

# Just Marital Establishment

Jennifer Brown  
University College London  
PhD Political Theory  
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Declaration:

I, Jennifer Brown, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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### Abstract:

During the course of their lives, many, if not most citizens in modern liberal states, enter into, develop, live through, and sometimes terminate, significant personal relationships. In the vast majority of these states, the predominant and often only means of regulating and recognising such relationships within family law has been through the institution of marriage, which has a formal relationship of establishment with the state whereby the state reserves the right to apply the label 'marriage' to only certain types of relationship, and confers benefits on those that receive the label.

In recent years this practice of marital establishment has been challenged by various liberal disestablishmentarians who argue that it is inconsistent with liberal values such as liberty, equality, and neutrality, and that consequently, the state should get out of the business of marriage and administer a more inclusive regime of relationship regulation and recognition such as civil unions or relationship directives. The purpose of this thesis is to respond to this challenge. Specifically, I entertain the possibility that *Matrimonia*, a state that symbolically establishes marriage as a cultural institution whilst also providing rights, benefits, and recognition to a broad range of relationships, can be a good enough liberal state even when compared to *Omnia*, where the alternative institutions endorsed by disestablishmentarians are in firmly in place.

By both disputing and developing the work of recent marital establishmentarians, I endorse the use of a practice-dependent approach in order to account for the value of marital establishment as a pre-existent practice. As a cultural good through which value is pursued collectively, marriage has some normative value that we have reason to protect and recognise. I argue that liberal states can permissibly establish this cultural good if and when it can be demonstrated that marriage does not entail religious establishment, does not involve the state in wrongful discrimination, and does not raise neutrality concerns that are different in kind to those raised by all states, including *Omnia*. Having argued for the possibility of cases that satisfy these requirements, I conclude that although not required by liberal justice, certain forms of marital establishment can be permissible for states without a resultant loss of their liberal credentials.

### Impact Statement:

The regulation and recognition of significant personal relationships is an essential part of the state's remit. In recent years there has been much discussion within political theory about what sort of institutional arrangement the state ought to adopt to best govern this aspect of the lives of citizens justly.

This project aims to contribute to that discussion within academia, thereby developing and extending understandings and uses of concepts such as establishment, culture, discrimination, and liberal neutrality. The academic work engaged with in the project has contributed to a wider discourse within the public sphere about how relationships should be regulated and recognised, with alternations in law in order to incorporate these insights fairly frequent. Most recently, in *Steinfeld and Keidan v. Secretary of State for International Development*, the way has been paved for the expansion of civil partnerships to different-sex couples. The UK government's policy response to the case has yet to materialise, and this project aims to provide a means of assessing what role marriage, if any, should play in the state's architecture of relational justice.

The recommendations made in the project are intended to guide states, officials and representatives, those working within family law, as well as the public more generally, in decisions about the future of established marriage. Whether to support the institution, to participate in it, to enter or leave it, or to reject it, is both a deeply personal and political question that this project provides an answer to. I hope that those grappling with that question will find the following work of use.

## Table of Contents

Chapter 1 – Mapping Out Marital Establishment .....	10
1 Questioning the State’s Role in Marriage.....	10
2 Mapping Out Regimes of Relationship Regulation and Recognition.....	15
3 The Parameters of Just Marital Establishment .....	23
4 Structure of the Work.....	25
Chapter 2 - If You Like It Should the State Put a Ring on it?: Macedo on Marriage, Public Reason and Culture.....	30
1 Introduction: A Tale of Two Desires.....	30
2 Macedo on Marriage.....	33
2.1 The Public Reason Argument .....	33
2.1.1 The Liberal Good Argument.....	40
2.1.2 The Personal and Social Good Argument.....	42
2.2 Problems with Macedo’s Public Reason Arguments .....	44
2.3 The Cultural Argument.....	52
2.4 Problems with Macedo’s Culture Arguments.....	55
3 What is the Relationship between Public Reason and Culture?.....	57
4 An Alternative Approach – Practice Dependence.....	59
5 Concluding Remarks.....	61
Chapter 3 - Interpreting the Practice of Marriage: Is a Practice-Dependent Justification of Marital Establishment Possible? .....	64
1 Introduction .....	64
2 Why Turn to Practice-Dependence? .....	66
2.1 Lessons from Macedo’s Marital Establishment.....	68
3 Refining Practice-Dependence.....	73
3.1 The Normativity of Practice-Dependence.....	73
3.2 Distinctness I: Interpretivism.....	75
3.3 Distinctness II – Reflective Equilibrium.....	79
4 When Can Practice-Dependence Help? .....	81
5 Where Does the Value of Practices Lie? .....	87

6 The Value of Marriage.....	92
6.1 Marriage-Specific Values.....	92
6.2 Conditions for the Permissibility of Marriage.....	93
7 Is Marriage an Appropriate Candidate?.....	95
7.1 History: Is Marriage Tarnished?.....	97
7.2 Culture: Is Society Skewed in Favour of Marriage?.....	102
7.3 The Problem of Non-Participants.....	104
8 Concluding Remarks.....	111
Chapter 4 - What's Wrong with Marital Establishment? Part One: Do Religious and Marital Establishment Share Relevant Wrong-Making Features?.....	113
1 Introduction.....	113
2 Holy Matrimony?: The Claim.....	115
3 Is Establishment Itself Wrongful?.....	116
4 Is Marital Establishment a Form of Religious Establishment?.....	118
4.1 The Conceptual Argument.....	119
4.2 The Empirical Argument.....	125
5 What is the Shared Wrong-Making Feature of Marital and Religious Establishment?.....	132
5.1 Is Marriage Really an FCSI?.....	135
5.2 Can Other FCSIs be Established in a Way Consistent with Liberal Principles?.....	139
5.3 What's Wrong with Being an Ethical Authority?.....	140
6 Concluding Remarks.....	142
Chapter 5 - What's Wrong with Marital Establishment? Part Two: Love Hurts?.....	144
1 Introduction.....	144
2 Amatonormativity – The Charge.....	145
2.1 Aspects of Amatonormativity - “ <i>What’s Love Got To Do With It?</i> ”.....	145
2.2 Centrality.....	147
2.3 Exclusivity.....	148
2.4 Love.....	149

2.5 Normativity.....	151
3 Is Marital Establishment a Case of Wrongful Discrimination?.....	155
3.1 Cases <i>A</i> and <i>B</i> – Public Discrimination.....	158
3.2 The State of <i>Matrimonia</i> .....	160
3.3 Is a Purely Symbolic Form of Marriage Possible?.....	162
4 What Could be Wrong with Purely Symbolic Marital Establishment?.....	169
4.1 Discrimination and Symbolic Equality.....	170
4.2 Affected Groups.....	172
4.2.1 Unmarried Mothers.....	173
4.2.2 Singles .....	176
5 Concluding Remarks: The Non-Discriminatory Matrimonial State.....	183
Chapter 6 - What is Wrong With Marital Establishment? Part Three: The Neutrality Objection to Marital Establishment.....	185
1 Introduction.....	185
2 Chambers and Neutrality in ‘ <i>Against Marriage</i> ’.....	189
3 Two Responses to Chambers.....	193
3.1 Is the Meaning of Marriage a Zero-Sum Game?.....	193
3.2 How Do Conceptions of the Good Life Conflict? .....	195
4 The Perils of Neutrality: Why the Marriage-Free State does not give us State-Free Marriage.....	198
4.1 Regulation and Recognition Overlap.....	201
4.2 Regulation Alone Does Not Avoid The Neutrality Question.....	210
4.2.1 Appellation.....	212
4.2.2 Form, Content, and Proxy Control.....	219
5 Concluding Remarks.....	225
Chapter 7 – The Terms of Cultural Establishment.....	226
1 Marital Establishment from Scratch?.....	226
2 Perfect or Imperfect Justice?.....	228
3 Accepting Cultural Establishment.....	234
4 Concluding Remarks.....	235
References.....	238

## Chapter 1 - Mapping Out Marital Establishment

In this introductory chapter I consider *marriage as establishment* by giving an overview of the literature questioning the state's role in marriage.

### 1 Questioning the State's Role in Marriage

On the 26<sup>th</sup> June 2015, the Supreme Court of the USA ruled in *Obergefell v. Hodges* that the US constitution guarantees the fundamental right of same-sex couples to marry. This decision overruled existing state bans on same-sex marriage, and required that states not already doing so begin issuing marriage licenses to same-sex couples, and recognising same-sex marriages made out of state. The US thereby joined 20 other nation-states where same-sex marriage is legal, ranging from the first to offer such recognition, the Netherlands, in 2000, to Ireland, one of the latest countries to follow suit, but the first to do so through a popular referendum, in which 62% of voters supported the change in May 2015.<sup>1</sup> Nevertheless, the vast majority of the global population live in jurisdictions where same-sex marriage is not recognised, and in 75 countries, same-sex sexual activity is criminalised, and punishable by death in 9 states.<sup>2</sup> Depending on where they reside then, lesbian, gay, bisexual and transgender (LGBT) citizens may find their sexually intimate relationships can be officially recognised and celebrated by the state as legally valid marriages, or legally denied and subject to criminal prosecution.<sup>3</sup> It is a matter of

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<sup>1</sup> David Masci, Elizabeth Sciupac and Michael Lipka, 'Gay Marriage Around the World' *Pew Research Center*, 2015 <<http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>> [accessed 27 February 2016].

<sup>2</sup> Aengus Carroll and Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love* (ILGA, May 2015) <[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf)> [accessed 27 February 2016]; pp. 9-10. The death penalty is implemented in 6 states (Mauritania, Sudan, Saudi Arabia, Iran, Yemen and Iraq); it exists in statute, but is not implemented, in Pakistan, Afghanistan and Qatar. Brunei Darussalam was due to activate the death penalty for such offences in 2016, after the report was published.

<sup>3</sup> In what follows, I use LGBT to refer to lesbian, gay, bisexual and transgender persons as if all such persons are in a similar position as regards marriage law. Although generally this is the case for lesbians and gay men, the relationships of bisexual and transgender men and women may or may not be same-sex, so the prohibitions and legalisations relating to same-sex marriage and sexual activity may only affect certain persons in these groups at any one time. Prohibitions on same-sex marriage have had a particular effect on transgender persons who were married prior to transition, since in many cases, such persons had to

liberal consensus, clarified by H. L. A. Hart in his exchange with Lord Devlin regarding the legalisation of same-sex sexual activity in the late 1950s and early 1960s, that the Millian harm principle insulates sexual activity between consenting adults from state interference or concern.<sup>4</sup> As such, I take it as uncontroversial that the criminalisation of same-sex sexual activity is wrong and cannot be justified on liberal grounds. The concern of this project is with the opposite form of state treatment to criminalisation, that is, recognition. LGBT citizens should be free to pursue sexually intimate relationships without being subject to limitations from the state, but should the state legally recognise their relationships as marriage?

The obvious liberal answer is: yes. Just as LGBT citizens should be subject to equal treatment with regards to their sexual expression, having the same freedoms to engage in sexual activities and relationships as heterosexual persons, so LGBT citizens should be able to cement their relationships as marital unions if they so desire, as their heterosexual peers have long been able to. The US Supreme Court stated as much in its declaration that same-sex marriage is required by both the Equal Protection and Due Process clauses of the constitution: securing equal justice for all, and safeguarding against arbitrary treatment by the state, respectively. Legal distinctions between heterosexual and LGBT citizens have progressively and rightly been removed, such that the rights to protection from discrimination in the workplace, to adopt children, and to serve openly in the military, to name a few, have been asserted and secured in some states. Marriage is just one of the legal battles fought in a more extensive war for equal LGBT rights.

Yet for some, marriage is not just one battle amongst many: it is a watershed moment. Marriage is cast as a central social institution, entry into which clearly enhances citizenship. The majority opinion in *Obergefell* described marriage variously as ‘one of civilization's oldest institutions’, ‘a keystone of our social order’, and ‘a building block of our national community’.<sup>5</sup> All such characterisations work to emphasize the injustice of legal exclusion. In her political history of marriage in the US, *Public Vows*, Nancy Cott shows how marriage has served important political functions. For instance, she describes how marital non-conformists were labelled “racially” different and how marriage was (and arguably still is) is used by government as a marker of who does or does not possess

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divorce their spouses since their change of legal gender rendered their extant marriage illegal. The recognition of same-sex marriage therefore means that transgender persons can alter their legal gender without having a legal effect on their marriage, if they have one.

<sup>4</sup> Herbert L. A. Hart, *Law, Liberty and Morality*. (Stanford, Calif: Stanford Univ. Press, 2007).

<sup>5</sup> Justice Anthony Kennedy, *Obergefell v. Hodges*, 2015; pp. 16; 28.

civil rights. Due to their direct impact on reproducing the population, marriage laws were integral to forming “the people” and as such informed notions of national belonging. Consequently aspiring minority groups, such as former slaves during the Reconstruction, often tried to improve their social position by engaging in conventional marriage behaviour. The contemporary political significance of marriage is emphasized by Cheshire Calhoun, who argues that the denial of marriage to LGBT citizens plays a central role in their oppression: ‘Bars on same-sex marriage encode and enforce the view that lesbians and gays are inessential citizens because they are unable to participate in the foundational social institution.’ By joining the near-sacred institution of marriage, LGBT citizens are affirmed as worthy of such entry, thereby challenging their displacement from both the public sphere of politics and work, and the private sphere of the family.<sup>6</sup>

The question that is the focus of this project is whether, and to what extent, the state should be involved in such a foundational social institution. The legalization of same-sex marriage in some territories does not resolve or conclude the marriage question for liberal political theorists.<sup>7</sup> Instead, the debate shifts to another level: liberals begin to question the legitimacy of marriage as a state-sponsored institution, and therefore to question the necessity, and indeed the justice, all-things-considered, of instituting same-sex marriage. The argument tends to go: *if* the state is involved in administering marriage, *then* of course it should be open to same-sex couples on an equal basis.<sup>8</sup> But, for many of these theorists, a further question must be explored, namely *whether* the state should be in the business of administering marriage *at all*. Many liberals, and others, including feminists and queer theorists, on closer inspection of this question, conclude that marriage, as such, should not be administered by the state.

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<sup>6</sup> Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford; New York: Oxford University Press, 2002); pp. 107-131.

<sup>7</sup> Due to the aforementioned liberal presumption in favour of freedom of sexual expression, a number of liberal thinkers were instrumental in providing defenses of same-sex marriage: John Corvino, ‘Homosexuality and the PIB Argument\*’, *Ethics* 115, 3 (2005): 501–34; Christie Hartley and Lori Watson, ‘Political Liberalism, Marriage and the Family’, *Law and Philosophy* 31, 2 (2012): 185–212; Martha C. Nussbaum, ‘A Right to Marry?’, *California Law Review* 98, 3 (2010): 667–96; Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, & the Future of Marriage* (Princeton, New Jersey: Princeton University Press, 2015).

<sup>8</sup> Clare Chambers, ‘VII-The Marriage-Free State’, *Proceedings of the Aristotelian Society (Hardback)* 113, 2pt2 (2013): 123–43; pp. 131-132; Nussbaum op. cit.; p. 762; Hence, in the US context, the Equal Protection clause of the US Constitution (and the common benefits clause of some state constitutions) have been appealed to in order to prompt a fairer and more inclusive rendering of legal benefits. See Anita Bernstein, ‘Introduction: Questioning Marriage’ in A. Bernstein (ed.) *Marriage Proposals: Questioning a Legal Status* (New York: New York University Press, 2008): 1–25; p. 5.

The feminist critique of marriage was motivated initially by the legal doctrine of coverture that accompanied it in the English common law tradition until the mid to late 20<sup>th</sup> century. Under this arrangement, upon marriage, a woman's legal identity became subsumed under that of her husband, so that she could not own property or enter into legal contracts in her own name. John Stuart Mill famously characterized marriage as enslaving women, describing the wife as 'the actual bondservant of her husband: no less so, as far as legal obligation goes, than slaves commonly so called.'<sup>9</sup> Despite the legal dismantling of coverture and the confirmation of the equal status of spouses in law (illustrated most powerfully perhaps by the criminalization of marital rape on a par with non-marital rape in the UK in 1991, and ongoing but almost complete in the US), feminist criticism points to other problematic features of marriage. Susan Moller Okin points to the gendered division of labour that commonly exists within marriages, and the 'vulnerability by marriage' this creates for the women rendered financially dependent on their husbands.<sup>10</sup> Claudia Card argues that marriage 'tends to be coercive, especially for women in a misogynist society', becoming in some cases 'a dangerous trap' which she, like Mill, compares to slavery.<sup>11</sup> These concerns about the patriarchal dynamics of marriage lead Card, and other feminists such as Martha Fineman, Marjorie Shultz and Clare Chambers, to call for an end to the legal status of marriage, and its substitution in law with something less saturated with patriarchal norms.<sup>12</sup>

Similarly, queer theorists have thrown the status of marriage into question. For Michael Warner, marriage represents an attempt to domesticate and normalise nonheterosexual sexualities, with conservative and exclusionary consequences. Non-conventional and non-normative sexualities are best protected by reducing the role of the state in regulating sexuality, not by expanding its marital remit. Marriage is by its very nature discriminatory, it retains benefits for the initiated only and uses the politics of shame to silence its others. By drawing the circle of the marriage club a little wider, we simultaneously cast the not-married in a shameful light, 'throwing shame on those who stand farther down the ladder of respectability.'<sup>13</sup> For Judith Butler, the legitimation

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<sup>9</sup> John Stuart Mill, *The Subjection of Women* in S. M. Okin (ed.) (Indianapolis: Hackett Pub. Co, 1988), p. 32.

<sup>10</sup> Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); pp. 134-169.

<sup>11</sup> Claudia Card, 'Against Marriage and Motherhood', *Hypatia* 11, 3 (1996): 1-23; p. 11.

<sup>12</sup> Card op. cit.; Martha Albertson Fineman, 'Why Marriage?', *Virginia Journal of Social Policy and the Law* 9, 1 (2001): 239-70; Marjorie Maguire Shultz, 'Contractual Ordering of Marriage: A New Model for State Policy', *California Law Review* 70, 2 (1982): 204-334; Chambers, 'VII-The Marriage-Free State' op. cit.; Clare Chambers, 'The limitations of contract: Regulating personal relationships in a marriage-free state', 2014.

<sup>13</sup> Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999); pp. 82; 15; 60.

granted by marriage is an ‘ambivalent gift’ – whilst making an intelligible and recognisable claim on behalf of a much maligned group, thereby raising their profile, the right-to-marry campaign lacks a critical and transformative edge. For instance, Butler notes how the legalisation of same-sex marriage has often been made less controversial by the distancing of the beneficiaries from full familial opportunities by excluding rights to adoption or access to reproductive technologies. Recognising same-sex marriage involves marking the line between the ‘not yet legitimate’ and ‘the never will be’, ‘the unthinkable’, in even greater relief. Whilst monogamous, committed gay couples are redeemed by marriage, all others excluded by it, the promiscuous and the polyamorous, are disenfranchised, and we mourn the ‘lost horizon of radical sexual politics’.<sup>14</sup>

If marriage is a harmful practice, as these critics attest, liberals have good reason to be concerned about it. Certainly, the liberal state could not justify its involvement with an institution that entrenches inequality between the sexes by the legal submission of women to men. Even if the marriage it establishes is formally equal, if structural forces combine to limit the freedom and opportunities of married women, the institution should be questioned. If the existence of marriage stigmatizes those it excludes, so that their equal citizenship is somehow compromised, this should trouble us. If the expectation to marry is experienced as oppressive or coercive, this is a problem. The liberal state generally aims to legislate against practices that cause harm to others, not seek to establish them. So a key question that liberals must consider is whether, and in what ways, marriage is harmful.

A further, and equally worrying concern about marriage for liberals concerns state neutrality. Whether or not marriage causes harm to persons, it may not be justifiable to those who do not endorse it. The *Obergefell* opinion said of marriage: ‘No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.’<sup>15</sup> Such a statement is hardly uncontroversial. Many people may reasonably disagree with such a valorization of marriage. Marriage, particularly as characterized in such pronouncements, is but one conception of the good amongst many. The ideas of the good endorsed by the politically liberal state must, according to Rawls, belong to a reasonable political conception of justice that can be both shared by citizens and that does not ‘presuppose any particular fully (or partially) comprehensive

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<sup>14</sup> Judith Butler, ‘Is Kinship Always Already Heterosexual?’, *Differences: A Journal of Feminist Cultural Studies* 13, 1 (2002): 14–44; pp. 15–16, 17, 23, 25, 35.

<sup>15</sup> Kennedy op. cit; p. 28.

doctrine'.<sup>16</sup> The state should pursue neutrality of aim by not favouring, promoting, or assisting any particular comprehensive doctrine.<sup>17</sup> Establishing marriage seems to do just that.

## 2 Mapping Out Regimes of Relationship Regulation and Recognition

For those who challenge the state institution of marriage, there are a number of alternatives mooted. Here I present a conceptual map of different marital systems, or systems of *relationship regulation and recognition* (RRR). I use a normatively neutral concept of establishment as a “special relationship” between the state and another institution in which the former supports the latter, but both sides may influence each other. *Marital establishment* involves the state and marriage sharing an institutional relationship whereby the state reserves the right to apply the label ‘marriage’ to certain types of relationship, and confers benefits on those that receive the label. I portray marital establishment as a scalar concept, that is, existing on a continuum between *complete establishment* at one end and *complete disestablishment* at the other. I present the different options along the scale as also existing at different points on a second axis, that of *singularity* to *plurality*. At the establishment end of the scale, the state defines marriage for legal purposes, by, for example, stating that a valid marriage must be between one man and one woman. The state can establish a single form of marriage, that is, traditional different-sex monogamous marriage, or it can diversify the civil marriages on offer by expanding along the scale towards plurality by adding sex-neutral marriage, or polygamous marriage, or civil unions open to non-amative relationships.

Under complete establishment, state control over marriage is complete, as the state is successfully the sole legal arbiter of marriage, and legal and social validity coincide completely, so that a marriage is not considered by social groups to be “true” unless it is entered into through a legally recognised form. This does not mean that the state has full control over marriage, as other social institutions may exert some influence over what marriage is, but the state’s interpretation is final, even if it merely fully co-opts one religion’s interpretation as its own. Establishment is incomplete whenever the state fails to exert full control over marriage in the sense that there exist some marriages in society that are considered socially valid, but not legally so. In this case, there are other

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<sup>16</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 176.

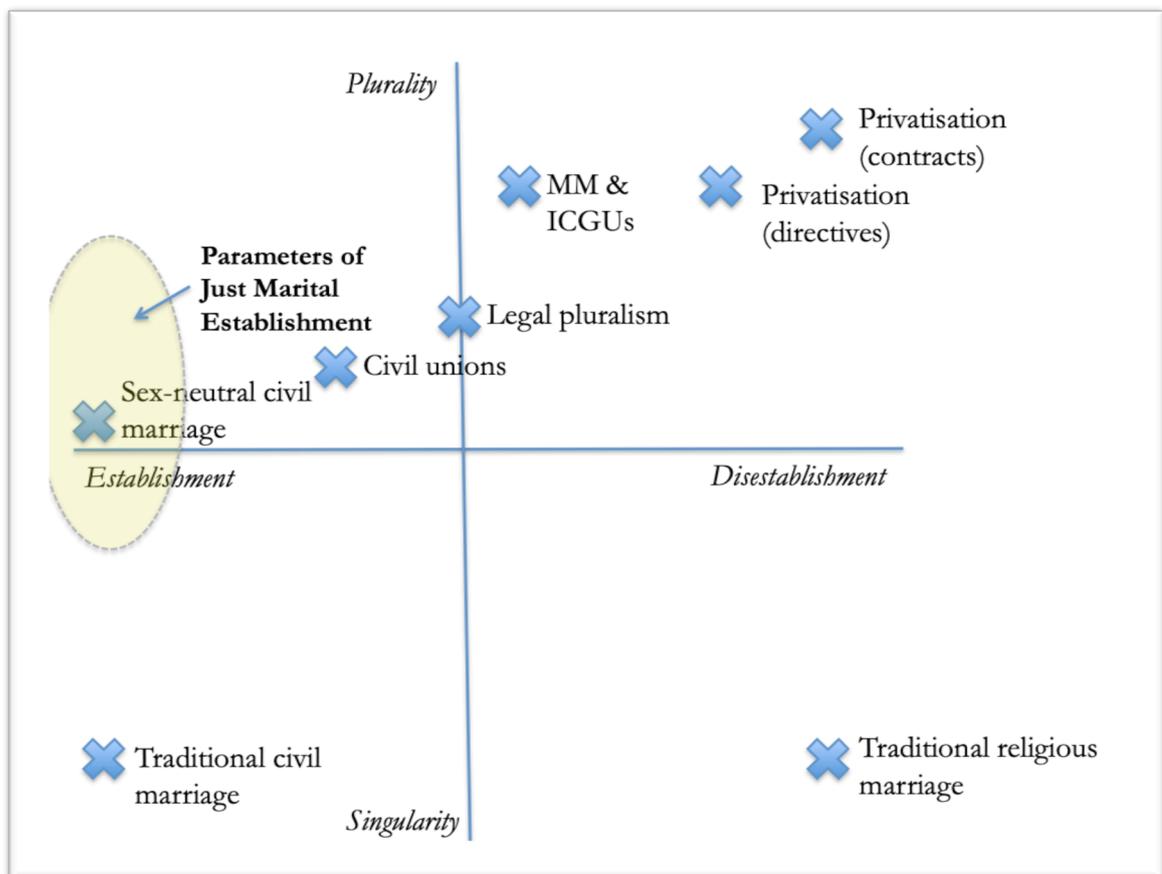
<sup>17</sup> Rawls *op. cit.*; pp. 192-193.

authorities that provide access to marriage without the state being involved. Here, establishment is de jure but not completely de facto. Although, the cases here are likely to be limited to, for example, isolated cases of individual couples who are married in the eyes of their religion but not of the state, or polygamous arrangements, in Chapter 6 I argue that the majority of states that practice marital establishment have partial and not total appellate control over marriage, that is, they allow private individuals to refer to themselves as married without seeking legal recognition, so that there is generally a gap between legal and social validity. This means that technically, in liberal states marital establishment is always incomplete. Institutional departure from full establishment doesn't occur until the state divests some of its power to define marriage for legal purposes to other authorities, thereby privatising marriage somewhat by handing control over it to religious and cultural groups.. Thus, systems wherein the state administers traditional different-sex civil marriage, sex-neutral civil marriage and even a dual system of marriages and civil unions, however expansively defined, have full marital establishment.

Each alternative represents a different regime of relationship regulation and recognition (RRR). The below figure presents the main options along two axes: full state establishment to full disestablishment; and singular models of marriage, to more pluralised ones. In each case, what is or is not established is marriage, although the nature of this establishment will be open to interpretation and will likely vary according to the specific concerns of the theorists involved. Thus, marital establishment could be seen as a form of religious establishment, or heterosexual establishment, or both, or neither. What it means to disestablish it will therefore likely mean different things. This means that the path from establishment to disestablishment is not smooth, and movement from the former to the latter will not progress uniformly across these different orders of magnitude. The privatisation of marriage might not achieve the disestablishment of heterosexual marriage and religious marriage in equal measure. As such, a move across the establishment axis from left to right might not produce a concomitant move up the intersecting axis from singularity to plurality. Rather, the availability of plural forms of marriage depends on there being socially viable institutions available to convene such marriages. At the bottom of the scale, a single form of marriage is in existence – a monogamous union between a heterosexual couple (although this could be conducted as a religious or a civil affair). Some systems of marriage may be

more likely to allow space for plural forms of religious marriage (e.g. different faiths and forms such covenant marriage, polygamous unions, etc.) with limited or no options for gay citizens. Others might multiply the number of civil options, whilst leaving religious variety without state sanction or delegated authority. This then raises the question of whether the point of disestablishment is pluralisation, or whether these two goals are separate and distinct.

Figure 1: Regimes of Relationship Regulation and Recognition



Broadly speaking, liberal responses may take two approaches to the disestablishment of marriage: a “deflationary” approach, which endorses a “Status Model”, or an “eliminativist” approach, which suggests a “Contract Model”.<sup>18</sup> Either way, the result is that the state no longer legally sanctions and administers “marriage” as we know it; on the former model, a pared down form of union is endorsed by the state, and on the latter, the state enforces “relationship contracts” as part and parcel of its ordinary remit in guaranteeing contract law.

<sup>18</sup> This terminology is from Baltzly op. cit; p. 41.

On the above diagram, liberal alternatives to state marriage occupy three positions: *Civil unions*; *Privatisation (contracts)*; and *Privatisation (directives)*. *Civil unions* refer to various attempts to maintain a form of state-administered relationship status, albeit in a more inclusive and pluralised form. Rather than meeting demands for same-sex marriage by “levelling up” to an expanded form of marriage, the state “levels down” by conferring a status of a thinner, more neutral form than marriage, whilst privatising marriage proper by leaving the institution to religious and cultural groups.<sup>19</sup> This is an attractive alternative to the expansion of marriage to include LGBT citizens, since ‘if all the state offered to anyone was legal status as a civil union then there could be no complaint of unfairness or disrespect by those offered a status less than marriage.’<sup>20</sup> It would also enhance the agnosticism of the state as it would enable gay couples to have their relationship legally recognised without forcing religious organisations to accept a sacrilegious redefinition of marriage. Thus, ‘[p]rivatization would eliminate a serious current problem for democratic debate, which is that official marriage is now conflated with religious marriage, in a way that makes alteration in the first seem to threaten the second. It would be highly desirable to have separate terms for what governments do and for what private institutions do.’<sup>21</sup> Instead of the state acting as custodian of marriage equality, those who propose privatization argue that who should be able to enter into a marriage should be a purely doctrinal or cultural issue – not an issue that the neutral, secular state should engage with. Many extant civil institutions of marriage amount to religious establishment as they contravene or fail to be limited to the secular – secular courts are apply legal categories ‘given shape & substance by centuries of thought of ecclesiastical canons & courts’, even when they profess to be talking about merely “civil” “marriage”.<sup>22</sup>

Proposals for civil unions include Metz’s *Intimate Care-Giving Unions (ICGUs)* and Brake’s *Minimal Marriages*. Here, the state stays in the business of marriage, but not as we know it: it may open its official unions up to gay couples, siblings, polyamorous groups, non-cohabiting non-amative parents - all who wish to benefit from the legal security that the union provides. The resultant unions are neutral ‘not only to the gender or even to the

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<sup>19</sup> Baltzly op. cit; p. 41.

<sup>20</sup> March op. cit; p. 41.

<sup>21</sup> Cass R. Sunstein and Richard H. Thaler, ‘Privatizing Marriage’, *The Monist* 91, 3/4: 377–87; p. 379.

<sup>22</sup> Charles J. Reid Jr., ‘Marriage: Its Relationship to Religion, Law, and the State’ in D. Laycock, A. R. Picarello and R. F. Wilson (eds.) *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Lanham: Rowman & Littlefield, 2008); p. 162; see also, Metz.

numbers of the partners, but also to the affective content of domestic life and the purposes behind contracting domestic partnerships.’<sup>23</sup> Nevertheless, the public justification offered for the state’s establishment of such unions is the protection and support of the highly risky provision of intimate caregiving, since the ‘social bases of caring relationships are social primary goods’ that the state has an interest in distributing fairly.<sup>24</sup> It is because the state values these relationships, due to the contribution they make to justice, that the state remains in the business of publicly endorsing these relationships.<sup>25</sup>

Most extant civil unions, such as the registered partnerships of Hungary and the civil partnerships of the UK retain a dyadic, amative character, and therefore closely resemble civil marriages. The civil unions proposed by Metz and Brake reject both the amatonormativity of the traditional conjugal form, and the bundling of all rights and responsibilities within one core relationship. Despite this increased plurality, some argue that the state needs to be even further removed from the regulation of relationships. *Privatisation (contracts)* provides the same legal security offered by civil unions, but in an ad hoc and bespoke manner – individuals choose to enter into legal contracts with others governing their various relationships (sexual, economic, familial, etc.). The state’s involvement is limited to drawing the limits of lawful contracts and enforcing those entered into, hence disestablishment is close to complete, and maximal pluralism can result as people personalise whom they would like to distribute their bundle of legal rights and privileges amongst.

According to Shultz, a contractual system can meet ‘modern demands for privacy, individualism, and diversity’, whilst still meeting ‘needs for legitimacy and support, for vindication of expectations and resolution of contract’.<sup>26</sup> The state’s role in establishing a particular kind of relationship as ideal is drastically reduced: ‘the end of marriage as a state regulated and defined institution undermines, and perhaps entirely erodes, the state interest in controlling and regulating sexual affiliations. If no form of sexual affiliation is state preferred, subsidized, and protected, none could or should be prohibited.’ Contractual systems place less weight on public endorsement, so avoid creating a special

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<sup>23</sup> March op. cit; p. 2.

<sup>24</sup> Metz op. cit, pp. 126, 131-132.; Brake op. cit, p. 173.

<sup>25</sup> Baltzly op. cit; p. 44.

<sup>26</sup> Marjorie Maguire Shultz, ‘Contractual Ordering of Marriage: A New Model for State Policy’, *California Law Review* 70, 2 (1982): 204–334; p. 328.

status, and they continue to avoid the bundling of rights and obligations in a relationship, like marriage does.<sup>27</sup> They eschew the state imposition of a standard type of care-giving relationship, however expansively understood, but still involve the state in drawing the boundaries of socially legitimate forms of intimacy when it draws the limits of contracts.<sup>28</sup>

*Privatisation (directives)* refers to a different proposal made by Chambers, whereby the state provides default legal rules to govern different aspects of relationships (romantic, caregiving, parental, financial etc.), with the possibility of greater personalisation through contractual opt-outs. Under such a system, disestablishment and pluralisation are ever so slightly reduced as compared to the contractual system. The state provides a set of non-voluntary, default rights and duties to regulate in a piecemeal fashion people who enter into certain functional relationships with each other (e.g. child-rearing, property ownership), so it still plays a significant role in defining the terms of particular relationships. However, since Chambers rejects bundling, there are manifold ways in which persons can choose to relate to one another, so directives may regulate multiple aspects of a single relationship or many relationships, and this plurality is increased by the ability to opt-out of state directives by drawing up alternative contracts that alter the terms of the relationship within limits set by justice.<sup>29</sup> Chambers argues that this system is superior to the contractual model because it protects those who fail to draw up a contract, and is honest about the fairly extensive role of the state in creating principles and limits of contract law and determining the obligations of third parties.<sup>30</sup>

The preceding alternative regimes of RRR (*Civil unions*; *Privatisation (contracts)*; and *Privatisation (directives)*) all begin from the assumption that what faces us is a pure system of state-sponsored marriage, and that to privatise marriage is to take marriage out of the hands of the state and place it in the hands of individuals, who, if they choose to use it, gain the freedom to determine what sort of union they would like to enter into, under the authority of their choice. Yet in most jurisdictions, an albeit imperfect architecture of choice is in existence. Thus, in almost all states, citizens have the choice of whether to

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<sup>27</sup> Baltzly op. cit; p. 47; Chambers op. cit; pp. 134; 135.

<sup>28</sup> Shultz op. cit; pp. 332, 334; Martha Albertson Fineman, 'Why Marriage?', *Virginia Journal of Social Policy and the Law* 9, 1 (2001): 239–70; p. 263..

<sup>29</sup> Chambers op. cit; p. 137.

<sup>30</sup> Chambers op. cit; p. 136; Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford: Oxford University Press, 2017).

enter into a religious marriage, conducted by an official within a faith group, or a civil marriage, officiated by a state registrar (there are, of course, exceptions, for example, France, where for a marriage to be valid it must be conducted by the state). Moreover, some polities have adopted even more pluralistic systems of marriage, wherein the options available to the would-be spouse extend beyond religious or civil. “Multi-tiered marriage”, has been touted, and in some jurisdictions, established - for instance, in some states in the USA, couples can choose to enter into a covenant civil marriage, which has higher costs to enter and exit than the standard model on offer. In India, couples can choose between parallel civil, Hindu, Muslim and Christian institutions (although they must be a recognised member of the relevant faith in order to exercise the religious option).<sup>31</sup> Thus, privatising marriage isn’t as simple as just wresting control of marriage off the state and handing it to individuals, who then choose an association to conduct one on their behalf. Instead, the picture is much more complex. Since marriage is not solely under the control of the state, privatisation doesn’t just affect the state. Religious and cultural groups are invested in a system where they share jurisdiction over marriage with the state. Assuming that the state is the sole officiator of marriage ignores the existing participation of non-state actors and groups in marriage, and the dynamic interplay between the two parties.

In the literature on legal pluralism, extant and possible systems of pluralising marriage through systems of joint governance between state and group are explored. On the above diagram, *legal pluralism* occupies a middle position on the establishment/disestablishment scale – such systems can be described as forms of indirect or multi-faith establishment. Here, states remain in the marriage business, administering or overseeing a menu of different marriage options: creating ‘[a] more robust millet system in the realm of family law would allow religious systems to function as semi- autonomous entities with the state acting as the over-arching sovereign that intervenes only when basic minimum guidelines are not met’<sup>32</sup> Such systems recognise that the “unofficial law” of the community sometimes trumps the civil law of the

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<sup>31</sup> Joel A. Nichols, ‘Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community’, *Vanderbilt Journal of Transnational Law* 40 (2007): 135–96; Joel A. Nichols, ‘Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion’ *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (New York: Cambridge University Press, 2012): 11–59.

<sup>32</sup> Nichols, ‘Multi-Tiered Marriage’ op. cit.; p. 164.

polity.<sup>33</sup> Joel Nichols suggests that the recognition of plural forms of marriage (and divorce) may be better for freedom of marital expression than the ‘current least common denominator notion of marriage law’.<sup>34</sup> However, the plurality achieved under such an arrangement is of a religious type, as multiple faiths institute multiple forms of marriage, but heterosexual establishment is less likely to be dismantled, since many religious groups oppose open homosexuality.<sup>35</sup> The chief concern when considering legal pluralism is finding a way to guarantee that universal citizenship rights continue to be respected when some legal authority is transferred to the level of cultural or religious group. In a prominent piece within the literature, *Multicultural Jurisdictions*, Ayelet Shachar<sup>36</sup> argues for a model of joint governance between state and group called ‘transformative accommodation’, where, for example, the state administers the distributive function of marriage by guaranteeing certain legal rights and obligations, whilst the groups takes on the demarcating function by cashing out the meanings attached to a change in marital status.<sup>37</sup>

Further along the scale, legality and validity start to separate. Complete disestablishment is not advocated by liberals, since any state concerned with basic rights and liberties needs to set some limits to what marriage can be, by, for example, banning child marriage, just as it sets limits to other forms of private behaviour. Thus, under a liberal disestablished system, marriages are considered legally valid (or legal) if they conform to basic liberal standards, but this legal recognition extends no further, as marriage has no legal consequence in terms of benefits, rights and responsibilities. Despite the diagram above, which suggests that each position occupies a determinate place on the scales of establishment/disestablishment and singularity/plurality, the differences between the proposed alternative systems are not clear. Does the contractual system entail a lesser degree of establishment than the civil union because the state appears more “hands-off” under this system? Is the state any more “hands-off” when it sets and enforces the limits of private contractual agreements than when it adopts and enforces the marital systems

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<sup>33</sup> Joel A. Nichols, ‘Introduction’ in J. A. Nichols (ed.) *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (New York: Cambridge University Press, 2012): 1–10; p. 2.

<sup>34</sup> Nichols, ‘Multi-Tiered Marriage’ op. cit.; p. 141.

<sup>35</sup> Andrew K. T. Yip, ‘Sexual orientation discrimination in religious communities’ in M. V. Lee Badgett and Jefferson Frank (eds.) *Sexual Orientation Discrimination: An international perspective* (Abingdon: Routledge, 2007): 209–224.

<sup>36</sup> Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge, UK; New York: Cambridge University Press, 2001).

<sup>37</sup> Shachar op. cit; pp. 119–120.

of one or many faith groups? In Chapter 6, I argue that the “marriage-free state” as envisaged by Chambers may deliver a less formal relationship between the state and marriage, but cannot provide us with “state-free marriage”, since to regulate private marriages, states need to continue to interpret the meaning and significance of marriage.

Which of the above systems best suits justice depends upon what marital disestablishment intends to achieve. For example, for some queer theorists, such as Warner<sup>38</sup>, non-conventional or non-normative sexualities are best protected by reducing the role of the state in regulating sexuality, so if heterosexual disestablishment is our goal, greater privatisation may be the solution. However, Calhoun<sup>39</sup> posits that taking the state out of the business of marriage will fail to provide the most effective challenge to the system of heterosexual domination. Instead, if the state takes an official stand by opening up marriage to gay couples, it will confront the displacement of LGBT citizens from both the public and private spheres, and will thereby have a much greater impact on the heteronormative structures within society than remaining agnostic on the matter would do. In other words, heterosexual disestablishment may require an inclusive form of marital establishment.

### 3 The Parameters of Just Marital Establishment

This work plots a course between and responds to two positions: that of liberal disestablishmentarians such as Metz, Brake, and Chambers, and liberal establishmentarians, such as Stephen Macedo. The primary question posed by the work is - what are the parameters of just marital establishment? It looks at the contribution a practice-dependent approach can make to the question of marital establishment, taking a position more culturally sensitive than Metz and Brake, and more critical than Macedo. The exploration of this question leads to further questions: Can non-universal, non-neutral goods be established by the state? Do the expectations created by establishment have any normative significance? Can the history of a practice condemn it? What is the relation between democratic desire and principle? At what point does the centrality of a social practice or institution cause it to become part of citizen’s fundamental interests? How does the innovative potential of political liberalism work alongside the authority of established practice? Is a marriage culture part of the problem, that needs dismantling, as

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<sup>38</sup> Warner op. cit.

<sup>39</sup> Calhoun op. cit.

feminists and queer theorists attest, or are there circumstances when a marriage culture can be recognized by the state without violating justice?

To navigate a course through this terrain between the main positions heretofore presented I will introduce two hypothetical states, *Matrimonia* and *Omnia*, as two alternative versions of RRR contrasted throughout the study. *Omnia* represents the state that opts to disestablish marriage and replace it with an alternative as prescribed by liberal disestablishmentarians, be it Brake's MM, Metz's ICGUs or privatisation by contracts or Chamber's directives. *Matrimonia* exemplifies the state that chooses to retain the symbolic establishment of marriage, whilst rolling out the legal and material benefits bestowed by the state upon marriage to all other non-marital relationships that qualify (either automatically or by express consent, depending on the system adopted). The purpose of considering these two states is to explore whether, and in what ways, there is a normative difference between the two of them. The identified disparities between the two form the basis of the discussion in later chapters. For example, *Matrimonia* retains an institution of cultural value (Chapter 2), yet seemingly discriminates against unmarried citizens (Chapter 5) whilst violating standards of liberal neutrality (Chapter 6).

To gain a sense of how symbolic marriage could work, imagine that the state retains the licensing role by recording and rubber-stamping marriages by issuing the certificate but without any concrete privileges attached to it. As such, the certificate would not do much beyond state "You are married". The value of this statement for the persons involved would depend on the value attached to the label "marriage" and the state's assigning of it. Marriage licensing would be more substantial than the administrative task of the registration of births and deaths, since not only would the state require marriages to be recorded by law, it would also prohibit the use of the term "marriage" without its approval – unlike birth or death, marriage would not be a natural event that occurs outside of and without regard to the state's purview and recorded by the state *ex post facto* – marriage could only occur through the state. However, marriage licensing would be less substantial than driver licensing, since no legal rights would accrue from the registration process (apart from the right to "be married"), no test would need to be passed to gain the license (apart from, perhaps, some entry requirements like minimum age), and no penalties would be wrought upon those who engage in marriage-like behaviour without a license (unless they fraudulently claimed that they were married for some official purpose, but it is unclear what the motive of doing so would be).

The questions that are raised by this symbolic, licensing model include: does such a system violate neutrality or equal treatment? How is expenditure of resources on such a system justified? What are the benefits of getting married under this system (mainly symbolic)? Does this system offer any advantage over a fully privatised system? What would the state be expressing about marriage in instituting this system? How does this system compare to systems of symbolic religious establishment?

#### 4 Structure of the Work

A recent response to the marital disestablishmentarian literature has been provided by Stephen Macedo. In Chapter 2, I address *marriage as a cultural good, as popular, as non-neutral and as a liberal good*, by reviewing the case for the establishment of sex-neutral, monogamous marriage presented by Macedo in *Just Married*.<sup>40</sup> In particular, I interrogate the relationship between two arguments made throughout the work, which I term the *public reason argument* and the *cultural argument*. The former states that monogamous marriage is a *liberal good* the establishment of which can be defended by pointing to the liberal democratic values that it realises, alongside the equal opportunity to family life that it secures. As a result, states have a legitimate interest in the establishment of marriage, which reasonable persons can grasp through sound public arguments. The *cultural argument* points to the popularity and desirability of marriage in the contemporary US, and thus, the existence of a marriage culture there. Macedo uses this cultural fact to argue that it is justified for democratic governments to establish widely but not unanimously valued institutions, or *cultural goods*, such as marriage. These two arguments operate as a dual test that serves to unite subjective valuing with a more objective form of value. Thus desires for widely appreciated human goods are considered reasonable when supported by arguments that the majority of people can endorse.<sup>41</sup> Goods like marriage, non-neutral but common to a number of divergent comprehensive doctrines, can be promoted by the state and find support in public reason. This shared idea of “marriage” is whatever is constant and stable amid the endless tests of actual lived reality and democratic deliberation.<sup>42</sup> I both reject the liberal instrumentalism Macedo engages

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<sup>40</sup> Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage* (Princeton, NJ: Princeton University Press, 2015).

<sup>41</sup> Macedo op. cit; pp. 43, 48, 83, 210.

<sup>42</sup> Macedo op. cit; p. 107.

in, whereby he makes marriage ‘fit’ the point and purpose of liberalism, and share Macedo’s scepticism about the purely liberal, culturally-empty alternatives to marriage proposed by marital disestablishmentarians. In response, I propose the use of a practice-dependent approach in order to generate a justification for ME as a cultural good. I argue that widely shared desires for non-liberal, yet not illiberal cultural goods, could receive state support within liberal constraints.

In Chapter 3, I explore *marriage as a practice* by considering the normative significance that pre-existent practices might have. Practices, such as marriage, often become formalised and solidified into traditions and institutions over time, and in this case, established by the state. Does the fact of this institutional configuration have any bearing on what our principles of justice should be? Does the fact of establishment provide any normative justification for establishment? Most liberal approaches to the question of a just marital system are what we would term “practice-independent” – that is, they attribute no value to extant practices. Instead, they attempt to generate normative principles without reference to practice, and those principles are then considered as prior to practices and as capable of dictating that practices change or disappear if they are not consistent with principle. In other words, in the context of justification, practices do not figure, and in the context of application, practices are subject to the requirements of principle. A just system of marriage is one that can be compatibly arrived at under these principles.<sup>43</sup> Due to the fact that practice-independent approaches to RRR abstract from current practice, they tend to propose more expansive forms of institutions that not only replace marriage but also extend across the broader range of practices that humans in caring relationships are engaged in. These practice-independent approaches to marriage can be contrasted with more “practice-dependent” arguments, which credit the contemporary practice of marriage with some value, beyond the practical consideration of convenience, which in some way conditions the principles we choose to govern relationship regulation. I address claims that the practice-dependent method is normatively indistinct and argue that it claims normative self-sufficiency. I then develop the account of practice-dependence to show that it has a weak normative role to play in a limited range of cases,

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<sup>43</sup> Compatible forms of marriage could be seen as required by principles of justice, or merely consistent with them: whether they are required depends on a prior question of whether some regulation or support of relationships is required by justice, a question answered in the affirmative by the liberal thinkers considered here. For example, Brake (*Minimizing Marriage*, Chapter 7) sees caring relationships as social primary goods essential for the development and exercise of the two moral powers, thus in need of the protection and recognition of the state.

where there is complexity, controversy, and conflict over the meaning of a practice, arguing that marriage is such a case. I present an account of the plural values to be found in practices, and the value of marriage specifically. Finally, I turn to further challenges regarding the method, arguing that history does not always condemn a practice, that we can factor in the ways that culture can affect the consent and perceptions of participants, and finally, that practice-dependence has adequate resources to ensure fairness for non-participants. Having both clarified and defended the method, I am in a position to defend an interpretation of the establishment of marriage as a cultural good against key arguments in the following chapters.

In Chapter 4, I turn to arguments against marital establishment which draw an analogy between marital establishment and religious establishment.<sup>44</sup> I consider *marriage as religious*, and I show the futility of such an analogy, and try to get a more precise sense of what is wrong with marital establishment. I explore whether religious and marital establishment share the same wrong-making features. I claim that any shared wrong-making does not inhere either in the nature of establishment itself, and argue that although liberals are right to be concerned with establishment *per se*, all forms of establishment must meet a high threshold of justification that some institutions won't meet. I argue that the proximity of marital establishment to religious establishment is a mere historically contingent fact, and not a conceptual necessity, so that any shared wrong-making feature must inhere in the nature of the both institutions being established. I then turn to the relevant shared features of marriage and religion that cause them both to fall short. Then I address Metz's claim that what is wrong-making about the establishment of religion and marriage is that they are both formal, comprehensive social institutions (FCSIs) that employ the state as an ethical authority. I argue that marriage is not as formal or comprehensive as religion, that the state's acting as an ethical authority can be justified, and that other FCSIs are established, such as education, which Metz argues do not require the same disestablishmentarian response. Finally, I consider the wrongness of the state acting as an ethical authority. I defend an interpretation of *marriage as secular*, and *as thin*. I conclude that we need a more precise account of the wrongness of marital establishment, one which focuses on the ways in which

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<sup>44</sup> See Metz *op. cit.*; Baltzly *op. cit.*; Andrew F. March, 'What Lies Beyond Same-Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification', *Journal of Applied Philosophy* 27, 1 (2010): 39–58; their arguments are elaborated below.

contemporary civil marriage is comprehensive, and what this implies about its potential wrongness.

In Chapter 5, I turn to another significant charge made against marital establishment: that its prioritisation of the amorous dyad in spousal relationships amounts to amatonormative discrimination. I present the charge and establish that marriage as practiced in both a legal and social sense is amatonormative, and therefore places one group, those persons who are members of an amorous dyad, in a different position relative to other persons. I reduce the charge by arguing that the only defensible form of marital establishment will be *symbolic, not material*, as is the case in *Matrimonia*, thereby granting an essential role to alternative forms of relationship regulation and recognition (RRR) for the satisfaction of justice. I consider whether and in what sense a purely symbolic form of marriage is possible, arguing that ‘symbolic marriage with purely symbolic intent’ can only be inferred on the satisfaction of certain conditions. Then, I turn to the question of what could be wrong with symbolic marital establishment, and whether such a symbolic type of marriage can be accused of wrongful discrimination. I defend marriage *as thin, as non-stigmatising, and as symbolic, not material*.

In Chapter 6 I move on to *marriage as non-neutral*, and the claim made by marital disestablishmentarians that a neutral justification of the state’s recognition of the practice is not possible. I assess whether Chambers’ Marriage-Free State (MFS) can deliver on its promise of providing a neutral solution by taking the state out of marriage. I argue that it is unlikely that the MFS can be interpreted as a regulation-only enterprise, as it entails moments of recognition, which on Chambers’ own definition violate neutrality: the difference between the MFS and ME is therefore one of *degree*, and not *kind*. I claim that even if we limit the MFS to matters of regulation, it will still need to operate with an archetypical notion of what marriage is, and will still need to engage with and interpret the social meaning of marriage. Not only that, but rather than marriage becoming more like friendship, friendship will become more like marriage – subject to the control and interpretation of the state. As such, the privatisation of marriage merely displaces, rather than resolves the neutrality problem. Rather than pursue the impossible, it is more helpful at this juncture to give guidance on the ways in which the non-neutral can be made compatible with justice. This would be achieved by limiting the neutrality requirement to

matters of basic justice and constitutional essentials, or by developing a less stringent standard of neutrality for such matters.

Finally, in Chapter 7 I conclude that the cultural value of marriage could permissibly feature as part of a liberal state. I argue that what I term a “no-frills state” is neither possible, nor desirable. I claim that a range of cultural goods are likely inextricable from justice, and will be inevitable features of the institutions utilised by the state to deliver justice. Many of these cultural goods are or can be interpreted in ways consistent with justice. Although justice may need to focus on the broader category of intimate, caring relationships, instead of the narrow class of marriage, securing justice for all such relationships does not preclude the establishment of marriage. Specifically, I advance an imperfection principle, which states that when the pursuit of justice leads us to interact with social institutions and their participants, such as marriage, schools, and hospitals, the some cultural value will be an inevitable by-product. Rather than purge this value, in order to refine justice, it is permissible to accept and retain it, in cases where justice is not violated or compromised.

Chapter 2  
If You Like It Should the State Put a Ring on it?: Macedo on Marriage,  
Public Reason and Culture

1 Introduction: A Tale of Two Desires

It is a mainstay in liberal theory that the state should remain neutral between competing conceptions of the good life. Individuals are afforded the maximal freedom, concomitant with the freedom of others, to pursue their own preferences and desires. The free pursuit of life, liberty and happiness reaches its limit where those pursuits cause harm to others, without their due consent. Yet, beside the class of desires to harm or enslave others, which liberalism straightforwardly disrespects, there is another class of desires which liberalism must contend with. The desire for the state to uphold one's desire, to celebrate it, endorse it, even establish it, seems another desire too far.<sup>1</sup>

In his classic defence of an objective measure of well-being for the distribution of social resources, Scanlon presents us with a man who would rather build a monument to his God, than feed himself.<sup>2</sup> Scanlon argues that, given that this personal project is more costly than the average, we cannot justify using the state's resources to enable the monument to be built, even if the man's desires to see it to completion are stronger than any desire to eat or meet his other basic needs. The man in Scanlon's example, call him Tom-Paul, helps us to establish that political liberal principle that citizens cannot be called upon to subsidize, through their tax contributions, the desires and preferences of others. Rather, they can only be expected to support their co-citizens in their securing of a set of all-purpose means, or primary goods, which all persons can agree are reasonable requirements in the pursuit of any life plan. Tom-Paul wishes to claim more from the state than is reasonable to satisfy an expensive taste. Subjectively-felt urgent needs like monument construction need to be moderated by a more objective account of major and

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<sup>1</sup> This language of desire is borrowed from Judith Butler, who describes the gay marriage movement as 'desiring the state's desire' in Judith Butler, 'Is Kinship Always Already Heterosexual?', *Differences: A Journal of Feminist Cultural Studies* 13, 1 (2002): 14-44; p. 17.

<sup>2</sup> T. M Scanlon, 'Preference and Urgency', *The Journal of Philosophy* 72, 19 (1975): 655-669; p. 659.

minor concerns<sup>3</sup> in order to ensure that shares of scarce social goods are reduced overall in a justifiable way.<sup>4</sup>

In this chapter, I consider a similar preference, held by two men, Tom and Paul. They wish to get married. At first blush, that might seem like a reasonable desire to have. Yet Tom and Paul live in a place where marital establishment (ME) exists. As such, their desire is not a straightforward one for liberalism to contend with. Tom and Paul wish to go to their local registry office, and spend thirty minutes expressing their desire to marry to a state employee. They then wish for that employee to use state resources, such as computers, stationary, buildings, and personnel, to log and publicise that desire, and schedule for a state employee, or an non-state official authorised on the state's behalf, to conduct a ceremony which publicly declares that Tom and Paul's desire to be married has been satisfied.

In many respects, Tom and Paul's preference is no different to that of Tom-Paul. As it stands, both desires involve asking the state to subsidise or support the desire. Yet this needn't be the case: the involvement of the state is not essential to the projects at hand. If Tom-Paul had enough personal wealth to build the monument himself, his desire would not be problematic. Similarly, if ME did not exist, Tom and Paul's desire might not concern us. Under marital disestablishment (MD), marriage would be privatised, such that, Tom and Paul could simply ask someone deemed competent and relevant enough in their eyes to conduct a wedding and announce their marriage to an audience they have assembled. Indeed, their desire could be satisfied in many ways, some resembling weddings as we know them, or others more idiosyncratic and deeply personal. For example, they could privately exchange vows, just the two of them, in front of their pet dog, and not inform any other humans of their marriage, if they so desired.

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<sup>3</sup> In the following chapter I will discuss the problem of choosing between subjective and objective needs, and distinguishing between major and minor concerns or interests by way of a discussion about the significance within the practice-dependent method of the participant perspective.

<sup>4</sup> Scanlon op. cit.; p. 666. It is worth noting that we are operating with an account of the circumstances of justice that includes moderate scarcity: there are enough resources available that all citizens can receive their due and satisfy their needs such that the pursuit of justice is not completely futile, but there are not enough resources to ensure that all citizens can satisfy their wants, so there will likely be conflict regarding how to distribute these resources, and who has claim to them. For more discussion of this aspect of the circumstances of justice, and for a taxonomy of possibilities within moderate scarcity ranging from relative abundance to real but manageable scarcity, see Robert E. Goodin, 'Managing Scarcity: Toward a More Political Theory of Justice,' *Philosophical Issues* 11 Social, Legal, and Political Philosophy, (2001); 202-228.

Or even less conventionally, they could eschew vows completely, and agree to be married by the mere act of winking simultaneously.

Although it is conceivable that the projects be carried out without state involvement, this does not preclude the claim that Tom-Paul and Tom and Paul may very well believe that their project cannot be carried out without state involvement, either for practical reasons, such as being unable to afford the project without state support, or for more principled reasons, such as they believe the state ought to recognise and support their project, because the project would lose some of its meaning or value without state support. Suppose that Tom and Paul's desire contains within it a desire for ME. That is to say, they don't want just anyone to marry them, let alone to marry themselves: they want the state to marry them. They want the state to lend its voice in declaring to the world that they are married. They want to 'make it official' by using the state's legal powers and symbolic resources to recognise their relationship. This is equivalent to imagining that Tom-Paul wants the state to build his monument for him, complete with any associated markers of state involvement, be they standard signage, or inclusion in a local community index, so that all can see that he has built a monument in the eyes and with the gravitas of the state. What could possibly be wrong with this desire? If you like marriage, should the state put a ring on it?

In his recent book, *Just Married*, Stephen Macedo defends this desire, and indeed presents the case for the establishment of monogamous, sex-neutral marriage. In doing so, he utilises two arguments, one from public reason, and one from culture. The latter argument invokes the desires and preferences of the majority in order to lend weight to the case for ME. In this chapter, I explore what normative work these desires might be doing, and consider marriage as a *cultural good*. Under what conditions would the desire for the state to establish your desire be a reasonable one? Is there room in liberal theory for the state to accommodate and satisfy desires for non-neutral and non-universal goods, such as monument-building or marriage? In what follows, I present and critique Macedo's two argumentative strategies (*Section 2*), before analysing the relationship between public reason and culture (*Section 3*). I both reject the liberal instrumentalism Macedo engages in, whereby he makes marriage 'fit' the point and purpose of liberalism, and share Macedo's scepticism about the purely liberal, culturally-empty alternatives to marriage proposed by marital disestablishmentarians. In response, I propose the use of a

practice-dependent approach (*Section 4*) in order to generate a justification for ME as a cultural good. Finally, I return to Tom-Paul and Tom and Paul, in order to reflect on the nature of their desires, and consider how we should interpret them in the light of the cultural argument advanced by Macedo and developed by myself. (*Section 5*). I argue that widely shared desires for non-liberal, yet not illiberal cultural goods, could receive state support within liberal constraints.

## 2 Macedo on Marriage

In *Just Married*, Stephen Macedo is on the defensive. He defends gender-neutral marriage against conservatives, such as New Natural Law theorists, who want to confine state-sanctioned marriage to the recognition of traditional, heterosexual relationships. He defends monogamous marriage against those that call for a broadening of the relationships that qualify for entry into the institution, made by liberals such as Elizabeth Brake and Tamara Metz, such that the state's support should not extend to polygamy. He defends ME against Brake, Metz, and other disestablishmentarians, arguing that the state's ongoing relationship with marriage (in its sex-neutral, monogamous form) is both appropriate and required. Macedo uses two arguments to make his case, which I term the public reason argument, and the cultural argument. These arguments, although not distinguished from each other in the book, provide two distinct normative justifications for ME. In this section I outline and evaluate both arguments, before showing in *Section 3*, that for Macedo's argument to both succeed and remain distinct, we should understand the cultural argument as taking primacy.

### 2.1 The Public Reason Argument

The public reason argument goes along the following lines: Monogamous marriage is a public good the establishment of which can be defended by pointing to (i) the liberal democratic values that it realises, alongside (ii) the equal opportunity to family life that it secures. States have a legitimate interest in the establishment of marriage, which reasonable persons can grasp through sound public arguments.

Following the standard liberal formula, Macedo states that the public reason test applies to laws and policies that touch upon people's vital interests.<sup>5</sup> The public reason requirement may apply as much to parking regulations as much as it does to the regulation of our intimate personal lives. However, generally speaking, liberalism provides a strong presumption in favour of freedom in private matters, such as choice of sexual partner and seeks to limit illegitimate incursions into these by the state. In such matters, liberalism dictates that civil interests extend only insofar as required to prevent harm to others; hence, age of consent legislation is designed to protect minors. However, marriage extends beyond the intimate sphere and as such must be subject to further public scrutiny: as a public, civil institution in its established form, its status and structure cannot be justified by appeal to sectarian philosophical or religious doctrines.<sup>6</sup> Instead, it must be subject to the test of public reason – arguments presented in favour of it must be supported by evidence and claims that are accessible to all.<sup>7</sup>

Immediately, the marital disestablishmentarian will raise two related questions. First, why does the state have a legitimate interest in marriage? As a deeply private and personal matter, marriage, like sex, should be considered outside of the purview of the state. Second, in what ways is marriage a public good? Construed as a private matter, marriage - a private resource located in one's religious or cultural community for one's individual use – it has no general value for society, just the value that accrues to the individuals who choose to use it. Macedo's response is to refute the privacy of marriage – marriage is in fact a public good, therefore the state has a legitimate interest in establishing it.

For disestablishmentarians, marriage, as a private matter, can avoid the stringent justification of the public reason test. The fact of ME needn't be justified, since establishment is not a necessary feature of marriage. Some disestablishmentarians argue that subjecting marriage to public justification forces the institution to alter, and restricts free marital expression.<sup>8</sup> There is considerable opposition to same-sex marriage, resulting from inevitable disagreement about the purpose of marriage. The public reason test

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<sup>5</sup> Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, & the Future of Marriage* (Princeton, New Jersey: Princeton University Press, 2015); p. 33.

<sup>6</sup> Macedo op. cit; p. 124.

<sup>7</sup> Macedo op. cit; pp. 34, 36.

<sup>8</sup> See Edward A. Zelinsky, 'Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage', *Cardozo Law Review* 27, 3 (2006): 1161–220; Daniel A. Crane, 'A "Judeo-Christian" Argument for Privatizing Marriage', *Cardozo Law Review* 27, 3 (2006): 1221–59; Metz op. cit.

requires that if we want to legislate on marriage, we must find a non-sectarian ideal of marriage to motivate public arguments that all reasonable persons can accept. Yet we have no reason to believe that such an ideal exists: we may have set ourselves an impossible task. Why not avoid such a task altogether by taking it outside of the purview of the public reason test? In other words, prior to giving public reasons for established marriage or same-sex marriage, we must justify why marriage as an institution is a matter of justice and therefore an institution that the state has a legitimate interest in managing (as part of its purview of securing basic justice).

Marital disestablishmentarians, like many of the political liberals that Macedo contends with in his work, advocate the disestablishment of marriage as we currently understand it, which involves both giving private associations control of the religious and cultural institution of marriage, and creating alternative, more inclusive and flexible, forms of relationship regulation, such as civil unions, for the state to administer. Nevertheless, public justification still plays a role here. Firstly, the state has an interest in the personal relationships its citizens enter into. Relationships are repositories of relational goods: they can thus be viewed as socially distributed resources that have institutional bases that ought to be arranged according to principles of justice.<sup>9</sup> Relationships as sites of care, are loci of both value and vulnerability, which the state must protect and compensate for, respectively.<sup>10</sup> The feminist insight that the personal is political reminds us that an all-too-easy public/private distinction within liberalism is problematic and needs to be challenged. Thus, any alternative form of relationship regulation and recognition (RRR) to marriage is still subject to the public reason test so long as these arrangements have distributional consequences or use the coercive force of the law in any way. Any sort of civil union that uses tax revenues to support relationships, and/or enforces the obligations generated by commitment on the termination of such relationships, is a matter of legitimate public interest. So, the stricture that '[c]ollective decisions governing access to important civil institutions such as marriage should be accompanied by public reasons and evidence sufficient to justify the way that power is being used to all the

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<sup>9</sup> Chiara Cordelli, 'Justice as Fairness and Relational Resources', *Journal of Political Philosophy* 23, 1 (2015): 86-100; p. 89.

<sup>10</sup> This is a position of agreement amongst marital disestablishmentarians such as Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, N.J.: Princeton University Press, 2010); Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012); Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford: Oxford University Press, 2017).

members of political community<sup>11</sup> would apply to Brake's Minimal Marriages (MM) and Metz's Intimate Care-giving Unions (ICGUs) too. The precise nature of any primary goods distributed by marriage and/or any alternative institution is by no means straightforward, but their general role in doing so is unproblematic. The state has a legitimate interest in personal relationships, so that any scheme of RRR adopted by the state must be subject to the test of public reason.<sup>12</sup>

Secondly, the expectations attached to the pursuit of a 'non-sectarian' ideal need to be clarified. If the requirement is to generate an institution that is completely neutral between conceptions of the good, the task is most likely impossible. Even alternative forms of union will be controversial for some: 'there will always be some taxpayers who simply do not care about this or that agency or institution [...] Nevertheless, the overall systems of modest subsidy and encouragement are made fully legitimate by several considerations.'<sup>13</sup> For Macedo, public justification needs to deliver legitimacy, not neutrality.

Finally, for Macedo at least, even marriage as we know it must be subject to public justification, because there are good public reasons for maintaining the establishment of marriage. Not only does marriage promote a wide range of personal goods (conducing to greater health and happiness<sup>14</sup>); and has great import for individuals, not just in terms of the legal benefits accrued, but also the status gained and the symbolic and expressive dimension it allows,<sup>15</sup> it also contributes to the securing of liberal values.<sup>16</sup> The great "constitutive" significance of marriage for the shape of private and public lives, and the net benefits of this constitutive role for the liberal state, means that established marriage does not simply survive public justification; it gives us good reason to reject its replacement by other alternative forms (but not necessarily its supplementation).<sup>17</sup> The

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<sup>11</sup> Macedo op. cit.; p. 36.

<sup>12</sup> In Chapter 6, I argue that the state's interest in personal relationships means that states cannot ever really 'get out of the business of marriage' in the way some marital disestablishmentarians claim they can.

<sup>13</sup> Macedo op. cit.; p. 209

<sup>14</sup> Macedo op. cit.; p. 21.

<sup>15</sup> Macedo op. cit.; p. 2.

<sup>16</sup> Macedo op. cit.; p. 84.

<sup>17</sup> Macedo op. cit.; pp. 137-138. Here we see Macedo linking the constitution of personal identities with the constitution of liberal states. Metz draws the opposite conclusion – the constitutive significance of marriage for the private lives of individuals attests against the idea that it is appropriate for the state to be involved with marriage, mainly because she doubts that the personal and the political can marry up so well in the way Macedo supposes.

public interest lies not merely in defending its existence (a negative claim), but also preserving that existence so that the value it brings is not lost (a positive claim).

Having established that marriage is an appropriate subject of the public reason test, Macedo subjects some well-known arguments regarding marriage to it. He argues that New Natural Law (NNL) arguments against same-sex marriage fail the test, despite the fact that these arguments appeal to common human reason and its ability to recognise certain basic human goods.<sup>18</sup> Proponents of NNL see marriage as an intrinsic good that has a two-fold point: firstly, procreation (it allows ‘the most radical and creative enabling of another person to flourish’); and secondly, friendship (it secures ‘the most far-reaching form of togetherness possible’).<sup>19</sup> Marriage is traditionally open only to heterosexuals, and this is rightly so, mainly because of its procreative role: it is only through heterosexual marriage that people can form the kind of relationship intrinsically oriented to procreation and childrearing as only heterosexual couples are capable of ‘real bodily union’.<sup>20</sup> Indeed, only sexual acts ‘open to procreation’ are permissible according to NNL, and since this sexual morality can plainly be discerned by all reasonable persons, its enforcement as law would be justified, thus criminalising all extra-marital sex and all intra- and extra-marital non-procreative sex acts (such as masturbation, oral and anal sex, and contracepted vaginal intercourse). The public reason test reveals that many of the purportedly non-religious arguments offered by NNL theorists against same-sex marriage (and for these restrictions on intimate freedoms), are in fact derived from or dependent upon religious claims. For example, the two-in-one flesh argument that ‘real bodily union’ relies upon is biologically unsound and rests on controversial metaphysical and mystical beliefs about the conjugal sexual act.<sup>21</sup> Macedo has good reason to conclude then, that the NNL conception of marriage and sex is a perfectionist ethic, supported by assertions that are ethereal and opaque, and as such, cannot pass the public reason test.<sup>22</sup>

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<sup>18</sup> John Finnis, ‘Marriage: A Basic and Exigent Good’, *The Monist* 91, 3/4 (2008): 388–406; p. 389; John Finnis, ‘Abortion, Natural Law, and Public Reason’ in R. P. George and C. Wolfe (eds.) *Natural Law and Public Reason* (Washington, D.C: Georgetown University Press, 2000): 75–105: p. 78; Macedo op. cit; p. 39.

<sup>19</sup> Finnis, ‘Marriage: A Basic and Exigent Good’ op. cit.; p. 389.

<sup>20</sup> Amicus Brief: George, Girgis & Anderson, in opposition to Justice Walker’s judgment in *Perry*, cited in Darren R. Walhof, ‘Habermas, same-sex marriage and the problem of religion in public life’, *Philosophy & Social Criticism* 39, 3 (2013): 225–42; pp. 233–234.

<sup>21</sup> Nicholas Bamforth, ‘New Natural Law, Religion, and Same-Sex Marriage: Current Constitutional Issues’, *Wake Forest JL & Pol’y* 1 (2011): 207–279; pp. 229–232. For a lengthier analysis and critique of NNL views from the perspective of public reason, see Nicholas C. Bamforth, *Patriarchal Religion, Sexuality and Gender: A Critique of New Natural Law* (Cambridge: Cambridge University Press, 2008).

<sup>22</sup> Macedo op. cit; pp. 52, 59.

A more subtle argument relating to marriage sees it characterised as a channel for heterosexual sex, guiding couples towards committed relationships and thereby limiting the tendency for unplanned pregnancies to result, and providing the best environment for the rearing of any children that do result. If this function is key, the argument goes, same-sex marriage is unnecessary, as homosexual relationships do not run the risks that justify entering the institution. Therefore, there is no rational basis for extending marriage in this way. Macedo argues that the channelling argument also fails the public reason test, as it is not consistently applied (why is marriage open to infertile couples?,<sup>23</sup> and why aren't same-sex couples who are engaged in childrearing given access to the beneficial marital environment?) which reveals that laws designed on this basis are probably shaped by 'hidden illicit interests', (likely motivated by mere animus or prejudice) rather than the inadequate public reasons proffered.<sup>24</sup>

By contrast, Macedo's model of gender-neutral, monogamous marriage supports liberal values and thereby passes the public reason test. Marriage is characterised as a liberal good, which possesses a liberalising power or influence not shared by other forms, such as polygamy. Macedo emphasizes that only monogamous marriage (modified to include same-sex relationships) contributes in this way: 'While same-sex marriage helps us secure equal basic liberty and fair opportunity for all, substantial evidence suggests that the spread of plural marriage would undermine these same values.'<sup>25</sup> Empirical studies of polygamy<sup>26</sup> provide us with public reasons against it: such as the inherent inequality of such relationships with their "hub and spokes" structure and enshrinement of a patriarchal form of hierarchy; and the "cruel arithmetic" beset on marriage markets as competition between young men for a diminishing pool of women unleashes various social problems and an unfair distribution of the opportunity to enter into family relations.<sup>27</sup> Thus, '[t]he law of monogamy, including the criminal prohibition on plural marriage, would seem to play an important educative and formative role in our society: buttressing important social norms that encourage people to form marital commitments that are at least formally reciprocal, equal, and available to all', whilst the widespread

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<sup>23</sup> Macedo notes that in many US states elderly first cousins are allowed to marry, precisely because they cannot procreate.

<sup>24</sup> Macedo *op. cit.*; pp. 68-69, 71.

<sup>25</sup> Macedo *op. cit.*; p. 146.

<sup>26</sup> It is worth noting here that most, if not all, of the polygamy referred to here is in the form of polygyny (one husband and two or more wives), since polyandry (one wife and two or more husbands) is incredibly rare.

<sup>27</sup> Macedo *op. cit.*; pp. 163-166, 170, 172-173.

practice of polygamy is inconsistent with securing these social norms.<sup>28</sup> According to Macedo then, monogamy's key contribution to liberal values consists of securing for all citizens a 'fair opportunity to pursue the great good of family life', in a manner that simultaneously models a freely chosen and egalitarian relationship form, the celebration and visibility of which has an important liberal educative function.<sup>29</sup>

As we have seen, if we are to cash in on the support for liberal values that marriage supposedly generates, we need to seek a 'non-sectarian ideal of marriage' that the citizens of a diverse polity, such as the US, with a range of reasonable opinions, could endorse.<sup>30</sup> For Macedo, this is arrived at by the invocation of three interrelated ideas. Firstly, marriage is viewed as a *shared, public institution*, belonging to all citizens. He states: "The religiously orthodox have every right to decide who is validly married within their particular communities of faith. The civil law of marriage, however, belongs to all of us as citizens of the political community: it is instituted by us and answerable to us as political equals."<sup>31</sup> Because Macedo thinks that genuinely public reasons can be offered in support of monogamous civil marriage, a "one-size-fits-all" institution or 'one canonically defined template' can legitimately receive state endorsement.<sup>32</sup> Even though marriage is neither equally valued, nor uncontroversial, it still is 'an altogether fit subject for ongoing democratic deliberation. We can describe marriage and its benefits without having to invoke any obscure philosophical claims.'<sup>33</sup> The widely appreciated benefits of marriage mean that the aim of public policy in regards to it should be to promote just, healthy, low-conflict and equal marriages that provide respect, status, and opportunities for their participants.<sup>34</sup> Secondly, this shared institution, which the state is entitled to promote, has been the subject of *significant social learning*. Over time, societies have learned to identify the 'reasonable, stable, and healthy forms of human relationship' that have emerged under conditions of freedom. We should acknowledge the reliability of this knowledge and submit it as reasons and evidence within our democratic deliberation about ME.<sup>35</sup> Finally, this social learning is related to *transformations* in what Macedo calls the '*reasonableness of everyday life*', whereby attitudes towards same-sex relationships have

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<sup>28</sup> Macedo op. cit.; pp. 161, 187.

<sup>29</sup> Macedo op. cit.; p. 187.

<sup>30</sup> Macedo op. cit.; p. 36.

<sup>31</sup> Macedo op. cit., p. 36.

<sup>32</sup> Macedo op. cit., p. 80.

<sup>33</sup> Macedo op. cit.; p. 141.

<sup>34</sup> Macedo op. cit.; p. 64.

<sup>35</sup> Macedo op. cit.; p. 203.

shifted dramatically as a result of multiple, infinitesimal lessons learnt from the “coming out” of ordinary persons. The great social learning triggered by these ‘private dramas of disclosure’ gives Macedo a reason to be optimistic that the shared institution of marriage can be figured in a non-sectarian manner.<sup>36</sup>

### 2.1.1 The Liberal Good Argument

We can further subdivide the public reason argument into two parts, comprising two separate reasons that state support for marriage is in the public interest. The first public reason argument is the *liberal good* argument. This states that marriage as an institution advances the liberal cause, that is, it supports the state in its stable pursuit of liberty and equality for its citizens. The second public reason argument is the *personal good* argument. This is the claim that by establishing marriage, the state provides citizens with valuable opportunity – in Macedo’s case, the opportunity to pursue a family life. It is possible to treat the arguments separately – we can accept one without accepting the other, and equally, each argument on its own is sufficient to conclude that there is a good public reason to establish marriage. By presenting us with both, Macedo overdetermines the case for marriage. In what follows, I present both arguments, and in the next section, I dispute that ME can be defended by presenting marriage as either a liberal or a personal good.

In making the liberal good argument, Macedo aligns himself with a long tradition from Montesquieu’s *Spirit of the Laws* to *Obergefell v. Hodges* that ties monogamous marriage to liberal democratic values. Since the founding of the US, monogamous marriage – a voluntary union based on consent – has been linked to republican forms of government.<sup>37</sup> In an essay entitled “Conjugal Love”, which appeared in a Massachusetts Magazine in 1792, marriage is presented as a ‘school of affection’ in which ‘[t]he lover becomes a husband, a parent, a citizen.’ John Witherspoon, one of the signatories to the US Declaration of Independence, wrote that by marriage, ‘man feels a growing attachment to human nature, and love to his country.’<sup>38</sup> Montesquieu famously associated

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<sup>36</sup> Macedo op. cit.; p. 58.

<sup>37</sup> Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002); p. 10.

<sup>38</sup> Cott, op. cit, p. 19.

monogamy with the government of consent, moderation and political liberty and polygamy with tyranny, corruption and coercion.<sup>39</sup> In the Anglican tradition of marriage, with its commonwealth model, marriage is appointed by God as ‘a little commonwealth’ within which both the mutual love, service and security of the husband, wife and their children is fostered, and a ‘seedbed and seminary’ is provided for the broader commonwealth through the teaching of key Christian and political norms and behaviours.<sup>40</sup> In its opinion in *Obergefell v. Hodges*, the case that ruled that the right to marry for same-sex couples is guaranteed by the constitution, the Supreme Court of the USA quoted the court in *Maynard v. Hill* (1888), which declared that marriage is ‘a great public institution, giving character to our whole civil polity has always been a building block of our national community.’<sup>41</sup>

The liberal good argument claims that marriage as an institution has liberal democratic value. This provides us with a public reason to defend its establishment – either marriage itself is a constituent part of the liberal democratic order, or it is instrumentally valuable as an institution that makes a net positive contribution to it. The force of this argument turns on whether marriage is an essential part of that order. Can liberal democracy survive without it, or with it confined to civil society? Can other institutions do the work required? Is the claim that marriage alone does the work, or marriage-like relationships in addition? If so, is establishment required to ensure that marriage is promoted to a sufficient extent, so that enough marriages and their analogues exist to have the desired effect on the political climate?

If we read Macedo’s argument in the context of his other work, we can read it as resting on an understanding of marriage as an educative and transformative institution.<sup>42</sup> Monogamous marriage itself has certain institutional features that create certain effects for the persons and relationships that enter it. This understanding is at the base of the public reason argument for ME – due to the transformative effects of marriage, its

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<sup>39</sup> Cott, op. cit, p. 22.

<sup>40</sup> John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville, KY: Westminster John Know Press, 2012), pp. 8-9.

<sup>41</sup> Justice Anthony Kennedy, *Obergefell v. Hodges*, 2015; p. 16.

<sup>42</sup> Here, I take license to draw from Macedo’s previous work, namely Stephen Macedo ‘Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism’, *Political Theory* 26, 1 (1998): 56-80; and Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2003). The former presents his view that the ‘liberal constitutional order is a pervasively educative order’ (pp. 56-57), whilst the latter defends a model of compulsory education that schools fledgling citizens in essential liberal values.

impact on liberty, equality, stability and personal and societal well-being - it makes good liberal sense to support it. Marriage appears as but one institution in Macedo's account of liberal transformative constitutionalism, a process whereby the liberal order works over time to constitute the private realm in its own image, so that a citizenry willing to be self-restrained, moderate, and reasonable, can be the resulting political achievement.<sup>43</sup> The public reason of 'civic liberalism' can support Macedo's ME as a legitimate and reasonable effort by the state to instill shared and vital political virtues.<sup>44</sup>

Just as education is imperfect, and is not an unalloyed liberal good (often containing authoritarian and illiberal tendencies) but is justified by liberal values (transforming diversity into more liberal democratic variants<sup>45</sup>), marriage is justified in the same way, as on balance, good for liberalism, and indeed, perhaps, required for the stable continuation of the liberal order. It should be noted that Macedo has not made this argument by relating marriage back to the kind of case he made for liberal educational establishment in *Diversity and Distrust*. Since people can't be made to marry (and indeed, doing so would be counterproductive both for overall liberty and for the liberal quality of the ensuing relationships) marriage can't be as crucial an institution for the maintenance of civic liberalism as education, which, as universal and compulsory, directly forms liberal citizens from childhood. Nevertheless, the role that Macedo seems to want marriage to play for liberalism has important parallels.

### 2.1.2 The Personal and Social Good Argument

The second aspect of the argument from public reason offered by Macedo, states that marriage is a personal good and a social good, which the state should provide for citizens in order for them to have an equal opportunity to pursue the good of family life. There are various versions of this argument presented in the pro-ME literature. Sometimes marriage is construed as a general opportunity that all citizens benefit from – this seems to be the case for Macedo. On other occasions, the argument goes slightly differently – state provision of the opportunity to marry is required in order to ensure that certain disadvantaged groups are guaranteed access that has previously been denied. In all these

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<sup>43</sup> Macedo, 'Transformative Constitutionalism', pp. 57-59.

<sup>44</sup> See Macedo, *Diversity and Distrust*.

<sup>45</sup> Macedo, *Diversity and Distrust*, pp. 179; 200.

arguments, it is claimed that marriage is an important institution to secure subjective preference-satisfaction and/or objective well-being.

This argument either views marriage as a constituent part of a personal or social good (be it family, health, or happiness) or sees marriage itself as a personal or social good that citizens have a right to (or a claim to an equal opportunity to pursue). This argument is partly influenced by the US conservative marriage movement of the 1980s and 1990s, which regularly cited evidence that showed that marriage caused or created a number of personal and social benefits.<sup>46</sup> The idea that marriage is an important opportunity that states should provide for citizens is also presented by Wedgwood, who argues that marriage is a central part of many people's most fundamental goals and aspirations, such that the chance to participate in this communicative act is not only personally important, but promotes the common good.<sup>47</sup> Martha Nussbaum also argues that marriage is fundamental to individual self-definition, autonomy, and the pursuit of happiness – so that if the right is available to some, it should be an opportunity available to all.<sup>48</sup>

For Cheshire Calhoun, the denial of marriage to same-sex couples plays a central role in the subordination of LGBT persons. Marriage is a foundational social institution, functioning alongside family as the bedrock on which social and political life is built. Being fit to enter marital and family life is seen as a marker of full civic status, ME promotes the idea that LGBT citizens are fit to participate in 'normatively ideal forms of marriage, parenting, and family', so that the opportunity to marry includes with it the right to define what counts as a family.<sup>49</sup> Similarly, for Christie Hartley and Lori Watson, given the central role marriage plays in the lives of many people and its long history as a central social institution, the institution of marriage is related to some fundamental

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<sup>46</sup> See Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (New York: Broadway Books, 2001).

<sup>47</sup> Ralph Wedgwood, 'Is Civil Marriage Illiberal?', in Elizabeth Brake (ed.) *After Marriage: Rethinking Marital Relationships* (Oxford: Oxford University Press, 2016): 29-49; pp. 35, 39, 45. Wedgwood presents the desire to marry as a reasonable one, given the centrality of marriage in our culture: 'It is reasonable for people who have this aspiration to wish for the social meaning of this legal relationship to be underpinned and stabilized by the law... the best way for the state to enable these people to satisfy these life-aspirations is by maintaining the legal institution of civil marriage.' (p. 39) Wedgwood also draws links between popular morality and public reason: 'rather than abstract, take 'much more empirical interpretation of the idea of public reason, according to which the actual distribution of ethical views among the population is part of what determines which principles can be appealed to from the standpoint of public reason.' (p. 45)

<sup>48</sup> Martha C. Nussbaum, 'A Right to Marry?', *California Law Review* 98, 3 (2010): 667-696; p. 690.

<sup>49</sup> Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (New York: Oxford University Press, 2002); pp. 108, 123, 131, 132.

interests of citizens and therefore justifiable using public reason. Not only does marriage secure the opportunity to form and safeguard a family by providing a viable means of protecting caregivers from certain vulnerabilities, it is also closely tied to citizenship more broadly and all the opportunities related to that status: ‘in a society in which powerful religious institutions fail to recognize same-sex marriage or condemn it and in which marriage is completely privatized, same-sex couples may be effectively reduced to second-class citizenship.’<sup>50</sup> According to these arguments, suggested by Macedo and developed by a number of other theorists, marriage has significant value, and that even if that value is not specifically political, it can still be defended publically.

## 2.2 Problems with Macedo’s Public Reason Arguments

Macedo’s liberal justification is unconvincing, for a number of reasons. First, it is dependent on, but not supported by *empirical reality*. It might very well be the case that some marriages school their participants, and any dependents living in the marital home, in liberal democratic values. Spouses may treat the commitment to love one another as entailing respect for one another’s equal liberty. But they may not. Montesquieu’s account of monogamy can be contrasted with de Tocqueville’s observation of marriage in the US: ‘In America, a woman’s independence is irretrievably lost in the ties of marriage. If a young woman is less restricted there than anywhere else, as a wife she submits to narrower duties. The former enjoys a place of liberty and pleasure in her father’s house, the latter, in her husband’s home, lives in almost cloistered surroundings.’<sup>51</sup> It is of course the case that marriage is no longer legally structured in such a way that mandates gender inequality. Wives are no longer the legal property of their husbands, such that entering into marriage does not erase a woman’s legal identity. Rather, the gender-neutral institution of marriage that has evolved leaves it up to the spouses how they order their relationship.<sup>52</sup> Yet it would be grossly naïve to assume that

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<sup>50</sup> Christie Hartley and Lori Watson, ‘Political Liberalism, Marriage and the Family’, *Law and Philosophy* 31 (2012): 185-212; pp. 186, 202, 203.

<sup>51</sup> Alexis de Tocqueville, *Democracy in America and Two Essays on America* (London: Penguin, 2003): p. 686. De Tocqueville emphasizes the consensual nature of this submission: ‘she herself freely bows beneath the yoke. She courageously endures her new state because she has chosen it.’ (p. 687)

<sup>52</sup> Anecdotally, in the UK, some subtle gendered differences remain, highlighted by the introduction of civil partnerships for same-sex couples in 2004 and the subsequent concurrent running of this new institution alongside traditional heterosexual marriage. For example, on registering the desire to marry, potential spouses are asked for their father’s name and occupation, which is required to be included on the marriage certificate. When potential civil partners register, they are first asked whether they would like to include their parents at all, and if they do, they are asked to provide details of both their father’s and their mother’s names and occupations. The former practice being a vestige of a more patriarchal climate where

the emptiness of the legal form had ushered in a new wave of gender equal relationships. What is more than likely is that marital relationships, although no doubt influenced by their legal context, are more thoroughly influenced by the wider culture in which they operate. Given the persistence of gender inequality at all levels and across all societal domains, it is not surprising to find that marriages generally reflect the societal norm. Although there are of course exceptions, even same-sex marriages, once heralded as ushering in a new form of marital relationship - devoid of gender roles and expectations<sup>53</sup> - have exhibited the same pathologies as their heterosexual counterparts.<sup>54</sup> The argument that marriage is a liberal good relies on an empirical claim about the liberality of lived marriages, yet a glance at the reality reveals that good liberal marriages are neither an institutional necessity, nor the statistical norm. Macedo's argument would be rendered more consistent if there were more stringent entry requirements into marriage, such that certain types of illiberal relationships were not permitted to enter the institution<sup>55</sup>, or the actual vows uttered upon entry directly expressed a commitment to liberal values.<sup>56</sup> As neither is the case, good liberal marriages are by no means fostered.<sup>57</sup> For every 'marriage

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fathers were instrumental in granting permission to wed, and mothers were inconsequential; the latter, reflecting the fact that both parents might be equally significant, or entirely irrelevant to the process.

<sup>53</sup> Brian Heaphy, Catherine Donovan, and Jeffrey Weeks 'Sex, Money and the Kitchen Sink: Power in Same-Sex Couple Relationships,' in Julie Seymour and Paul Bagguley (eds.) *Relating Intimacies: Power and Resistance* (London: Palgrave Macmillan, 1999): 222-245; Jeffrey Weeks, Brian Heaphy, and Catherine Donovan, *Same-Sex Intimacies: Families of Choice and Other Life Experiments* (London: Routledge, 2001); Gillian A. Dunne, *Lesbian Lifestyles: Women's Work and the Politics of Sexuality* (London: Palgrave, 1997); Judith Stacey, *Brave New Families: Stories of Domestic Upheaval in Late Twentieth-century America* (Berkeley and Los Angeles: University of California Press, 1998).

<sup>54</sup> Shannon Gilreath, 'Same-sex (Monogamous) Marriage v. Polygamy: Macedo's Incomplete Sex Equality Analysis', *Wake Forest University Legal Studies Paper* (July 27, 2017): Available at SSRN: <https://ssrn.com/abstract=3009869>

<sup>55</sup> The attempt to design entry criteria based upon liberal values is of course Macedo's motivation for excluding polygamous unions – the point I am making here and in the following is that the liberal criteria is crudely constructed, and as such, is not applied consistently to all marriages.

<sup>56</sup> It is worth noting here, of course, that were any such entry requirements proposed, enforcing them would likely be too intrusive, and therefore, illiberal. Many commentators have noted the strange absence of stringent entry requirements into marriage, given its alleged importance and the esteem marriage brings. See Nussbaum, *op. cit.*; p. 670, (a 'mixture of casualness and solemnity'); Michael Warner, 'Response to Martha Nussbaum', *California Law Review* 98, 3 (2010): 721-730; p. 723, (marriage is 'lax or indifferent' on who enters); Mary Anne Case, 'Marriage Licenses', *Minnesota Law Review* 89 (2005): 1758-1797; p. 1782, ('we do not only license those marriages entered into only for certain enumerated or even only for worthy purposes.');

Ronald Den Otter, *In Defense of Plural Marriage* (Cambridge: Cambridge University Press, 2015): pp. 23-24, ('With the exception of a fraudulent marriage...the law not only overlooks the reasons that individuals have for marrying, but it also pays little attention to how the couple plans to interact with each other.').

<sup>57</sup> The idea that good liberal marriages may need to be created through good liberal weddings, with vows expressing commitment to the liberal order, may be taken by Macedo as excellent suggestions that make the establishment of monogamy more credible. However, the embracing of any such suggestion would come at the cost of the cultural authenticity and sensitivity towards marriage in the here and now that Macedo prizes about his account. Echoing Macedo's sentiments about the cultural insensitivity of liberal alternatives to marriage expressed later in [note ?](#), we can sum this concern up as 'No one wants to marry

as a school of liberty’ we find, we can likely point to another ‘marriage as a school of oppression’.<sup>58</sup>

Perhaps Macedo can respond in a number of ways. All that matters is that the average monogamous marriage, or the majority of them, are of liberal value – the institution of marriage will not be tainted by the behaviour of some at the margins. Resolving this would require a statistical analysis of the liberal credentials of marriage. Or perhaps we should acknowledge that all marriages are of mixed value, at times liberal, at other times illiberal, but that over the course of time, monogamous marriages tend towards greater liberality. This could be due to the commitment that the spouses make to each other, which steers them in the direction of liberality, despite imperfections here and there. Or perhaps the best marriages, the ones that last over time, are those that are more liberal, with the more illiberal ones tending to break down and end in divorce.<sup>59</sup> As such, divorce laws contribute as much to liberalism as marriage laws, since they allow the termination of illiberal marriages. Or perhaps Macedo wants to claim that those people who choose monogamous marriage over other relationship forms can be interpreted as having liberal intentions, whilst that intention could never be genuinely attributed to a man agreeing to have dominion over two or more wives. It could be a deep fact of human psychology that there is something in the practice of monogamous marriage itself that structures relationships in certain ways that tend towards liberalism – a feature that is lacking in polygamous marriage and/or confounded by other problematic features. However, it is very difficult to identify whether there is something internal to the structure of marriage (both polygamous and monogamous), which leads to certain behaviours on the part of its members, or whether there are other causes at work. The exact details of how marriage as Macedo defends it is of liberal value is deeply problematic and requires a more thorough account, particularly if it is to pass the test of public reason.

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their state’, bar, perhaps, Queen Elizabeth I of England. I thank Jeff Howard for pressing me on this point.

<sup>58</sup> For the illiberal elements of marriage, see Chambers, op. cit., Chapter 2; and on the ambivalent relationship between marriage and freedom, see Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (New York: New York University Press, 2015).

<sup>59</sup> Given that the divorce rate in the US is often presented as high, a high rate of illiberality in marriages could also be inferred. Divorces statistics in the US are problematic as they do not present a complete picture (for example, the state of California does not contribute its figures to the national picture). However, since it can now be demonstrated that divorce rates in the US are falling, particularly amongst younger sections of the population, the possible greater liberal credentials of these more robust marriages (formed increasingly after long periods of cohabitation) are not widely felt as marriage becomes a rarer, more stable, and more elite practice. See Philip N. Cohen, ‘The Coming Divorce Decline,’ *Socius* 5, (2019) available at: <https://doi.org/10.1177/2378023119873497>.

The same point about empirical cases can be made about polygamy. This leads us to a second problem, that of *asymmetrical treatment*. Whilst Macedo relies on an idealised account of monogamy, he presents an overwhelmingly empirical account of polygamy. The most common type of polygamous union is polygyny, a marriage between one man and two or more wives. Empirically speaking, there is a tendency for these marriages to exhibit gender inequality. Macedo argues that this is likely due to the ‘hub and spokes’ structure, which renders the husband in control of his relation with each individual wife, so that, for example, it is his sole decision whether to add another wife to the arrangement. However, this is not, and need not be, an essential feature of polygamy. Legal arrangements can be made, as have been designed in South Africa, so that a husband can only marry further wives if he can agree to protect the economic interests of existing spouses so that more ‘traditional’ polygamous marriages could better respect liberal values.<sup>60</sup> Indeed, much the same process occurred within monogamous marriage when unilateral and fault-based models of divorce were replaced by equal, no-fault divorce laws. Polygamy can include polyamorous arrangements involving multiple individuals in same-sex or different gender combinations. Within the set of polygamous relationships, there will be liberal and illiberal examples. Justifying monogamy by pointing only to the liberal examples in the set, and condemning polygamy by pointing to only the illiberal examples, is unfair.<sup>61</sup> Even if there is a statistical tendency for monogamy to be liberal, and polygamy to be more illiberal, these results do not reflect the performance of these two marital institutions under the same conditions. As Laurie Shrage rightly points out, we do not actually know how polygamous marriages perform under liberal democratic conditions, as the examples pointed to by Macedo are either drawn from more authoritarian societies, or at the margins of society, hidden due to their illegality.<sup>62</sup> This echoes the point made above that we do not really even know how

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<sup>60</sup> Under the 1998 Recognition of Customary Marriage Act (RCMA), customary polygamous unions are accorded full legal status. When a husband wants to marry a second or subsequent wife, he must apply to court to “approve a written contract which will regulate the future matrimonial property system of his marriages.” This requirement is intended to ensure the fair treatment of existing wives. Joel A. Nichols, ‘Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community’, *Vanderbilt Journal of Transnational Law* 40 (2007): 135–96; pp. 188-189.

<sup>61</sup> As Ronald Den Otter argues, opponents ‘transform polygamy into its worst possible manifestations’, which, most often than not, is “asymmetrical polygyny”, Den Otter, *op. cit.*, p. 22.

<sup>62</sup> Laurie Shrage, ‘Just Two: Macedo and Marriage Equality’, in *Symposium on Just Married*, Syndicate: <https://syndicate.network/symposia/philosophy/just-married/>. This point is made by Den Otter: ‘the state cannot...base its policy on a small sample of illegal polygynous relationships.’ Den Otter, *op. cit.*, p. 22.

monogamous marriage operates under conditions of gender equality, as such conditions do not exist.

Macedo may wish to distinguish between type and token, and argue that although particular tokens of monogamous marriage may not be models of liberty, monogamous marriage as a more abstract, general type is liberal.<sup>63</sup> Even if in many cases, actual lived examples do not display the right quality, the liberal state is justified in pointing to a normative ideal of monogamous marriage, perhaps apparent in some lived marriages, which can function to guide and inspire citizens in their often imperfect unions. There is something special about the form of monogamy that makes it best suited to, or more congruent with liberalism, regardless of the substance of empirical relationships. Macedo points to claims that the twoness of dyads – and the symmetry of reciprocal dependence this make possible – can make for a more egalitarian society.<sup>64</sup> In an idealised liberal society, monogamy can play a unique role in promoting and supporting liberalism.<sup>65</sup> However, it is unclear what decisive role ME would play in an idealised society where egalitarian gender norms were effective, and what the educative function of monogamy would be since the project of transformative constitutionalism assumes an incomplete actualisation of liberal norms, pointing towards ways to make such actualisation more progressively achievable. Moreover, the *asymmetrical treatment* objection points out that this strategy is also available to the defender of polygamy. Indeed, Elizabeth Brake, Ronald Den Otter, and Elisabeth Sheff, amongst others, present us with types of polyamorous relationship that exhibit openness, consent and respect.<sup>66</sup> A more fine-grained conceptual analysis of polygamy allows us to draw distinctions between forms of polygamy that are inherently unequal, and those that are conceptually egalitarian. In contrast with the “hub and spokes” structure of traditional polygamy, which functions in a sexist and heterosexist manner, Gregg Strauss identifies two models of polygamy that are consistent with liberal egalitarian values: polyfidelity – where each spouse marries every other spouse in the family; and molecular polygamy – where multiple spouses are

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<sup>63</sup> I thank Jeff Howard for suggesting this argument to me.

<sup>64</sup> Macedo, *op. cit.*, p. 164. Macedo points to George Simmel’s account of the sociological difference between dyads and triads.

<sup>65</sup> As we will see when we consider the cultural argument below, Macedo does not claim to be describing how monogamy operates in an idealised liberal society – rather, he ties his argument to the ‘here and now’ of the contemporary US. Indeed, he argues that the current US society is liberal enough to work alongside monogamy in its capacity as a liberal good, claiming, for example, that complaints about gender inequality in marriage are dated Macedo, *Just Married*, p. 126.

<sup>66</sup> Brake, *op. cit.*; Den Otter, *op. cit.*; Elisabeth Sheff, *The Polyamorists Next Door: Inside Multiple-Partner Relationships and Families* (Lanham, MD: Rowman & Littlefield, 2015).

not all married to each other, but each has the same rights to marry another spouse outside of the family.<sup>67</sup> These theorists can equally claim that they have identified ideal types that can function as a normative ideal that liberalism can and should promote. Further, in an idealised liberal society, this polygamous ideal could play a supporting role alongside its monogamous counterpart in the sustenance of the liberal order. If Macedo wishes to retort that majority of polygamous arrangements are not of this sort, such that this ideal is too far removed from reality, we come back to the *empirical reality* objection. If monogamous marriage has any special relationship with liberalism in reality, it is that it is here and now tied to the liberal state in a relationship of establishment. As such, the state is better placed to promote the normative ideal of monogamy, as opposed to the normative ideal of polygamy, to serve its purposes. That the state promotes one, and not the other, seems to be a mere contingent fact of history.

Monogamous marriage is not unique in its ability to further liberal values, although it is uniquely placed to, given the history of ME. Some liberal disestablishmentarians would go so far as to argue that marriage - both polygamous and monogamous – is inconsistent with liberalism – a relationship type that violates liberal values.<sup>68</sup> Rather than make the empirical claim that marriage makes a net positive contribution to the liberal order, or, conversely that it has a net negative effect, I acknowledge the complexity of marital reality and argue that rather than being a liberal good, marriage is of mixed and inconclusive value. As a normative ideal, whether monogamous or polygamous, marriage can be rendered consistent with liberal values. How consistently this ideal is implemented depends on how well liberal values have penetrated the forms of marriage that currently exist in practice. If the most we can say is that the type is or can be consistent with liberal values, that seems to make monogamy's contribution to the liberal order too minimal to justify its establishment on that basis. However, rather than being an unalloyed liberal good, marriage (in whatever form) may be a different sort of good (be it personal, societal, or cultural) that is sufficiently liberal to be established. The public reason argument is not exhausted, because the personal good argument still stands.

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<sup>67</sup> Gregg Strauss, 'Is Polygamy Inherently Unequal?', *Ethics* 122, 3 (2012): 516-544. For further discussion of this conceptual work, see Christie Hartley and Lori Watson, *Equal Citizenship and Public Reason: A Feminist Political Liberalism* (New York: Oxford University Press, 2018): pp. 240-247.

<sup>68</sup> Chambers, *op. cit.*, Chapter 2.

As we have seen, Macedo's own account of transformative constitutionalism is unclear – is liberalism shaping institutions by remaking them in its own image? Or is liberalism selecting institutions that it deems sufficiently liberal, and supporting them by establishing them? A third problem – that of *unknown causation* – arises here. This relates to the fact that when analysing social processes, it is notoriously difficult to establish whether correlation equals causation. The problem applies to the liberal good argument – insofar as marriage is purported to have an impact on the liberal order – but it arises when we consider the personal good argument too. On the one hand, Macedo argues that liberalism must make use of and transform a range of social institutions, such as education and religion, in order to sustain itself. Yet on the other hand, he describes the transformative effects a constitutional arrangement, the separation of religion and state, has on religion itself. Under such a secular liberal arrangement, religions learn their own political irrelevance.<sup>69</sup> Those who advocate for marital disestablishment want to unleash those very same effects upon marriage, by confining the consequences of marriage to the private realm of diverse religious and cultural communities. Macedo wants to do the opposite – he wants to harness the liberal qualities of marriage for liberal purposes. One of the causal processes at work, then, is establishment itself. The state, in entering into a formal relationship with an institution, alters that institution, often reinventing it in its own image. As we have seen, Macedo's claims about marriage being a liberal good are not reflected in *empirical reality*, although they are likely to become closer to reality upon establishment. If a *liberal dynamic of establishment* is at work, then polygamy can be transformed too. As above, perhaps the reason why monogamy is best placed to deliver the liberal goods is its being historically subjected to this dynamic, meaning that other institutions could be potential liberal goods, given the chance. We might need an account of the other cultural, personal, and social goods that are potentially liberalisable.<sup>70</sup> However, too much focus on the potential, rather than actual liberality, would begin to take use away from Macedo's second, cultural argument (see the next section), which claims that institution of marriage in the here and now, is good.

When Macedo points to the positive social outcomes associated with marriage – be they levels of income, health, or happiness, it is very difficult to determine whether marriage

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<sup>69</sup> Macedo, 'Transformative Constitutionalism', p. 68.

<sup>70</sup> Scott Barclay raises a similar question: 'Which institutional forms, beyond marriage, are also supposedly central?'. Scott Barclay, 'A discussion of Stephen Macedo *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage*', *Perspectives on Politics* 14, 3 (2016): 793-794; p. 794.

causes these outcomes, or whether these factors lead to marriage, or whether there is a third factor causally linked to both. A number of theorists dispute Macedo's argument by raising this *unknown causation* objection. Brake, Jyl Josephson, and Carlos Ball, all contend that the causal process is the reverse of how Macedo presents it – rather than marriage causing greater outcomes in terms of wellbeing – those who are better off are more likely to enter into marriage in the first place, since '[e]conomic well-being and educational attainment lead to marriage', creating a selection effect.<sup>71</sup> More troublingly, the personal benefits of marriage are by no means equally distributed, and supporting marriage may create more, not less inequality: 'the United States has become a two-tiered society, a divide that tracks socioeconomic and racial lines...the danger is that the more society privileges marriage through laws, policies, and norms, the more it will remain an institution for the privileged.'<sup>72</sup> This leads us to a further problem, that marriage might be the *wrong target* for a social policy designed to secure these positive individual and societal outcomes.<sup>73</sup> The value of marriage as linked to the opportunity to form a family can be questioned as marriage is neither a necessary nor a sufficient condition for this pursuit. The existence of many non-marital family forms shows that marriage is a poor proxy for family. Moreover, if we are genuinely concerned about equal opportunity to family life, ME may be instrumental in sustaining unequal opportunities.

It is also notable that the arguments advancing the personal and social good of marriage are *parasitic on culture* – marriage only has the beneficial impacts it is claimed to have because marriage plays such a central and fundamental role in the culture in which the arguments are made – if there were a weaker marriage culture, links between marriage and wealth, health, happiness, autonomy, citizenship and family could not be drawn. This opens up the possibility that this second aspect of the public reason argument for

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<sup>71</sup> Elizabeth Brake, 'Review: Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, & the Future of Marriage*, *Ethical Theory and Moral Practice* 20, 2 (2017): 443-446; p. 445; Jyl J. Josephson, 'A discussion of Stephen Macedo *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage*', *Perspectives on Politics* 14, 3 (2016): 797-798; p. 798.

<sup>72</sup> Carlos A. Ball, 'Book Review Symposium: Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, & the Future of Marriage*', *The Journal of Politics* 79, 9 (2017): 63-64; p. 64.

<sup>73</sup> This point is made most forcibly in Nancy D. Polikoff, *Beyond (straight and gay) Marriage: Valuing All Families Under the Law* (Boston: Beacon Press, 2009). Polikoff points out that Waite and Gallaghers' "socially scientific" rather than religious account of the value of marriage confuses correlation with causation and misses the insight shown by the majority of research on the subject of marriage and children that the quality of the relationship (a stable, intimate relationship with one adult) is more significant for positive outcomes than the form of the relationship between parents. Indeed, the focus on a single variable (marriage) as critical for an "optimal" environment for children has been dismissed by a number of social scientists as scientifically invalid (pp. 68, 73).

marriage points to marriage as a cultural good, a notion that will be explored further in the following sections.

A final concern with Macedo's argument is that of *better liberal alternatives* – even if we can sustain that marriage is a liberal good as he claims – it is evidently not *the* liberal good *par excellence*. Any liberal credentials it has surely pale in comparison to the thoroughgoing liberal value of alternative forms of RRR advocated by marital disestablishmentarians – such as Brake's Minimal Marriage, Metz's Intimate Care-Giving Unions, and Chambers' Relationship Directives – which are of course liberal by conscious design. Here Macedo's cultural argument kicks in, which, if it is to work, needs to give an account of why we have liberal reasons to prefer a less liberal good over a more liberal one.<sup>74</sup>

### 2.3 The Cultural Argument

The cultural argument Macedo offers draws upon the popularity and desirability of marriage in the US, and thus, the existence of a marriage culture there. Macedo uses this cultural fact to argue that it is justified for democratic governments to establish widely but not unanimously valued institutions such as marriage.

Macedo emphasizes the cultural specificity of marriage as a practice, but also the generality of this practice in contemporary US society. Marriage cultures vary around the world, so that marriage is more important in some places than in others, but in the 'here and now', a monogamous, established form of marriage open to same-sex couples 'makes sense'.<sup>75</sup> Civil marriage is viewed as one of the cornerstones of 'our way of life', the subject of many a personal aspiration and serious desire: 'the institution of marriage in the US is freighted with social meaning and moral, cultural, and religious significance'.<sup>76</sup> Consequently, '95% of American adults are either married, or would like to be', which means that 'many people have come to rely on and build their lives around [this] existing institution'.<sup>77</sup> This all despite the fact that marriage is no longer socially or culturally required as the only respectable means of living an adult life – having shifted

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<sup>74</sup> Here and at points in the preceding discussion I talk about liberalness as a quality as if it can be quantified, or admits of degrees. I make no claims here to support any particular metric of liberty, rather, I enter into the game of talking about liberal value in this way as it appears to be a game that Macedo is playing in his work.

<sup>75</sup> Macedo op. cit.; pp. 11, 204.

<sup>76</sup> Macedo op. cit; pp. 2, 79, 86, 91.

<sup>77</sup> Macedo op. cit; pp. 1, 16.

from being an unreflective tradition towards being a chosen one, marriage has retained its appeal.<sup>78</sup> The fact that large numbers of people have persistently over time converged on monogamous marriage, notwithstanding the existence of alternative forms of relationship, might give us cause to recognise and preserve what seems to be a stable and successful form of life.<sup>79</sup> A democratic state presiding over a society with a strong marriage culture would likely legislate to establish marriage as a common and highly valued cultural practice.

Given these salient facts about the practice of marriage, Macedo thinks it is justifiable for the state to promote marriage alongside other ‘widely if not unanimously valued goods’ such as science and the arts, on the proviso that the state accords priority to the protection of equal basic rights and a fair distribution of resources and opportunities.<sup>80</sup> In the US context, we can point to a fundamental right to marry that exists within the political and legal culture and has been invoked in various judicial cases over the years, and pronounced by Supreme Court justices in, for instance, *Loving v. Virginia*: “the freedom to marry has long been recognised as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>81</sup> What this is a fundamental right to can be found within US culture – the common conception of marriage is a companionate one: “*marriage in America is generally understood as an exclusive and long-term commitment, aspiring to permanence, between two people who love each other, share a household and sexual intimacy, and promise to love and care for each other through life’s trials.*”<sup>82</sup> From this conception, we can affirm that same-sex marriage fits, whilst polygamy does not, into our understanding of what marriage is. Macedo argues that an appreciation of the particular social meaning of a practice that a culture manifests in a particular place need not conflict with a Rawlsian or Dworkinian commitment to the priority of justice and basic rights: we can assume that insofar as it is consistent with that commitment, the practice is unproblematic.<sup>83</sup>

The value of culture as presented in these arguments weighs against the substitution of established civil marriage with alternative forms of relationship regulation. The MMs and ICGUs presented by Brake and Metz are culturally unrecognizable, they either attempt to

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<sup>78</sup> Macedo op. cit.; p. 86. See Chapter 3 for the idea that the practice of marriage has become “reflexive”.

<sup>79</sup> Macedo op. cit.; pp. 204, 211.

<sup>80</sup> Macedo op. cit.; p. 10. In Rawlsian terminology, as long as questions of basic justice and constitutional essentials are taken care of first.

<sup>81</sup> *Loving v. Virginia*, 1967.

<sup>82</sup> Macedo op. cit.; p. 89.

<sup>83</sup> Macedo op. cit.; p. 35, n. 12.

invent a new cultural form or disfigure extant marriage by stretching its meaning beyond its cultural usage (as Macedo comments, ‘no one wants to say, “I am marrying my grandmother.” Not even minimally.’).<sup>84</sup> They are untested and as such have not proven themselves to be ‘stable and successful forms of life.’<sup>85</sup> Without being validated by historical and social norms, we cannot be confident about the goodness of these alternative forms.<sup>86</sup> The novelty and therefore ambiguity surrounding these institutions would mean that the expressive desire of couples to be married as a matter of ‘common, public knowledge’, would effectively be thwarted.<sup>87</sup>

Perhaps marriage would matter less in a more just social context, where the benefits of marriage could be distributed by something closer to MMs or ICGUs. Here Macedo admits a certain level of deference to context: there are certain features of US culture which make the pursuit of social justice particularly challenging and count against the feasibility of liberal egalitarian policies.<sup>88</sup> For example, the cultures of individualism and personal responsibility, and the federal system, make the establishment of a welfare state in the US a hugely difficult task. ‘If a genie appeared and offered to stably institutionalize the Danish social welfare state in the United States, but only if we got rid of civil marriage, I would likely take that deal, but it is not on offer.’<sup>89</sup> The US baseline is much lower than that found in Scandinavian social democracies: as a result, the net impact that marriage has on welfare is much greater in the US than in Denmark. Maintaining the established system of marriage is a way of reconstructing what is rational and reasonable in a particular context, rather than risking tampering with beneficial cultural forms for the sake of a more neutral institution which is unlikely to achieve the same cultural fit and thereby meet the same cultural needs that marriage currently does. Macedo urges us to preserve cultural forms, like marriage, that have proven their value over the test of time and which do not compromise our commitment to basic justice.<sup>90</sup>

Macedo describes his approach as being ‘sensitive to empirical evidence and our evolving

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<sup>84</sup> Macedo op. cit.; p. 135.

<sup>85</sup> Macedo op. cit.; p. 204.

<sup>86</sup> Macedo op. cit.; p. 96.

<sup>87</sup> Macedo op. cit.; p. 91.

<sup>88</sup> As argued in section 2.2 above, it appears that Macedo is referring to the present US context, not an ideal liberal society.

<sup>89</sup> Macedo op. cit.; p. 108.

<sup>90</sup> Macedo op. cit.; pp. 209-210. It is worth noting here that “proving its value over time” may make marriage more likely to pass the public reason test – but it might not be sufficient for the argument need not collapse into the public reason argument here.

public understandings of human sexuality and family life’ and ‘closer to the common sense of ordinary citizens’.<sup>91</sup> His solution is more contingent on circumstances than that of Brake or Metz: it is likely that the human need for care is going to remain a constant that can justify the establishment of MM or ICGUs regardless of great societal change and upheaval; whereas if the importance of marriage diminishes due to a reduction in the symbolic or expressive force of the practice, or a ceasing of its role as the gateway to family life, so that getting married by the state is no longer a reasonable or widespread desire (i.e. the US no longer has a marriage culture), then state establishment might no longer be justified.

#### 2.4 Problems with Macedo’s Cultural Argument

Macedo’s cultural argument raises some significant issues. Firstly, the *neutrality* objection arises when the satisfaction of common aspiration or serious desire involves using the state to validate that desire – as in the cases of Tom-Paul and Tom and Paul presented at the start of the chapter. In the case of civil marriage, the desire is ‘to get married and to be married as a matter of common, public knowledge: that is, in the eyes of one’s whole society, not just in the eyes of one’s church or social circle.’<sup>92</sup> Is this a desire that the state should satisfy? Macedo argues that in this case there is no ethically neutral option – since fulfilling the desire will implicate the state in supporting a controversial institution, and privatising marriage would have the state place a serious barrier in the way of persons who want to enter into such a state-sanctioned commitment.<sup>93</sup> However, such an argument confuses neutrality of justification with neutrality of effect. It is certain that however the state acts is going to affect persons with differing conceptions of the meaning and purpose of marriage differently, and some persons (in this case those who desire the state’s approval), stand to gain or lose more: no state policy on this will be neutral in its effects. Yet, as long as the policy is neutral in its justification, that is, it is supported by appeal only to reasons that can be shared by all, rather than reasons accessible within only some comprehensive doctrines, it can be considered to be neutral in the eyes of public reason. However, as we have seen, Macedo is committed to seeking legitimacy rather than neutrality, so it is not apparent that this objection is one that Macedo would need to address. Nevertheless, the key question remains: can the desire to

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<sup>91</sup> Macedo op. cit; p. 11.

<sup>92</sup> Macedo op. cit.; p. 91.

<sup>93</sup> Macedo op. cit.; p. 97.

be married by the state be legally enabled in a manner that is legitimate and/or neutral? This is a question I address more fully in Chapter 6.

Secondly, in discussing legal prohibitions against same-sex sexual activity, such as those that existed in the US and the UK in the past, Macedo makes it clear that the beliefs and feelings of the majority are not sufficient to ground law – law is not simply the codification of popular morality. Instead, as we have seen, laws require a separate justification, making use of common sense reasons and evidence to pass the public reason test.<sup>94</sup> If, ultimately, it is these public reasons that justify a law, the cultural argument is *superfluous*.

Finally, as Macedo admits, monogamy is not the dominant marital form – approximately 85% of human societies have at some point practiced “normative polygamy”, by regarding polygyny as the preferred marital form.<sup>95</sup> If this is the case, how does this fact square with his claims about ‘stable and successful forms of life’ and the authority of a convergence on certain social practices? To address this *polygamous culture* objection, Macedo may have to admit that he has independent reasons to dismiss polygamy, despite its cultural success – as we saw previously, he rejects polygamy on the basis of its failure to conform with and support liberal values. Here, liberal concerns about justice, liberty and equality override a popular cultural form. But there is perhaps more to Macedo’s objection: he also points to the greater rates of violence and crime found in polygamous societies.<sup>96</sup> Does this amount to a claim that polygamy is therefore not a ‘stable and successful form of life’, and therefore does not meet the threshold of cultural success to justify state endorsement? Ultimately, this depends on how success is construed – as a descriptive account of the positive and negative outcomes of the institution, or a normative assessment of congruence with liberal values.<sup>97</sup> Ultimately, we need an account of how the public reason and cultural arguments fit together, and which, if any, takes priority. This is what I turn to in the next section.

A final point to note here, is that throughout his presentation of the argument, Macedo uses the terms ‘we’ and ‘our’ culture – construing US culture as a monolith, and

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<sup>94</sup> Macedo op. cit.; pp. 26-27, 31-32.

<sup>95</sup> Macedo op. cit.; p. 150.

<sup>96</sup> Macedo op. cit.; p. 172.

<sup>97</sup> Of course, any description is unlikely to be purely descriptive, especially if it is concerned with deeming some outcomes more successful than others.

presuming a shared culture amongst his audience. This has the effect of marginalising alternative voices. It appears that the ‘we’ he constructs includes advocates for same-sex marriage, but not members of the religious right or Mormon polygamists. Arguing from a shared conception of marriage, then, is problematic, when those you are trying to convince do not share the conception to begin with.

### 3 What is the Relationship between Public Reason and Culture?

In this section, I suggest a number of ways that the two arguments Macedo makes, public reason and culture, are related. If we suppose that Macedo’s public reason argument is successful, what work is the cultural argument doing, given that the first argument should be sufficient to provide a liberal justification for ME? If Macedo were to accept that marriage wasn’t the liberal good he claims it is, would the cultural argument still be advanced? Is it just a happy coincidence that the most popular form of marriage in the US is a liberal one?

Firstly, Macedo dual argumentative strategy might be required if, in the case of marriage, public reason is *incomplete* and *inconclusive*. Drawing on the work of Micah Schwartzman, we can identify cases where public reason leaves a question unresolved, such that there is reasonable disagreement amongst citizens about which of a number of mutually exclusive solutions is the most reasonable.<sup>98</sup> Perhaps marriage is such a case, where neither ME nor marital disestablishment is unreasonable, so that public reason can be advanced to justify both, but neither one or the other conclusively. If this is the case, Macedo’s cultural argument may be meant to tip the scales in favour of ME. Invocation of culture as a justification for marriage would not be a violation of public reason, since both solutions would be equally reasonable – culture just provides an additional, non-public reason that a majority of citizens could support.

A possible challenge that arises here is that if amongst equally reasonable solutions, culturally familiar forms are permissibly chosen by a majority of citizens, it is democracy, rather than culture that does the normative work. This would make the cultural argument redundant. It is the permissibility of democratic solutions that makes the cultural forms

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<sup>98</sup> Micah Schwartzman, ‘The completeness of public reason’, *Politics, Philosophy & Economics* 3, 2 (2004): 191-220; pp. 194-195.

permissible. This may be so: for now, I submit that the relationship between culture, democracy, and public reason is complex and substantial.<sup>99</sup>

A second possibility is that what Macedo terms the ‘*reasonableness of everyday life*’ connects public reason and culture. On this account, public reason can be viewed as a reified version of popular morality. Ultimately, liberal values interact with culture in ways that complicate a simple reliance on liberal values. What can be justified in public reason is, to some extent, conditioned by culture. Which reasons have currency, and which arguments have weight, depend on multiple cultural understandings and priorities which are not confined simply to liberal values. This is the kernel of truth in Aaron James’ attribution of practice-dependence to Rawls.<sup>100</sup> The conceptions of the person as free and equal and of society as a system of fair cooperation, found in the public political culture of liberal democratic societies, express values that are both liberal and cultural. This happy coincidence serves to guarantee that such conceptions have such initial intuitive appeal, and can subsequently survive the course of reflective equilibrium. Macedo’s popular conception of marriage could be another aspect of the public political culture that is both liberal and cultural.

Finally, it is possible that Macedo is making a *non-ideal* argument which reflects on the feasibility of the liberal ideal. His remarks about liberal alternatives to marriage being culturally unrecognisable, about the lack of a social democratic culture in the US, and about the legibility of marriage as an act about which there is common knowledge regarding what the participants are doing, point towards a non-ideal justification of ME as the second-best solution in the here and now.

Here, I want to argue that Macedo’s argument can only work, that is, the model of marriage he wishes to defend can only defeat its liberal alternatives, if he argues for the *primacy of culture*. This argument would state that although it appears that the cultural argument is superfluous, it is actually the case that the liberal good and personal good arguments are parasitic on the cultural good argument. The account of marriage as a liberal good collapses into one of marriage as a cultural good, since the level of impact the good has on the liberal order depends on the importance or strength of its cultural

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<sup>99</sup> I thank Jeff Howard for raising this challenge.

<sup>100</sup> Aaron James, ‘Constructing Justice for Existing Practice: Rawls and the Status Quo’, *Philosophy & Public Affairs* 33, 3 (2005): 281–316.

role. Equally, valuing marriage as a personal good is only relevant if marriage is culturally valued, that is to say, the importance of the good depends on an account of its cultural value. Marriage can only be considered as an important opportunity in a marriage culture. Indeed, the more contextual and conditional arguments advanced by Calhoun, and Hartley and Watson, depend upon the cultural importance of marriage and the consequent normative significance of exclusion and unequal opportunities relating to it. As such, the public reason argument is parasitic on culture – marriage is only marked out as a liberal or personal good if it has a certain bearing or status in the culture. Liberal goods and personal goods can be seen to collapse into cultural goods – what gives them their value, over and above more abstract alternatives, is their role and influence in the culture.

#### 4 An Alternative Approach – Practice Dependence

Marital disestablishmentarians claim that marriage is a private matter, whilst relationships per se are not. Marriage is just one way of structuring personal relationships: relationships per se are more universal, general and widespread, broader, more inclusive than just marriage. The state is interested in relationships *qua* relationships, due to the relational goods and vulnerabilities they contain. Marriage does not map accurately onto those relational goods without remainder – it does not capture all the value the state is interested in. Marriage, therefore, is under-inclusive.

Yet this liberal critique of marriage is also under-inclusive - it does not capture marriage as a cultural institution. Focusing on relationships more broadly does not capture all of the value of marriage. Marital disestablishmentarians argue that the additional material contained within marriage – that is, marital expression, its symbolism, its culture - belongs in the private sphere. Macedo, however, wants to tie the cultural, symbolic meaning of marriage to liberalism. As we have seen, he characterises marriage as a liberal good, and has confidence in the liberalising power of marriage. I argue instead that marriage is not a liberal good, although the practice of establishment itself might aim to liberalise it. Macedo is right to say that marriage is a public good – since it is a significant part of the public culture. I propose that the power of marriage within a culture could mean that the state has a legitimate interest in it – and therefore that the strength of popular desires may justify establishment.

I suggest that a practice-dependent justification will be fruitful here. According to Andrea Sangiovanni, the practice-dependence thesis is as follows: ‘The content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern.’ When applying principles of justice to an institution, such as marriage, we can take an instrumental approach, whereby we consider how effective marriage is as an instrument for realising certain independently justified principles or values, such as fairness or equality, and consider whether it requires reformation or transformation by the lights of this prior standard. Here, we aim for ‘*all-things-considered*’ judgements regarding what rules and norms ought to govern the operation of the practice.<sup>101</sup> Practice-dependent theorists are less certain about which higher-level principles and values should be used for standards of reform for specific practices, so require mediating principles which tell us which values should apply in our all-things-considered judgements about the practice.<sup>102</sup> By interpreting the practice at hand, we can specify what normative values, such as justice, mean in the given context, and then use the principles so generated to reform the practice. The resultant mediating principles thus emerge out of an interpretive reading of the institution, which serves to identify the values that apply and refine their content given the point or purpose of the institution, thereby justifying the applied principles that realise these values.

A more thorough consideration of the method, its potential applications, and responses to concerns with it, will be the subject of the next chapter. For the moment, however, I will point to some of the potential contributions the approach will make. Whilst practice-independent liberal theorists (PILs) value practices only insofar as they contribute to liberal values, and have no presumption in favour of extant practices, practice-dependent liberals (PDLs) see the existence of long-standing practices as evidence of realist political value that is not necessarily tied to liberal values. Whilst Macedo tries to offer a justification of marriage purely by reference to liberal values, I argue that his strategy instrumentalizes marriage for liberal purposes: seeing monogamous marriage as contributing to liberal values whilst polygamous marriage fails to do so. This, according to PDLs, misunderstands how we should interpret practices.<sup>103</sup> Rather, interpreting a

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<sup>101</sup> Andrea Sangiovanni, ‘How Practices Matter’, *Journal of Political Philosophy* 24, 1 (2016): 3-23; p. 20.

<sup>102</sup> Sangiovanni terms this aspect of practice-dependence “mediate deduction”, see *op. cit.*, p. 20.

<sup>103</sup> Macedo may respond that he doesn’t care about interpreting practices – rather, we should revise institutions and coopt them for liberal purposes. But as we have seen, this makes the cultural argument unnecessary, and opens him up to the challenge of *better liberal alternatives*. In what follows in the next chapter, I try to take the cultural argument seriously, and argue that if we are endorsing the extant practice of value, we need to engage in an interpretation of the institution, using the practice-dependent method.

practice involves giving a reading of its point and purpose, not assigning a purpose because it suits. Marriage may not contribute to the realisation of liberal values. Therefore, the justification for the establishment of the practice might not be a liberal one. The liberal values identified by Macedo are instead *ex post facto* political values, attributed to the practice for political purposes on its establishment. This is an important dynamic of establishment that needs to be explored. A PDL justification of marriage need not assert that marriage is a *liberal good*, although it must accept that marriage will be constrained by the state in accordance with liberal values. PDLs recognise that institutions establish a network of relationships which alters the way in which participants interact and shapes the reasons we have for endorsing or rejecting a given set of principles, thereby conditioning the criteria of justice. As such, giving an account of the reasonable expectations generated by the establishment of marriage can help us to resolve reasonable disagreements about ME (or enable us to decide whether these disagreements are indeed reasonable at all). Finally, looking at the often overlapping practices that persons are engaged in, living as they do in multiple relationships both diachronically and synchronically, can help us to better forecast the effects of disestablishment or establishment with supplementation. I turn to this task in the next chapter.

## 5 Concluding Remarks

After reflecting on Macedo's account of marriage, Tom and Pauls' desire looks different to Tom-Paul's because, according to Macedo, theirs is a desire for a liberal good, which is not only consistent with liberalism, but actually advances and supports liberalism. However, I have argued that we should reject the argument that marriage is a liberal good. Instead, we should view Tom and Paul as wishing to participate in a valued cultural practice. The question, then, is whether the state should play any role in administering that opportunity for them, and enabling them to pursue that desire by guaranteeing that opportunity. The parallel with Tom-Paul, if his desire to build his monument was characterised as one for a cultural good, would be for the state to build a museum to his God, or an art gallery of works celebrating his God. The difference between Tom-Paul, and Tom and Paul, is that the former wants the state to support him in the pursuit of a personal good – the idiosyncrasy of his religion is a relevant aspect of the example. For Tom and Paul, their desire is for a personal good that a significant number of persons

desire – a cultural good – such that it may be the case that part of its goodness derives from this shared nature.

Within the wide-ranging literature on the justice of subsidizing expensive tastes, there is a tension between the notion that Tom-Paul and Tom and Paul can assume responsibility for their conceptions of the good life and the ends they entail, and the idea that some expensive tastes are genuinely involuntary. Whilst we might not be passive carriers of desires, and we can assume that most people reflectively endorse and choose their conception of the good life, individuals cannot be expected to bear responsibility for the environment they pursue their conception in, which sets the price of their tastes and presents disadvantages to some pursuits.<sup>104</sup> The centrality of ME to Tom and Pauls' conception of the good life, and urgent interest they have in pursuing it, is not universally shared. If ME is to be defended as permissible, the challenge is to show that subjective preferences can be endorsed by the state without entailing a perfectionist judgment about how others should live their lives.<sup>105</sup> If you like it, can the state put a ring on it without conveying that others should enter marriage too? Both the preferences of supporters of ME, and those that reject it, need to be respected by the state, and the environment created or supported by state action or inaction on this matter, that is the marriage culture, needs consideration in terms of the costs and benefits, advantages and disadvantages that result. The following chapter will begin some of this work.

Marriage is a widely shared desire, non-liberal, yet not illiberal, which can muster some public arguments to support state involvement, within liberal constraints. These arguments, however, are not directly premised on liberal principles, which means that arguments for liberal alternatives to marriage fare better in terms of the public reasons they can muster. The case for ME as advanced by Macedo, then, is not decisively victorious. One way of viewing the state of play is to describe the lack of convergence on a determinate conclusion between marital establishmentarians and disestablishmentarians

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<sup>104</sup> Rawls argues that primary goods are designed to allow individuals to assume responsibility for their ends. See John Rawls, 'Social unity and primary goods', in Amartya Sen and Bernard Williams (eds.) *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982): 159-185; p. 169. Amongst those who argue that individuals cannot be held entirely responsible for their expensive tastes are G. A. Cohen, 'On the Currency of Egalitarian Justice,' *Ethics* 113, 4 (1989): 745-763; G. A. Cohen, 'Expensive Taste Rides Again', in Justine Burley (ed.) *Dworkin and His Critics* (Oxford: Blackwell, 2004): 1-29; Richard J. Arneson, 'Equality and Equal Opportunity for Welfare,' *Philosophical Studies* 56, 1 (1989): 77-93; Steven Wall, 'Neutrality and Responsibility,' *Journal of Philosophy* 98, 8 (2001): 389-410.

<sup>105</sup> Arneson argues this is possible in Richard Arneson, 'Neutrality and Utility,' *Canadian Journal of Philosophy* 20, 2 (1990): 215-240; p. 239.

as an example of the inconclusiveness of public reason.<sup>106</sup> Later, in Chapters 4-6, I respond to challenges from marital disestablishmentarians that hold that we can reach a determinative conclusion that ME is conclusively unjustified within political liberalism by public reason. I present a number of arguments that challenge the conclusiveness of the disestablishmentarian position. In particular, I propose and defend the idea that a non-sectarian institution of marriage is possible. Assuming this inconclusiveness can be maintained, the following chapter develops an account of other, practice-dependent reasons that can be advanced in favour of ME, which will defend, but not conclusively justify the arrangement.

Marriage is not a liberal good, but is a cultural good that can be constrained by liberal values. If ME is permissible, it is because outside of the scope of justice, there is space for cultural establishment on the basis of practice-dependent justifications. In what follows, I argue that ME, although not required by justice, and subject to liberal constraints, can be defended. The space within which this defence will be mounted is located between the prohibited and the mandatory – this is where practice-dependent justifications will apply. In questions of state symbolism and the institutional design of governing institutions, instead of advancing the first principles and all-things-considered judgments appropriate for matters of basic justice, a more contextual approach is appropriate: ‘one should expect to see normative analysis proceed with reference to consequences, balancing, and better-or-worse considerations. These are, in general, the sort of considerations that require sustained attention to context. Consequences vary according to a wide range of circumstances. Balancing proceeds differently when different sets of claims are in play.’<sup>107</sup> A significant contribution that has been made by Macedo’s addressing of the marriage question is to bring context to bear against the more abstract arguments of liberal disestablishmentarians. Instead of switching methodologies between the idealism of liberalism, and the empirical context, as Macedo does most prominently when comparing polygamy and monogamy, in the next chapter I develop an argument for a more methodologically-disciplined contextual approach to the question.

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<sup>106</sup> Schwartzman, op. cit.; p. 194.

<sup>107</sup> Jacob T. Levy, ‘Contextualism, Constitutionalism, and *Modus Vivendi* Approaches,’ in Anthony Simon Laden and David Owen (eds.) *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007): 173-197.

## Chapter 3 - Interpreting the Practice of Marriage: Is a Practice-Dependent Justification of Marital Establishment Possible?

### 1 Introduction

What normative significance do pre-existent practices have? Practices, such as marriage, often become formalised and solidified into traditions and institutions over time. In many places the practice of marriage is both socially central and established by the state. Does the fact of this institutional configuration have any bearing on what our principles of justice should be, specifically the principles regulating and recognising personal relationships? Does our normative assessment and justification of practices need to take into account the expectations and commitments of those participating in them? In this chapter I consider the normative implications of marriage *as a practice*.

Most liberal approaches to the question of a just marital system are what we would term “practice-independent” (PI) – that is, they attribute no value to extant practices. Instead, they attempt to generate normative principles without reference to practice, and those principles are then considered as prior to practices and as capable of dictating that practices change or disappear if they are not consistent with principle. In other words, in the context of justification, practices do not figure, and in the context of application, practices are subject to the requirements of principle. A just system of marriage is one that can be compatibly arrived at under these principles.<sup>1</sup> So, under the Rawlsian theory of justice, any marital system would need to respect the two principles of justice, and would have to be justified in public reason. That is, it would have to uphold the rights, liberty and equality of citizens and be part of the overlapping consensus that reasonable persons with a plurality of comprehensive doctrines could support. As we saw in Chapter 1, Elizabeth Brake takes Rawlsian political liberalism as her starting point and argues that the requirements of public reason and its concomitant neutrality of justification in a diverse society prevents a state from endorsing heterosexual monogamous marriage through its establishment, and calls for a more neutral ‘minimal marriage’ (MM)

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<sup>1</sup> Compatible forms of marriage could be seen as required by principles of justice, or merely consistent with them: whether they are required depends on a prior question of whether some regulation or support of relationships is required by justice, a question answered in the affirmative by the liberal thinkers considered here. For example, Brake (*Minimizing Marriage*, Chapter 7) sees caring relationships as social primary goods essential for the development and exercise of the two moral powers, thus in need of the protection and the recognition of the state.

framework that supports caring relationships more generally conceived, admitting polyamorous groups, networks of friends, and family members into its folds.<sup>2</sup> Similarly, Tamara Metz starts with the liberal values of liberty, equality and stability, argues that established marriage violates these, and proposes an Intimate Care-Giving Union (ICGU) status as an alternative that better respects those values: these unions would also be open to any combinations of persons in such relationships.<sup>3</sup> In both these cases, universal human interests, such as care, provide the justification of the alternatives to marriage, and drive the need to abstract from culturally specific and therefore controversial forms of marriage to arrive at a thinner, more neutral means of regulating relationships. Due to the fact that practice-independent approaches to relationship regulation abstract from current practice, they tend to propose more expansive forms of institutions that not only replace marriage but also extend across a broader range of practices that humans in caring relationships are engaged in.

This does not mean that the fact of existence counts for nothing. As Brake states: ‘There are reasons for keeping institutions already in place. The familiarity of an institution should count for something when considering other equally good imaginary institutions.’ The contemporary established marital system is just one possible option among many and is as such judged against the same standards as all other options. If it was found to be on a par with another option, then the avoidance of transition costs would give us an additional good reason to choose it over the alternative (although, it is likely that this consideration would only enter in at the level of non-ideal theory). However, as Brake asserts, ‘what is currently in place is not working well; divorce rates are high, and many children are being raised outside marriage. In the balance against the familiarity of our current system are the constraints of public reason, equal opportunity, equal treatment, and child welfare.’<sup>4</sup> Extant marriage is not a good enough practice to retain.

This chapter will not directly attempt to address the claim of whether the current system of marriage is working well or not. Rather, it will consider a liberal argument for a just marital system that is practice-dependent (PD), i.e. an argument that credits the contemporary practice of marriage with some value, beyond the practical consideration

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<sup>2</sup> Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012); Chapter 7.

<sup>3</sup> Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, N.J.: Princeton University Press, 2010); especially Chapter 5.

<sup>4</sup> Brake, *op.cit.*, p. 151.

of convenience, which in some way conditions the principles we choose to govern relationship regulation. I focus on showing that, at least in some cases, marital establishment is as “equally good” as the imaginary institutions designed for a disestablished system. Part of the work required in order to do this will entail a positive argument, which includes both an account of the value of marriage, and an attempt to work up the familiarity described above by Brake into a credible normative account. For marriage to be permissibly pursued by a liberal state, the notion of “equally good” must also encompass “equally just”, understood in the sufficiency or threshold sense of being consistent with, and not violating or undermining, justice. This negative argument is made, in this chapter and the following Chapters 4, 5 and 6, by demonstrating that it is plausible that some instances of marital establishment can escape the charges made against the arrangement by disestablishmentarians. I argue that the possibility for something “equally good” to be “equally just” arises due to the fact that justice is indeterminate, and therefore admits of various equally permissible permutations, rather than one singular solution.

I begin by briefly presenting the PD method, and suggest how the approach may both overcome some of the shortcomings of Macedo’s justification of marital establishment (ME) in his *Just Married*, and address two intuitions raised by his work (*Section 2*). I then refine my account of practice dependence by addressing claims that it is normative indistinct and arguing it claims normative self-sufficiency (*Section 3*). I then develop the account of practice-dependence to show that it has a weak normative role to play in a limited range of cases, where there is complexity, controversy, and conflict over the meaning of a practice, arguing that marriage is such a case (*Section 4*). I present an account of the plural values to be found in practices (*Section 5*), and the value of marriage specifically (*Section 6*). Finally, a turn to further challenges regarding the method, arguing that history does not always condemn a practice, that we can factor in the ways that culture can affect the consent and perceptions of participants, and finally, that practice-dependence has adequate resources to ensure fairness for non-participants (*Section 7*). Having both clarified and defended the method, I am in a position to defend an interpretation of the establishment of marriage as a cultural good against key arguments in the following chapters.

## 2 Why Turn to Practice-Dependence?

In the previous chapter, I rejected Macedo's public reason argument for marital establishment (ME). I argued that claims advanced in public reason are unable to support the form of ME Macedo advances, that is, marriage in the 'here and now' of the US, as monogamous, sex-neutral marriage. In that chapter, I viewed Macedo's work in part as a response to liberal supporters of marital disestablishment (MD), such as Elizabeth Brake and Tamara Metz, who derive alternatives to ME from liberal commitments to abstract values such as liberty, equality and stability. Against these, Macedo advances a liberal account of the cultural institution of monogamy. His account combines two claims: marriage in the here and now has valuable liberal credentials (which I term the *public reason argument*); and marriage as a cultural institution is valued by the majority of society (which I refer to as the *cultural argument*). In that chapter I rejected (or cast doubt upon) the first claim; in this chapter, I consider what the normative implications of the second claim are.

Macedo can be read as doing two things in *Just Married*.<sup>5</sup> First, he calls for the cultural practice of marriage to be factored into our normative account. Second, he gives a liberal reading or interpretation of the cultural practice of marriage.<sup>6</sup> I support the first project, and in this chapter I attempt to provide a methodological account of, and normative justification for, taking cultural practices seriously. I endorse the use of contextual approaches - specifically practice-dependence (PD) - for resolving the question of marital establishment. In making the case for practice-dependence I aim to demonstrate why the second move Macedo makes, that of casting marriage as a liberal good, is both incorrect and unnecessary. It is incorrect because it gives a false interpretation of the actual practice of marriage - the participants of marital practices do not view themselves as serving the liberal polity. It is unnecessary, because if the case for practice-dependence can be made, marital establishment can be justified (in some if not all cases, but importantly including Macedo's US context) without resorting to putting a liberal gloss on non-liberal practices.

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<sup>5</sup> Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton, New Jersey: Princeton University Press, 2015).

<sup>6</sup> For my account of the details of Macedo's arguments, and my response to them, see the previous chapter.

The PD method was developed initially in response to questions of global justice, but is intended to reach, and is beginning to be utilised, beyond this debate. The thesis of the method, as expressed by its key proponent, Andrea Sangiovanni, is that '[t]he content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern.'<sup>7</sup> Practice-dependence aims to be distinct from its opposite, practice-independence, by claiming that practices are relevant not just in the context of application, where pre-existing norms are employed in specific cases, but also in the context of the development and justification of the norms themselves. Instead of understanding norms as applying uniformly to distinct practices, we should, in some cases at least, view norms as depending on or being conditioned by the practices they apply to.

Following Aaron James, another prominent PD theorist, I take a social practice to exist 'when a group of people organise their behaviour in some way for the sake of some ends.'<sup>8</sup> This can include the more formally instituted rules we associated with institutions, and the more informal expectations and understandings generated by practices. The PD method considers practices as able to have a normative impact in two senses – in both the selection of which norms or standards are relevant, and the characterisation and formation of those norms. In order to generate appropriate norms for particular practices, we need to engage in an interpretation of those practices, so that our norms will best govern their point and purpose. PD theorists follow the steps provided by Ronald Dworkin's interpretive method. The first, pre-interpretive stage identifies the object of interpretation: it individuates and delineates the practice in question. The second, interpretive stage, aims to both give an accurate account of the point and purpose of the practice, and to adopt the perspective of a participant in order to reconstruct the reasons they are likely to have for endorsing the rules, procedures, and standards upheld by the practice. A final stage, the post-interpretive, reflects critically upon the practice so interpreted, and uses that evaluation to derive first principles to govern the practice.<sup>9</sup>

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<sup>7</sup> Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality', *Journal of Political Philosophy* 16, 2 (2008): 137–64; p. 138.

<sup>8</sup> Aaron James, 'Why Practices?', *Raisons politiques* 51, 3 (2013): 43–61; p. 44.

<sup>9</sup> See Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), Chapter 2, esp. pp. 65–66. See also Sangiovanni, *op. cit.*, pp. 148–150. James terms these three stages of the practice-dependent method individuation, characterization, and substantive argument. See James, 'Why Practices?', p. 45.

As we will see, the practice-dependent approach to normative justification has been challenged on a number of fronts. In what follows, I begin by indicating why I think that practice-dependence is an appropriate method for dealing with the question of marital establishment: it is well equipped to respond to two intuitions raised in response to Macedo's argument for marital establishment. I then flesh out the method in more detail whilst simultaneously responding to key criticisms made of it. Once the case for practice-dependence has been made, and its particular use in the marriage case justified, I begin the task that will continue in subsequent chapters – to offer an interpretation of the practice of marriage that could permissibly be established in liberal states.

## 2.1 Lessons from Macedo's Marital Establishment

As we saw in the previous chapter, Macedo attempts to give an account of marriage that is 'closer to the common sense of ordinary citizens'.<sup>10</sup> He adopts a certain deference to context in order to provide a normative account of marriage that has an acceptable cultural fit, and responds sensitively to cultural needs. At times Macedo appears to be engaging in an interpretivist reading of marriage. He identifies a practice – marriage - and gives an interpretation of it - the common conception of marriage in the US is a companionate one: "*marriage in America is generally understood as an exclusive and long-term commitment, aspiring to permanence, between two people who love each other, share a household and sexual intimacy, and promise to love and care for each other through life's trials.*"<sup>11</sup> He then presents principles to regulate the practice - the establishment of monogamous sex-neutral marriage. These principles 'make sense' given 'our way of life': that is, one in which marriage is a 'stable and successful form of life', 'freighted with social meaning and moral, cultural, and religious significance', and elevated to the level of fundamental right in US legal culture.<sup>12</sup>

What is striking, however, about Macedo's work on ME is that he never once gives an account of the method of interpretation he is employing (if any) to paint the picture of marriage in the US that he thinks justifies its establishment. We do not know whether his interpretation provides a normative justification, because we do not know what steps,

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<sup>10</sup> Macedo op. cit; p. 11.

<sup>11</sup> Macedo op. cit; p. 89.

<sup>12</sup> Macedo op. cit; pp. 204, 79, 2.

procedures or trials an interpretation of marriage needs to go through in order to be justified, on his account.

Macedo may respond that he doesn't need a method of interpretation. Yet, as we shall see, even theorists such as Ronald Dworkin, who claim to begin from abstract values and then see how they apply to a given practice, need to interpret practices in the light of these values. Macedo, who clearly wants to give a more culturally sensitive account than, say, Elizabeth Brake (remember his comment about the preposterous idea of marrying your grandmother?), surely needs to get his hands dirty with the work of interpretation. Indeed, Macedo suggests that the cultural insensitivity of Brake's Minimal Marriage highlights a poverty in her method: to sustain this claim, Macedo needs to advance a superior normative method for dealing with the marriage question.

If Macedo is indeed engaging in interpreting the practice of marriage, as it exists in the contemporary US context, he needs to provide an account of the method of interpretation he is following. The purpose of following a worked-out method, as opposed to presenting unreflective personal observations or anecdotes, is to build a case that can be endorsed by many, that is, one that is convincing beyond a narrow audience of like-minded persons.<sup>13</sup> By following such a method, he can avoid the pitfalls that I claim in this chapter he succumbs to - by providing a standard of evidential proof (what counts as knowledge according to the method?), and a guide to gathering such evidence (where should the researcher look? What rules should they respect in gathering it?) others initially unsympathetic to his conclusions can verify his argument for themselves.<sup>14</sup> If, ultimately, the unsympathetic challenger remains unconvinced by Macedo's argument, it will either be because he has failed to employ the method correctly (and the challenger is able to use the method more carefully and thoroughly to come to an opposing or

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<sup>13</sup> It is worth noting here, that Dworkin's characterization of the interpretive method is not one in which interpreters need to convince others of the value of their own interpretation. Although there must be consensus about the object of interpretation for interpretation to begin, people will disagree about the point and purpose of practices, and the values that we should bring to bear upon them. Interpretation is a private and individual, and not a common and interactive, process: 'There is nothing in Dworkin's meta-theory of interpretation of social practices that requires attention to the interpretive activities of fellow participants.' The "strong Protestantism" of Dworkin's method, as Gerald Postema puts it, is considered in section 7 below. See Gerald J. Postema, "'Protestant' interpretation and social practices', *Law and Philosophy* 6, 3 (1987): 283-319; pp. 296-297.

<sup>14</sup> For now, I bracket the question of what verification means in the context of interpretative arguments. Clearly it is distinct from, although related to, the kind of empirical verification we are familiar with in the physical sciences, and involves determining whether an interpretation is reasonable, given the data available.

altered conclusion), or it will result from the fact that the challenger rejects the method employed as normatively groundless and unable to provide the required justification. It is therefore imperative that an account provides both clear directions on how to employ the method, and a convincing argument concerning the normative grounds of its results.

Macedo's account of marriage raises two intuitions that this chapter aims to pursue. The first, the *culturally attuned intuition*, is that principles designed to regulate marriage should be sensitive to the practice of marriage. Macedo pits his own account of marriage against liberal disestablishmentarians who he describes as too abstract and out of tune with reality. Yet Macedo also needs to apply this standard to himself – his own account of marriage needs to be recognisable from within the practice by its participants. In the previous chapter I argued that Macedo's characterisation of polygamy is overly empirical, whilst his account of monogamy is charitably normative. This meant that monogamy could be endorsed by liberal states, since it was interpreted in its best light by reference to ideal types or normative ideals. By contrast, polygamy failed the establishment test because the empirical examples of it highlighted by Macedo were overwhelmingly in violation of liberal standards. The *asymmetrical treatment* objection I levelled against Macedo asked for the same standards to be applied to both monogamy and polygamy, in other words, for diverse marital practices to be assessed according to either their empirical specimens or their normative potentials, whichever was deemed appropriate. Thus, we need a methodological account of the proper role of reality in justifying, vindicating, or condemning practices. Normative responses to marital establishment need to be prefaced by an engagement with the practice, how it functions, and its meaning for its participants. A method of interpretation provides this. Later in the chapter (section 6) I argue that a reasonable interpretation of marriage could include polygamous unions.

Macedo's attempt to present monogamous marriage as a liberal good also conflicts with the *culturally attuned intuition*. The contribution that monogamy allegedly makes towards the sustenance of liberal democracy is far from the minds of spouses when they enter into marriages, and celebrants when they officiate weddings. Accounts of the political value of marriage, liberal or otherwise, rarely register in the participant's perspective of the point and purpose of marriage. Or if they do, they do not capture the full value of marriage for participants. Of course this does not mean that marriage does not have

political value. Accounts of the political dimensions of marital practices are important and illuminating.<sup>15</sup> They offer a critical perspective by which to judge the purported value of marriage, and help us to identify any ways in which marriage may violate liberal norms and values. If we are to make use of these political insights, without fully erasing the participant perspective, we need an account of the weight held by this perspective, when we should respect it, and when we should dismiss it. Again, a method of interpretation will deliver this.

The second intuition, related to this element of the first, is that there is something of value in marriage that is not necessarily liberal. The reason that Macedo's account does not quite ring true is that his assertion that marriage is a liberal good sometimes simply cannot be supported by reality, and in cases where evidence for it can be found to support it, it offers an insufficient or incomplete account of the value of marriage. Instead of retreating into the kind of idealised and abstract interpretation of marriage that Macedo is opposed to, the *non-liberal value intuition*<sup>16</sup> prompts us to look beyond the contribution that marriage makes to the liberal polity for justifications of marriage that both (a) better serve the culturally attuned intuition, by more fully capturing the multifaceted value of marriage as experienced by its participants; and (b) avoid instrumentalising marriage for liberal purposes.

Developing the *non-liberal value intuition* allows us to address the problem of *better liberal alternatives* that I argued Macedo's public reason justification for marriage faced in the last

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<sup>15</sup> See, for example: Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass: Harvard University Press, 2000); Katherine Franke, *Wedlocked: The Perils of Marriage Equality: How African Americans and Gays Mistakenly Thought the Right to Marry Would Set Them Free* (New York: New York University Press, 2015); Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (New York: Oxford University Press, 2017).

<sup>16</sup> Note that non-liberal does not mean illiberal. Non-liberal is intended to express the idea that the value is neither derived from nor reducible to liberal values. Some things described as non-liberal will be illiberal, meaning they violate liberal values and cannot be made consistent with them. Others, although not related to liberal values, will be consistent with liberal values. An analogy with language may be instructive here. Imagine that liberalism is a family of languages, like the Sino-Tibetan family. Any expressions made in any of the languages in the family, such as Mandarin or Central Tibetan, are liberal expressions. Imagine also that the opposite or inversion of liberalism, illiberalism is also a family of languages, this time, Indo-European. Any expressions in these languages, whether French or Sinhalese, are illiberal expressions. Non-liberalism is then imagined as third, separate family of languages, say Niger-Congo. Expressions made in any of these languages, such as Shona or Busa, are both silent on liberal values, and silent on illiberal values, since there is no overlap between the three different families. Now, if we imagine marriage, and many other practices besides, as complex, multi-lingual practices which contain expressions in Mandarin, French, and Shona, if we can identify these expressions, we can isolate liberal, illiberal, and non-liberal aspects. The claim of this chapter, is that we should interpret a significant proportion of marriage (the main bulk) as expressed in Shona.

chapter. Even if monogamous sex-neutral marriage is a liberal good, as Macedo asserts it is, it will fare poorly against the alternatives proposed by marital disestablishmentarians, such as Brake's Minimal Marriage, Metz's Intimate Care-Giving Unions, and Chambers's Relationship Directives, which are liberal by conscious design.<sup>17</sup> If the value of extant marriage extends beyond the political - even if it is mainly accounted for by personal, social, and cultural sources of value - then if we take a more holistic approach to assessing the value of practices, we may find that extant marriage can trump these *better liberal alternatives*, or, at the very least, be considered 'equally good'. A method of interpretation, then, needs to provide us with an account of the *range of values* we can discover in, and ultimately can play a role in the justification of, extant practices.

The two intuitions outlined above point us in the direction of a more practice-dependent alternative to the practice-independent approaches employed by marital disestablishmentarians. In what follows I give an account of practice-dependence, and attempt to show how it can help us to give credence to the intuitions just outlined. I also present some caveats in my utilisation of the method, to illustrate that there is a limit to the work that I expect practice-dependence to do. I will then be in a position to use the method to interpret the practice of marriage in order to better address the question of marital establishment.

### 3 Refining Practice-Dependence

#### 3.1 The Normativity of Practice-Dependence

The most significant challenge that practice-dependence has to face are attacks on its purported normativity. As a form of contextualism, practice-dependence occupies a middle ground between universalism and relativism - the same principles of justice don't apply in all times and places, yet the different principles of justice that apply in different contexts are not merely local customs that are immune from criticism.<sup>18</sup> Contextual critique aims to judge alike cases alike - if the context is similar, then similar standards apply, if the context is different, we cannot apply the standards used in one context to judge another. Practice-dependence is expected to generate 'mediating principles' that

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<sup>17</sup> Brake, op.cit; Metz, op. cit; Chambers, op. cit.

<sup>18</sup> David Miller, *Justice for Earthlings: Essays in Political Philosophy* (Cambridge; New York: Cambridge University Press, 2013); p. 40.

provide us with normative guidance for specific practices - such principles aim to be non-relativist, universalist, but not independent of practices.<sup>19</sup> Practice-dependence appears to try to bridge the gulf between morality and ethics: by adopting the first-person I/we perspective in order to specify universal moral principles that nevertheless arise amongst a particular group of people in a particular place and time without claiming universal scope or justification. As we shall see, this is a rather awkward place to be positioned, hence raising these significant problems.

The normativity of PD approaches is problematic for a number of reasons. Firstly, as a relatively new and uncommon way of reasoning about justice, PD methods can appear mysterious and confusing. Although some work has gone into shedding more light on the workings of the method, and the normative manoeuvres involved, this has only gone some way towards salvaging it. Unfamiliarity and the discomfort of doing things differently may place limits on the ability of the method to be widely adopted and understood. Certainly, until very recently, applications of the method have been limited to the question of global justice, and as such, have not been novel enough. This issue of *novelty* will only be resolved with the repeated development and use of the method – something this work aims to contribute to. A certain reticence about considering and adopting the method, however, likely stems from some more significant issues it must face. A second problem concerns the *distinctness* of the method. Partly this stems from PD's use of the Dworkinian notion of interpretation. Such use implies that the two methods have a similar normative structure, when in actual fact, they adopt opposite normative stances about the standards we bring to bear on the practices we are interpreting. Yet successfully separating out practice-dependence and Dworkinian interpretivism is not sufficient to resolve the distinctness problem - when adequately fleshed out, PD still risks collapsing into existing normative methods such as relativism or reflective equilibrium. In this section, I will address the distinctness challenge, with a view to providing further illumination for those pressing the first concern about novelty also.

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<sup>19</sup> Andrea Sangiovanni, 'How Practices Matter', *Journal of Political Philosophy* 24, 1 (2016): 3-23; Andrea Sangiovanni 'Global Justice and the Morality of Coercion, Imposition, and Framing,' in Ayelet Banai, Miriam Ronzoni and Christian Schemmel, *Social Justice, Global Dynamics: Theoretical and Empirical Perspectives* (Abingdon: Routledge, 2011): 26-45.

### 3.2 Distinctness I: Interpretivism

Although practice-dependence draws upon Dworkinian interpretivism by employing the same three-step interpretive process, the normative structure of the two theories are distinct. Dworkin's approach starts from "abstract elemental convictions" concerning normative values, and then sets to interpreting institutions "in their best light" to consider whether and to what extent such institutions embody or realise such values. Extant practices do not constrain these values, as the latter are prior to and independent from the former. Our interpretation of the practice must respect its form, such that the account we offer must "fit" the point and purpose of the practice. Once we have a range of differing interpretations that meet this minimal requirement of fit, we choose between them by considering their substance, that is, their substantive appeal in the light of our moral values. If we can characterise the practice as fulfilling one or more of these values, we will have succeeded in showing it "in its best light", as morally worth pursuing in its reinterpreted form. However, if we cannot find anything of value in the practice, the practice could fail to be vindicated by the interpretive method, and would need to be abandoned.<sup>20</sup>

The PD method proceeds in the opposite manner. Rather than applying pre-existing moral values to the practice, the theorist hopes to discover or construct values from the practices themselves. Form and substance are not considered separately, rather they coincide. To understand the exact way in which this will lead to different normative principles to those generated by the Dworkinian method, consider the interpretation of marriage. Suppose that consideration of the point and purpose of marriage leads us to identify three values realised by the practice:  $v1$  is the value of care – marriage protects and promotes caring relationships;  $v2$  is the value of sexual intimacy – marriage provides a socially acceptable space within which adults can enjoy and develop their sexuality ;  $v3$  is the value of commitment – marriage creates and celebrates the public and legally binding committing of individual persons to a shared life together.<sup>21</sup> Now let's imagine that on a Dworkinian account,  $v1$  and  $v2$  are values that we value abstractly, prior to and

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<sup>20</sup> Dworkin, op. cit, Chapter 2; Saladin Meckled-Garcia, 'The Practice-Dependent Red Herring and Better Reasons for Restricting the Scope of Justice', *Raisons politiques* 51, 3 (2013): 97-120; p. 114; Postema, op. cit, pp. 293-294.

<sup>21</sup> Here I acknowledge that I present no argument for the plausibility of the attribution of these particular values to the practice of marriage – at this point in the argument, they function as mere examples of different values, which could easily be substituted for more plausible candidates.

apart from any practices. These values form part of our “abstract elemental convictions”. When an outsider to the practice interprets marriage, they interpret it in the light of these values. Marriage is valuable to the extent that it realises these values, and if there were no values discoverable in marriage, or the only notable value was  $v_3$ , it would not be valuable in the abstract and we could not justify its continuation as a practice. This conclusion would not necessarily mean that marriage was of negative value, rather, it would mean that a reasonable interpretation of the point and purpose of marriage would not recommend its continued place in the legal and political order. Suppose that their interpretation of marriage identifies either concrete or potential expressions of the values  $v_1$  and  $v_2$  in the practice. Now suppose that current participants in the practice of marriage explicitly attribute  $v_2$  and  $v_3$  to marriage. The Dworkinian approach can both attribute values to practices that its participants do not recognise ( $v_1$ ), and ignore values that participants claim for practices ( $v_3$ ). Interpretations must fit the point and purpose of the practice form, but the substantive values applied to it exist independently of this form.

Practice-dependence operates differently. It does not attribute values to a practice that participants could not recognise as applying to it, and can uncover and recognise values that we don't have an independent reason to hold. If  $v_1$  is only implicitly present in marriage, and participants would not recognise care as an existing element of the practice, we don't have a reason to attribute care to the practice. We do, however, have a reason to recognise  $v_3$  instead, even if commitment is not something that we value generally in the abstract, if participants describe marriage to be important or valuable because it enables and celebrates commitment.<sup>22</sup> This means that we either do not have, or when engaged in interpretation we suspend, our “abstract elemental convictions”.<sup>23</sup>

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<sup>22</sup> This account of the PD method is not consistent with all accounts. For example, Aaron James accepts the relevance of values that are ‘explicitly recognised’ and those that are only ‘implicitly assumed’ in the practice. See James, *Fairness in Practice: A Social Contract for a Global Economy* (New York: Oxford University Press, 2012); p. 29. My contention here is that values that are implicitly assumed will be explicitly recognized once they have been highlighted to participants. What needs to be ruled out then, on a PD account, is a justification by reference to values that participants fail to recognize even after a demonstration designed to convince them otherwise. Even less consciously held and explicitly acknowledged, yet included by James here are ‘(perhaps deep) presuppositions of moral concepts’. Again, my suggestion is once these presuppositions are identified and articulated, participants should be able to recognize and endorse them.

<sup>23</sup> As James puts it, in the second stage of interpretation, the interpreter proceeds like an ‘amoralist anthropologist’, whose object of study may be moral, but whose moral judgment is suspended. Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (New York: Oxford University Press, 2012); p. 28.

This absence or suspension, however, raises the question: from whence does normativity come?

I argue that practice-dependence, to maintain its distinctness, must be committed to an *internal value* claim. Practices possess value that is internal to them – that is – not attributable to or derived from something outside of each particular practice.<sup>24</sup> The way this internal value claim is operationalised is as follows:

1. It is assumed from the outset of interpretation that a practice has some value. For the PD theorist, the question is not whether a practice has value, but what value the practice has.
2. If this assumption is mistaken, this will very quickly become apparent, and will occur only in a minority of cases.
3. The existence of a practice implies, suggests, or indicates that value is present. If people are cooperating together to participate in some practice or institution, they are doing so (a) in pursuit of something of value, and (b) creating something of value in the process.

Part 1 of this claim means that all practices, including morally abhorrent ones such as slavery, can begin the process of interpretation, although they may not get very far. Significantly, all practices realise value, but in morally abhorrent practices this value is confined to a minority of participants and/or outweighed by the disvalue participants experienced by participants. The second part of the claim assumes some rationality on the part of participants – why would humans pursue practices if there was no value in it for them? Even in cases of true false consciousness, there is some value in pursuing a practice, although the baseline against which this value is gauged is highly skewed, such that disproportionate value is attributed. Again, such practices will likely fare poorly on

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<sup>24</sup> The way in which something can be internal to a practice has been explored by Charles Beitz, who argues that there are four distinct ways to understand the term ‘internal’. Three out of the four apply here. With regards to the first sense, used in individuating a practice, ruling aspects or elements in or out, a value is internal to a practice if it is realised by certain elements of the practice, not elements located outside of the practice. In the second sense, regarding the source or origins of normative issues arising from the practice, a value is internal when the moral considerations related to it only apply within the practice, such that without the practice, there is no morally significant value present. The third sense, regarding the grounds of judgements recognised or assumed within the practice, points to the authority of participants in the practice as pursuers and/or creators of value. The final sense of internal, a contractualist sense that all-affected persons should be included in the constituency of those who can reasonably reject a practice, is not consistent with the internal value claim. Even though persons outside of the practice may be affected by the practice, as third-party beneficiaries of the value, or subjects of disvalue, this is not to be understood as part of the internal value of a practice for its participants. See Charles R. Beitz, ‘Internal and external’, *Canadian Journal of Philosophy* 44, 2 (2014): pp. 225-238.

interpretation, nevertheless, some value can be recognised. The third aspect of the claim incorporates the realist insight that by cooperating together and acting for a shared purpose, a special value is created. That is, by acting jointly, value is added beyond what could be realised by acting singly. This value is not independent of cooperation, it is a constituent part of it. Here I extend the realist insight from its focus on political practices and political cooperation to include social and cultural practices more broadly. However, because in some cases it is permissible to recognise this value politically, this cultural value also has potential political value. This opens up the *internal value* claim to the critique that since much of this social and cultural value will be non-liberal, recognising it entails extending the political beyond the liberal, and therefore out of the confines of political liberalism. I address this challenge in Chapter 6.

There is only sometimes an overlap between general, abstract values and practice-specific values. Dworkinian interpretivism searches for points of overlap: practices that have some are vindicated; practices without any are condemned and should be abandoned, or should have no legal recognition or significance. Practice-dependence does not assume a prior commitment to general, abstract values, so does not search for an overlap. The raw data of the practice provides an account of practice-specific values, from which practice-specific principles are formulated. In Dworkinian interpretivism, the points that remain fixed throughout the process are the abstract elemental convictions that provide normative anchoring; in practice-dependence the practice being interpreted provides that fixed point.

A serious concern arises with this practice-dependent manner of doing things. The idea that practices could be justified purely by reference to values that only exist or operate within the practice itself amounts to an argument for *normative self-sufficiency*. The distinctness of the practice-dependent method depends on this claim – if all norms are generated from pre-existing values then there is no need to generate norms from practices. Yet, if norms derived from practices are to be taken seriously, and used to distribute rights and obligations, benefits and burdens, they need to be justified in a manner that all those affected can accept. Saladin Meckled-Garcia refers to this as the *justifiability constraint* on moral principles – any normative standards we apply to govern the lives and opportunities of any group of people ‘must be justifiable by reference to at

least one moral value or independently derived moral principle'.<sup>25</sup> If the normative self-sufficiency of practice-dependence is genuine, then the method fails to meet this requirement. But any justification that pointed to a value we hold independently of the practice, or the significance of the consent of the participants to the practice, would be justified by way of principles located outside of the practice itself. Instead of practice-dependence, we would have independent-value-dependence, or agreement-dependence; in other words, practice-independence. It seems that the PD method cannot meet the justifiability constraint without giving up its normative distinctness.<sup>26</sup>

Later, we shall see how failure to meet the justifiability constraint threatens the credibility of practice-dependence as a moral methodology, as without an independent justification the method could endorse the coercive imposition of practices or their effects upon persons (be they participants or not) in the name of values they do not accept or without their consent. I will address this concern in Section 7, but for now, I will continue to address the problem of distinctness raised above.

### 3.3 Distinctness II – Reflective Equilibrium

A second method that threatens to subsume practice-dependence is reflective equilibrium. This method aims to construct a conception of justice from reflections on the values present in our public political culture, working back and forth between our considered judgments about particular cases and practices, and our more general, theoretical beliefs about moral norms. The aim of seeking coherence between our beliefs and practices does not assign any special justificatory role to the latter – there are no fixed points and all practices considered are potentially revisable – what justifies the account of justice arrived at is the reflective equilibrium reached, not the practices that form but a part of the coherent whole.

James refers to the practice-dependent method as both constructive interpretation and as an effort at reflective equilibrium.<sup>27</sup> He recognises variation in different approaches to

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<sup>25</sup> Meckled-Garcia, *op. cit.*; p. 108.

<sup>26</sup> As A. J. Julius argues, practice-dependence based upon practice-independent values is not practice-dependence. See: A. J. Julius, 'Practice independence', *Canadian Journal of Philosophy* 44, 2 (2014): pp. 239-254; p. 250.

<sup>27</sup> Aaron James, 'Constructing Justice for Existing Practice', *Philosophy and Public Affairs* 33, 3 (2005): 281-316; p. 301; Aaron James, 'Reply to critics', *Canadian Journal of Philosophy* 44, 2 (2014): 286-304; p. 290;

reflective equilibrium, some of which are more indifferent to practices than others. However, in a recent challenge to the distinctness of practice-dependence, Sune Lægaard argues that the method of reflective equilibrium can fully capture the concerns about the relevance of facts and lived practices raised by practice-dependence. According to Lægaard, reflective equilibrium views justification and application as joint exercises, so that facts about institutions are both ‘objects of application’ and ‘objects of considered judgements’. Reflective equilibrium, however, appears different to practice-dependence, since within the method justification is holistic, and not foundational, and all judgments are open to revision, whilst practice-dependence makes the foundational move of granting priority to existing institutions and practices. Lægaard suggests that if practice-dependent theorists could abandon this priority, they may be satisfied with the assurance that facts about practices are not a mere afterthought reserved for the application of principles, but also feature as part of the considered judgments that play a role in the justification of principles meaning that the worries about normative principles being culturally out of tune and instrumentalising practices expressed in section 2 can be set aside.<sup>28</sup>

The claims that I have made so far about practice-dependence being committed to internal value and normative self-sufficiency can help us to maintain the distinctness of the method from reflective equilibrium. Reflective equilibrium is a coherentist methodology, it seeks to reach a point where there is coherence between beliefs, with this coherence serving a justificatory role.<sup>29</sup> This coherence must not only satisfy the weak requirement of logical consistency, but each belief must have an explanatory role with regards to other beliefs in the coherent whole.<sup>30</sup> In an effort to systematise our

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James, ‘Why Practices?’, op. cit.; p. 45; Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (New York: Oxford University Press, 2012); pp. 27-28.

<sup>28</sup> Sune Lægaard, ‘The role of interpretation of existing practice in normative political argument’, *Critical Review of International Social and Political Philosophy* 22, 1 (2019): 87-102; pp. 100-101.

<sup>29</sup> See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999), p. 19: ‘A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.’ At other points Rawls refers to this process of finding coherence between principles and considered judgments as matching, fitting in, organizing, fitting together, such that the resulting equilibria can ‘hang together reasonably well’, pp. 18, 507-508.

<sup>30</sup> Norman Daniels, “Reflective Equilibrium”, *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2018/entries/reflective-equilibrium/>>.

moral judgments, we may revise them extensively in order to create coherence.<sup>31</sup> As Rawls characterises it, the search for reflective equilibrium may reveal our moral grammar, the structure and syntax of our normative lives.<sup>32</sup> Practice-dependence, on the other hand, holds that the principles we develop to regulate our practices must cohere with the point and purpose of the particular practice at hand, but it is silent on how those principles and that practice fit into a larger system. Given the culturally attuned and non-liberal value intuitions expressed in Section 2, it is plausible that practice-dependence would have no requirement to seek a coherent whole. If practice-dependence is to co-exist with liberalism, all that is required is consistency, congruence, or compatibility with liberal values, such that practices so justified by the method must not conflict with liberal values. However, these practices may not make sense in the light of liberal values, since they are not liberal by design. It might be that some practices cannot be fully integrated into the moral system, that is there are some normative outliers and pockets of normative self-sufficiency on the normative landscape. These outlaw elements of societies could be remade in liberalism's own image, but if they do not directly conflict with liberal values, practice-dependence would provide normative reasons to regulate them in a manner sensitive to their internal point and purpose.

#### 4 When Can Practice-Dependence Help?

In a recent attempt to clarify the normative structure of the PD method, Sangiovanni argues that there are two (non-relativist)<sup>33</sup> ways in which the interpretation of practices can play a normative role. The first – “triggering” – occurs when a particular social relation binds people in a normatively significant way, as joint participants in a social practice, or sometimes, a looser social interaction. Relational principles, which do not apply otherwise, but are ‘triggered’ by the existence of the particular social relation, will need to be worked out with the aid of an interpretation of whichever practice is involved, if any.<sup>34</sup> The second normative role for practices is in the generation of “mediating

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<sup>31</sup> Norman Daniels, ‘Wide Reflective Equilibrium and Theory Acceptance in Ethics’, *Journal of Philosophy* 76, 5 (1979): 256–82; p. 266.

<sup>32</sup> Rawls, *op. cit.*; p. 47.

<sup>33</sup> If practice-dependence collapsed into relativism, again it would no longer be a distinct method. Relativism claims that practices fully determine which norms and principles apply to them, and that the only standards that are possible are those relative to a specific social group – there are no general, universal normative standards. Relativism cannot assert or deny the truth of any moral claim, as it provides no standards outside the specific group – the bounds of which are not clear – to judge its own claims.

<sup>34</sup> Sangiovanni, ‘How Practices Matter’; pp. 5-10.

principles”. These are required in many cases where higher-level principles or values have an “open texture”, that is, ‘they cannot be used to provide a unique determination of the all-things-considered optimal rules of regulation in the absence of a mediating principle.’ This lack of determinacy means we cannot be clear about which higher-level principles and values to use as standards by which to assess practices, without engaging in an interpretation of the practice. This approach is contrasted with instrumental application, where the practice is viewed as a means or instrument for realising independent norms.<sup>35</sup> Mediating principles therefore ‘bridge the gap’ between higher-level principles and lower-level norms and rules regulating a practice. The standards provided by the mediating principles will vary depending on the point and purpose of the practice at hand.<sup>36</sup>

Eva Erman and Niklas Möller argue that if values are provided independently from practices, then justification, rather than being dependent upon interpretation, is orthogonal to interpretation.<sup>37</sup> To respond to this challenge, the significance of the idea of open texture and indeterminacy needs to be developed.

I propose that the PD method can play a role alongside liberal principles in identifying the permissible range of marital establishments and ruling out those that are impermissible. My argument includes a weak normative claim:

*Weak normative claim* - there is some normative value internal to the social and cultural practices that people pursue together

This is the normative upshot of the internal value claim discussed in section 3.2 above. Acknowledging this claim as weak means there are stronger normative reasons that regularly trump those generated by practice-dependence, but that does not mean that there are no normative reasons that derive from practice. These reasons are related to but not completely dependent on liberal reasons. When liberal requirements are satisfied, all other things being equal, the normative reasons that practice-dependence picks out will be decisive in tipping the scales in favour of the practice. As such, practice-based

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<sup>35</sup> I have rejected this kind of approach for addressing the question of marriage in the previous chapter, and have articulated the intuition motivating this rejection in this chapter (section 2.1) as the non-liberal value intuition.

<sup>36</sup> Sangiovanni, ‘How Practices Matter’, pp. 14-16, 20; see also H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press; 1961), pp. 121-132.

<sup>37</sup> Eva Erman and Niklas Möller, ‘Practice-dependence and epistemic uncertainty’, *Journal of Global Ethics* 13, 2 (2017): 187-205; p. 196.

reasons provide us with pro tanto reasons which we can factor into our all-things-considered judgments.

PD theorists do not claim that PD justifications are appropriate in all cases.<sup>38</sup> Consequently, my argument for the method includes a second claim:

*Limited scope claim* – practice-dependent justifications are only appropriate and required in some and not all cases

Sangiovanni argues that the PD method is required in circumstances where the principles we endorse lack sufficiently precise content (they are “open textured”) or when we are unclear about which principles or values we should use as standards for reform of a practice.<sup>39</sup> When principles of justice underdetermine what should be done, selecting the right course of action may still be a moral question that practice-dependence can solve. In reality, this will likely mean that the PD method can be utilised in numerous, wide-ranging cases. However, the limited scope claim means that practice-dependence is not exhaustive of all morality.<sup>40</sup> Particularly apt for PD justifications are cases that arise in the space (assuming that there is such a space) between what justice requires of the state and what is impermissible for the state (as Jacob Levy puts it, between the mandatory and the prohibited<sup>41</sup>), since it is here that implications for the rights and duties of citizens are limited and Meckled-Garcia’s justifiability constraint does not apply.<sup>42</sup>

To develop a case for the worth of the PD method, I develop an example used by Erman and Möller and challenge their conclusion that it demonstrates the irrelevance of practice-dependence. Recall that Erman and Möller argue that if values are provided independently from practices, then justification is orthogonal to interpretation. We can assess the value of practices without engaging in any interpretation of their point and

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<sup>38</sup> For example, James, in ‘Why Practices?’, p. 43, states that not all of morality must be seen as practice-dependent.

<sup>39</sup> Sangiovanni, ‘How Practices Matter’, op. cit, pp. 20-21.

<sup>40</sup> See section 7.3 below, where the idea that morality could be practice-dependent “all the way down” is entertained.

<sup>41</sup> Jacob T. Levy, ‘Contextualism, Constitutionalism, and *Modus Vivendi* Approaches,’ in Anthony Simon Laden and David Owen (eds.) *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007): 173-197.

<sup>42</sup> Here I do not address the objection that such a space does not exist, that is, that the state’s role is completely exhausted by justice. I return to this idea in Chapter 7. Certainly, policies that occupy this space still make use of the state’s power and resources, and still require justification of a sort.

purpose. With very minimal information about a practice we can recognise which values ought to apply and assess the practice with these values in mind. Erman and Möller take the example of football. They construct the following case, which I quote at length (emphasis my own):

‘Let us say that the rules of football define the practice, and that the rules state that the team scoring most goals is the winner... Let us now assume that we strive to develop a principle of fair play in football. Suppose further that the higher-level principle we take to be central for determining this applied principle of fair play is a principle telling us never to behave deceitfully. Just as in the case of the principle of reciprocity in Sangiovanni’s example, the principle of anti-deceitfulness is here taken to be open-textured in the sought sense (what counts as being deceitful depends on the situation), and there is no fully specified general account of deceitfulness on which to fall back.... In our justificatory endeavours, let us now assume, we make no attempt to interpret the nature of football in the sense of understanding its point and purpose. *We remain agnostic about the many potential teleological interpretations of football*, instead reflecting upon and deliberating about what non-deceitfulness may require given the rules, ending up with an applied principle that interprets being deceitful as, say, intentionally breaking the rules, or to pretend that something has happened that we take not to have happened (e.g. pretending to be injured). *This principle is in accordance with the target practice*, i.e. it can be a principle of fair play for football, since the practice we must follow in order to abide by this principle *is in accordance with the rules of football, which, we have assumed, are definitional for the practice.*’<sup>43</sup>

Erman and Möller argue that we only need very basic, minimal information about a practice in order to generate principles for it – in the case of football, we only need know that the rules define the practice and, briefly, what the rules are. Practices fix principles in a very weak and unremarkable sense: principles must meet the baseline constraint, which states that principles have to be applicable to the target practice, that is, it has to be possible within the target practice to follow the principle. This functions as a condition of applicability - principles that do not meet this constraint do not apply to the practice being considered. This is a fairly easy condition to meet, as any ‘competent concept user’ can judge the compatibility of a principle with a practice without enquiring into point and purpose of the practice: they simply ‘know it when... [they] see it.’ According to Erman and Möller, the point and purpose of football could be many different things, but this would not affect how we apply the principle of fair play. Indeed, football could even be a ‘game from the gutter’, in which the purpose ‘winning-no-matter-what’ encourages players to act deceitfully in order to be fulfilled. If this is the case, our principle stands, indeed ‘so much the worse’ for football, revealed to be a morally questionable game.

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<sup>43</sup> Erman and Möller, op. cit; p. 197, emphasis mine.

To diagnose what is amiss with this account, let us consider the interpretation of football in more detail. Suppose that an interpretation of football could recognize the following three purposes for the game: *p1* is to identify the most athletic team; *p2* is to have fun; and *p3* is winning-no-matter-what. Suppose that an outsider interprets football and attributes *p1* and *p2* to the game. Suppose also that no current participant in the practice of football recognises *p1* and *p2* - the game neither reflects athleticism (more guile and deceit) and is not fun (more traumatic in some oddly satisfying way). No participant would accept a characterisation of the game as a reduction to those two values. Instead, they endorse *p3* and have formulated local principles to meet this purpose.

Insisting that football be reformed in line with *p1* or *p2* would amount to an imposition of inappropriate standards to the game. This violates the baseline constraint, since the principles would not be applicable to the target practice. The practice cannot follow the principle: if it did, it would no longer be football, it would become rugby or some other ‘gentlemen’s game’. It would appear then, that the outsider cannot be a truly competent concept user without really understanding the practice. If she understood the practice better, she would not make the mistake of applying the wrong principle (fair play) to the practice. When a competent concept user intuitively “knows it when they see it” they risk seeing it according to their own point of view and misinterpreting it.

It may be a stroke of luck for the participants in the gutter football game that their practice can be justified on the basis of loftier values that outsiders ascribe to their practice. Their practice gets vindicated and so can be continued. Yet if the practice must be transformed in light of these alien values, the practice won’t be football anymore, it become another game: gentlemen’s football. The participants who want to save their practice from this transformation may reasonably reject that fair play be applied to their game of football. Although the principle appears to be compatible with practice from the outsider perspective, it is not. If applied, it will have a deleterious effect. Instead of settling for “so much the worse for the practice”, we should recognise that there will be some sense of loss or grievance felt by the practitioners.

We may ask why it is that football needs to be justified or vindicated in this way? One reason why a justification is necessary is to test whether the practice is morally permissible at all. Although gutter football as just described isn’t the cleanest or most admirable of games, it would be an overly strict conclusion to claim that it was morally impermissible. The players, fully aware of its point and purpose, willingly consent to

joining the game and deceiving their way to victory or defeat. A second reason why justification may be required is if the practice is going to be legitimated by the state, or legally adopted and imposed on insiders and/or outsiders to the practice. If we attempt to justify gutter football without interpreting it, we will likely end up instrumentalising the practice. From the participants' perspective, it may be better for the practice to fail this test than be transformed in inappropriate ways. That way, they can continue their practice as before, without losing or compromising the game as they know it. If, however, state support or legitimation was somehow important to the practice, or football was dependent on the state to survive, the participants would want the state to engage in an interpretation of the game before legitimating or adopting the practice, rather than seeking to instrumentalise it and alter football beyond recognition (thereby rendering state support counterproductive).

Most cases are not as extreme as this case. There is usually some overlap of values between the observer and participants, whilst other values are only recognised by one side or the other. In many cases, we will find some values on the basis of which a practice can be justified that insiders and outsiders can agree on. But even in these cases, there is some sense in which some value is lost if the practice is required to progress only in the direction of the overlap. Even though more value may be gained by this move, something is still lost.

Suppose that some of the value of football is not universally recognised, and that you really have to be devoted to football to "get" this aspect of value. To outsiders the value appears either morally questionable, or morally of no value. To insiders it has considerable value. If the practice of football meets other liberal constraints, could it be justified on the basis of this purely internal moral value? Practice-dependence denies that all participant-identified values must be reducible to or ultimately grounded in independently justified values. Some values may bear some relation to values or considerations held independently, but they only come into their own within the practice. Without the practice the value doesn't make sense: no independent notion of this value exists or is acknowledged.

Justification, then, should not be entirely orthogonal to interpretation. We do not know whether fair play is an appropriate choice of principle without interpreting the practice first. Certainly in cases where there is little or no familiarity with a practice, outsiders are not competent concept users who intuitively "know" what is right for a practice. I

suspect that in cases of familiar practices, where there is complexity, controversy, and conflict within the practice, concept users can also reach the limit of their competency.<sup>44</sup> Marriage is such a case. As Macedo's comment about marrying one's grandmother makes clear, interpreters should be aware that '[t]he point of something may not be just what it is, but also what it is not'.<sup>45</sup> When G. A. Cohen used the example of a camping trip to demonstrate the principles of socialism in action, Miriam Ronzoni replied with the practice-dependent response: 'life is not a camping trip'.<sup>46</sup> Similarly, the practice dependent response to liberal disestablishmentarians when they design alternatives to marriage that step outside of the point and purpose of marriage is: 'sibling love is not marriage'; 'love and care for elderly relatives is not marriage'; 'friendship is not marriage'. Although analogous in some respects, there are usually important differences that ought to be reflected in principle.

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## 5 Where Does the Value of Practices Lie?

In this section, I identify the range of values that the PD method can recognise and use for the purposes of justification. I propose six that are plausible candidates:

(A) Objective personal value (well-being): the value that the personal goods realised by the practice have for the individual's well-being; in the case of marriage, this could include the impact getting married has on health, income, social status, level of self-respect, etc.

(B) Subjective personal value (desires): the value that the personal goods realised by the practice have for the fulfilment of the desires of individuals; in the case of marriage, this could include the desire to show to your partner and others the seriousness of your commitment, the desire to socially or culturally validate your relationship before you have children, etc.

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<sup>44</sup> Jubb describes these kind of practices as 'internally complex and normatively loaded'. Robert Jubb, 'Recover it From the Facts as We Know Them': Practice-dependence's Predecessors,' *Journal of Moral Philosophy* 13 (2016): 77-99; p. 94.

<sup>45</sup> Jubb, op. cit., p. 94.

<sup>46</sup> Miriam Ronzoni, 'Life is not a camping trip – on the desirability of Cohenite socialism,' *Politics, Philosophy & Economics* 11, 2 (2001): 171-185.

(C) Liberal political value: the value of the liberal political goods realised by the practice; in the case of marriage, this could include the creation of more equal relationships, or the enhancement of autonomy, etc.

(D) Historical or cultural value: the value that is realised by a practice by virtue of existing in a particular time and space, above and beyond any of the other values it produces; in the case of marriage, this could include religious ideas of the special value of marriage as a covenant, or cultural ideas about the special value of marriage as a unique expression of romantic commitment, or ideas about the special value of marriage as an age-old tradition.

(E) Realist political value (stability): the value realised by a practice in being a stable form of cooperation over time.

(F) Practical value (feasibility): the value realised by a practice in being easy to implement.

Practice-independent liberals (PILs)<sup>47</sup> give priority to (C). Practices are justified by reference to liberal values – a practice that conforms with, and in some way contributes to ideals of liberty and equality is preferred to one that does not, or does to a lesser extent. (C) is the primary sort of value that a practice can have under liberal practice-independence. After this, other considerations may weigh in in order to determine a choice between equally-good options. Insofar as (A) involves the distribution of social primary goods, it is the next consideration. Here, an alternative to marriage that allocates economic and social benefits more equally will trump extant marriage. Next, all things being equal, a practice that better realises (E) is preferable, since a stable practice will better guarantee the continued realisation of the prior values.

PILs dismiss (B), (D) and (F). If we assume that PILs are ideal theorists, (F) is a consideration for non-ideal theory – once a practice or set of practices have been identified at the level of principle, then considerations of feasibility may weigh in to affect the application of principle. However, any changes made to a practice in the context of application will not change the principles that have been worked out – instead

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<sup>47</sup> I specify these practice-independent theorists as liberals in this case: there are other possible kinds of practice-independent theorists, for example, PI utilitarians would value (A) and/or (B) primarily.

we will have an imperfect realisation of principle in practice. (B) refers to subjective personal desires that are not necessarily shared, and cannot be justified to those who do not share them. To credit the desires felt by persons in regard to practices would be to privilege the personal conceptions of the good of some over those of others, which would violate liberal values of freedom, equality and legitimacy. For PILs, (D) appears little different to (B), they are merely collections of (B)s attached to or associated with particular cultural, historical or religious forms. As such, to endorse a practice on such as basis would be problematic for the same reasons as (B). PIL therefore attribute no value to collective or cultural goods independent of their contribution to liberal values (C).

Now we turn to practice-dependent liberals (PDLs).<sup>48</sup> PDLs seek a valuation of a practice based on an interpretation of its point and purpose. This may include (C), if the point or the purpose of the practice is to realise liberal values. However, if the practice merely incidentally realises liberal values (i.e. it is not part of its designated purpose, but a unforeseen by-product) or it doesn't realise them at all, we need to offer a valuation that takes seriously these non-liberal purposes. Since PDLs believe that 'political and social institutions aren't solely instruments for the realisation of justice',<sup>49</sup> they will attribute more value to the participant's perspective. This means that (A) and (B) will both be possible sources of value, although we can raise the question of which is more important. If the aim of the practice is to realise certain objective personal goods, then (A) is relevant, and if the practice is meant to deliver desire satisfaction (for example, a market) the same applies to (B). However, although Sangiovanni recommends an initial charitable interpretation of practices, he does argue that the desires of individuals who support the institution cannot be decisive, since false consciousness might be at work.<sup>50</sup> Normative standards are not a function of the contingent beliefs of individuals: 'believing don't make it so'.<sup>51</sup> This suggests that the purpose of the PDL interpretation is to use subjective valuing to identify a more objective account of the personal goods realised by the institution. Nevertheless, PDLs are interested in the way that demands and expectations emerge from actual institutions, and to that extent, (B) can influence

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<sup>48</sup> There is, of course, the question here, of whether PD theorists are liberals. One of the questions raised by this chapter is whether they can be considered so, given the commitments they have to certain aspects of practices that are not justified by appeal to liberal values. For the purposes of this chapter I do not consider this question in depth, although as I state later, I would consider PDs to be PDLs if the practices they endorsed were consistent with liberal values, even if they did not positively realise them.

<sup>49</sup> Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality', *Journal of Political Philosophy* 16, 2 (2008): 137–64.; p. 20.

<sup>50</sup> Sangiovanni, 'Justice and the Priority of Politics to Morality' op. cit.; p. 20.

<sup>51</sup> Andrea Sangiovanni, 'How Practices Matter', p. 30.

principles. The relationships and interactions that occur within practices shape the reasons people have for endorsing and rejecting principles, so that people's perception of their own good, and the desires that they have, emerge from practices.

For PDLs, (E) is also an important value: long-standing practices communicate value by having stood the course of time in contexts of political conflict and disagreement; therefore, a well-established, stable institution contributes value. For PDL, this is likely to be independent from the value of stability as the reliable realisation of (C) as we saw with the PILs. In addition to this, PDLs think that stable practices bear some realist value as the non-violent forms of cooperation that have emerged and carved out a space in conditions of political conflict. This is a political value, but not necessarily a liberal one, since non-liberal (but nonviolent) practices that have longevity may also claim this realist value of stability.<sup>52</sup>

Since PDLs are still ideal theorists, I will assume that they take the same position on (F) as PILs, leaving feasibility as a concern for the non-ideal theory of the application of principles.

(D) describes a set of values that can be central to the interpretation of a practice. If participants in the practice see the aim of it as realise cultural or religious goods, this interpretation needs to be given some weight. Sangiovanni argues that practices aren't justified by their role in constituting personal identities or providing communal integrity, rather they are justified by first-order arguments from values. However, the reasons participants have for accepting certain arguments are affected by the cultural forms that establish networks of relationships within which they come to hold certain expectations.<sup>53</sup> Thus, if the point or purpose of the practice is to realise such cultural goods, reasonable participants will have reason to reject alternatives that do not meet this point. Yet cultural values in themselves do not have any especial value, but their content may influence principle through the mediating role of institutions and practices.

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<sup>52</sup> Sangiovanni, 'Justice and the Priority of Politics to Morality' op. cit.; p. 20. Whether, and to what extent, this communicates a different view of the value of stability to the liberal one, and thus whether we need two versions of (D), one liberal, and one realist, I will leave aside in this chapter.

<sup>53</sup> Sangiovanni, 'Justice and the Priority of Politics to Morality' op. cit.; pp. 10-11.

One question worth considering concerns the relationship between (A) and (B), specifically should we check the subjective desires of individuals against a more objective account of well-being? In the cases of Tom-Paul and Tom and Paul discussed in Chapter 2, a combination of objective and subjective needs and interests are factored in. What is major and significant, and what is minor, is decided on the basis of an interpretation that credits and balances (A) and (B) (often in combination with (D)). The second-order justification provided by (B) – that a practice has value because the participants believe it has value – is considered alongside the range of other values suggested. Although subjective valuation can provide a *pro tanto* reason for supporting a practice, this can be outweighed by other countervailing reasons. The greater the range of values satisfied, the more robust the case for the practice’s value.

Another question worth discussing at this juncture is the distinction Sangiovanni draws within practice-dependence between cultural conventionalism and institutionalism.<sup>54</sup> The former version of the PD method places greater emphasis on (D) as a source of value, the latter focuses more on (E). However, as Sangiovanni argues, the distinction can blur when institutional systems depend upon and are constituted by cultural beliefs and practices. Some practices are not well embedded in societal cultures (for example, the practices of the World Trade Organisation), whilst others, like marriage, are much more culturally-infused. However, even for a practice like marriage, its value is not completely reducible to (D), hence the fact that (E) remains a relevant source of value located in the cooperation, relationships, and expectations generated by marriage. The argument that I have made in this chapter and the one previous, that the marital establishmentarian ought to view marriage as a cultural good, is not intended to erase these other sources of value. However, the claim is that the cultural value of marriage is a significant part of the practice that is a key source of value (related as it is in various ways to (A), (B), (E), and even (C)), that PILs with a focus on liberal value (C) tend to ignore. Crediting some of this value is part of the process of demonstrating the some forms of ME can be “as good as” disestablishmentarian alternatives.

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<sup>54</sup> Sangiovanni, , ‘Justice and the Priority of Politics to Morality’, p. 10.

## 6 The Value of Marriage

Given that practice-dependence recognises the cultural and historical value of practices, an account of the value of marriage, based on an interpretation of the point and purpose of the practice, can provide normative reasons for the support of this practice. In particular, an interpretation that differentiates marriage from other relational practices could serve to provide reasons for the differential symbolic treatment of marriage and other institutions of relationship regulation and recognition in the state of *Matrimonia*. If marriage can be shown to be a distinct cultural practice that is valued by its participants, this internal value can provide pro tanto reasons for state support for the institution.

In this section I offer a partial and undeveloped interpretation of the value of marriage. A full interpretation would be beyond the scope of this work: here I am only able to highlight key aspects of the practice of marriage that are important aspects of any good interpretation of marriage. I divide the section into two, the first sketches out some values that are specific to marriage, marking it out from other relational practices, and, I suspect, permissible for the state to support. The second presents key aspects of marital practice which, if an interpreter identifies them as present and live in the point and purpose of marriage, enhance the permissibility of ME in a liberal state.

### 6.1 Marriage-Specific Values

Below are three aspects of the value of marriage that can be identified as present in the practice of marriage:

- A. Marriage is a *publicly binding commitment* to an intimate, caring relationship
- B. Marriage is the *marking out* of an intimate, caring relationship as *centrally important* to a person's life
- C. Marriage *celebrates* the *romantic and sexual love* present in an intimate, caring relationship

Note that each account of the value of marriage (which are not mutually exclusive, and indeed are often combined) encompasses an intimate, caring relationship, which justice is required to protect and support. However, as we know, marriage does not exhaust all such relationships. Furthermore, marriage adds elements of the relationship that are not present in some relationships that justice cares about. The elements publically binding commitment (A), marking out as centrally important (B), and celebrating romantic and

sexual love (C) are not necessary features of intimate, caring relationships, and justice needn't protect these elements. Nevertheless, the practice-dependent justification of marital establishment claims that these features are permissible features for the state to support. In Chapter 5, I focus on and defend the idea that it is permissible for the state to recognise and celebrate the romantic and sexual love (C) associated with marriage.

## 6.2 Conditions for the Permissibility of Marriage

For ME to be permissible in liberal states, there are certain features in the practice of marriage that we should expect to be present. These features make compatibility with liberal values more likely, although, as argued above in section 3.3, coherence is not necessary. Marriage may not be a necessary or even obvious part of the liberal order, but if an interpretation of marriage can bring to light some of the features listed here, co-existence with liberal states is permissible.

*Reflexivity*: although the couple-centred life is may still be assumed to be the most obvious and natural way to relate, if marriage is not viewed as a script that is given to individuals who are then compelled to follow its edicts, and there is evidence that marriages are experienced by participants as vital projects in which their agency is central, then the practice of marriage can be described as reflexive.<sup>55</sup> This notion that marriage has become more democratic as an institution, means that marriage can be understood as the product and construct of the individuals forming it, rather than an institution that raises itself above the individual.<sup>56</sup> Sociological work by Anthony Giddens on reflexive modernisation and the post-traditional order describes marriages as a 'shell institution', its traditional façade concealing significant, progressive changes within. Katie Bruce more precisely describes marriage as existing within a 'post-regulative traditional order', wherein traditions remain as relics, marooned and cut off from their original context, with their authority diminished, and their meaning articulated discursively in a new context of choice.<sup>57</sup> The reflexivity that becomes possible within late-modern societies enhances the possibility of practices such as marriage functioning in reflexive, and

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<sup>55</sup> Brian Heaphy, Carol Smart, and Anna Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (Basingstoke: Palgrave Macmillan, 2013): pp. 5, 8.

<sup>56</sup> Heaphy et. al., op. cit., pp. 4-5; Katie Bruce, 'Doing Coupledness: Imagining, Managing and Performing Relationality in Contemporary Wedding and Civil Partnership Rituals,' (Unpublished doctoral dissertation), University of Southampton, 2012; p. 35.

<sup>57</sup> Bruce, op. cit., pp. 29-30, 48, 67. See also, Ulrich Beck, Anthony Giddens, and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Cambridge: Polity, 1994).

dynamic ways, so that the positivistic or institutional conceptions of marriage expressed in laws can interact with and respond to the functional conceptions of marriage practiced by individuals in actual fact.<sup>58</sup> The autonomy and diversity this enables for practitioners of marriage, and the reduction in authority they are subject to, enhances the compatibility of marriage with the liberal order.<sup>59</sup>

*Pluralistic marital culture:* generally speaking, the practice of contemporary marriage includes a doctrine of marital privacy, which creates a vacuum or absence of legally mandated meaning, which couples can fill with their diverse and divergent aspirations and expectations.<sup>60</sup> Contemporary legal renditions of marriage now increasingly extend marriage to same-sex couples, and in some cases, polygamous unions. The greater the diversity in practice and in law, the more compatible the marriage culture is with the liberal order.

*Diverse and overlapping relational context:* the interpretation of marriage will likely reveal that marriage is but one means by which individuals relate to each other (both across different individuals, and within one individual life). The participants of marriage are therefore engaged in a range of overlapping relational practices which bear similarities and differences to marriage. I will discuss this aspect in more detail in section 7.3 – particularly the normative role overlapping practices have – for now, it is sufficient to note that robust and integrated protections and recognition for a wide range of relationships will enhance the compatibility of established marriage, as part of the relational architecture, with the liberal state (as is the case in *Matrimonia*).

*Rights:* if the marital practices that are the subject of a practice-dependent interpretation contain liberty- and equality-enhancing rights, such as equal spousal entitlements, and rights to divorce, then establishment is more likely to be permissible. Societies that promote the ‘cruelty’ and ‘torture’ associated with forbidden divorce,<sup>61</sup> or that enshrine unequal rights and powers between spouses (usually along gender lines) violate liberal values. However, the existence of such rights does not guarantee that liberal values will

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<sup>58</sup> Daniel Nolan, ‘Temporary Marriage,’ in Elizabeth Brake, (ed.) *After Marriage: Rethinking Marital Relationships* (New York: Oxford University Press; 2016); 180-201: pp. 197-199.

<sup>59</sup> Note that reflexivity does not mean that the content of marriages is guaranteed to be liberal (and therefore, that the non-liberal value intuition is misplaced). Rather, what it means is that individuals have the opportunity to reflect on the tradition and self-consciously select or endorse various aspects of it (liberal or non-liberal).

<sup>60</sup> Martha Albertson Fineman, ‘The Meaning of Marriage,’ in Anita Bernstein, (ed.) *Marriage Proposals: Questioning a Legal Status* (New York: NYU Press, 2008): 29-69.

<sup>61</sup> Mike W. Martin, ‘Love’s Constancy,’ *Philosophy* 68, 263 (1993): 63-77; p. 72.

be pursued within marriage, only that certain liberal protections will apply.

*Establishment:* in Chapter 7, I consider the question of whether marital establishment ‘from scratch’, assuming it satisfied some of the conditions above, could be permissible. Such a notion seems strange – marital establishment is only an question that needs answering because it is an extant practice that regularly presents itself. This feature of the practice of marriage – its relationship with the state – is a feature that on interpretation, may enhance the permissibility of marriage. Recall in section 1 that Brake argues that familiarity counts for something in the justification of institutions. The existing relationship of establishment does more than enhance familiarity though, it also presents an opportunity for liberal influences to operate upon the institution of marriage. A history of establishment means that participants of marriage have reasonable expectations about how their marriages will be treated and supported, which they may have a claim to be honoured, but it also means that the state has potentially already had a liberal influence on marriage (although this may never be complete). In the last chapter I termed this the liberal dynamic of establishment: when liberal states get into bed with marriage they exert a liberalising influence, thereby rendering marriage in such states more likely to be liberal-compatible.

### 7 Is Marriage an Appropriate Candidate?

In section 3, I addressed concerns about the distinctness of the practice-dependent method, arguing that the sui generis aspect of practice-dependence consists in an element of normative self-sufficiency that derives from an internal value claim. Confirming the distinctness of the method merely serves to confirm practice-dependence as an appropriate target for another more serious concern – regarding how the value that claims normative self-sufficiency fares when compared with norms generated using standard, practice-independent means. Even if it conceptually possible to acknowledge that practices contain some value, what significance can this value possibly have when placed alongside the more universal and general moral norms that can be justified to all, participants and non-participants alike?

For the purposes of responding to this challenge, I will divide the concern into three parts. The first two address how the normativity of practices impact on insiders, that is, how the internal norms of practices have force for their participants. The third considers

concerns about outsiders, specifically, how internal value can be sufficient to justify practices to non-participants, particularly when they are affected by negative externalities generated by a practice. I do not wish to claim that answering these pieces of the normative puzzle will suffice to exonerate the practice-dependent method. At most, all I can offer here is a partial defence of the method for particular purposes.

If our interpretation of marriage is to get off the ground, we first have to confirm that it is a suitable candidate for a practice-dependent justification. Some institutions are so objectionable, that no amount of clarification and elucidation can salvage them. Slavery is one such practice. When assessing such a problematic institution, Sangiovanni recommends an initial charitable interpretation that aims to understand the history and aims of the institution, and the principles of justice that suit it, before condemning it if it relies on unmediated coercion to survive and therefore cannot be capable of being justified to all participants.<sup>62</sup> The practice of slavery depends for its continued existence on the denial of the participant status of all owned humans, considered as objects who cannot and need not consent to it. Although marriage has often been compared to slavery<sup>63</sup>, in a contemporary context of robust rights and legal protections for most, if not all citizens, such comparisons appear more rhetorical than accurate. Certainly, whilst the marital practice of setting bride prices, or dowries, resembled slavery as women were bought and sold, and despite the fact that both dowries and slavery still exist, we can quite confidently identify both fair terms of employment and of marriage.<sup>64</sup> More troubling cases for practice-dependence to grapple with are those in which the outward acceptance and consent of participants may conceal the existence of deeply entrenched and elusive coercive forces.<sup>65</sup> Marriage may be such a case: it may display a veneer of voluntarism that when scratched reveals historical, cultural, social and political pressures which render entry into, and continued participation in marriage, unchosen. In such cases, the desires of the individuals who support the institution cannot be taken at face value since their acquiescence or affirmation may be the result of false consciousness.<sup>66</sup> If

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<sup>62</sup> Sangiovanni, 'Justice and the Priority of Politics to Morality' op. cit.; p. 27.

<sup>63</sup> John Stuart Mill, *The Subjection of Women* in S. M. Okin (ed.) (Indianapolis: Hackett Pub. Co, 1988), p. 32; Claudia Card, 'Against Marriage and Motherhood', *Hypatia* 11, 3 (1996): 1–23; p. 6.

<sup>64</sup> Elizabeth Abbott, *A History of Marriage* (London: Duckworth Overlook, 2011): pp. 26-31.

<sup>65</sup> Greta Favara, 'Practice-dependent theory and the boundaries of political imagination', Working Paper, 3/16, *Centro Einaudi*, Torino, Italy: available at <http://eprints.lse.ac.uk/67103/>; pp. 23-24.

this is the case, we need some way of weighing the point of view of participants with that of the observer, who is likely to be more capable of critique.

This section aims to answer two questions. Firstly, in what ways does the history of marriage bear significance for its current practice? Should interpreters of marriage emphasize continuity or change? In what sense can contemporary legal and social renderings of marriage be tainted by past meanings? I advance the argument that marriage should be interpreted as *plastic* in two senses: first, as man-made therefore without a natural essence; and second, as elastic therefore able to change. History can impact on our current practices, but it is possible to escape history. It is the task of the interpreter to identify to what extent historical meanings continue to affect current practice.

The second question I consider concerns culture. Even if marriage is not tainted by its past, even if 21<sup>st</sup> century marriage is qualitatively different to its past incarnations, the legal institution does not exist in a vacuum. If the culture within which marriage is embedded continues to exert pressures that throw the voluntariness of marriage into doubt, either the historical transformation of marriage is not complete, or historical transformation alone is not sufficient to guarantee that there is not a coercive element to the practice of marriage. The problem becomes one of skew, not of taint. If a societal culture is skewed in favour of marriage, does this raise the same concerns of false consciousness that history raised before? Can we differentiate between marriage cultures that coerce and marriage cultures that don't? Is a practice-dependent justification really possible, or necessary, in a culture whose devotion to marriage is so limited as to not feature amongst the preferences and interests of citizens. I argue that practice-dependent justifications are only appropriate in what I term *goldilocks cultures*, where the commitment to marriage is neither too strong to raise concerns regarding coercion, nor too weak to render the justification artificial and superfluous.

### 7.1 History: Is Marriage Tarnished?

Over the course of history, marriage has undergone significant changes: once an essential part of the legal doctrine of coverture, which erased the status of women in law; now

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<sup>66</sup> Sangiovanni, 'Justice and the Priority of Politics to Morality' op. cit.; p. 27.

increasingly figured as a sex-neutral arrangement. Despite these changes, it has been argued that this progress is illusory or superficial: deep down, marriage has not, and perhaps cannot change. Brake puts the problem thusly: ‘Histories of marriage document its role in oppressing women, gays and lesbians, and racial and religious minorities. Critics argue that marriage is essentially patriarchal, heteronormative, harmful, and an ownership relation, and that reform cannot excise its oppressive nature. Is marriage unjust in itself or has it only been contingently unjust?’<sup>67</sup> Brake goes on to take the latter position – marriage can be rehabilitated. Chambers, however, takes the opposite stance - marriage is irremediably tainted. In order for marital establishment to be considered a permissible arrangement for a liberal state, we need to side with Brake on this matter. Marriage does not have an essentially unjust nature. However, for Brake marriage is only rescued if it is opened up into a gender-neutral, number-neutral, and somewhat purpose-neutral<sup>68</sup> form – only the transformation into Minimal Marriage will correct a problematic history.

Since *Matrimonia* aims to adopt a marital form that meets the cultural attuned intuition, we cannot side with Brake fully. Although we need to agree that marriage can be rehabilitated, what this rehabilitation requires must be less extensive than what Brake proposes - marriage will not be extended to all caring relationships. Recall Macedo’s thought that motivates the intuition: “Nobody wants to marry their grandmother!” This reaction to the idea of Minimal Marriage suggests that in encompassing caring relationships between grandparents and their grandchildren marriage will be stretched too far from current understandings of its point and purpose. Yet, to claim that such an institution will no longer be marriage challenges Brake’s position at the risk of lending support to that of Chambers – the notion of a stretch too far suggests that marriage has an essential nature that places limits on its elasticity. If some aspects of marriage are fixed and not amenable to change, might it be that oppression is one of those aspects? How do we determine those features of marriage that endure and those that are less able to resist change?

Here, it is worthwhile consulting the practice-dependent method in order to navigate the

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<sup>67</sup> Brake, op. cit.; p. 111.

<sup>68</sup> I qualify purpose-neutral with a somewhat since although the purpose of marriage will be expanded from the protection of amatonormative relationships to a more general protection of caring relationships, this still reflects a specific purpose that rules out marriage for other purposes, for example, the obtaining of benefits such as immigration status for one member of a mutually disinterested partnership.

precarious terrain between fixed and unlimited accounts of the meaning of marriage. The actually existing practice of marriage should be the starting point, and fixes the possible trajectory of any interpretation. Interpretation is grounded by the practice: rather like an animal whose lead is tethered to a determinate point, it can move around but not roam freely; it can only venture so far before the limited length of the lead is felt pulling on its neck. Some movement is possible, but possible interpretations can stretch current understandings but only so far. The limit of this stretch is set by the stricture that we must be interpreting the relevant practice rather than inventing a new one. The exact point at which interpretation tips into invention needs specifying if this standard is to be properly applied.

The claim suggested by the culturally attuned intuition must be that the current point and purpose of marriage for participants does not extend to “marrying your grandmother”. This does not entail the essentialist claim that marriage never could arrive at having that point and purpose. The determinate point to which the interpretation is tethered is not fixed – it is set by the here and now but will shift with every here and now that is selected. The fixed element is provided by the lead or tether, the length of which fixes the range of possible movement. This length may of course vary for each object of interpretation, with some objects possessing a greater potential for innovation without invention, whilst others have more restrictive leads which threaten to snap away from the core of their practice at a point soon after departure on the interpretive journey. Although lengths can vary, all practices have stretch: their tethers resemble retractable dog leads which can all be made shorter or longer, but are sold with varying maximum extension limits.<sup>69</sup>

To help us identify the limits of interpretation, that is, the point at which interpretation tips into invention, it is helpful to make determinate certain aspects of my account of the practice-dependent method. Once these aspects are in place, we will be better equipped to draw the limits of interpretation, by identifying permissible and impermissible stretches of the meaning of marriage. The first aspect to specify is the relationship practice-dependence has with factual reality.

Greta Favara analyses this relationship by utilizing the notion of fictional models. A

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<sup>69</sup> These notions of the length and stretch of a tether are expressed by Favara as ‘the border of political imagination’, which ‘is given by those worlds which represent ideal embodiments of the point and purpose of the practice under scrutiny.’ Favara, *op. cit.*; p. 27.

model is a representation that explains a given phenomenon. A model may be quite closely related to reality by simply abstracting from complex details and offering a simplified version of reality. Some models, however, are fictional models, constructed from unrealistic representations. The fictional models considered relevant by the practice-dependence method are those that imagine a world in which the point and purpose of current practices is fully realised. This world is different from reality, where the point and purpose of a practice may be currently restricted or distorted. Practice-dependence has a closer relationship with reality than some other normative theories, as it does not employ alternative fictional models that ‘picture circumstances structured around other social meanings and practical purposes’.<sup>70</sup> Nevertheless, this rather limited fictional model is intended to challenge and not merely accept reality by shedding light on the ways in which our current practices may be improved and developed in line with their own rationales.

On this account, interpretation will tip into invention when other social meanings and practical purposes are attributed to a practice alongside or instead of the actual ones they have, or when some current meanings are ignored. The appropriate test for the limits of interpretation involves answering the question ‘is the point and purpose attributed to the practice real or fictional?’ We can term this the *reality test*. The problem with carrying out this test, however, is that there may be significant disagreement over the point and purpose of the practice. Only the first stage of interpretation – the identification of the object to be interpreted – is fairly uncontroversial. In the second stage, where the point and purpose of the practice is determined, interpreters may differ in the accounts they provide. On a Dworkinian interpretivist account, this need not lead to a stalemate, since as we have seen, the normative notion of best light can guide us towards the most appropriate account. The institution can be rewritten from the observer’s perspective if that is what the notions of fit, substantive appeal, and best light suggest. Moral values have ultimate authority – the final say – and the interpretation must both ‘fit’ ‘enough’ of the practice, and show the practice to have normative appeal. Theory drives the practice.<sup>71</sup>

As in the football example we considered earlier, Dworkinian interpretivists can home in

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<sup>70</sup> See Favara, op. cit.; p. 15: ‘in a PD perspective, there would be no point in assessing our intuitions about requirements of justice starting from fancy representations which bear little, or none [sic], resemblance with how our practices actually work.’

<sup>71</sup> Postema, op. cit, p. 293.

on one purpose that is either partial or only peripheral to the whole practice, and claim that that exhausts the purposes of the institution. Although they cannot invent new practices, they can also attribute new purposes quite different to those that participants think the practice serves, as long as the purpose still 'fits'. This notion of fit is determined by the observer, not the participant. Interpreting the practice in its best light might involve ignoring or sidelining the perspective of participants if the observer's interpretation is superior. The resulting interpretation of the practice may not be recognized by its participants, but will result in a re-invention rather than a new invention as long as some degree of 'fit' is still taken into account.

Practice-dependence utilizes a stricter standard of fit. This second aspect of the method that sets the limits of interpretation specifies the role that the participant perspective plays in setting the point and purpose of the institution. The difference between practice-dependence and interpretivism is sometimes illustrated by appealing to a distinction between catholic and protestant types of interpretation.<sup>72</sup> In protestant interpretation, the individual interpreter is sovereign – they individually come to an authoritative account of the point, purpose, and required principles of the practice. For catholic interpretation, these aspects are arrived at somewhat collectively, with greater interaction with and consideration of the participant perspective. To maintain its distinctness, the PD method should be understood along catholic lines, as requiring greater sensitivity towards the practitioners themselves.

Dworkin's protestant approach regards the interpretation of a practice as private and individual, with shared understandings functioning only as data from which the interpreters own conception of the practice can be constructed.<sup>73</sup> The problem of such an approach, is that where there is disagreement and contestation about the point, purpose, and meanings of a practice, the interpreter may end up imposing their own interpretation on the participants. This would likely lead to the instrumentalisation of the practice, and the denial of internal values that have little or no connection with external values held and recognized by the interpreter. The fear of moving away from a protestant mode of interpretation is that an interpreter may simply take the participants word as gospel, and mechanically recreate the extant practice without bringing any critique to bear on it. However, as Dworkin himself acknowledges, and Gerald Postema

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<sup>72</sup> See Postema, *op. cit.*; James, 'Why Practices?', p. 47

<sup>73</sup> Postema, *op. cit.*; pp. 288-289; James, 'Why Practices?', p. 47.

emphasizes, the mere adoption of the “interpretive attitude” is a reflexive move that introduces theoretical controversy and makes blind deference impossible.<sup>74</sup> As Postema points out, there is a ‘thick texture of practice’ between the extremes of runic traditionalism and full reflexivity – which includes some routine, some social dexterity, some savoir-faire, some transparency, and some reflection.<sup>75</sup> Not only is adopting a perspective closer to that of the participants not as dangerous as Dworkin supposes, it is also ultimately a superior way of accessing the meaning of a practice. Instead of being a ‘private matter’, Postema describes meaning as ‘publicly disclosed’, and interpretive activity as essentially interactive, addressed as a conversation with other participants.<sup>76</sup> The catholic approach guards against the abstract characterization of practices that was rejected by Macedo and has been challenged in this chapter and the previous one, and as James notes, gains in critical depth will be accompanied with losses in specificity and comprehensiveness.<sup>77</sup>

Interpretation, then, is a reflexive activity, which is somewhat tethered to the meanings of extant practices, and therefore connected to the history of the practice. However, practices evolve and change, and participants can and have moved the meaning of marriage away from its past, without inventing an entirely new practice in the process. Even if we prioritise the participant perspective, practices can be plastic.

## 7.2 Culture: Is Society Skewed in Favour of Marriage?

Even if we grant that the history of marriage as an oppressive institution is no longer operative, we still can’t take the consent of participants as normatively validating the practice. The current participants in marriage most obviously include those currently married, but participation could also be stretched to include those previously married,

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<sup>74</sup> Postema, op. cit, p. 288.

<sup>75</sup> Postema, op. cit, p. 302.

<sup>76</sup> Postema, op. cit.; pp. 308, 312. This interaction extends both diachronically and synchronically, since fellow participants extend both backwards and forwards in time. ‘Interpretations of social practices, especially highly self-conscious practices like law and friendships, are public formulations of collectively meaningful activities. They are accounts of behavior that is meaningful to the participants as a common activity, a common work. Thus, they are formulations, or successive re-formulations, of shared understandings, proposals for a better understanding of their common activity. This does not entail that all participants must agree about how to understand their practice, but it does imply that one’s own understanding must be addressed to other participants and sensitive to their understanding of it. Far from being “a conversation with one-self”, such interpretative activity is, when properly understood, essentially a conversation with other participants.’ (pp. 312-313)

<sup>77</sup> James, ‘Why Practices?’, p. 59. We thus have both interpretive and normative reasons to assign ‘special interpretive weight’ to evidence from ‘[w]idely shared assumptions within the practice’; pp. 57-58.

hoping to be married, those who celebrate the marriages of their friends and families, and those raised in marriages, who have been benefited or damaged by it in the process. Even if we focus only on current factual participants, we cannot take them as a unified, undifferentiated group. There are disagreements between participants regarding the meaning of marriage, and there are also winners and losers in the practice – those whose well-being and social opportunities are improved by marriage, and those whose are diminished.

The current marriage culture within which participants move in and out of marriage undoubtedly has an effect on how people perceive and evaluate marriage. Here I argue that for a practice-dependent justification of ME to be based upon normative reasons provided by the participants of marriage, the marriage culture in which they operate needs to be neither too strong, nor too weak, but just right. For this reason, I term it a *goldilocks culture*. If the marriage culture is too strong, we cannot reasonably infer that participants in marriage have consented to the practice without having been subject to coercive pressures. If the culture is too weak, the practice-dependent justification lacks motivation, as participants, and the wider society, will not be sufficiently attached to marriage to advance its value. In what follows, I present some ways in which we can identify this just right, goldilocks culture.

As Brake argues, '[l]egal recognition of exclusive dyads, and only exclusive dyads, underwrites amatonormative social pressures.'<sup>78</sup> However, in a context in which alternatives to marriage were recognized in law, this problem would be somewhat neutralized, and the dependence and vulnerability associated with pressures to marry would be avoidable as robust protections would be available for alternative relationships. Thus, this problem is addressed 'by recognizing and supporting a range of relationships, including networks or friendships, thereby—indirectly—creating new social scripts and making alternative relationships salient.'<sup>79</sup>

Drawing on the theme of reflexivity developed in the previous section, a goldilocks marriage culture contains elements that both resist and pursue marriage, and these elements may be expressed simultaneously by the same participant. Some feminist responses to marriage have this feature of ambivalence towards marriage – where

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<sup>78</sup> Brake, op. cit.; p. 115.

<sup>79</sup> Brake, op. cit.; p. 115.

conflicted views regarding the institution cannot be reduced to a simple affirmation and rejection.<sup>80</sup> A goldilocks marriage culture therefore would contain a complex interpretation of marriage, with both reforming and preserving elements in play. Signs that marriage was the subject of disagreement and discourse within the culture would reduce the worry of cultural skew.

### 7.3 The Problem of Non-Participants

Again, when it comes to the non-participants of a practice, exactly who this refers to be can unclear. With regards to marriage, the obvious group that appear to be non-participants are the unmarried. However, many people who are currently unmarried have previously been married, or very soon will become so. The subsection of the unmarried to focus on then would be the never-married. Yet even within this group, there are potential participants, such as the want-to-be- married, and the avowed non-participants, the never-want-to-be married, and as noted in the previous section, both of those groups could be associate participants in the sense of taking part in, facilitating, and celebrating the marriages of their friends and family. If it is total non-participation we are looking for, celibate hermits might be the best candidates. Should aspirations and attitudes towards marriage, and indirect relations with it other than being a spouse be taken into account, so that there are gradations of participation, or should all non-participants be treated as a monolith?

According to Merten Reglitz, the appropriate response to the fact that all practices generate externalities that affect non-participants is to adopt a practice-independent baseline against which to measure the fairness of the differential benefits and impacts felt between participants and non-participants. Reglitz raises a number of inadequacies with the normative picture provided by practice dependence. The first, concerning *overall fairness*, claims we can't really assess the fairness of a practice without taking into consideration the overall opportunities available to everyone across different and separate practices. Thus, we can't really have a full assessment of the justice of marriage and marital establishment without looking at state protection, support, and recognition of other personal relationships. However, this involves looking beyond the practice in

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<sup>80</sup> Celia Kitzinger and Sue Wilkinson, 'The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership', *Feminism & Psychology* 14, 1 (2004): 127-150.

question and beyond practice-dependence towards more egalitarian concerns regarding the relative position of others in separate practices. A response available to practice-dependent theorists is to claim that such different and seemingly separate practices are in fact *overlapping* or in some sense interrelated, such that often our assessment of the relative experiences of participants and non-participants across practices does not lead us into practice-independence: instead, the borders of the practice in question are redefined to recognise its place in a wider network. Since each individual practice, in combination with every other practice it overlaps with, is still providing the normative resources with which to judge its own performance, with the shared elements of the interrelated practices providing a standard with which to make relative judgments, no practice-independent standard is required. This response adds to the doubt expressed above that true non-participants exist, developing the sense that participants in practices that neighbour and overlap with practice *A*, in some sense participate in practice *A*, or at the very least, exert some power or influence over it.

This move has been made most prominently in the global justice literature, by pointing to the interdependence of nations with regards to trade and finance: the existence of overlapping practices between states means that practice-dependency can provide a normative justification for the continuation or formalisation of transnational practices of regulation and distribution, addressing global justice concerns short of the cosmopolitanism advocated by practice-independent theorists.<sup>81</sup> However, Reglitz has challenged how satisfactory this response can be, arguing that there are ‘countless ways to diminish other’s future opportunities in maximally indirect ways that make it implausible to speak of overlapping practices in these cases.’<sup>82</sup> By presenting a series of divided world, island scenarios, he argues that overlapping practices cannot encompass and account for all morally relevant duties: for instance, we need universal normative obligations to deal with cases of unclaimed territory. Although this kind of counter-challenge might be powerful in the context of global justice, it is not decisive for all contexts. At the very least, practice-dependence might provide sufficient justification in certain contexts, the justice of personal relationships being one candidate.

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<sup>81</sup> Ayelet Banai, Miriam Ronzoni and Christian Schemmel, ‘Global and Social Justice: The Possibility of Social Justice Beyond States in a World of Overlapping Practices,’ in Ayelet Banai, Miriam Ronzoni and Christian Schemmel, (eds.) *Social Justice, Global Dynamics: Theoretical and Empirical Perspectives* (Abingdon: Routledge, 2011): pp. 46-60.

<sup>82</sup> Merten Reglitz, ‘Fairness to non-participants: a case for a practice-independent egalitarian baseline’, *Critical Review of International Social and Political Philosophy* 20, 4 (2017): 466-485; p. 474.

In the realm of personal relationships, there are many overlapping and interrelated practices – marriage, friendship, cohabitation, caregiving, parenting – some more formally institutionalised, like marriage, others less so. At any one time, and across a lifetime, an individual may participate in a number of such practices. Consequently, a divided world isn't an appropriate scenario for the world of relational practices – in this world, there is significant spatial-temporal and personnel overlap (many different relationships at the same time, in the same location e.g. family home, with the same participants), and functional overlap (different relationships with similar features, serving the same point and purpose), so that different practices are not separate but interrelated. By interpreting each practice, we may find that some practices are normatively significant in similar ways. Common elements may provide the basis of more general principles that apply across the various relational practices. Other more specialised aspects of relational practices may generate principles that only apply to those practices.

Nevertheless, although it doesn't mirror empirical reality, perhaps an appropriate test of the fairness of practice-dependence would be to ask whether even if there were no overlap between practices, would participants in the separate practices have obligations towards one another? We imagine that the married are completely separate and unrelated participants to the cohabiting, who are again completely separate and unrelated to those that care for elderly relatives. The married, perhaps unbeknownst to the cohabiting and the caring, have been claiming resources that each potentially have a stake in. Are the married obligated to share these resources with the other two groups? The practice-dependent interpreter may begin by asking whether the resources claimed for by the married are necessary, given the point and purpose of marriage. Then, if some resources are warranted, the cohabiting and the caring would have a claim to such resources to the extent that they are similar practices to marriage. Similar elements of separate practices may trigger similar entitlements, whilst relevant differences between the practices may mean that some can make claims others can't. Even in the absence of spatial-temporal overlap, or the overlap of personnel, there may be functional overlap such that non-participants will be treated akin to participants.<sup>83</sup> Thus, it seems possible to do justice to these separate practices just by considering the internal value of each, treating like for like

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<sup>83</sup> The equal treatment of like practices is an important way of differentiating practice-dependence from relativism – the latter utilises the same internal standards that participants use, with no comparison across practices – and to maintain its distinctness, practice-dependence needs to avoid collapsing into relativism.

within each practice. Fairness between practices would be delivered by interpreting them in the same manner, and treating similar points and purposes similarly. However Reglitz argues that we cannot extrapolate from the value of one practice to another because the obligation to leave space for unrelated others requires a practice-independent, egalitarian principle. The claim is that any requirement to give ‘equal concern and equal distributive entitlements must be thought of as an *independent constraint* on the purposes and extent of practices.’ The practice-dependent requirement to treat like practices alike requires a prior commitment to the value of equality as such.<sup>84</sup>

The necessity of an external egalitarian standard comes to the fore if we consider certain types of practices where equal concern looks unlikely to manifest internally. In *disputed participants*, there is disagreement amongst self-styled participants regarding whether they truly belong in the practice. We can see this sort of problem when conservative practitioners of “traditional” marriage don’t want to treat same-sex participants in gay marriage alike. In *discriminatory practice*, the participants in one practice have external preferences that non-participants are treated unequally, and these preferences are part of the point and purpose of the practice, directly leading to conflict between participants and non-participants. This occurs when participants in marriage wish to deny the benefits and legal protections to non-participants in functionally identical relationships. In *monopolising practice*, the point of a practice is to claim and use up all of a scarce resource, which indirectly leads to conflict between participants and non-participants. This occurs when participants in a religion see part of its purpose is to be established as the one true religion, a purpose that by definition denies the same to non-participants.

The requirement to treat participants and non-participants equally, or even fellow participants (where there is controversy between them about the point and purpose of the practice), is lacking in these types of practice. Again, good interpretation will reveal which practices are similar/dissimilar and thereby provide an indication of how to treat non-participants. However, if the purpose of the practice is to limit or eliminate another practice, it makes it impossible to treat the other practice equally, without denying the point or purpose of the practice. It might be that in such cases a practice-dependent justification cannot get underway – such practices are analogous to slavery as they do not rest on consent. However, the consent they lack is from non-participants, whose consent

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<sup>84</sup> Reglitz, *op. cit.*; pp. 475-476.

is only independently significant. Practice-dependence only works to exert normative force if practices don't contain external preferences (direct conflict) or indirect conflict (the point of practice is to claim and use up all of a scarce resource). If they do involve external preferences, then a possible way out for practice-dependence is to claim that the objects of external preferences in a practice themselves become participants, such that only self-regarding practices can limit participation to true participants.

As Ayelet Banai, Miriam Ronzoni and Christian Schemmel argue, practice-dependence has the resources to extend normative principles beyond initial practices, to call for reforms and emancipatory changes to practices, to address the externalities of other practices, to demand for the supplementation of practices by additional corrective practices, and in cases of conflicting practices, appeal for the abolition of one practice in favour of a normatively more significant practice.<sup>85</sup> If practice-dependent principles are sufficient for such purposes, we need not look for or apply universal principles. The sufficiency of practice-dependence would mean that it provides an "equally good" way to resolve normative issues arising from a range of practices, compared to the practice-independent alternative.

Even if we reject the possibility that all of our normative concerns can be addressed from within practices, I think that a promising way out of this impasse has been provided by critical theorists. On these accounts, normative critique can have its basis in practices so that normativity can be practice-dependent all the way down. Malte Frøslee Ibsen expresses this possibility by adopting a distinction between basic practices and institutionalized practices. Whilst both kinds of practices possess normative structures that guide human action, the two kinds of practice vary in significance and scope. Basic practices are fundamental to all human activity, necessary and integral aspects of human nature, and operate universally across history and culture. Institutionalized practices are contingent and vary over cultural space and historical time. Whilst institutionalized practices are constructed deliberately, related-to reflexively, and altered by collective choice, basic practices are discovered underlying all human action.<sup>86</sup>

One example of such a view is Jürgen Habermas' discourse theory of morality, which

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<sup>85</sup> Ayelet Banai, Miriam Ronzoni and Christian Schemmel, op. cit., pp. 55-56.

<sup>86</sup> Malte Frøslee Ibsen, 'Global Justice and Two Conceptions of Practice-Dependence', *Raisons Politiques* 51, 3 (2013): 81-96 ; p. 88.

derives normative content from the basic practice of language and communication. The universal presuppositions of argumentation are standards intuitively held by everyone, without which, argumentation could not proceed. These standards express proto-moral content: the features we must assume in order to communicate effectively also operate as norms that guide our communicative actions. The four key features that Habermas discusses are (1) inclusion; (2) equal opportunities; (3) sincerity; and (4) non-coercion. (1) expresses the common sense intuition that a search for the better argument can't exclude any person that can make a contribution; (2) reinforces this perception and states that therefore all should have an equal chance to participate; (3) grants that we cannot comprehend others unless we assume that they mean what they say; and (4) states that the search for the better argument would be futile unless the "yes" and "no" stances taken by interlocutors in response to criticisable validity claims are 'motivated solely by the rational force of the better reasons.'<sup>87</sup> Each of these features operate to constrain argumentation and facilitate progress towards mutual understanding and agreement. The pragmatic presuppositions of argumentation are unavoidable counterfactuals that we accept whenever we enter into communication with others. They express ideal content that we can never fully realise but which we are obliged to accept. Our expectations that the concepts we use are generally accepted, the semantic meanings of words are identical, and the performative utterances we issue are valid are idealistic, but we hold onto them as necessary conditions of communication – without them, we couldn't expect to reach understanding with others about anything.<sup>88</sup>

Habermas stresses that although the content of these presuppositions have moral implications, they express only a weakly normative substance, delineating 'argumentative duties and rights' not moral ones.<sup>89</sup> The discourse principle "D" reconstructed by Habermas states that 'Only those norms can claim validity that could meet with the acceptance of all concerned in practical discourse'.<sup>90</sup> This sets out a standard by which argumentative procedures can be judged and the resultant norms be thereby justified. Because language is a shared and public medium, every speech act we engage in is addressed not only to our immediate audience, but also to an ideally expanded audience,<sup>91</sup> or in Habermas' close colleague Karl-Otto Apel's words, an ideal

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<sup>87</sup> Jürgen Habermas, *The Inclusion of the Other* (Cambridge: Polity, 1999); pp. 42; 44.

<sup>88</sup> Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity, 1997); pp. 17; 18.

<sup>89</sup> Jürgen Habermas, *The Inclusion of the Other*, pp. 44-45.

<sup>90</sup> Habermas, *op. cit.*, p. 41.

<sup>91</sup> Jürgen Habermas, *Between Facts and Norms*, p. 18.

communication community.<sup>92</sup> In communication, every validity claim made is redeemable, that is, tacitly guaranteed to be backed up by reasons if challenged. ‘Any speech act therewith refers to the ideally expanded audience of the unlimited interpretation community that would have to be convinced for the speech act to be justified and hence, rationally acceptable.’<sup>93</sup> Since speech acts have referents beyond the here and now, they have transcendental implications. The intersubjective recognition of criticisable validity claims creates the validity of a rational agreement.<sup>94</sup> Through “D”, valid norms can be generated, since as a principle it has a weak transcendental status –it has a universal scope since it expresses presuppositions that are necessary and pragmatically unavoidable.<sup>95</sup>

Although institutionalised practices only allow internal criticism, as the normative standards they contain only apply within the bounds of their particularity, basic practices such as those operating in communicative interaction identified by Habermas, allow external criticism of institutionalized practices. Because basic practices operate simultaneously on factual/sociological and on idealizing/normative levels, this creates the possibility of immanent transcendence.<sup>96</sup> If our interpretation stays focused upon institutionalized practices, we are confined to taking their legally defined participants as the basic units of moral concern, but by combining this with an interpretation of basic practices, the range of participants concerned expands to potentially include all language speakers as basic units of moral concern.<sup>97</sup> Because basic practices are fundamental, they overlap with all institutionalized practices, therefore the norms worked up from them can be used as a resource to critique any institutionalized practice. The normative standards brought to bear from basic practices can provide a practice-dependent baseline against which fairness across different practices can be judged. These standards can also be used to construct a practice-dependent, all-affected principle. Contrary then to Reglitz’s arguments about the necessary of practice-independence in order to provide an

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<sup>92</sup> Karl-Otto Apel, ‘Discourse Ethics, Democracy, and International Law: Toward a Globalization of Practical Reason’, *The American Journal of Economics and Sociology* 66, 1 (2007): pp. 49-70; p. 51.

<sup>93</sup> Habermas, op. cit, p. 19.

<sup>94</sup> Habermas, op. cit, p. 20.

<sup>95</sup> Joseph Heath, ‘Justice: Transcendental not Metaphysical,’ in James Gordon Finlayson and Fabian Freyenhagen, (eds.) *Habermas and Rawls: Disputing the Political* (London: Routledge, 2011): 117-134; p. 123.

<sup>96</sup> Ibsen, op. cit., p. 92.

<sup>97</sup> Ibsen, op. cit, p. 91.

egalitarian normative standard, practice-dependence can be normatively self-sufficient.<sup>98</sup>

## 8 Concluding Remarks

In this chapter, I have defended the use of a practice-dependent approach to the question of marital establishment. I began by showing how such an approach looked to provide a promising way to address some of the intuitions raised by Macedo's cultural argument for marital establishment – the culturally attuned intuition and the non-liberal value intuition. I then proceeded to defend practice-dependence against charges that it lacks distinctness as a normative method. In response, I presented the method as distinct from Dworkinian interpretivism by being committed to an internal value claim. I then argued that practice-dependence is also distinct from the method of reflective equilibrium, as is not committed to achieving overall coherence. I then argued that practice-dependence is committed to a weak normative claim, and a limited scope claim, and presented an argument to demonstrate that it is an appropriate method for constructing principles for practices that display complexity, controversy, and conflict, marriage included. I then provided an account of the plural sources of value in practices, and the value of marriage in particular, before addressing concerns regarding how the method treats history, culture, and non-participants. I argued that practices generally, and marriage in particular, is plastic, thereby related to but not confined to historical versions. I argued that our assessment of marriage cultures should focus on identifying goldilocks cultures that are neither too strong, nor too weak, to render a practice-dependent justification unjustifiable, or unnecessary, respectively. Finally, I argued that practice-dependence can treat non-participants fairly either by including overlapping practices in the interpretive picture, or by utilizing the universality of basic practices to critique institutionalized practices.

In this chapter, I have aimed to provide a fairly comprehensive defense of practice-

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<sup>98</sup> Here I only gesture towards the possible existence of basic normative standards that ultimately can be derived from practices. I fully acknowledge the complications involved in specifying exactly how these basic standards apply to institutionalized practices. In particular, the question of how the weak normative potential of communicative interaction connects to different value spheres and dimensions of validity goes beyond the scope of this project. The relationship between morality and ethics, and the priority of the former over the latter, which both Habermas and Rawls are committed to, raises further questions regarding how these two distinct dimensions of practical reason interact, and how the normative critique of ethical practices is possible. Here, note the relevance of Habermas' modernization thesis, which makes the empirical observation that we have reached a historical period where ethical values and the collective identities build around them can be reflexively reinterpreted and critically appropriated. Rejection of this thesis would make it more challenging for the universal moral principles that basic practices point towards to apply to ethical questions.

dependence, although certainly the method will still not be secure on all fronts. At the very least, I hope to have made the case that practice-dependence is an “equally good” method by which to present the “equal goodness” of marital establishment to its alternatives. In the following three chapters, I defend marital establishment from three arguments that claim it is worse than disestablishment: the religious establishment argument, the discrimination argument, and the neutrality argument.

## Chapter 4 -

### What's Wrong with Marital Establishment?

#### Part One: Do Religious and Marital Establishment Share Relevant Wrong-Making Features?

##### 1 Introduction

The case for the disestablishment of marriage sometimes draws on an analogy between marital establishment and religious establishment. This is a rhetorically effective strategy – if we assume that religious establishment is wrong, then marital establishment must be too. The claim is that we should treat marriage like we treat religion;<sup>1</sup> that marital establishment is akin to establishing a civil religion, and as absurd as the state administration of other sacraments;<sup>2</sup> and that the disestablishment of marriage is the same as the disestablishment of bar mitzvahs.<sup>3</sup> *Prima facie*, this comparison seems appropriate, but it needs to be interrogated. What features do the two types of establishment share that make them analogous? Is this a conceptual claim about the sharing of certain structures or features, an empirical claim about the similar effects wrought by each, an historical claim about the overlapping relationship between the two, or a normative claim about the implications or meaning of these forms of establishment for justice? Is the argument as explicitly stated that marital establishment is *like* religious establishment, or is there an implicit suggestion that marital establishment is *a form of* religious establishment?

In this chapter, I try to get a more precise sense of what is wrong with marital establishment, and I argue that the religion analogy is not accurate or useful, in fact it works to confuse matters. I focus on claims about *marriage as religious*, and begin to consider *marriage as comprehensive*. I explore whether religious and marital establishment

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<sup>1</sup> Andrew F. March, 'What Lies Beyond Same-Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification', *Journal of Applied Philosophy* 27, 1 (2010): 39–58; pp. 40–41: that is, treat it as 'something protected and possibly subsidized in moderate ways by the state but which the state is not the [sic] business of defining, regulating, honouring or distributing other than for reasons of individual rights and legitimate public interests'.

<sup>2</sup> Vaughn Bryan Baltzly, 'Two Models of Disestablished Marriage', *Public Affairs Quarterly* 28, 1 (2014): 41–69; pp. 61, 62; as Baltzly adds to further his point, whether marriage is a sacrament, and how many sacraments there are, is of course a question that can only be answered by religion and not the state.

<sup>3</sup> Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, N.J.: Princeton University Press, 2010), p. 119.

share the same wrong-making features (*Section 3*). I claim that any shared wrong-making does not inhere either in the nature of establishment itself, and argue that although liberals are right to be concerned with establishment *per se*, all forms of establishment must meet a high threshold of justification that some institutions won't meet. I argue that the proximity of marital establishment to religious establishment is a mere historically contingent fact, and not a conceptual necessity, so that any shared wrong-making feature must inhere in the nature of the both institutions being established. (*Section 4*). I then turn to the relevant shared features of marriage and religion that cause them both to fall short. I focus in particular on Tamara Metz's claims that liberal values preclude the establishment of marriage because, like religion, marriage is a formal, comprehensive social institution (FCSI) that requires the state to act in the capacity of an ethical authority towards its citizens (*Section 5*). I offer a different interpretive reading of marriage that challenges Metz's claims about its FCSI status, and places marriage in a broader context of establishment by contrasting both religious and marital establishment with educational establishment. I conclude that if marriage is no more like religious establishment than educational establishment, the analogy argument obscures rather than illuminates the debate. Moreover, if education is also an FCSI that utilizes the state as an ethical authority over its citizens, either educational establishment is just as wrong, or religious and marital establishment have additional wrong-making features that need to be further explored. Finally, I consider the wrongness of the state acting as an ethical authority. I defend an interpretation of *marriage as secular*, and *as thin*.

I define establishment in a normatively neutral way as a "special relationship" between the state and another institution in which the former supports the latter, but both sides may influence each other. Following Sune Laegaard, *religious establishment* 'denotes an institutional relationship between religious organisations such as churches and the state'.<sup>4</sup> *Marital establishment* involves the state and marriage sharing an institutional relationship whereby the state reserves the right to apply the label 'marriage' to certain types of relationship, and confers benefits on those that receive the label.<sup>5</sup>

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<sup>4</sup> Sune Laegaard, 'Secular Religious Establishment: A Framework for Discussing the Compatibility of Institutional Religious Establishment with Political Secularism', in S. Maffettone, G. Pellegrino and M. Bocchiola (eds.) *Philosophy and Public Issues (New Series)* 3, 2 (2013): 119–57; p. 125.

<sup>5</sup> Here I am deliberately vague about the nature of the benefits conferred – they could be legal, material, symbolic, or a combination of these.

## 2 Holy Matrimony?: The Claim

The arguments considered here assert that religious establishment and marital establishment are somehow analogous. The argument is made in the most sustained way by Tamara Metz in her *Untying the Knot*:

Just as the “establishment of religion” refers to the state’s active involvement in defining, inculcating, and supporting particular religious worldviews and institutional arrangements, so the “establishment of marriage” highlights the state’s integral role in reproducing and relying on belief in a particular, comprehensive account and institutional form of intimate life.<sup>6</sup>

Later, Metz compares marriage and baptism: ‘Leaving the definition and conferral of marital status to civil society is no different from leaving the control of baptismal status to civil society.’<sup>7</sup> Similarly, Vaughn Baltzly suggests that marital establishment establishes a version of religion: ‘sacramental establishment is already partially in effect, inasmuch as marriage is one of the Catholic Church’s seven sacraments, and is...already established’.<sup>8</sup> He also imagines a regime of civil religion whereby individuals who register with the state as ‘religionists’, by making a public commitment to a faith of their choice, are awarded with legal benefits denied to non-religionists, implying that civil unions operate in a similar fashion.<sup>9</sup> Finally, March, in arguing for a universal civil union status, asks:

‘Why not treat ‘marriage’ the way we treat religion: something protected and possibly subsidized in moderate ways by the state but which the state is not the business of defining, regulating, honouring or distributing other than for reasons of individual rights and legitimate public interests?’<sup>10</sup>

Marriage and religion are alike and should be treated as such by the state. These analogies rely on intuitions we have on the wrongness of religious establishment and assume both that religious establishment is wrong, and that as a result, marital establishment is too.

The claim contains three possibilities:

- (a) Marital and religious establishment are wrong because all forms of establishment are wrong

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<sup>6</sup> Metz op. cit, p. 11.

<sup>7</sup> Metz op. cit, p. 120.

<sup>8</sup> Baltzly op. cit, p. 61.

<sup>9</sup> Baltzly op. cit, p. 62.

<sup>10</sup> March op. cit, pp. 2-3.

- (b) Marital establishment is a form of religious establishment, which is wrong, therefore marital establishment is wrong
- (c) Marital and religious establishment are distinct and separate things, which are both wrong because they share a wrong-making feature found in both religion and marriage

I will now explore each of these possibilities in turn.

### 3 Is Establishment Itself Wrongful?

According to libertarians, the state should be as minimal as possible, that is, it should restrict itself to the bare minimum of functions, concerning itself with securing property and protecting basic liberties. The state should leave society as untouched as possible, providing the broadest possible range of freedom from state interference. The state should not incorporate any social institution into its folds by establishing it, thereby extending its influence beyond its proper limits.<sup>11</sup> As far as possible, any services beyond the provision of basic rights and protections should be delivered privately. Libertarians, then, subscribe to an *absolute prohibition* view with regards to the establishment of institutions.

Even if we take the libertarian position, this does not necessarily condemn the establishment of social institutions. Imagine that the set of rights protected by the minimal state already exists informally in the ethical principles and practices of a social group. In protecting and enshrining these rights, the state could be seen to be (although it might not perceive itself as) establishing an existing social institution by formalising these rights into law. If law, or pre-legal moral codes are classified as institutions, even libertarians may not be able to avoid establishment. Indeed, Nozick's account of how a dominant protective agency becomes a minimal state could be described as the establishment of a single social institution, albeit unintentionally.<sup>12</sup> Whether these characterisations can be accepted as fair descriptions depends upon our accounts of what an institution is and what kinds of institutions can be established.

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<sup>11</sup> See for example: Robert Nozick, *Anarchy, State, and Utopia* (Malden, MA: Blackwell, 2012); p. 149 - 'The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights'.

<sup>12</sup> Nozick op. cit., Chapter 2.

The liberal disestablishmentarians who critique marriage aren't committed to libertarian principles: they endorse liberal egalitarianism. On this model state action is not always regarded with suspicion and castigated as 'interference' – instead, the state is seen as having an enabling function. Under its purview of protecting rights and liberties, the state guarantees the fair value of liberties by ensuring that persons have adequate resources and opportunities provided to them to exercise these rights and liberties. This will involve the state in providing a wide range of goods – including education, healthcare, a free media – which might require that pre-existent social institutions be established.<sup>13</sup>

Rather than adopting an absolute prohibition view, liberal egalitarians should instead adopt a *threshold* view. On this view, establishment is not intrinsically and absolutely wrongful, but *pro tanto* wrong, such that we should set a high threshold for the justification of establishment. This threshold is higher than the one set for ordinary coercive state action (which is also *pro tanto* wrong), since in establishment the state enters into a relationship with citizens through familiar and perhaps acculturated forms rather than through external and purely political laws and policies. On the threshold view, it may be possible to justify the establishment of some institutions, but not others, if the threshold of justification is met.

So what is wrong with establishment, if the state is likely to have some such involvement in social institutions? It turns out that even non-libertarians have good reason to be worried about establishment. Whenever the state assumes the relationship of establishment with an institution, a collection of liberal values are threatened. According to Metz, both marital and religious establishment violate these values. To name a few transgressions, marital establishment: violates liberal neutrality with respect to the good life; treats relationships unequally; restricts freedom of marital expression; threatens marriage; homogenizes marriage; threatens political stability; and inefficiently protects the goods (intimate caregiving) secured by the institution (and other functional alternatives).<sup>14</sup> Religious establishment can be seen as just as problematic: it also violates liberal neutrality with respect to the good life; treats religions unequally; restricts freedom of religious expression; threatens religion; homogenizes religion; threatens political

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<sup>13</sup> In Chapter 7, I argue that the large, interventionist state that social justice requires will inevitably end up establishing institutions and practices – and that it is important to be able to identify cases where this is permissible, and cases where the threshold of justification is not met.

<sup>14</sup> Metz op. cit. pp. 6, 7, 115, 119, 124, 127-128, 135-136, 141, 143.

stability; and inefficiently protects the goods (e.g. conscientious commitment) secured by the institution (and other functional alternatives). Thus, the role the state takes on with regards to the social institution is problematic, raising two main concerns. Establishment obscures the boundaries between the state and the institution, so that the combination of the two becomes problematic. One, or the other, or both, end up operating in an area of competence that they are not qualified to operate in, and this lack of appropriate expertise or authority results in the corruption of both. One or both overextend their jurisdiction beyond its proper bounds. This is the jurisdictional concern with establishment, which threatens liberal freedoms, legitimacy, and stability, to name a few values. A further problem with establishment is the non-neutrality it entails. Under religious establishment the state favours one religion over others, or religion generally over nonreligion. What this amounts to is the endorsement of a conception of the good that many reasonable citizens do not share. The state's lack of neutrality is sectarian, and violates liberal freedoms, equality, and stability.<sup>15</sup>

Any form of establishment that is to be justified needs to allay these concerns regarding jurisdiction and non-neutrality, thereby meeting the threshold required. To assess whether and how this threshold is met, we need to turn from the combination of the state and social institution to the social institution itself. To determine whether the jurisdictional concern is valid, we need to know if the institution is one that the state has legitimate authority over, and also what kind of expertise the state is assuming in administering the institution. To evaluate the significance of the non-neutrality concern, we need to know more about the nature of the good that inheres in the institution, that the state is thereby being non-neutral about. Since it is the case that the state cannot be neutral about all goods, and should not be neutral about the goods required by justice, it might be that the non-neutrality resulting from the establishment of some institutions is of little concern. Hence, the wrongness of establishment must inhere in the nature of the social institution being established.

#### 4 Is Marital Establishment a Form of Religious Establishment?

As we have seen, it seems that liberals should be worried about both marital and religious establishment. However, recent work on religious establishment has disputed whether

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<sup>15</sup> I thank Cécile Laborde for helping me to delineate these two concerns more clearly.

and in what ways both purely symbolic and modest forms of religious establishment can be considered as wrong on politically liberal grounds.<sup>16</sup> Paradoxically, this work shows that although it is claimed that religious establishment violates principles of political liberalism by entailing state endorsement of a particular comprehensive (religious) doctrine, one needs to go beyond political liberalism to more comprehensive liberal or republican doctrines in order to effectively capture what is wrong with it. It is important to note that if some forms of religious establishment can be compatible with liberalism, some forms of marital establishment might be too: so that even if marriage is shown to be religious, this might not fully condemn its establishment.

It is obvious that religion is ‘deeply embedded in the conventions of marriage and family formation.’<sup>17</sup> The question I want to consider here is whether this embeddedness is a necessary feature of marriage, and, relatedly, whether a liberal state that adheres to principles of secularism or separation of church and state can establish marriage without violating these principles. In what follows I will consider two arguments, one conceptual, and one empirical, about the necessary connection between marriage and religion.

#### 4.1 The Conceptual Argument

The conceptual argument makes the claim that marriage is, by definition religious. Just as some opponents of same-sex marriage argue that marriage just *is* a relation between a man and a woman, so that to include same-sex couples within its remit would be a category mistake, the claim can be made that marriage just *is* religious, by virtue of its nature as a concept. As a result, any attempt to establish marriage is simultaneously one to establish religion.

This argument is rarely made in an explicit form, but it seems to be working implicitly behind some of the arguments made by disestablishmentarians. Thus, when Baltzly

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<sup>16</sup> Daniel Brudney, ‘On Noncoercive Establishment’, *Political Theory* 33, 6 (2005): 812–39; Cécile Laborde, ‘Political Liberalism and Religion: On Separation and Establishment’, *Journal of Political Philosophy* 21, 1 (2013): 67–86; Sune Laegaard, ‘What’s the Problem with Symbolic Religious Establishment? The Alienation and Symbolic Equality Accounts’, in Cécile Laborde and Aurélia Bardon (eds.) *Religion in Liberal Political Philosophy* (Oxford: Oxford University Press, 2017): 118–131; Simon Căbulea May, ‘Democratic legitimacy, legal expressivism, and religious establishment’, *Critical Review of International Social and Political Philosophy* 15, 2 (2012): 219–38; Cécile Laborde, *Liberalism’s Religion* (Cambridge, MA: Harvard University Press, 2017).

<sup>17</sup> Bryan S. Turner, *The Religious and the Political: A Comparative Sociology of Religion* (Cambridge: Cambridge University Press, 2013); p. 102.

argues that the establishment of marriage is as absurd as state administration of other sacraments, he is trading on the assumption that marriage is a sacrament – a particular (Catholic) religious interpretation of marriage that is hugely controversial, necessarily religious (the OED definition being ‘a ceremony regarded as imparting spiritual grace’) but which is by no means the only conceptual possibility.<sup>18</sup> Equally, when Metz compares the disestablishment of marriage to the disestablishment of bar mitzvahs, she is hoping that we will conflate our religious understanding of the latter, as the ceremony through which Jewish boys are considered to be responsible for their own actions and therefore subject to the holy commandments, with a religious interpretation of the former. Leaving aside the question of whether secular bar mitzvahs are possible, a civil wedding ceremony between two atheists is unlikely to be anything like as religious as a bar mitzvah. At the very least, it should be conceded that at least some marriages are not religious in kind.

Some religious thinkers insist that marriage is religious. More specifically, what is claimed is that from some perspectives, or in regards to some conceptions, marriage must be religious. Thus, following Pope Leo XIII, some Christian thinkers claim that ‘marriage for Christian jurisprudence is an essentially sacred and religious act’.<sup>19</sup> Daniel Crane argues for the following specific interpretation of marriage: ‘marriage is the province of religious communities, and not the state, and empowering the state to define marriage uniformly not only profanes a holy institution but threatens the ultimate autonomy and authority of religious communities with respect to marriage.’<sup>20</sup> Crane argues against centralized attempts to constitutionalize the definition of marriage, like the US Defense of Marriage Act (DOMA), since the Judeo-Christian theological tradition points away from state intervention in the institution of marriage.<sup>21</sup> Instead, marriage should be privatized so that religious groups, including Christian churches, can exercise greater control over its definition. That way the church can take on its essential role as a mediating institution in regulating matrimonial relationships, and religious communities can be actively involved in blessing, defining, nurturing, structuring, and regulating

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<sup>18</sup> Baltzly, op. cit., pp. 61, 62.

<sup>19</sup> Quoted in Daniel A. Crane, ‘A “Judeo-Christian” Argument for Privatizing Marriage’, *Cardozo Law Review* 27, 3 (2006): 1221–59; p. 1233.

<sup>20</sup> Crane op. cit; p. 1222.

<sup>21</sup> Crane op. cit; p. 1221.

marriage.<sup>22</sup>

Like Metz and Baltzly, Crane asks us to imagine a proposed constitutional amendment that specifies how communion or baptism be carried out as sacraments alongside marriage (that is, ‘a mysterious means of dispensing God’s grace to believers’). Such a thought leads to an ‘aversion to state control over marriage and insistence that the church, not the state, defines, sanctions, and regulates Christian marriage.’ He posits that this contrast goes to jolt us out of the accustomed way in which we think of marriage as civilly ordained.<sup>23</sup>

Against Crane, we should understand the civil marriage established by the liberal state as sufficiently *thin* to be combined with a wide range of religious and non-religious conceptions.<sup>24</sup> Most importantly, the establishment of civil marriage does not necessarily involve the state in making an inappropriate interpretation of religious sacrament because a civil conception of marriage is possible. Civil marriage does not preclude and is not incompatible with the Catholic interpretation of marriage as a sacrament, such that Catholics could not enter into legally binding marriages without defying their specific religious interpretation of marriage. For instance, although civil marriage includes the option of (or the right to) divorce, Catholics need not make use of the right, just as the liberal state does not instruct Catholics to use contraception or abortion when it legalizes access to it. As we shall later see, arguments that posit the contamination of marriage for all religious believers once the civil category includes and is therefore associated with same-sex marriage derive from a heretofore comfortable coincidence of civil and religious interpretations of marriage, that has rightly been upset by the drive to render civil marriage thinner or more inclusive. This expansion of marriage doesn’t make it incompatible with heteronormative interpretations of marriage like those found in Catholicism, although being associated with this greater inclusivity may be uncomfortable.<sup>25</sup>

Simon Cabulea May offers a challenge to the conceptual argument along the same lines, by arguing that marriage ‘is not a presumptively doctrinal cultural practice’.

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<sup>22</sup> Crane op. cit; p. 1259.

<sup>23</sup> Crane op. cit; pp. 1229-1230.

<sup>24</sup> The thinness of civil marriage will only be partially defended here – I maintain its thinness against Brake’s charges of amatonormativity in Chapter 5.

<sup>25</sup> To be sure, civil marriage is incompatible with or rejects certain practices – it draws the limit at child marriage, for example.

Presumptively doctrinal practices are those that are governed by the following social norm: ‘to participate in the practice in good faith, an individual must endorse a particular doctrine or, at least, some range of its tenets.’ Marriage is not like this, as there is ‘no social norm that newlyweds must also endorse the matrimonial ideal’, i.e. to ‘adopt the philosophical view that marriage is an ultimately superior form of relationship’. Although some may marry because they embrace this conception of the good life, others may marry for convenience, out of tradition, or in order to follow convention. This range of meanings of is a matter of contingent sociological fact (it has been, and could have been otherwise), but nevertheless it is a fact that marriage has become more like other non-religious practices ‘like soccer, and unlike pilgrimage, in being open to all people, whatever their conception of the good life happens to be.’ Metz’s analogy with baptism does not work, because ‘[a]theists cannot sincerely baptize their children, they can only dunk them in water. Thus, if the state were to promote pilgrimage or baptism, even on entirely instrumental grounds, it would thereby promote either belief in the religious doctrine or bad faith participation in the activity.’<sup>26</sup>

I wish to go further than May on this point. Currently marriage is sufficiently thin to incorporate both religious and secular interpretations, this thinness means that the meaning of marriage is underdetermined, leaving substantial space for the participants in the practice themselves to fill in the meaning. The meaning of marriage is currently thinner than that of baptism, and marriage is also practiced more generally, so it has become the canvas for a range of meanings. Metz wants the comparison between baptism and marriage to highlight ‘distinctions between action and thought, behaviour and belief, and material and meaning’ that show the impropriety of the state compelling or dictating any specific content regarding the latter. The state may compel certain actions or behaviours (infant washing) that are similar to actions motivated by religious beliefs (baptism), but it cannot compel such actions using the religious motivation as justification. Although historically, this may have been an element of what the state was doing when it instituted marriage, it is not plausible to claim that this is still the case. In establishing marriage, the state often delegates some authority to religious bodies to conduct marriages on its behalf, but it also administers its own form of civil marriage. It is an open question whether this type of marriage is or can be purely secular, but it certainly is not purely religious.

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<sup>26</sup> Simon Cabulea May, ‘Liberal Neutrality and Civil Marriage,’ in Elizabeth Brake (ed.) *After Marriage: Rethinking Marital Relationships* (New York: Oxford University Press, 2016): 9-27; pp. 25-26.

Although the conceptual connection with religion is tighter in baptism, that does not mean that baptism is essentially religious and non-secular. If the state established baptism, rather than seeing this as a form of de facto religious establishment, we could see the move as changing the meaning of baptism, or inviting other interpretations of the meaning. For example, the state, knowing the value that many of its citizens place upon baptism, might introduce weekly, compulsory infant washings, referred to as baptisms and accompanied with the uttering of religious verses, in order to best reach its public health goal of encouraging hygiene. The behaviour and beliefs of Christian citizens may cohere completely here, but for other citizens who do not value baptism, they may only go along with the ritual because they recognise the public health benefits. They may even press the state to introduce a civil version of the ritual with purely secular utterances, which some may invest with great meaning, and others may ignore all of the ceremony and symbols and just engage with the practical act of washing. The point here is that an established version of baptism could change its meaning to make it a more civil, purely secular institution.<sup>27</sup>

It isn't conceptually implausible that baptism could become a secular practice, a kind of ritualistic baby-washing. If that is the case, then it is certainly plausible that civil marriage can be as secular as baby-washing, with no necessary religious content. If the conceptual connection between religion and baptism is not watertight, neither is the connection between religion and marriage, given that marriage has many current non-religious and secular interpretations. Certainly secular baptisms would face an objection on grounds of authenticity - baptism as just described would simply not be baptism. The practice involving baby-washing would have moved so far from its original, doctrinal meaning, that it would make no sense to refer to it as baptism anymore. This objection would point to various elements that should be considered essential parts of baptism, such as the use of holy water, the involvement of a church, the inclusion of particular religious utterances referencing God and Christ, and the intention to enter into the Christian faith. Any non-religious versions of this ritual that sprang up would simply be poor mimicry, going through the motions, inauthentic copies. True baptism would remain distinct from

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<sup>27</sup> Secularizing such an institution would of course not be without its problems. One question raised by this development would be: assuming that this was now a fully secular institution, what would this institution be expressing to those excluded by it such as those who want to wash their babies without the ritual, those who do not want to wash their babies, and those who do not have babies?

this pretended version. These objections would certainly be made, and they mirror the objections made by religious advocates of traditional marriage, and the culturally attuned intuition explored in Chapter 3. Baptism would become a site of much contestation over meaning much like marriage has been throughout history. Yet arguments regarding authenticity will only succeed if it can be shown that the secular version of baptism cannot be observed in the actual lived practice of baptism, the authentic behaviour of some participants. If there are some secular versions of the practice being practiced, then baptism cannot be wholly religious, although it may mainly be. The point of this argument has been to explore and reflect on the conceptual possibilities of the partially and overwhelmingly religious practices, marriage and baptism respectively. The line between civil interests and matters of the soul is not conceptually fixed, rather it is set and reset in a complex interplay between religion, state, and citizens.

We should reject the conceptual argument because it misinterprets the liberal use of the concept of marriage. Following Walter Gallie, we should see marriage, like other essentially contested concepts, as having many conceptions that operate under its term, as the plurality of religious and secular conceptions of marriage at work in the world attests.<sup>28</sup> Many theological accounts of marriage claim that marriage was created by God, for a specific and immutable purpose, and must not be altered by secular culture. On these accounts, marriage is treated as if it were a natural kind, with a set of essential and constant properties. Yet, the liberal state does not need to treat marriage like this – indeed, it should not if it is to avoid establishing a theological notion that can be reasonably rejected by non-believers. The liberal state must eschew theological conceptions of marriage in favour of thinner, more agnostic conceptions of marriage. This general conception can cover and be compatible with a variety of more specific conceptions: Catholic sacrament, covenant, temporary, and even polygamous marriages – all practices that share enough of a family resemblance to be part of the categorical set, and fit within liberal limits (e.g. excluding child marriage and forced marriage).<sup>29</sup> Liberalism therefore interprets a number of marital practices as having the value it sees in marriage, and establishes a conception of marriage that captures that value.<sup>30</sup>

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<sup>28</sup> W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1955): 167-198.

<sup>29</sup> The question of whether polygamy fits within liberal limits is considered in Chapters 2 and 6.

<sup>30</sup> For the idea that the law does not need to capture the full value of an institution, see George Letsas, 'The Irrelevance of Religion to Law', in Cécile Laborde and Aurélie Bardón, (eds.) *Religion in Liberal Political Philosophy* (Oxford: Oxford University Press, 2017): 44-53; Cécile Laborde, *Liberalism's Religion*, p. 31. The thinness and agnosticism of this position is consistent with my own, but the broadening of values to

## 4.2 The Empirical Argument

The empirical argument claims that marriage has historically been intertwined with marriage, and since this connection remains, many forms of marital establishment are indeed religious. Thus, although a secular conception of marriage may be analytically possible, as yet it has not been realised in law.

Charles Reid Jr. makes this kind of argument by tracing the invocations of divine law made in the US Supreme Court rulings on marriage in multiple states over the past two centuries.<sup>31</sup> He argues that it seems anomalous that secular courts would apply ‘categories of thought given shape and substance by centuries of thought of ecclesiastical canons and courts’.<sup>32</sup> As a result, the US, in the 19<sup>th</sup> century, was governed by a Protestant establishment, whose presence was felt *de facto* if not always *de jure*.<sup>33</sup> Reid Jr. then goes further claiming that there is religious significance in the marital acts of every society. He quotes Bronisław Malinowski: ‘Marriage is regarded in all human societies as a sacrament, that is, as a sacred transaction establishing a relationship of the highest value to man and woman. In treating a vow or an agreement as a sacrament, society mobilises all its forces to cement a stable union.’<sup>34</sup> Reid Jr. thus suggests that it is an anthropological fact that marriage is religious, and attempts to desacralize it will likely fail.<sup>35</sup> Before I challenge this argument, let us consider further the interconnection between religion and marriage, in order to help us to reflect on whether a divorce is indeed possible.

The mutual imbrication of marriage and religion can be seen quite clearly when we consider the state’s treatment of polygamy, and the investigation of Kody Brown in particular. Brown is an adherent to the Apostolic United Brethren (AUB), a splinter group from the Mormon (LDS) church that retains the belief that salvation can only be

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include potentially non-liberal, internal values required by practice-dependence approaches means that my argument part ways to some extent from this more Dworkinian position. See also Chapter 3, for more on non-liberal value, internal value, and the range of possible values practice-dependence can recognize. Although ‘not all values can, or indeed should, be expressed by the law’ (Laborde, p. 31), establishment complicates the picture by extending the state’s relationship with an institution beyond that of the mere governing by law.

<sup>31</sup> Charles J. Reid Jr., ‘Marriage: Its Relationship to Religion, Law, and the State’ in D. Laycock, A. R. Picarello and R. F. Wilson (eds.) *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Lanham: Rowman & Littlefield, 2008): 157-188; pp. 165-166.

<sup>32</sup> Reid Jr. op. cit; p. 162.

<sup>33</sup> Reid Jr. op. cit; p. 181.

<sup>34</sup> Reid Jr. op. cit; p. 178.

<sup>35</sup> Reid Jr. op. cit; p. 186.

attained through the practice of polygamy or “celestial marriage”, a tenet that the latter church now rejects. Brown has 4 wives and 18 children, and was fairly open about his marital arrangements, which were known to the Utah authorities. However, on appearing in the US reality TV show *Sister Wives*, the state began investigating the family, with a view to prosecuting Brown for bigamy. The Browns raised a legal complaint through their lawyers, which appealed to a number of grounds, one of which was that any prosecution would seem to violate the US Free Exercise and Establishment Clauses. Kody Brown was only legally married to his first wife, Meri, and was only subsequently “spiritually married” to his further three wives. Presuming that adults are allowed to live openly in polyamorous intimate relationships so long as they do not attempt to obtain multiple marriage licenses, the Browns had not broken the law. The legal complaint therefore pointed to the fact that the Browns faced prosecution ‘solely because they call themselves a family in the eyes of their church’, despite the fact that they had not sought official recognition of their plural family. The law thus treated similarly situated persons differently on the basis of religious distinctions. As such, monogamists may have and bear children with an infinite number of sexual partners and avoid prosecution so long as they do not refer to these relationships as further marital unions. The law thus ‘imposes majoritarian religious beliefs concerning private unions on minority groups like polygamists.’ This codifies Judeo-Christian accounts of marriage over those of the AUB, and some Muslims and other minority religious groups.<sup>36</sup>

The connection between religion and marriage is quite clear in the case of polygamy, but as Mary Ann Case argues, the visibility of religion in marital establishment will vary according to our perspective. She begins with the ‘paradox that the United States, with a much greater commitment to separation of church and state, conflates civil and religious marriage to a far greater extent than some continental European countries in which church- state cooperation is constitutionally secured.’ Thus, whilst in Germany only civil marriage has the force of law and religious ceremonies have no legal effect, in the US members of the clergy are authorized as agents of the state to ‘simultaneously and seamlessly’ perform a ceremony of religious and civil marriage.<sup>37</sup> This may mean that

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<sup>36</sup> Quotes are from Jonathan Turley and Adam Alba, *Complaint for Declaratory, Injunctive, and Other Relief, in Brown v. Buhman*: 1–39. <<http://lawprofessors.typepad.com/files/brown-complaint.pdf>> [accessed 27 January 2016].

<sup>37</sup> Mary Anne Case, ‘Marriage Licenses’, *Minnesota Law Review* 89, 6 (2004): 1758–97; pp. 1793–4; see also Mary Ann Case, ‘Why Evangelical Protestants are Right When They Say that State Recognition of Same-

marriage is, or appears to be, more religious in certain states than in others, due to the legal traditions at work there.

These legal traditions also work to affect the conceptions of marriage that citizens living under them can accept. We know that religiosity has a statistically significant role in attitudes towards same-sex and interracial marriage, with highly religious individuals more likely to oppose both.<sup>38</sup> But the religious aspects of a legal heritage can also influence attitudes. Case explains the relative willingness of New England states to endorse same-sex unions by pointing to the model of marriage inherited by these states from Dutch Puritan settlers, wherein marriage was predominantly a civil contract solemnized by a civil magistrate, such that clerical involvement with marriage followed later and was never so well established.<sup>39</sup> By contrast, the legal tradition inherited from England by much of the rest of the US, especially the Southern states, was that influenced by Lord Hardwicke's Act of 1753, under which state control over marriage was exercised through the established church of England – hence, in these states, civil marriages were performed by members of the clergy.<sup>40</sup>

Case thus postulates that the gap between civil and religious marriage varies by religion or denomination, so that marital establishment is perceived differently from different perspectives. Thus, from the point of view of Catholics and Jews, civil marriage is quite obviously distinct from the religious versions practiced in their faiths: as noted above, the conception of civil marriage established by the state does not establish Catholic sacramental marriage. Devout Catholics are aware that legally they are able to end their marriage by way of divorce, nevertheless, they consider themselves as prohibited from doing so, and must seek a more difficult to obtain annulment if they wish to end their marriage. Likewise, an observant Orthodox Jewish woman will not consider herself to be divorced in the eyes of her faith until her husband has issued a *get*, even though the couple may already be divorced under civil law. By contrast, 'Protestant denominations in the United States have essentially abdicated the definition, creation and, above all the

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Sex Marriages Threatens Their Marriages and What the Law Should Do About It' (University of Chicago, 2008) <<http://www.law.uchicago.edu/node/57>> [accessed 27 January 2016].

<sup>38</sup> Donald P. Haider-Markel and Mark R. Joslyn, 'Attributions and the Regulation of Marriage: Considering the Parallels', *PS: Political Science and Politics* 38 (2005): 233–9; p. 236.

<sup>39</sup> Case op. cit; pp. 1794–5. She also suggests that this may explain why the Netherlands was one of the first states to offer both registered partnerships (1998) and same-sex marriage (2001) for gay couples.

<sup>40</sup> Mary Anne Case op. cit.; p. 1794

dissolution of marriage to the state.<sup>41</sup> As such, there is little if any gap to perceive between the (Protestant) religious and civil concepts of marriage in the US, as the two are so closely aligned. Case argues that this explains both why opposition to same-sex marriage is greatest amongst evangelical Protestants, even when conservative Catholics and Jews shared their opposition to homosexuality; and why same-sex marriage is more strongly characterized by evangelical Protestants as a threat to both the ‘institution of marriage’ and their own marriages, since they perceive their religious conception of marriage to be identical to the civil one. The heretofore heavily Protestant nature of marital law has spared members of this faith the everyday cognitive dissonance required by other believers when faced with two versions of marriage that exist in tension.

Thus, marital establishment is a form of religious establishment, but one that is difficult to detect from the majority perspective of the Protestant, until ‘that ownership is challenged and taken away’, as same-sex marriage threatens to do.<sup>42</sup> What we see then in the legalisation of same-sex marriage is the progressive disestablishment of religious marriage, and the further entrenchment of a civil alternative. Case points to a similar dynamic that operates in the sphere of education: the overwhelmingly Protestant bias of public schools led Catholics and Jews to develop their own private faith schools; yet the sectarian nature of the purportedly secular institution is only revealed when further attempts to secularize education (for example, by ruling in the teaching of Darwinian evolutionary theory and ruling out the teaching of creationism) is met with much resistance from evangelicals who until now have benefited greatly from the ‘capture’ and ‘ownership’ of the institution by the Protestant faith.<sup>43</sup>

What the empirical argument shows is not the necessity of religion in marriage, as Reid Jr. argues, but rather the contingent relation between marriage and religion. In different states, the connection between the two varies. As we have seen, in the US, although there is, in law, no religious establishment, the marital establishment found there is partly religious: for example, members of religious clergy can act as celebrants for civil weddings. The UK, by contrast, has an established church, but has a strict division between religious and civil weddings, so that civil weddings may make no reference to God or any related sacred notions. However, the Anglican establishment has a special relationship with marriage in law as the Church of England is the only religious group

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<sup>41</sup> Case op. cit; p. 1795.

<sup>42</sup> Mary Ann Case op. cit; p. 6.

<sup>43</sup> Mary Anne Case op. cit.; p. 1796

that is legally prohibited from conducting same-sex marriages. As noted earlier, Germany, despite its religious establishment, only recognizes civil marriages in law, as does France, under *laïcité*. Thus, two states with contrasting approaches to religious establishment maintain a similar separation between civil and religious marriage that aims to give the latter no legal form. Marriage law can thus be written with no reference to religion. The polygamy case shows clearly that in the US (and many other states, including perhaps even Germany and France) marital and religious establishment go together in fact. Nevertheless, this does not mean that it is not possible in principle to remove religious elements from marital establishment through, for example, a review of the laws regarding polygamy, requiring that the law be justified on purely secular grounds, if required, or removed altogether.

There is nothing necessarily religious about marriage, as these variations show. It is true that because of the historical dominance of religious versions of marriage, the conventional view of marriage is a religious one – many hold that the legitimacy of marriage derives not from the state but from the sanction of religious communities.<sup>44</sup> Nevertheless, unless we are also to claim that there is something in the concept of marriage that is religious (as in the conceptual argument in the previous section) we must accept that the past does not fully determine the present, or for that matter, the future. To do so would be to commit the genetic fallacy, assuming that the religious origin of marriage somehow taints its current or future existence; presuming that those who continue to participate in the tradition of marriage intend to endorse its religious aspects. Indeed the relationship between religion and marriage has been highly complex and points in various directions. For instance, some argue that religion itself has had a more than incidental role in the historical development of the institution of civil marriage – as the Protestant rejection of the sacramental nature of marriage may have paved the way for the establishment of marriage as a secular, legal institution.<sup>45</sup>

Nevertheless, the history of an institution can concern us in the present. Even if we grant that civil marriage is no longer religious, our contemporary understanding of the practice might have been unduly shaped by history. The historically religious meaning of marriage may have contemporary significance in certain contexts, so that we have symbolic reasons for insisting on the impermissibility of marital establishment. For instance, in her

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<sup>44</sup> Crane *op. cit.*; p. 1222.

<sup>45</sup> Crane *op. cit.*; p. 1223.

account of when discrimination is wrong, Deborah Hellman argues that whether drawing a distinction between persons is demeaning (wrongful) depends to some extent on the conventional and social meanings created by a history of mistreatment or current social disadvantage, which make certain discriminatory practices more symbolically loaded or stigmatizing than others.<sup>46</sup> As such, history may make certain things intolerable and other things permissible. If marriage has been traditionally seen as an emblem of religion or religious ideas, the symbolic meaning of marriage may indicate that marital establishment will entail contempt or disregard for other religions or nonreligion, even after the marriage that is established is thoroughly secular.<sup>47</sup> However, I doubt the extent to which we can claim that such a symbolically religious form of marriage is truly secular in that particular context. Nevertheless, I argue that in modern liberal societies the religious significance of marriage is so diminished that a secular conception of marriage is possible.<sup>48</sup>

What does Reid Jr. mean when he says that it is an anthropological fact that marriage is religious? Attributing an anthropological quality to human behaviour implies that the behaviour is deeply rooted and universal. If behaviour is found to be empirically universal through historical and anthropological studies, does this mean that the behaviour is necessary, in a conceptual sense? Anthropologists themselves caution against attributing human necessity to practices that are almost always momentary human solutions. Calling the religiosity of marriage an anthropological fact serves to naturalise a legal and social arrangement that can be humanly altered.<sup>49</sup>

Assessing how religious marriage is in the end requires consideration of the conception of religion at work. There are at least three meanings that religious might have in the context of this discussion. The first, a narrow meaning, refers simply to the presence of a world religion, and gives an account of the involvement of a specific and discrete religion with the institution of marriage. Thus, Case's account of the Protestantism present in the US version of civil marriage makes use of this sense of religious. Secondly, religious can

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<sup>46</sup> Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard Univ. Press, 2011); pp. 7-8, 14-15, 21-22, 26, 28, 32). I thank Matthew Clayton for pointing this work out to me. See Chapter 5 for further discussion with regards to Hellman's account of wrongful discrimination.

<sup>47</sup> This kind of argument is made by Dworkin regarding the tolerability of deviations from the equal vote in the US historical context. I thank Matthew Clayton for making me aware of it. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000); pp. 200-201.

<sup>48</sup> For further discussion regarding marriage, history, and taint, see Chapter 3.

<sup>49</sup> Lawrence Rosen, 'Anthropological Perspectives on the Abolition of Marriage', in Anita Bernstein, (ed.) *Marriage Proposals: Questioning a Legal Status* (New York: New York University Press, 2006): 147-170.

have a broader meaning, referring to religion as a conception of the good. Here, a general, religious account of the nature of the good may be embroiled with civil marriage, for example, a notion of marriage as eternal, or of marriage as the only legitimate setting for sex and procreation, which could influence further laws regarding divorce or adoption. This kind of generic religious account of the good of marriage may explain the commitment of many states to monogamous marriage only, and the privileging of marriage over other kinds of relationship in the distribution of legal and material benefits. Finally, religious could be used in a universal or anthropological sense, to attribute a religion-like ‘sacredness’ found in many acts that involve a certain level of symbolic meaning. Here, the symbolic value of the conferral of marital status makes all civil marriage religious.<sup>50</sup>

Which conception of the religious is problematic from the perspective of justice? If religious establishment is wrongful, then the first narrow sense of religious can’t be present in the marriage established by the state. The establishment of Protestant marriage as Protestant marriage would amount to the state elevating or showing preference for one religion over another, ipso facto, religious establishment. However, the state could establish Protestant marriage as civil marriage and justify its establishment with non-religious, public reasons, if Protestant marriage were sufficiently thin to be compatible with a reasonable range of religious and non-religious conceptions of marriage, so that no real preference or elevation could be detected. The wrongfulness of the establishment of the narrow sense of religion requires that any established institution be secular, including secularised versions of religious institutions, if such secularization is possible. If the marriage that gets established is religious in the broad sense of general religious accounts of the good of marriage, the liberal concern may have little to do with its religiosity *per se*, since it will be difficult to pinpoint exactly which specific religions are privileged, and non-religious groups may also concur with the account established. The wrongfulness of such establishment has more to do with the fact that, however generalized and shared between different religions, what is established is a comprehensive conception of the good, and thus violates neutrality. What civil marriage needs to be, if it is to be justly established then, is neutral, or non-comprehensive, and so

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<sup>50</sup> I thank Cécile Laborde for encouraging me to think about religion in these three distinct senses.

not religious in this broad sense.<sup>51</sup> Finally, what should we make of established marriage if it is religious in the anthropological sense? If we want to attribute wrongfulness to marriage on the basis of this conception, we will have to condemn many other practices the state engages in too. Citizenship ceremonies, for example, in which foreign nationals are awarded full membership in the polity, often employ rituals with symbolic meaning which could be interpreted as ‘sacred’, as do political rallies and speeches. The anthropological sense of religious is too universal to be a meaningful form of critique.

*Contra* Reid Jr. then, marriage law can be secularized (this does not mean that this will be without consequence, some of which may be unforeseen). Disaggregating the religious from the secular licensing of marriage is both possible, and if the state is to remain as its administrator, desirable.<sup>52</sup> Certainly, the disentangling of the ‘religious, symbolic, kinship and economic functions of marriage’ is required for both ‘civil equality and the separation of church and state’.<sup>53</sup> In what follows, I begin to consider the non-neutral, comprehensive aspects of civil marriage, and continue to do so in Chapters 5 and 6.

## 5 What is the Shared Wrong-Making Feature of Marital and Religious Establishment?

If the above is correct, then marital establishment is not necessarily a form of religious establishment, in the narrow sense. If marital and religious establishment are to be treated as analogous then, this must be due to a similarity they share, rather than an identity between them. Here I consider some of the arguments made by Metz that attempt to capture their shared wrong-making feature.

Metz develops her account of the analogy of religious and marital establishment in Chapter 4 of her book, in which she argues that like religion, marriage is a formal, comprehensive social institution, or FCSI. To unpack what this means, we need to take each element in turn. First, marriage is a social institution, which means that it encapsulates a pattern of behaviour that exists prior to and outside of secular law, although it has since come to have a legal existence.<sup>54</sup> Its existence prior to its establishment is clear when we reflect that the state’s administration of marriage is by no

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<sup>51</sup> Of course, the use of the word religious is not particularly helpful, as it merely serves as a placeholder for both a more specific (clarifying which aspect of religion is problematic), and a more general (applying to many more things than just religion) idea, that is, conception of the good.

<sup>52</sup> Case op. cit; p. 1797.

<sup>53</sup> Lisa Duggan, ‘Holy Matrimony!’, *The Nation*, 2004: 16–18.

<sup>54</sup> Metz op. cit; p. 86.

means a necessary feature of marriage, and is a relatively recent arrangement – in the UK, it wasn't until 1753 that state power over marriage was centralised through 'An Act for the Better Preventing of Clandestine Marriage', popularly known as Lord Hardwicke's Act.<sup>55</sup> The practice of marriage can exist without the participants seeking the formal involvement of the state, as evidenced by the fact that in certain US states, "common law marriages" are still recognised in law.<sup>56</sup> Over the long view of history, there has been much fluidity in the bodies that have administered marriage, 'moving from custom to legal regulation to ecclesiastical regulation and back again.'<sup>57</sup> As we shall see, Metz makes it the purpose of her book to argue that not only is the state's relationship with marriage not necessary, but also that the "fit" between marriage and the state is less than ideal.<sup>58</sup>

When presenting marriage as a social institution, Metz describes it as 'prepolitical'. I would join Case in questioning how prepolitical marriage can be, since even prior to its establishment, marriage clearly had a political existence, much like most social institutions do. It would be perhaps more accurate to say that the practice of pair-bonding may have been prepolitical, but that anything as formalised and institutionalized as marriage cannot be.<sup>59</sup> It is hard, for example, to interpret marriage as outside of politics in the time of the Act of Supremacy. Thus, it would be more accurate to say that the institution of marriage pre-exists its own establishment, but that this pre-existence may still have been of political import. This would be true of all established institutions that were not created *de novo* by the act of establishment. This account of marriage as pre-existing still coheres with Metz's broader account of marriage as containing extralegal forces or powers, in other words, having a notable presence outside of or beyond the law.

The second feature of marriage is that it has a comprehensive purpose: 'it relies on and reproduces complex accounts of the connections between individual and community;

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<sup>55</sup> Rebecca Probert and Liam D'Arcy Brown, 'The impact of the Clandestine Marriages Act: three case-studies in conformity', *Continuity and Change* 23, 2 (2008): 309-330.

<sup>56</sup> Anita Bernstein, 'Introduction: Questioning Marriage' in A. Bernstein (ed.) *Marriage Proposals: Questioning a Legal Status* (New York: New York University Press, 2008): 1–25; p. 4.

<sup>57</sup> Joel A. Nichols, 'Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion', in Joel A. Nichols (ed.) *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (New York: Cambridge University Press, 2012): 11–59; p. 16.

<sup>58</sup> Metz *op. cit.*; p. 11.

<sup>59</sup> Mary Ann Case, 'Why Evangelical Protestants are Right When They Say that State Recognition of Same-Sex Marriages Threatens Their Marriages and What the Law Should Do About It' (University of Chicago, 2008) <<http://www.law.uchicago.edu/node/57>> [accessed 27 January 2016]; pp. 1-2.

public and private; belief and behavior; and sexual, social and political self-understanding.<sup>60</sup> In other words, its scope is broad and its impact on the lives of individuals deep. Metz's use of the word 'comprehensive' here is not accidental, she means to point towards the fact that marriage is rooted in a comprehensive moral or cultural doctrine, which the state, in establishing it, endorses.<sup>61</sup> Since Metz here makes use of Rawlsian terminology, it is worthwhile being specific: rather than being a fully comprehensive conception of the good life, which 'covers all recognized values and virtues within one rather precisely articulated system', marriage is partially comprehensive, that is, it 'comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated'.<sup>62</sup> Although marriage may form a part of a more fully comprehensive doctrine, taken by itself, it alone is partially comprehensive. To state the point more precisely then, marriage often has a comprehensive purpose when located within a broader comprehensive doctrine. The broad scope and deep impact Metz describes are contingent on the embedding of marriage within a wider, more complete comprehensive doctrine. As we have seen in the previous section, this embedding could occur in a both religious and non-religious comprehensive doctrines. In cases where this embedding does not occur, the scope and impact described by Metz might not be forthcoming.

Third, marriage requires the formal, that is, official, public recognition and regulation by an 'ethical authority'.<sup>63</sup> According to Metz, in assuming this role, the state mimics religious forms of authority and therefore oversteps its mark. Like religion, marriage alters actions by altering beliefs, and relies on a formal relationship between the individual and the communal authority, so that its commands are experienced as ethical, that is, freedom-guiding rather than freedom-limiting, in the way that the commands of the Pope are experienced as freedom-guiding by a Catholic.<sup>64</sup>

Metz states that 'the latter two features explain why I call this the (un)liberal concept of marriage.'<sup>65</sup> If we are to analyse the relationship between religious and marital establishment properly, we need to unpack this claim a bit further. First, it means that the

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<sup>60</sup> Metz op. cit; p. 86.

<sup>61</sup> Metz op. cit; p. 97.

<sup>62</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 13.

<sup>63</sup> Metz op. cit; pp. 86-87.

<sup>64</sup> Metz op. cit; pp. 87; 103.

<sup>65</sup> Metz op. cit; p. 87.

fact that marriage is a social institution does not make its establishment problematic for liberals. Other prepolitical or pre-existent social institutions might be incorporated into the state without concerning us, for example, education, morality, healthcare. Second, what makes the establishment of marriage and religion problematic (and potentially any other established social institution including those just mentioned) is a combination of their comprehensive purpose and their formal use of an ethical authority. Here some questions must be raised. Does Metz intend to suggest that these are two necessary but insufficient conditions for an unliberal form of establishment? Are there instances of establishment that are problematic for liberals but which don't meet one or both of these conditions? Is it possible that a social institution could be established, in such a way as to fulfill these two conditions, and yet not be declared "unliberal"? Furthermore, is marriage a FCSI, as described by Metz? If so, is the problem with the establishment of marriage fully captured by its status as a FCSI, without remainder? In what follows, I will explore some of these issues by offering answers to three broad questions.

### 5.1 Is Marriage Really an FCSI?

In her discussion of the problem of marriage as a FCSI, Metz compares marriage to family, domestic partnership, and caregiving in order to illustrate that it is much closer to religion in kind, since it 'assumes and instantiates a formal relationship between individual and community whereby the commands of the communal authority are experienced as *ethical*'.<sup>66</sup> Here I want to suggest some problems with this presentation of the case against marital establishment. Firstly, this argument could rest on a tautology – we could think that it is because marriage is established that it has a comprehensive purpose and relies on the recognition of an ethical authority. Here, it may help to imagine that one of Metz's distant cousins of marriage, family, was established, say, by state-run family units, each headed by specially trained state employees. In such a world, the family would satisfy the first concern of comprehensive purpose – indeed it achieves this without establishment. But once established, the family relies on the public recognition of an ethical authority in the form of the state – indeed without this formal state recognition as families, these units may lack meaning for their members. Prepolitical, "natural" families would not fade into the background and be replaced by units populated and regulated by the state without the authoritative ethical rendering of

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<sup>66</sup> Metz op. cit; p. 87.

the arrangement by the state. Yet in taking over the family, the state would not be introducing ethical authority where it didn't exist before. Rather, it would be replacing the ethical authority of parents and guardians, whose authority is experienced as ethical by their children, and its formal, public recognition would replace the informal, yet still public recognition of these parents. If the family, an informal, comprehensive social institution (ICSI), can become a FCSI on becoming established, then will marriage become an ICSI on disestablishment? Or, more importantly, as there are divergent conceptions of marriage in civil society, will some remain FCSIs and others become ICSIs?

What kind of an institution will marriage become on disestablishment? Metz's claim is that marriage in its pre-established form is an FCSI, that is, that its formal and comprehensive nature precede its establishment, and that is what makes its establishment problematic. Historically this seems about right: marriage formalizes the relationship between two people and between the couple and their community, indeed, in seeking to marry, couples are making their relationship 'official' in the eyes of their religion or the law. Equally, in the past, marriage was comprehensive, being the only way in which sexuality could be legitimately expressed, and more than just a personal relationship, being a means through which economic alliances between families were made.<sup>67</sup> Metz argues that it is the formal and comprehensive nature of marriage that makes it fit for disestablishment. Yet, is marriage still a FCSI in this way? On its disestablishment then, we assume that marriage will remain a FCSI, but is that the case? And, is marriage as formal and comprehensive as Metz thinks, even before its disestablishment?

One of Metz's concerns about the establishment of marriage is that the state has the tendency to "crowd out" other sources of authority, and that removing the state's involvement would 'create a "definitional vacuum" into which diverse cultural groups would carry their unique and complex definitions of marriage.' Metz illustrates how new secular forms of authority can so develop by citing the practice by which couples can personalize their wedding ceremonies by choosing a close friend or family member to be

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<sup>67</sup> Bryan S. Turner, *The Religious and the Political: A Comparative Sociology of Religion* (Cambridge: Cambridge University Press, 2013); p. 101.

ordained by the Universal Life Church, so that they can officiate at their wedding.<sup>68</sup> As such, Metz argues that on disestablishment couples can find their own ethical authorities, ‘capable of conferring effective constitutive recognition’, thereby formalizing their marriage on their own terms.<sup>69</sup> But it is not obvious why disestablishment is required to achieve this end, since the practice Metz describes has evolved heretofore under an established system.

What is interesting about this example is how the idea of formality can be understood by reference to it. By ordaining their friend or family member, these couples formalize the otherwise informal ethical authority of their immediate social circle, rather than using pre-existent formal sources of authority such as a church (priest) or the state (registrar). It therefore seems that couples can choose which ethical authority to employ in the recognition of their relationship, and the level of formality that ethical authority should have. Thus, couples who choose to marry in a church may understand the ethical authority that holds sway over them to be that of the relevant religion, regardless of the fact that they are likely to be entering into a marriage that is also civilly recognized – and ultimately, the state will be the authority that enforces the obligations and rights acquired in marriage. Likewise, in the case of the Universal Life Church, couples may focus on the ethical authority of the individual ordained for the sole purpose of their wedding, rather than that of the state, which still presides somewhere in a legally valid marriage. My point here is that a factual account of where the actual formal ethical authority resides, and a phenomenological account of where it is perceived to be might point to different sources. Although marriage does seem necessarily to be formal (even couples who want to be married by their friends go through the formality of getting them ordained; and couples ‘married’ by their friends without such formality are unlikely to be considered to be ‘really’ married), the source of the formality, although technically the state (for a marriage to be legally valid), need not be perceived to be the state. As such, Metz’s account of the way that established marriage utilizes the state as an ethical authority may not be as problematic as originally thought. Even though the state is the official force behind marriage, any state that allows citizens to enter into legally binding marriages through or alongside religious or other non-civil ceremonies remains neutral on the

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<sup>68</sup> See for example Rachel Lehmann-Haupt, ‘NOTICED; Need a Minister? How About Your Brother?’, *New York Times* January 12, 2003, available at: <http://www.nytimes.com/2003/01/12/style/noticed-need-a-minister-how-about-your-brother.html>.

<sup>69</sup> Metz op. cit; pp. 144-6.

ethical dynamics authorizing the marriage. A couple can quite coherently enter into a legally-valid marriage under what they perceive is God's authority, or, if they ask a friend to be ordained, their own.<sup>70</sup> For Metz's account of the ethical transformation enacted by marriage to be valid, we should not ignore the phenomenological account of marriage as experienced by the participants of the institution, which is likely to not always reference the state.

In what sense is marriage still a FCSI on disestablishment? Does the formality of disestablished marriage depend upon the formality of the authority instituting it? Are marriages entered into via a ceremony led by a vicar with content from the Common Book of Prayer more formal than those initiated by a friend reading idiosyncratic and self-penned vows? In other words, is the former more of a FCSI and the latter more of an ICSI? In the previous example of state-run family units, we considered the ethical authority of the family to be informal, with authority only becoming formalized when the state takes it over. But in Metz's account of religion and marriage as FCSIs, the state is not required for formality, as the formal nature inheres in the prepolitical, or pre-existent institution itself. To the extent that religions tend to be highly formalized, providing procedures and rules which all unions must respect before they can be considered valid, they appear to formalize marriage. To the extent that family members conduct wedding ceremonies at the behest of and to the design of individuals, they appear to informalise marriage. As such, although it is the case that historically marriage has been formal, whether under the authority of the religion or the state, the formality may not be completely necessary, and is reduced or optional under civil marriage. If formality and comprehensiveness are necessary conditions for the wrongness of establishment, is the wrongness in any way diminished if the level of formality and comprehensiveness is diminished?

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<sup>70</sup> There are of course many examples of 'unofficial' marriages which utilize non-state ethical authorities, but do not have the official backing of the state. These include the 'broom' weddings between African-American slaves in the pre-abolition south of the United States; the commitment ceremonies entered into by LGBT persons prior to, or in the continued absence of, legal same-sex marriage, (see Victoria Clarke, Carole Burgoyne, and Maree Burns, 'Unscripted and Improvised: Public and Private Celebrations of Same-Sex Relationships', *Journal of GLBT Family Studies* 9 (2013): 393-418; Beccy Shipman and Carol Smart, 'It's Made a Huge Difference': Recognition, Rights and the Personal Significance of Civil Partnership', *Sociological Research Online* 12, 1 (2007); and Krista B. McQueeney, 'The New Religious Rite: A Symbolic Interactionist Case Study of Lesbian Commitment Rituals', *Journal of Lesbian Studies* 7, 2 (2003): 49-70) and the unregistered religious marriages that make up an estimated 80% of marriages between Muslims in the UK (see Rajnaara C. Akhtar, 'Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights,' in Joanna Miles, Perveez Mody, and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015): 167-192.)

## 5.2 Can Other FCSIs be Established in a Way Consistent with Liberal Principles?

Here, I want to suggest that there are other FCSIs, like education, that have established status within liberalism, and which can be defended on liberal egalitarian grounds. If this is so, then there are a few potential implications for Metz's argument: either (1) if we can justify the establishment of the FCSI education, we may be able to justify the establishment of the FCSI marriage (and by implication religion); (2) if we cannot justify the establishment of marriage, this must be because either (a) marriage (and religion) are in some ways different to education, being FCSI+ that can't be established on liberal grounds or (b) education can be established on liberal grounds because it falls short of being a FCSI in the ways that marriage and religion are.

Metz states that '[t]he case for nonestablishment of religion was not a case for the state to get out of the business of education, social services, public health, or criminalizing that took place in the church.'<sup>71</sup> Does this mean that these other institutions are not FCSIs? If we take the example of education, we can point to many of the same features common to religion and marriage. Education is obviously a social institution: it existed in many forms prior to its establishment; in the UK state encroachment on the predominantly religious institution began with the 1870 Education Act which established school boards to provide elementary education to areas not already served by faith-based voluntary schools. As for comprehensiveness, education certainly relies on complex accounts of the connections between individuals and the community, particularly the pupils' future role within and responsibilities towards the community. It also attempts to connect the public with the private, aims to affect belief and behavior, and its broad curriculum coverage serves to alter sexuate, social and political self-understanding. Finally, education does require the formal, official, and public recognition of an "ethical authority". Here it is worth noting the alternative form of authority considered by Hegel – the public authority mustered by the state in its role as enforcer of contract. This is a limited role since the state's involvement is 'distant, legalistic, and neutral, present more often in its absence'.<sup>72</sup> Ethical authority, by contrast, is much more involved, and education leans much more in this direction. However practical or instrumental the education provided,

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<sup>71</sup> Metz op. cit; p. 150.

<sup>72</sup> Metz op. cit; p. 102.

teachers are qualified to be authorities on a subject, and, in order to confer meaningful qualifications and thereby status by the knowledge they impart, they must be considered as ethical authorities. In particular, the commands of teachers are believed to be freedom-guiding rather than freedom-limiting, opening up more opportunities the more they are respected. Pupils find their competencies recognized and confirmed at societal level, their achievement is publicly celebrated, and their initiation into wider society largely confirmed by their successes.

Thus, education appears to be an FCSI too. But, as we have seen, Metz is not committed to its disestablishment. This is not to say that the establishment of education is uncontroversial on liberal grounds. State involvement in education and, in particular, its compulsory nature, has been contested in many legal battles, and liberals have clashed over the outcomes of such cases.<sup>73</sup> Indeed, one of the key sites of conflict is the question of whether the ethical authority of parents and/or religious communities with regards to their children's education can be substituted by that of the state without transgressing on the liberties of parents (and, possibly, their children). Nevertheless, we may bracket the question of whether education can be established on liberal grounds and assume with Metz that it can be. Yet if we do this, we must account for the fact that religion and marriage are FCSIs that cannot be established, whilst education can. Either religion and marriage are FCSI+ and/or education is less than a FCSI. Since I have argued against the latter, we need an account of what the former could involve.

### 5.3 What's Wrong with Being an Ethical Authority?

Metz draws on Hegel to offer an account of the way that the state is used in marriage as an ethical authority. She contrasts the Hegelian account of the state's role with liberal accounts which reject an 'assumption of deep ideational homogeneity within and through the state', and thereby reject the state's role with respect to marriage.<sup>74</sup> Whilst I would agree that a 'deep ideational homogeneity' between citizens and the state would violate liberal principles, ultimately liberalism requires that there be some ideational

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<sup>73</sup> See, for example, the different positions taken regarding *Wisconsin v. Yoder*. Richard J. Arneson. and Ian Shapiro, 'Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*,' in I. Shapiro and R. Hardin, eds., *Political Order: NOMOS XXXVIII* (New York: New York University Press, 1996): 365-411; and Shelley Burt, 'In Defense of *Yoder*: Parental Authority and the Public Schools,' in I. Shapiro and R. Hardin (eds.) *Political Order: NOMOS XXXVIII* (New York: New York University Press, 1996): 412-437.

<sup>74</sup> Metz op. cit; p. 107.

homogeneity, that is, enough to both ensure liberal values are met and sustain liberalism over time. As such, an important task for liberals is to give an account of the extent of the homogeneity, however minimal, that is required. What many liberals overlook or deny, however, is quite the range of this homogeneity.

As we have seen, Metz argues that the establishment of marriage causes the state to overstep its legitimate reach by making it into an ethical authority. Yet with its commitment to certain basic liberties, the liberal state regularly acts as an ethical authority by taking a position on numerous ethical questions. For instance, liberals tend to characterize the state as pursuing neutrality of justification, that is, requiring that laws and policies can be publically justified by appeal to reasons shared across a plurality of comprehensive worldviews, without reference to the ethical or truth value of any particular position. However, this position does not entail neutrality of outcome, that is, the outcome of such a process does not absolve the state from taking an ethical position at all, rather, it merely dictates that the position adopted is justified on neutral grounds.<sup>75</sup> Thus, the liberal state, insofar as it is understood as more than a minimal, nightwatchman state, will find itself weighing in on all sorts of ethically wrought questions, such as the education of children, or abortion. If we take abortion as an example, the liberal state will attempt to justify its position by reference to purportedly neutral grounds, by, for instance, avoiding making conclusions about the status of the fetus and focusing instead on the rights of women. Yet, this of course involves the state taking an ethical position, by placing the rights of women above the rights of unborn fetuses. In this way, liberalism settles some moral controversies, and prescribes ways of dealing with others.<sup>76</sup>

If we substitute the words “the liberal state” for the word “marriage” in the following statement from Metz, we can see that this description of an ethical authority applies broadly to it. “[The liberal state] aims to alter the self-understanding, affective attachments and inclinations, norms, and expectations of those it covers in its ideational folds. Crucially, to achieve these ends, [the liberal state] must assume and reproduce the belief that the regulating authority is properly concerned with these ends. To alter actions by altering the most deeply held beliefs, [the liberal state], like religion, assumes a

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<sup>75</sup> See, for example, Rawls *op. cit.*; pp. 191-194.

<sup>76</sup> This raises significant issues for the liberal state’s claim to neutrality, which I turn to in Chapter 6. See also Matthew H. Kramer, *Liberalism with Excellence* (Oxford: Oxford University Press, 2017): Chapter 3; Cécile Laborde, ‘Abortion, Marriage and Cognate Problems,’ *The American Journal of Jurisprudence* 63, 1 (2018): 33-48.

relationship between individuals and community whereby the commands of the public authority are experienced as freedom-guiding, not freedom-limiting.” In particular, the liberal state aims to alter the self-understanding and expectations of citizens so that they see that they are not justified in imposing their worldview on others (that, for example, the pre-term destruction of fetuses is murder), so that instead they are inclined to search for and offer supporting reasons that others can share. The liberal state must give an account of its scope (usually coterminous with Lockean ‘civil Interests’) and argue that it is authorized to intervene in this limited area of concern. Finally, the liberal state construes its actions as freedom-guiding, (or freedom-enhancing) as opposed to limiting the freedom of its own citizens (thus, access to abortion increases the freedom of women, rather than limiting the freedom of the unborn).

Whichever position the state takes on controversial issues, it will take that position as an ethical authority, with the ability to legitimate and strengthen the ethical position taken by some citizens, whilst challenging that of others. Even though that ethical position may be justified on liberal neutralist grounds, nevertheless, a position will be taken. The question then becomes, what’s wrong with being an ethical authority? Metz suggests that what is wrong with being an ethical authority is the state’s mimicry of religious ethical authority. But, as we have seen, the use of ethical authority is not purely a religious phenomena, since religion is not the sole source of ethical guidance in the world. The liberal response to this question is to say that the state should aim to take an ethical position on a limited scope of essential questions that touch upon the basic, civil interests of citizens. Being an ethical authority *per se* is not the problem, rather, acting as an ethical authority in regards to a matter that is not in the public interest is. The state is justified in acting as an ethical authority with regards to matters of justice, but not with regards to questions of the good life. The core issue identified by Metz here then is best expressed as the concern that marriage is a comprehensive conception of the good life, not that marital establishment causes the state to adopt an inappropriate religious-like relationship with its citizens.

## 6 Concluding Remarks

Marriage need not be religious – in a narrow sense – it can be secular, and therefore does not inherit the wrongness associated with religious establishment. The core concern

raised by the analogy with religion is that marriage is religious in the broad sense – a comprehensive conception of the good the establishment of which violates liberal neutrality. The religion analogy does little to illuminate this issue, on the contrary, it obfuscates it by introducing other possible ways that marital establishment could be, but is not in fact, wrongful. I have argued that the widespread practice of marriage in contemporary societies is *thin* with *secular* versions available. Having dismissed the analogy between religious and marital establishment, I have cleared the ground so that we can now focus on the ways in which contemporary civil marriage is *comprehensive*, and what this implies about its potential wrongness.

Chapter 5 -  
What's Wrong with Marital Establishment?  
Part Two: Love Hurts?

*Love hurts*  
*Love scars*  
*Love wounds and marks*  
*Any heart not tough or strong enough*  
*To take a lot of pain, take a lot of pain*  
*Love is like a cloud, it holds a lot of rain*  
*Love hurts*  
*Ooh love hurts*  
(‘Love Hurts’ – Boudleaux Bryant)

1 Introduction

In the last chapter, I argued that we cannot claim that the establishment of marriage amounts to a form of religious establishment, and therefore marital establishment cannot be condemned on the basis of that charge. However, this does not mean that it thereby exonerated. In this chapter, I will continue to examine the claim that marriage should be interpreted *as non-neutral*, and *as comprehensive*, therefore incompatible with political liberalism. Specifically, I will address the charge made by Elizabeth Brake that the institution of marriage is amatonormative, that is, it presents one kind of relationship - an amorous coupling - as a universally shared goal, with the effect that other forms of relationship are seen as less worthy.

Here I consider one potential normative concern with amatonormativity: it amounts to unjust discrimination. On this count, the claim is that when the state promotes one form of caring relationship, that of the amorous dyad, and not others, such as those between friends and other relatives, this amounts to discrimination against those not in amatonormative relationships, which Brake argues is wrongful, rather than justified differential treatment.<sup>1</sup> In this chapter, I will develop an interpretation of marriage *as thin*, *as non-stigmatising*, and *as symbolic, not material*, in an attempt to demonstrate that the state could establish marriage without violating justice through discrimination.

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<sup>1</sup> Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012); p. 88, 99.

The structure of the chapter is as follows. First, I present the charge and establish that marriage as practiced in both a legal and social sense is amatonormative, and therefore places one group, those persons who are members of an amorous dyad, in a different position relative to other persons (*Section 2*). I then reduce the charge by arguing that the only defensible form of marital establishment will be *symbolic, not material*, as is the case in *Matrimonia*, thereby granting an essential role to alternative forms of relationship regulation and recognition (RRR) for the satisfaction of justice (*Section 3*). Next I consider whether and in what sense a purely symbolic form of marriage is possible, arguing that ‘symbolic marriage with purely symbolic intent’ can only be inferred on the satisfaction of certain conditions. Then, I turn to the question of what could be wrong with symbolic marital establishment, and whether such a symbolic type of marriage can be accused of wrongful discrimination (*Section 4*). I consider the three most prominent accounts of the wrongfulness of discrimination – the harm account, the expression account, and the prejudice account – and apply these to a range of cases of amatonormative discrimination. I conclude by outlining four conditions that states practicing symbolic marital establishment ought to meet in order to avoid acting in wrongfully discriminatory ways, or encouraging private citizens to do so, and keep marital establishment within the parameters of justice (*Section 5*).

## 2 Amatonormativity – The Charge

Currently, the establishment of marriage is amatonormative. The relationships that are understood to qualify for entry into the institution are couplings founded on love. According to Brake, amatonormativity ‘consists in the assumptions that a central, exclusive, amorous relationship is normal for humans, in that it is a universally shared goal, and that such a relationship is normative, in that it *should* be aimed at in preference to other relationship types.’<sup>2</sup> As we shall see, this amatonormativity is problematic for liberal states. First, though, let us consider what amatonormativity consists in.

### 2.1 Aspects of Amatonormativity - “What’s Love Got To Do With It?”

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<sup>2</sup> Brake op. cit, pp. 88-89.

Marriage is both a cultural construct, and a legal institution.<sup>3</sup> The former refers to the idea of marriage as present in our culture (as revealed in widespread cultural practices), whereas the latter looks to the formal codifications of marriage in law. In this section I will consider these two elements of marriage (which often overlap) and look for evidence that aspects of amatonormativity are present in both parts. Amatonormativity might be deeply entrenched in the common cultural practice of marriage, yet if none of that amatonormativity finds expression in legal form, can the state still be at fault for establishing marriage? Or conversely, if the legal rendering of marriage is deeply imbued with amatonormative features, but these features do not find expression in any extant lived practices of marriage, do we still need to be concerned? It is reasonable to think that we should still be concerned about both cases – if we are concerned about amatonormative marriage – either will be sufficient to warrant moral concern. For example, in the case where amatonormativity is present in the cultural but not in the legal practice, it would be complacent of the state to ignore the wider social and cultural meaning and practice of marriage, since the state’s establishment of marriage could reasonably be interpreted as the establishment of amatonormative marriage. Things are more complicated, but less problematic, where cultural practices are ambiguous, so that the identification of the state with a non-amatonormative view of marriage would signal a rejection of an amatonormative version in favour of an alternative. By contrast, in the case where amatonormativity is present in the legal but not in the cultural practice, the state’s expression of its understanding of marriage does not achieve uptake. At first glance, this may appear unproblematic, as if the state is merely out of touch with its citizens, the state’s position on marriage may generally be regarded as irrelevant. However, the state’s position remains relevant if the state enforces amatonormativity legally, for example, if people have to conform to such a version of marriage in order to qualify for marriage, or to avoid their existing marriages being viewed as suspect or invalid.

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<sup>3</sup> This explains why, when we are considering the discriminatory potential of marital establishment, we need to consider the possibility of both public forms of discrimination (engaged in by the state), and private forms (engaged in by businesses and private individuals). The state’s involvement with marriage, although not discriminatory itself, could cause or contribute to private discrimination. Equally, marital disestablishment may remove the legal institution of marriage from the state apparatus, but private discrimination deriving from the cultural institution of marriage may remain. Although the state would not be directly complicit in this, to the extent that historical (and possibly discriminatory) marital establishment enabled such private discrimination to be legitimated in the past, there could be a case of historical injustice which would require reparations in a disestablished future.

Brake's definition can be separated into four aspects: centrality, exclusivity, love and normativity. Let's consider these in turn.

## 2.2 Centrality

First, marriage entails a relationship that is central in the lives of its participants. This means that the marriage is more important, or at least as important as other relationships that its participants have, such as, the parent-child relationship, sibling relationships, or relationships with friends. Marriage occupies a place in the core of one's life, rather than being allocated to its periphery. Centrality is demonstrated through the act of marriage itself (a commitment to marry is seen as a commitment to 'the one', a person elevated above others as being important enough to become spousal material); and through behaviours associated with marriage such as living together, spending time together, and presenting as a couple (attending social occasions with your 'other half'). Brake's claim here is that the assumption is that all other relationships, with friends, parents, siblings or other family members, are less important than the spousal relationship.

It is this centrality component that explains the bundling that marriage law engages in: grouping together a set of rights and duties that all accrue to married couples on entry into the institution, such as inheritance, next of kin, immunity from legal testimony – which cannot be reduced or increased without a separate pre-nuptial agreement - because it is assumed that the marital relationship is the repository of various functions or roles such as financial beneficiary, confidante, close family relation, etc. As Clare Chambers shows, this bundling amounts to 'a claim about the sorts of functions and interactions that belong together, and which properly change the relationship between the two people into a capital-R Relationship, given an honorary title.'<sup>4</sup> It is thus considered appropriate that marriage would incorporate rights about inheritance, financial support, parentage, and next-of-kinship, amongst others, since the centrality of the marital relationship suggests that the relationship spans across a number of important aspects of one's life.<sup>5</sup>

This centrality is also illustrated by omission – by the fact that most states do not grant the same benefits, rights, and obligations to other personal relationships – thereby

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<sup>4</sup> Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (New York: Oxford University Press, 2017); p. 64.

<sup>5</sup> As we shall see in Chapter 6, this bundling is critiqued by Chambers on neutrality grounds.

reflecting the centrality of marriage in the legal architecture, and possibly, the culture. Once states begin to expand their regimes of RRR beyond marriage, the centrality element of amatonormativity begins to be challenged.

### 2.3 Exclusivity

Second, the marital relationship is exclusive, that is, it is the only relationship of its kind in the life of the spouse. Centrality is just one feature of the importance of a relationship - exclusivity is another. Exclusivity suggests monogamy – polygamous marriages can meet the centrality requirement, since the spouses can consider all their marital relationships as equally important, belonging in the core and not the periphery of one’s life, but since there is more than one, the exclusivity aspect is violated. The majority of modern, Western liberal states have only established monogamous marriage, outlawing or withholding legal recognition from polygamous unions, by criminalizing bigamy, and therefore have established exclusivity as a component of marriage. However, polygamy may be practiced informally, as might polyamory both furtively (as in the case of extra-marital affairs) or openly. Despite this, the claim about exclusivity is that under monogamy, each person should only enter into one relationship of this sort at a time. At some times, and in some places, these relationships have also been required to be permanent, that is, exclusive over the course of one’s whole life (“til death do us part”). Yet the majority of states recognise the right to divorce and thereby grant that marriage can be a temporary state of affairs (although this is not explicitly acknowledged from the outset<sup>6</sup>), so that exclusivity can be achieved in permanence or in serial monogamy. Again, currently, many states only allow one marriage at a time, and even in the case of polygamy, one type of legally recognized relationship at a time (for example, one cannot concurrently have a domestic partnership and a marriage, even if one can have more than one marriage). Whilst diachronic-exclusivity (with one’s whole life setting the limit) is often hoped for at the outset of marriage, it is sometimes not culturally expected, and rarely legally required. Exclusivity, then, refers more to synchronic-exclusivity, and type-exclusivity, although as with centrality above, once states expand their RRR provision,

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<sup>6</sup> Unlike temporary marriages, which at their outset only continue for a fixed period of time, say, 5 years. On reaching their expiry date, spouses could agree to extend the marriage for another fixed period of time, make the marriage permanent, or let the marriage lapse. Daniel Nolan argues that such marriages should be recognised by the state alongside “permanent marriages”. See Daniel Nolan, ‘Temporary Marriage,’ in Elizabeth Brake, (ed.) *After Marriage: Rethinking Marital Relationships* (New York: Oxford University Press; 2016); 180-201.

the latter, and potentially also the former version of exclusivity, may become less significant.

## 2.4 Love

Third, marriage involves or contains a loving relationship, as opposed to a merely Platonic, friendly, or acrimonious one. Since there are many types of love – it is worth considering which sort of love is supposed to be present within marriage. Is it sexual, yearning love of eros, the romantic love of roses and chocolates, a caring, unconditional familial love, or a mere friendly concern?

In the majority of modern, Western, liberal states, the sort of love that is culturally expected to be present within marriage is a romantic kind, accompanied by sexual attraction. The claim that marriage involves love is not about the scope of the relationship, that is, whether it spans across familial, financial, social, and other aspects of one's life, but rather says something about the pedigree, purpose, and quality of the relationship. An amorous relationship is borne out of love, motivated by love, and contains love.

Brake is not claiming that actual factual marriages are all amorous in nature. Some people might get married never intending to love one another (sham marriages for immigration purposes, for example); others might not be in love with each other on entering the marriage, but hope to fall in love over time (as might be the case in some arranged marriages); and still more might love each other at the start of a marriage, but fall out of love over the course of its lifetime.<sup>7</sup> Rather than being an empirical claim about what marriages are generally like, or a conceptual one about what marriage necessarily is, Brake is making more of a semantic claim about what marriage means and how the term is used in our culture. The institution of marriage as we know it in modern Western societies is a relationship formed by an amorous dyad, two lovers who commit to love one another

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<sup>7</sup> Coontz argues that the idea of marrying for love is a fairly recent innovation and is credited by her with driving up the demand for divorce, as marital ideals and expectations were heightened as it gained prominence in the 1950s. Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (London: Penguin, 2006).

for the duration of the marriage.<sup>8</sup> That is why proposals to marry serve as the culmination of many a romantic story; why spouses vow to ‘love, honour, and cherish’ each other; and why falling in love with someone else can spell the end of a marriage.

Does the state, when establishing marriage, expect love to be present? Is established marriage really about love? Of course, there is no requirement in law that marital relationships be loving. But, apart from the obvious expectations about love and marriage, which are present within modern Western culture, there are a number of elements of marriage expressed through legal or governmental processes that indicate an expectation of amatonormativity in marriage. For example, the pedigree of a marriage might have to conform to amatonormative standards in order for it to be considered genuine by the state for immigration purposes. During the spousal visa application process, questions posed by immigration officials about the colour of the bedroom carpet, or a spouse’s hobbies, belie the expectation that marital relationships will be intimate and the site of a loving care for and interest in one another. Helena Wray argues that an archetypical ‘pure relationship’, as conceptualized by Anthony Giddens, lies behind the standards of assessment against which suspect marriages are measured. As such, the ‘underlying instrumentalism’ present in all marriages (since people marry for an array of reasons besides or alongside love, be they economic, social, familial, etc.), only becomes visible under harsh lights of immigration control.<sup>9</sup> Such immigration controls subject suspect relationships to a standard of amatonormativity that is not required of the unsuspecting marital relationships that exist between co-citizens. The “subsisting” and “intention to live together” test employed when assessing potential sham marriages rely on ‘a conventional model of marriage based on life-long cohabitation’ and ‘nudges parties towards the model of the ‘pure’ relationship’.<sup>10</sup> Similarly, the consummation requirement is a quirk in marital law that suggests an amatonormative conception. As Jonathan Herring notes, ‘although there is extensive regulation on how to marry and the role of courts on divorce, what happens during the marriage in-between is very largely unregulated’, that is, except for ‘one odd exception to that: the requirement of

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<sup>8</sup> Whether it is possible to commit to love another into the future, when love is something that is unpredictable and cannot be compelled, is a question addressed in Brake, op. cit, Chapter 2.

<sup>9</sup> Helena Wray, ‘The ‘Pure’ Relationship, Sham Marriages and Immigration Control,’ in Joanna Miles, Perveen Mody and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015), 141-166; p. 148.

<sup>10</sup> Wray, op. cit, p. 159.

consummation.<sup>11</sup> This requirement (which in the UK applies only to marriages between different-sex couples, having been explicitly dropped on the creation of same-sex marriages), contributes to the notion that marriage is amatonormative by building sexual intimacy into the purpose, and potential legal validity, of (some) marriages.

## 2.5 Normativity

This aspect puts the ‘normativity’ in ‘amatonormativity’. If something is normative, it is presented as the morally right standard towards which people should aspire and conform. Under amatonormativity, relationships based on romantic love are seen as culturally desirable and ethically correct. Societal culture could be amatonormative without the state being involved, however, since it is the state’s relationship with marriage that is being critiqued by liberal disestablishmentarians such as Brake, its hand in appears central. Ways in which cultures express the normativity of marriage include religious notions of marriage as God’s creation, able to sanctify human relationships, an essential part of sexual morality, as well as providing norms of family life and fostering important virtues within and beyond marriage. Although neither paramount, nor unproblematic, marital faithfulness is often, and plausibly, characterised as a morally desirable and admirable virtue.<sup>12</sup> Legal opinion of marriage is often normatively charged, from the 1888 US Supreme Court opinion in *Maynard v. Hill* – where marriage is ‘the most important relation in life’, and ‘is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilisation nor progress’<sup>13</sup> – to that of *Obergefell v. Hodges* in 2015 - ‘[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.’<sup>14</sup> The political “marriage movement” which gained popularity in the US in the 1980s and 90s with the formation of organisations such as the Institute for American Values and the National Marriage

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<sup>11</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy,’ in Joanna Miles, Perveez Mody and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015), 275-292; p. 275.

<sup>12</sup> Mike W. Martin, ‘Love’s Constancy’, *Philosophy* 68, 263 (1993): 63-77.

<sup>13</sup> Justice Stephen Johnson Field and Supreme Court of the United States, *Maynard v. Hill* 125 US 190, (1888).

<sup>14</sup> Justice Anthony Kennedy, *Obergefell v. Hodges*, 2015; p. 28.

Project, aimed to promote marriage as a morally superior family form and see off threats to it posed by alternatives.<sup>15</sup>

For amatonormativity to be a problem addressable by marital disestablishment, establishment itself, and not just marriage alone, must entail normativity. Whilst the amatonormativity of marriage alone is such that it is problematic for the state to become involved with and promote that normativity, disestablishment would change the agent of normativity, i.e. who does the promoting, and as a result, both who the charge of amatonormative discrimination applies to, and who can be held responsible for causing the discrimination to occur, be it the state, or private actors. If establishment itself has a normative significance independent of the normativity of the practice established, then disestablishment will reduce the intensity or the significance of the normativity involved, rather than simply reallocate agency.

There are three possible ways that normativity could feature in relationship between a norm or practice and the state: (1) a non-normative practice could be transmitted normatively by the state; (2) a normatively-charged practice could be transmitted non-normatively by the state; and (3) a normative practice could be transmitted normatively by the state. Non-normative practices involve actions to which notions of right or wrong are not normally applied, such as brushing one's hair, or going for a run. Normative practices involve actions to which the notions of right and wrong are normally applied, such as shaving someone's head whilst they are passed out drunk, or running someone down with a car. Normative actions are often other-regarding, but not necessarily so, and the set of non-normative and normative actions will vary by context, so that, in the Sikh religion, where one's kesh or hair is a symbol of God's perfect creation, brushing one's hair (and not cutting it) takes on normative significance and twice daily use of a comb, or kangha, is an important religious requirement. If one believes, as some Christians do, that the body is a temple, going for a run may be an important normatively charged act. Practices are transmitted non-normatively by the state when the state's involvement cannot reasonably be interpreted as entailing moral approval, judgment, censure or blame. Practices are transmitted normatively when it is reasonable to interpret the state as morally approving or disapproving of the relevant acts.

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<sup>15</sup> Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Boston: Beacon Press, 2008); pp. 71-72.

Some actions are normatively neutral, but once they become embedded in a broader system of rules or laws, take on normative significance (1). For example, in the UK, the action driving on the right-hand side of the road, or driving through a red light, are normatively problematic. These actions are not necessarily wrong, but wrong contingently, given the system of traffic laws we have established: had the other side of the road been nominated, the opposite action would have been normatively correct. Although generating only a weak, contingent normativity, it seems that even legally-enshrined answers to coordination problems are normative to the extent that obeying the law and avoiding the endangering of lives are morally required. However, the state's relationship with norms isn't always to establish laws that enforce norms - state promotion can be short of legislation. States promote many practices for instrumental reasons, and whilst this promotion may convey the sense that the practice in question is necessary or highly recommended, it is not obvious that the kind of necessity is moral necessity. When states promote things as disparate as adult literacy, cervical screening, recycling, and immunisations, is normativity introduced where it wasn't formerly present, or is more normativity added to an already normatively-charged practice? For the self-regarding acts on the list (adult literacy, cervical screening), normativity does not appear strongly operative – the issue is more what the state owes to its citizens, rather than what citizens owe to the state or their fellow citizens. Here the state transmits a normative practice non-normatively (2). Prior to state involvement, literacy and cancer prevention are morally significant concerns, so that all the state does in taking up these concerns is to recognise these things as morally significant as related to certain rights (to education, or health). Failure to respond to state promotion and take up the practice supported is not easily understood as moral failure.<sup>16</sup>

The other-regarding practices on the list – recycling and immunisations - carry more normative weight: because they are related to duties we owe to other citizens, it is more likely that moral censure will result from our failure to respond to state promotion on their behalf. These are normative practices that are often transmitted by the state normatively (3). That is, a moral judgment is already assumed in the initial practice, but

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<sup>16</sup> This does not mean that this understanding is impossible, for example, when a failure to take up opportunities to learn to read is a causal factor in the commission of moral wrongs or the failure to contribute in various moral ways, or where a failure to take up a chance for early diagnosis of cancer leads to an early and preventable death and a dereliction of duties to dependents.

the state does not merely transmit it, it adds weight to it. Although not generally legally mandatory, there are instances when such practices have been legally enforced and non-compliance punishable by fine or imprisonment.<sup>17</sup>

Marital establishment seems to lie between these two points. Marriage is partly a self-regarding affair, which the state endorses or recommends for instrumental reasons, rather like literacy or cancer screening. Because of its instrumental value, states may even owe this kind of recommendation to their citizens. Yet marriage is also partly an other-regarding affair, since the benefits claimed for it accrue to children, and society more generally. However, it has never been legally mandatory, although penalties have been applied for failing to take up the recommendation, in the form of denial of the legal and financial benefits awarded to those who do take up the practice.<sup>18</sup>

I purposely use the term transmitting here to express the ambiguity of the states' involvement. Transmitting can involve the mere acting as a conduit for another thing, as when a host transmits a virus to another, or when a television channel transmits a show. However, transmitting can also include active involvement with the content and form of what is being transmitted: although hosts cannot control how the virus behaves and the form it takes, they might have control over whether to risk transmission or not.

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<sup>17</sup> For instance, in the London Borough of Islington, recycling is compulsory and repeated failures to use the recycling services provided by the council can attract a fine (see <https://www.islington.gov.uk/recycling-and-rubbish/enforcement/compulsory-recycling>). In some places, such as all 50 states of the US, up-to-date immunisations are a legal requirement for entrance into public school, see Kristin S. Hendrix, Lynne A. Sturm, Gregory D. Zimet, and Eric M. Meslin, 'Ethics and Childhood Vaccination Policy in the United States', *American Journal of Public Health* 106, 2 (2016); 273-278. Once the smallpox vaccine was developed, its administration to children was made compulsory in a number of states, prompting protests from anti-vaccination campaigners, including violent riots in some cities, with the notion of conscientious objector being first introduced into English law as a result of the exemptions that followed. See Robert M. Wolfe and Lisa K. Sharp, 'Anti-vaccinationists past and present,' *British Medical Journal* 325 (2002); 430-432.

<sup>18</sup> Being legally mandatory, of course, is but one extreme end on a scale of compulsion and necessity. It is worth noting here that religious notions of the moral necessity of marriage have varied significantly in strength over space and time. Within the western Christian tradition, a full range of positions have been operative: marriage was considered as the subject of spiritual compulsion for all of age to wed in the Lutheran tradition; in Calvinist Geneva marriage was only encouraged for those persons who were spiritually fit enough to enter the covenant, with the church consistory issuing threats to elicit spiritual discipline with regards to the fulfilment of marital duties, which were backed up by civil and criminal sanctions from the city council if compliance was forthcoming; for the Catholic tradition, marriage was not considered to be particularly spiritually significant, given the superiority of the celibate life. See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Westminster John Knox Press: Louisville, Kentucky; 1997); pp. 4, 5, 7-8.

Television channels commission much of the content they transmit, and so creatively design the show, as well as choosing when and how to transmit it.<sup>19</sup>

The charge of amatonormativity requires that we understand the legal recognition of the practice of marriage as a form of state promotion or ethical endorsement.<sup>20</sup> There is some normativity already present in the cultural practice, and the state both endorses and adds to that normativity by establishing marriage. People who practice or support marriage believe that marriage is not something of normative disvalue, they are not morally indifferent to it, they value it. Establishment supports that value. Those who are morally indifferent to marriage, or those who don't value it, find themselves in a different normative position to the state under marital establishment.

### 3 Is Marital Establishment a Case of Wrongful Discrimination?

So far we have established that marital establishment treats relationships (and therefore the persons in them) differently on the basis of the amative quality of the relationship. Whether this differential treatment amounts to wrongful discrimination, however, is another question.

Marriage discriminates. A society in which marriage is present, that is, a society with a marriage culture, classifies, draws a distinction, or distinguishes between persons on the basis of a trait, marital status. A state that administers marriage, through marital establishment, is complicit in this discrimination.

Discrimination in itself is not necessarily wrongful. Rather, as Deborah Hellman points out, discrimination, that is, the practice of distinction-drawing, is ubiquitous and necessary, important and even sometimes unavoidable.<sup>21</sup> Thus, we need to distinguish between mundane or harmless instances of discrimination, and more pernicious forms. A teacher discriminates between students when only awarding an A grade to the students

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<sup>19</sup> Since transmission, is often a form of expression, it is important for expressive theories of discrimination (considered below) to take it into account.

<sup>20</sup> Chambers argues that although state promotion is a stronger departure from neutrality than mere state recognition, the distinction between recognition and promotion is not firm – ‘recognition alone is a form of promotion, since it attaches state approbation to one form of relationship.’ (Chambers, *op. cit.*, pp. 51-52, n. 13) If that is the case, even established marriage *as symbolic, not material*, will be problematic. See Chapter 6 for further discussion on this.

<sup>21</sup> Deborah Hellman, *When is Discrimination Wrong?* (Boston, Massachusetts: Harvard University Press, 2011); pp. 2-3.

who achieve the highest marks. An employer discriminates between job candidates when selecting the one with the best qualifications and experience. These instances of discrimination are not *prima facie* wrong. However, the discrimination engaged in by the teacher looks unproblematic but could be wrongful if, for example, the marks were awarded for performance in a test that was biased in favour of certain types of student, such as those from a higher class background. Similarly, the employer may discriminate wrongfully if, for example, the 'best experience' is defined in a manner that privileges certain people, such as male candidates. The discrimination between the married and the unmarried that marriage entails (whether material or symbolic), thus needs to be examined to consider how wrongful, if at all, it is.

There exist various accounts of what makes discrimination wrongful, and the three most prominent ones that emerge from the literature locate the wrong in either the harm caused by discrimination, the meaning expressed by discriminatory acts, or the prejudice that motivates the act. I will refer to each of these accounts as the *harm account*, the *expressive account*, and the *prejudice account*, respectively. Although there is some overlap between these accounts, each account includes some cases that are excluded by the others, so that each account can only explain the wrongness of a limited range of cases. For example, the expressive account deems discrimination wrongful when a demeaning and objectionable social meaning is expressed by the act, even if the discriminator is not motivated by prejudice, and no harm results, whether to the discriminatee, discriminator, or third parties. The harm account includes cases in which discriminatees are made worse off, but there is no demeaning expression and no prejudice present. The prejudice account includes acts in which nobody except the discriminator, the discriminatee included, knows that discrimination has occurred, such that no harm results, and there is no known act to attribute objectionable meaning to. A recent response to the inability of each account to offer a comprehensive view of all of the discriminatory acts our intuitions suggest to us are wrongful has been to develop pluralistic or hybrid accounts.<sup>22</sup> These accounts recognise that in different cases, there may be different wrong-making features of discrimination at work. As such, in what follows, I will subject marital establishment to significant scrutiny by considering whether it entails wrongful discrimination on the three main accounts just presented.

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<sup>22</sup> A prominent example of the use of this approach can be found in Andrew Mason, 'Appearance, Discrimination, and Reaction Qualifications', *The Journal of Political Philosophy* 25, 1 (2017): 48-71.

In order to represent and discuss the range of potentially wrongful discriminatory actions that result from marital establishment I will describe what I take to be four central cases of discrimination against the unmarried. These cases will allow me to explore and examine how the three dimensions of harm, expression, and prejudice operate under marital establishment, and well as enable me to draw out other relevant concepts that arise in the literature on discrimination and raise issues for how we respond to the charge of discrimination being applied to marital establishment, such as the idea of socially salient groupings, and the normative differences between discrimination by the state or its agents (public discrimination), and discrimination by individuals and businesses (private discrimination), if any. Ultimately my aim is to clearly delineate where marital establishment has the potential to go wrong as regards discrimination, and thereafter provide a number of conditions that must be satisfied if marital establishment is to avoid such wrongful discrimination, thereby violating justice (*Section 5*).

*Case A - Public Material Discrimination:* the state provides a range of rights and financial benefits to its citizens when they get married. It does not offer these rights or benefits to the unmarried, even if they are in functionally similar or equally significant relationships.

*Case B - Public Symbolic Discrimination:* the state provides a range of rights and financial benefits to its citizens who are married and also to those in functionally similar or equally significant relationships. It maintains marriage as a separate institution, which it has a special relationship with, thereby symbolically recognising marriage as distinct to the other relationships recognised by the state. (*Matrimonia*)

*Case C - Private Discrimination (Business):* a private business refuses to provide a service it offers to married couples to two persons who request it but are unmarried.

*Case D – Private Discrimination (Social):* a private individual treats unmarried persons differently and less favourably than married persons in their social interactions.

I will now discuss each case in turn. I present cases *A* and *B* together as this enables us to perceive the difference between the material effects and the symbolic effects of

differential treatment. Cases *C* and *D* are grouped together as instances where symbolic differential treatment has what I term secondary material effects.

### 3.1 Cases *A* and *B* – Public Discrimination

In cases *A* and *B*, both states engage in differential treatment of marital and non-marital relationships, but in case *A* the differential treatment is material, whereas in case *B* it is in the symbolic order. Both cases can be contrasted with a further case *Z*, where there is no differential treatment at all, and therefore no public discrimination occurring - if there is any discrimination against the unmarried occurring at all, it is purely private discrimination.

If marriage is amatonormative, as set out above, by establishing it, the state protects, recognizes and promotes one form of caring relationship, that of the amorous dyad, at the expense of many others, such as those between friends and other relatives.<sup>23</sup> In case *A*, *Public Material Discrimination*, there are significant legal differences between marital and non-marital relationships. Laws (and therefore governments in their legislative capacity) can have an effect in a number of ways. *Material effects* include impacting on the resources available to persons (for example, by increasing financial benefits, or denying access to a resource), and activating certain rights. For example, marital laws sometimes involve awarding financial benefits to married couples in the form of tax breaks. In the UK, the 'Marriage Allowance' allows low-earning spouses to transfer £1,150 of their personal tax-free allowance to their marital partner, thereby reducing their tax liability by £230 per annum.<sup>24</sup> Married couples may have exclusive access to certain rights (for example, they may be the only sort of couple that is legally permitted to adopt children) or they may be given preferential treatment in the allocation of rights and responsibilities (for instance, in the UK, spouses automatically acquire parental responsibility towards any children born to their marital partner, whilst unmarried partners must specifically register themselves as a parent on the birth certificate, or otherwise obtain parental responsibility through an agreement or a court order.)<sup>25</sup> According to harm-based accounts of discrimination, this differential treatment is wrongful because it makes people worse-off both financially and with regards to legal powers and rights, and social opportunities,

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<sup>23</sup> Brake op. cit, p. 88.

<sup>24</sup> <https://www.gov.uk/marriage-allowance>

<sup>25</sup> <https://www.gov.uk/parental-rights-responsibilities/who-has-parental-responsibility>

having an overall negative effect on well-being.<sup>26</sup> Since we can envisage non-discriminatory alternatives where persons are not made worse-off and well-being is instead maximized, the discrimination that occurs in case *A* is wrongful and not justified. The term ‘material’ refers to physical goods and services, benefits and rights, but it is obvious that the allocation of material effects has symbolic effects. Some goods are tightly linked to the symbolic order, for example, the distribution of political rights and opportunities is crucial for constructing the social bases of self-respect, which when secured enable citizens to consider themselves as political equals.<sup>27</sup> Equally, the conferral of parental responsibility shapes public understandings of who does and does not qualify as a parent. In other words, through the distribution of legal and economic benefits, the state expresses a particular message.<sup>28</sup> To the extent that these messages make some persons worse-off than they otherwise would be, the harm account of discrimination can also take issue with the symbolic effects of material differences between persons when they have palpable effects on well-being.

Proponents of the expressive account of discrimination need not look to the palpable effects of differential treatment – they can condemn case *A* on the basis of the message of inequality that is sent by states that confer legal and material benefits on some relationships but not others. Those who subscribe to the prejudice account of discrimination can question the basis upon which the distinction between marital and non-marital relationships are drawn. It is likely that the exclusion of all other relationships from the financial and legal benefits awarded to marriage, be they marital-like, or caring relationships more broadly, is due to a prejudicial mental state that is not a sound basis for drawing such distinctions. These include biases, stereotypes, dubious ideologies, tainted preferences, moral beliefs about ideal relationships, personal aversions, proxy traits and believed correlations.<sup>29</sup> On this view, marriage is not a qualification for the receipt of legal and financial benefits of marriage, since if we subject

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<sup>26</sup> The key proponent of the harm-based account is Kasper Lippert-Rasmussen, whose work I focus on here. See Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2013).

<sup>27</sup> John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) pp. 386-391.

<sup>28</sup> The establishment of marriage may also lead to the burdening of other caring relationships, by increasing the costs (social, cultural, financial etc.) of entering into alternative forms. This phenomena is related to the question of discrimination, but also goes beyond it e.g. costs may increase not because of any intentional discriminatory actions, but due to the cumulative effect of many legitimate individual decisions and actions, and their impact in supply and demand of various options. This issue is a question for neutrality, and is therefore outside the scope of this chapter.

<sup>29</sup> Larry Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’, *University of Pennsylvania Law Review* 141, 3 (1992): 149-219.

the scheme of RRR in case *A* to greater scrutiny, there is no rational basis for the differential treatment that occurs. Instead, the privileging of marriage is likely due to erroneous judgments about the inferior moral worth of non-marital relationships. Even where the trait ‘married’ is or has been a rational proxy for a morally relevant factor, because of the choices the persons with the trait can be predicted to make in the present culture – such as rearing children together or becoming financially interdependent – the social costs of freezing a culture because of common or historical patterns of behaviour count in favour of a more precise way of drawing distinctions.<sup>30</sup>

In case *A*, then, the state is engaged in wrongful discrimination when it established marriage. I grant to Brake, Metz, Chambers, and other marital disestablishmentarians<sup>31</sup> that it has been aptly shown that marriage is inefficient and inadequate as the sole way for the state to recognise care. I therefore argue that any marriage that is established must carry only *symbolic, not material* benefits over other forms of RRR. This lessens the charge made against marital establishment but does not eliminate it, since cases *B*, *C*, and *D* could still be classified as instances of wrongful discrimination. I turn now to case *B* and reintroduce the distinction made between the states of *Matrimonia* and *Omnia* drawn in previous chapters.

### 3.2 The State of *Matrimonia*

Imagine two states, with two different systems of RRR. Both states acknowledge the value of non-marital caring relationships. They therefore both provide certain benefits, that is, legal rights and material advantages, to both marital and non-marital relationships. Despite this, the first, named *Matrimonia*, retains a special place for marriage. The state presides over an established institution of marriage, alongside an alternative institution/s of RRR. Those in marital-like relationships<sup>32</sup>, who wish to do so, can register as married

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<sup>30</sup> Alexander, op. cit, p. 195.

<sup>31</sup> Amongst the other disestablishmentarians, Nancy Polikoff neatly expresses this position in terms that echo the harm-based account of discrimination: ‘When laws makes marriage the dividing line, it harms all unmarried people, including those with children. The harm is the dividing line. The remedy is drawing a different line more closely tailored to achieving the law’s purpose.’ In case *B* the legal line is drawn more carefully, but a cultural, symbolic line is still drawn. Whether that harms, or is wrongful in a different way, is discussed in the next section. See Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (Boston: Beacon Press, 2008) p. 123.

<sup>32</sup> What counts as a ‘marital-like relationship’ is defined by the state and based on the notions of marriage operative in the culture of the nation concerned. Here I bracket the question of whether justice requires that this cultural understanding of marriage needs to recognise some relationships between more than two persons as ‘marital-like’. For the purposes of this section of the chapter, the only cultural notion that

and gain certain legal and material benefits. Those who do not wish to get married, or those who do not qualify to do so, can register with the alternative institution/s and the same benefits will accrue to them. The only difference, then, between registering for one or the other institution/s, is found in the meaning of such a registration. Thus, there are symbolic benefits of marriage, which mean that some people wish to enter into it rather than a functionally similar alternative: perhaps because it retains a certain kudos in their community or social network, or because it expresses something special about their relationship, that is, that it is not only a caring relationship, but a special kind of caring relationship, a marital one; or for cultural reasons, they wish to belong to or participate in a valued cultural form.<sup>33</sup> The distinctness of marriage as compared to other caring relationships may not necessarily entail supremacy over them, but equally, this interpretation is plausible too. The question raised here is whether this kind of differential treatment amounts to wrongful discrimination.

The second state, named *Omnia* (or case *Z* in contrast to case *B*), has just one scheme of RRR, with both relationships that are generally referred to as marital, and other caring relationships, falling under its wide remit. Thus, all qualifying relationships (with qualifying criteria construed broadly as encompassing a wide range of relationships) receive the same material and legal benefits. There is no further nominal distinction in law between the relationships within the recognised set. Any distinctions between the qualifying relationships (as, for example, marital or non-marital) are cultural distinctions that bear no legal consequences. Thus, although there may be a common perception among the populace that more traditional, amative relationships are better or more worthy<sup>34</sup>, the state does nothing to endorse this view and the law is facially neutral between different sorts of caregiving relationships. As we have seen in Chapter 1, many of the marital disestablishmentarians we have considered thus far have endorsed a system like *Omnia*'s. Both Brake's Minimal Marriage, and Metz's Intimate Care-Giving Unions, dispense with marriage as a distinct category and supplant it with a broader institution of RRR that encompasses both relationships conventionally termed as marriages and other

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operates in a manner that includes some relationships as 'marital-like', and excludes others, is an amatonormative notion about the special value of relationships based upon romantic love.

<sup>33</sup> Some aspects of the value that marriage might have for persons who have a cultural attachment to the institution are introduced in Chapter 3 and further developed in Chapter 7. Here it is sufficient to state the aspects: A – marriage is a *publicly binding commitment* to an intimate, caring relationship; B – marriage is the *marking out* of an intimate, caring relationship as *centrally important* to a person's life; C – marriage *celebrates* the *romantic and sexual love* present in an intimate, caring relationship.

<sup>34</sup> Private discrimination may still occur as a result of this, however the state will not be a causal factor in its occurrence.

kinds of caring relationships. For Chambers, rather than creating an alternative and all-encompassing institution that grants to persons within significant relationships a legal status, a scheme of relational directives or laws are designed to apply to and regulate various functional aspects of relationships.<sup>35</sup> Either way, *Omnia* escapes the charge of amatonormative discrimination because it does not treat marital and non-marital relationships differently.

The difference between *Matrimonia* and *Omnia* consists in a state that retains a distinct meaning for marriage as separate cultural institution of RRR, and one that does not. The question this work is concerned with is whether *Matrimonia* can maintain the distinctness or separateness of marriage without violating certain liberal values, in this case, equality. For the purposes of this chapter, the distinctness of marriage (what marks it apart from other forms of RRR) is that it is reserved for amative relationships and these alone, such that, non-amative relationships do not qualify as genuine marriages. Although some non-amative relationships may slip through the net, as it were, and be given the title of marriage, those are the exceptions that prove the rule: marriages are based on a special sort of love, and as such make up a special and distinct set of caring relationships. A state like *Matrimonia*, that continues to establish marriage, still faces the charge of amatonormative discrimination.

### 3.3 Is a Purely Symbolic Form of Marriage Possible?

*Matrimonia* does not grant any unique material effects (financial benefits or legal rights) to the married as the state does in case *A*. All persons entering into any institution of RRR, be it marriage or its alternative, are eligible for the same rights and benefits.<sup>36</sup> Nevertheless, in *Matrimonia*, the state discriminates by engaging in differential treatment since only some are allowed to enter into the institution of marriage. Despite this, no discrimination occurs with regards to the state's allocation of rights and responsibilities, benefits and legal protections, etc. Officially (in law) no material consequences are *enacted*

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<sup>35</sup> *Omnia* could recognize a range of different relationships, as Brake argues Minimal Marriage should do, or a range of different relational functions that might span across a range of relationships, rather than being bundled together, as Chambers argues her Relationship Directives are designed to do. I do not intend to settle the question of which is kind of relational scheme is preferable here, I only suggest that *Omnia* could adopt either model.

<sup>36</sup> Under a system like that endorsed by Chambers, which attempts to disaggregate or unbundle relational functions from actual relationships, some relationships will only be eligible for some (and not all possible) rights and benefits, yet all relational functions will be treated the same, regardless of the form of relationship they are located in.

by the establishment of marriage. However, this does not mean that there are no material consequences that are *attributable* to the establishment of marriage. The purely symbolic distinction between ‘the married’ and ‘the unmarried’ still has material effects.

In *Matrimonia*, particular material effects accrue to all persons who enter into an institution of RRR, be it marriage or its alternative/s. Any distinction between the two parallel schemes of RRR, then, is purely symbolic. Here, ‘symbolic’ refers to the realm of meanings, and how laws can impact on ideas and understandings. The mere distinction in law between marriage and its alternative contributes to and validates a “marriage culture” in which the married could be treated differently to the unmarried. Maintaining the category of marriage risks perpetuating social attitudes such as approbation for the married and disapproval for the unmarried. The state’s position may thereby sanction the discriminatory behaviour of citizens and third parties: both in informal social interactions with others, and when accessing goods and services from businesses, or dealing with employers, the unmarried might be subject to differential treatment.<sup>37</sup> The effects of symbolic acts could be recast as *secondary material effects*, which, if reasonably anticipated and preventable, the state has good reason to avoid. Although attributable in part to the establishment of marriage, I will discuss the instances of private discrimination that occur in a marriage culture (cases *C* and *D*) later. For now I will focus on the question of whether the symbolically differential treatment that the state engages in in symbolic marital establishment is wrongful regardless of whether it inspires or contributes in some way to acts of private discrimination.

A consideration of case *B* allows us to focus on expressive accounts of the wrong of discrimination, which are concerned about the objective meaning of discriminatory acts. These acts express the idea that some persons have unequal moral worth, or send out messages of exclusion. True expressive accounts are deontological, since they consider the expression of certain meanings as wrong regardless of the consequences of the expression. As such, rather than being concerned with symbolic effects (also referred to above as secondary material effects), the focus is on the treatment itself being wrongful. Consequentialist readings of expressive accounts dispute this, arguing that the wrong of

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<sup>37</sup> This concern is fleshed out further below, with reference to DePaulo’s work on ‘singlism’. Although focused explicitly on material legal distinctions, the negative effects of a marriage culture on access to benefits from third-parties is thoroughly presented by Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Boston: Beacon Press, 2008), see especially Chapter 8.

the expression of a particular meaning or symbol reduces down to the harm that expression causes. For example, Kasper Lippert-Rasmussen argues that although discriminatory acts that demean the discriminatee often result in stigmatic harms, demeaning acts are not wrong independently of this harm. As such, the wrong of demeaning expressions is epiphenomenal.<sup>38</sup> For now, I will leave these disputes aside, but will return to them when they become most pressing, when laying out the conditions states must meet if they are to avoid the charge of wrongful amatonormative discrimination.

Expressive theories of law, such as that advanced by Elizabeth Anderson and Richard Pildes, point to this additional category of state actions that should raise our concern. These are acts that communicate a message the only effect of which is that it elicits a certain understanding, potentially without any further cultural or material consequences.<sup>39</sup> They ask us to consider the decision by the state to display Christmas decorations on public property. Here, they argue, the state legislators ‘manifest[...] their exclusive conception of the “we” with whom they are collectively celebrating.... [they] fail to acknowledge the insider status of non-Christians in a context that demands such acknowledgment, and thereby withdraw from non-Christians the social status of fully included citizens.’<sup>40</sup> This altering in status occurs even where the only uptake of the message communicated is that it is heard and understood, but not necessarily acted upon.<sup>41</sup> Such understanding need not trigger a subjective state in the hearer (for example, a feeling of exclusion on the part of non-Christians), or find acceptance or endorsement of the stigmatizing message by the wider public (for example, eliciting a belief of superiority on the part of Christians).<sup>42</sup> Symbolic acts then, can be problematic even without the attribution of any palpable effects: rather, the expression of an improperly divisive conception of the public is intrinsically wrong.<sup>43</sup>

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<sup>38</sup> Lippert-Rasmussen, op. cit, pp. 134-137.

<sup>39</sup> Elizabeth S. Anderson and Richard H. Pildes, ‘Expressive theories of law: a general restatement’, *University of Pennsylvania Law Review* 148, (2008): 1503-1575 p. 1531.

<sup>40</sup> Anderson and Pildes, op. cit, p. 1550.

<sup>41</sup> Again, here is it worth drawing the threefold distinction between symbolic treatment that is in itself wrongful; symbolic effects that - even without uptake, since no action results from the expression - cause or contribute to stigmatic harms; and secondary material effects, which occur when expressive acts achieve a clear uptake.

<sup>42</sup> Anderson and Pildes, op. cit, p. 1545.

<sup>43</sup> Anderson and Pildes, op. cit, pp. 1537-8. The phenomenon of wrongful-yet-harmless discrimination can be partially accounted for by these kinds of cases. Other cases of wrongful-yet-harmless discrimination can occur when a discriminatory act occurs but is never perceived, in these cases, the wrongness of the act resides in the prejudicial beliefs and discriminatory intentions of the discriminator. For more discussion of

As we have seen, even if marriage is symbolic, not material, as in *Matrimonia*, so that there is no difference of treatment as regards the distribution of rights and benefits, the state still participates in a practice in which persons are marked out as different due to their membership, or non-membership, in an institution. This differential treatment, then, occurs in the symbolic order, as the state participates in and maintains a category, even though it may often fail to populate that category with specific details that are obviously problematic. The underdetermined act of establishing marriage parallels the act of displaying Christmas decorations in public places: both posit the state as having a relationship with one practice (marriage, Christmas) that it, by omission, does not have with alternative practices. This is the case even if the chosen practice is presented as empty or ecumenical. The differential treatment of practices, and by implication, their participants, can be described as a form of discrimination. This sends a message to the relevant insiders and outsiders, which we have reason to be concerned about, quite apart from any harms encouraged or enacted by the discrimination.<sup>44</sup> In this section, I explore the question of whether this discrimination is wrongful.

In *Matrimonia*, this omission is less present, as alternative relationship forms are also represented in the state's regime of RRR. The equivalent contrast, then, is with a state that not only displays decorations at Christmas time, but also during Hanukkah and Eid, and any other significant religious or cultural celebrations, *ad infinitum*.

Following expressive theories of law, it is worthwhile here to treat laws as speech acts by the state, and thus to distinguish between locutionary acts (what is said), illocutionary acts (the intended meaning) and perlocutionary acts (the actual effect or consequence).<sup>45</sup> By retaining marriage as a separate category (locutionary act) the state may intend one thing (illocutionary act) but simultaneously send a particular message (perlocutionary effect) whether it intends to do so or not. Given then that the state does things through symbolic actions, where do we draw the line of what the state can or cannot do? Since the state is a particularly powerful and influential actor, perhaps without rival, in acting it must err on the side of caution. As such, only under certain conditions, when we are

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these latter types of cases, see Adam Slavny and Tom Parr, 'Harmless Discrimination', *Legal Theory* 21, 2 (2015): 100-114.

<sup>44</sup> Hellman, *op. cit.*; p. 27.

<sup>45</sup> John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962), pp. 98-103.

assured that certain safeguards are in place, may it act. It would be remiss of state to ignore the consequences of actions that are foreseeable or could be reasonably anticipated. Yet, due to its size, authority, coercive reach, and level of influence, nothing that the state does could be purely symbolic. If so, what does *symbolic, not material* mean, if the state's illocutionary act is symbolic, although the perlocutionary effect is not confined to the symbolic?

To ensure that the state is not engaging in wrongful discrimination in this case, we need to be mindful of two possible wrongs here. The harm account encourages us to look for stigmatic harms that accompany the expression the state conveys with symbolic marital establishment. These are likely to accompany such expressions, and will entail a loss of self-respect, a sense of shame and inferiority, and subsequently reduced well-being for the affected persons. However, it is possible that the objectionable meaning of the expression is never known or perceived, and therefore does not affect anyone's lives, being a mere 'free-floating, uninterpreted cultural meaning'. On the deontological version of the expressive account, it is nevertheless absolutely morally impermissible for the state to convey this meaning, so that wrong inheres not in the harm but in the expressive act divorced from its consequences. The expressive view looks to either put a stop to the expression, or change its social meaning.<sup>46</sup>

Although 'purely symbolic marriage' is not possible, I propose that 'symbolic marriage with purely symbolic intent' is. For the state to deliver on this possibility, certain conditions would have to be met:

C1: The state intends to support the participation of citizens in a cultural institution – establishment is not foil for other intentions, e.g. stigmatising other cultural practices, or privileging a particular social group (non-prejudicial intention)

C2: The state does not endorse (and is required to mitigate against) any material effects emanating from its actions e.g. protected characteristics include relationship status, robust discrimination legislation (symbolic, not material)

C3: The state recognises and offers material supports to all relevant alternative practices and has genuine, robust, and accessible RRR for non-marital relationships (equal material treatment)

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<sup>46</sup> Lippert-Rasmussen, *op. cit.*; pp. 131, 132-133, 171.

If we return to the charge of amatonormativity presented at the start of the chapter (*Section 2*) we can see that some of the aspects of amatonormativity fall away under *Matrimonia*. Under *Matrimonia*, marital establishment no longer assumes centrality or exclusivity. Although marriage may be an important, and even the most central relationship in a person's life, the state recognises the importance of many other relationships, and their possible centrality in an individual's life. Similarly, exclusivity is not assumed, since relationship units can number more than two persons, and each person may have different relationships protected and recognized in different ways at any one time. The other aspects, love and normativity, are still features of marital establishment, although other forms of love, intimacy, attachment, partiality, and care are also promoted, and their normative value, with the rights and obligations they give rise to, recognised, so that amatonormativity is much weakened. As such, the amatonormative meaning of marriage should become sufficiently *thin*, and *non-stigmatising* under symbolic marital establishment.

Finally, a note on expenditure. Although symbolic marriage does not involve the state in distributing material benefits, this does not mean that symbolic marriage is not without material cost. The state would still need to spend some taxpayers' money on marriage: in paying the salary of registrars and funding other expenses of the registration services, a portion of this budget is allocated to work solely focused on the delivery of marriage, for example, the officiation of wedding ceremonies, and the administration of marriage certificates. Although much of marriage currently is self-funded, since the spouses themselves pay an admin fee for registration, a fee for the registrar's time during the ceremony, and a fee for copies of the marriage certificate, the fairness of this arrangement can be disputed – since marriage is currently often the only way to gain access to benefits and protections for relationships, it seems unfair to have to pay something that should be provided as a matter of right. It is therefore plausible that under *Matrimonia* or *Omnia*, individuals would not need to directly pay for the registration or recognition of their relationships: the process would be less like applying for a passport or driver's license and more like receiving one's national insurance or social security number. However, this would simply mean that the costs would be borne more generally by all taxpayers, regardless of the wealth or dearth of their personal relationships. To the extent that the state directs resources to the implementation of

marital establishment, it could be argued that we have not a case of symbolic establishment but one of revenue establishment, which is potentially a form of secondary coercion, since it asks that opponents to marriage fund something that they disagree with.<sup>47</sup> To this, I offer three responses. First, as a portion of one's tax contribution, the amount of money each person pays to subsidize marriage is likely to be miniscule, given that marriages make up but one part of a registrar's responsibilities. Generally speaking, we are not usually concerned about much more sizable contributions that are made unconscionably in many cases, as for example, ethical vegans subsidising food made from animal products in schools, hospitals, government offices and prisons. Although these are essential services and not indulgences, unlike, it would appear, the case of marriage, as I go on to argue in Chapter 7, we all end up funding the state to do things that we disagree with or think are superfluous to justice, even in the delivery of essentials, and it is not obvious that this can be avoided, even in the ideal. Second, it is not obvious that the cost of RRR in *Matrimonia* will be much different to the cost in *Omnia*, if administrative procedures are sound, assuming that roughly the same number of relationships require registration. Indeed, if registrars are allocated the work of administering the registration of non-marital relationships, their workload overall will increase, but the proportion of their work taken up by marriage will decrease further, unless the work of administering the registration of relationships will fall elsewhere. Either way, the work will need to be accounted for somewhere on the government's books.<sup>48</sup> Third, it is worth asking why the state funding of marriage is any different to the state funding of culture (museums, art galleries, national parks etc.). If we assume, for the sake of argument, that cultural subsidies can be justified, it is not obvious in what ways symbolic marital establishment is any different.<sup>49</sup>

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<sup>47</sup> Kevin Vallier, 'Religious Establishment and Public Justification,' in Cécile Laborde and Aurélia Bardon, (eds.) *Religion in Liberal Political Philosophy* (New York: Oxford University Press, 2017): 103-117; pp. 104, 107.

<sup>48</sup> Even in the regime of relationship directives proposed by Chambers, there will be work to be done and costed. Although there will be no formal registration process, there will need to be investment in publicising the rights and benefits available, supporting those who wish to opt-out contractually, and when claims and disputes arise, verifying the existence of a qualifying relationship or relational function.

<sup>49</sup> Lægaard suggests this argument, see Sune Lægaard, 'What's the Problem with Symbolic Religious Establishment?,' in Cécile Laborde and Aurélia Bardon, (eds.) *Religion in Liberal Political Philosophy* (New York: Oxford University Press, 2017): 118-131; note 1.

#### 4 What Could be Wrong with Purely Symbolic Marital Establishment?

If we grant that symbolic marital establishment is possible, we next need to consider what could be wrong with such an arrangement. If we consider a parallel case, that of symbolic religious establishment, we find that theorists have struggled to pin down exactly what it is about this arrangement that raises our normative concerns.<sup>50</sup> Weaker forms of establishment - whether religious, marital, or otherwise - may exhibit few obvious flaws. In many cases, under marital establishment, the state:

- does not disapprove of alternative forms of relationship
- does not interfere with citizens who pursue alternative forms of relationship
- confers rights to freedom of association or other relevant freedoms to all citizens
- may even publicly recognise and accommodate alternative relationship forms<sup>51,52</sup>

Indeed, just as ‘modest’ (i.e. symbolic) versions of religious establishment need not contravene liberal values, symbolic marital establishment need not either.<sup>53</sup> Given that *Matrimonia* includes additional RRR beyond marriage, these conditions are even more clearly satisfied. It is therefore hard to capture the wrongness of symbolic discrimination, but the strongest accounts of the wrongfulness of religious establishment turn on the idea of equality and the way that a symbol can threaten the equal standing of persons.<sup>54</sup> Can the intention to support the cultural institution of marriage be interpreted as threatening the equal standing of citizens?

The key question that needs to be considered here is whether the institutional links formed through marital establishment can reasonably be understood as sending the message that those citizens within the institution of marriage have higher civil status.<sup>55</sup> In

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<sup>50</sup> For discussion of the attempt by Tamara Metz and other marital disestablishmentarians to draw parallels between religious and marital establishment, see Chapter 4.

<sup>51</sup> Given that *Matrimonia* includes additional RRR, these conditions are even more clearly satisfied.

<sup>52</sup> Here and throughout this section, I model my discussion on work carried out by Lægaard, op. cit, p. 120.

<sup>53</sup> The question of whether marital establishment is analogous to religious establishment was addressed in Chapter 4.

<sup>54</sup> Lægaard terms this the ‘symbolic equality’ account and attributes it to May, Nussbaum, Laborde, and Ahdar and Leigh. See Simon Căbulea May ‘Political Liberalism and Religion: On Separation and Establishment’, *Journal of Political Philosophy* 21, 1 (2013): 219-238; Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008); Laborde, op. cit; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005).

<sup>55</sup> Lægaard, op. cit, p. 126. It is the worry about this kind of message that motivates Chambers to move from the status model of RRR used in marriage and retained by Brake’s Minimal Marriage and Metz’s Intimate Care-Giving Unions, to a regime of piecemeal directives. Other disestablishmentarians endorse a contract model as an alternative to status, for example Marjorie Maguire Shultz, ‘Contractual Ordering of Marriage: A New Model for State Policy’, *California Law Review* 70, 2 (1982): 204–334; Martha Albertson Fineman, ‘Why Marriage?’, *Virginia Journal of Social Policy and the Law* 9, 1 (2001): 239–70.

his consideration of the religious establishment question, Laegaard suggests an interpretative principle, which operates as a diagnostic tool to help us to identify when an instance of symbolic establishment is morally problematic. The principle states:

‘Whenever the state officially recognizes non-state organisations [further conditions...] then it sends a message that members of the recognised organizations have a higher civic status than other citizens.’<sup>56</sup>

To consider whether marriage, as a non-state organisation, is a relevant object of recognition, and involves a relevant kind of recognition, for this principle to apply, we need to make further specifications. Laegaard suggests that asking the following questions will be fruitful: What is the content of the message that is communicated?; What is the mode of communication?; Who are the recipients receiving the message?<sup>57</sup> These questions relating to meaning, action, and audience, crop up again, and are given due consideration, below, where I consider whether marital establishment is a form of wrongful discrimination. For now, it is sufficient to note that accounts of the wrongfulness of symbolic establishment echo the concerns of expressive theories of law that there may be a class of wrongful acts that derive their wrongfulness purely from the message they send, irrespective of any further effects, that is, they are non-instrumentally, extrinsically wrong.

#### 4.1 Discrimination and Symbolic Equality

In this section, I draw upon Hellman’s account of how we distinguish between wrongful and acceptable discrimination. The key question that Hellman asks, which we can echo here, is ‘when does drawing distinctions among people fail to treat those affected as persons of equal moral worth?’<sup>58</sup> When this happens, the party discriminated against is demeaned: both disrespect is expressed towards them, and they are put down.<sup>59</sup> According to Hellman, whether discrimination on the basis of a certain trait is wrongful is a question that must be answered contextually. The first contextual consideration concerns the group affected, the second concerns the action occurring. Treating persons with certain traits in particular ways can be interpreted differently depending on social

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<sup>56</sup> Laegaard, op. cit, p. 128.

<sup>57</sup> Laegaard, op. cit, p. 126.

<sup>58</sup> Hellman, op. cit, p. 7.

<sup>59</sup> Hellman, op. cit, p. 35.

conventions.<sup>60</sup> The troubled historical course of some traits, such as race, may mean that they hold strong social significance across various contexts (i.e. political representation, employment, education, personal relationships), meaning that discrimination on that basis is likely to be demeaning and therefore wrongful. Other traits, however, such as wearing eye glasses, may have strong social significance in more limited contexts, for example, amongst the Khmer people of Cambodia, where the trait was considered a marker of intelligence and therefore considered a basis on which to target victims in the genocide of 1975-1979. These very traits might be considered insignificant in other contexts, such that discrimination on their basis will have different normative implications in different contexts. Hellman suggests that we pay particular attention to what she terms “HSD” traits, the bearers of which suffer a history of mistreatment or current social disadvantage, such that distinguishing persons by them risks reinforcing or entrenching caste-like aspects of society.<sup>61</sup> Thus, ‘[w]hether the characteristic one uses to classify has the potential to demean is determined largely by how that characteristic has been used to separate people in the past and the relative social status of the group defined by the characteristic today.’<sup>62</sup> Persons bearing HSD traits can be understood as belonging to a *socially salient grouping*, the differential treatment of which is suspect. For the expression of disrespect to another to be demeaning, there needs to be a power-differential between the parties involved – one cannot be put down by somebody of inferior social status. The relevance of socially-salient groupings is also recognised and utilised by Lippert-Rasmussen in his harm account – on his specific desert-prioritarian view socially vulnerable groups are more likely to be harmed by expressions of disrespect, so that the worse-off should be subject to greater protection from disrespectful views, whereas persons more deserving of such disrespect (who have, perhaps, already treated others with disrespect) need less priority in protection.<sup>63</sup>

For *Matrimonia* to escape the charge of wrongful discrimination, I need to show that three things are true concurrently. First, I argue that relationship status is not always a suspect trait, which means there are some cases where there is not a high risk of demeaning if differentiation occurs on the basis of it. Second, and related, I argue that what the state does in establishing an institution like marriage does not convey a meaning

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<sup>60</sup> Hellman, op. cit, p. 7.

<sup>61</sup> Hellman, op. cit, pp. 21-22.

<sup>62</sup> Hellman, op. cit, p. 28.

<sup>63</sup> Lippert-Rasmussen, op. cit., p. 8.

that undermines or challenges the equal moral worth of any citizens. These two conditions suffice to show that, on the basis of this interpretive judgement of the complex practice of marital establishment, both the group affected, and the action taken, do not give us reason to suspect that wrongful discrimination is occurring – symbolic establishment is *non-stigmatising*. Third, I claim that this differentiation or distinction drawn by marriage (on the basis of a non-HSD trait) does not deny the excluded group something that is required by justice. This second requirement will be easier to fulfil if my previous claims, about marriage being symbolic, not material, go through.

#### 4.2 Affected Groups

To consider the discrimination affected by amatonormative marital regimes, then, we need to ask a number of questions. Which group/s is/are affected by the discrimination on the basis of this trait? Is there a long history of mistreating this group? Does this group currently have low socio-economic status? Are the unmarried a socially salient group? Or do the unmarried form an arbitrary assemblage? Under the guise of “the unmarried”, are we really excluding people based on other protected characteristics such as religion or ethnicity?<sup>64</sup>

But first, a note about what is meant by exclusion. To say that a group is excluded from marriage means something quite specific. Some people are legally excluded from marriage, for example, persons under the age of marital consent, siblings and other close family members, and polygamists.<sup>65</sup> Despite this, many people who do not enter the institution of marriage are not actually legally excluded from it. They can legally marry, although they either can't on their own terms, or do not wish to do so at all.<sup>66</sup> The same is even true of polygamists, who need not commit bigamy as long as they only seek legal recognition of one of their marriages. Best friends, and couplings of single persons can marry too, without legal impediment. Yet, if we are to take the amatonormativity of marriage seriously, we need to recognise that what exclusion from marriage means in this context is not actual legal exclusion, but the sense that the institution of marriage is not

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<sup>64</sup> Hellman, *op. cit.*, pp. 14; 20-21.

<sup>65</sup> Polygamists are excluded from many, but not all, marital regimes.

<sup>66</sup> In the former case, the point was (rather disingenuously) made regularly by opponents during the same-sex marriage debate, that gay marriage was in fact legal, since gay people could and indeed did marry members of the opposite sex, and that was sufficient provision for them. These marriages were often referred to as “lavender marriages”.

designed or intended for them. In other words, the state administers an institution that is not universal, in that it does not cater for all, since only a subset of the population would wish to make use of it.<sup>67</sup>

When we consider who the unmarried are then, we find that they are a rather disparate group. Amongst the singletons in the group, we find the long-term and short-term singles by choice and by circumstance – ‘quirky-alones’ and celibate members of religious orders, eligible bachelors and bachelorettes, the divorced and the widowed. Amongst the partnered we come across the short-term and long-term cohabitants, the terminally engaged, the serial monogamists, the courting and the non-cohabiting couples. Amongst the unpartnered we find other non-spousal couplings and collections of people – siblings and other family combinations, friends and urban tribes. For this group to be the subject of wrongful discrimination, we need an account of how this is a socially salient grouping. Relating to this motley crew of affected persons are a range of different cultural meanings, stereotypes, and presumptions. The trait of being unmarried does not have a single meaning attached to it, instead more detail is required if we are to specify what is signified by the trait. In what follows, I by no means give a comprehensive account of how the trait operates in society, rather, I focus on two sub-groups bearing the HSD trait that I consider give us the most reason to be concerned about symbolic marital establishment.

#### 4.2.1 Unmarried Mothers

By looking at the first sub-group, unmarried mothers, it is clear that certain relationship-based classifications have been used in the past to violate the rights of individuals in egregious ways. In the Republic of Ireland, from the 1920s and until as late as the 1980s, unmarried women who became pregnant could be sent to ‘Mother and Baby Homes’ for the duration of their pregnancy and up to two years after having given birth. After that time had elapsed, most had to leave their babies in the care of the nuns at the home, whilst they either risked a hostile reception back home, started a new life elsewhere, or in the most troublesome cases (often those who had ‘fallen more than once’) were sent for further detention in a Magdalen laundry. In 1951, a daily average population of 983

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<sup>67</sup> This is also true of RRR under *Omnia*, since although the scope of the population using the institution/s will be broader, it will not be completely universal: Robinson Crusoes need not apply.

unmarried mothers were held in these state-funded homes.<sup>68</sup> Conditions were strict and oppressive for the women, and as recent investigations have revealed, worse still for the children, who died and were unofficially buried in their tens, and, possibly, hundreds.

Here we have a clear case of historical mistreatment on the basis of the trait ‘unmarried’. The combination of being pregnant and having the trait ‘unmarried’ in that context invited further associations with derogatory traits, such as religious notions of sinfulness, social perceptions of deviance and poor reputation, and class and gender expectations about probable behaviour and prospects. Women bearing the trait were treated as inmates and penitents, subject to a ‘form of internal exile’, marginalised and stigmatised as a pariah group.<sup>69</sup> Many women, dubbed ‘PFIs’ (Pregnant From Ireland), travelled to England to avoid incarceration, where social attitudes were only marginally better. Research conducted in England in the late 1940s found that unmarried mothers were subject to discrimination in maternity services: being more likely to have their baby’s delivery entrusted to student midwives; less likely to be given analgesia; and subject to behaviour from staff intended to embarrass them.<sup>70</sup> Ireland was by no means the only context within which unmarried mothers was mistreated.

Treatment such as this – deeply damaging to individual wellbeing and deleterious to the autonomy of its victims – has long-lasting effects. Discrimination is not simply switched off, like a light. In most cases, the dismantling of discriminatory practices is a slow, non-linear process subject to halts and backlashes, and the end point may be unclear. Although the confinement of unmarried mothers in Mother and Baby Homes has been discontinued, there will likely be continuities in treatment, less severe but discriminatory nonetheless. Once it finally comes to an end, discrimination is more like the embers of a fire, that once it has died down, continues to be too hot to handle for some time afterwards. Long after the morally reprehensible forms of treatment against unmarried mothers have been outlawed, condemned and dismantled (assuming complete dismantlement is even possible), vestiges remain.<sup>71</sup> Social stereotypes possess significant

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<sup>68</sup> Eoin O’ Sullivan and Ian O’Donnell, ‘Coercive confinement in the Republic of Ireland: The waning of a culture of control’, *Punishment and Society* 9, 1 (2007): 27-48; p. 35.

<sup>69</sup> O’Sullivan and O’Donnell, op. cit; p. 37; Paul Michael Garrett, ‘Unmarried Mothers’ in the Republic of Ireland’, *Journal of Social Work* 16, 6 (2016): 708-725; pp. 709, 722.

<sup>70</sup> Garrett, op. cit, p. 720.

<sup>71</sup> Since the state is only just beginning to understand and acknowledge what occurred in the home, with an ongoing inquiry initiated thanks to the work of an amateur historian, Catherine Corless, who uncovered evidence of the remains of babies and children at one site, the process of dismantlement is far from

power, such that in this context the trait ‘unmarried mother’ carries with it heavy baggage, deeply entrenched and encoded in our consciousness.<sup>72</sup> Thus within the Irish context and beyond, the state making distinctions on the basis of marriage is potentially harmful to those individuals directly or indirectly affected by the mistreatment of unmarried mothers, and even when no palpable harm is present, the meaning of such distinctions is still loaded. It is likely that there are few contexts in which unmarried mothers have not been mistreated or disadvantaged, for another example, consider the treatment of “welfare queens” in the US.<sup>73</sup> Nevertheless, in at least some contexts, the treatment was less severe, and is overcome more easily.

There will be some cases where a history of mistreatment renders a group distinction ‘live’ such that, any future differential treatment is sufficiently symbolically loaded to connote inferiority. However, there are other cases where, although history is never deleted, it fades in significance alongside new symbolic orders. As I argued in Chapter 2, taint cannot exist indefinitely beyond living memory.<sup>74</sup> Variables affecting where cases are located between these two possibilities include: the attribution of responsibility, criminal or otherwise; access to redress and compensation for victimized communities; the use of pardoning and public apology; and public memorializing.<sup>75</sup> Although it is the case that the symbolic establishment of marriage is more negatively charged in this context, there is no reason, in principle, to believe that the establishment of marriage will be demeaning towards unmarried mothers in affected communities in perpetua. Although the risk that such discrimination is wrongful is higher in this context, risking and doing are not the same thing, and such a risk can be avoided.<sup>76</sup> Although some Mother and Baby Homes remained open in Ireland as late as the 1980s, by the 1960s countervailing forces were in motion: ‘single parenthood’ was increasingly seen as a ‘difficult but still potentially viable alternative’; and the 1973 Social Welfare Act granted unmarried mothers and their

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complete. Concomitantly, in the Australian government has only recently apologised for its role in the transportation and adoption of the children of Irish unmarried mothers. The effects of this policy, then, are far-ranging to the point of international.

<sup>72</sup> Hellman, op. cit, p. 66.

<sup>73</sup> See Nancy Fraser and Linda Gordon, ‘A Genealogy of Dependency: Tracing a Key Word of the U.S. Welfare State’, *Signs* 19, 2 (1994): 309-336.

<sup>74</sup> For example, the increased uptake of marriage amongst LGBT persons belonging to younger generations, compared to their older counterparts, is explained by the fact that marriage is no longer tainted for them by its history of exclusion of LGBT citizens. See Brian Heaphy, Carol Smart, and Anna Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (Basingstoke: Palgrave Macmillan, 2013).

<sup>75</sup> Again, these kinds of resolutions are only just being explored for unmarried mothers in the Republic of Ireland.

<sup>76</sup> Hellman, op. cit, p. 66.

children entitlements to maintenance allowances.<sup>77</sup> Here, the state begins to offset group harms with group benefits, a process that could continue with the extension of RRR to all caring relationships alongside marital establishment. Given a multifaceted context, in which numerous messages of equality and inequality of varying strengths are being transmitted, the meaning of the state's act of marital establishment needs to be interpreted in the light of all the noise directed towards a group.<sup>78</sup>

#### 4.2.2 Singles

As we have seen, Brake argues that the establishment of amatonormative marriage is discriminatory. This discrimination consists in the negative stereotyping, differential treatment in the provision of services, and lack of social recognition of the relationship status of persons not in amative relationships.<sup>79</sup> To provide us with empirical evidence of this, Brake points to the phenomenon of singlism, meaning the stigmatizing of and discrimination against adults who are single (not in an amative relationship). Singles, as a group, are subject to a current social disadvantage. Singlism has been documented most extensively by Bella DePaulo, who argues that '[a]lthough singlism is a nonviolent, softer form of bigotry than what is often faced by other stigmatized groups such as African Americans or gay men and lesbians, the impact of singlism is far ranging.'<sup>80</sup> Marriage, whether different-sex, or modified to be sex-neutral, and/or polygamous, brings material benefits to its participants that are denied to single persons. Yet, even if the effects of marriage are purely symbolic, not material, discrimination may occur. DePaulo and Wendy Morris point to the discriminatory effects of a culture that values coupledness: single men are paid less by their employers than their married male colleagues; housing discrimination exists as rental agents are more likely to choose a couple over a pair of friends who apply; and single persons report 'poorer service in restaurants or condescending attitudes in everyday life.'<sup>81</sup> This discrimination is no doubt fuelled by the prevalence of certain negative social attitudes towards singletons – they are rated as 'less socially mature, less well-adjusted, and more self-centered and envious than married

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<sup>77</sup> Garrett, op. cit, p. 721.

<sup>78</sup> Hellman, op. cit, p. 67. In this particular case, the fact that the homes were Catholic institutions, both publically and privately funded, and fact that laws prohibiting abortion were only lifted as recently as 2018, points to elements of religious establishment present that compound the issue and its possible resolution.

<sup>79</sup> Brake op. cit, pp. 91-92, 94.

<sup>80</sup> Bella DePaulo and Wendy Morris, 'The Unrecognized Stereotyping and Discrimination Against Singles', *Current Directions in Psychological Science* 15, 5 (2006): 251-254; p. 251.

<sup>81</sup> DePaulo and Morris, op. cit, p. 252.

people (though also more independent and career-oriented).<sup>82</sup> Such discrimination may also be legitimated by the state, even in the case of public, symbolic discrimination.

We shall now consider the problem of singlism in relation to the two cases of private discrimination presented earlier. After developing them in more detail, I will turn to the wrongness of such cases, and draw some lessons for symbolic marital establishment from them.

Recall Case *C* - *Private Discrimination (Business)*: a private business refuses to provide a service it offers to married couples to two persons who request it but are unmarried. Imagine that the owners of a bed-and-breakfast only sell their double rooms to married couples. Unmarried couples, and pairs of single friends, are thereby treated differently by being denied a service available to others, although they fulfil other relevant criteria, such as ability to pay.

In this case, the harm account of discrimination would ask in what way unmarried couples and single friends are harmed by such treatment. Apart from the obvious inconvenience, and potential costs of having to go elsewhere to secure accommodation, there are potential harms related to other accounts of discrimination. The prejudice account may point to harms resulting from being the target of prejudiced views, ideologies, and moral beliefs. Being the target of such views can harm persons self-respect and their sense of community and trust with others. The prejudice account would claim however, that regardless of any harms caused by treatment motivated by such views, the putting of such views into action can itself be wrong, particularly since the prejudice has found its way into a conscious business policy, and not a mere kneejerk reaction. Moreover, the mental state behind the policy is likely a cognitive belief in the inferiority of the relationships of unmarried and single people. The expressive account can consider factors such as the speaker and their relative power and social standing, the content of their expression, and the audience. The meaning of the acts of a B&B owner is less significant than the acts of more powerful actors, such as corporations or the state, but more significant in cases where, say, there are few choices of accommodation available. The likely meaning of the action, that the intimate relationships of unmarried

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<sup>82</sup> DePaulo and Morris, *op. cit.*, p. 251.

and single persons are less worthy than those of married persons, and, perhaps, wrong, is also factored into the wrongness of the discriminatory act.

In *Case D - Private Discrimination (Social)*: a private individual treats unmarried persons differently and less favourably than married persons in their social interactions. Imagine that someone is throwing a big birthday party, and they are sending out invites. For all the friends and acquaintances that they invite that they know are partnered (married or not), they send them a plus-one invite. Friends who are single receive an invite addressed to themselves only, so they must attend the social event alone.

In this case, the harm account of discrimination would need to identify the harm resulting, most likely the social costs of attending an event on one's own, and feeling of slight or unfairness felt, which may have a knock-on effect on self-respect and overall well-being. The prejudice account would need to consider whether the plus-one policy was the result of a conscious belief in the insignificance of the close relationships of singletons, or hostile contempt for such relationships, which could be conscious or a more unthinking, non-cognitive valuation. In the latter case, there may be little that could be done to prevent the valuation from occurring, and the party planner may not be responsible for their feelings. The expressive account would consider again the speaker's power, their act, and their audience. Given the micro-social context of this interaction, there is unlikely to be much of a power differential between the inviter and the invitee, and the audience is restricted to the invitee alone. The meaning of the invite could send out a message of inferiority, although this would not be significantly audible. In this case, and case *C* too, the cumulative effect of such expressions, if they occur regularly, will be a significant part of the account.

In both of these cases, it is not certain whether wrongful discrimination against single persons has occurred. If it has, it is likely that the treatment, although *prima facie* wrong, is not wrong all-things-considered, or state action required to address it would not be justified all-things-considered. This is most plausible in case *D*, where the inviter's act may be included the range of permissible actions available, perhaps under the rubric of "the right to do wrong". Case *C* also might not necessitate state action to resolve, although other actions, such as boycotting and protesting, may be appropriate responses.

In what follows, I focus on a prominent issue that arises in cases of private discrimination against single persons. This concerns whether singletons can be classified as a socially salient grouping. The differential treatment of single persons by private businesses and individuals could be explained away as idiosyncratic discrimination against otherwise unstigmatised groups. This would be much less harmful, and would express something less troubling, than discrimination directed towards members of vulnerable and stigmatised groups. This is due both to the fact that individual acts of differential treatment in an otherwise discrimination-free context are barely felt as harmful or expressively wrong, and the nature of stigmatic harms, which spread across all members of a tainted group so that the cumulative effect is a significant and systematic unequal opportunity structure.<sup>83</sup> If it can be shown that singles are a socially salient group, we ought to be more concerned about acts of private discrimination against them.<sup>84</sup>

Can the unmarried be described as a disadvantaged class? Under amatonormativity, persons are treated differently on the basis of an important social marker - their relationship status. This trait, unlike sex or race, is not considered an inherent quality, rather, it refers to a relational quality, and therefore, according to Brake, “singlism” is like classism, in which individuals are judged inferior due to membership in a social class.<sup>85</sup> When class is described as a relational concept, this refers to the differential relationship that people have to sources of income, assets or capital (in classic Marxian terms, their relationship to the means of production).<sup>86</sup> When Brake makes this comparison, perhaps she has in mind the idea that singletons belong to a class of persons who suffer from relational inequality resulting from their possessing comparatively less relational capital (a species of social capital) than others.<sup>87</sup> However, according to Brake, this diagnosis is incorrect. Brake’s point is that the stereotyping and lack of social recognition associated with amatonormativity constructs an understanding of the unmarried as somehow deprived or living lives of inferior quality, because the relational

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<sup>83</sup> Lippert-Rasmussen, op. cit.; pp. 168-170.

<sup>84</sup> In her account of liberal minimal secularism (which includes the possible permissibility of symbolic religious establishment), Cécile Laborde includes the following principle, which focuses on state expression with regards to socially salient identities: ‘When a social identity is a marker of vulnerability and domination, it should not be symbolically endorsed and promoted by the state.’ Cécile Laborde, *Liberalism’s Religion* (Cambridge, MA: Harvard University Press, 2017): p. 137.

<sup>85</sup> Brake, op. cit, p. 97.

<sup>86</sup> Erik Olin Wright, ‘Social Class,’ in George Ritzer (ed.) *Encyclopedia of Social Theory Vol. 1* (Thousand Oaks, CA: SAGE Publications, 2005): 718-724.

<sup>87</sup> Chiara Cordelli, ‘Justice as Fairness and Relational Resources’, *Journal of Political Philosophy* 23, 1 (2015): 86-110.

capital available to or chosen by them is not recognised as of equal value to that utilised by the married. In actual fact, singletons may be just as rich or even richer in relational capital than their married counterparts. What Brake is calling for is a reappraisal of alternative forms of relational capital, located in friendships and other non-amative relationships, so that they are considered on a par with amative relationships, and individuals can freely seek value in whichever kind of relationship they choose, without being unduly burdened.

Are class and relationship status really parallel cases? Class tends to operate as an ascribed and a fairly static status, such that both inter- and intra-generational social mobility are limited. Relationship status, however, is not inherited from our parents (although some relationship behaviours may be passed down and repeated), and is highly responsive to choice, and subject to flux over the course of one's life. Being in the working class and being in the unmarried class are two different kinds of membership. Does being in a lower 'relational' class place you into a denigrated class?

One's relationship status has more in common with one's birth position. Within most cultures, there are widely-held perceptions about what being the first-born, middle-born, or baby of the sibling set means, in terms of character traits, abilities and experiences. Equally, being an only child carries with it many associations. For example, only children are spoiled, first-born children are high achievers, last-born children are rebels. Some of these claims are supported by empirical evidence from scientific studies.<sup>88</sup> Sometimes these differences are accompanied with, and arguably reinforced by official differences of treatment, for example, in the UK, Child Benefit payments are higher for a first child, and reduce in value to a lower rate for second and subsequent children. Women who are pregnant with their first child (primigravida) are entitled to more routine medical checks on the UK National Health Service than women pregnant with subsequent children (multigravida). Which, if any of these positions, could be considered to be a disadvantaged one? Some positions are associated with more negative experiences, (middle-borns are disadvantaged by never being the only-child, unlike the first and last children in the nest, and therefore tend to receive the lowest overall investment of time and money from their parents) although these do not always translate into negative traits. On balance then, although our culture distinguishes persons to some extent on the basis

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<sup>88</sup> Jeffrey Kluger, 'The Power of Birth Order', *Time* Oct 17<sup>th</sup> 2007.

of their birth position, there is not overwhelming disadvantage created by this, such that we could say that middle-born children are a denigrated class.

However, birth position differs in some important respects from relationship status. Firstly, it is ascribed at birth, and rarely chosen, unless we consider the possibility that an older sibling could influence their parent's decision about whether to have another child, to some extent. Relationship status, although not necessarily chosen, is never ascribed at birth. Secondly, the preferential treatment afforded to first children by the social security and healthcare systems have a rational justification: the initial financial outlay in providing for a first child is higher than for subsequent children, since much of the hardware acquired initially can be reused (prams, cots, toys, etc.); in a first pregnancy, since the medical risks for an individual are as yet unknown, they are all treated with a degree of extra caution, and an inexperienced mother is likely to raise concerns about her health more regularly than a seasoned childbearer. The same cannot be said for relationship status, without advancing an argument about the value of marital relationships over and above other significant personal relationships that can justify preferential treatment in the law.

Relationship status could also be compared to employment status. Like personal relationships, a person can have one job that they devote many hours of their working lives to, or they can concurrently hold a number of job positions. Traditionally, people are expected to have one job at a time, such that most positions of employment are full-time and are hard to combine with other jobs, although more flexible working patterns have developed in recent years. If persons follow the predominant social pattern, and choose to only have one job at a time, over the course of their life they may have many different jobs in succession, or when they are just starting out, they may try a few jobs before settling down with 'the one'. Employers, who expect potential employees to demonstrate commitment to a job, may be suspicious of career breaks and short-term stints of work, and may even discriminate on this basis when selecting between candidates.

Being unmarried, or single, then, is similar to being unemployed. One can be single or unemployed by choice, or as a result of circumstances outside one's control. In a marriage culture, being single is usually understood to be a temporary status, to be

rectified once the search for a new partner is fruitful, just as is the case for unemployment in a capitalist culture. Singlehood and unemployment are considered to be deprived statuses, both accompanied by the assumption that one aspires to more, be it another relationship or job. Choosing unemployment and choosing singlehood are not recognised as valuable life choices. This is reflected in the fact that in most states, employment relief is cast as a form of jobseekers allowance, designed to support individuals to find another job as soon as possible, and tied to willingness to work. However, the increased uptake of the idea of an unconditional basic income by politicians and policy-makers around the world, suggests that perceptions of unemployment are changing. However, to the extent that basic income is a benefit provided by the state, that is blind to whether persons have or intend to enter into employment, it does not mirror schemes of RRR that allocate benefits and rights without regard to the nature of the relationship entered into, since RRR is not truly universal by not applying to persons who have no significant relationship at all (recall, Robinson Crusoes need not apply), whilst all persons, regardless of personal activity, qualify as having basic needs to be met through the allocation of basic income payments.

Universal basic income can remove the stigma from unemployment (and some of the social pressure to seek full-time employment). All citizens are entitled to certain means without consideration of their individual circumstances. *Matrimonia* provides the equivalent of a basic income for the relational sphere – rights, protections, and benefits for all significant relationships. This goes a significant way towards neutralising any differential treatment above and beyond the basic allocation of what is required by justice. Just as the state may provide a basic income, but still express alongside that the value of paid and gainful employment, the state could support all relationships and express the value of marriage.<sup>89</sup>

The problem with the two examples just considered, is that distinctions drawn on the basis of birth order, or employment status, can be publically justified. The facts about relatively higher costs and risks associated with first-born children, and the great importance of work for the fulfilling of everyone's needs for various goods and services, provide clear public reasons. Can the symbolic establishment of marriage be justified in

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<sup>89</sup> For an insightful discussion about neutrality, the work requirement, and universal basic income, see David Jenkins, 'Everybody's gotta do something': neutrality and work,' *Critical Review of International Social and Political Philosophy* 2018, DOI: 10.1080/13698230.2018.1497248

the same way? This is a separate question from whether it is discriminatory. Even if it is not, marital establishment is not out of the woods. I turn to the issue of public justification and neutrality in the following chapter.

### 5 Concluding Remarks: The Non-Discriminatory Matrimonial State

The above discussion leads us to arrive at four conditions, the satisfaction of which promotes a form of marital establishment that avoids the discrimination that violates justice. As presented above, these conditions would need to be satisfied to ensure that the practice of marital establishment did not result in wrongful discrimination by the state, and encourage it from private individuals:

C1: The state intends to support the participation of citizens in a cultural institution – establishment is not foil for other intentions, e.g. stigmatising other cultural practices, or privileging a particular social group (non-prejudicial intention)

C2: The state does not endorse (and is required to mitigate against) any material effects emanating from its actions e.g. protected characteristics include relationship status, strongly enforced discrimination legislation (symbolic, not material)

C3: The state recognises and offers material supports to all relevant alternative practices – the state has genuine, robust, and accessible RRR for non-marital relationships (equal material treatment)

C4: as much as is possible, historical mistreatment should be neutralized, through reparations, public apology, and altering the social meaning of marriage (non-stigmatising)

Each of these four conditions operate to limit the likelihood that differential treatment between married and unmarried persons, by the state or private individuals, is harmful, expressively objectionable, or prejudicial. I have argued that the 'unmarried' need not be seen as a disadvantaged class as long as they are an arbitrary assemblage and not a foil for the targeting of a particular socially salient group, vulnerable or otherwise. The diversity of the group places limits on the extent to which it can be marked as palpably distinct from others. As long as other noise from the state regarding the unmarried is positive or neutral, the harmful effects and objectionable meanings of symbolic marital establishment will be negligent. Since I argue that the current dominant interpretation of

marriage is thin, it is somewhat ambiguous what the state is saying in establishing marriage. The state's expression cannot be interpreted as prescribing, or privileging marriage, or stigmatising its alternatives. Ultimately, there are inevitable variations in the constellation of significant others surrounding diverse persons, and the state should avoid the development of systematic disadvantages relating to these variations. Here, I have shown that symbolic marital establishment supplemented with a broader scheme of RRR successfully avoids this.

Chapter 6 -  
What is Wrong With Marital Establishment?  
Part Three: The Neutrality Objection to Marital Establishment

1 Introduction

We start this chapter by revisiting a couple we met in Chapter 2. Recall that Tom and Paul wish to get married. Recall also that Tom and Paul's desire contains within it a desire for marital establishment (ME). They don't want just anyone to marry them, let alone to marry themselves: they want the state to marry them. They want the state to lend its voice in declaring to the world that they are married. They want to 'make it official' by using the state's legal powers and symbolic resources to recognise their relationship.

Yet ME is problematic. Like all of their co-citizens, Tom and Paul hold a conception of the good life (CGL).<sup>1</sup> That is, they possess an idea of what makes a life go well, and what brings value to a life. If their conception of the good life is very thoroughly worked-out, and consciously held, we can say that they adhere to an identifiable comprehensive doctrine, such as Catholicism, or humanism, which provides guidance or structure with regards to how they approach a range of matters that arise across the course of their life, such as moral, philosophical, ontological and epistemological questions, cultural practices, and routine behaviour involving family, friends, colleagues and strangers. Tom and Paul's conception of the good life may be only loosely worked-out, incomplete, or unconsciously held, such that it may be difficult to attribute a particular comprehensive doctrine to them; nevertheless, we can assume that all persons, Tom and Paul included, possess one, whether fully comprehensive, or merely partially so. Their conception of the good life may address what we would deem to be complex or intellectual questions, or it may be focused on more quotidian and mundane matters. Either way, it will provide a standard against which Tom and Paul can distinguish what counts as an advancement, and what is a hindrance, to their life plans. A conception of the good life tells us whether

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<sup>1</sup> For simplicities sake, we will assume that Tom and Paul possess the same conception of the good life. This is unlikely, even amongst long-term life partners, as individuals are bound to disagree about some aspects of the good, and engage in different interpretations of the particular doctrine they adhere to. All that Tom and Paul must agree on, for the purposes of this discussion, is that marital establishment is a feature of the good life.

having children, not being able to secure season tickets to football club, getting married, or losing one's job as a telemarketer, are occasions for celebration or commiseration.

Since Tom and Paul count ME amongst their desires, interests and priorities, ME forms a part of their conception of the good life. The problem is, however, that under normal liberal conditions, there exist a plurality of different conception of the good life, which, being either partly or completely incompatible with each other, are in competition.<sup>2</sup> Rawls refers to this as the fact of reasonable pluralism: the inevitable result of the free exercise of reason by citizens in a liberal polity. Even if all citizens are fully reasonable, they will inevitably disagree with each other on a range of issues due to certain conditions under which human reasoning unavoidably occurs, which Rawls terms the burdens of judgment. These six burdens include certain differences and difficulties relating to evidence, weighting, concepts, and life experiences, that make convergence on a judgement amongst separate individuals challenging and often impossible without resort to force or coercion.

The Rawlsian response to these features of modern liberal societies is political liberalism – an attempt to show how citizens could converge on a set of judgments and principles limited in scope to political matters alone, concerning justice, legitimacy, and the rights and liberties associated with free and equal citizenship. Insofar as an issue or judgment relates to non-political matters - personal and social concerns about family, work, and leisure that do not relate directly to free and equal citizenship, such as whether to put your toddler into childcare, or what to wear, or whether to accept a job offer – political liberalism exercises silent restraint, allowing an individual to make judgments according to their personal conception of the good life. Political matters, such as whether the state should offer free or subsidised childcare, whether and in what settings a swastika can be

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<sup>2</sup> Suppose that a conception of the good life takes a position on all issues, a - z. Conceptions of the good life are distinct from one another when they take a different position on one or more issue. A conception of the good life is partially incompatible with another when it shares the same position on some issues (say, a - w), but takes a different (and necessarily opposing) position on some issues (x, y, z). Partially incompatible conceptions of the good life may therefore overlap considerably. Wholly incompatibly conceptions of the good life take a different position on all possible issues (a - z). Jonathan Quong (Jonathan Quong, *Liberalism without Perfection* (New York: Oxford University Press, 2011); p. 29) points out that only comprehensive doctrines take a position on all issues (a - z), whilst partially comprehensive doctrines only take a position on a subset of issues (say, a - e). As such, some conceptions of the good life, although distinct from each other, are not incompatible, since they each have limited focus and do not take a position on the same issues (conception 1 focuses on a - e, whilst conception 2 focuses on f - k). Although rendered as compatible, this does not mean that such partially comprehensive conceptions of the good life are not in competition, as we shall see.

worn, and what the fair terms of employment are, are resolved by reference to political values only, appealing to judgments within and common to a range of conceptions of the good life. Political liberalism aims to achieve an overlapping consensus between conceptions of the good life, such that each conception of the good life converges on the same political judgments and has the same political conception of justice embedded as a module amongst diverse non-political judgements.<sup>3</sup>

Reasonable persons are defined as those that possess reasonable conceptions of the good life, that is, conceptions of the good life that recognise and subscribe to the political conception of justice. Citizens are under a non-enforceable duty of civility to offer only public reasons in support of political arguments addressed to their co-citizens. Liberal standards of legitimacy require that political actors do not justify political decisions on the basis of values or judgments that are non-political and therefore non-public and unshared. Political liberalism thus demands neutrality of justification such that laws are supported by reasons that can be endorsed by all reasonable conceptions of the good life, rather than a mere subset of them.

ME may be an aspect of 'Tom and Pauls' conception of the good life, but it is not an aspect shared by all conceptions of the good life, and, therefore, not shared by all persons. Some conceptions of the good life like 'Tom and Pauls' include ME (ME acceptance), others exclude ME by either being silent on ME (ME indifference), or being opposed to it (ME rejection). Unless ME is part of the political conception of justice, those persons who possess conceptions of the good life that do not include ME are not unreasonable, rather, Tom and Paul are unreasonable since they wish to utilise the state for non-political purposes: the endorsement of unshared aspects of their conception of the good life. Any state that engages in ME by endorsing, supporting or establishing marriage will be non-neutral between conceptions of the good life that value or accept ME and those conceptions of the good life that are indifferent towards or reject ME. ME, then, is not permissible by the tenets of political liberalism.

There are four ways out of this problem:

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<sup>3</sup> There is disagreement regarding whether such convergence can be based on different, possibly incompatible reasons, or whether the more demanding requirement that the converging must be on shared reasons, and therefore agreement. Since part of the argument I construct in this chapter points to possible shared reasons for ME, if successful it would work for either position taken. See Quong, *op. cit.*, Chapter 9 for further discussion.

1. Reject political liberalism and embrace a moderate form of perfectionism<sup>4</sup> that could allow non-political judgements supportive of ME to be justified
2. Argue that ME is a part of the political conception of justice, and can therefore be justified using public reason<sup>5</sup>
3. Restrict the scope of neutrality and public reason to constitutional essentials and basic justice, so that once justice is satisfied, ME and other non-neutral commitments could legitimately be implemented<sup>6</sup>
4. Give an alternative account of neutrality that lets ME and certain other non-political commitments in and keeps others out, on non-perfectionist grounds

My aim in this chapter is to discuss solutions (3) and (4). As I wish to engage in the debate about marriage within political liberalism, I will avoid (1) by rejecting moderate perfectionism. In Chapter 2, I rejected (2), with particular focus on Macedo's approach, claiming that marriage is not a liberal good. The remaining terrain is split between (3) and (4). Position (3) is consistent with the arguments advanced in previous chapters, which attempted to show that although not required by justice, ME need not violate justice. Rather than straightforwardly defending (3) here, I wish to entertain the possibility of (4). Those that reject the narrow scope of public reason in (3) might be satisfied should they

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<sup>4</sup> Examples of those who defend the perfectionist position include Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), and Joseph Chan, 'Legitimacy, Unanimity, and Perfectionism', *Philosophy and Public Affairs* 29, 1 (2000): 5-42.

<sup>5</sup> As we saw in Chapter 2, this is the position taken by Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage* (Princeton, NJ: Princeton University Press, 2015); Christie Hartley and Lori Watson, 'Political Liberalism, Marriage and the Family', *Law and Philosophy* 31 (2012): 185-212; Ralph Wedgwood, 'Is Civil Marriage Illiberal?', in Elizabeth Brake (ed.) *After Marriage: Rethinking Marital Relationships* (Oxford: Oxford University Press, 2016): 29-49; and Ralph Wedgwood, 'The Fundamental Argument for Same-Sex Marriage', *The Journal of Political Philosophy* 7, 3 (1999): 225-242.

<sup>6</sup> This is the position held by John Rawls and Tim Scanlon. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993): pp. 214-215; '[m]any if not most political questions do not concern those fundamental matters, for example. Much tax legislation and many laws regulating property,; statutes protecting the environment and controlling pollution; establishing national parks and preserving wilderness areas and animal and plant species; and laying aside funds for museums and the arts.' See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Belknap Harvard University Press, 2001): p. 152; 'Fundamental justice must be achieved first. After that a democratic electorate may devote large resources to grand projects in art and science if it so chooses.' Scanlon defends the limited scope of public reason on the basis of the more fundamental impact that basic institutions have on citizens, and the greater feasibility of reaching completeness with regards to a political conception of justice if it is limited to basic questions only. See T. M. Scanlon, 'Rawls on Justification,' in Samuel Freeman (ed.) *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2002): 139-167; pp. 162-163.

accept a different, less demanding standard of neutrality, (4), that applies outside of the scope of justice. Specifically, I want to advance the argument that (4) be presented as a supplement to (3) to allay concerns that some political liberals, such as Quong, have that (3) prematurely dismisses the potential of finding shared standards with which to justify laws and policies regarding matters outside of justice.<sup>7</sup>

The liberal state of *Omnia* satisfies neutrality requirements by adopting a scheme of relationship regulation and recognition (RRR) that is tightly mapped onto what justice requires – that is, focusing on relationships and aspects of relationships where rights and obligations apply. *Matrimonia* involves the state in supporting something that is surplus to the requirements of justice – the question addressed in the chapter is how such support could be justified. The structure of the chapter is as follows. First I present the neutrality challenge to marriage (*Section 2*), and then refine the challenge by offering some initial responses (*Section 3*). Then I turn to Clare Chambers’s alternative to marital establishment – the marriage-free state - and argue that it cannot deliver state-free marriage (*Section 4*). I argue that the attempt to regulate relationships neutrally through disestablishment still raises neutrality concerns because recognition and regulation overlap (4.1) and the rolling back of regulation to the content of marriages alone, and not their form, cannot prevent the state from exercising proxy control over the form of marriage (4.2). I conclude that since even under the marriage-free state, all relationships will be subject to the control and interpretation of the state, the difference between the MFS and *Matrimonia* in terms of neutrality is one of *degree*, not *kind*, which opens up the possibility that non-neutrality might be compatible with justice, or neutrality requirements for policies beyond basic justice could permissibly be weakened whilst delivering an “equally good” scheme of relationship regulation and recognition.

## 2 Chambers and Neutrality in ‘*Against Marriage*’

In her recent book *Against Marriage*, Clare Chambers presents an argument against ME utilising the liberal notion of neutrality. She lists some conceptions of the good life that appear to conflict with the conception of the good life held by Tom & Paul:

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<sup>7</sup> Quong, op. cit.; Chapter 9. Quong argues that there are at least some broader legislative matters that can be resolved by appeal to public reason, and it would be inconsistent with our commitment to political liberalism not to try and see if such matters are resolvable on publically acceptable grounds – if they are – a greater proportion of the exercise of political power will be grounded in substantively public reasons.

nonmonogamy, bohemianism, feminism, pragmatism, and celibacy. Chambers claims that these are all reasonable conceptions of the good life because ‘none of them imply that legislative preference should be given to their respective value judgements’. However, ‘they are all incompatible with the state recognition of marriage, because they all conflict with the value judgements inherent to that recognition.’<sup>8</sup>

We can question the extent to which these conceptions of the good life conflict with Tom and Pauls’, and therefore how incompatible they really are. If we consider the content of Tom and Pauls’ judgement about ME contained within their conception of the good life, we will find that the judgement is likely to be comprised of the following:

- (a) ‘We want to get married’ – Tom and Paul value marriage for themselves in the here and now (personal preference)
- (b) ‘We value marriage’ – Tom and Paul see the value of marriage, whether for themselves or others, for now or in the past or future, for society, culture, or children (general and/or impersonal preference)
- (c) ‘We would like the state to marry us’ - Tom and Paul value marital establishment for themselves in the here and now (personal preference)
- (d) ‘We value marital establishment’ - Tom and Paul see the value of ME, whether for themselves or others, for now or in the past or future, for society, culture, or children (general and/or impersonal preference)

Adherents to many conceptions of the good life will make some or all of the above judgements about marriage. Even the conceptions of the good life cited by Chambers will. For example, a nonmonogamist could accord with the four judgments (a) – (d) but judge that the marriage so valued ought to be polygamous. A bohemian, who eschews permanent ties, could accord with them, taking the availability of divorce as the green light to engage in serial marriages. A feminist might value marriage personally or impersonally if a suitably feminist reinventing of marriage could be presented. A pragmatist, supportive of a range of different relationships for different individuals, could value marriage alongside other forms of relationship regulation and recognition. And a celibate could interpret marriage along lines that excluded sex, or accept (b) and (d) and value it for impersonal reasons.

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<sup>8</sup> Clare Chambers, *Against Marriage An Egalitarian Defence of the Marriage-Free State* (Oxford: Oxford University Press, 2017); pp. 55-56.

It is inaccurate for Chambers to describe nonmonogamy, bohemianism, feminism, pragmatism, and celibacy as conceptions of the good life that conflict with marriage. On the contrary, there may be some overlap, they may even be complementary and coexist successfully. None of the conceptions of the good life cited by Chambers necessarily entail a rejection of marriage. It seems that we need to be more specific about the way that they might conflict. Some of Chamber's alternative conceptions of the good life might not endorse marriage wholeheartedly, but they might accept or tolerate marriage as for others but 'not for me' – note that we can still support ME even if we reject (a) and (c). For Chambers' argument to go through, we must stipulate that conceptions of the good life do conflict in a particular way. Adherents to these conceptions of the good life could hold positions that range from active rejection of marriage, through mere disinterest or indifference, to qualified or unqualified acceptance. The mere existence of different conceptions of the good life is insufficient to establish that there is a problem. Indeed, Chambers admits as much, conceding that the liberal state can permit and support many things that are incompatible with certain conceptions of the good life, such as parental leave.<sup>9</sup>

Let us return then, to Chambers' argument, in order to make sense of exactly how ME violates neutrality. Her claim is: 'the political liberal state cannot base its recognition or regulation on *values* that conflict with some reasonable conception of the good.'<sup>10</sup> We have now shifted from specific conceptions of the good life to the general values that underlie them. In Chapter 2, I we saw that Macedo employs strategy (2) in section 1 above to ground ME in liberal values, which are public, and shared. Both Chambers and I reject this strategy: marriage should not be characterised as a public good *qua* liberal good. Chambers' argument is that certain values integral to marriage are rejected by many reasonable conceptions of the good life, and are therefore unshared. Justifying ME necessarily relies upon these unshared values. If we are to escape the charge of non-neutrality, we need to find some shared values upon which ME could be justified to all.

Chambers points to three ways in which ME rests on unshared and incompatible values: meaning, bundling, and hierarchy. Since in this work I have been concerned with justifying *Matrimonia*, a model of ME that eschews bundling and hierarchy, by engaging in

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<sup>9</sup> Chambers, op. cit.; p. 56.

<sup>10</sup> Chambers op cit; p. 56.

purely symbolic establishment - with robust support and protection for other relationship forms - the latter two ways need not concern me. Bundling is unproblematic as those who wish to engage in piecemeal exchanges of rights and responsibilities with regards to different relationships of various function and scope can do so under *Matrimonia*. As for hierarchy, as there are no material differences between the married and the unmarried, there is no practical hierarchy. Symbolic hierarchy, consisting in the 'celebratory conferral of an honorific status'<sup>11</sup> lacks the status Chambers envisages of it if it does not confer rights, and any celebratory distinction could be subsumed into her third concern, meaning.

Thus, we shall focus on the unshared and incompatible nature of the meaning of marriage. Chambers' concern regarding the meaning of marriage runs thusly:

'Insofar as marriage is allowed to remain true to its traditional and patriarchal past, it conflicts with feminist and other egalitarian conceptions. But, if it is reformed, it conflicts with the conceptions of the good of those who revere its traditional meaning, a meaning that they see as sacred and inviolable.'<sup>12</sup>

If the state takes any stance on the meaning of marriage, it will find itself between Scylla and Charybdis, with no version of marriage that is not controversial to some reasonable conceptions of the good life. This is because, as Chambers shows by quoting Torcello:

'we cannot genuinely imagine any definition of marriage that does not in some sense call upon a comprehensive notion of the meaning of marriage'.<sup>13</sup>

In Chapter 5 I have shown that a purely symbolic establishment of marriage is possible, and that any meanings expressed by ME could be 'safe' enough not to implicate the state in wrongful discrimination against the unmarried. The concern there was to avoid certain illiberal and disparaging meanings. Chambers' concern here is deeper still, and remains. The claim is that to attribute any meaning to marriage, however anodyne, is necessarily problematic. This claim rests on a zero-sum understanding of the state's definition of marriage – if feminist and egalitarian then not traditional and patriarchal. The establishment of one conception of marriage only happens at the exclusion of all other

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<sup>11</sup> Chambers op cit; p. 66.

<sup>12</sup> Chambers op cit; p. 61.

<sup>13</sup> Chambers op cit; p. 61, quoting Lawrence G. Torcello, 'Is the State Endorsement of Any Marriage Justifiable?: Same-Sex Marriage, Civil Unions, and the Marriage Privatization Model', *Public Affairs Quarterly* 22, 1 (2008): 43-61; p. 51.

conceptions. As such, for Chambers, '[t]he best way to solve this intractable conflict is for marriage and its meaning to cease to be determined, or recognised, by the state.'<sup>14</sup> The state avoids taking sides in this controversy by getting out of the business of marriage altogether.

### 3 Two Responses to Chambers

#### 3.1 Is the Meaning of Marriage a Zero-Sum Game?

The state can take a number of approaches to the meaning of marriage. The state could abstain from setting the meaning of marriage, either by disestablishing marriage<sup>15</sup>, or establishing a maximally permissive notion of marriage. The meaning of marriage would thereby be determined by various popular conceptions of marriage, such that, if there was a particularly dominant conception, that would to some extent fix the meaning of marriage. Alternatively, the state could directly fix the meaning of marriage through ME. This could be done in a perfectionist manner, with a specific and singular comprehensive notion of marriage endorsed. Or, this could be done in an explicitly ecumenical way, perhaps by licensing many different purveyors of marriage to be able to enact legal marriages (legal pluralism), meaning again, that the meaning of marriage tends towards the most popular amongst the purveyors. Or, the state could explicitly fix the meaning of marriage as very minimal or thin. If the state pursues this latter option, this meaning could be compatible with a range of different conceptions of marriage, need not encroach on conceptions of the good life that reject or place less value upon marriage, and avoids a zero-sum game.

Chambers implies that as long as some conceptions of the good life don't agree with ME, we can't accept ME. This standard of neutrality is too demanding, since nothing would pass the test, as there will always be someone opposed to a policy or practice. Rapists don't agree with laws against sexual violence. Yet, political liberalism is not concerned with the actual agreement or disagreement of real persons, but with the imagined

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<sup>14</sup> Chambers op cit; p. 61.

<sup>15</sup> As we shall see later, disestablishment means that the meaning of marriage will be set to whichever meanings dominate within civil society, and state regulation of marriage *qua* relationship will still, to some extent, set the meaning, or place limits on the meaning, of marriage. See also, Frances E. Olsen, 'The Myth of State Intervention in the Family,' *University of Michigan Journal of Law Reform* 18, 4 (1985): 835-864.

acceptance of policies by reasonable persons - could it be justified to them?<sup>16</sup> We need to look not at the values contained within conceptions of the good life that might not be universally shared, but instead look to reasons supporting them. Reasonable people can accept policies based on values they do not share as long as they can appreciate and accept the reasons behind them. Chambers herself gives the example of parenting: people accept the provision of generous schemes of maternity or parental leave and pay by the government, even though they may never benefit from them as their conception of the good life doesn't place any value on becoming a parent. We can consider this in terms of type and token – people can appreciate the type of value or good that is being upheld, even if they personally do not value the particular token. Many reasonable people have reason to support generous parental leave, not because they wish to make use of it, but because they recognize the reasons supporting parental leave: being granted paid time off work in order to pursue a worthwhile and costly life project; enabling the optimal care for children. Insofar as the consciously childless share these reasons with parents, they may press for parallel opportunities to pursue their own valuable, child-free projects (e.g. paid sabbaticals). Yet this does not entail that they reject parental leave, since even though they do not personally value it, they accept the rationale that supports it. A problem arising from this example is that state support for parenting is generally recognized as required by justice as parenting is socially necessary work, and the interest of children are at stake. The particular token in this example, then, does have public value, which means that reasonable persons could come to accept this token, given the political principles they accept. The good of parental leave belongs to a type of goods – call them public goods – that all have reason to value.

To be justifiable to all, ME would have to be a token of a broader type of good that has public value. In Chapter 2 I argued that marriage ought to be viewed as a cultural good. We can posit a type of goods - call them 'cultural goods' - that are supported by reasons shared by all. All citizens have good reason to want some cultural goods supported by state. Everyone could accept the reason behind the state's involvement in supporting this type of good, even if there are particular tokens that they do not value. As long as the state's rationale explicitly references this type of good, when enacting ME as an instance

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<sup>16</sup> The exact question of whom public justification is addressed to is a point of contention amongst political liberals: reasonable citizens as a subset of actual citizens in a particular liberal democratic society, or reasonable citizens in an idealized well-ordered society? The former view can be attributed to Gerald Gaus, *The Order of Public Reason* (New York: Cambridge University Press, 2011); the latter to Quong, *op. cit.*; Chapter 5.

of cultural establishment, even those who reject judgments (a) – (d) about marriage above, can accept ME insofar as they share a further judgment, (e) ‘*we value cultural goods*’, with marriage being figured as one such good.

The liberal state needs to claim that what it is valuing in establishing marriage is not harmful or discriminatory, but rather a thin, and multipurpose, cultural good.<sup>17</sup> This account need not simply collapse into strategy (2) above – which claims marriage as a liberal good. I postulate that cultural goods would be figured in a contextual, practice-dependent manner, grounded in the reasonable wants, desires and interests of persons in a particular society.

### 3.2 How Do Conceptions of the Good Life Conflict?

It seems that ME can escape the charge of neutrality fairly easily. Conceptions of the good life that display ME indifference or even ME rejection might not actually conflict with ME. Insofar as such conceptions of the good life accept cultural establishment they could in principle accept ME. The appearance of conflict between conceptions of the good life may be more apparent than real. Therefore our concern is misplaced: ME does not violate neutrality. But ME has escaped too easily. Chambers’ account of conflicting conceptions of the good life doesn’t fully capture the problem neutrality is designed to address. An enlightening account of the conflict and incompatibility of conceptions of the good life has been presented by Nick Martin. If we accept the account, ME is still not off the hook.

Martin presents three types of rivalry between conceptions of the good life:

*Incompatibility rivalry* ( $r1$ ) – incompatibility between the content of two or more goods (e.g. Christianity and Islam)

*Intra-domain rivalry* ( $r2$ ) – plurality of goods within the same domain of life (e.g. football and cricket)

*State power rivalry* ( $r3$ ) – conflict over the use of state power between two or more goods<sup>18</sup>

Martin’s argument is that  $r3$  is the type of rivalry that liberal neutralists ought to be

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<sup>17</sup> I argue that this state support for this good is not discriminatory in Chapter 5.

<sup>18</sup> Nick Martin, ‘Conceptions of the good, rivalry, and liberal neutrality’, *Critical Review of International Social and Political Philosophy* 20, 2 (2017) 143-162; pp. 147, 149.

concerned about. If we present the conflict between conceptions of the good life in the other two ways (*r1* or *r2*), we will not fully capture the problem neutrality is designed to address. For example, under *r1*, the state can endorse goods as long as they do not exclude or are not incompatible with goods valued by subscribers to other conceptions of the good life. Thus, the state could endorse ME and without rejecting celibacy, feminism, bohemianism, etc., since there does not exist the mutual exclusion that exists when the state establishes Christianity as the ‘one true faith’ and, therefore, rejects Islam.<sup>19</sup> Even the battle between polygamy and monogamy is not always one of incompatibility, as if the state opts for polygamy, monogamy is not thereby rendered impossible: as argued above ME need not be a zero-sum game. As stated before, even Chambers’ concern about the bundling involved with marriage as one way in which the state expresses that marriage is the central and one true relationship can be dismissed if ME is symbolic and the wider scheme of RRR extends to robustly support non-marital relationships and relational functions.

Under *r2*, the problem arises from the ‘competition for allegiance amongst a simple plurality of goods’. If we take relationships as our relevant domain, the idea here is that state support for one type of relationship may come at a cost to all other types of relationship. Under ME, the state supports marriage, meaning that the alternatives to marriage valued by some citizens, such as singledom, cohabitation, and ‘urban tribes’ have relatively less ability to attract followers and/or are rendered more costly to pursue. However, even within the same domain, the state of *Matrimonia* could support all relationships equally, whilst retaining ME as a cultural form.<sup>20</sup> Within the other relevant

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<sup>19</sup> Unless, of course, the state establishes marriage as the ‘one true relationship’. This is of course the concern that Chambers, and other disestablishmentarians, such as Metz, have. Whether this is to be inferred from ME will depend both on the content of ME (if opposite-sex, same-sex, and polygamous unions are included, ME may convey the more expansive ‘many true relationships’) and the nature of ME (does establishment per se, whatever the object, imply the truth or validity of the object so established?). Without evidence to the contrary, it would be reasonable to interpret religious establishment as affirming the truth of its object, since one of the functions of religion is to give an account of ontological reality, such that state support for one religion could be an endorsement of that reality, but it is unclear whether this interpretation is appropriate for other forms of establishment. The elevation of an object to establishment status by the state could entail the superlative claim that that object is the best of its set, or the comparative claim that it is better than others in its set, or simply that it is just plain good amongst other goods. There is the further question of how we populate the sets from which the established object is drawn, and above which it is elevated. For ME, is it all relationships (including, say Martha Alberston Fineman’s mother/child dyad – see Martha Alberston Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995)) or all adult relationships, (including polyamory and friendship) or all couplings (including same-sex)?

<sup>20</sup> Indeed, this is what I argue the state must do if it is to establish marriage without violating justice. As argued in Chapter 5, ME could be purely symbolic, with the material effects traditionally associated with marriage being extended to a more inclusive range of relationships.

domain, that of cultural goods, the state could support a range of cultural goods beyond marriage, and thereby avoid problems associated with *r2*.

Under *r3*, the problem is the influence exerted by the state over the relative standing of rival conceptions. Each good is in rivalry with every other good – marriage is not just in competition with the seemingly related alternative conceptions of the good life that Chambers points to, such as bohemianism and celibacy, but all other goods, such as football, fashion, knitting, and rambling. According to *r3*, the state must be neutral between all goods subscribed to by its citizens. It would be impossible for the state to support all goods equally, as it can do in *r2*, as all goods across all domains are too numerous and costly to support.<sup>21</sup> As such, all policies should be susceptible to some kind of test of neutrality. ME falls foul of the neutrality requirement however it is categorized.

Even if the state establishes religion for strategic reasons rather than claiming that the chosen faith is the one true one (as in *r1*), neutrality is still violated through the relative positioning of one faith over another. And if the state establishes multiple faiths in an attempt to be evenhanded between different religions (as in *r2*), neutrality is still violated since religion as such is placed above nonreligion. If *r3* is the correct version of neutrality, it would appear that all forms of establishment would violate neutrality, unless all goods known to man were to enter an establishment-like relationship with the state, or there were neutral, justice-based reasons for such establishment.

As Martin concludes, if this is the type of rivalry liberal neutrality is concerned with, the liberal state will necessarily be a minimal one. In the subsequent half of the paper, I propose an alternative. Neutrality of justification applies to constitutional essentials and basic justice, whilst a weaker form of neutrality applies to other matters. This allows us to retain some standard for regulating state policies outside the scope of justice, and does not simply rely on the legitimacy of the basic structure to guarantee that non-essential matters do not violate justice. Once we identify the purpose neutrality is meant

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<sup>21</sup> Recall that, as noted in Chapter 2, we are operating with an account of the circumstances of justice that includes moderate scarcity: there are enough resources available that all citizens can receive their due and satisfy their needs such that the pursuit of justice is not completely futile, but there are not enough resources to ensure that all citizens can satisfy their wants, so there will likely be conflict regarding how to distribute these resources, and who has claim to them. This means that there are not enough resources for the state to support all of the good valued by everyone.

to serve – defending the free & equal standing of citizens – we can articulate a weaker standard for these non-essential matters.

#### 4 The Perils of Neutrality: Why the Marriage-Free State does not give us State-Free Marriage

Under MD, as envisaged by Chambers, the state no longer attaches itself to, or administers marriage. Yet the society governed by the marriage-free state (MFS) is not a marriage-free society.<sup>22</sup> Disestablishing marriage does not dismantle marriage, it merely hands it back to civil society, where individuals and religious or other community groups can perform and practice marriages freely.

According to Chambers, in the MFS:

“Marriage’ would be a term like ‘friendship’. It would have meaning, and typically be used to denote a certain sort of relationship, but that meaning would not be a matter of legal ruling. Like friendship, marriage would mean different things to different people. [...] As with friendship, not all uses of the word marriage would succeed in achieving uptake. They would not all make sense to others. But their use would not conflict with any legal definition.”<sup>23</sup>

Under Chambers’ proposal, marriage would be like friendship in that the state has no official relationship with it. Many meanings of marriage would be possible and permissible. Specifically, the meaning of marriage ‘would not be a matter of legal ruling’. The state is ‘laissez-faire about the term ‘marriage’ – it does not police how the term can be applied or set limits to how far its meaning can be stretched.<sup>24</sup> The meaning of marriage would not be set in law in such a way that some marriages would be ‘true’, ‘real’, ‘valid’, and therefore legally recognized, whilst others failed to make the grade. The MFS would have no crime of bigamy on the statute books, and would have no interest in whether marriages were sham or genuine. The state would not be in the business of legally validating any marriages, so it need not declare that a man cannot marry three wives, or 500 online acquaintances, or a kunekune pig, or his mobile phone. The only standard of validity that would apply to marriage would be one internal to the individuals or social groups that administered the marriage – a marriage could be ‘invalid’ if it failed to meet in-group standards regarding the participants, the officiator, the ceremony, the

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<sup>22</sup> Chambers, p. 170.

<sup>23</sup> Chambers op. cit.; pp. 2-3.

<sup>24</sup> Chambers, op. cit.; p. 176.

vows, or any other features involved. No legal or material benefits distributed by the state would hinge on the ‘validity’ of a marriage; RRR would go far beyond marriage to include the more general and diverse class of relationships or relational functions broadly construed.

So it is clear that under the MFS, the state would have much less involvement with marriage. There would, however, be some state involvement. All marital relationships entered into under the marriage-free state (MFS) are termed by Chambers ‘private marriages’.<sup>25</sup> This terminology isn’t meant to suggest that the state has no interest in the content of marriages. A state committed to the pursuit of liberal justice, which includes the prevention of harm to persons and the promotion of equality (however construed) still cares about marriage, the ways that it operates and the impacts that it has on persons. All states regulate behaviours and practices that are deemed harmful, in many cases by labeling them as illegal and applying criminal sanctions to those persons who attempt to engage in them. Some marital practices are harmful and as such Chambers proposes that the state should take a regulatory role with regards to them.

The choice between ME and MD is one between differing regimes of relationship regulation and recognition (RRR). In her rendering of the MFS, the RRR that Chambers advocates is a series of relationship directives with contractual opt-outs. As we have seen, marriage has no special place in this system – marital and other conjugal relationships are one among many types of relationships that will receive state support and have legal ramifications. So far in this chapter (and work as a whole), I have referred to schemes of relationship regulation and recognition (RRR). In what follows, I explain why these two state practices (regulation and recognition) need to be lumped together in our analysis of the state’s governance of personal relationships: there is a conceptual overlap which makes them inextricably linked. Contrary to this view, in her account, Chambers suggests that the proper role of the state with regards to personal relationships is limited to regulation alone: the MFS as Chambers describes it, is in the business of regulation, not recognition. Under ME, there is ‘state recognition of [...] special status for personal relationships’, whilst under the MFS there operates ‘piecemeal regulation’.<sup>26</sup> Chambers never uses the term recognition to apply to the way that the MFS governs

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<sup>25</sup> Chambers, *op. cit.*; p. 171.

<sup>26</sup> Chambers, *op. cit.*; p. 49.

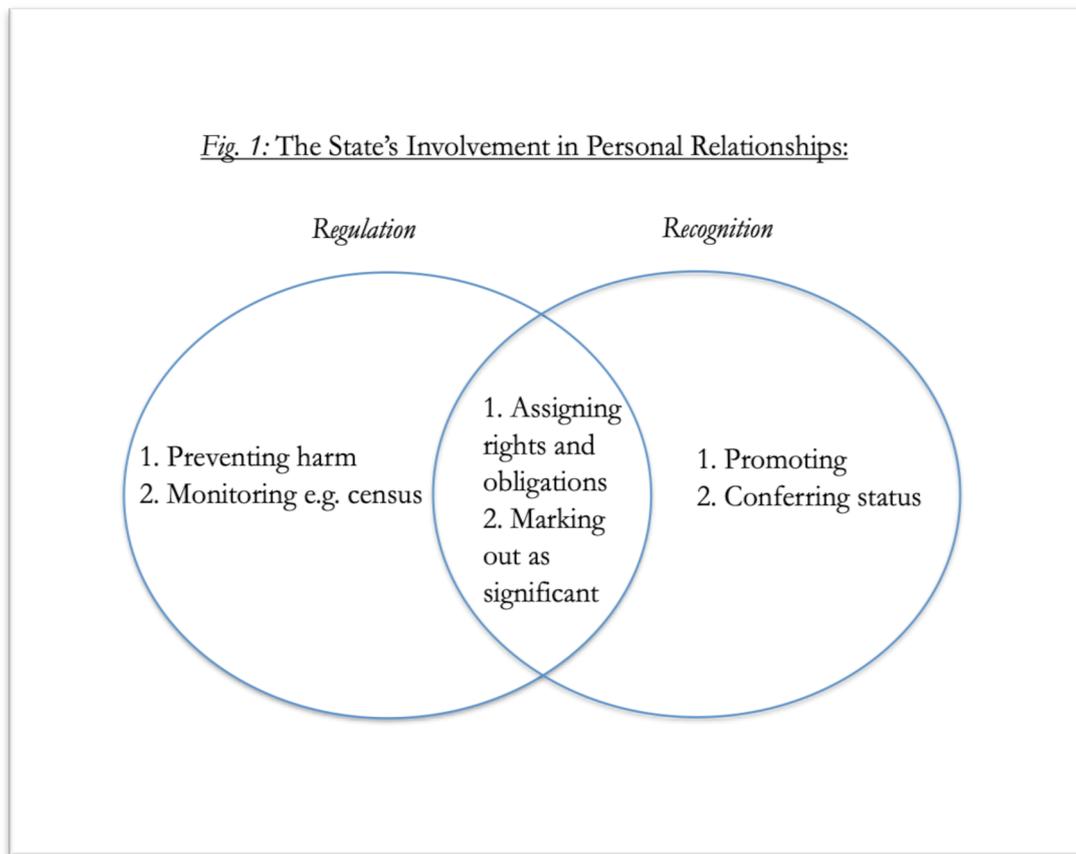
personal relationships, and since Chambers states that any form of recognition violates neutrality requirements, it is reasonable to infer that the MFS is deliberately designed to be a regulation-only enterprise.<sup>27</sup>

In this section I wish to show two things. First, that regulation and recognition cannot be tightly held apart, which means it is difficult if not impossible to claim that a state is engaged in regulation alone. As such, states cannot avoid having their neutrality questioned however they engage with personal relationships. Second, that even if the first argument fails and we grant that states can regulate relationships without recognition, regulation in the MFS still requires the state to engage with marriage in a way that raises neutrality-based concerns. I will argue that all states, including the MFS, require a working definition or archetype of both ‘marriage’ and ‘relationships’, which keeps the MFS in the business of marriage, and that the neutrality of such a state is still suspect, even when the question is marriage is displaced to civil society.

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<sup>27</sup> In a footnote, Chambers argues that the distinction between the state *recognising* a status called ‘marriage’ and the state *promoting* that status is not firm, and then states the following: ‘recognition alone is a form of promotion, since it attaches state approbation to one form of relationship. Thus even recognition alone is a departure from neutrality that can be justified only if political reasons can be adduced.’ (Chambers, *op. cit.*; pp. 51-52, n. 13)

#### 4.1 Regulation and Recognition Overlap



RRR is meant to encompass the role that the state has with regards to relationships. *Regulation* and *recognition* can be understood as distinct aspects of state involvement, but here I argue that there some areas of overlap where the two become indistinguishable. *Regulation* refers to the ways in which the state monitors and controls relationships, by setting rules and responding to changes in societal practices. The most obvious justification for the state's involvement in regulating relationships is *policing* them in order to prevent harm to persons. If there are certain relationship practices that violate the rights of persons, limit their liberty, undermine equality, or negatively impact on their wellbeing, it will be permissible for the state to intervene in relationships by enforcing legal rules designed to prevent such harms. In order to do this effectively, the state will likely need to monitor relationships by making regular inquiries into the number, type and substance of the relationships its citizens are engaged in. *Monitoring* enables the state to remain responsive to novel relationship types and practices, so that laws are applied appropriately and fairly, and efforts to protect individuals and their relationships are effective. With regulation, the state takes on the role of a referee or *umpire*, remaining

impartial between different relationship types or teams, concerned only with the fair implementation of the rules of the game as demanded by justice. The regulation of relationships appears both mandated by justice (by preventing the violation of rights)<sup>28</sup> and in keeping with requirements of liberal neutrality (for example, all relationships are equally subject to the same laws).

*Recognition* refers to the ways in which the state acknowledges the existence and validity of people's relationships. One form of recognition the state could enter into is the *promotion* of certain relationships. This includes celebrating them, through state officiated or endorsed ceremonies and events; marketing them through the dissemination of propaganda material in schools, social services and other governmental agencies; and subsidizing them, through the allocation of financial benefits or tax breaks for people in recognised relationships. States engaging in such promotional tactics often do so with the aim of increasing the numbers of people entering into the relationships that it values. The opposite technique of discouraging persons from entering into relationship types that the state has reason to disvalue can occur, and often has the result of promoting valued relationships as the norm and incentivising people to pursue them over less valued alternatives. Another way in which states recognise relationships is by *conferring status* to people in some but not those in others. This involves raising the standing or rank of citizens with regards to others by granting them certain legal powers, immunities or privileges. For example, in some jurisdictions spouses are immune from the requirement to testify as a witness with regards to their partner during criminal trial proceedings. In the UK, husbands automatically have parental responsibility for any children born to their wives, with all the rights, powers, responsibilities and authority that entails. State recognition of relationships can thus create a difference in legal status with regards to various issues. With recognition, the state acts more like a *team devotee* than a referee – with the aim of encouraging and supporting some relationship types more than others. It is less straightforwardly obvious that the recognition of relationships is required by justice (although the case can be made), and the neutrality of a state that takes positive measures to validate some relationships is questionable (as this may involve promoting and elevating certain conceptions of the good life and their adherents

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<sup>28</sup> For Chambers, who states that '[r]egulation is needed to secure freedom and equality for all', there is a clear justice mandate - this is due to the fact that '[t]he domain of personal relationships is a domain of inequality, oppression, and vulnerability, as much as it is a domain of care, respect, and support.' Chambers, op. cit.; p. 143.

over others).

However, the distinction between regulation and recognition is not clear-cut – there is a significant area of overlap. States often *assign rights and obligations* to citizens when they register as married or enter into certain relationships. When people become parents together, or buy a house together, or live together for a certain period of time, they can gain specific rights and obligations with regards to each other.<sup>29</sup> This practice can be interpreted through the lens of regulation or recognition. From the perspective of *regulation*, the allocation of such rights and obligations is a way of preventing harm to persons, by protecting them from the vulnerabilities that arise from the investment of time, money, and other personal resources in relationships. As a neutral *umpire*, the state merely identifies all relationships that have a significant impact on the lives of those participating in them, and any relevant third-parties, and allocates rights in order to protect all involved. Buying a house with someone is a more significant act of investment and commitment than buying a bike with someone, so once an acceptable account of which types of relationship trigger the allocation of rights is provided, the state applies this account fairly by treating all like cases alike. From the perspective of *recognition*, rights and obligations operate as status differentials that mark some persons out in contrast to others, and serve to acknowledge the value of certain relationships to the individuals partaking in them, and society more generally. As a *team devotee*, the state takes sides with some relationships by deeming them significant enough to merit the allocation of rights. By identifying a joint house purchase as rights-triggering, and a joint bike purchase as not, the state marks out some relationships as more significant than others.

How far the allocation of rights can be described as a form of regulation or a form of recognition depends upon whether the allocation marks certain relationships out as distinct in a way that can be interpreted as a positive endorsement of their value. By granting rights to some people and not others, the state may be marking the excluded out as second-class citizens. The *overlap* argument contends that with state regulation some recognition, and therefore endorsement coupled with exclusion, is unavoidable.

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<sup>29</sup> For example, although common law marriage is fictitious in the UK, in Canada and some US states, couples who live together for a certain length of time gain marriage-like rights and obligations. Although the allocation of rights in response to the practices individuals engage in is currently rarer than allocation through legal statuses people opt-in to, Chambers argues that practice-based allocation should be universal, so my point here is that even this arrangement of rights-without-status, can be deemed a type of recognition.

However, if it is the case that recognition is a component of rights allocation, this needn't be a problem. If the conferral of these rights is required by justice, then the recognition that results is not only unavoidable, but also required.<sup>30</sup>

I think that this is more productive way to think about the difference between the MFS and states that practice ME. By arguing that recognition violates neutrality, and that the MFS is a regulation-only enterprise, Chambers presents the MFS as a state of a different *kind* to states with ME. I argue instead, that the difference is one of *degree*. The question of how we classify and present cases is important, and when inaccuracies are included, classifications can mislead. Consider the equivalent case. I am choosing some birds to live on my pond. I believe that mute swans are a swan of an altogether different kind to other swan species, such as trumpeter swans and whooper swans, because they are mute. I don't want my writing sessions in the boathouse to be disrupted by a cacophony of bird noise, so I am going to purchase a flock of mute swans in order to avoid the trumpeting and whooping associated with alternative species. When the swans arrive at my property, it is immediately apparent that I have made a mistake – the cursed birds constantly disturb the peace with their trumpeting and whooping. On expressing my dismay to the swan dealer, she replies incredulously: “Didn't you know? Mute swans aren't really mute, they call as much as any other swan, but their sound carries comparatively less.” I appeal to her: “How can I focus on my writing with that awful racket going on?” She replies: “If it's silent swans you're after, you've got the best of a bad bunch here – if you move your desk back to the house, at least you won't hear these mutes in there like you would a trumpeter or a whooper.” Devastated that my dreams of a silent writing retreat by the swan pond have been shattered, I ask the dealer again: “Are you sure you don't have another kind of swan, a silent kind?” The dealer laughs and replies: “No, I don't, but my neighbour makes very convincing models of swans if you'd prefer one of those, but of course, they are not real.”

My contention is that the MFS, like the mute swan, claims to be silent, when it is not. It regularly makes pronouncements about relationships. It recognizes, promotes and

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<sup>30</sup> Within critical theory, a number of theorists emphasize the significance of recognition. For example, Nancy Fraser advances a two-dimensional conception of justice that views both redistribution and recognition as existing on opposite ends of the same conceptual spectrum. Axel Honneth advances a monist theory that collapses all redistribution into recognition. For these theorists, the relational justice, the regulation of relationships, and the allocation of rights and obligations, would certainly have a recognitional element. See Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003).

excludes just like all other states; it is not a different kind of state in that regard. What is different about the MFS state, however, like the mute swan, is that it is comparatively quieter than other states: it tries to make fewer pronouncements, to recognize, promote and exclude in ways that people will be likely to accept. Like the mute swan, the MFS might be the least objectionable by certain standards (noise, neutrality). Yet, it is worth remembering, that a completely silent state, like a silent swan, doesn't actually exist. The idea that the state can regulate relationships without recognizing them, is like the idea that the state can speak, without making a sound: allocating rights to some persons or their practices makes a statement that is palpable.<sup>31</sup>

One response to this argument is to continue to assert the primacy of the MFS. We should acknowledge that the MFS says less about marriage, but still says something. But we should also acknowledge that it is better to say less than to say more – it is better for the state to be more neutral than less. As we have seen, Chambers is clear that the MFS will preside over a marriage-free society, and as such, will need to regulate marriage to the same extent that it regulates all societal practices and individual behaviour. In the following section, I focus on different ways that states can be involved in the regulation of marriage, and try to shed some light on what states are or are not saying when they adopt different regulatory approaches. My response to this “*more is better*”/“*less is more*” argument is the following. What the above argument serves to do is to acknowledge the persistence of the problem of neutrality even for the MFS. This makes the choice between the MFS and forms of ME less stark, and presents the possibility that we may be willing to make trade-offs between neutrality and other values, such that, we might choose a less neutral state if it delivered more on other fronts. By shifting the claim from difference *qua* kind to difference *qua* degree, the reason to reject ME over the MFS becomes less decisive. Once the swan dealer has convinced me that it is impossible to obtain a real silent swan, if I am still in the market for swans, I may adjust my expectations accordingly to include this new fact. All-things-considered, I might end up preferring the mute swan because, after all, it is quieter and will distract me less. But once I accept that all swans will distract me somewhat, I might bring other factors into my assessment of the relative merit of each species of swan: for example, I might prefer the

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<sup>31</sup> This argument alludes to the idea that state acts are expressive acts. As such, it has important connections with the expressive theories of law discussed in the previous chapter. However, one need not endorse these theories in order to accept the argument. The metaphors of noise and silence can be interpreted as just that, metaphors. The key claim being made is that the regulatory act of assigning rights has a recognitional dimension.

swimming style of the louder whooper swan, and be willing to forgive its incessant whooping because of the calm that descends upon me when I gaze upon its seemingly effortless gliding across my pond. Each attractive quality of swans gives me a prima facie reason to choose that variety of swan. Which swan is the best overall, however, depends upon the weighing of all reasons and all considerations. The same is true of regimes of RRR – better neutrality credentials may make the MFS the better regime on that dimension, but since the MFS is only relatively better than ME regimes, rather than in a completely different league as absolutely different and better scheme, it must compete with ME in the same contest, and its neutrality credentials may not be decisive in its success.

There are other responses available to defenders of the MFS. The *argument from justice* accepts that it is the case that regulation by assigning rights always involves the state in recognition. It asserts that we need not worry about this, however, as the conferral of these rights is required by justice. Any promotion or exclusion that results can be justifiable to all citizens since these rights are the proper expression of their free and equal status. There is an element of circularity in this argument – recognition is justified because it is justifiable – this is the circularity characteristic of democratic forms of justification. The argument, however, is sound: recognition is only justified if it can be supported by proper political reasons that all can accept. My response at this point is to consider then why Chambers aims for the MFS to avoid recognition when it can clearly be justified once attached to her directives which are so clearly motivated by justice. Perhaps Chambers wants to avoid the controversy associated with recognition, particularly concerns she herself raises about creating a legally recognized status that differentiates some citizens from others.<sup>32</sup> Avoiding this, instead of strengthening the case, weakens it – if recognition where it exists is ignored and therefore not explicitly justified, what else has been overlooked?

Another response is the *argument from equivalence*. This states that recognition, promotion and exclusion is acceptable as long as similarly situated persons are treated in the same way. When a state only recognizes marriages as meriting the conferral of rights, there will be many similarly situated persons in marriage-like relationships, or non-conjugal relationships that are as significant by various measures, whose personal arrangements

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<sup>32</sup> Chambers, *op. cit.*; p. 63.

are not acknowledged as important or valuable by the state, since they do not merit the protection and support that rights bring. However, a state could recognize all similarly situated persons by allocating rights to all persons in significant relationships, identified by some objective or subjective test. That way, the only persons excluded from the conferral of rights are persons differently situated – persons for whom such rights would have no use or value – until they entered into relationships that required such protection. There is nothing wrong with marking some people out as different through rights conferral when those excluded don't deserve, need, or merit the rights. Further, it is not the case that those excluded do not possess, or lack these rights; rather, they are not able to exercise them until they are engaged in a relevant relational practice. There is a difference between rights that mark persons out as essentially different, as in some non-universal allocation of natural rights, and rights that mark persons out as different with regards to relevant dimensions of their different positions and relationships. In the former case, recognition is discriminatory; in the latter case, recognition tracks morally significant differences.

But the precise problem with these responses regarding justification and equivalence is that of providing an acceptable account of which relationship practices are significant. The state's account of which relationships require protection, and which arrangements need rights assigned to them, will at times be out of step with the account held by some citizens.<sup>33</sup> People who hold differing conceptions of the good life will have differing accounts of the value and requirements of different relationships. Suppose there is a subset of the population who subscribe to a conception of the good life known as Velophilia. This conception of the good life highly values the ownership, maintenance and use of bicycles, above all other things. For the people who subscribe to this way of life, call them Velophiles, buying a tandem bike together is in act of commitment and investment analogous to buying a house together. Once a tandem partner is found, Velophiles begin to spend two hours daily cycling together with their significant other. Such a shared purchase is indicative of a level of economic and emotional interdependence and commitment that we currently associate with marriage. For Velophiles, going halves on a tandem is sufficient to show the seriousness and longevity

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<sup>33</sup> See Olsen, *op. cit.*, p. 860: 'In many situations, someone's expectations will be disappointed or sense of entitlement violated no matter what action the state takes or refuses to take. One can often argue that in a particular case nonintervention really means whatever one wants the state to do; any policy one dislikes may be labeled intervention.'

of one's commitment to the other, such that Velophiles may neglect to marry each other, combine their finances, or even live together, as they believe these usual markers of a significant relationship are surplus to requirements once the tandem has been shared. Members of a tandem partnership may still be in conjugal-style and parenting relationships with others outside of the partnership, but for the Velophiles, the tandem partnership trumps these in importance. Despite the lack of these other markers of commitment, Velophiles experience the dissolution of a tandem partnership to be devastating, and need some way to resolve the question of who deserves to keep the bike (and other shared aspects of their lives, most notably, children) in such an eventuality. Velophiles believe that the drawing up of contracts to pre-emptively deal with this question is unacceptable, as at the outset of the purchase, a tandem coupling is intended to be lifelong. Yet, despite this, a legal account of the rights and obligations acquired at the outset of this relationship is required to enable Velophiles to navigate the relational terrain of dissolution, next-of-kinship, immigration status, and other areas of relationship regulation.

The state may fail to respond to the needs of the Velophiles, in which case politicized members of the group would call the state out for misrecognition – failing to see the value and significance of tandem couplings and marking them out as worthy of the protection of rights. Or the state may recognize the tandem practices of the Velophiles as equivalent to other relational practices already afforded legal protection, and treat them equally. Regardless of how the state responds to the issue, it is apparent that what is up for grabs is the state's recognition. Doubtless, regulation is in play, as part of the issue for the Velophiles is how the state monitors and controls relationships, by setting rules and responding to changes in societal practices. Yet in order for such regulation to occur, the state needs to engage in some recognition - it needs to acknowledge the existence and validity of people's relationships. However much the state is meant to act as an impartial referee, fairly applying the rules of the game, the state needs a way to recognize and distinguish between players and spectators. When a hyped-up fan runs onto the football pitch, tackles a player from the rival team, and scores a goal for his, the referee knows that he must disallow it. This is because the football referee is operating with a formalized and established distinction between players (wearing named and numbered shirts no less!) and spectators (who may – to confuse matters - wear these shirts too!). How does the state know whether a Velophile is as out-of-place to claim player's rights

as a pitch invader, or as perfectly justified as a substitute sent from the bench?

By standards internal to the game of football, the fan is excluded – a subset of the rules of the game are rules about who qualifies – and the fan lacks the skills, training, and most importantly, official membership in the team and selection by the coach to play in that game in that moment. By standards internal to the game of relationship regulation, the Velophile couplings are either included or excluded, and this may require a fresh reinterpretation of the rules in the light of the discovery or development of Velophile practices. But this analysis of Velophile practices vis-à-vis established relational practices, if a positive result ensures, involves a moment of recognition, wherein the purchase of tandems is acknowledged by the state as important to Velophiles. Regulation, it seems, is punctuated by moments of recognition. Is such recognition problematic from the perspective of state neutrality?

Chambers suggests as such. She argues: ‘Relationships do not need state recognition if they are to be performed safely or in line with justice, and the state does not need to stipulate who counts as being in A Relationship.’<sup>34</sup> The MFS eschews accounts of relationships that have the effect of fixing or essentialising what a relationship is, so that all relationships and aspects of relationships that perform functions that require the protection and support of justice are included. This means that the qualifying players in the game of relationships to be regulated are neither self-evident, nor static. Not only that, but in order to be sensitive to different relational practices, the rules may need to be different for and responsive to different conceptions of the good life since, we don’t, for example, want any purchase of a tandem to trigger significant rights and obligations for non-Velophiles.<sup>35</sup> Football is different: the rules stay the same, and neither players nor spectators can change them. But citizens pursuing diverse conceptions of the good life can call for the rules of RRR to be applied more fairly, and also attempt to expand the rules if certain possibilities have not be considered or conclusions fully followed through. Neutrality requires that the state only supports relationships that there are properly political reasons to support. Neutrality does not require that all relationships get supported, and that all citizens are players: neutrality of justification does not entail

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<sup>34</sup> Chambers, *op. cit.*; p. 68.

<sup>35</sup> It is an important aspect of Chamber’s account that personalisation of relationship regulation can occur through contractual opt-outs, but what the case shows us is unless everyone needs to opt-out of the legal consequences of buying a tandem, opt-ins, or laws tailored to certain conceptions of the good life, may be required.

neutrality of outcomes. So when we apply the rules of the game there is some ruling in and ruling out, and how we decide where the dividing line goes is a matter of justice. Contrary to what Chambers claims, the MFS will stipulate what counts as ‘A Relationship’ for the purposes of the law: as the case of the Velophiles shows, it must decide whether to recognise “A Relational Practice That We Agree Is Significant”. Denying this makes it appear that non-neutrality has been eliminated in the MFS, when in fact, it has been displaced from marriage to all relationships more generally.<sup>36</sup> Chambers argues that marriage should be more like friendship, but under the MFS, friendship will become more like marriage. We cannot assign rights and duties to friendships and other relationships without thereby recognizing their value, and recognizing value elevates friendships above other less important, temporary, or non-affective relationships. In the next section I consider the interest that state will still have in marriage, even as a MFS. Although it is not at the forefront of my account, it is worth stating now that this interest will apply also to friendships and other relationships under the remit of RRR: once the legal incidents of marriage apply to a broader range of relationships, the state does not become disinterested in marriage, instead the state’s interest becomes more widely dispersed across the full range of relationships.

#### 4.2 Regulation Alone Does Not Avoid The Neutrality Question

Even if we dismiss the above argument, and grant that the state can be engaged solely in the regulation of marriages, without any recognitional spillover, I argue here that in restricting itself to regulation alone the state still cannot remain neutral between conceptions of the good life.

As we have seen, Chambers states that under the MFS the regulation of marriages will become like the regulation of friendships. This means that the state will become much less involved in marriage, and much more hands-off. However, the state will not become completely disinterested in marriage.

States can involve or absent themselves from three aspects of marriage:

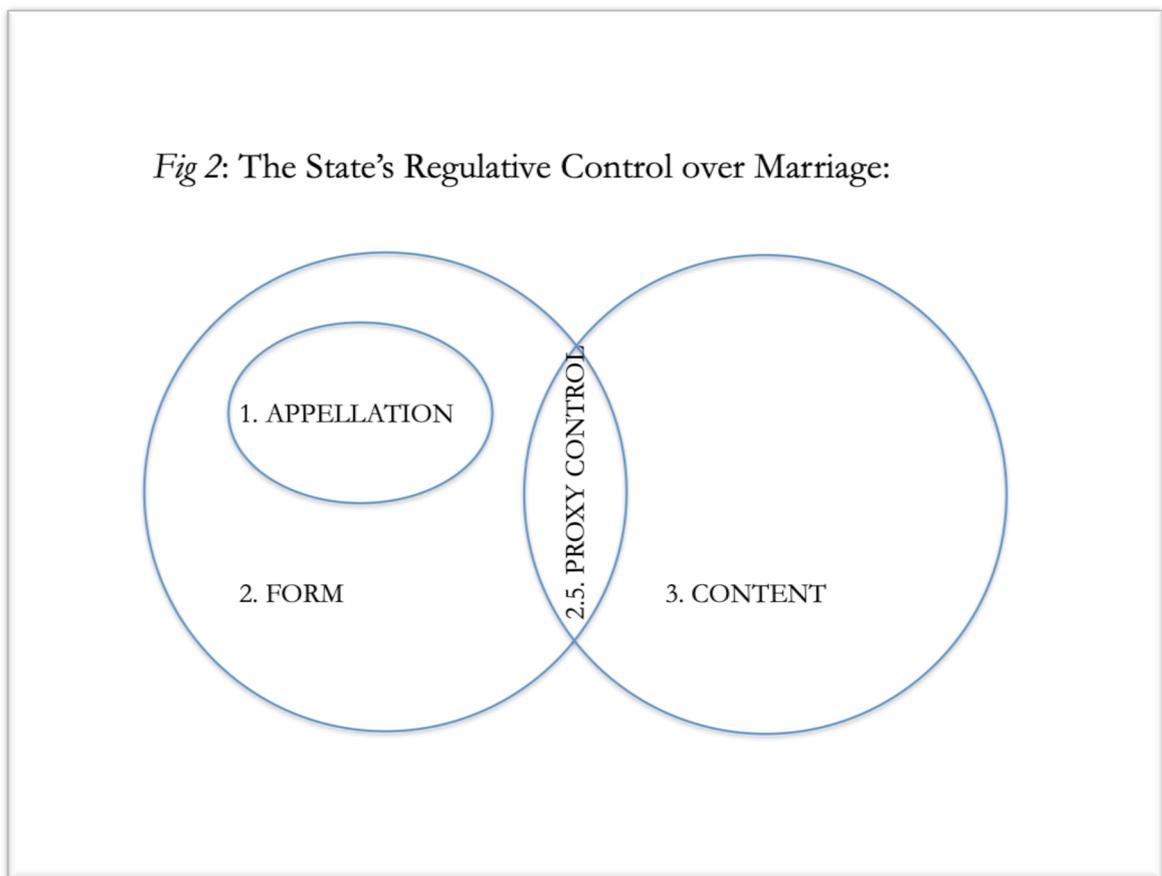
1. *Appellation* – States can claim monopoly over the term ‘marriage’ by setting rules

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<sup>36</sup> The idea of displacement of the neutrality problem with regards to marriage and the work of Chambers in particular is present in Matthew Kramer’s account of neutrality: the MFS will ‘relocate rather than eliminate the difficulties that confront neutralists’, Matthew H. Kramer, *Liberalism with Excellence* (Oxford: Oxford University Press, 2017): Chapter 3, note 23.

regarding who may legally be referred to as ‘married’ or ‘unmarried’ and who cannot.

2. *Form* – States can set rules regarding which types and terms of marriage are prohibited in law.
3. *Content* – States can identify behaviours within marriages that are illegal. These could be universal/general (also found widely outside of marriage, e.g. rape), marriage-related (more common within marriage, e.g. coercive control), or marriage-specific (only found within marriage, e.g. child marriage, forced marriage).



It is important to note that these three aspects are interrelated, and cannot cleanly be held apart. In fact, (1) and (2) are fairly hard to distinguish. In this section, I will analyse how the MFS regulates marriage with regards to each of the above aspects, and consider the impact the state will have on the meaning of marriage by taking the stance that it does. I argue that ME involves the state in (1), whilst the MFS state aspires to only regulate the content of marriage (3), aiming to leave untouched (1) and (2). However, it is

my contention that the MFS fails to do this. By positing a further category – proxy control (2.5) - located at a point of overlap between form and content, I claim that the state can regulate the content of marriage through its control over its form, and vice versa. This idea of proxy control serves to remind us that even states that purport to only control the content of marriages will have a working notion of the archetypical marriage such that through this minimal regulation they will in effect also exert control over the form of marriage. Further, even if we take marriage out of the equation, states that regulate the content of relationships more generally will similarly operate with an archetypical relationship form in mind, to the same effect.

#### 4.2.1 Appellation

In her critique of ME, one of the problematic state practices Tamara Metz points to is the punishment of persons for non-legal use of the ‘m’ word, thus severely restricting freedom of marital expression.<sup>37</sup> Metz is concerned that ME, like religious establishment, may have deleterious effects on the pursuit of diverse marital forms: states that define what marriage or religion is for the purpose of law restrict free exercise of marital or religious practice, so a “wall of separation” is the appropriate arrangement between the state and objects like marriage and religion.<sup>38</sup> Here I argue that Metz’s concern is overblown – that state’s rarely restrict marital expression in the way she suggests. Nevertheless, I explore what appellative control looks like and its impact on freedoms. The normative claim I make in this section is the following: amongst states that practice ME, there are two types of control over the use of the term “marriage”. Only *total appellative control* over marriage violates liberal values. *Partial appellative control*, as I describe it, is permitted by liberal values. It will be objected that all forms of appellative control violate liberal neutrality, and so cannot be permitted. However, as I go on to argue in subsequent sections, non-neutrality alone is not sufficient to condemn ME with partial appellative control, since states like the MFS that regulate marriage without policing the label still violate neutrality.

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<sup>37</sup> Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, N.J: Princeton University Press, 2010); p. 98.

<sup>38</sup> Metz, op. cit.; pp. 119, 124, 141, 143. I do not challenge nor defend here the idea of freedom of marital expression: I assume if not a *sui generis* freedom it can easily be subsumed under well established freedoms such as freedom of speech and expression, freedom of thought, conscience and belief, and freedom of association.

A state would have total appellative control of marriage when *any and all* use of the term ‘marriage’ to describe a relationship, whether uttered by a credible person in a credible context, or not, is condemned as criminal if it (a) does not meet the legal criteria for marital candidates (who can marry), and/or (b) has not followed the legal procedures for instituting a marriage. Under schemes of total appellative control, non-legal use of the term ‘marriage’ is punished through the criminal or civil law, with incarceration or monetary fines meted out. Whether we declare ourselves married with the intention of entering the legal institution of marriage - perhaps by deceiving the state - or we make the declaration within our social circle without seeking state approval or validation, we may be subject to strictures regarding the appropriate use of the term. Under total appellative control, (1) and (2) are coextensive, so that the state’s control of the form of marriage is executed through its control of the use of the term “marriage”. All marriages that do not fit the legal definition of marriage (which excludes all undesirable forms) are condemned as either criminal or illegal. States that practice total appellative control of marriage could not be described as liberal states: not only freedom of marital expression, but freedom of expression more generally, and other freedoms such as association, conscience, religion, and sexuality as well as rights to privacy would be routinely violated under such a regime.

A state has partial appellative control of marriage when *some* uses of the term ‘marriage’ to describe a relationship are condemned as criminal if they (a) do not meet the legal criteria for marital candidates (who can marry), and (b) have followed (or attempted to follow) the legal procedures for instituting a marriage. Under partial appellative control of marriage, proceedings in criminal or civil law against persons are only warranted when legally unsuitable candidates have attempted to obtain a legal status for their ‘marriage’. The non-legal use of the term ‘marriage’ is not condemned if its users acquiesce in non-legality. In states that practice partial appellative control of marriage, the range of marriages deemed legal, i.e. those entered into by legal means entailing legal consequences, is more limited than the scope of marriages that are legally permitted, i.e. relationship forms that utilize the label “marriage” that are neither recognized nor prohibited in law. Under partial appellative control then, (1) and (2) start to come apart, as the forms that are prohibited make up a separate class from the marriages that are not legally recognized but not prohibited either.

A comparison with the appellative control of wine may be instructive here. It is a long-standing practice within wine-growing regions for states to maintain the quality and distinctness of certain wines by regulating the use of geographical names to label wine and restricting use to wines made from grapes genuinely grown in the region and, often, also meeting further quality standards. French “appellations d’origine controlee” (AOC) and parallel systems in other states are designed to prevent wine fraud. To bear the label “Chateauneuf-du-Pape” a wine must have been grown in the specified area, made with certain grape varieties, and have a minimum alcohol content. According to my above distinction, states with total appellative control over wine production would declare as fraudulent, and apply sanctions, to any wine calling itself “Chateauneuf-du-Pape” that (a) did not meet the criteria for that appellation (e.g. region produced and grape variety used) and/or (b) did not follow the correct procedures for obtaining the label. Wines are considered fraudulent whenever they use the label “Chateauneuf-du-Pape” – this includes wines intended for commercial sale and home-made concoctions whose tongue-in-cheek labelling was never intended to be scrutinized beyond one’s personal home. Thus, even wines that do not attempt to obtain the label, but use it informally, are considered as fraudulent as those that seek official appellation in the knowledge that they fail to meet the appropriate criteria. By contrast, states with partial appellative control of wine production condemn wines as fraudulent if they (a) do not meet the criteria for that appellation (e.g. region produced and grape variety used), and (b) have followed (or attempted to follow) the correct procedures for obtaining the label. Thus, homemade concoctions bearing the label “Chateauneuf-du-Pape” only attract sanctions when they attempt to acquire official accreditation whilst knowingly failing to meet the criteria. The hand scrawling of a label and placing it on a bottle of moonshine for personal consumption is not an offense.

It is definitive of ME that states have appellative control over marriage. Under MD, states exercise no control over what marriage “is” for legal purposes: under the MFS (and MD generally) the state defers completely to citizens’ own definitions of marriage. All states engaged in ME exert some control over, or police the use of the term “marriage”. As we have seen, this control is usually partial, and rarely, if ever, total.<sup>39</sup>

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<sup>39</sup> Indeed, part of the reason that total appellative control is unusual if not completely absent from liberal states with ME is due to the nature of establishment: states don’t guard the term “marriage” jealously as establishment involves the state entering a formal relationship with a pre-existing social institution. The state does not incorporate the whole institution, just those parts that serve its purposes. For a liberal state,

States set the legal criteria of what is to count as a legal marriage: what procedures must be followed to be legally wed (e.g. notification, fees, licenses, registrars and officiators, premises, declarations and vows, signing a register); and who is a candidate for a legal marriage (e.g. based on age, ability to consent, current marital status). Even states with very limited control over appellation are still likely to control marital form by, for example, setting or policing the terms of divorce.

Within states that practice ME with partial appellate control a distinction can be drawn between legal marriages, which have been created by qualifying candidates using the proper procedures, and non-legal marriages, which have not. Within the latter category, there are various possibilities, for example, suitable candidates failing to follow proper procedures (e.g. having a religious ceremony which does not meet legal requirements<sup>40</sup>); unsuitable candidates following proper procedures (e.g. “sham” marriages for immigration purposes, where candidates know their unsuitability<sup>41</sup>, or bigamous marriages, where one candidate may not know their spouse’s unsuitability); or unsuitable candidates failing to follow proper procedures (e.g. child marriages conducted by a non-legal religious or cultural authority, forced marriages<sup>42</sup>). Under ME, only legal marriages legally merit the name “marriage”. However, although non-legal marriages do not qualify for legal benefits and protections, their existence is usually either permitted or tolerated – unlike under total appellate control, non-legal marriages are not always illegal marriages.

It is rare that the state’s position is that persons in such marriages cannot refer to themselves as married. Rather, it is generally the case that the state will only apply the legal incidents of marriages to marriages that are deemed legal. When persons get married by the lights of their religious or cultural community, but fail to officially register the marriage with the state, their marriage has no legal standing or consequence. The

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it serves no purpose to dictate all the possibilities of a social practice that it did not design or create in its entirety from scratch – one principle of the ethics of establishment operating informally seems to be to grant relative autonomy to the broader social practice.

<sup>40</sup> For example, the estimated 80% of marriages between Muslims in the UK that are unregistered, are legally understood as ‘non-marriages’ – ‘a non-event neither valid nor invalid for the purposes of marriage’, see Rajnaara C. Akhtar, ‘Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights,’ in Joanna Miles, Perveez Mody, and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015): 167-192; p. 168, n. 2.

<sup>41</sup> See the marriages discussed in Helena Wray, ‘The ‘Pure’ Relationship, Sham Marriages and Immigration Control,’ in Joanna Miles, Perveez Mody and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015), 141-166

<sup>42</sup> Such as those discussed in Perveez Mody, ‘Forced Marriage: Rites and Rights,’ in Joanna Miles, Perveez Mody and Rebecca Probert, (eds.) *Marriage Rites and Rights* (London: Hart Publishing, 2015): 193–208.

state does not object to the spouses concerned referring to themselves as married, but it refuses to recognize the marriage as a legal arrangement until it is officially registered. When persons enter into a “sham” marriage in order to gain some of the legal consequences of marriage (often rights to reside or remain in the country), on discovery of or suspicion of the subterfuge, the state both refuses to allocate the legal rights of marriage, and often prosecutes the parties to the marriage, and any co-conspirators, for facilitation (assisting unlawful immigration), deception, perjury and/or bigamy.<sup>43</sup> Here, the crime is not necessarily the use of the term “marriage” to refer to the suspect relationship, but the attempt to claim some of the legal incidents of marriage for a relationship that does not meet the state’s definition of a legal marriage. When bigamy occurs, the crime involves the attempt by a legal spouse to take on another spouse, with or without the knowledge or consent of their current and projected future spouses. As with sham marriages, the state objects to the attempt to create a legal marriage between persons where one is already legally married to another. The state may not object to the unofficial designation of others as wives or husbands despite pre-existent legal marriages, neither does it object to the ending of one marriage by divorce in order to embark on another marriage by legal means, even if this serial monogamy in fact results in an unofficial, non-legal but not illegal polygamy. When children are married by a community authority to each other, or to an adult, the organizing parties rarely seek legal approval for an arrangement they know to be not only non-legal, but unlawful even in its unofficial form. Here, the state objects to the use of the term marriage to refer to a relationship involving persons unable to consent, in this case, children. The state does not only withhold from that relationship the legal recognition and consequences of marriage, as it does in the above cases of unofficial marriages, sham marriages and bigamy. It also condemns the relationship as a violation of the rights of children, even when the relationship has no legal standing: it controls the form of not only marriage, but all relationships between adults and children.

Control of the term “marriage” is used by states practicing ME to determine whether a marriage is legal for the purposes of assigning rights and obligations. The state holds the keys to the castle with regards to the legal rights and incidents of marriage tied to the legal definition of marriage. However, the state does not hold all the marital keys, as we

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<sup>43</sup> UK Home Office report, *Criminal investigation: sham marriage*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/488521/Sham\\_Marriages\\_v1.0\\_EXT\\_clean.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488521/Sham_Marriages_v1.0_EXT_clean.pdf)

have seen persons are free to enter marriage in a non-legal manner. Under the MFS, the state will hold the keys to the castle with regards to the legal rights and incidents of relationships tied to the legal definition of a relationship. The state will hold all of the relationship keys, as all relationships entered into will be recognized legally – persons will not be free to enter into relationships containing pertinent relational functions in a non-legal manner.<sup>44</sup> Nevertheless, the state does place a lock on some forms of marriage, such as child marriage. Here, control of appellation (1) overlaps with control of form (2): some types and terms of marriage are illegal such that any use of the term “marriage” to describe such relationships triggers a legal response. In contrast, states rarely use appellative control to police the content (3) of marriages. Whether a marriage is legal or non-legal, the behaviour within it does not change the status of the marriage. Some behaviours within marriage, for example adultery or spousal abuse, are often considered as grounds for divorce, but they do not in themselves invalidate a marriage: a legal petition to end the marriage must be made.

States may use this gatekeeping role to protect and promote a particular notion of the good of marriage. States may adopt the ethical position that only legal marriages deserve the protection of rights and responsibilities, and that there is nothing of equivalent value in non-legal marriages and other relationships. As I have argued in Chapters 1 and 5, such a position violates justice: states should include a much broader range of relationships under their schemes of legal rights and protections. However, I argue that states that otherwise meet the requirements of relational justice are still permitted to practice ME, that is, *Matrimonia* would be permitted to engage in partial appellative control of marriage. The state reserves the right to control the use of the term in some cases where rights are violated, and/or the use of the term “marriage” triggers criminal suspicions or investigations. The state may also use the existence of a legal marriage as one way of determining whether rights and obligations exist. Legal marriage thus functions as part of a verification process that sometimes has the effect of creating a legal entity: just as we cannot say “I declare bankruptcy!” to our friends and expect legal consequences to ensue, non-legal or unofficial marriages are either subject to further

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<sup>44</sup> This is a mixed blessing – it addressed the problem of unregistered relationships and the vulnerabilities resulting from these – but also means that the legal consequences of many relational practice may not be fully understood and willingly accepted.

scrutiny or require more formalization before rights are assigned.<sup>45</sup> Although legal marriage is one way of declaring such a relationship, it is neither necessary (there are other means by which such a declaration can be made), nor sufficient (some marriages may not in fact contain any relational functions, although this is unlikely, given that marriage is an expression of a cultural form that generally has contained some) for verification.

Even in the case of polygamy, which is illegal in many states, including the UK and the US, total appellate control is absent. The outlawing of polygamy can mean many things. Polygamous marriages are often not legally recognized, but persons living in them are rarely prosecuted. In some states, such as the UK, certain polygamous marriages are acknowledged for the purposes of immigration or housing.<sup>46</sup> (Here, although the state does not wish to administer or encourage such marriages, it does not deny their existence or their significance within people's lives.<sup>47</sup> In other cases, polygamy is categorized legally as a form of bigamy, and the consent of an existing spouse is discounted as irrelevant. However, prosecutions for polygamy are rare and limited to extreme cases, often with factors that compound the legal case. For example, the most high-profile prosecution for bigamy in the US in recent decades, and the first in the state of Utah for over 50 years, was that of the Mormon polygamist Tom Green. Green was brought to trial on charges relating to bigamy, child rape, and failure to pay child support: Green had married and conceived children with some of his wives as young teenagers, and had legally married each wife, then divorced them and claimed the child support they were then entitled to as "single mothers" whilst still cohabiting with them as "wives". Green technically never committed bigamy, since he was never, and never attempted to be, legally married to more than one person. However, he did attempt to defraud the state by seeking for his wives the legal incidents of single motherhood whilst they were non-legally married to him. Had Green not sought such legal recognition of his multiple relationships he likely

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<sup>45</sup> Hence the following exchange in the US comedy series "The Office", Season 4, Episode 4, "Money Pt 1 and 2":

Michael Scott: "I declare bankruptcy!"

Oscar: "Hey, I just wanted you to know that you can't just say the word and expect anything to happen."

Michael: "I didn't say it, I declared it."

Oscar: "Still..."

<sup>46</sup> In the UK and Canada, entry is facilitated for multiple migrating spouses without the state fully endorsing plural marriage, see Sarah L. Eichenberger, 'When for Better is for Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage', *Duke Law Journal* 61, 5 (2012): 1067-1110.

<sup>47</sup> Unless denying legal recognition entails denying their significance. In these cases, there is partial legal recognition – the allocation of some rights but not all relevant rights.

would have been treated in much the same way as the majority of polygamists in the US – with a de facto tolerant blind eye – even if polygamy remains illegal de jure.<sup>48</sup>

In states such as the US, Canada, and the UK, polygamy remains on the statute books (as an instance of “bigamy”), but this criminalization is accompanied by underenforcement: the law against polygamy appears to mainly have an expressive function. Such states practice partial appellate control by only prosecuting actual legal bigamy, that is, the seeking of multiple marriage licenses. When states go further than this, as, for example, Utah did, they have been legally challenged. In *Brown v. Buhman* (2013) the federal court struck down portions of Utah’s law that prohibited multiple cohabitation as displaying special animus towards religiously sanctioned plural relationships.<sup>49</sup> Metz is perhaps right to point out that the fact that some states are prepared to punish persons for the non-legal use of the ‘m word’ violates their freedom of marital expression, and indeed, instills a regime of unequal freedoms when the state prosecutes fundamentalist Mormons using the label without prosecuting non-Mormons engaged in functionally similar relationships.<sup>50</sup> In these cases, (1) and (2) begin to merge: persons who do not seek the legal validation of their use of the term “marriage” are still considered in violation of the law and potentially subject to prosecution; and persons who engage in relationship forms that appear to deviate from approved types and terms of marriage are open to legal challenge. Yet, I have argued here that such policing of the term “marriage” is the exception rather than the rule: state’s rarely exercise total appellate control over marriage.<sup>51</sup> Let us now turn to the other types of control.

#### 4.2.2 Form, Content, and Proxy Control

As I have argued in the previous section, appellate control is unique to ME: MD requires the state to cease exercising appellate control over marriage.<sup>52</sup> In this section, I argue that all states, including the MFS, regulate the form and content of marriage, that is, both the types and terms of marriage that are legally permitted, and the behaviour that

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<sup>48</sup> Macedo, op. cit.; pp. 151-152.

<sup>49</sup> *Brown v. Buhman*, Case No. 2:11-cv-0652-CW (2013).

<sup>50</sup> Metz, op. cit.; pp. 98, 129.

<sup>51</sup> The existence of the Utah law against multiple cohabitation that enabled the state’s prosecution against Green to get underway serves to remind us that the categories of total and partial appellate control over marriage are ideal types that are unlikely to map perfectly onto reality. In this case, the US slipped into a more authoritarian mode of total control regarding marriage with such cohabitation laws.

<sup>52</sup> This is by no means all that MD requires, but is a necessary component of the move from ME to MD.

occurs in marriages. Most of Metz's concerns about freedom of marital expression relate to appellative control – and as I argued earlier, total control of appellation entails a total control of the form that marriage can take in a society. Under such schemes, marital expression will be severely limited. Under more permissive schemes, such as ME with partial appellative control, and MD, there will be a range of different types of marriage being practiced. Under ME, marriages can be legal, non-legal, and illegal, whilst under MD, marriages will cleave into only two categories – non-legal and illegal. Here, I consider regulation of the form and content of marriage together in order to demonstrate the following point: the MFS, Chambers claims, regulates only the content of marriages, and not their form: it is *laissez-faire* about types and terms of marriage; it cares about marriages only to the extent that they contain harmful behaviour. I challenge this formulation: it is not so easy for states to isolate their control to the content of marriage alone. Attempts to regulate content alone result in proxy control being exercised over the form of marriage, since laws concerning content dictate the forms of marriage ruled in and out. The MFS polices the content of marriages by operating with an archetypical notion of marriage that, although less controversial, is not universally accepted and will not be justifiable to all. If this archetype of marriage is not explicitly spelled out and shared with citizens, states will control the form of marriage without acknowledging the fact. This could be considered by citizens to be objectionable – they may reasonably prefer to know the types and terms of marriage that are legal as they do under ME, than to “wait and see” what the regulation of relational content rules in and out.

First, we will consider again how the MFS regulates marriage, and in particular, how its focus on content equips it to deal with the problem of objectionable forms of marriage, specifically, child marriage. I then argue that the way that the MFS responds to cases such as these will reveal features of the archetype of marriage it is operating with, and try to reconstruct some of these. Finally, I claim that far from meeting Chambers' aspiration of making the state's relationship with “marriage” more like its relationship with “friendship”, the MFS does the reverse: it makes friendship more like marriage.

As we have seen, there is no appellative control over marriage in the MFS. Legitimate use of the term “marriage” is not policed, so all use is permissible. Yet not all practice is. All marriages are non-legal, in the sense that like all other relationships, they possess no

special legal status and confer no special legal benefits. Relational aspects of marriages in a sense become legal, that is, legally recognised: typical marital behaviours such as living together, having children together, and operating as one financial unit trigger the entitlement to certain legal protections and benefits. In what follows, we consider the question of whether and in what sense all marriages under the MFS are legal in a different sense, meaning not illegal. A state that regulates the content of marriages alone does not declare that some marriages are illegal whilst others are legally permitted. Instead, regulation of content requires that legality attaches to relational behaviour rather than relational form: marriages themselves are neither legal nor illegal. States that practice ME take a different tack: some forms of marriage are condemned regardless of their content. Child marriage, for example, is illegal, regardless of the actions of the parties involved. The MFS, by contrast, since it aspires to only control marital content, must accept that child marriage could be an acceptable and therefore legal (in the not illegal sense) form of marriage: any illegality of such marriages relates to the presence of illegal behaviours within them; child marriage absent these behaviours could be permissible.

At first, Chambers appears to concede that the MFS will regulate the form that marriage can take, that is, the types and terms of marriage that are legally permitted. She states:

“The marriage-free state should be *laissez-faire* about the term ‘marriage’. It should set no limits on who may call themselves married other than those that are needed to prevent or limit harm, such as the requirement that all concerned are consenting adults. But this does not mean that the marriage-free state should be *laissez-faire* about what goes on within marriages, or about the terms that private religious or secular groups set upon marriage.”<sup>53</sup>

The state’s obligation to secure the equal value and status of all citizens requires that the state take an interest in the content of marriages<sup>54</sup>, but also, it would appear, their form. Chambers argues that alongside and in addition to limits the state sets on behaviour (physical harm, coercion etc.), the state should establish restrictions on what may count as private marriages.<sup>55</sup> Marriages must be contracted between consenting adults, and must not include harmful terms and conditions – perhaps preventing divorce or setting terms for dissolution that are overly demanding.

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<sup>53</sup> Chambers, *op. cit.*; p. 176.

<sup>54</sup> Chambers, *op. cit.*; p. 170.

<sup>55</sup> Chambers, *op. cit.*; pp. 172-173.

Yet, the way that Chambers deals with the problem of child marriage reveals otherwise: the MFS objects to child marriage on the grounds of its content, not its form. If the content of such marriages were to change, child marriage would be permissible. Chambers suggests that we proceed on a case-by-case basis: judging each child marriage by its content. But our general approach to each case should include an awareness of ‘what the social meaning of marriage currently is and historically and currently problematic forms of marriage’. Chambers envisages that the social meaning of marriage will remain somewhat constant in the transition from ME to the MFS, such that “marriage” will retain connotations of sex, permanence, and hierarchy. As such, child marriages are highly likely to contain oppressive behaviour, therefore they are ‘too closely associated with existing relationships of coercion, rape, and gendered oppression for the state to permit’. To Chambers’ question: ‘Should it be acceptable for an adult to marry a child, as long as he does not rape or kidnap her?’ the answer is: “it depends”.<sup>56</sup> In a possible future world, if the meaning of marriage shifts away from sex and hierarchy, child marriage could be as unproblematic as, say, friendships between adults and children.

Under ME, states exercise proxy control (2.5) over the content of marriages, by controlling the form marriages can take. For example, justifications for the prohibition, or non-legalisation of polygamy are often based on the content of these marriages, that is, behaviour that is considered harmful. Rather than wait for the harm to occur, these states take pre-emptive steps to limit harms by discouraging or outlawing forms associated with certain content.<sup>57</sup> As I argued in Chapter 2, this kind of approach is unsatisfactory. It lacks appropriate focus on harm, the justified target: it targets all marriages of a polygamous form, regardless of whether harm occurs, and permits other monogamous marriages, even when harmful.<sup>58</sup> The MFS rejects this approach: rather than exercise proxy control over polygamy or child marriage by condemning their forms,

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<sup>56</sup> Chambers, *op. cit.*; p. 173. The same applies to forced marriage in the MFS: “Again, the question must be contextual: what would forced marriage mean in any given context, and would it involve significant harm or restriction to those subject to the forcing?” (Chambers, *op. cit.*; pp. 173-174)

<sup>57</sup> Daniel Nolan claims that this is a strong argument for the state recognition of marriage – legislation setting standards for the validity of marriages is an obvious way to ensure that consent is present and to prevent child marriages. See Daniel Nolan, ‘Temporary Marriage’, in Elizabeth Brake, (ed.) *After Marriage: Rethinking Marital Relationships* (New York: Oxford University Press; 2016): 180-201; p. 201, note 6.

<sup>58</sup> At the very least, it fails to take a suitably fine-grained approach to identifying specific forms of polygamy that are structurally illiberal. See Gregg Strauss, ‘Is Polygamy Inherently Unequal?’, *Ethics* 122, 3 (2012): 516-544.

regulation is focused on factual behaviour and the meanings of particular acts in particular contexts.

It is worth asking, however, whether it is ever the case, as it is under ME, that the form of a marriage should be condemned regardless of its content? Let's imagine that in the society presided over by the MFS, there exists a group called the "Bethrothians". This groups practices what, to all intents and purposes, is child marriage. At the age of 8, girls are betrothed to adult men. This betrothal is considered binding and functions like a marriage, and the girls cannot call it off. The consent of the 8 year-old Betrothian girls is at no point sought, but the socialisation of the girls is such that by the age of 16 the overwhelming majority "consent" to the marriage, or display no resistance or objection to it. On their 16<sup>th</sup> birthday, the girls and their fiancés undergo a wedding ceremony which, previously under ME, was legally binding. Betrothian custom dictates that there is no sexual contact between the girls and their fiancés until the marriage has been officially sanctified through the wedding ceremony. The Betrothians have so far successfully instituted a regime of child marriage, by carefully navigating around the law. Once the MFS is inaugurated, how should the Betrothians be treated? What should the MFS make of the Betrothian form of marriage?

One possibility is that Betrothian marriage, like all marriages in the MFS, does not have any legal standing, so that child marriage is not legitimated or supported by any legal rights or recognition, even though it is not illegal either. It is unlikely that this would be sufficient to protect Betrothian girls. A second possibility is that Betrothian marriage would be subject to a test of legality that makes reference to the "social meaning" of marriage. If the meaning of marriage was still sexual, child marriage would not be permitted. How widespread does the meaning need to be for state to accept it? This still leaves the question of whether child betrothal would be permitted? What is the meaning of betrothal? Would we have to take the Betrothians' word for it that the relationship was not sexual before marriage?<sup>59</sup> Would we need to take the consent of the majority of

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<sup>59</sup> In the Canadian Mormon polygamy case against Winston Blackmore, who was wed on different occasions three 15-year-old girls, should the state take his assurances that "I never touched anyone before they were 16" seriously? (Macedo, op. cit.; p. 167) In duplicate fashion, the 41-year-old Malaysian rubber trader Che Abdul Karim Che Abdul Hamid told *The New York Times* he would not "touch" his 11-year-old wife, Ayu, until she was 16. That left him plenty of time spoil his favourite with holidays and rides in his sports car, treatment he did not reserve for his other two, older wives. ('11 and Married: Malaysia Spars Over an Age-Old Practice', *The New York Times* July 29, 2018:

the girls as genuine? If we took the Betrothians' word for it, would it be permissible for them to bring the marriage ceremony forward (say, to age 12), if they agreed that the relationship would be still not be sexual until the age of 16?

If we add a parallel case, 1000 years hence in the MFS, by which time the link between sex and marriage has effectively been severed. At this point in the distant future, a group unearth information about the Betrothians, begin practising child marriage. A subset of the group do some further research, and discover the long since forgotten sexual aspect of marriage, and begin to apply this aspect to relationships between adults and children. In the cases where the content of such marriages is unproblematic, it appears that the form is acceptable too, yet if sexual content begins to creep into some future Betrothian marriages, the marriages become problematic because of the conscious adoption of a particular marital form. In this kind of case, the state would have to judge cases individually, and decide which marriages had illegal contents, an act that would begin to discredit and alter the form that child marriage had heretofore taken.

As long as private individuals are playing the game of interpreting marriage or other relational practices, a game which is likely inevitable and unavoidable, the state will need to play that game too. It cannot let them alone, it must interact with them in their interpretation of their practices. The state will need to be abreast of the prevailing social meaning of marriage, but also the meanings coming and going at the margins of society. This is as true of friendship and other caring relationships as it is of marriage.

In this case, the state remains in the business of marriage, because it is still required to engage with the question of what marriage is, what it means, who can enter it, and how. Irrespective of what the state decides (whether Betrothian marriages and betrothals are illegal or not), the state has grappled with marriage in a way that gets its hands dirty by the light of liberal neutralists.<sup>60</sup> Both the form and the content of marriage may well need regulation, in cases where the state contests the account of the form of marriage offered by its practitioners, and suspects the form will harbour harmful marital content. The

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<https://www.nytimes.com/2018/07/29/world/asia/malaysia-child-marriage.html>) This sort of statement of sexual abstinence until the age of consent is reached is common to many cases of child marriage.

<sup>60</sup> See Olsen, *op. cit.*, p. 849, on the same point regarding the state's regulation of families: 'State officials must determine borderline questions about the nature and extent of family hierarchy on a case-by-case basis, and pursuing a policy of "non-intervention" cannot relieve state officials from having to make ad hoc political decisions about the family.'

meaning of marriage is such that it is unlikely to become 'like friendship' prior to the MFS for the foreseeable future.

#### Summary of Marriage Regulation:

1. Appellation – type of control unique to ME
  - Total appellative control = illiberal
  - Partial appellative control = typical and permissible for liberal states
2. Form – ME and other MD (Brake, Metz) both control in this way
3. Content – only type of control used by MFS
  - ME and other MD control content as per all behaviour
- 2.5. Proxy control – (a) Content through form (F → C) e.g. polygamy
  - (b) Form through content (C → F) e.g. MFS archetypes
    - (i) official definition of relational practice (Velophiles)
    - (ii) social meaning of marriage (Betrothians)

#### 5 Concluding Remarks:

In this chapter I began by clarifying whether, and in what way, marital establishment is in violation of the liberal neutrality requirement. I then assessed whether Chambers' Marriage-Free State (MFS) can deliver on its promise of providing a neutral solution by taking the state out of marriage. I argued that it is unlikely that the MFS can be interpreted as a regulation-only enterprise, as it entails moments of recognition, which on Chambers' own definition violates neutrality. The difference between the MFS and ME is therefore one of *degree*, and not *kind*. I then argued that even if we limit the MFS to matters of regulation, it will still need to operate with an archetypical notion of what marriage is, and will still need to engage with and interpret the social meaning of marriage. Not only that, but rather than marriage becoming more like friendship, friendship will become more like marriage – subject to the control and interpretation of the state. As such, the privatisation of marriage merely displaces, rather than resolves the neutrality problem, meaning that some forms of ME could be "as good as" the MFS. Rather than pursue the impossible, it is more helpful at this juncture to give guidance on the ways in which the non-neutral can be made compatible with justice. This would be achieved by limiting the neutrality requirement to matters of basic justice and constitutional essentials, or by developing a less stringent standard of neutrality for such matters.

## Chapter 7 - The Terms of Cultural Establishment

In this final chapter, I advance an imperfection principle, which states that when the pursuit of justice leads us to interact with social institutions and their participants, such as marriage, schools, and hospitals, some cultural value will be an inevitable by-product. Rather than purge this value, in order to refine justice, it is permissible to accept and retain it, in cases where justice is not violated or compromised.

### 1 Marital Establishment from Scratch?

Up until now, it has been assumed, but never explicitly stated, that *Matrimonia* arises in the following way. A state has a relationship with the institution of marriage that persisted over a significant time period, and which has been accepted, or at the very least, has been met with minimal resistance. In this context, marital establishment has entailed the bestowing of support upon the married in the form of legal and material benefits, and marriage exhausts the RRR that the state provides. At some point in the recent past, faced with growing objections to the monopoly that marriage holds with regards to the RRR offered by the state, *Matrimonia* concedes that it can no longer justify its lack of support and recognition for the various and multifaceted relationships which its citizens invest with value and meaning. The state decides to roll out its scheme of RRR to cover all relevant relationships, so that participants in many relationships beyond the marital are entitled to the same legal and material benefits. However, the state opts to retain a special place for marriage in its architecture: marriage will still be a civil institution that can be accessed through a process of celebratory registration with a local government authority. By contrast, the relationships (or relational functions) that have just been included under the state's remit are accessed in a more remote or unassuming fashion – perhaps through the private completion and sending of forms, or the mere participation in the relationship, which triggers the activation of certain legal rights and obligations.

Some obvious reasons why *Matrimonia* would preserve a role for marriage include concerns about the costs of transitioning away completely from marriage, as well as the significance of history and the relevance of settled expectations. The practice-dependent method defended in Chapter 2 provides an account of the normative significance of

historical and well-established practices, and the potential value lost in transition or liberal translation.

Now, let us imagine that the opposite chain of events occurred. Instead of the historical trajectory described, suppose that *Matrimonia* came about in a different way. *Matrimonia* began as a very progressive state, rather like *Omnia*, which from the outset designed its scheme of RRR to be fully inclusive – marriage was regulated and recognised alongside and in the same manner as a whole host of other significant relationships, using the same legal schema, be it civil unions or relationship directives. Marital establishment had never existed. Then, one day, *Matrimonia* opts to part ways with *Omnia*, symbolically establishing marriage by offering a ceremonial option of civil marriage alongside the standard fare. This scenario strikes one as unlikely – why would an otherwise relationally just state opt to do this? One possible explanation would be population change – due to an influx of immigrants from states with regimes of marital establishment, the state bows to popular pressure and institutes a new scheme of civil marriage. Another could be that demand for marital establishment has always been simmering away amongst the populace, yet the state has always denied such demands, assuming such a move would be unjust. After conducting a comprehensive review of the proposal, and being reassured that no rights violations or stigmatising state expressions would occur as a result, the state institutes symbolic marital establishment as a form of permissible cultural establishment. Even though the likelihood of this series of events occurring is low, given the lack of a history of ME in *Matrimonia* up until this point, it is worth reflecting on the question of whether such an unlikely event would be problematic in the eyes of justice.

Although confusing, seemingly lacking explanation, and without precedent, it is not obvious that such a regime of marital establishment started “from scratch” would violate justice. Of course, such an exercise clashes with the practice-dependent method advocated, since it requires us to imagine a different world. Nevertheless, if the establishment of the practice could be permitted in that world, it may tell us something about our world. What could be wrong with such a scenario? If it was possible to reasonably interpret marriage as secular, the sudden establishment would not be considered to be an instance of religious, and therefore possibly wrongful, establishment. If, as would be likely, there was no historical mistreatment of the unmarried, and they were not otherwise reasonably considered to be a socially-salient grouping, against which

prejudicial intentions were formed, and they were no worse off than they were before, then the move from *Omnia* to *Matrimonia* would not be wrongfully discriminatory. Finally, if the state's involvement with the practice of marriage was to remain fairly constant, that is, if the state was required to interact with and provide a (potentially controversial) interpretation of marriage in order to simply regulate and recognise the relationships featuring marriage, then the difference with regards to neutrality concerns would not be considerable. The most likely scenario is that it would be met with significant objections, which would mean the regime would not be democratically viable. The main intuition that arises on reflecting on such a scenario is the culturally-attuned intuition raised in Chapter 3 – if there is something problematic about marital establishment from scratch it is the worry that such a regime would not reflect or respect the actual relational practices of citizens, and the priorities and expectations they give rise to. On a practice-dependent account, the transition from *Omnia* to *Matrimonia* could be permissible (and there would be normative reasons for it) if it could be shown that marital establishment entailed not the invention but the reasonable reinterpretation of marriage and other adjacent relational practices.

## 2 Perfect or Imperfect Justice?

In the alternatives to marital establishment considered in this work, universal human interests, such as care, provide the justification of the alternatives to marriage, and drive the need to abstract from culturally specific and therefore controversial forms of marriage to arrive at a thinner, more neutral means of regulating relationships. It is because the state values these relationships, and the contribution they make to justice<sup>1</sup>, that they are considered social primary goods. Since the provision of these relationships is highly risky on an individual level, the state remains in the business of publicly endorsing and protecting these relationships with a regime of relationship regulation and recognition (RRR).<sup>2</sup> However, marriage on the one hand, and care and justice on the other, do not fully align. As I argued in Chapter 3, the elements that are valuable in marriage - publically binding commitment (A), marking out as centrally important (B), and celebrating romantic and sexual love (C) - are not necessary features of intimate, caring relationships, and justice needn't protect these elements. Nevertheless, as I have argued, marital establishment might not violate justice. Although justice may need to

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<sup>1</sup> Metz op. cit, pp. 126, 131-132.; Brake op. cit, p. 173.

<sup>2</sup> Baltzly op. cit; p. 44.

focus on the broader category of intimate, caring relationships, instead of the narrow class of marriage, securing justice for all such relationships does not preclude the establishment of marriage.

To further understand the relationship between marriage, care, and justice, it is worth considering an extended example. Many states provide state-funded and state-delivered education for the minors living in their territory. States are obligated to provide educational opportunities for all by both their actual commitments to human rights standards, and the theoretical requirements of many accounts of social justice. Exactly what children are entitled to from the state with regards to education is not obvious or clear, but there is some sense in which we can understand the objectives of state-provided education as set and circumscribed by the requirements of justice and human rights. Suppose our normative commitments suggest that the purpose of education should be to allow children to develop their abilities and talents in order to afford everyone fair and equal opportunities to compete for the full range of social offices and positions. We can identify practices within the education system that appear to be essential to this purpose: the inclusion of a range of subjects on the curriculum, for example, or the implementation of assessment procedures to gauge progress, provide feedback, and ultimately rank students in a manner deemed useful to potential employers. We can also identify practices that, although present in state-provided educational institutions, are peripheral, or even irrelevant, to the purposes of education. Pledging an oath of allegiance to the nation, or requiring an act of daily worship, are activities that might be such peripheral or irrelevant practices. If their relevance to human rights or justice is not clear, their continued existence within state-provided educational settings does not appear to be justified.

Let us suppose that we want to redesign state-provided education so that schools deliver all and only what justice and human rights require, that is, they fulfil all their justice-related purposes, and no longer engage with practices that are surplus to just requirements. Depending on one's perspective on this process, we could describe it favourably as refining, or pejoratively as purging, state education. The resulting system I will refer to as *no-frills education* - it delivers justice, nothing more and nothing less.

Now let's imagine that during the course of the refinement or purge, we come to consider one of the practices that marks of the end of schooling: the prom. This is a

common practice within secondary education or high schools in the US, and increasingly in the UK. What are we to make of this practice, and does it make the cut? Proms do not appear to be obviously related to the purposes of the education system: they seem to have *little or no connection* to the fulfilment of justice and human rights. Attending the prom will not increase your grades, or expand your employment opportunities. Not only that but proms may actually *undermine* some of the legitimate purposes of education. If it is the case that the closer students get to the date of their prom, the more preoccupied they become with it, such that lessons with clear learning objectives are hampered by heated discussions about shoes, dresses, suits, and the best deals on stretch hummers, then proms might be judged to be barriers to the fulfilment of educational purposes. Although the costs of prom may be shouldered by the students and their families (and not by taxpayers) the use of teachers' and students' time in endless meetings about decorations, awards, and playlists uses the resources of state-provided education for purposes beyond what human rights and justice require. Furthermore, the prom is not an uncontroversial and morally unproblematic practice. In some southern states of the USA, racially segregated school proms are not unheard of.<sup>3</sup> Many school proms discriminate against LGBT students by enforcing rules that require couples attending as dates to be different-sex, and/or insist on strictly gendered dress codes.<sup>4</sup> Other aspects of the prom, such as the crowning of the prom queen, we might find objectionable if the selection criteria used for the title makes use of gendered and oppressive beauty ideals. At the very least, we can say that proms are *not required by justice*. Taking into account the negative impacts that proms can have on learning, and some of the morally troubling versions of proms that have been practiced, we might be justified in claiming that proms actually *violate justice*, such that it would be impermissible for state-funded schools to allow them. Either way, proms will not feature in a no-frills education system.

Do proms have any redeeming features? One could argue that proms are not completely unrelated to the purposes of education. For one thing, the endless meetings of the prom committee, which appear to divert time, resources, staff and students from their learning,

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<sup>3</sup> For example, the first racially integrated prom at Wilcox County High School, Georgia, took place in 2013. 'Georgia school hosts first racially integrated prom', <http://edition.cnn.com/2014/04/04/living/integrated-prom-wilcox-county-georgia/index.html>

<sup>4</sup> For example, the 2010 Itawamba County School District prom controversy began when an 18 year-old lesbian student, Constance McMillen, sought permission from her Mississippi high school to bring her female partner to prom, and to wear a tuxedo to the event. The school refused her requests, and when the ACLU filed a free speech lawsuit against the school, the case received national attention. 'Mississippi school sued for cancelling prom over lesbian student', <http://edition.cnn.com/2010/LIVING/03/11/mississippi.prom.suit/index.html>

teach those students involved various important skills and strategies which are invaluable for their future employment. Planning, budgeting, sharing ideas, resolving conflicts, and so on, all teach important lessons. The lure of the prom can be used as a carrot by teachers to encourage good behaviour and improved work effort, and the ultimate punishment of being barred from the prom is a useful stick for teachers to wield. Lastly, and perhaps most importantly, many students fully endorse and want to go to their high school prom, they see it as an important feature of their high school experience, and rite of passage that marks the end of their school education. Because this rite is tightly focused on the school and the particular body of students leaving each year, purging schools of proms and privatising such events in order to continue to meet the preferences and expectations of students might not work: the school might be a constitutive part of the prom. Taking all this into account, it still seems absurd to say that people have a right to a prom. Certainly, we don't think that children's rights to education are violated if they are not allowed to attend prom, or their school doesn't provide one. Yet it is still worth considering whether we want to live in a world without school proms. If it were possible to rid proms of the more troubling features mentioned previously, and it seems unlikely that these features are necessary to the practice, would proms, although not required by justice, be *permitted by justice*? Or does justice mean no prom: no thrills, no spills, no frills?

I have dwelt on this example in order to try to tease out some problems with marital establishment and disestablishment. Like the school prom, marriage seems awfully frilly for a no-frills state. Although it may contain aspects that require the protection of human rights and justice, such as intimate caring relationships, it contains more baggage than that, and is not the only site where such relationships exist. Like the prom, marriage is celebratory, ceremonial, and culturally specific. We can protect and support caring relationships without the former two features: marital establishment, like the prom, appears to be a waste of time and resources, an unnecessary indulgence. The latter feature reminds us that we only meet the needs of some, not all persons, by supporting marriage. Like the prom, there are some people who just don't buy into it. How can the state, through schools and through marriage, support the projects of some as if they were everyone's project, without a clear justice-based reason?

With all this weighing in favour of disestablishment, are there any normative reasons that count in favour of establishment? Here I suggest one developed from the practice-dependent account provided in Chapter 3: even if there is no right to marry, when marital establishment does not violate justice, and marriage has some internal normative value, marital establishment is permissible.

We needn't be concerned if some people can't marry according to their own ideals, even if they consider it very important that they can. The state need only support citizens to pursue those things that justice requires it to support, such as caring, intimate relationships. People can and do regularly enter such relationships without marriage: marriage has some overlap with, but is not a part of justice.

I have argued, however, that marriage has some valuable aspects, which extend beyond the scope of justice (A, B, and C). Must these non-essential aspects of relationships be purged in our refinement of relational justice? Here I return to the high school prom. This example can perhaps effectively characterise the no-frills state as overly clinical and unnecessarily strict: is it really so bad to bend the requirements of justice to allow the kids a good shindig after all those years of hard slog? We are less willing to bend the rules for marriage: after all, as we have seen, it has been subjected to sustained and serious critique by liberals, feminists and queer theorists. Marriage is not the same as the high school prom in that regard: its reach, significance, and power is much greater. Nevertheless, I hope to use the prom example to motivate a principle designed to aid our thinking in matters where disestablishment is touted as a solution.

States regularly use pre-existing institutions to deliver justice – education, healthcare, marriage. This means that certain imperfect conditions apply. Not all participants in these institutions, both administrators, and beneficiaries, have the fulfilment of rights and justice as their objective. They are, perhaps unlike political representatives and judges, only *partially focused on justice*. Even when they try to focus on justice, as teachers and medics may do when they reflect on the purpose of their jobs and their wider societal role, they have some discretion as to how they interpret their roles, and we can expect a

certain *margin of error* to exist.<sup>5</sup> We can assess the imperfection that will likely result under these conditions, by using the following principle.

The *imperfection principle*: If the imperfection violates justice, or significantly undermines its pursuit, we should correct the imperfection. If the imperfection does not conflict with justice, or once corrections have been made to make this the case, we can accept the imperfection.

The imperfection, however, is not required by justice, in the usual way we understand that idea. However, insofar as the institution is required to deliver justice, the imperfection is related to justice. Imperfections violate justice when they entail the denial or obstruction of the rights and entitlements of citizens; they significantly undermine justice when they correlate strongly with behaviours or actions in persons that lead to the violation of justice, for example, creating a culture that tolerates or fails to prevent or challenge violations.

The imperfection principle is intended respond to the idea that a no-frills state may not be possible, and even more, it may not be desirable. The pursuit of social justice requires a significant effort, on the part of the state, to ensure that rights and opportunities are fairly and effectively distributed. Justice then, is complex, and requires significant engagement with citizens and their social institutions. Because justice is complex, it becomes, messy, since the lives of the citizens it serves and employs are culturally rich and not fully aligned with justice. Practices peripheral or even irrelevant to justice, such as marriage, high school proms, museums, art galleries, birthday parties on the children's ward, may feature when states support relationships, schools, libraries, and hospitals. There may be a case for refining justice and withdrawing support from these practices.

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<sup>5</sup> Onora O'Neill reminds us, quoting Burke, that man's abstract right to food or medicine requires us to 'call in the aid of the farmer and the physician rather than the professor of metaphysics.' As she challenges us to acknowledge, the burdens of being both a rights-holder and an obligation-bearer can elicit several possible reactions from the mercenaries of justice working as teachers, administrators, registrars and priests: compliance, resentment, protest, complaint, and withdrawal. Embracing imperfection could be the key to ensuring the active engagement of the humans whose job descriptions encompass the delivery of justice and rights: 'The farmer and the physician, and others whose work and commitment are indispensable, are the key to securing a decent standard of life for all: their active enthusiasm and efforts are more valuable than their dour compliance with prescribed procedures, their resentful protest, let alone their refusal to contribute.' Onora O'Neill, 'The dark side of human rights', *International Affairs* 81, 2 (2005): 427-439; pp. 427, 437, 439.

But if there is some normative value in these practices, we have a *pro tanto* reason for allowing them to continue, if we have no just reason to reject them.

### 3 Accepting Cultural Establishment

Since I have argued that we should interpret marriage as a cultural good, rather than a liberal good, the case for marital establishment stands and falls with the case for cultural establishment more generally. In what follows, I present some reasons to be sceptical that a just state can be a no-frills state.

*Inextricability* – As the prom example above shows, practices related to but not fully aligned with justice may nevertheless be inseparable from justice. This may mean that attempting to purge the practice from justice may result in further injustices (as, for example, when the oppression of LGBT persons within religious or minority cultural groups may worsen when the state withdraws its recognition from marriage), or where there is some overlap between justice and the practice, identifying which aspects of a practice are required by justice, and which are surplus to requirements, may prove impossible (can we arrive at a definitive answer to the prom question?). The more expansive the state's involvement in societal institutions and practices, the greater the risk of non-neutrality, but also the greater the chance of implementing justice effectively.

*Inevitability* – Because what justice requires is indeterminate and controversial, accounts of which aspects of practices are necessary to achieve what justice requires will conflict. Cultural practices form the means by which people communicate and act, and we cannot escape them. This means that the state also cannot avoid “establishing” certain practices when it acts in the name of justice – be it language, education, even religion. States may elevate pre-existing practices to prominent positions, or even create new, or formalise and transform old, practices. Even the Marriage-Free State, which attempts to avoid establishing marriage, recognises and thereby brings certain relational practices into light. The formal recognition of friendships enabled by relationship directives could increase the state's involvement with cultural practices, rather than decrease it. For example, in the context of Australia, where “mateship” as a cultural construct communicating values such as loyalty, teamwork, and honesty has already been utilised by the state for particular purposes, relationship directives may further “establish” this practice as

culturally important and an expression of Australian identity.<sup>6</sup> Even by focusing solely on what justice requires, a state cannot avoid cultural embroilments in certain contexts.

Diagnostic value – In the preceding chapters I have argued that marital establishment, in certain contexts, can both stay within liberal parameters, and can, when suitably supplemented, satisfy the requirements of liberal justice. Although marital establishment will be a second-best option, particularly for practice-independent liberals, I have argued that it can be equally good, and therefore good enough from the perspective of justice. A further reason for interrogating and then accepting this form of cultural establishment is the importance of being able to identify when the parameters of just establishment have been overstepped. As noted in Chapter 2, there is significant space between the mandatory and the prohibited, and it is only by engaging with and drawing detailed distinctions within that space that it is possible to identify when and where states slip into the prohibited. Blanket prohibitions on cultural establishment aim to avoid the risk of legitimating state actions that should be prohibited, but they also are less able to sensitively negotiate particular cases. For example, blanket prohibitions are likely to term all forms of differential treatment of citizens by the state as wrongfully discriminatory, instead of trying to develop a more fine-grained account of the permissible and impermissible ways in which states can treat their citizens. Being open to the possibility of cultural establishment within the parameters of justice places one in a good position to diagnose when states overstep the mark, for example, by treating persons in a way that stigmatises.

#### 4 Concluding Remarks

I have argued that marriage has some normative value. Not all value is aligned to justice, and insofar as marital practices complement, support, and fail to threaten the requirements of justice, marital establishment can be a permissible feature of relational justice. The magnitude and complexity of social justice leads us to adopt a an imperfection principle, that gives the benefit of the doubt to unobjectionable practices related to, but at the periphery of, the ideal vision of justice. Although not liberal by

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<sup>6</sup> BBC News, 'Mateship Hit for Six', August 12, 1999: available at [www.news.bbc.co.uk/1/hi/special\\_report/1999.02/99/e-cyclopedia/418548.stm](http://www.news.bbc.co.uk/1/hi/special_report/1999.02/99/e-cyclopedia/418548.stm); The Sydney Morning Herald, 'Migrants need to learn mateship: PM', December 13, 2006, available at: [www.smh.com.au/national/migrants-need-to-learn-mateship-pm-20061213-gdp18m.html](http://www.smh.com.au/national/migrants-need-to-learn-mateship-pm-20061213-gdp18m.html)

design, in some contexts marital establishment can coexist with liberal constraints. As such, there is a permissible range of national variation in the expression of liberalism, wherein some forms of cultural establishment are legitimate.

The satisfaction of justice will lead the state to engage with a range of social institutions and practices. Unless we are to end up with political libertarianism, which defends only a minimal state focused on basic rights only, a more expansive, redistributive state will operate in a way that encounters reasonable disagreements about its content and scope.<sup>7</sup> Consider the following examples:

- A school employs a community arts coordinator.
- A children's centre runs a free baby massage course.
- A national bank consults widely on the design of its new banknotes, canvassing for ideas on which prominent cultural figures to display.
- A state declares that it has a national sport.
- A school offers students the opportunity to achieve qualifications in a range of community languages.
- A national parliament offers heavily subsidized alcohol to its members.
- A government subsidizes fees or offers free higher education.
- An otherwise liberal-democratic state retains its monarchy.
- A state subsidizes cattle farmers in order to support traditional beef farming practices.

In all these cases, the state pursues policies that promote and support certain cultural goods and practices. These are sometimes related to but only partially focused on justice, such as school arts coordinator and free higher education. In other cases, for example national sport, it is not apparent how the policy is connected to justice. Some of these cultural goods contain or overlap with public or primary goods, and can be justified in public reasons, others are less easily publically justifiable. Often the state's involvement with societal institutions and practices leads to policies that operate as blunt tools and imprecisely focus on justice. For example, although subsidized fees for medical degrees might be easily justifiable, subsidies for degrees in golf studies or wine studies are less obviously warranted. The approach the state action adopted by liberal disestablishmentarians would gesture towards the purging of state institutions policies so

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<sup>7</sup> See Jonathan Quong, *Liberalism without Perfection* (New York: Oxford University Press, 2011), p. 202.

that direct correlations between justice and policy can be drawn. The approach advocated in this work has been to be open to the potential value in the range of practices states engage with, to interpret each practice on a case-by-case basis, and to accept the imperfection of cultural establishment if requirements of justice are not thereby violated or undermined.

In the particular case at hand, I have defended an interpretation of marriage as a cultural good, rather than a liberal good (Chapter 2), as a practice that has internal normative value (Chapter 3), as secular and thin (Chapter 4), as symbolic, not material and non-stigmatising (Chapter 5) and as non-neutral (Chapter 6). Although marital establishment may not hang coherently as part of a liberal project, in cases where its consistency with liberal values is demonstrated, and its *pro tanto* internal value is apparent, marital disestablishment will not be the only solution to the question of justice for personal relationships. Liberals can think *antidisestablishmentarianistically*.

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