

Public Reason, Liberal Neutrality and (Same-Sex) Marriage

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Principles of state neutrality are often invoked to undercut conservative arguments against same-sex marriage. When people claim that marriage is an institution defined by God, which the state may not redefine as it pleases¹, liberals will sometimes adopt what Michael Sandel calls the "naive" strategy of simply denying these claims.² Often, however, they will employ the "sophisticated" strategy of asserting that, whether true or false, religious views are not legitimate grounds for public policy in a pluralistic society. During the 2003 hearings that the Canadian House of Commons' Standing Committee on Justice and Human Rights held on same-sex marriage, for example, Bloc Québécois M.P. Richard Marceau repeatedly invoked an ideal of public reason in response to claims that homosexuality was sinful or that same-sex marriage was unnatural or that marriage was essentially heterosexual.

I am not a theologian so it is difficult for me to define the notion of essence. However I am a jurist and a legislator. That is why the kinds of social organization that I am familiar with and that I study are necessarily legal ones. So, with the greatest of respect for people who because of their religious beliefs do not accept homosexual marriages—and they are fully entitled to their opinion—the Justice Committee must not rely on theology to determine the essence of marriage. It is incumbent upon us to take a stand as legislators.³

When political theorists articulate the moral concerns that lie behind democratic practice, however, they tend to put forward antiperfectionist principles that exclude more than just religious doctrines. Since only reasons that are acceptable to all reasonable citizens can legitimate the ex-

1. Daniel Cere made the same point in his submission to the Ontario same-sex marriage court case; *Halpern v. Toronto (City)* (2003), 225 DLR (4th) 529 (Ontario Court of Appeal) ¶7; see also The Catholic church's *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (Rome: Congregation for the Doctrine of the Faith, 2003).

2. Michael Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," *California Law Review* 77 (1989), 521.

3. Marceau's comment appears at 10:20 am of the Feb. 6 hearings; <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=22311>.

ercise of political power, and reasonable people will disagree about the good life, as well as about salvation, we must not enact laws that can only be justified by appeals to reasonably contestable conceptions of the good.⁴ However, marriage is a privileged public status that underwrites social norms about commitment and fidelity. The principle that undermines the conservative case against same-sex marriage may therefore undermine the case for marriage, same-sex or otherwise. The question this paper addresses is whether we can invoke the sophisticated, public reason argument against opposite-sex-only-marriage while defending marriage on suitably public grounds.

One reason for asking this question is to see if there is any principled ground between social conservatives and libertarians in debates about the legal definition and regulation of personal relationships. Yet the issue of marriage also brings to the fore an important question about the ideal of public justifiability that underwrites liberal neutrality, which is the question of the criteria for excluding reasons as non-public. One way to defend marriage, consistent with a commitment to public reason, is to claim that the institution has ideal-independent benefits for third parties. Such arguments are plausible but not fully satisfactory, I will argue. Another way to justify marriage, consistent with public reason, is to limit the range of policies to which the principle of public reason applies. This approach would allow a more robust perfectionist defense of marriage, but also open the field to religious objections to same-sex marriage. The only way successfully to defend marriage, while preserving the 'sophisticated' objection to religious arguments for opposite-sex-only marriage, is to claim that there is a morally relevant distinction between the kinds of reasons necessary to justify marriage and the kinds of reasons necessary to

4. Jonathan Quong, "The Scope of Public Reason," *Political Studies* 52 (2004), 233.

justify the restriction of marriage to opposite-sex couples. I will modify an argument from Charles Larmore in order to claim that only views about inevitably reasonably contestable questions ought to be considered illegitimate grounds for policy in all contexts, and suggest that this criterion differentiates ethically perfectionist arguments for marriage from religiously perfectionist arguments for against opposite-sex marriage.

1. Liberal Neutrality vs. Marriage?

Anti-perfectionism, as defined by Joseph Raz, is the doctrine that "the implementation and promotion of ideals of the good life... are not a legitimate matter for governmental action."⁵

Anti-perfectionism is a doctrine of restraint, in that it restricts the pursuit of truly good, valuable, or sound ideals, as well as the pursuit of defective ones.⁶ Raz warned that a strict adherence to anti-perfectionism would rule out public support for marriage.

Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions... [P]erfectionist ideals require public action for their viability.⁷

The simplest form of conflict between anti-perfectionism and marriage arises when anti-perfectionism is understood to require neutrality between competing conceptions of the good. Since one's choice of intimate personal relationships is a highly significant element of one's conception of the good life, it seems that the state should remain neutral between types of relationships, and one natural interpretation of 'remaining neutral' is treating the opposing parties the same, so that

5. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 110.

6. Ibid., 11.

7. Ibid., 162.

one's actions do not change the relative positions of the parties, as compared to inaction. Neutrality between conceptions of the good life can therefore seem to require what the Law Commission of Canada called "relational equality."⁸

A guarantee that state policies would have equal direct impact on different ways of life would be a very demanding standard, however. It is not permissible to ban the slaughter of calves so as to prevent a religious minority from making sacrifices, Locke argued, but it might be justified if necessary to increase the stock of cattle after the outbreak of disease, despite the ban's differential impact on calf-slaughtering and non-calf-slaughtering sects.⁹ Raz criticized liberals such as Dworkin for not distinguishing what he called "neutralist" and "exclusionist" conceptions versions of anti-perfectionism. Sometimes Dworkin seemed to demand that state actions have equal direct impact on the degree of ease or difficulty involved in following rival conceptions of the good (compared to the baseline of inaction), but other times he demanded only that these contested ideals be excluded from the justification of public action.¹⁰ Exclusion of ideals permits differential impact across adherents of rival ideals, but only if such impact can be justified on suitably public grounds.

Paradoxically, even this justificatory neutrality¹¹ can be given a consequentialist ra-

8. *Beyond Conjugalitv : Recognizing and Supporting Close Personal Adult Relationships* ([Ottawa]: Government of Canada, 2001), 13.

9. John Locke, *A Letter Concerning Toleration* (Indianapolis, Indiana: Hackett Publishing Company, 1983), 42.

10. Raz, *The Morality of Freedom*, 134.

11. The term "justificatory neutrality" is from Will Kymlicka. Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. July (1989), 884; see also Daniel M. Weinstock, "Neutralizing Perfection: Hurka on Liberal Neutrality," *Dialogue* 38 (1999), 54-55. Kymlicka contrasted justificatory neutrality with consequential neutrality, which he defined as a guarantee of equal eventual outcomes no matter the choices made by individuals. Kymlicka argued that Rawls and Dworkin could only have

tionale. Thomas Hurka interpreted Will Kymlicka as arguing that neutrality is simply a rule of thumb for governments to follow in their ultimate objective of promoting the true (perfectionist) good, a rule of thumb based on the government's lack of detailed information about individual circumstances, and the fact that forcing people to live objectively good lives will not make their lives better, if they do not endorse the ideals in question.¹² This consequentialist rationale only justifies neutrality with respect to the most blunt and coercive means at the state's disposal, however, and so poses no threat to the institution of marriage, so long as no one is forced or coerced by the state into marriage. To get the conflict between neutrality and marriage off the ground, we need to view neutrality as a moral constraint on legitimate reasons for the exercise of political power, a constraint that applies prior to any calculation of the perfectionist benefits of a neutral governmental decision-rule.

Such a conception of neutrality is clearly on display in Ralph Wedgwood's attempt to identify the "fundamental" argument for same-sex marriage – the argument that would justify same-sex *marriage*, against the alternative of abolishing marriage altogether.¹³ To defend same-sex marriage, Wedgwood argues, we must identify an inequality in the denial of marital status itself, rather than in the denial of the concrete legal benefits attached to marriage, because these benefits might be severed from marriage (and have been attached to civil unions, in many jurisdictions). The obvious remaining inequality is the lack of recognition for same-sex relationships.

intended to endorse justificatory neutrality, because the core liberal right of religious freedom will permit religions to rise and fall based on the number of adherents they manage to attract.

12. Thomas Hurka, "Indirect Perfectionism: Kymlicka on Liberal Neutrality," *The Journal of Political Philosophy* 3 (1995): 36-57.

13. Ralph Wedgwood, "The Fundamental Argument for Same-Sex Marriage," *Journal of Political Philosophy* 7 (1999), 225-42.

As the Ontario Court of Appeal insisted, marriage conveys society's highest seal of approval.

Marriage is, without dispute, one of the most significant forms of personal relationships... Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed, conjugal relationships...¹⁴

However, if the state's purpose in honouring married couples were "to express the view that married life is an especially virtuous or valuable way of life," then the institution of marriage would conflict with the principle of liberal neutrality used to condemn opponents of same-sex marriage.¹⁵ Wedgwood's solution is to argue that having access to a pre-packaged set of mutual legal obligations preserves a shared understanding of what a marital relationship is. This shared understanding is not a conjugal ideal that would include moral norms about fidelity and commitment, nor confer any symbolic privilege, but a purely descriptive set of beliefs about the sort of relationship that is typical of married couples. Having the public status of being married can be useful to couples because it allows them more easily to communicate the nature of their relationship to the rest of the population. On Wedgwood's view, civil marriage cannot involve any legal support for shared moral expectations or constitutive ethical meanings. To be compatible with liberal neutrality, marriage laws can only facilitate the transfer of information.¹⁶

The potential conflict between liberal neutrality and marriage is evident in David Estlund's response to Stephen Macedo's defense of same-sex but otherwise traditional marriage.¹⁷

14. Halpern v. Toronto (City) (2003), 225 DLR (4th) 529 (Ontario Court of Appeal)¶5.

15. Wedgwood, "The Fundamental Argument for Same-Sex Marriage," 227.

16. Ibid., 236.

17. Stephen Macedo, "Sexuality and Liberty: Making Room for Nature and Tradition?," in David M. Estlund, and Martha Craven Nussbaum, *Sex, Preference, and Family: Essays on Law and Nature* (Oxford: Oxford University Press, 1997), 86.

Macedo had argued that the protection of basic rights "leaves ample room for moral judgments distinguishing better and worse ways of using our freedom, and for public policies that gently encourage the better ways."¹⁸ No one should be coerced to marry nor prevented by law from engaging in forms of sexual behaviour that are degrading but not harmful to others, but people need incentives to form stable commitments, since such relationships are, in general, good for people, gay or straight.¹⁹ Against Macedo's "judgmental liberalism,"²⁰ Estlund defended a "more neutral, more liberal, liberalism."²¹ Estlund conceded that some reasons might justify legal measures designed to influence sexual conduct. In certain circumstances, economic prosperity might require encouraging childbirth, or public health might require discouraging particular kinds of sex. Like Locke's restrictions on the slaughtering of calves, such laws would have differential impact but not violate justificatory neutrality. Estlund denied, however, that the intrinsic value of a form of sexual conduct was ever, by itself, a legitimate reason for policy.²² The fact that marriage is good for unmarried people would be a legitimate reason in its favour, but the claim that marriage is good for those who marry is not.²³ The marital ideal is excluded not because false or logically irrelevant, nor because allowing government to appeal to such a value would lessen its realization, but rather because the exercise of political power must be justifiable to all those subject to

18. Ibid., 87.

19. Ibid., 93-94.

20. Ibid., 87.

21. David M. Estlund, "Shaping and Sex: Commentary on Parts I and II," in *Sex, Preference, and Family: Essays on Law and Nature*, ed. David M. Estlund, and Martha Craven Nussbaum (New York: Oxford University Press, 1997), 164.

22. Ibid., 162.

23. Ibid., 163.

it, i.e. not reasonably rejectable.

The perceived tension between neutrality and marriage is also evident, finally, in the responses to Mary Shanley's recent attempt to defend an egalitarian but not purely contractual conception of marriage.²⁴ Shanley takes aim people such as Martha Fineman, who would eliminate civil marriage as a public institution in favour a regime of personal-relationship contracts.²⁵ Shanley thinks we should reject the inequality involved in opposite-sex-only marriage and eliminate remaining inequalities between men and women in marriage but maintain marriage as a special public status deserving of legal recognition and support. Shanley makes much of the fact that contractualism gives too much weight to freedom from state interference, and not enough to the positive state action equality requires. Yet one can be a libertarian about marriage while still supporting egalitarian economic policies. The real divide between Shanley and contractualists such as Fineman is over the value of marriage itself, and the relevance of the marital ideal to public policy. In Shanley's view, marriage is not simply an agreement that serves the separate interests of rational, bounded individuals, but, ideally, an "unconditional commitment" that "transcends the individual lives of the partners" by creating a "relational entity" – one that is "not entirely reducible to its individual components."²⁶ The question, as David Cruz points out in his commentary on Shanley's essay, is whether we can privilege this one form of intimacy without violating "the proper liberal neutrality about the good life."²⁷

24. Mary Lyndon Shanley, *Just Marriage* (Oxford: Oxford University Press, 2004).

25. Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004).

26. Shanley, *Just Marriage*, 26, 27, 6, 15, 55.

27. *Ibid.*, 55.

2. A Public Case for Marriage

Despite this is apparent conflict, it may be possible to reconcile liberal neutrality and marriage, either by finding conventionally public grounds that support the institution, or by specifying the principle of justificatory neutrality in such a way that it does not apply to marriage. Since my goal is to use the issue of marriage to shed light on the relationship between perfectionism and public reason, I will not canvass the many possible variations in the design of civil marriage, but simply provide a generic account of marriage as it exists today in most developed Western countries, in its un-Wedgwoodian form, except without the opposite-sex requirement that persists in many jurisdictions. Marriage, as I will conceive of it, consists of a pre-packaged set of mutual legal rights and obligations, and includes some special rights or exemptions with respect to the state. The existence of civil marriage also supports social norms about fidelity and commitment, and involves some symbolic elevation of marital relationships. Marriage thus imposes some costs on third parties. For example, in many counties spouses cannot be compelled to testify against each other in criminal proceedings. The fact that Carmela Soprano cannot be compelled to testify against Tony makes it slightly easier for Tony to get away with his criminal activities. Or again, if there is a social stigma associated with being single late in life, it is likely supported by the existence of civil marriage as a public institution. Yet no one is forced to marry, divorce is permitted, and individuals are free to cohabit and to enter into contractual arrangements of their own devising, within certain limits. The question is whether an institution like this can be justified, consistent with a liberal principle of public reason.

One possibility is to try to defend marriage on conventionally public grounds, by arguing

that the institution has ordinary public benefits, by which I mean ideal-independent benefits for third parties. A good model, here, would be William Galston's "liberal-democratic case for the two-parent family."²⁸ Despite his official disavowal of liberal neutrality, Galston's case was based on an account of liberal purposes that was intentionally "thin,"²⁹ focusing on goods such as life, normal development of basic capacities, freedom, and rationality, and Galston ruled out appeals to revelation as the basis for public action.³⁰ His defense of the two-parent family was "functional" rather than "intrinsic."³¹ Republican thinkers such as Machiavelli have long argued that self-government requires that citizens be willing to follow the laws and contribute to the public good beyond what the threat of sanctions makes rational from a self-interested point of view. Galston added to this instrumental defence of civic virtue the claim that the two-parent family is the structure most likely to raise self-reliant and law-abiding children.³² Whether this claim about the effects of family structure is true or false, the goal of raising healthy, responsible citizens is clearly a legitimate public concern.

Like Galston's civic-functionalist case for the two-parent family, Jonathan Rauch's defence of marriage (same-sex or otherwise) is based on the institution's ordinary public benefits.

28. William Galston, "A Liberal-Democratic Case for the Two-Parent Family," *The Responsive Community* 1, no. 1 (1990): 14-26; William Galston, *Liberal Purposes* (New York: Cambridge University Press, 1991).

29. *Ibid.*, 177.

30. *Ibid.*, 178.

31. *Ibid.*, 280.

32. As Andrew Sabl points out, Galston provided little evidence for his claim about the link between family structure and civic virtue; Andrew Sabl, "Virtue for Pluralists," *Journal of Moral Philosophy* 2, no. 2 (2005), 213-14.

Marrying makes people healthier and happier, Rauch argues.³³ People such as David Estlund and Jerry Gaus would object to government encouraging people to do what is good for them to do, even if the good in question is the relatively uncontroversial, ideal-independent good of avoiding sickness and depression, because there is reasonable disagreement about the weight attached to these goods compared to others.³⁴ Yet Rauch also argues that marriage benefits *unmarried* people, again in ordinary, relatively uncontroversial ways. Marriage allegedly settles men down, making them less likely to commit violent crime, for example.³⁵ Marriage also promotes stable, two-parent childrearing, which is good for children. And marriage provides reliable caregivers for adults who get sick or become disabled, and whose care would otherwise be the responsibility of society as a whole.³⁶ In contrast, limiting marriage to opposite-sex couples hurts everyone – gays and lesbians and their children, in particular, but straights too, because it undermines marriage, Rauch claims.³⁷

There are a number of ways one might criticize this thin, consequentialist case for marriage. One might deny the empirical claims upon which it is based. The functional virtues of the traditional family have often been overstated, as Iris Marion Young asserted in response to Gal-

33. Jonathan Rauch, *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America* (New York: Henry Holt and Company, 2004), 23.

34. Gerald F. Gaus, "Liberal Neutrality: A Compelling and Radical Principle," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Stephen Wall, and George Klosko (New York: Rowman & Littlefield, Inc., 2003), 157, criticizing Weinstock, "Neutralizing Perfection: Hurka on Liberal Neutrality."

35. Rauch, *Gay Marriage*, 19-21.

36. *Ibid.*, 18.

37. *Ibid.*, 55-86.

ston³⁸, and Judith Stacey asserted in response to David Blankenhorn.³⁹ To whatever extent growing up in a single-parent family is associated with lower outcomes, on variables such as academic achievement, Young claimed, the causes are economic, and could be remedied by fairer social and economic policies. One might also reject the ranking of values on which the public case is based. In his criticism of Macedo's judgmental liberalism, Estlund not only rejected perfectionist paternalism, he also established a high threshold for ordinary public benefits to outweigh the general presumption against state action. Ideal-independent third-party benefits can provide a legitimate reason for promoting particular kinds of relationships, Estlund conceded, but they outweigh our interest in autonomy only when the absence of incentives to form such relationships would put into question the stability of the political order.⁴⁰ A third criticism of the thin-consequentialist case for marriage would be that the benefits of two-parent families (the formation and stability of which marriage is supposed to promote) and the correspondent costs of alternate family structures accrue only on average, not in each particular case. Any differential treatment of relationships therefore involves discrimination, in the sense of a lack of individualized treatment.⁴¹

Even if none of these criticisms were persuasive, however, there would still be some-

38. Iris Marion Young, "Mothers, Citizenship and Independence: A Critique of Pure Family Values," *Ethics* 105 (1995): 535-79.

39. Judith Stacey, *In the Name of the Family* (Boston: Beacon Press, 1996); David Blankenhorn, *Fatherless America : Confronting Our Most Urgent Social Problem* (New York: BasicBooks, 1995).

40. Estlund, "Shaping and Sex," 164.

41. Young, "Mothers, Citizenship and Independence: A Critique of Pure Family Values," 553. This anti-aggregative interpretation of equal treatment is also evident in the Law Commission of Canada's endorsement of "relational equality"; *Beyond Conjugalilty*, 14, 18-19.

thing unsatisfying about the public case for marriage. The problem has to do with the role that facts play in the argument, given its thin-consequentialist structure. The public case depends on the causal claim that the institution of marriage has a significant positive impact on variables of uncontroversial public concern. It therefore concedes that were the facts different, and the ordinary social benefits of marriage small or uncertain, marriage would not be justified. And it permits the conclusion that marriage is justified only as a necessary evil, given people's unjust partiality towards their own children.

Consider the empirical evidence supporting the claim that marriage has ideal-independent third-party benefits. An important part of this argument is that the institution of marriage promotes stable two-at-a-time parenting, and that growing up in a two-parent family is beneficial for children in ordinary ways. Still, the size of this benefit depends on the structure of surrounding social institutions. In a society with little public spending on welfare, health care, and education, people will clearly be much better off if they form stable care-giving couples, and if they have the good luck to be born to such couples. In a society with more ample social insurance and better access to education, however, it wouldn't be so risky to remain single, or to be born to single-parents, or to experience the divorce of one's parents. Stable two-parenting might still bring non-economic benefits,⁴² but the impact of parents divorcing or not marrying could be eliminated by socializing child-rearing. Still, in the absence of such radical changes, measures that further weaken marriage are likely to hurt children, particularly among the least well off. Wealth and all

42. According to Sara McLanahan, in the U.S., "income appears to account for some, but not all, of the lower attainment of offspring from mother only families." Sara McLanahan, and Gary D Sandefur, *Growing Up With a Single Parent : What Hurts, What Helps* (Cambridge, Mass: Harvard University Press, 1994), 565.

that comes with it (better schools, networks of personal friendships with professionals with special expertise and access to institutions, etc.) can go some way to make up for disrupted family life. Children born to parents without such resources are in a much more vulnerable position, and much more at risk from family breakdown. Given the limits of likely social transformation, therefore, a concern for the position of the least well off would tend to suggest that we avoid further destabilizing marriage.⁴³

The reason that socialized childrearing is not a realistic option, however, is not any technical or physical limitation, but simply that people do not want socialized childrearing. In part, this preference may reflect the fact that some of the wealthy and the childless want to exempt themselves from the economic responsibility of providing (unrelated) children with fair equality of opportunity. Of course, resistance to socialized childrearing is also rooted in a desire to raise one's own child in one's own home. Such a desire ought to be permitted, I think, by a reasonable prerogative to pursue one's own good. But this judgment supposes that raising one's own child is an important human good, not merely an expensive taste. If this judgment were classified as a non-public reason, the instrumental defence of marriage would have to be classified as an argument about what is best in the unfortunate circumstance that people lack an adequate sense of justice. The public case would show only that having the institution of marriage is a necessary evil. Public acknowledgement that this is the justification of marriage would be incompatible,

43. Such arguments may sound dangerous, because they can be used against same-sex marriage, if one is willing to defend the view that same-sex marriage will destabilize opposite-sex marriages. There is little reason to believe, however, that allowing same-sex couples to marry will lead opposite-sex couples not to, and in any case it would be unfair to force gays and lesbians to shoulder the consequences of heterosexual irresponsibility. Arguments based on child welfare and the welfare of the least well off that are implausible in the case of the move to same-sex marriage are more plausible in the case of the proposal to abandon marriage altogether.

however, with the institution's role in supporting social norms.

Marriage involves an informal social contract between couple and community, Rauch explains. "In exchange for the caregiving commitment we are making, you, our community, will recognize us not only as individuals but as a bonded pair, a *family*, granting us a special autonomy and a special status which only marriage conveys'."⁴⁴ In a culturally homogenous society, legal support for such norms might not be necessary, but in a pluralistic society, civil marriage is a universally recognized sign that says "These people have made the ultimate commitment, so treat them accordingly'."⁴⁵ It is unlikely that civil marriage could fulfill this function, if everyone were to understand that on the only legitimate public rationale for the institution, marriage is merely a necessary evil. When individuals come into contact with a married couple, they are supposed to recognize (for example), that it would be inappropriate to take advantage of a rough spot in the marriage to entice one of the members to leave the relationship. Ordinarily, this norm is supported by the sense that marriage is important, and worthy of some kind of respect. If marriage were commonly seen as lacking any intrinsic value that is relevant to public policy, but as simply a necessary means to other, contingently-connected ends, it seems unlikely that the norms in question could survive. So justified, the institution could do not do its job of facilitating stable, committed relationships. Paradoxically, the case for marriage developed to satisfy liberal neutrality's demand for public justifiability would undermine itself, if it became common knowledge that this is the only permissible rationale for the institution. The fact that the public case could not be made fully public as the only legitimate ground for marriage sug-

44. Rauch, *Gay Marriage*, 33.

45. *Ibid.*, 40.

gests that we ought to look for other ways to defend the institution.

3. Limiting the Scope of Public Reason's Application

Excluding perfectionist reasons from public decision-making will affect the justifiability of marriage only if the principle is specified so as to apply to this kind of policy. To make public reason safe for marriage, therefore, one possibility would be to narrow the range of policies to which the principle applies. Rawls maintained that “the limits imposed by public reason do not apply to all political questions but only to those involving what we may call ‘constitutional essentials’ and questions of basic justice.”⁴⁶ This limitation on the scope of public reason’s application leaves some room for perfectionism, and so makes it easier to defend institutions that rely on perfectionist arguments. Charles Larmore suggests that in virtue of this restriction in scope, Quebec’s present system of special support and protection for the French language might be consistent with the principle of public reason.⁴⁷ The rationale for such limitations in scope is unclear and much contested.⁴⁸ More importantly, restricting public reason’s scope of application will legitimize religious arguments against same-sex marriage along with perfectionist arguments for marriage (same-sex or otherwise). It is plausible to see an ethical distinction between laws on sodomy, which prohibited by criminal law forms of intimate conduct in which people could engage anyway, if they were left alone, and laws on marriage, which don’t forbid people from hav-

46. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 214.

47. Charles Larmore, "Public Reason," in *The Cambridge Companion to Rawls*, ed. Samuel Richard Freeman (Cambridge: Cambridge University Press, 2003), 381.

48. See Quong, "The Scope of Public Reason."; Joseph Chan, "Legitimacy, Unanimity, and Perfectionism," *Philosophy and Public Affairs* 29, no. 1 (2000): 5-42..

ing sex, living together, or even recreating marriage-like rights and obligations via private contract. It is therefore plausible to argue that the grounds for marriage can be perfectionist in a way that the grounds for criminalizing sodomy cannot. It is more difficult to draw a such a contrast between opposite-sex-only marriage and marriage itself.

I want to consider in more detail one particular way of limiting public reason's scope of application. One of the main objections to perfectionism has been that it involves an illegitimate paternalism.⁴⁹ "The spring from which anti-perfectionism flows," Raz claimed, "is the feeling that foisting one's conception of the good on people offends their dignity and does not treat them with respect."⁵⁰ As Raz and others have shown, however, perfectionism can be non-coercive and pluralistic.⁵¹ Simon Clarke has recently argued that the requirement of justificatory neutrality should apply only to paternalistic policies. Paternalistic laws must be justifiable in terms of some limited set of public reasons, but non-paternalistic state actions can be perfectionistic.⁵² An action is paternalistic, according to Clarke, if it (a) aims to limit a person's options (b) for the sake of the constrained person's own good. Actions that expand a person's options cannot be paternalistic, on this definition, even if motivated by reasonably contestable ethical claims about the value of autonomous choice or the value of the specific options involved. And actions that have

49. Simon Clarke, "State Paternalism, Neutrality, and Perfectionism," *The Journal of Political Philosophy* 14, no. 1 (2006), 111-12.

50. Raz, *The Morality of Freedom*, 157.

51. Ibid., 160; see also Hurka, "Indirect Perfectionism: Kymlicka on Liberal Neutrality."; Colin Macleod, "Liberal Neutrality Or Liberal Tolerance?," *Law and Philosophy* 16 (1997): 529-59; Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge, England ; New York: Cambridge University Press, 1998); Chan, "Legitimacy, Unanimity, and Perfectionism."

52. Clarke, "State Paternalism, Neutrality, and Perfectionism," 117.

as their ultimate aim promoting the perfectionist good *of others* are not paternalistic, on this definition, even if such policies restrict conduct, because there is no substitution of judgment about what is good for the constrained person. Policies that aim to make interesting work available to everyone might be justified in the first way, as *option-enhancing* perfectionism, while laws against destroying buildings of historic value might be justified in the second way, as *other-directed* perfectionism.⁵³ There are, correspondingly, two non-paternalistically perfectionist ways to defend marriage. The first is to argue that the existence of the institution creates options and thus enhances everyone's autonomy. The second is to argue that whatever costs and constraints marriage imposes on third parties aim to secure the perfectionist well-being of the married, not to improve the lives of the unmarried by pushing them into marriage.

Take the second way first. A group of people who believe in marriage may want to enlist the power of the state behind the institution, not so as to get others to marry, but to get themselves to stay married. Even if I believe marriage is good, I also recognize that marriage is at times difficult, and that I may be tempted to stray. A group of like-minded people might want the state to create an institution of civil marriage that will create not only a descriptive cross-cultural meaning for this kind of relationship, as Wedgwood would have it, but a normative cross-cultural meaning, in an effort to help themselves lead the kind of life they think best. Just as motorcycle helmet laws are useful to protect people against predictable carelessness and ordinary lapses in rationality, the institution of marriage helps people avoid carelessly damaging relationships they want to be permanent. Those who are consciously committed to riding with the wind in their hair or not marrying are not the targets of such laws, even if they are to varying extents

53. Ibid., 118.

affected by them.

It might be objected that those wanting the state to act as a commitment mechanism (in order to overcome weakness of the will) could achieve the same result privately, by contracts that would impose penalties for infidelity beyond whatever remains of fault in divorce law. The only reason for having the state perform this function, the objection would continue, would be to impose perfectionist marital values on others. What private contracts can't do, however, is restrain the conduct of third parties in their interactions with the married couple. The institution of civil marriage supports the social norm that one ought to consider other people's spouses off limits, romantically and sexually. Although obviously not universally honoured, the widely recognized norm is that one ought not take advantage of the fact that one spouse is drunk or upset to seduce them, to try to pry them away from their partner. It is not the point of state involvement in marriage to impose monogamy on those who reject it, and thereby to improve their lives. The point is to support the social norm that marital commitments merit respect and self-restraint on the part of others.

This idea that civil marriage sustains social norms that facilitate the making of long-term intimate commitments is part of what Raz seems to have had in mind in saying that monogamous marriage requires public support. If a particular way of life is valuable but difficult to lead, policies that make it more feasible can enhance everyone's range of choice. The other part of Raz's thought, however, was that civil marriage creates options for everyone that would otherwise not be available at all. At first glance, it is not obvious why monogamy cannot be practiced by a single couple, but requires a culture that recognizes it, as Raz says. One cannot be a lawyer in a society with no legal system, but one doesn't need the institution of marriage to make a long-

term intimate commitment. One need not live in a society to design buildings or cohabit, Raz admits, but one would not thereby be an architect or be married, because these are socially recognized statuses.⁵⁴ Part of what constitutes a marital relationship, Raz suggests – part of the distinctive good involved in such a relationship – is that it is recognized by others as having a certain character. The idea is not just that social understanding of the independently existing nature of the relationship is useful to the couple, as Wedgwood argues, but that this social understanding is partly constitutive of the relationship. For example, Raz claims that the abandonment of marriages pre-arranged by parents did not simply increase the range of choices individuals faced, but had a qualitative effect on the nature of the choices available to people, because it affected the "constitutive conventions," social expectations, and significance of marriage.⁵⁵ For similar reasons, we could argue that the availability of civil marriage creates options for everyone. When civil marriage exists, and it is open to everyone, then everyone has a choice they would not otherwise have, the choice to enter into a particular kind of relationship that would not otherwise exist – or *not* to enter into this relationship, and to live an *unmarried* life, which would also not be possible if there were no institution of marriage.

Once we have narrowed the scope of the demand for public justifiability, a case for civil marriage could be developed along these lines, as being necessary for the existence of a valuable option, and thus as an element of an autonomy-supporting culture, although I will not further develop this case here. The problem is that such a narrowing of scope might at the same time permit perfectionist opposition to same-sex marriage. If marriage policy need not be justified in terms

54. Raz, *The Morality of Freedom*, 207.

55. *Ibid.*, 392-93.

of values and principles people would be unreasonable to reject, why aren't conservative religious arguments against same-sex marriage fair game?

One possibility is to argue that the ban on same-sex marriage falls afoul of the rule against perfectionist paternalism, triggering the neutrality requirement. Gays and lesbians are prohibited from marrying, in effect, whereas the institution of marriage itself prohibits nothing. Although everyone is legally permitted to marry members of the opposite sex, recognizing only opposite-sex marriages denies gays and lesbians the right civilly to marry anyone they could fully and honestly love, in the manner marriage is normally understood to involve. This restriction on liberty is not motivated by a concern for the well-being of gays and lesbians, however, and on Clarke's account, laws trigger the neutrality requirement only if they restrict liberty for the sake of the well-being of those restricted. Still, opposite-sex-only marriage restricts everyone's liberty, since no-one can marry someone of the same sex, and that is presumably intended to benefit all. However, in this revised form, the threshold at which the neutrality requirement is triggered is very low. By limiting marriage to opposite-sex couples, the state is not forcing anyone not to do things that they could do anyway, if the state did nothing at all. Citizens are permitted to enter religious same-sex marriages, to cohabit, and to enter marriage-like contractual arrangements. Insofar as opposite-sex-only marriage limits liberty for the sake of those constrained, it simply involves the failure to provide all of the opportunities or options the law might provide. If any law that fails to create possibilities counts as paternalism, even if the law doesn't foreclose possibilities of conduct that would have existed anyway, then marriage itself is paternalist, since the limitations on who can enter a civil marriage rule out some options (polygamy, for example). On the other hand, if the liberty-restriction criterion for paternalism is that state

action must limit people's options compared to the range of options they would have if the state did nothing, opposite-sex-only marriage would not be paternalistic, and therefore would not need to meet the requirement of justificatory neutrality Clarke imposes on paternalistic policies. None of this is to say that opposite-sex-only marriage is just, of course. At issue is only whether there is a way of restricting the scope of application of the demand for public justifiability, so that it constrains the arguments available for opposite-sex-only marriage but not for marriage itself. It seems not.

The broader question raised by Clarke's constrained perfectionism is whether there are any general limits on admissible reasons for public decisions and institutions, limits that apply to non-paternalist as well as paternalist policies. Could non-paternalist perfectionism be justified for the sake of Protestantism, Catholicism, Judaism, Islam, or atheism? Are there no reasons that we should exclude across the board, no matter the political context? If perfectionism were permissible in non-paternalistic contexts without any restrictions as to its content, Richard Marceau could not have maintained, as he did, that it was inappropriate to design civil marriage on the basis of claims about sin and sacrament. Was he really wrong to do so? Quebec's language laws may be permissibly perfectionist because they do not infringe on basic individual liberties, as Larmore suggests, but would it therefore be morally permissible for Quebec to promote Catholicism or Christianity, so long as it did so gently, within the constraints of basic rights? Such laws would be considered unconstitutional, but this only shows that Canadian constitutional practice excludes religious doctrines from the justification of all policies, not just paternalistic ones. The question is whether this strict exclusion of religious doctrines can be given a principled rationale.

4. Limiting the Scope of Reasons Excluded as Non-Public

The demand that the exercise of political power be publicly justifiable rests on a broadly Kantian notion of respect for persons. Political associations claim the authority to ensure compliance with their rules through use of force. For this exercise of power to be legitimate, it must be justified to all those forced to comply, and justified by reasons all reasonable persons could accept (accept, that is, without having to give up the comprehensive doctrine they reasonably endorse).⁵⁶ There is an ambiguity, however, in the notion of political principles being reasonably acceptable. The principle refers to universal *acceptability*, by the reasonable, not actual acceptance. So we must specify the conditions under which acceptance would come about, which enable us to say that a particular view is unanimously (reasonably) acceptable, despite not being unanimously accepted (by the reasonable) at present. Are we assuming as our context of universal acceptance an actual society, even if a not-yet-existent just society? Or, are we assuming an ideal speech situation, in which reasonable parties can deliberate until they reach agreement, without time constraints or the pressure to decide anything in advance of reaching a conclusion? If our context of acceptance is a just society, then ‘reasonably acceptable’ would mean ‘would be accepted by all reasonable citizens in a just society’. If our context of acceptance is the ideal speech situation, then ‘reasonably acceptable’ would mean ‘would be accepted by all fully reasonable persons in the long run, under ideal deliberative conditions.’ The ‘just society’ interpretation of the context of acceptance imposes a stronger constraint on the legitimate grounds of public decision-making because, assuming free institutions, it will be more difficult to get agreement

56. Charles Larmore, "The Moral Basis of Political Liberalism," *The Journal of Philosophy* 96, no. 12 (1999), 607.

on the part of all reasonable citizens of a just society than it would be to get agreement in the long run in the ideal speech situation. Suppose, for the sake of argument, that on an issue such as that of the relationship between consequentialist and deontological considerations, fully reasonable dialogue in the ideal speech situation would converge, in the long run. Nonetheless, convergence would not come easily or quickly, because this is a hard question. In a just society, convergence might not come at all, despite deliberative conditions that are much better than in existing societies. In the ideal speech situation, we imagine deliberators unconstrained by the pressures of time, with the leisure to deliberate until all aspects of the issue have been examined, all reasons canvassed, all potential consequences explored, all experiences shared, all values articulated, and so on. Actual deliberation, even among reasonable citizens in a just society, faces much more stringent constraints. A real society is populated not by a fixed set of ideal deliberators, all of whom might together eventually work through all of the issues at stake, but by a continual flow of individuals who must face ultimate questions and make difficult, irreversible choices before they pass away, without having heard all evidence and all perspectives on all questions. Therefore, one could coherently maintain that fully rational deliberation would converge in the long run on the one true view, but nonetheless admit that in a just modern democracy populated entirely by reasonable people, there would always be a diversity of opinion on fundamental ethical questions.

These two characterizations of the conditions of acceptance have different virtues. The "just society" account avoids epistemological controversy, because it is compatible with the claim that there is one true view, upon which ideal deliberation would converge, even if consensus is not to be expected among the citizens of a just society. Rawls, for example, was espe-

cially concerned that the ideas of reasonable pluralism and the burdens of judgment not be seen as sceptical doctrines. Political liberalism "does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs."⁵⁷ Rawls may simply have been asserting that political liberalism did not require a low absolute level of confidence. However, he may also have meant that recognition of the burdens of judgment and the fact of reasonable pluralism should have no effect on one's degree of confidence in one's views, even if one was initially completely certain. According to this interpretation, the thesis of reasonable pluralism is meant to be an empirical claim about the sociology of a just society. "We are to recognize the practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines."⁵⁸ In this passage, Rawls avoids claiming that human reason is not able to answer some questions conclusively. Rawls seems to want to remain neutral on this epistemological issue, on the grounds that any stronger claim would "defeat from the outset [political liberalism's] aim of achieving an overlapping consensus."⁵⁹

Yet this epistemological avoidance, motivated by second-stage considerations of stability, has consequences for the first-stage question of the limits of legitimate exercise of political power. Rawls can avoid problematic epistemological claims only by specifying the thesis of reasonable pluralism in narrowly sociological terms, which has the consequence of broadening the scope of public reason's exclusions. In order to avoid controversial epistemological questions, Rawls must claim that the morally salient kind of disagreement, the kind of disagreement

57. Rawls, *Political Liberalism*, 63.

58. *Ibid.*, 63.

59. *Ibid.*, 150.

that triggers the demand for neutrality with respect to the contending views, is any persistent disagreement among the reasonable citizens of a just society. The problem is that when the category of non-public reasons is defined so broadly, it becomes less plausible to claim that legislation based on non-public reasons involves disrespect in all contexts. Suppose that the ethical truth is accessible to all reasonable persons, in the sense that there would be convergence of opinion in the ideal speech situation, but that, due to the limitations of the human condition, this truth will never be accepted by all reasonable citizens at the same time. When I make a political decision on the basis of my reasonably contestable view, it may appear to you that you are being forced comply without any accompanying reasons you could accept, but I can plausibly claim that you are wrong about that. You may feel disrespected, but I am not necessarily acting disrespectfully, because I am offering you reasons you could accept. The fact that not everyone will simultaneously accept these reasons does not mean that a particular individual couldn't, if (by assumption) deliberation in the ideal speech situation would converge. I will still be acting disrespectfully, of course, if the policy in question is paternalistic; perfectionist paternalism is illegitimate no matter how well-founded the perfectionist doctrine. Yet the principle of public reason excludes non-public reasons even where there is no such paternalism involved.

If we interpret the criterion of reasonable acceptability in the ideal speech situation sense, it becomes more plausible that exercising political power based on particular comprehensive doctrines involves a kind of disrespect, even in the case of non-paternalistic laws. For if one is requiring compliance with rules the justification of which would always be a matter of reasonable controversy between fully reasonable deliberators under ideal conditions, then for some people, the reasons that justify the rule will be inaccessible in principle. Even in the long-run

ideal speech situation, they could reasonably persist in holding that doctrine. However, not all of the views normally classified as ‘comprehensive’ are the subject of inevitable reasonable disagreement, when the idea of inevitability is specified in terms of the ideal speech situation. With respect to views about the answers to core religious question (about the existence and nature of god), it makes sense both (i) to believe a particular answer, and (ii) believe that the answer would never achieve universal assent even between fully reasonable people in the ideal speech situation. Where this kind of question is concerned, we cannot demonstrate the truth of our views in a way that ought to command the assent of any rational moral agent. There may be one right answer and it might be Catholicism, or Islam, or atheism, but the superiority of this answer cannot be established by human reason in a manner that ought to convince all reasonable persons. By their very nature, questions about god and god’s will are going to difficult to answer for finite beings like ourselves; even the faithful generally admit that we cannot fully comprehend god. Exercising power on grounds of faith is disrespectful, because it is in principle impossible to imagine reason generating only one reasonable answer to questions of faith. We have specific grounds for doubting the possibility of conclusively answering religious questions, because these are subjects that surpass finite human understanding. The same cannot be said of ethics generally. The upshot of the argument is that reasonably contestable ethical arguments ought to be considered valid public reasons, at least when paternalism is not an issue. Only those reasons that we have reason to believe are inevitably reasonably contestable should be considered out of bounds in all contexts.

This broadening of the legitimate grounds of public institutions and policies broadens the range of considerations to which an argument for marriage could appeal to, without legitimating

the main principled arguments against same-sex marriage, because the leading attempts to identify intrinsic wrongs in same-sex conduct make appeals to notions of natural purposes that are unintelligible without a religious backdrop. To make the natural law case against same-sex marriage, it is not enough to argue that sexual activity, at its best, can be an opportunity to participate in real human goods such as love and friendship, and the creation of new life, or, more controversially, that sexual activity that is purely oriented towards pleasure violates the integrity of the person (since one uses one's body and perhaps someone else's solely as a means to produce a particular mental state, apart from any projects or activities that involve intrinsically worthwhile achievements). It is not enough because such arguments provide no reason to oppose, but reason to support same-sex marriage.⁶⁰ Instead, one must appeal to the idea that marriage is, by its very nature, intrinsically, a "two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type."⁶¹ Macedo is right, I think, that the force of this argument depends upon "accepting particular religious convictions."⁶²

It will of course be controversial what views are inevitably reasonably contestable, and the suspicion will be that excluding only such views will unfairly discriminate against religious doctrines, while admitting secular ideals. I cannot deal with this issue here, except to say that the differential impact will be against those with strong religious or irreligious views, *i.e.* those who

60. My summary is based on Stephen Macedo, "Homosexuality and the Conservative Mind," *Georgetown Law Journal* 84 (1995), 272-76.

61. Robert George, and Gerard Bradley, "Marriage and the Liberal Imagination," *Georgetown Law Journal* 84 (1995), 301. See also Germain Gabriel Grisez, *The Way of the Lord Jesus, Volume I: Living a Christian Life* (Chicago: Franciscan Herald Press, 1993), 637-38; John M. Finnis, "Law, Morality, and "Sexual Orientation"," *Notre Dame Law Review* 69 (1994), 1066.

62. Stephen Macedo, "Reply to Critics," *Georgetown Law Journal* 84 (1995), 335.

believe that homosexuality is or is not sinful, in favour of the uncertain and the muddled, who have no clear views about the issues in question. This paper constitutes simply a first step towards the development of what one might call a sliding-scale view of public reason, according to which different kinds of policies would be subject to more or less stringent requirements of multi-perspectival acceptability.