).

What is needed, then, is some well-motivated criterion for determining the relevant kind or otherwise resolving this conflict (perhaps through a definitive ranking). However, when we look for a criterion what we are inevitable drawn back to is the value itself. For example, one criterion that immediately suggests itself is the percentage of a specified kind that is instrumentally valuable. On such a criterion, a traditionalist might try to show that the relevant kind is "traditional marriage" since as a class it has a greater percentage of members which are instrumentally valuable in securing the good of children’s well-being. However, a rationale built around this criterion obviously will not do the work that the traditionalist needs it to do. While it is almost certainly the case that a greater percentage of the kind "traditional marriage" than the kind "childless traditional
marriage” will be instrumentally valuable for this intrinsic good, it is equally certain that a greater percentage of the kind “child-bearing traditional marriage” will be instrumentally valuable than the kind “traditional marriage”. In other words, it is highly unlikely that the kind “traditional marriage” would fare better percentage-wise than every one of its exceedingly (if not infinitely) many subsets (e.g., child-bearing traditional marriages, white Protestant traditional marriages, traditional marriages composed of partners with Ph.D.’s, etc.). However, what is certain is that the kind “traditional marriage” will never fare better than the kind in which 100% of the relationships within it instantiate the value. Thus, if an appeal to percentages were the definitive consideration, then “traditional marriage” would never be the relevant kind.

What this reveals, then, is that any non-arbitrary search for a criterion will simply collapse the weak into the strong interpretation. Since the only relevant “kind”, if one insists on calling it that, is the kind “actually instrumentally valuable in promoting some X”, any other kind assignment will be arbitrary. So despite the formidable burden it places on the traditionalist, the strong interpretation really is the only option.

b. The Problem of Empirical Fit

Unfortunately for the traditionalist, the credibility of the empirical claim might be challenged in still further ways. Most obviously, it simply might be false (or at least sufficiently dubious) that all or some TCM’s in fact promote some intrinsic good X. This certainly would be the most pointed type of response one could make to the instrumental value defender of TCM.
c. The Problem of Intrinsic vs. Extrinsic Sources of Value

However, another kind of response can be made even where it is plausible to conclude that all or some TCM’s do in fact promote $X$. This second response proposes that the promotion of $X$ is largely a function of the contingent social norms surrounding marriage—norms like stability, fidelity, commitment, and parental responsibility—rather than any intrinsic property of TCM’s. Kimberly Yuracko articulates the core idea of this response as follows:

"Under this view, marriage itself is not transformative, norms are transformative. It is the norms of stability, fidelity, and commitment that are responsible for strong adult relationships and positive parenting effects rather than marriage itself... Marriage does not transform the ill-equipped into good spouses and good parents. Instead, such individuals must themselves be transformed before entering the institution in order to avoid degrading and destroying the institution itself."


There are two important elements in Yuracko’s analysis. The first is the conceptual separation of traditional marriage from the norms that have been contingently associated with the institution. The second is an argument that the important transformative work is done, not by traditional marriage itself, but rather by its contingently associated norms. In other words, marriage does not make people better; stability, fidelity, commitment, responsibility, and the like make people better. As she notes, if this thesis were not true, then the institution of marriage would be at constant risk of internal collapse; supposing that most of the transformative work is not done prior to marriage, the institution would be degraded before it could transform unsuitable participants.

This analysis has significant implications for the justification of traditional civil marriage. For if the social norms surrounding marriage are most important, and if these are contingently grounded and sustained (i.e., their link to traditional marriage is cultural
rather than conceptual), then it can be argued that these norms could be reorganized and alternatively directed toward a form of marital contractualism or a more pluralistic form of civil marriage (or institutions compatible with either). For example, if the norm of parental commitment and responsibility is what contributes the lion’s share of well-being to children, then detaching that norm from expectations about marriage and then directly investing an institution of responsible parenthood with the bulk of moral, social, and political support would seem to be the most attractive option. That is, children should fare better on average when society unambiguously emphasizes and expects the norms of stability, commitment, and responsibility themselves, regardless of parental marital status, rather than relying on the indirect vehicle that historically has been used to encourage these norms. In addition to the positive value it would yield in terms of its directness, such a policy focus would discourage persons from thinking (1) that simply entering and remaining within a legal marriage is the primary contribution they can make with respect to their children’s well-being, and (2) that if they are not legally married, then they cannot contribute much to this good.

Hence, if (or perhaps more accurately, since) it is not TCM’s themselves that are doing the instrumentally valuable work, they do not merit the state’s privileging. Thus, even if what is doing this work – a wider system of social support for intimate relationships (in the form of contingent roles, norms, and incentives) – is worth encouraging, it does not follow that this justifies the particular kind of intimate relationships which have most recently been supported as such. In fact, there are good reasons for thinking that encouraging the beneficial norms historically associated with
traditional marriage requires the expansion or elimination of the institutional vehicle of TCM.

d. The Problem of Multiple Properties and Multiple Goods

Finally, a fourth response might be offered even where the instrumentally valuable work is plausibly credited to some intrinsic property $P$ possessed by all or some TCM’s, but no or very few non-traditional unions. Here it can be argued that at least some non-traditional unions possess some other intrinsic property (call it $Q$) which is instrumentally valuable in securing or promoting either $X$ or some other intrinsic good of state interest (call it $Y$). In other words, there might be either (1) multiple properties (e.g., $P$, $Q$, etc.) capable of securing or promoting $X$, or (2) other properties besides $P$ (e.g., $Q$) which are capable of securing or promoting $Y$. Hence, the traditionalist seeking a knockdown argument for the state’s exclusive recognition of TCM’s needs not only to show that all and only TCM’s possess some $P$ which is instrumentally valuable for $X$, but also that no non-traditional unions possess some $Q$ which is instrumentally valuable for $X$ or $Y$. It simply will not suffice for the traditionalist to defend the former claim (if even that much can be done) without also defending the latter claim.

e. Responding to the “Blunt Instruments” Objection

I will say more about each of the four problems of empirical credibility in bringing the general argument to bear on particular examples of the instrumental value defense of TCM. However, I want to address a worry that many readers will undoubtedly have regarding the general orientation of the empirical credibility problem as I have described it. This worry I will refer to as the “law and social policy are blunt instruments”
objection. It admits that any value-conferring property $P$ proposed by the traditionalist either will be one which not all traditional marriages instantiate or will be one which some non-traditional unions do instantiate. However, the objection goes on to note, it simply is impossible, impractical, and/or too expensive for legal and social institutions and policies to track the exceptions to a general rule or to build around nuanced criteria. Instead, these institutions and policies must identify fairly obvious and inexpensive criteria (e.g., lifelong heterosexual dyads) that, it is claimed, tend to be instrumentally valuable.

While this is a familiar, and at a certain level, understandable worry, I want to argue that it is multiply problematic from a normative perspective. For one thing, the objection already makes the crucial concession that TCM is, at best, justified more on prudential than philosophical grounds. It essentially gives up the prior aim of offering a philosophical defense of the institution, preferring instead a form of realpolitik to moral philosophy. Thus, any defense of TCM that features this objection prominently is not of the right sort to achieve the desiderata of a genuine instrumental value defense. By making a premise about practical feasibility do as much or more work as its central value claim, such a defense would instead amount to some other form of political argument which would be poorly suited for philosophical evaluation.

For another thing, the implicit logic of the objection already prejudices matters in favor of traditional civil marriage (as well as other status quo institutions) by making several unwarranted assumptions. First it assumes that there is a sufficiently large and uncontroversial body of evidence supporting the value of TCM’s, but not some narrower or wider class of unions. However, such a body of evidence would itself likely be very
costly to conduct in any sort of rigorous fashion and, were it to be conducted, should provide much of the information needed for a wider or narrower comparison. Secondly it assumes that the purported instrumental value of TCM’s is causally related to their distinctive intrinsic properties and not to contingent social norms. However, this assumption does even more damage to the traditionalist’s argument than the first, since any data that could make that kind of case on behalf of TCM’s either does not exist or would likely be extremely impractical and costly to obtain. Thirdly the objection assumes that various kinds of union cannot have multiple and/or overlapping sources of instrumental value. But even if TCM’s do have some unique or exceptional value-conferring property, it does not follow that non-traditional unions cannot share some or all of this property or have their own unique or exceptional value-conferring attributes. Finally, some popular candidates for P (e.g., procreative potential or actual guardianship of children) would not raise any burdensome identification problem at all. Thus, if P really is what does the normative work in recommending civil status S, then, at the very least, these easily identifiable exceptions (which would obtain in both traditional and non-traditional relationships) should be excluded from claims to S. So, for example, if TCM’s are justified because they are especially beneficial for children, then it is no objection to my critique to argue that it would simply be too impractical or costly to identify those TCM’s which are exceptions to this tendency; one need simply locate those TCM’s without children, a task already and easily performed by civil rituals such as issuing birth certificates, filing annual tax forms, requesting Social Security numbers, etc.
Thus, as I see it, the "legal and social institutions are blunt instruments" objection is seriously problematic. It not only fails to do the needed work for the traditionalist, it actually is incapable of doing so.

3. Normative Adequacy

Each instrumental value defense ultimately must link its empirical claims to defensible normative principles and value claims in order to support a conclusion about the justification of civil marriage; these principles and claims each can be challenged in various ways.

In the case of value claims, it can be asked of any particular candidate whether or not the good it cites is in fact intrinsically valuable. Recall here that the distinguishing feature of the instrumental value defense is the claim that some institution Y is justified not because Y itself is intrinsically good, but rather because Y is instrumentally valuable in promoting intrinsic good X. To the degree that X's status as an intrinsic good is insecure, then so too is the overall argument for TCM in which that value claim is featured.

In the case of principles of political morality, certain distinctions can be introduced which complicate the instrumental value defense of TCM. For example, consider a principle authorizing (or perhaps even requiring) the state to secure and promote what is intrinsically valuable. The adequacy of this principle can be questioned by introducing a distinction between two conceptions of how this pursuit of value is to be measured – maximizing and satisficing. A maximizing conception of the state's pursuit of value faces a plethora of familiar problems, including the potential sacrifice of justice to goodness, the difficulty in ranking valuable goods (supposing that there may be more
than one item of value in existence), and the potential exhaustion of social resources in order to maximize some valuable good. On the other hand, the satisficing conception of the state’s pursuit of value also introduces problems for the defender of TCM. Here the primary difficulty is that once our concern becomes merely about the state securing some reasonable threshold of value, it becomes more likely that either the state’s backing becomes superfluous (because social marriage is already sufficient for meeting the threshold) or too limited (because some or all non-traditional unions also can satisfy the relevant threshold and, per the argument, sufficiently justify state recognition and support). Either conception of pursuing value, then, makes the instrumental value defense of TCM vulnerable in terms of its normative adequacy.

4. Policy Efficacy

The potential benefits of any regime of civil marriage must be set against not only the known costs of the regime, but also against the various possibilities for policy failure. Such failures can assume many forms, but for the sake of convenience here we can follow Albert Hirschman in identifying three categories of policy failure as represented by three kinds of reactionary theses\(^\text{218}\):

(1) *Perversity Thesis* – “any purposive action to improve some feature of the political, social, or economic order only serves to exacerbate the condition one wishes to remedy”.

(2) *Futility Thesis* – “attempts at social transformation will be unavailing, that they will simply fail to ‘make a dent’”.

(3) *Jeopardy Thesis* – “the cost of the proposed change or reform is too high as it endangers some previous, precious accomplishment”.

\(^\text{218}\) The quotes from Hirschman in each of the below theses are from: Hirschman (1991, p. 7). Hirschman, of course, does not identify the three theses for endorsement or blanket rejection; rather, he wants to make the case that conservatives employ them far more than is warranted and in sort of a knee jerk manner. Nonetheless, he recognizes that each of the three theses applies to at least some social policy.
Though there is undoubtedly an objective component to any particular instantiation of Hirschman’s theses (i.e., either a particular policy yields outcomes that are perverse to some degree or it does not), the initial weight I can reasonably assign to these risks will depend on the general weight they are given by a particular defender of TCM. For those that tend to object to social policy or efforts at so-called “social engineering” on the grounds that they are futile, or jeopardize other prized social or political achievements, or result in perverse consequences that are antithetical to those intended, as many modern day political conservatives do, then this final layer of worry could be quite potent. Certainly, at the very least, the defender of TCM who tends to grant these kinds of worries a lot of weight would owe us an explanation of why government is significantly more likely to secure and promote the desired goals and values of TCM when it tends to fail at so many other pursuits. However, even those interlocutors with significantly greater optimism regarding the relative success of government programs (e.g., Hirschman) will need to assign some weight to these kinds of policy worries since they undoubtedly occur at least some of the time.

C. Summing up the Burden of Instrumental Value Defenses of TCM

What the four problems facing instrumental value defenses reveal, then, is a considerably more complex and difficult burden than is traditionally assumed. More specifically, the nature and extent of this burden can be understood in the following set of six necessary conditions for any successful instantiation of the argument:

1. It must defend successfully its value claim(s) that some good X is intrinsically valuable;
2. It must defend successfully a principle of political morality that justifies the state in pursuing X (if not all intrinsically valuable goods);
(3) It must make a compelling case that TCM actually secures or promotes $X$;
(4) It must make a compelling case that TCM actually secures or promotes $X$ because of some intrinsic property $P$ possessed by all TCM’s but no or very few non-traditional unions.\(^{219}\)
(5) It must make a compelling case that no non-traditional unions possess some intrinsic property $Q$ that is instrumentally valuable for $X$ or some other intrinsically valuable good $Y$ that the state is also justified in pursuing.
(6) The state’s pursuit of $X$ via an institution of TCM must, on a final accounting, exceed in total goods realized the initial justificatory deficit and any additional costs incurred, such as those predicted by the perversity thesis, futility thesis, and/or jeopardy thesis.

D. Evaluating Three Prominent Examples of Instrumental Value Defenses of TCM

In this section, I will critically examine three prominent examples of instrumental value defense of traditional civil marriage – (1) the appeal to the value of social stability fostered by intermediary institutions like TCM, (2) the appeal to the value of individual well-being, and (3) the appeal to the value of children’s interests. Against each appeal, I will argue that, while important, it is insufficient for grounding an exclusive state interest in TCM. I will conclude the section by trying to show how my response to these three versions of the argument might be generalized to other instrumental value defenses.

1. TCM as Instrumental for Fostering Social Stability through Intermediary Institutions

One familiar collectivist defense of TCM appeals to its instrumental value in fostering stabilizing intermediary institutions. According to this defense, traditional marriages and families stand between the individual and the state and serve several valuable functions

\(^{219}\) I am specifying this condition according to the strong interpretation because I am convinced that the weak interpretation fails. However, for those still not convinced of this claim, the condition would need to be revised as follows:

(4a) It must make a compelling case that TCM actually secures or promotes $X$ because of some intrinsic property $P$ possessed by some TCM’s but no or very few non-traditional unions. Additionally, two further necessary conditions would need to be added to the above list:

(7) It must defend successfully a normative principle which justifies the inference from “some” to “all”.
(8) It must defend successfully a rationale for selecting the relevant class of “all” as TCM’s and not some narrower or wider class.
that, broadly speaking, can be separated into two categories – (1) integration and (2) mediation.

On the one hand, marriages and families serve to *integrate* otherwise isolated and unattached citizens into larger stabilizing relations and projects with others. Here the basic insight is not simply that isolated individuals are unlikely to live fulfilling lives apart from larger bonds and social ties, but even more that radical social individualism is incapable of fostering the kind of long-term stable interaction that is prerequisite to the realization of any collectivist goods. Given this fact, and also that the state is too large and impersonal an entity to bind otherwise unattached citizens in the right ways, we simply must have families unified through traditional marriage if stability (or at least optimal stability) is to be achieved.

On the other hand, this defense claims, marriages and families also serve to *mediate* relations between citizens and the state. Here the basic insight is that these institutions serve as a bulwark against the state’s considerable power and the looming threat of tyranny. In particular, familial groupings invested with a robust measure of autonomy protect both individual freedom and the pluralistic transmission of values. By limiting the extent to which the state and individual will be brought into conflict regarding decision-making and value transmission, traditional marriages serve to stabilize society in another important way.

The picture that emerges, then, is one where TCM’s value consists primarily in negotiating two dangers threatening stable and long-term social interaction: (1) radical individualism and (2) state tyranny. In responding to these twin dangers, the state either is incapable of solving the problem (as with the first danger) or is itself the source of the
problem (as with the second). Thus, this defense concludes, TCM is justified in light of its instrumental value in guarding against both of these otherwise devastating threats.

2. Evaluating the Appeal to Stabilizing Institutions

In evaluating the appeal to stabilizing institutions, it is important to emphasize a central commitment lying at its very heart—namely, a belief that the state ought to show deference to traditional marriages and families where possible and respect their autonomy. However, as even one defender of this line of argument, William Duncan, has noted (citing F.C. DeCoste), this deference may take two forms:

[First,] the state may simply leave alone the institutions, practices, and traditions which together constitute the lifeworld of its subjects, or [second] it may instead seek to support them by enacting laws to support them by enacting laws that recognize the importance of their contribution to the life of the political community.  

What is important to note in this passage is that the first form of state deference is, for all intents and purposes, marital contractualism (MC). Since MC “leave[s] alone” the intimate unions formed by citizens, save for those dimensions regulated by general laws or individually initiated and designed contracts, it constitutes one of two viable alternatives for fostering vital intermediary institutions.

But this concession by the traditionalist raises a serious initial problem for his defense of TCM via an appeal to stabilizing institutions—namely, that it leaves unclear how its central consideration is supposed to advance the status of TCM over and above MC. Moreover, given the significant prima facie case in favor of MC, and especially considering the hefty social and moral costs of any system of civil marriage, the present defense of TCM provides an exceptionally vivid example of the liability of instrumental

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220 Duncan (2005, p. 3).
value defenses to the first general problem described earlier in this chapter. Recall that
the problem cited there was the initial justificatory deficit faced by these kinds of
defense. With the present example, we can ask whether TCM and its concomitant deficit
can be defended adequately by appealing to a consideration that is also secured by its
primary rival in MC. One might think that what would be needed is a defense of TCM
which shows it to do significantly better than MC in fostering intermediary institutions.
However, it is not clear that even that would constitute a sufficient defense of TCM over
and above MC absent the latter’s being shown to fall short of some satisficing threshold.
Since TCM’s success in fostering intermediary institutions will likely correspond to the
costs which it produces, it might simply be the case that any marginal gain in the quantity
or quality of intermediary institutions does not warrant the costs required to produce the
gain. In this way, the present instrumental value defense is liable to the problem of
justificatory deficit and very possibly to the problem of normative adequacy as well.

However, there are two far more fundamental flaws with the appeal to stabilizing
institutions. First, to the extent that the second form of state deference (recognizing and
promoting intermediary institutions, rather than leaving them alone) promotes social
stability and other valuable ends, then expanding, rather than restricting, the range of
unions eligible for the civil franchise would seem to be the appropriate conclusion to
support. That is, if what are desired are more limits on state power and the increasingly
pluralistic transmission of values, then the sensible solution is to foster more unions and
families standing between individuals and the state. And this is true regardless of
whether the pluralistic transmission of values touted by the traditionalist is understood
qualitatively (since the promotion of non-traditional unions would only tend to increase
the diversity of values transmitted) or quantitatively (since it also would quite clearly increase the sheer number of value-transmitting unions). Hence, the instrumental value defense appealing to stabilizing institutions cannot (without much more in the way of argument) justify the exclusive state privileging of traditional marriage, as it cannot adequately satisfy the fifth necessary condition listed above – namely, that of making a compelling case that no non-traditional unions also possess some intrinsic property \( Q \) which is instrumentally valuable for \( X \) (in this case, stabilization through integration and mediation).

A final fundamental problem with this defense is that it proposes the necessity or usefulness of having institutions between the individual and the state and then claims this justifies an institution of social control established and regulated by the state. As Claudia Card has rightly noted in this regard, “The bulwark is not the legitimation . . . of [marriage and family] through institutions of the State. The State was often one of the things that these relationships formed a bulwark against.”\(^{221}\) Indeed, it is difficult to understand how any form of civil marriage can be especially effective in limiting state power when by its very nature it is itself a profound and substantial expression of state power and control. Unlike with the first mode of state deference (again, what essentially is just MC), then, the institutions fostered under TCM (or any system of civil marriage) are not truly intermediary, but rather top-down creations of the state that are subject to its discretionary power.\(^{222}\) MC, on the other hand, fosters genuinely intermediary institutions that interact voluntarily with both individuals and the state (by winning the [voluntary]

\(^{221}\) Card (1996, p. 4).

\(^{222}\) As such, there are grounds for worrying about a perversity effect here – namely, that pursuing the value of fostering stabilizing intermediary institutions via TCM actually has the effect of reducing the quantity and autonomy of such institutions.
participation of individual citizens and by requesting [voluntarily and largely on its own
terms] the limited involvement of the state with the enforcement of certain contractual
agreements).

Thus, the appeal to stabilizing institutions turns out not only to be incapable of
justifying TCM, but moreover to provide additional support for MC. In addition to being
liable to the problem of initial justificatory deficit, this kind of defense very clearly falls
prey to the problem of normative adequacy and quite possibly to the perversity effects
described by the problem of policy efficacy.

3. TCM as Instrumental for Promoting Individual Well-Being

A second good regularly cited in instrumental value defenses of TCM is individual well-
being. In fact, the title of an influential recent book defending TCM goes so far as to
equate the prospects for a successful defense of TCM with its capacity to produce just
this kind of good – i.e., Linda J. Waite and Maggie Gallagher’s *The Case for Marriage:
Why Married People are Happier, Healthier, and Better Off Financially.*

According to this line of defense, TCM is justified because it produces happier and more fulfilling lives
for those that participate therein than would exist in its absence. As such, the argument
concludes, the state is justified exclusively in promoting TCM as a means to the intrinsic
good of individual well-being.

As Waite and Gallagher’s title suggests, there are many elements to individual
well-being which marriage might or might not influence – personal happiness (measured
according to various subjective and/or objective criteria), physical and psychological
health, and financial wealth are some of the more important elements that might be (and

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typically are) emphasized. For each of these elements of individual well-being, a vast range of social scientific data is usually marshaled in support of the conclusion that traditional marriage makes positive contributions to it. Of course, and as should be expected, there is much debate within the social scientific community about how properly to analyze, interpret, and evaluate the data. Obviously, as a philosopher lacking social scientific training, this leaves me in a less than ideal situation with respect to a full evaluation of this strand of argument. However, despite being unqualified to comment on some specific empirical claims made in the social scientific debates over TCM’s contribution to individual well-being, it nonetheless remains true that philosophers can point to problems with the assumptions and inferences underlying the analytical and evaluative claims which proceed from them. In fact, in my own critical evaluation that follows, I will generally be content to grant the defender of TCM the empirical claim that the institution makes positive contributions to the individual well-being of many of its participants. Where I will focus my own critical remarks, then, is upon claims that such contributions sufficiently warrant the state’s exclusive recognition and promotion.

4. Evaluating the Individual Well-Being Defense

As with my response to the stabilizing institutions defense, an evaluation of the individual well-being defense of TCM should begin by noting the problem of initial justificatory deficit. Since TCM creates a variety of moral and social costs not had by MC, and since MC itself would be conducive to the well-being of some non-negligible percentage of individuals, the appeal to individual well-being must provide plausible

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224 The literature here is quite extensive and ever expanding; however, the Waite and Gallagher book provides an adequate place to start for someone looking to get a rough sense of the nature and range of studies being conducted.
grounds for concluding that the gains in well-being minus the moral and social costs of the institution surpasses the expected amount of well-being fostered by MC.\footnote{In this way, the burden faced by the individual well-being defense of TCM is similar to that faced by a sophisticated (rather than straw man) version of utilitarianism. Here I mean that it will not suffice simply to point out that some act, relation, institution, etc. has net positive utility. Rather, the real burden is to show that an act, relation, institution, etc. has greater utility than any relevant and well-defined alternative. Similarly, the burden facing the appeal to individual well-being is to show that once all benefits and costs are weighed, TCM secures and promotes more individual well-being than any relevant alternative institution that might replace it.}

Unfortunately, while this is easy enough to see at a very general level of description, it is not clear how we would go about locating such grounds. For one thing, determining the actual contributions of TCM to individual well-being, and the expected contributions of MC to the same, would require a Herculean effort of social science. For another, it is unlikely that we could ever even settle on the criteria for determining the quantity and quality of contributions to well-being in the first place. Determining the relevant criteria for measuring these, as well as a ranking for organizing the relative significance of these criteria, would require settling a number of thorny methodological questions (several of which I will describe in the following discussion of the empirical credibility of the individual well-being defense). As such, I cannot do much more here than to note how a complete defense of TCM appealing to individual well-being would need to account for the initial justificatory deficit in some way; hence, the problem constitutes an initial complication not typically recognized by such arguments.

Next we can consider a cluster of problems that arise with respect to the empirical credibility of the appeal to individual well-being. Here it will be helpful to restate the empirical claim from the general argument structure for instrumental value defenses of TCM, but with its content revised to coincide with the well-being defense.

\[ \rightarrow \text{All or some traditional marriages are instrumentally valuable in securing or promoting individual well-being. (Empirical/Factual Claim)} \]
Stated as such, this claim raises two fundamental interpretive questions. The first question concerns the problem of quantification discussed earlier. If the claim is understood according to the *weak interpretation*, then we will need to satisfy two necessary conditions: (1) identify a clear rationale for specifying the relevant class of “all’s” as “traditional marriages” as opposed to some narrower or wider class (e.g., “white Protestant traditional marriages” or “lifelong intimate human relationships”), and (2) locate an additional normative premise that underwrites the legitimacy of supporting and promoting all TCM’s on the grounds that some of them promote individual well-being. As we have seen, the weak interpretation is really a chimera; it either arbitrarily specifies the relevant kind or it collapses into the strong interpretation. However, if the claim is understood according to the *strong interpretation* as applying to all traditional marriages, then the premise surely is false. Many people have not only had their well-being diminished by their participation in a TCM, but also seen their lives absolutely ruined as a result. Thus, in my judgment, the quantification problem leaves the traditionalist unable even to get his defense of TCM via an appeal to individual well-being off the ground.

However, a second question can be stated in the following way and regardless of whether the strong or weak interpretation is being advanced: how and to what do we credit any purported gains in well-being? Typically the traditionalist’s empirical claim is conducted (or at least reported) in a very unsophisticated manner, as if citing a study concluding that persons in a traditional marriage are happier, wealthier, etc. is all that is required to justify the state’s exclusive recognition and promotion of this form of union.
However, this claim proceeds much too quickly and overlooks a number of subtle, but important, questions regarding how best to explain these findings:

1. **Overdetermination** → Are the marginal gains in well-being attributable to a union being a TCM rather than just a TSM (traditional social marriage) or, more broadly, an intimate human relationship? Or, in other words, is the value of TCM overdetermined by the fact that it already is a TSM or an intimate human relationship? This will be especially important when we turn to the normative adequacy of this defense, for if the primary gains are already possessed by such relationships prior to the state's involvement, then it will be harder to justify the state's extending extra privileges and benefits to persons whose well-being is already faring better.

2. **Selection Effects** → Is it the case that TCM makes for greater well-being or rather that persons with greater well-being tend more often to enter TCM's? Or, in other words, can empirical results associating greater well-being with TCM be explained by the fact that those with greater well-being already will be more likely and attractive candidates for entering a TCM?

3. **Alternative Causality** → Is it traditional marriage itself that makes for greater well-being or rather that the contingently-granted social support and benefits attaching to the institution make for greater well-being? Since it would not be surprising to find that one class of individuals with access to a special range of social and financial benefits is faring better than another class without access to these benefits (and indeed from whom resources are taken to provide the other class with access), it needs to be shown that something more is occurring that is directly attributable to marriage itself.

4. **Lack of Counterfactual Data** → How can we attribute gains in well-being to TCM when we have no data indicating how persons might have fared under various counterfactual scenarios where they did not enter a TCM?

My point in raising each of these is not to claim that all or even most of the empirical studies cited in support of the well-being defense fail to satisfy them properly. As might be expected, studies vary considerably in the quality of their design and with respect to the size of their samples, etc. Thus, what I want to do here is simply to show that things are more complicated for the traditionalist than is generally acknowledged – one cannot simply cite studies finding that TCM's are associated with greater well-being, but must supplement this claim with a host of fairly sophisticated empirical and normative
argumentation. Since I want to focus the bulk of my critical energies on the normative adequacy of the well-being defense, I am content simply to draw attention to the possible empirical problems it might face prior to even being in a position to be evaluated normatively.

This brings me to what is in my judgment the central difficulty facing the appeal to well-being – its normative adequacy. Again, it will be helpful to state the relevant premises from the instrumental value argument structure recast in terms of individual well-being.

→ The state is justified in securing or promoting (some or all) goods that are intrinsically valuable. *(Principle of Political Morality)*

→ Individual well-being is intrinsically valuable. *(Value Claim)*

Though some might want to challenge the value claim regarding the intrinsic value of individual well-being, I will focus entirely on the principle of political morality at work in the argument. Here I want to develop four layers of problems.

First we can go back to my original statement of the problem of normative adequacy and introduce certain distinctions that complicate the instrumental value defense of TCM. We can refine my earlier example; here the principle authorizes the state to secure and promote well-being. We can apply a distinction between two conceptions of how the pursuit of well-being is to be measured – maximizing and satisficing. Both conceptions of how to measure the pursuit of well-being are problematic if the vehicle used to secure well-being is TCM. If we choose maximization, the argument falls prey to the host of familiar problems I cited earlier; the potential sacrifice of justice to goodness, the difficulty in ranking well-being against other valuable goods and the potential exhaustion of social resources in order to maximize well-being.
On the other hand, the satisficing conception also introduces problems for the defender of TCM. Here once we shift to charging the state with securing some merely reasonable threshold of well-being, it becomes more likely that social marriage or alternative practices are already sufficient for meeting the threshold. Thus, state involvement turns out to be unnecessary and unjustified. Alternatively, if state involvement is required to meet the threshold of well-being, then the defender of TCM’s argument becomes too limited because some or all non-traditional unions also can satisfy the relevant threshold and, per the argument, sufficiently justify state recognition and support. Either conception of pursuing well-being, then, makes the instrumental value defense of TCM vulnerable in terms of its normative adequacy.

Secondly, even if the state is justified in promoting goods which are intrinsically valuable, and even if TCM makes positive contributions to the well-being of a significant number of those participating therein, the institution still might not be justified if other modes of improving well-being would be more efficient, direct, just, or otherwise better. Simply put, there is any number of ways in which a state might improve the lives of its citizens — by improving the quality of schools, neighborhoods, transportation networks, the environment, medical institutions, or by increasing access to good careers, health care, etc. A convincing argument for TCM would need to show that the state’s efforts at securing and promoting individual well-being would not be better served by devoting its energies and resources more fully to alternatives that might also come with fewer/lower social and moral costs.

Thirdly, however, even if TCM were a very efficient, effective, etc. way of promoting individual well-being, this might not justify it. For one thing, it could be
argued that promoting the individual well-being of some simply does not justify imposing costs on others. This might be thought especially true when those others are more likely to have lower levels of overall well-being already. If the state wants to promote well-being, and if traditional social marriage already improves this good for those participating therein, then the state might be better off trying to improve the already lower welfare of those persons from whom resources are taken to support civil marriage. For another, it is not always sufficient for an institution's receiving the exclusive recognition and promotion of the state that it is especially instrumentally valuable. Suppose it turned out to be the case that, with respect to its instrumental value in promoting well-being (or some other intrinsic good), religion R is significantly ahead of other religions. Typically this would not be treated as a sufficient condition for the state institutionalizing and promoting a religious institution. But if this is the case, then it can be asked why promoting individual well-being should be sufficient justification for the state exclusively to recognizing and promoting TCM.

Fourthly and finally (for present purposes), to the extent that civil marriage makes persons happier, then, absent reasons to think this would not also be the case for, say, same-sex couples, this would seem to be an argument for favoring the expansion of the civil franchise. If “promoting individual happiness” is a sufficient justification for giving special legal rights and status to Union A, then ceterus paribus it would have to be sufficient justification for giving special legal rights and status to Union B. Thus, once improving individual well-being becomes the dominant consideration in favor of the legitimacy of social institutions, it leads quickly and naturally to the conclusion that purported welfare-promoting institutions like civil marriage ought to be expanded.
The final cluster of problems relate to the *policy efficacy* of defenses of TCM that appeal to individual well-being. As was noted earlier in this regard, the potential benefits of any regime of civil marriage must be set against not only the known costs of the regime, but also against the various possibilities for policy failure. Here we can note how state efforts to improve individual well-being via TCM might be futile, lead to perverse consequences, or jeopardize existing social achievements. First of all, pursuing individual well-being via TCM might be futile if perhaps roughly the same amount of well-being would exist without the institution (because roughly the same number of persons live in ways that are conducive to well-being, or because the overall costs of the institution might limit the extent to which aggregate levels of well-being can rise, etc.). In other words, it is possible that a regime of TCM might at best change the distribution of well-being, but not raise the overall aggregate numbers.

Alternatively, efforts to pursue well-being through TCM may actually have the perverse effect of lowering overall well-being. Since at least part of the rationale behind TCM is to encourage persons to marry who otherwise would not, the worry about perverse effects is indeed a serious concern. Even one defender of civil marriage has acknowledged this, noting that the incentives for marrying (in the form of financial and social subsidies) “may well induce marginally-committed couples to marry, seeding the chances for continuing marital dissolution and weakening norms of fidelity, selflessness and commitment associated with marriage”.\(^{226}\) In other words, by attracting persons into the institution who are not already inclined to live in the ways believed to be conducive to well-being, a state might actually lower overall well-being. Those persons lured into the institution will likely find the fit between their own goals and desires and those had by

the state for the institution to be poor and uncomfortable. Hence, their overall well-being might be lower despite the additional material benefits that come with being civilly married. Even those who are already inclined to live in ways conducive to well-being may suffer a decrease in their overall well-being. If the social institution of traditional marriage were weakened and limited by those who have to be lured in through financial and social subsidies as Wilson postulates, then the benefits to the already inclined would decrease. This is, of course, simply a hypothetical outcome, but it points to a larger problem with the proposal that a regime of TCM is justified if traditional marriage makes positive contributions to well-being—namely, that there are any number of ways in which the state institutionalization of some activity or relation which is conducive to well-being might actually diminish rather than expand the activity or relation’s capacities. Again, the weight which can be assigned to this concern partially depends on the particular interlocutor—to the extent that they are inclined to accept the perversity thesis as applying to other government programs and policies, then to that extent they have to be concerned that the thesis will apply to TCM as well. However, even those interlocutors with significantly greater optimism regarding the relative success of government programs will need to assign some weight to this kind of policy worry since it undoubtedly occurs at least some of the time.

A final concern is that pursuing individual well-being via TCM might jeopardize existing social achievements. Given their close connection with various religious traditions, the state’s involvement in marriage and marriage ceremonies might pose particular dangers to the separation of church and state. Other candidate achievements include the gains in liberty for women and increased tolerance for gays and lesbians, with
the worry being that TCM might compromise these gains in order to raise aggregate well-being. My point here in raising these is to demonstrate an argument sufficient for defending TCM cannot simply point to the individual well-being that might be promoted as a result. Things are much more complicated than this and much would remain to be shown even if TCM does make net positive contributions to well-being.

5. TCM as Instrumental for Securing the Interests of Children

This brings the discussion to the third and, in all likelihood, most popular version of the instrumental value defense of TCM – namely, the appeal to traditional marriage’s capacity to secure and promote the best interests of children. Not only is this appeal the most popular, but it also likely is the most promising (which undoubtedly at least partially explains its popularity). By linking the value of TCM to the results of sexual acts which in their “natural” form always and only derive from a heterosexual (though not necessarily permanent or committed) dyad, the appeal to children’s interests seems prima facie more promising than either the appeal to stabilizing institutions and individual well-being (each of which seemed actually to turn quickly into a consideration in favor of expanding rather than restricting civil marriage).

According to this line of defense, TCM is justified because it makes it more likely that any given child will be raised by two persons who will love and care for him or her, a fact which is claimed to be associated with a host of positive outcomes for individual and social well-being. In particular, traditional marriages might be claimed to be essential or especially efficacious in securing two child-related goods: (1) the individual goods of children themselves (primarily in the form of healthy physical and psychological growth and development), and (2) the social good of maintaining healthy and socially-desirable
population levels. As such, the argument concludes, the state is justified exclusively in promoting TCM as a means to these intrinsic goods.

As with the appeal to individual well-being, a vast range of social scientific data is usually marshaled in support of the conclusion that traditional marriage makes positive contributions to the interests of children. And of course the same disclaimers apply regarding the state of the debate among social scientists and also with respect to the appropriate areas where philosophers can contribute to the overall debate. Again, in my own critical evaluation that follows, I will generally be content to grant the defender of TCM the empirical claim that the institution makes some positive contributions to the interests of children. Where I will focus my own critical remarks, then, is upon claims that such contributions sufficiently warrant the state’s exclusive recognition and promotion.

6. Evaluating the Appeal to the Interests of Children

In one sense, the appeal to the interests of children is just a species of the individual well-being defense. Insofar as the state has a legitimate interest in promoting the well-being of its citizens, this interest likely applies both to adult and child citizens. Hence, it might be claimed that if the individual well-being defense fails, then ipso facto the appeal to children’s interests fails as well. However, the appeal to children’s interests is often framed as a “special case” in light of the biological and social dependencies and vulnerabilities of children. Whereas many might be reluctant to enlist state involvement in promoting individual adult well-being at a certain point, at least some portion of this

— 227 The literature here is also quite extensive and ever expanding. Wilson (2005) references much of the more important research that has been done on the topic and provides an adequate place to start for someone looking to get a rough sense of the nature and range of studies being conducted.
same class would readily support the state's more extensive involvement in promoting individual child well-being. Thus, it is worth considering in more detail the proposal that the interests of children can ground a special welfare-based defense of TCM.

Prior to engaging in that task, however, I do want to raise a point of caution that is related to the question of how distinct the present defense is from the previous. Here I have in mind that this conceptual question forces us to consider the empirical question of how or why children's interests became not just a distinct consideration put forward in favor of TCM, but a paramount consideration. Since the moral commitments underlying our legal system, at least in the U.S., recognize the equal and inherent worth of all citizens, regardless of their age or stage of development, why should the interests of children be thought to count differently or any greater than those of adults? It may be the case that the explanation lies more with the rhetorical effect of this appeal in actual political debates (what politician wants to be seen as not "thinking about the children"?) rather than in any philosophically cogent ground. To the extent that this is correct, then the present appeal might be thought to stand or fall largely with the previous appeal to individual well-being. That being noted, however, I want to turn to consider some specific ways in which the appeal to children's interests fails sufficiently to support the conclusion that the state is justified in exclusively supporting and promoting TCM.

In evaluating the appeal to children's interests, it seems to me that moral and political philosophy might learn something significant from family law. Here I have in mind the fact that there already exists in family law a separate legal category assigned with protecting many of the interests of children — namely, the category of parenthood. This category, of course, identifies and describes the assorted rights and responsibilities
assigned to biological and custodial parents. This is instructive for the present exercise in moral and political philosophy because it raises the question of why we should think that an appeal to the interests of children would lead to conclusions about marriage rather than about parenting. Indeed, insofar as there is an argument grounded in children’s interests for licensing something, it would seem to be not marriages, but the biological or custodial parents charged with raising those children. In what follows, I will attempt to show how this fact about the realities of family law comes to bear on each of the four problems to which the appeal is liable.

First, we can consider how it features in the problem of *initial justificatory deficit*. Since a well-ordered legal and social institution of parenthood is fully compatible with a regime of MC, the real burden faced by the traditionalist appealing to the interests of children is to show how the benefits TCM fosters for children outweigh both its moral and social costs as well as the benefits had by a regime of MC supplemented with an optimal legal and social institution of parenthood. This burden puts into clear relief a central claim on which the appeal to children’s interests succeeds or fails – namely, the claim that the benefits for children from traditional marriage itself (and not the associated category and policies of parenthood which MC can also adopt) can justify the state’s exclusive recognition and promotion of all TCM’s with all their concomitant social and moral costs.

As we have seen with the argument from individual well-being, the problems with the empirical credibility of the appeal to children’s interests may well be insurmountable.
It will be helpful again to restate the empirical claim from the general argument structure for instrumental value defenses of TCM, but with its content revised to coincide with the children's interests defense.

→ All or some traditional marriages are instrumentally valuable in securing or promoting interests of children. (Empirical/Factual Claim)

The only options left open to the traditionalist are either to arbitrarily specify TCM as the relevant kind or revert to the strong interpretation. Again, as with the argument from individual well-being, on the strong interpretation the premise is simply false. It is clearly not in the interests of many children that their parents participate in a TCM, particularly its requirement of life-long commitment; many children benefit from the dissolution of the marriage into which they were born.

Moreover, the problem of quantification is particularly poignant in light of the fact that the class of “TCM’s” and the class of “child-bearing unions” are far from cleanly overlapping. Simply put, many TCM’s do not (and cannot) bear children and many child-bearing unions are not TCM’s. But if we begin with the fact that only some children will be born into TCM’s, and then add in the further fact that only some of these TCM’s will be instrumentally valuable in promoting the interests of only some of these children, the justification for supporting all TCM’s seems particularly weak.

A second question arises about empirical credibility: how and to what do we credit any purported gains in the interests of children? Again, the traditionalist needs much more than to merely cite a study that concludes TCM’s have some positive correlation with children’s interests. The same problems (overdetermination, selection effects, alternative causality and lack of counterfactual data) that confronted the traditionalist arguing from individual well-being crop up here, as would be expected
given that children's interests form a subset of individual interests relevant to well-being. These take on further dimension when the claim involves children. One well-known adage about childrearing is that it takes a village to raise a child. This simply means that the devoted care and attention of a child's parents are sometimes not enough to ensure that child's proper development; rather the efforts of an extended family and larger community in addition to the parents often are needed.

In light of this view of childrearing, the problem of overdetermination becomes a bit stickier. Are the marginal gains in children's interest attributable to their parents' involvement in a TCM rather than just a TSM, or more broadly a committed parenting partnership (which may include any number of extended family members) or a well-ordered community? If it takes a village, then it seems all the more likely that TCM cannot take responsibility for securing the interests of children.

The problem of alternative causality takes a similar turn. Is it traditional marriage itself that makes for better conditions for children or rather the contingently-granted social support and benefits attaching to the institution? If we consider the lingering stigma that attaches to childbearing outside of marriage, it seems likely that the village is contributing more to children born to married parents than those born to unwed parents and again TCM itself does not play a central role.

As with the individual well-being defense, my point in raising each of these is simply to show that things are more complicated for the traditionalist than is generally accepted. I am content simply to raise rather than dwell further upon these possible empirical problems and instead turn directly to the normative adequacy of the appeal to children's interests.
I will restate the relevant premises from the instrumental value argument structure recast in terms of these interests.

\[ \rightarrow \text{The state is justified in securing or promoting (some or all) goods that are intrinsically valuable. (Principle of Political Morality)} \]

\[ \rightarrow \text{The satisfaction of the interests of children is intrinsically valuable. (Value Claim)} \]

As with my previous treatment of the argument from individual well-being, while some might challenge the value claim regarding the intrinsic value of satisfying children’s interests, I will focus entirely on the principle of political morality at work in the argument.

Prior to doing this, however, I want to return briefly to the claim I made earlier that the appeal to children’s interests is the most promising strand of instrumental value defense because of its ties to heterosexual dyadic reproduction. Here I think it is important to clarify that this link is not nearly as strong as is often implied and for two reasons.

(1) Any special relationship between children and traditional marriage is limited primarily to the bearing of children rather than the rearing of children.

(2) It is the raising of children that is of primary ethical significance.

Thus, the unique resources of a defense of TCM which appeals to children’s interests only link to the far weaker set of interests that children might have; with respect to the far more significant interest they have in how they are raised, there is little in the way of a unique contribution to be made by the fact that a union is traditional rather than non-traditional.

With that noted, I want to develop a layered critical response to the normative adequacy of the appeal to the interests of children. First we can again introduce the
distinction between two conceptions of how the satisfaction of children's interests is to be measured—maximizing and satisficing. A maximizing conception (in addition to the normal litany of problems) does not fit well with the ordinary intuition that the state's interest in children is not to see that the very best care is given to every child, but only that an adequate level of care is provided. But again the traditionalist is not served well by even this satisficing conception. Once our concern is that the state secure some reasonable threshold of child well-being, it becomes more likely that the state's backing becomes superfluous because social marriage or alternative practices like the "it takes a village" model are already sufficient for meeting the threshold. If state involvement is required then a policy of TCM is far too limited because some or all parents involved in non-traditional unions also can satisfy the relevant threshold and, per the argument, sufficiently justify state recognition and support. Either conception of pursuing child well-being, then, makes the instrumental value defense of TCM vulnerable in terms of its normative adequacy.

Secondly, even if the state is justified in promoting the interests of children, and even if TCM makes positive contributions to the interests of children, the institution still might not be justified. There may be other modes of securing children's interests that would be more efficient, direct, just, or otherwise better. Simply put, there is any number of ways in which a state might improve the lives of children—by improving the quality of schools and neighborhoods, protecting the environment for their future habitation, redirecting the resources of medical institutions to childhood diseases, or by increasing access to health care, etc. A convincing argument for TCM would need to show that the state's efforts at securing and promoting child well-being would not be better served by
devoting its energies and resources more fully to alternatives that might also come with fewer/lower social and moral costs.

Thirdly, however, even if TCM were a very efficient, effective, etc. way of promoting the interests of children, this might not justify it. For one thing, it could be argued that promoting these interests does not justify imposing costs on others. This might be thought especially true when children living with non-married parents are more likely to have lower levels of overall well-being already. As Laura Adams has rightly observed:

Children are not randomly distributed in married and unmarried households. Rather, children in married households are whiter, wealthier, and have better educated parents for reasons other than marriage itself. Thus, state support for marriage maximizes the welfare of children who are already the most privileged. State support for marriage provides far less benefit to children who are less privileged in terms of race and socioeconomic status. Indeed, by maximizing the welfare of the privileged group of children, state support for marriage may actually reduce the welfare of the less privileged children on an absolute as well as a comparative basis.  

Adams point can be understood to turn the appeal to children’s interests on its head – far from supporting the state’s continued support of traditional civil marriage, the appeal to the interests of children might actually support eliminating the institution (or at least its attendant benefits that exacerbate already significant socioeconomic disparities). If the state wants to promote child well-being, and if traditional social marriage already improves this good for those children whose parents participate therein, then the state might be better off trying to improve the already lower welfare of those children living with parents from whom resources are taken to support civil marriage.

For another, it is again not always sufficient for an institution’s receiving the exclusive recognition and promotion of the state that it is especially instrumentally

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valuable. Again the example of religion is instructive. Suppose it turned out to be the
case that, with respect to its instrumental value in promoting child well-being (or some
other intrinsic good), religion R is significantly ahead of other religions. Typically this
would not treated as a sufficient condition for the state expending a significant portion of
its resources devoted to the interests of children to parents associated with that religious
institution. But if this is the case, then it can be asked why promoting the interests of
children should be sufficient justification for the state exclusively to recognizing and
promoting TCM, especially given its close and prior connection to the dominant religious
traditions of the West.

The final cluster of problems relate to the policy efficacy of defenses of TCM that
appeal to the interests of children. In setting the potential benefits of any regime of civil
marriage against the various possibilities for policy failure, we can again note how state
efforts to improve child well-being via TCM might be futile, lead to perverse
consequences, or jeopardize existing social achievements. First of all, pursuing child
well-being via TCM might be futile if perhaps roughly the same amount of well-being
would exist without the institution (because roughly the same number of persons live in
ways that are conducive to well-being, or because the overall costs of the institution
might limit the extent to which aggregate levels of well-being can rise, etc.). In other
words, and as with individual well-being, it is possible that a regime of TCM might at
best change the distribution of which children’s interests are satisfied, but not raise the
overall aggregate numbers.

An alternative outcome would be that efforts to pursue well-being through TCM
actually have the perverse effect of making it less likely that children’s interests will be
satisfied. Such results would largely be driven by two trends. First, if TCM tended to lure persons who are not well-suited to be parents into a relationship that they are unlikely to enjoy or find worth remaining in, this could very well put more children at increased risk of being raised in a broken, violent, neglectful, or otherwise undesirable home. Secondly, however, and what is more likely, if the policy actually has the effect of driving down the supply of available and qualified parents, then it might actually undermine the goal of increasing the likelihood that children's interests will be satisfied. Here the worry is that a regime of TCM might have the effect of driving away available and qualified non-traditional couples from having or raising children. This would reduce the total number of children; qualified non-traditional couples might decide that the social costs of having children are too high to bear and opt not to have children. Reducing the total number of children will increase the percentage of children raised in bad homes. This would also leave more existing children either with no or less adequate parents or guardians. Both of these possibilities may have bad consequences for the interests of children and society as a whole.

A final concern is that pursuing the interests of children via TCM might jeopardize existing social achievements. Here one might be particularly worried that TCM jeopardizes the efficiency, efficacy, and directness of a well-ordered legal and social institution of parenthood. Since there will always be children born outside of TCM, it would seem that the most efficient way to secure the interests of all children is to focus on the institution of parenthood (or guardianship in the absence of parents) rather than TCM which only applies to some children. Other candidate achievements include the increased tolerance for children raised by gays and lesbians, where again the worry is
that the interests of these children will be compromised in order to try to secure and promote the interests of other children. Again, my point here in raising these is to demonstrate an argument sufficient for defending TCM cannot simply note that some children’s interests will be promoted as a result. Things are much more complicated than this and much would remain to be shown even if TCM does make net positive contributions to the well-being of children.

As with the previous two versions of the instrumental value defense of TCM, the appeal to the interests of children is multiply problematic. In particular, it can be challenged in a variety of ways along each of the four dimensions of evaluation that were developed in my general critical strategy. As the most promising candidate for a successful instrumental value defense, the appeal’s uncertain and vulnerable status does not bode well for the traditionalist.

E. Concluding Remarks

The four-fold template provided earlier in this chapter provides a broad strategy for replying to any instrumental value defense of TCM. As such, the specific arguments given against the three versions of the defense considered here should bear a strong family resemblance to the specific arguments that might be raised against other versions. Again, my primary aims in this chapter are (1) to develop a promising critical model for responding to any of the vast number of instrumental value defenses (since I cannot possibly respond to each and every one of these independently) and (2) to illustrate that critical model in action by applying it to three of the most important and oft-cited versions.
In a nutshell, the fundamental problem with the instrumental value defense of TCM is two-fold. First, it lacks the empirical and normative support for concluding that all and only traditional marriages ought to be supported by the state, as it is either the case that only some of these have value or that other non-traditional unions have value and seemingly ought to be promoted. Secondly, it offers no reason to think that whatever value traditional marriages have is dependent on the state civilizing them. Indeed, such a claim is straightforwardly in tension with a familiar strand of defense made by traditionalists who claim that such unions are universals that appear in any number of cultural and legal contexts, including those without a distinctive form of civil marriage. But if permanent heterosexual monogamous mating pairs are so hardwired, then this will not be affected much by civil marriage. Thus, whatever advantages this form of union tends to facilitate are likely to obtain under MC (or a more pluralistic form of civil marriage) as well, but with the added advantage that other valuable kinds of union might be afforded more favorable conditions under which to foster valuable states of affairs.

Obviously, others will be more optimistic than I that TCM might be defended by appealing to its instrumental value in promoting some intrinsically valuable good. At the very least, I hope to have shown that a successful effort at making good on that optimism will require a far more sophisticated defense than is usually offered. If I am correct, then serious defenders of the instrumental value defense of TCM will need adequately to account for their argument’s liability to the problems of initial justificatory deficit, empirical credibility, normative adequacy, and policy efficacy. Any version of the defense that could successfully address all four potential problems would indeed provide compelling reasons for the state to lend its exclusive support to TCM. However, if there
are strong grounds for questioning the adequacy of the three important versions of the argument considered in this chapter, as I have tried to show, then the prospects for locating a successful defense seem dim. Coupled with the conclusions of Chapters Three and Four that traditionalism cannot be defended by intrinsic value arguments either, we would then have reason to reject the conclusion that states are justified *exclusively* in recognizing, establishing, and/or promoting a traditional form of civil marriage.
CHAPTER SIX
A Most-Things-Considered Defense of Marital Contractualism
In this final chapter, I want to revisit the prima facie case for marital contractualism set out in Chapter Two. In particular, I want to consider whether there now are sufficient grounds for making stronger and more considered judgments about the justification for MC.

In considering whether or not there are good reasons for establishing a form of civil marriage, one can usefully take cues from classic discussions of whether or not there are good reasons for exiting a state of nature generally. So, for instance, one might follow Locke in thinking that life in a marital state of nature would be mostly peaceful but also that the inconveniences of such a condition warrant an exit from it. Here one might locate something of great value (for Locke, property; for the defender of civil marriage, a certain kind of relationship), the security and prosperity of which is too uncertain to leave in a state of nature, and charge the state with a limited and well-defined role of protecting and promoting it. Or, for another example, one might take a decidedly Hobbesian line on the matter, viewing a marital state of nature as thoroughly and profoundly defective (normatively or practically) and concluding that any form of civil marriage would be preferable to life in such a condition. As I see it, one can find inspiration in the traditional Lockean and Hobbesian accounts for three separate kinds of reasons that might be advanced in favor of establishing a form of civil marriage: (1) the value of marriage justifies special state interest, (2) MC (or life in a marital state of nature) is morally problematic, or (3) MC is impracticable. I will examine these kinds of
reasons in turn, arguing that, upon closer examination, they either do not get off the ground or do not ultimately outweigh the prima facie case in favor of MC.

A. The Value of Marriage Does Not Justify Special State Interest

One way to argue against a marital state of nature (or MC) is to appeal to the value of marriage as sufficient justification for state recognition and promotion. According to this line of defense, marriage (whether defined traditionally or more inclusively) constitutes a valuable way of life that the state ought to recognize and encourage through its laws and social policies. Several examples of this kind of defense have already been considered in Chapters Three through Five. In particular, I identified and critically evaluated defenses of “traditional” civil marriage that appeal to its intrinsic value (deriving from either its historical pedigree or its philosophical caliber) and others that appeal to its instrumental value in securing and promoting numerous individual and collective goods.

I. The Pluralistic Alternative to Exclusively Traditional Civil Marriage

However, even if my arguments against the various kinds of defense of traditional civil marriage were thoroughly successful, there would still remain an important alternative that might be called pluralistic civil marriage (henceforth PCM). PCM, broadly speaking, would consist in a civil form of marriage that includes TCM’s and at least one other kind of durable intimate partnership (e.g., same-sex marriages, polygamous marriages, etc.). Undoubtedly, PCM will be a particularly attractive alternative to many readers, as it is more inclusive than TCM while still retaining some role for the state in designing and regulating an institution which recognizes and promotes intimate
relationships (unlike MC). As such, the question must at least be raised, "If TCM is rejected, why not PCM instead of MC?"

This question undoubtedly hits on an important point – namely, that a truly exhaustive account of the normative foundations of civil marriage would need to say quite a bit about PCM and address the strengths and weaknesses of the particular defenses that might be advanced in favor of it. However, such an account is far more ambitious than I can attempt here (and indeed would constitute its own dissertation-length project). Several reasons underlie my decision to give priority and focus to the normative foundations of TCM and its comparative status vis a vis MC. First, TCM is undoubtedly the most influential version of civil marriage in recent Western history. And given that an analysis and evaluation of the primary kinds of arguments in favor of it require something like a dissertation-length project, it makes sense to devote most of such a project to precisely this first and most fundamental task. Additionally, locating and undermining the justificatory claims of TCM is in and of itself a significant accomplishment. Thus, even if an exhaustive account of the normative foundations of civil marriage, and also a fuller defense of MC, cannot successfully be undertaken here, there will be considerable value and insight that results from an extended discussion of the normative basis for TCM. Indeed, and finally, I will argue briefly that PCM inherits most of the difficulties of TCM, from which it follows that a successful critical examination of TCM provides most of the resources needed to make a similarly successful examination of PCM; as I will emphasize, the problems really lie as much or more with the "civil" component of TCM as with the modifier "traditional".
Prior to laying out the brief case I want to make here for this last claim, I need to make one serious concession. In my own judgment, a well-designed institution of PCM would be morally superior to TCM. Though I cannot elaborate more upon this claim here, suffice to say that it seems true in light of its strong family resemblance to similar claims about more inclusive versus less inclusive social/political/legal institutions, such as individual rights to be free, own property, vote, etc. With the exception of children under a certain age, almost all attempts to defend the restriction of a certain class from access to these institutions seem to me to fail. As such, and in light of the lack of a distinctive and well-motivated rationale for restricting civil marriage only to “traditional” marital unions, I think that PCM enjoys a clear normative advantage over TCM.

2. A Brief Prima Facie Case against Pluralistic Civil Marriage

However, the problems with civil marriage are not simply a function of its close historical ties to traditionalism. Rather, they stem instead from the assorted moral and social costs associated with exiting a marital state of nature at all and from the lack of a sufficient rationale outweighing these costs. As such, and in light of the structurally similar nature of the arguments in favor of PCM as that of TCM, it follows that many of the problems and costs of TCM will be inherited by PCM.

To make this claim more systematic, consider how arguments for PCM would divide roughly into the same three basic categories as arguments for TCM: (1) historical intrinsic value defenses, (2) ahistorical intrinsic value defenses, and (3) instrumental value defenses. First of all, any historical intrinsic value argument for PCM would fail in at least two important ways that also plagued the same kind of arguments for TCM. For one thing, such an argument for PCM would clearly be liable to the problem of historical
fit. Simply put, PCM has no strong historical pedigree on which to ground this kind of intrinsic value defense. For another, even if it did, it would not be in any better position with respect to the was/ought problem than TCM – we would still lack a defensible normative principle linking what was the case to what ought to be the case. So, if anything, a historical intrinsic value defense of PCM is actually less promising than a historical intrinsic value defense of TCM.

What about ahistorical intrinsic value arguments for PCM? Here things are not so clear as with their historical counterparts, if for no other reason than that there are any number of ahistorical arguments that might be offered and far less of a general strategy to develop against them. Moreover, since PCM would be more pluralistic than TCM, it might appear more likely that one could identify a normatively significant property that is possessed by some class of unions. But appearances aside, it is not clear that a sustained examination of potential properties on which to ground a defense of PCM could locate one which is both normatively significant and possessed by each member within a diverse set of unions. As a general rule, the larger and less homogenous a group of relationships is, the less likely it will be that each relationship will share a given morally relevant property. This was well illustrated earlier when trying to locate an ahistorical morally relevant property had by all TCM’s; attempting a similar search on behalf of all PCM’s would only be even more daunting in light of the increased heterogeneity of whatever kinds of unions are under consideration. And, of course, one would still face questions regarding the normative adequacy and policy efficacy of any auspicious versions of the defense.²²⁹ So while I unfortunately cannot say more here about the

²²⁹ If, for example, the property of being a loving committed relationship were proposed as a candidate for an ahistorical intrinsic value defense of PCM, one could reasonably inquire into how, even with all good
prospects for this kind of defense of PCM, I hope to have at least alluded to some promising lines of critical response to it whatever form it takes.

This leaves only the instrumental value defense of PCM to consider briefly. Here, of course, the pluralist can take some cheer in the fact that they are not restricted to locating sources of instrumental value had by all and only traditional marriages. This makes the instrumental value defense of PCM much more promising than with TCM. However, this defense will be liable to the same four problems that I described as facing TCM. Any regime of PCM will inherit an initial justificatory deficit vis a vis MC; it will be dependent on the credibility of various empirical claims; it will need adequately to defend its normative principles and commitments; and it will need to inspire confidence that the values it seeks to promote can be efficacious in practice. Since I cannot here consider the rich variety of possible versions of this defense, I can only register my own skepticism that a well-defined but pluralistic class of unions will be instrumentally valuable in just the right ways to resolve each of these four problems. At the very least, again, I hope that the present project has at least made a significant contribution to this larger inquiry by identifying some important problems that would need to be dealt with successfully by any worthy defense of civil marriage.

intentions, the state actually might support this value via an institution of civil marriage. Since civil marriage can only support becoming and remaining legally bound in certain respects to another individual, it at best can only hope that an emotion like love supervenes on the union. Moreover, it is at least arguable that a formal legal institution of marriage might be a stumbling block for genuine love. Obviously, this might occur where persons become trapped in relationships that are not conducive for love and are, hence, discouraged from actually locating genuinely loving intimate relationships. However, a more subtle way in which civil marriage might be in tension with genuine love is by forming the dominant public conception of what marriage and love are about, leading more people to emphasize or become complacent with outward signs rather than inner realities.
B. Marital Contractualism is Not Morally Problematic

A second charge that might be made against a marital state of nature is that such a condition is unacceptably defective, normatively speaking. While there are numerous ways such an appeal might proceed, there is a general strategy available for addressing the normative defect charge, whatever particular form it may take. To see this, it will be useful to consider and respond to an important example of this charge and then generalize from this case study to show how many criticisms of this second kind tend to rest on a confusion about the nature and scope of MC.

1. A Critique of MC Inspired by Liberal Feminism

The specific version of the normative defect argument I want to consider here takes inspiration from a disconcerting charge that has been leveled by Susan Okin and echoed by other feminists. According to Okin and company, MC is especially insensitive to gender related issues and would leave women unacceptably vulnerable to various kinds of abuse and injustice. After extensively discussing the ways in which women (and also children) are made vulnerable before, during, and after (gender-structured) marriage, Okin concludes her *Justice, Gender, and the Family* with a fairly lengthy and detailed discussion of the possible ways in which society ought to be reconfigured in order to address these and related problems that she views as injustices. It is here that she summarily dismisses MC as a solution to the problems that marriage poses to women (and children), citing three specific inadequacies\(^{230}\):

1. Contractualism takes insufficient account of the history of gender in our culture and our own psychologies;
2. Contractualism takes insufficient account of the present substantive inequalities between the sexes; and

\(^{230}\)Okin (1989, p. 173).
Most importantly, contractualism takes insufficient account of the well-being of the children who result from the relationship.

As Okin sees things, an improved version of civil marriage, whatever ineradicable defects it might retain, is likely the best option for addressing the marriage-related effects of gender inequality.

2. Evaluating the Liberal Feminist Critique

In addressing this charge, it is important to emphasize that Okin’s actual remarks are set in a special context. For she is at this point in her book delicately (and admirably) straddling the line between political theory and practical politics (i.e., she clearly wants to effect significant changes in both venues). Hence, her critical remarks are most likely directed toward claims that problems of gender inequality produced and reinforced by traditional marriage can be remedied simply by instituting MC (e.g., doing away with legal marriage while retaining the same basic social and legal structures that she finds to disadvantage women). I am defending a more abstract position that allows MC to be partnered with any number of institutions and policies, including those animated by feminist principles of justice or care. Thus, I want to distance myself somewhat from Okin’s actual remarks and consider instead a less concrete gender-focused criticism of MC that takes inspiration from the basic spirit of her account.

Against such a criticism, I will argue that it fails to engage MC in its most modest and defensible form – namely, as holding that, of the two possible modes in which persons might enter and exit a legally recognized and enforceable relationship with others, ordinary individual contracts are preferable to state-defined status contracts. To see this, consider the structure of each of Okin’s three complaints against MC, where
each purports to show a distinct way in which MC "takes insufficient account" of some fact or value. This criticism seems to imply both (1) that these facts and values must be accounted for properly by either MC or civil marriage, and (2) that either MC cannot so account for any of them or cannot account for them nearly as well as civil marriage. I will argue that even where the first of these implications is granted, the second implication does not follow, unless what one means by adequately "accounting for", say, the "present substantive inequalities between the sexes" requires the ambitious goal of MC actually "solving" or "rectifying" these inequalities by itself. So long as what is meant by adequately "accounting for" these inequalities is the more reasonable requirement that MC not create, reproduce, or exacerbate them, then one would be mistaken in assuming MC to be unable to do this, albeit in a somewhat peculiar way. For MC sees the proper and effective means of accounting for inequalities as "outsourcing" them to other areas of the law or social policy which can address them in ways that are more efficient, effective, wide-reaching, and consistent with treating citizens as free and equal. Though perhaps peculiar, this method is anything but blind, neglectful, or incompetent.

Nor is it the case that this method is in anyway inferior to civil marriage. For civil marriage alone is not any better situated with respect to putting marriage partners in a more just or fair initial bargaining situation; it too will need to be paired with wider changes to the law (especially contracts) and social policy if it will have any chance at being effective. Moreover, it is unclear why someone concerned about the welfare of women would prefer to have the state (especially given its patriarchal tendencies) involved in defining the terms of marriage in ways that would apply to all legally-
recognized partnerships. Claudia Card, a well-known feminist philosopher, has richly suggested, it is the state’s involvement with the institution that is the source of many of its most pernicious defects, including fostering “conditions conducive to murder and mayhem”. \(^{231}\) She goes on to suggest that, in light of the “dismal political genealog[y]” of legal marriage, “perhaps those who want legal contracts with each other would do better to enter into contracts the contents of which and duration of which they specifically define”. \(^{232}\)

I want to build on Card’s suggestion that, if anything, MC will fare better than any form of civil marriage in numerous respects, including gender worries. First of all, a feminist version of MC would encourage the state to make fair all relations between men and women, intimate or otherwise, and not just marital relations. It would recognize that, insofar as women are made vulnerable in marriage contracts, it will likely be the case that they are made similarly vulnerable in other types of contracts and legal situations. Hence, MC recommends working on structuring the wider legal system in accordance with acceptable principles of justice, rather than on one particular quasi-contractual institution like civil marriage. And, unlike even a feminist version of civil marriage, it can do all of this without the moral liabilities of requiring one subsection of persons to subsidize, both financially and ideologically, the special benefits and status of another section of persons.

Secondly, the uncompromised treatment of marriage as a standard contract can either facilitate or dovetail with wider social aims of distributive justice. In Okin’s own

\(^{231}\) Card (1996, p. 8). Card is not alone among feminists in endorsing a version of MC. Martha Albertson Fineman also urges for this kind of approach in her 1995 *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*, where she contends that “we should abolish marriage as a legal category and with it any privilege based on sexual affiliation” (p. 228).

case as a liberal feminist, we can note how, on the one hand, aims such as the protection
of extensive individual freedom and pluralism about the good life can better be realized,
as persons would not have antecedent restrictions placed on their choice of partners or on
many of the terms of potential agreement, nor would they establish a subsidizing
relationship between two large classes of citizens. On the other hand, the aim of fairness
(at least as it is often construed) can better be realized, as the vulnerable could be
protected from coercive, exploitative, or otherwise unjust agreements of all kinds (not
just marriage contracts). Hence, it is quite possible that allowing persons to
individually determine the character of their relationships in ways that are in keeping
with the principles and counterprinciples of contract theory, coupled with other
institutional changes, is prima facie more promising for moving a society toward the
gender egalitarianism that Okin envisions and endorses.

In fact, I think Okin comes very close to realizing the potential for a more radical
kind of contractualism to do just this. Here I want to draw on passages where Okin is
critically analyzing the work of Roberto Unger, who usefully unpacked the theory of
contracts into two principles and two counterprinciples:

Two Principles
(1) Freedom to Contract – (whether and with whom to contract)
(2) Freedom of Contract – (the choice of terms)

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233 Some might argue that MC cannot rule out with general laws certain kinds of gender-related problems
that are highly specific to marriage (e.g., a woman who raises children and tends to domestic duties for 20
years and then is left without any support or recompense after a divorce). In response, it is essential to
remember first that MC itself does not rule out much of anything; rather, it is MC plus some larger system
of legal and social institutions that does this. In the case of gender-related problems that seem highly
specific to marriage, I would argue that general laws about “personal service” contracts (of which
“marriage” contracts could be understood as one example) can take the sting out of many of these worries.
In particular, this broader class of contracts might have time limits and other substantive restrictions placed
on them. It is possible that the defender of MC might have to bite some bullets at some point, but it would
need to be shown that these bullets are more fatal than the considerable range of moral and social costs
associated with any form of civil marriage.

234 Okin (1989, p. 120).
Two Counterprinciples
(1) Contracts should not be allowed to work in ways that subvert the communal aspects of social life.
(2) Contracts that are not fair are not enforceable.

Unger claims that contractual thinking, informed by these principles and counterprinciples, can serve radical critical ends (e.g., in the marketplace), but is inappropriate for relations within the family – the latter being a claim to which Okin stands in vehement opposition.

For Okin, the idea that the institution of marriage constitutes a special realm to which contractual thinking is entirely inappropriate is a “mythical notion” that must be destroyed if we are to arrive at a fully satisfactory critique. As she points out, marriage (taken generally) has long been regarded as a contract, though one with a highly anomalous character, as it does not conform to either the principles or counterprinciples of traditional contract doctrine. For example:

(1) Marriage is generally treated as a preformed status contract that:
   a) restricts the parties’ freedom to choose their partners (e.g., only one AND of the opposite sex)
   b) restricts the terms of the agreement in ways that the parties are not free to alter (e.g., lifelong, historically patriarchal, etc.)
(2) The parties to it are not required to even be familiar with the terms of the relationship into which they are entering or of its dissolution, let alone sign a formal, explicit statement of the terms. Thus, entering marriage is very often not a “fully articulated act of will,” in the way that contracts are generally required to be.
(3) The preformed, state-defined marriage contract establishes unfair terms for women, which are then enforced by the coercive apparatus of the state.

Okin goes on to say that one of the reasons that marriage has historically produced unjust outcomes for women is that it has been treated as a contract while failing to satisfy the standard principles and counterprinciples of contract theory. She concludes that a “re-

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236 Ibid, p. 123.
examination of contract can have implications for the institution of the family that are just as radical as those Unger draws out of it for the institutional basis of economic life. All I need add here is that a reexamination of contract with respect to intimate relationships can have equally radical implications.

What all of this is intended to clarify and reinforce is that MC, viewed in its most plausible form, applies simply to the particular mode in which persons enter and exit a legally recognized and enforceable relationship with others and is not itself an appropriate instrument for more ambitious social or theoretical aims (e.g., solving some plethora of social maladies such as gender-based injustices). Hence, criticisms of MC that find it normatively defective for not accomplishing such aims are missing the point. Moreover, not only does this kind of criticism fail to exercise the position in the right ways, but it actually reveals MC’s comparatively advantageous and open-ended compatibility with a variety of theories of justice. Social, legal, and economic institutions could be arranged in a multifarious assortment of ways that are compatible with the state’s treatment of marriage as nothing more than a variable type of arrangement which persons might choose to have it party to. Thus, generalizing from the case study of gender-focused criticisms of MC, it seems that other normative defect criticisms also are unlikely to critically exercise the view in the right ways and, upon closer examination, also will reveal its open-ended compatibility with a variety of alternative social ends.

C. Marital Contractualism is Not Unacceptably Impracticable

The final kind of reason for having a form of civil marriage holds that a marital state of nature is unacceptably defective, *practically* speaking. In other words, MC may sound

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nice in theory, but it would not work in practice. Here opponents of MC might appeal to numerous versions of the impracticality charge. Broadly construed, these include (but are not limited to):

(1) *Life under MC would be Too Unwieldy and Complicated* → One life under such a regime would be too unwieldy because everyone would have their own distinct marital contract, would have to create them from scratch, and could not possibly foresee everything that they might want included within them.

(2) *Life under MC would be Too Uncertain* → A regime of MC would have too many uncertainties, arising from its patchwork character.  

(3) *Life under MC would be Too Legalistic* → A regime of MC might be thought to exacerbate the legalistic tendencies of modern life by making every aspect of a relationship a matter of contractual agreement.

For each version of the impracticality charge, it bears emphasizing that the key word is "too". Since any form of civil marriage will also be unwieldy, complicated, legalistic, and filled with uncertainties (at least to some extent), the opponent of MC would need to show that it is far more liable than civil marriage to these and other practical defects.

Additionally, it is worth noting that the impracticality charge also might be issued against the systems of marriage law now in place had they been proposed in an initial setting where no legal category of marriage had yet been created. Thus, this argument gains most of its primary motivation from the perspective of imagining changes to the status quo in all its present complexity (which again is not the primary focus of this project). Still, it is an important enough criticism to say a bit more about. I obviously cannot take on here every possible example of the practicability of MC. However, we can consider three broader kinds of response that a defender of MC might make to any 

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238 For a helpful parallel here (though one that should not be taken too far), one might understand this complaint against MC to be akin to the complaint made against the common law – namely, that in deriving not from a larger, systematic, overarching vision, it will turn out to have too many gaps and uncertainties.
given instantiation of the impracticability charge and also focus on an example that might seem particularly worrisome to show how MC might get around this kind of worry.

1. The Appeal to Practical Worries is a Last-Resort Strategy

First of all, it should be immediately obvious that the appeal to practicality is, at best, a last resort strategy for the opponent of MC. For one thing, this kind of appeal overlooks a near platitude of policy making – namely, that all policy, including the lack of policy, has tradeoffs and practical difficulties (parts of which could almost always be better negotiated by alternative policies even if they are otherwise defective or inferior). Simply pointing out the particular tradeoffs and difficulties of one policy alternative is, by itself, insufficient for making a satisfying case for a rival alternative. One must also give good reasons for believing these tradeoffs and difficulties to be on a different order of magnitude than those facing the alternative one intends to defend.

For another thing, any version of the objection robust enough to do this and also outweigh the prima facie case in favor of MC (including the moral and social costs of civil marriage) will likely be liable to a decisive normative failure – namely, that it could be used to legitimate any number of morally bankrupt policies and programs. For example, worries about practicality no doubt could have been raised, and indeed were raised, by those opposed to the elimination of the legal category and institution of involuntary slavery, or the expansion of the legal category of “eligible voter” to include otherwise eligible women and racial and ethnic minorities, or the elimination of legal categories for heresy or witchcraft, etc. 239 Given that the impracticality charge fails in any

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239 I am not trying here to draw strong parallels between civil marriage and any of these cases (though see Claudia Card’s remarks about why she sees traditional civil marriage as bearing a strong family
number of other relevant cases, it already seems unlikely that it will prove to be decisive where others have not in the case of civil marriage.

2. The Appeal Likely has Mistaken Assumptions about MC

The second broader kind of response notes that many versions of the impracticability charge will rely on mistaken assumptions about MC. In particular, it is likely that they will tend to assume that because MC does not address a given practical problem through the distinctive lens of “marriage” law and policy that it cannot or will not address it at all. However, this conclusion does not necessarily follow, as many issues now treated (often awkwardly) as issues in marriage law could be dealt with through other areas of the law (torts, crimes, property, etc.) and through other legal categories (parenthood, guardianship, etc.). Legal systems have rich histories of shifting the primary areas of the law which deal with any given issue, such that what was once regulated as a crime (e.g., usury) is now dealt with as a matter of property or commercial contract law, to name just one of many possible examples. The fact that many issues in family or marriage law are presently categorized as such is often more historical accident than necessity. Hence, we can emphasize from the start that for any impracticability charge to get off the ground, it will need to demonstrate that no other areas of the law would be able to pick up the regulatory slack, so to speak.

3. Appeal Likely Underestimates the Adaptability of Law

The final kind of broad response points to the likelihood that the impracticability charge will underestimate the considerable adaptability of the law and legal/social institutions.

resemblance with slavery [Card, 1996, p. 11]), but rather to show that unless practical worries are given an almost decisive weight, they will tend not to outweigh strong normative reasons.
The law is a highly resourceful and flexible instrument with a rich evolutionary history of negotiating and solving a wide range of practical problems. Contract law in particular has dealt successfully with an impressive array of tough cases and seems quite promising for addressing MC's potential vulnerabilities. Bernstein (a legal scholar who opposes MC [on crudely utilitarian grounds] while admitting that many of the practical worries either are very inconsiderable or can be gotten around without much difficulty) provides many examples of how the law might successfully adapt in a marital state of nature. For example, she notes that:

Contract law has already pondered the enforceability of paradoxical contracts that waive freedom of contract; at least at this hypothetical level, Americans already live with the possibility of, for example, an agreement to live under the eighteenth-century coverture law. Moreover, the subject is familiar: courts today must construe cohabitation contracts, antenuptial contracts, separation agreements, child custody agreements, and other knotty bargains between intimate partners.  

Hence, if even legal scholars who are ultimately critical of MC can admit that the impracticability charge is overblown, then we have clear grounds for being optimistic that MC need not be unacceptably impracticable.

4. Putting the Tripartite Argument to Work against a Practical Worry

With the three kinds of appeal noted, I want briefly to consider an example of how the impracticability charge might proceed. Here I will focus on a very general complaint that seems to bother many critics of MC – namely, the complaint that life under such a regime would be too unwieldy because everyone would have their own distinct marital contract and would have to create them from scratch. According to this criticism, MC allows for

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too much relational diversity and might burden the legal system or our social vocabulary with its unfettered spirit of "to each their own".

A moment's reflection, however, should quickly dispel this worry. For one thing, the same claim could be made against ordinary commercial contracts that can differ radically in any number of important respects. So if the criticism is to stick, it would need to be convincingly demonstrated that marriage contracts would fare significantly worse than these fairly pedestrian counterparts. And this it seems to me is quite unlikely and reveals another way in which this kind of charge is a last-resort strategy.

Similarly, the charge of unwieldiness also could be made against important non-commercial activities and pursuits. Consider, for example, religious belief and practice. If anything is diverse, complicated, and unwieldy in modern pluralistic societies, then certainly it is religious life. Even within the dominant tradition of monotheism, several world religions each composed of thousands and thousands of (often radically different) sects and denominations coexist and interrelate with one another. Yet despite the social and legal complications this presents, very few would consider that unwieldiness, in and of itself, to constitute a good reason in favor of having a unified civil form of religion. Thus, any defense of civil marriage would need to explain how unwieldiness alone could justify it over MC when this practical consideration is insufficient in other contexts.

Moreover, as Bernstein notes above, the law already deals with a rich variety of agreements that overlap or link up with the preformed status contract of civil marriage, including "cohabitation contracts, antenuptial contracts, separation agreements, child custody agreements, and other knotty bargains between intimate partners".241 Thus, it is

241 Ibid.
unclear why it would suddenly be overwhelmed and left without sufficient precedent in dealing with the conditions and challenges of MC.

This particular criticism also makes mistaken assumptions about MC, supposing that everyone would be left entirely to their own devices. In practice, however, it can be expected that something like five to ten basic kinds of relationship contracts would emerge as general templates. Persons could start with whatever template seems best suited for their needs and then revise, delete, or add certain elements to fit their individual and relational needs and desires. The result need not be terribly confusing or unwieldy; indeed, if a regime of civil marriage appear to have certain advantages here, it is likely to be because in actual practice the many terms of the relationship are often not worked out or even understood at all by the marriage partners until during or when exiting the relationship. This is no advantage though, but merely the relocation of potential problems. If persons were actually required to sit down and work through the terms of the preformed status contract of civil marriage (as perhaps they should be), then any perceived advantage for civil marriage might quickly disappear.

Obviously, there is much more that could be said about practical worries. But hopefully the promise of the general tripartite response is clear and sufficient for now.

IV. CONCLUDING REMARKS

Many persons, in reading Hobbes and Locke, have been persuaded that there are strong reasons for exiting a general state of nature. Whether their vision of that condition is more sympathetic with the pessimistic picture painted by Hobbes or with the optimistic picture of Locke, these readers have tended to agree both that there are serious moral and practical problems with the state of nature and that life under government can solve these
shortcomings. However, if my arguments have been sound, then it does not follow from this more general move that any of the various institutions within a state can be justified in the same way. In particular, my arguments suggest that a marital state of nature, if not exactly warm and cozy, does have a number of things going for it:

(1) MC is default-justified.
(2) MC has a number of important virtues.
(3) MC avoids the several and significant costs of establishing civil marriage.
(4) MC has no momentous moral or practical defects that outweigh the significant prima facie case in its favor.

Combined with my arguments that marriage does not have some special value that would justify state recognition and promotion, a strong case for MC can be built around these advantages.
CHAPTER SEVEN

Conclusion

In this project, I have sought to clarify, analyze, and evaluate the normative foundations of the institution of civil marriage. More specifically, I have tried to make significant headway toward answering what is arguably the central political-philosophical question concerning the institution: “Should the state establish, recognize, and/or maintain a civil form of marriage?” My conclusion is that marriages in a pluralistic society ought to be mostly private affairs worked out between or among those party to the arrangements, with the state’s involvement limited to the enforcement of (1) general laws (e.g., regarding property, torts, crime, etc.) and (2) particular contracts that are individually initiated and designed within a defensible system of contract law. This view, marital contractualism, has been defended as both prima-facie justified (MC enjoys default justification and independent virtues, while civil marriage produces significant social and moral costs) and most-things-considered justified (MC is not liable to any unacceptable moral or practical defects, while civil marriage cannot adequately be defended by appealing to the value of marriage).

Though the primary focus of my critical attention has been directed at defenses of traditional civil marriage, I have argued that there are good reasons for thinking that the criticisms that militate against this form of civil marriage often can be generalized to more pluralistic forms as well. If this is, indeed, the case, then the project has produced at least three significant conclusions.

First, the dominant form of civil marriage in contemporary Western societies, traditional civil marriage, derives from inherited beliefs and practices that are philosophically problematic. When the various kinds of defense for this institutional form are critically analyzed and evaluated, their premises turn out to be false, underdetermined, or otherwise
insufficient for underwriting their conclusions about TCM. This conclusion alone would constitute an important achievement for the project with numerous implications for public policy.

Secondly, and more abstractly, any substantive account of the basis for civil marriage in a pluralistic society ultimately will face significant theoretical obstacles in defending its conclusions. Aside from always starting with a justificatory deficit, constituted by the combination of MC's advantages and CM's social and moral costs, such accounts only have a limited number of kinds of defense to which they can appeal. But as I argued in Chapter Six, there are good reasons for thinking that each kind of defense is liable to a host of general problems regardless of its specific features. At the very least, then, this project has shown that a successful defense of civil marriage will need to be much more complex and wide-ranging than those that have been offered thus far.

The final conclusion I want to emphasize is that my own view, marital contractualism, constitutes a promising and attractive alternative to a preformed, state-defined institution of civil marriage in political theory and practice. MC is not only the appropriate starting place from which to begin a moral/political investigation of the institution of marriage, but it also can withstand serious critical scrutiny with respect to its potential moral and practical liabilities. As such, it deserves to be taken more seriously within both political philosophy and public policy. In both domains, taking MC seriously would at the very least push those defending the status quo to better clarify and defend their beliefs about and hopes for the institution of civil marriage. Moreover, if it turns out that such attempts at clarification and defense continue to disappoint, then taking MC seriously might just recommend giving it a chance to prove itself in practice (at least in limited experimental contexts). Coupled with adequate supporting institutions and backed by the social resources currently thrown behind civil marriage, marital contractualism just might
turn out to outstrip its theoretical opponent with respect to how well it serves the interests of modern society.
WORKS CITED


