

The Meaning of Marriage: State Efforts to Facilitate Friendship, Love, and Childrearing

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What business does the government have in sticking its nose into people's private affairs? What affairs could be more legitimately private than relationships involving sex and love?

I. LOCKEAN LIBERTARIANISM

These questions resonate with many individuals across a wide range of ideologies and beliefs. For many of us these questions will strike us as rhetorical questions to which the obvious answers are “none” and “none.” These responses reflect a Lockean libertarian strain in the social thinking of many intelligent and thoughtful people.

Of course matters are more complex, even as viewed from a Lockean libertarian perspective.¹ Sex and love tend to bring about new children, and causing a child to exist is a social act with wide consequences for other people who could not be supposed to consent to bear these consequences. Libertarians will regard with equanimity the showering

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1. For the canonical statement of Lockean libertarianism, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 10 (1974). For John Locke's views, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (J.W. Gough ed., Basil, Blackwell & Mort Ltd. 1966) (1690); also consider A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* (1992) and A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* (1993).

of externalities in the form of benefits that typically accompany the creation and upbringing of a responsible competent person who becomes a useful member of society. The libertarian will insist that the receipt of such benefits does not generate any reciprocal obligations to benefit those who benefit us in these unconsented to ways—at least, not obligations that are legitimately enforceable and that justify forcible imposition on people’s liberty to lead their lives as they choose. However, bringing children into the world can, and often does, impose net costs on people who do not consent to bear these costs. The introduction of one extra person may strain scarce resources. A Lockean Proviso may be triggered, affecting everyone’s property rights. Bringing a child into the world and failing to see to it that the child is properly socialized may be the moral equivalent of tossing into a crowd an inexpertly wired bomb that might, or might not, explode and injure one person, or many. In these, and perhaps other ways, causing a child to exist might be violating the rights of others.

Even if two individuals brought a child into existence in an isolated world in which no one would be affected in any way except the two parents and the child, the Lockean will surely hold that by bringing a child into the world one incurs obligations to that child to sustain its well-being and prepare it for adult life.² It is not clear to me what a Lockean libertarian view entails concerning the shape and strength of the child’s rights to aid from its parents. Whatever minimal acceptable threshold level of parental care is set by those rights, it would seem that such rights are legitimately enforceable. For example, if one parent significantly violates obligations of care toward his child, it would be morally legitimate for the other parent to compel compliance.

Given that an activity violates Lockean rights, it does not automatically follow that there is a legitimate regulatory role for the state to play. Perhaps Lockeanism rightly understood implies anarchism, so there are no legitimate functions for the state to fulfill. However, if Lockeanism does allow that a minimal night watchman state could be morally legitimate, the legitimate functions that such a state would serve would

2. This formulation slides past a large issue: At what point in the development of a human child does the child acquire significant moral rights that include a right to care and nurturance from parents? *See* F.M. KAMM, *CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* (1992) (offering a sophisticated broadly Lockean account of this issue). I assume that at the very least, at some point in the development of a child, those responsible for bringing it into the world must either see to it that the child’s life is terminated or that some responsible adult persons agree to take on the full complement of rights and obligations identified with the parental social role. It is not morally acceptable that a child should be brought into the world and simply left to languish without care.

surely include enforcement of children's rights to adequate care from their parents.

Activities that bring children into the world may violate the Lockean rights of nonconsenting other people by wrongfully bringing about a newborn person that has rights to a share of what used to be other people's resources or by creating undue risk via neglectful parenting that the newborn child will eventually commit antisocial acts. These possibilities aside, activities that bring children into the world may wrongfully threaten to establish a state of affairs in which a child's right to care from its parents is not fulfilled. These considerations provide grounds for legitimate Lockean restriction of family life. So far as I can tell, these considerations are exhaustive. In particular, a social scientific finding that restricting people's legal opportunity to exit from marital arrangements would increase the expected well-being of the adults who enter these arrangements by contract would provide no reason at all for any state or private use of coercion to restrict people's legal opportunity in this way. Lockean adults are perfectly at liberty to enter into less than optimal or even self-destructive marital arrangements if they choose. Moreover, a social scientific finding that restricting adult individuals' freedom to cohabit on whatever terms they find mutually agreeable would increase children's average well-being appreciably (though no child would fail to get the minimal level of parental care to which she is strictly entitled according to Lockean rights theory if the restriction is not enforced) would provide no legitimate reason for enforcing such a restriction. Rights are trumps, according to the Lockean.

II. PRIORITARIAN CONSEQUENTIALISM

The considerations that the Lockean singles out as legitimately shaping correct conduct and just social policy seem to me to be undeniably morally relevant. What is harder to swallow is the negative claim that nothing else legitimately shapes policy.

This essay approaches the issue of state regulation of marriage from a standpoint opposed to the Lockean natural rights tradition. This standpoint is a close cousin of utilitarianism. The fundamental moral norm is that acts and policies should be selected to produce the best outcome, and outcomes are to be assessed in terms of the quality of human lives that people achieve. This outcome assessment assigns greater value to achieving a well-being gain, or preventing a loss, for a person, the lower the person's lifetime well-being would otherwise be, and the greater the size

of the well-being gain. In other words, we ought to maximize weighted well-being (weighted by priority for the worse off).³

What this prioritarian doctrine implies as to what actions we should choose and what social policies we should institute depends crucially on the nature of well-being—what constitutes it and what facilitates it.⁴ For purposes of the present discussion of appropriate state policy toward marriage arrangements, we need not enter deeply into an inquiry into the nature of human well-being. So far as love, sex, and childrearing are concerned, my sense is that we, for the most part, agree about what is desirable and worthwhile. The difficult questions revolve around the issue of what, if anything, the state can sensibly do to promote the good without thereby doing even more to promote the bad and the ugly.

Regarding the values that are usually thought to be at stake in the regulation of family life, I hold what I take to be entirely conventional and banal views. Pleasurable harmless sex acts between mutually consenting adults are good per se and inherently enhance the quality of the lives of the participating individuals. These sexual acts are good qua pleasurable. The acts have an imaginative and sensory content that is typically innocent (but can be morally problematic, for example, if one is sexually aroused by the thought of oneself beating up another person). These acts can exhibit a kind of athletic excellence, and be virtuous accomplishments. They can be also be virtuous along another dimension if appropriately motivated, (for example, if one aims at mutually enhancing the pleasure of all co-participants). The cooperating parties have a mutual friendly regard for one another and a mutual appreciation of the short-term common project in which they are engaged.

Mutually pleasurable casual sex as described above is a significant human good. Whether the sexual desire that motivates this activity is directed at a member of the human species of the opposite sex or of the same sex is morally inconsequential so far as I can see.⁵ If humans were psychologically capable only of sustaining casual sexual encounters, the

3. On prioritarianism, see Derek Parfit, *Equality or Priority?*, in THE IDEAL OF EQUALITY 81 (Matthew Clayton & Andrew Williams eds., 2000).

4. On the nature of well-being, see JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE (1986). See also ROBERT M. ADAMS, *Well-Being and Excellence*, in FINITE AND INFINITE GOODS 83, 83 (1999); Richard Kraut, Desire and the Human Good, Address Before the 92d Cent. Div. Meeting of the Am. Phil. Ass'n (May 6, 1994), in 68 PROC. & ADDRESSES AM. PHIL. ASS'N, at 39–54 (Nov. 1994).

5. A sympathetic reconstruction of traditional arguments derogating homosexual sex appears in Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 227, 227–28 (David M. Estlund & Martha C. Nussbaum eds., 1997) (quoting John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1066–67 (1994)). Weithman criticizes the traditional arguments he reconstructs, and I find his criticisms compelling. Weithman does not endorse casual sex as intrinsically valuable as I do.

state as the agent of a decent society should seek to promote casual sex, both the frequency, and the quality, of such encounters. A complication is that humans are typically capable of a greater good, the building and sustaining of long-term sexual partnerships in which mutual sexual sharing is combined with intimate friendship and cooperation in shared life projects, the complex relationship being cemented by assurances (or the confident mutual expectation) of mutual commitment and fidelity. Call this a committed sexual friendship (CSF). Moreover, casual sex sometimes facilitates and sometimes obstructs CSF in a host of familiar and complex ways. Casual sex is the usual experimental prelude to a CSF between two people, and in a wide variety of situations, having casual sex with a person will tend to trigger strong desires either to sustain a casual sexual relationship with that person or to develop a CSF with that person. Casual sexual encounters thus become an arena in which deceit, fraud, exploitation, and wasted investment are common. Despite its intrinsic desirability, promiscuity justifiably has a bad reputation. For many people in many situations, the pursuit of promiscuity tends to lead to the wrongful imposition of harms on one's associates and to inhibit the development of an otherwise feasible CSF for self and others.

At this point a legitimate state interest in the character of people's romantic and sexual relationships becomes discernible, an interest that is distinct and separate from the interest in promoting childrearing practices that are conducive to increased lifelong well-being of the individuals formed by these practices. The state should promote CSF, and seek to enhance the quality of people's CSF relationships, on the ground that on the whole and on the average, people will be better off forming and sustaining such relationships than not doing so.⁶

6. I stand by the statement in the text, but complications abound. For one thing, even if CSF tends to be a greater good than casual sex, there might be mixtures of CSF and promiscuity in a person's life that involve more fulfillment for self and others than any feasible life plan for that individual involving CSF alone. These mixtures might come about by way of the individual pursuing casual sex at one stage of life and CSF at another stage, or perhaps the individual might pursue a form of CSF that is tolerant of casual sex with persons other than the CSF partner(s). Also, casual sex and CSF may be viewed as end points on a continuum, and individuals might pursue any of various midrange points rather than either extreme. Moreover, there is a range of individual personalities varying in propensities to generate well-being for self and others when pursuing different romantic plans of life. These issues are explored endlessly in soap operas, popular songs, and other popular culture manifestations; philosophical analysis may be otiose.

The prioritarian pursues this concern with a twist. She assigns greater moral value to obtaining well-being gains for people, the worse off they would be without those gains. Regarding romance and CSF, she gives extra weight, not to securing gains for those who are disadvantaged specifically with regard to those goods, but to those who are worse off in well-being prospects generally.

Whether or not one accepts the prioritarian placement of a thumb on the scale in favor of the badly off, everyone should agree that the issue of how to treat conflicts of interest between those with poor life prospects and those with good life prospects has a large influence on people's views on appropriate state policy. Many policies that work just fine for competent choosers, who tend to fill the ranks of the better off, will work to the disadvantage of less competent choosers, who tend to be less well off overall. A difficult issue of distributive fairness arises here, and reappears in many social policy choices.

In principle, according to prioritarian doctrine, there is no limit to the sorts of considerations that could legitimately figure in the moral cost-benefit calculation that would determine morally right social policy concerning romance, sex, and childrearing. Anything that affects people's well-being now or in the future can tilt the scale.⁷ Without any justifying argument I shall just stipulate what I believe to be true. Three considerations loom large in determining appropriate state policy in this domain. Two have been mentioned: (1) the state has a legitimate interest in promoting good childrearing to boost people's lifetime expected well-being, and (2) the state has a legitimate interest in promoting CSF to boost people's lifetime expected well-being. A third consideration is equality between men and women: (3) the state has a legitimate interest in promoting social arrangements that bring us closer to a world in which being born a woman is not per se disadvantageous, that is, a world in which the average well-being level of men and the average well-being level of women is roughly the same.⁸

7. Nancy L. Rosenblum considers the view that "appropriately ordered intimate relations reinforce democracy." *Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community*, in *SEX, PREFERENCE, AND FAMILY*, *supra* note 5, at 63, 65. The idea that we should inter alia regulate romantic life to improve the quality of democracy is doubly instrumental in prioritarian perspective. Democratic political ideals are assessed for their instrumental contribution to priority-weighted well-being, and sexual regulation is then assessed according to its potential contribution to the degree to which appropriate democratic political ideals are satisfied. *Id.*

8. A concern for equality of life prospects between men and women is valued by the prioritarian on instrumental grounds—equality is a means to achieving greater priority-weighted well-being. For an indication as to how this argument might go, see JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Frederick A. Stokes Co., 1911) (1869). See also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989). In an interesting discussion of how social trends combine to weaken marriage and how we

III. MARRIAGE

The three desiderata just stated stand in no determinate relationship to the institution of marriage as we see it in the contemporary U.S. and other modern democratic societies. Nothing hinted at so far in this essay demonstrates that we should assign primary responsibility for childrearing to the biological parents (the sources of the sperm and egg that unite to generate, eventually, a child), rather than to the community as a whole. Nothing said so far implies that it is desirable that people should seek CSF within the very same partnership arrangement that is dedicated to producing and rearing children (if we assume for the moment that people should be at least permitted to enter into partnership arrangements for the purpose of childrearing). Normative discussion of these matters is plagued by a double risk—on the one hand of reiterating banalities, obvious truths everyone already knows, and on the other hand of asserting as true what are really demonstrably false claims that masquerade as obvious truths.

To start the discussion, I shall simply describe what I suppose is a conventional understanding of marriage as it ought to be. The remainder of this essay tentatively explores considerations that ought to shape public policy in this domain.

The current institution of marriage serves several functions. In the traditional marriage, a young man and woman fall in love and pledge to be sexually faithful to each other, live together, be intimate friends, pool financial assets, and cooperate as a team that develops and executes a common plan of life that is an important element in each individual's separate life plan. This common plan of life includes bearing and raising children together. The mutual pledge that establishes a marriage is a lifelong vow, "for better, for worse, for richer, for poorer, in sickness, and in health, . . . till death [do us part]."⁹ As the quoted words indicate, there is an insurance aspect to marriage. Good and bad fortune is

might reverse these trends, James Q. Wilson disparages Okin's policy proposals—that we should strive to bring about equal sharing of income, childrearing, and housework between the husband and wife in every marriage. Okin advances these proposals with a view to promoting equality of a sort between men and women; Wilson does not declare whether he accepts or rejects this broad goal. See JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 187–90 (2002). As noted later in this essay, the consequentialist of my stripe only contingently supports equality of any sort, and on some egalitarian views, a genuine commitment to equality requires a deeper commitment.

9. BOOK OF COMMON PRAYER 292 (John E. Booty ed., Univ. of Va. Press 1976) (1559).

shared, and if one suffers disaster, the spouse is expected to lend a steady helping hand. In infirmity and in old age, spouses assume caretaker roles. To some extent, the insurance aspect of marriage extends across generations.

What I have called the “traditional” model of marriage is roughly the main conception of it in twentieth-century America, lightly modified by concerns for equality between men and women. The light modification is that role expectations for husband and wife are left unspecified. The more traditional ideal of marriage would stipulate that the wife is to be homemaker and the husband the breadwinner, and would urge the wife to obey and the husband to command wisely. Here the husband is understood to be male, the wife female.

The traditional ideal of marriage receives some legal protection. By law in most jurisdictions, marriage is between one man and one woman. Property that accrues to either spouse is jointly owned by the couple. If a marriage lasts for several years, there is a presumption that both spouses have contributed to the income potential of the spouse with higher income, so there is income sharing required by law if the marriage dissolves. The state also sets the terms of divorce, and in contemporary practice, this generally means that each marriage contract must contain an easy exit clause via the option of no-fault divorce. Some states offer no-fault divorce but fault-based determination of terms of alimony. Except in states that now allow the option of the more restrictive covenant marriage, no person may sign a legally binding marriage contract that provides for no exit via divorce or includes clauses that render divorce difficult.

The traditional ideal of marriage is sustained by social norms and by dominant trends in most people’s desires. Even in the contemporary world, in which marriage and family life is buffeted by social forces, awareness of which is now widely shared, most of us grow up wanting and expecting to become married. We hope that our marriages will be successful for a lifetime. Though given the fact that about half of first marriages end in divorce, we probably marry now with a pair of fingers crossed behind our backs, and at least some residual dim appreciation of the reasonableness of providing in advance for what to do after a marriage crumbles. Although there is greater social acceptance than in the past of living as an adult without marrying, and of living as a married adult without having and raising children, most people still want marriage, and a childless couple is an object of pity. For that matter, most men probably hanker after the days in which the traditional division of marital roles between husband and wife was regarded as unproblematic, and some women have not freed themselves from similar hankerings.

Traditional marriage is a package deal, bundling together several distinct functions. The question immediately arises, whether or not these various functions are better fulfilled by being bundled in this way than they would be if they were assigned separately. Of course, to some extent legal and social marriage arrangements are a shell that can be molded to different shapes and filled with different content as times change and people's needs with them. The household economy of the family is no longer so important as it was, say, at the beginning of the twentieth century. Goods and services that used to be produced in the home are now purchased in the marketplace and brought to the home for consumption. Still, marital substance is significantly determined by the form of marriage—what sorts of lives people will live within the institution or alongside it.

The traditional marriage ideal presumes that the lover of your life will also be the person with whom you share childrearing joys and responsibilities if you have children. Why this presumption? The qualities that make one a good lover and intimate friend are not the same as the qualities that make one a good cooperative partner in the enterprise of childrearing, and it is commonplace that the two sets of qualities do not always coexist in the same person. Imagine that Maria, a heterosexual woman, has a long-term exclusive sexual friendship with Igor, but lives with her long-term friend Frances. The two women friends pool their finances and jointly share parenting responsibilities for the children they bear. In effect, Maria is married, but the marital status roles are split across two persons. Perhaps this arrangement is a bad idea, perhaps not. One wonders why the state should put its stamp of approval behind one particular bundling of social roles, the ones constitutive of traditional marriage.

In discussing alternatives to traditional marriage the discussion can easily veer off into irrelevant silliness. Some forms of family life that might look attractive from some normative theoretical armchair perspective might be ways of living that no actual persons will ever come to desire, or desire strongly enough to make the way of living a socially recognized and viable option for people. In the absence of tyrannical uses of state power that no sensible normative principles would condone, the imaginary alternatives are just that, imaginary alternatives. The discussion of such alternatives is no more fruitful than reflections on what life would be like if humans had wings and could fly.

Recall that the topic of this essay is not what form of marriage is ideal, but rather what form of regulation of marriage-type arrangements ought to be enforced by the state in a decent society. That is to say, given people and the background of institutions pretty much as they are, what regulation of marriage makes sense.

Consider as a starting point what I will call the Lockean baseline option: The state should simply enforce whatever voluntary contracts individuals make with one another concerning romantic, sexual, family, and marital arrangements—provided these arrangements (1) do not wrongfully impose costs on unconsenting third parties, and (2) do not run afoul of the state’s legitimate interest in ensuring that every child has an adequate level of nurturance, education, and socialization.¹⁰

One complication is what to do about risky contracts. Suppose some types of romantic contracts individuals might be prone to make do not necessarily result in harm to children, but are associated with greater risks of unacceptable harms to children than other sorts of arrangements.¹¹

The prioritarian approach veers off from the Lockean regulatory regime for another reason already noted. Suppose that romantic arrangements of types A and B both lead to outcomes for children above the Lockean baseline set by children’s rights. Suppose further that the A type arrangements result in significantly better above-baseline outcomes for children and do not incur any other significant moral costs, compared to the B type arrangements. Prioritarianism will then favor regulation by state policy that tends to induce people to opt for A rather than B (provided some feasible regulation passes a prioritarian cost-benefit assessment), but the Lockean prohibits any coercive restriction of people’s liberty with respect to their activities that violate no one’s rights. The same opposition of principle emerges for the desiderata of promoting CSF and promoting equality in men’s and women’s life prospects. But insofar as there is uncertainty, perhaps in-principle ineliminable uncertainty, in the normative and empirical measurement that enables us to judge what the weighted well-being consequences would be of adopting one or another marital regulatory regime, prioritarianism in practice might disagree with Lockeanism mainly in being more permissive: in allowing that any of several different and

10. Richard Posner endorses something in the neighborhood of this proposal in *The Economic Approach to Homosexuality*, in *SEX, PREFERENCE, AND THE FAMILY*, *supra* note 5, at 173, 173–91. See also RICHARD A. POSNER, *SEX AND REASON* (1992).

11. For discussion of the difficulties the Lockean libertarian theory encounters in determining how risks affect the interpretation of rights, see PETER RAILTON, *Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk*, in *FACTS, VALUES, AND NORMS: ESSAYS TOWARD A MORALITY OF CONSEQUENCE* 187, 187–225 (2003).

opposed regulatory regimes might be equally good, so far as we can know, from the standpoint of achieving best outcomes.¹²

Two assumptions are stated below. If accepted, they do not suffice to show that society should depart from enforcing the Lockean baseline all the way to giving legal privileges to traditional marriage. However, they do suggest that the state ought to be fostering some cousin, or other close relative, of traditional marriage. Exactly what type of regulatory regime might be best, is a question that remains open, for all that this essay argues or asserts.

(1) On the whole and on the average,¹³ a child is better off if raised under the steady supervision of a small number (larger than one) of parent or guardian individuals who have primary direct responsibility for meeting the child's needs and carry out this function without interruption until the child is full-grown.

(2) On the whole and on the average, an adult is better off if he or she lives with at least one other adult who is both a long-term friend and a long-term sexual partner.

Given 1 and 2, there is some reason for the state, acting as the agent of a decent society, to promote steady parenting and CSF cohabitation. This does not yet yield a rationale for promoting arrangements that combine these roles, but perhaps reasons are not far to seek. Given that time is a scarce resource, if one is going to rear children and cohabit in a CSF relationship, it is convenient if both activities occur under the same roof with the same partners. Moreover, the shared project of parenting is for many people an important and valued dimension of CSF. Also, having a successful long-term friendship and sexual relationship with the same person(s) with whom one is carrying out a long-term childrearing project gives one extra incentive to stay the course and continue cooperatively participating in the parenting role. Successfully cooperating in the childrearing endeavor could also induce one to persist in a CSF that was encountering troubles which would spell doom for the relationship were it not for the shared parenting. Of course, in a culture that prizes and glorifies romantic fulfillment, when individuals are raising children and

12. An interesting attempt to show that a consequentialism that eschews interpersonal well-being comparisons implies roughly libertarian moral rules and social regulatory policy is made in RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

13. This phrasing does not mean that each and every child is better off (averaging across time periods) when the stated condition holds, but rather that children on the average are better off if the stated condition holds. One should read assumption (2) in an analogous fashion.

engaged in a CSF together and the romance goes sour, there is pressure to split apart even if the parenting enterprise regarded separately is proceeding in a satisfactory way. As such, the bundling of roles can foster instability of parenting partnerships.

The bundling of roles in marriage as we currently understand it creates a certain oddity, though I think no real inconsistency, in current campaigns for legal recognition of same-sex marriage. In our culture, society promotes and celebrates CSFs by assigning legal and social privilege to marriage. So, unsurprisingly, those of us who press for an end to discrimination and prejudice against same-sex sexual activity and same-sex CSF, campaign for same-sex marriage. The legal recognition of same-sex messages expresses the correct idea that the important goods that are achieved in sexual activity, sexual friendship, and CSF are equally available in homosexual and in heterosexual relationships. However, this concern is somewhat orthogonal to the concerns of people who think of marriage primarily as a device for facilitating healthy childrearing and for disciplining adult humans' obsessive quest for romantic fulfillment in the service of healthy childrearing. The point emerges clearly if one imagines that over the long haul, in a society that does not impose any stigma on homosexuality or discriminate against nonheterosexuals in any way, it turns out that lesbian couples choose to have children and engage in childrearing as often or more often than heterosexual couples do, whereas gay male couples virtually never do so. In such a society, imagined to be free of sexual orientation prejudice, society might take various steps to promote CSF, but reserve certain legal constraints and privileges deemed constitutive of "marriage" and intended to enhance the quality of childrearing to lesbian and heterosexual couples which are presumed to be uniquely likely to be part of this enterprise.

IV. DONAGAN

Consider in this context a suggestion advanced by Alan Donagan some years ago.¹⁴ Donagan was not proposing reform of marriage. Nor was he engaged in utopian speculation as to how family life might be improved. He was simply interpreting and defending the core morality of the Judeo-Christian tradition, which he found to be continuous with a certain strain of Kantianism. Regarding sexual morality, Donagan proposed that it might be morally permissible for a number of adults to pledge to share family life together, to cohabit sexually on some mutually agreed terms, and jointly to share responsibility for any resulting children.¹⁵

14. ALAN DONAGAN, *THE THEORY OF MORALITY* 100–08 (1977).

15. *Id.* at 103.

Donagan includes a further constraint that involves the pledge by group members that when bearing a child is a prospect, a woman will cohabit only with one man so that there will be a determinate father if a child issues from the woman's sexual activity.¹⁶ Given that even apart from this further stipulation there would be multiple adults—fellow commune members—waiting in the wings who have pledged to assume fully the duties of parenthood, Donagan's further constraint strikes me as otiose.¹⁷ At any rate, if it was deemed morally important that each child should know the identity of her biological father in this communal setting, DNA testing could establish this fact without any insistence on temporary bouts of monogamy for this purpose.

It should be noted that Donagan limits his account of the morality of family life to the moral principles that should guide the relations of adults living together with a view to producing children. A type of marriage regarded as the initiation of a family by and for mature adults, to promote their friendship, with procreation ruled out, lies beyond the scope of his discussion.

Donagan has us imagine a group consisting of roughly equal numbers of males and females. He tentatively concludes that such a commune could provide adequate assurance that children born to any group member will be properly nurtured, educated, and socialized, and concludes on this basis that such a form of family life might well be permissible.

Why equal numbers of males and females? Writing in 1977, Donagan did not have in mind the present day options that reproductive technology makes available, but even then adoption made it possible for a partnership that cannot procreate on its own to carry on the enterprise of childrearing. So it is not clear that a viable reproductive group has to include any females at all, or any males, much less some specific ratio of males to females. Extracommunal donated sperm, eggs, and childbearing services render a commune with any number of males or females including zero a viable childrearing enterprise. His concern is clearly

16. *Id.*

17. Donagan's discussion is premised on the assumption that "a child's upbringing is impaired unless the ultimate authorities in charge of it are its natural parents, joined in a stable marital union." *Id.* at 102. I am not entirely sure how this premise is supposed by Donagan to be compatible with his tentative endorsement of commune style marriage as morally permissible, since in this form of marriage the communal members as a group assume joint and individual responsibility for the care and nurture of all children produced by group members.

not that the envisaged marital commune is ideally equipped for biological reproduction, but rather with the issue of polygyny and female subordination. He mentions and endorses Saint Thomas Aquinas' comment that in polygynist families the women will tend to become servants of the men.¹⁸

Donagan is concerned with determining morally permissible forms of family life, whereas my topic is the proper role for state regulation of family arrangements. Nevertheless, the two topics are closely linked. If a communal arrangement among adults provides adequately for the care and upbringing of the children who issue from the arrangement, there should be a strong presumption that this is a valid form of marriage, and that the state should not seek to dissuade people from engaging in it by regulation. In particular, there is no reason to extend legal privileges only to marriage arrangements that include just two adults rather than larger numbers of adults.

Hillary Clinton has famously commented, "It takes a village to raise a child."¹⁹ She has in mind that in order for the childrearing enterprise to have good prospects of success, the larger community beyond the family must provide support. However, her comment could equally well be construed as an expression of doubt that in a modern setting, in which both members of a two-person marital partnership face pressure from social norms and the expectation of personal fulfillment to engage as long-term committed participants in the productive economy, merely two parents could be expected to manage the job with reasonable prospects of success. Three, four, five, or more parents are needed—a village, not just a couple. At least, there should be no legal discrimination against marriage contracts encompassing more than two adults even if few individuals are expected to avail themselves of this option.

V. POLYGYNY

This last comment takes us back to the concern that certain forms of marriage, though they would not pose threats to the well-being of children, might nonetheless be inherently wrongful by posing risks of harm, bad subordination, or degradation, for their willing adult participants.

A Lockean libertarian position would dismiss any such concern on the ground that no wrongful injury is done to one who voluntarily consents

18. *Id.* at 102 (citing 3 [PROVIDENCE] SAINT THOMAS AQUINAS, ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES, pt.2, at 152 (Vernon J. Bourke trans., Hanover House 1956) (1261–64).

19. HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US 12 (1996) (quoting an old African proverb).

to interact with another adult, no matter how injurious the interaction proves to be. All rights one has to be treated in any specified way are waivable and alienable by one's voluntary consent. One's natural moral rights include this right of alienation and waiver, and the right is morally important. Each individual has her own life to live, and the judgment as to how best to live it is hers. Nonwaivable and inalienable rights would be a grievous affront to this expansive ideal of personal sovereignty.

However, this ideal of personal sovereignty is too expansive. We humans tend to be very imperfectly reasonable and rational guardians of our own best interests. So even if one is striving to be reasonably prudent, one may fail, and fail in such a drastic way that duties of beneficence are triggered, so that another person who can stop one from stepping off the cliff may be morally required to give one a coercive helpful protective shove. A bad marital choice can be the equivalent of inadvertently jumping off a cliff. Suppose, however, that one is not ill-informed at all, but simply wants to make a ruin of one's life, either by self-abnegating sacrifice of one's own large interests to get small benefits for others, or just as a perverse expression of one's autonomy. Only a hard paternalism, which critics say has an acrid moral smell, would countenance forcible restriction of someone's liberty to prevent her from self-harming conduct that results from fully informed and voluntary choice.²⁰

Here the metaphor of self-ownership seems to me to be helpful in charting the moral limits to personal sovereignty. The idea of self-ownership is that each adult person should be regarded as having over herself the same full rights to use and abuse that a person who has full private property rights in an object has over that object. However, private ownership rights are always limited by an element of stewardship. As Locke says of the initial acquisition of unowned land, if one lets the property one acquires go to waste, one's property right is eroded and at the limit, forfeited. To carry through the metaphor of self-ownership, we should acknowledge that each person, the rightful owner of herself, has a duty of stewardship toward herself, a duty to make something worthwhile of her life for herself and for others. Grievously vicious imprudent conduct voluntarily chosen violates this no waste requirement, and hence opens the individual to morally permitted restriction of her liberty against her will for her own good.

20. One deservedly influential critic who detects a moral taint in hard paternalism is Joel Feinberg. See JOEL FEINBERG, *Legal Paternalism*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 110, 110–29 (1980).

Setting aside the Lockean libertarian doctrine as, in this context, too extreme, we are left with the harder issue, whether a sensible paternalism or some related moral position would endorse legal disfavoring of polygynous marriage. A related moral principle might be a moral constraint against exploitation. One might hold that morality forbids a person, contemplating interaction with another on terms that give the first person the lion's share of the benefits, to profit in this exploitive way. One might then hold that the law should follow the track of morality and stand against the interaction, not in order to prevent loss to the one who would get the short end of the stick in this arrangement, but to prevent the wrongful gains of the willing exploiter.

Suppose that a society permits polygamous marriage and that a significant number of persons exercise this option by entering into one husband-many wives marriages. Would the consequences of such a regime of legal polygamy be expectably bad, in a way that would warrant withdrawal of the legal permission? I find the concern that leads Donagan to regard polygyny as impermissible to be important, and in principle this consideration could amount to a good reason for the prioritarian to demand a legal ban on such marriages. What is much harder to discern is the likelihood that bad consequences would indeed ensue. If polygyny is permitted, one might expect that males with greater than average wealth will make marriage offers that some women will find attractive. The main expectable result might be that the pool of eligible women available for marriage shrinks for less wealthy males. So the historical motivation for banning polygyny might have been democratic patriarchy rather than any sort of concern for women's equality.

Other things being equal, one would expect that having more marital options increases the leverage of women in the implicit bargaining for terms of marriage contracts. If wealthy males can offer second-wife and third-wife status to women who prefer this status to what they can obtain from men offering first-wife status, the end result might be closer to egalitarian sharing arrangements in monogamous marriages.

At the level of sheer empirical speculation, one could just as plausibly describe a scenario in which polygamy is permitted and the main form of polygamy that develops is polygyny with socially powerful males wedded to several female mates, most of whom occupy a servile role. The consequence might be a cultural shift that leads all men to disfavor the ideal of companionate marriage and to favor the ideal of wife as servant. The cultural shift puts antiegalitarian pressure on monogamous arrangements, so that on the whole and on the average, monogamous marriages become more patriarchal and hierarchical, with men dominant and women subservient.

VI. NONWELFARIST IDEALS AND MARRIAGE NORMS

My approach in this essay is to assess marriage practices and possible alterations of them by their consequences for the quality of human lives. Permitting polygamy is morally right if it is part of a package of policies that maximizes weighted well-being and wrong otherwise. Proposed policies are more right or more wrong, depending on how far they diverge from what would produce the best outcome for people. Such an approach is controversial in familiar ways. In the context of assessing the meaning of marriage, a consequentialism of well-being might fail to register people's belief that some modes of conduct are morally wrong, in and of themselves, whatever the consequences.

The prioritarian's relentless sifting to find the impact on human well-being might seem crass from some ideal-based perspectives.²¹ Broadly, one might hold that there are impersonal values worth respect that are not reducible to the well-being of humans. In this spirit one might hold that such strivings as the search for scientific understanding and the creation of ideal community in marriage are morally valuable for themselves, as worthy ends, quite apart from any contribution they might make to human well-being.²² The advocate of such nonwelfarist ideals might add that we misunderstand human well-being if we do not see it as properly subordinated to other moral goals. In some cases one pays proper attention to the well-being of people by helping them gain the proper relationship and orientation to nonwelfarist goals. Here gaining the good for people partly consists in assisting them successfully to pursue excellent goods that are not at all goods for people. Some values are not for us; rather, we should be for them. Some debates about the meaning of marriage center on such values, to which the welfarist consequentialist is blind.

Another possibility is that the welfarist consequentialist is seeing through prevalent illusions. I cannot in this essay attempt to address this large issue. I simply note that the nature and depth of the disagreement between one who holds that some values are impersonal and do not reduce to well-being gains and losses, and one who denies the existence of such values depend on the consequentialist's understanding of well-being. If she believes that achieving scientific understanding

21. See Connie Rosati, *What Is the "Meaning" of "Marriage"?*, 42 SAN DIEGO L. REV. 1003 (2005).

22. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 87–94, 108–143 (1998).

and achieving genuine friendship and love are themselves excellences, attaining which makes the attainer's life better for her, then the consequentialist is not reducing human life to a calculus of happiness. The aspiration to live so as to create intrinsic goods and make these excellences accessible to many people, including future people, "makes human life more than just an exchange of costs and benefits, more than just a job or a trip to the mall."²³ In this last sentence I am quoting a Kantian who claims that unless we recognize values that we must live up to, and that do not bottom out in welfare for self and others, we end up with a shopping mall notion of human existence. Not so, I say. We consequentialists may be crass (and maybe being crass is correct, a form of being plain-spoken), but we aren't crudely crass.

VII. DIVORCE

An element of the meaning of any contemporary marriage is the likelihood of its collapse. Roughly one-half of first marriages commencing in recent years down to the present in the U.S. are likely to end in divorce. The level of divorce has stabilized slightly below its peak level reached in 1980, but this tailing off of the divorce rate is not especially good news to fans of stable marriage, because it has been accompanied by a decreased tendency for people to engage in marriage rather than cohabit without formal ties.²⁴

Presumably there is an optimal level of divorce as well as an optimal distribution of marriages into those that endure and those that break apart. The optimal level and distribution would ideally balance the interests of children, adult married partners, and affected other people. The prioritarian doctrine supplies a schema for determining a proper weighting of interests and hence a morally right determination of optimal level and distribution. Presumably the optimal level and distribution of divorce are determined in tandem with the determination of the optimal level and distribution of undertakings of marriage commitments. Some who get divorced should never have taken the vow, but surely not all; for some, marriage is a reasonable gamble that turns out badly. The idea of the optimum here is the optimum that feasible alterations in state policy could achieve, though it is hard to get any clear idea as to what these

23. J. David Velleman, *A Right of Self-Termination?*, 109 *ETHICS* 606, 612 (1999). Velleman holds that a proper ethic sees the source of human dignity in rational nature, which demands our respect, and should not be regarded merely as one good for us or source of good for us, to be traded off against other goods and sources of well-being. *Id.* at 609–12.

24. WILSON, *supra* note 8, at 197. See also ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* (rev. ed. 1992).

optima might be. Social commentators bemoan the present state of marriage and divorce, but how do we tell whether we have too many divorces, too few, or just the right number? For the moment, I consider just the aspect of the question that involves the joint best interests of the currently married partners contemplating dissolution.

The ideal of romantic love is that a couple should stay intact just so long as mutual love endures between the romantic partners, so there is some presumption that if mutual love between husband and wife ceases, so should the marriage. Even if mutual love endures, its persistence may not be enough to enable the couple to avoid inflicting unhappiness on each other that is remediable only by means of separation and divorce.

These obvious considerations evidently do not, by themselves, amount to a case for easy divorce. Individuals may tend systematically to underestimate their own vices that might be causing their marriage to be foundering, and to overstate the likely causal contribution of what they perceive to be their spouse's vices toward marital discord. Hence their belief that divorce will improve the quality of their lives may systematically tend to be illusory. Making divorce difficult, rather than easy to obtain, may alter the incentives potentially divorcing people face in a way that encourages them to expend more energy on fixing their broken marriage instead of abandoning it, to their mutual benefit.

At the level of abstract speculation, one might just as well surmise that people will systematically tend to stick with the devil they know, the unhappy marriage they are presently enduring, rather than risk the devil they don't know, the uncertainties of life after divorce. Or people may adhere too strenuously to misguided ideals of unconditional love and commitment—stand by your man, no matter what sort of undesirable he turns out to be. The more prevalent these scenarios are, the more counterproductive it would be to erect new hurdles to divorce with an eye to discouraging people from taking this course.

In other words, the prioritarian willingness in principle to endorse paternalistic restriction of marriage relationships for the good of the adult marital partners does not carry any direct implications for policy. People can be foolish and imprudent, both by exiting too quickly from marriages that should endure, and from failing to exit quickly enough from marriages that should be terminated. Simply providing multiple options of less restrictive and more restrictive forms of marriage—from marriage lite to nondissolvable union—is not a solution, because people may choose the wrong form that does not suit their particular propensities and traits.

There is also the possibility that prudent marital partners will find themselves with opposed interests concerning whether or not their marriage should end. One partner may be better off if the marriage ends, the other partner worse off. Making divorce difficult and costly favors those whose interests are aligned with the survival of their marriage; making divorce easy and cheap favors those whose interests are aligned with its termination.

Here the issue of no-fault versus fault-based divorce and divorce settlement arises. If one marriage partner is better off if the marriage continues and the other is better off if the marriage is dissolved, how one balances the interests of the opposed parties surely varies depending on whether or not one thinks one of the parties has been abusive or in other ways vicious in behavior toward the spouse. Though even if one favors fault-based divorce settlements in principle, in practice one might suppose fault finding efforts by courts will not be sufficiently reliable and sensitive to sustain the integrity of the procedures. However, even if it is assumed that fault-finding procedures will work badly, one might still favor them, on the ground that they might help foster a cultural shift toward greater social disapproval of those who fail to sustain marriage until death do us part. But would such increased public censoriousness be a good thing or a bad thing on balance?

VIII. DISCOURAGING AND ENCOURAGING CHILDBIRTH

A crucial factor in determining appropriate state policy toward family life is normative population policy. Should we seek population increase or decrease? At what rate? Since potential parents in given circumstances are variously capable of raising children effectively, society will seek not simply population increase, decrease, or steady state, but will differentially favor reproduction by the more able or alternatively work to change the circumstances of those less able to boost their parenting prospects. At some lower level of parenting ability, society actively should discourage individuals whose childrearing capacities are at that level or below from giving birth and raising their own children.²⁵ If

25. This issue must be joined in state policy toward the disabled, especially the cognitively disabled. See MARTHA A. FIELD AND VALERIE A. SANCHEZ, *EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING & RAISING CHILDREN* (1999). In the U.S. in the late twentieth century, the issue of parental incompetence lurks in policy discussions concerning single-parent families. Here the unit of assessment is not each adult parent or guardian figure taken separately, but the fusion of adult caregivers in a single household. See FRANK F. FURSTENBERG, JR. & ANDREW F. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* (1991); KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996); SUSAN E. MAYER, *WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES*

there is no morally acceptable way to discourage childbirth, society needs mechanisms of separating incompetent parents from their children, either by encouraging adoption, or by installing children in orphanages or, less drastically, by channeling resources to children in ways that neither depend on the intelligent cooperation, nor reinforce the authority, of the incompetent parents. These draconian-sounding types of policies are double-edged swords, which can harm more than they help, if poorly designed and operated. However, a state that has administrative competence at its disposal has the responsibility to be a nanny state, and in some respects an aggressive nanny state.²⁶

IX. DIFFERENCES

Any regulatory regime for marriage faces the daunting task of balancing many sets of potentially conflicting interests—between children seeking nurturance and adults seeking adult fulfillment, between individuals with different romantic propensities who would benefit differentially under different types of regulatory regime, and between men and women. How it is reasonable to cope with the last-mentioned conflict depends crucially on the extent to which men and women are different in traits and needs in ways that either cannot be eliminated, or should not be eliminated.

(1997); SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1994); Andrew J. Cherlin et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 AM. SOC. REV. 239 (1998); William A. Galston, *Causes of Declining Well-Being Among U.S. Children*, in *SEX, PREFERENCE, AND FAMILY*, *supra* note 5, at 290.

26. Prioritarianism as I understand it supposes that the choices we make do not affect the number of people who shall ever live. Relaxing that simplifying assumption, we would need to determine the moral value of adding a child to the world, given a stipulation of the lifetime well-being that the child who might be added would attain. Prioritarianism by itself leaves this further evaluative issue wide open. We might combine prioritarianism with a critical level doctrine, which asserts that the moral value of adding a child to the world is negative unless the expected lifetime well-being of the child exceeds a critical level that is somewhat above the level at which the child herself would reasonably regard her life as a matter of indifference to her, neither beneficial nor burdensome. In this exercise one is assuming that the child does not affect the well-being of any other person. When that assumption is relaxed, we need simultaneously to assess the moral value of adding a child of given lifetime expected well-being, taking into account the well-being gains and losses that accrue to other persons due to the existence of this child. Only with these evaluations in hand is the prioritarian ready to tackle population policy issues. On critical level doctrines, see Charles Blackorby et al., *Intertemporal Population Ethics: Critical-Level Utilitarian Principles*, 63 *ECONOMETRICA* 1303 (1995). See also Charles Blackorby et al., *Birth-Date Dependent Population Ethics: Critical-Level Principles*, 77 *J. ECON. THEORY* 260 (1997).

Many years ago the economist Victor Fuchs commented that “many different kinds of evidence suggest that *on average* women feel a stronger desire for children than men do and a greater concern for their welfare after they are born.”²⁷ The evidence to which Fuchs alludes might be misleading or not; suppose it is not. The differences between men and women that Fuchs cites might be for all practical purposes fixed or alterable; suppose they are fixed.²⁸ There might be other significant differences as well—for example, a different propensity to violence. What then?

If we seek equality of life prospects between men and women, in a world of difference, the task for social policy would be to arrange institutions and practices so that the differences between men and women do not work to the disadvantage of either group. The aim would not be equal treatment of men and women but treatment that so far as is feasible given other moral goals, leads to equal life prospects on the average between men and women.

Notice that the prioritarian’s commitment to such equality is shallow. Equality of any sort is desirable, for the prioritarian, only in so far as equality in the circumstances serves the goal of maximizing weighted well-being. The prioritarian is a calculating feminist, not a committed feminist.

X. A TIME OF TRANSITION?

In broad terms, one might regard contemporary advanced industrial democracies including Europe and the U.S. as undergoing a long transformation toward societies in which men and women participate equally, and on equal terms, in the labor market and in market entrepreneurial activity. This transformation puts pressure on many institutions, notably, the family. It is simply not yet clear what forms of romantic and marital practices will best suit such sexually egalitarian societies. The marriage forms we have inherited limp along, and the ailments we now bemoan may prove temporary or may ultimately require prosthetic or more radical therapy. Should traditional marriage give way to a regime of Lockean contract? Should fluid cohabitation arrangements replace the traditional family arrangement, or should we

27. VICTOR R. FUCHS, *WOMEN’S QUEST FOR ECONOMIC EQUALITY* 4 (1988).

28. Fixed, that is, up to the discovery of a practical technology of genetic manipulation that allows for choice of traits; at that point, all bets are off.

engineer a new puritanism, if we can?²⁹ Since we don't yet have good answers to these and related questions, perhaps we should regulate with a light hand, letting a hundred flowers, and doubtless thousands of weeds, bloom—experiments in living that might provide bright ideas for future improvement.

29. Posner favors the former, Wilson the latter. Note the prediction of Friedrich Engels, Karl Marx's collaborator. Engels surmised that as economic inequality between men and women diminishes and thus ceases to influence terms of romantic and marital arrangement, women will be more able to get what they want in the implicit and explicit bargaining that sets these terms, and will tend to insist on monogamy. FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* 63–64 (1884).

